INTERNATIONAL COURT OF JUSTICE

MARITIME DELIMITATION IN THE INDIAN OCEAN

(SOMALIA v. KENYA)

APPENDIX 2 TO THE REPUBLIC OF KENYA'S APPLICATION TO SUBMIT NEW EVIDENCE AND WRITTEN SUBMISSIONS

VOLUME I

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INTRODUCTION

1. The Republic of Kenya respectfully files this Appendix 2 (the "**Appendix**") to its Application to submit new evidence in the case concerning the *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)* (the "**Application**"), for the purpose of explaining the relevance of the new evidence.[1]

2. As in any other proceeding before it, the Court must reach its decision in the present proceeding "on a fully informed basis".[2] This basis "provides both the parties and the Court with the safeguards required for the sound administration of international justice".[3] Conscious of that, the Court has made clear that it will "employ whatever means and resources may enable it to satisfy itself whether the submissions of the applicant State are well-founded in fact and law, and simultaneously to safeguard the essential principles of the sound administration of justice."[4]

3. In this proceeding, the Court would benefit from this additional information and evidence so as to make a "fully informed" decision. Kenya filed its Rejoinder more than two years ago, on 18 December 2018. Since Kenya filed that last written submission, Kenya has diligently and in good faith

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1 Unless otherwise defined in this Appendix, capitalised terms shall have the meanings ascribed to them in the Rejoinder filed by Kenya on 18 December 2018.

2 International Court of Justice, *Handbook*, 31 December 2018, page 51.

3 International Court of Justice, *Handbook*, 31 December 2018, page 51.

4 International Court of Justice, *Handbook*, 31 December 2018, page 51. *See also Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment of 27 June 1986, I.C.J. Reports 1986*, p. 14, paragraph 59. The Court made this statement in the context of a respondent State having failed to appear in proceedings before the Court. However, the statement applies with equal force in this case.

continued to look for relevant evidence to assist the Court. As part of those efforts, Kenya instructed a new team of researchers and technical experts in this case.

4. As explained in the Application, the COVID-19 pandemic has prevented Kenya from obtaining a crucial part of the material evidence it needs in order to present its position and have a fair and equal opportunity to comment on Somalia's contentions. However, with the benefit of its new research team, Kenya has already secured a significant amount of evidence that is highly relevant to the present dispute. This Appendix describes the content and relevance of that new evidence obtained to date, in order to provide the Court with an appreciation of the scope of the material evidence that is not yet on the record of the case.

5. Kenya is not seeking to re-plead its case to this Court. On the contrary, the purpose of this Appendix is to explain the relevance of the new evidence and information.

6. This Appendix consists of eight volumes. Volume I contains the explanation of the new evidence. Volumes II to VIII contain the abundant and significant new evidence.

7. The main text of this Appendix consists of five Chapters. Following this Introduction, **Chapter I** outlines the new evidence contained in this Appendix that was not previously before the Court. As that Chapter shows, that new evidence concerns every issue in dispute between the Parties.

8. The new evidence described in **Chapter II** confirms that Somalia has acquiesced in a boundary line that follows the parallel of latitude at 1° 39' 43.2"S (the "**Parallel of Latitude**"). Contrary to Somalia's arguments, maritime boundaries can and do form through acquiescence. The three-part

test for acquiescence is well established. As both Parties agree, a finding of acquiescence requires: (i) "an act, course of conduct or omission by [...] one party indicative of its view of the content of the applicable legal rule";[5] (ii) "the knowledge (actual or reasonably to be inferred) of the other party of such conduct or omission";[6] and (iii) "a failure by the latter party within a reasonable time to reject, or dissociate itself from, the position taken by the first".[7]

9. Somalia cannot credibly deny that the Parties' conduct in the period from 1979 until 2014 meets each of these three requirements. The evidence is clear. In the late 1970s, Somalia abandoned its irredentist policy of a "Greater Somalia".[8] Based on a new policy of "accommodation",[9] Somalia sought to repair its relations with Kenya. In response, Kenya welcomed and encouraged Somalia's overtures as a constructive development. It was in this context that Kenya issued its 1979 proclamation of an exclusive economic zone (the "**EEZ**") following the Parallel of Latitude (the "**1979 EEZ Proclamation**").

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5 SR, paragraph 2.6; KR, paragraph 44.

6 SR, paragraph 2.6; KR, paragraph 45.

7 SR, paragraph 2.6; KR, paragraph 46.

8 *See* KCM, paragraph 68.

9 *See* KCM, paragraph 68, citing, e.g., Report from the Kenyan Embassy in Somalia to the Ministry of Foreign Affairs, Mission Mogadiscio (KES.105A.Vol.II/73), *The Ambassador's Meetings with Somali Ministers*, 4 April 1978, KCM, Annex 15; Letter from the Kenyan Embassy in China to the Ministry of Foreign Affairs (KEP/POL/GEN/1A/59), *Vice-Minister Ho Ying's Tour*, 30 January 1980, KCM, Annex 22; Telegram to the Ministry of Foreign Affairs, No. 227, (MFA/231/21/001A/245), *Account of Siad Barre's Address at Mass Rally*, 2 December 1980, KCM, Annex 25; Minutes of a Meeting between H.E. President Daniel T. Arap Moi and H.E. President Siad Barre of Somalia on June 29, 1981, at State House, Nairobi (MFA/231/21/001A/28), 10 July 1981, KCM, Annex 26; Note on a Meeting between Hon. Ole Tipis, Minister of State in the Office of the President and the Somalia Ambassador to Kenya, H.E. MR. Abdirahman Hussein Mahamoud (MFA/231/21/001A/68), 7 September 1982, KCM, Annex 27.

10. Since 1979, Kenya has repeatedly made a formal, public and precise boundary claim. Acting in good faith throughout, Kenya continuously confirmed its claim with consistent conduct on the ground. Kenya also has sought to formalise the maritime boundary between the Parties through a written agreement. Kenya's conduct throughout this period was, indeed, more than simply one "act, course of conduct or omission". It was continuous, decades-long conduct that established Kenya's legal claim.

11. At all relevant times, Kenya ensured that Somalia had full, actual knowledge of its claim. This included directly notifying Somalia of its claim, repeatedly, through the auspices of the United Nations (the "**UN**") and multiple other means.

12. Yet, for 35 years, Somalia did not protest against Kenya's boundary claim. Nor did Somalia present an alternative claim, whether along the equidistance line it now invokes or otherwise. On the contrary, the evidence in this Appendix confirms that Somalia conclusively agreed with Kenya's boundary claim. That evidence also proves that Somalia's failure to protest was not an inadvertent omission. It was a fully conscious choice by Somalia. That choice was entirely consistent with Somalia's new policy of "accommodation" towards Kenya. Importantly, Somalia has benefited from – and Kenya has relied on – that choice in multiple ways.

13. Indeed, Kenya relied on Somalia's agreement for several decades. It invested time and expenditure in the management of marine resources, other natural resources and security threats in the now-disputed maritime area. Following Somalia's abandonment of its expansionist sovereignty claims, Kenya provided Somalia with extensive political, military and economic support. That support enabled Somalia to confront numerous existential threats emanating from its land and maritime territory, including

in relation to piracy, international terrorism and other crimes regularly committed in Somalia's maritime areas. Somalia's decision not to object to the latitudinal delimitation method – which was and still is considered wholly equitable in Eastern Africa – can only be understood within that overarching context.

14. Somalia's position in relation to its maritime boundary suddenly and dramatically changed in 2014. In February of that year, and for the first time, Somalia protested against Kenya's claim to the Parallel of Latitude boundary. In the six months that followed, Somalia frenetically took a series of major steps, without seriously pursuing negotiations or discussions with Kenya regarding its new position. From February 2014 to August 2014, Somalia: (i) protested against the Parallel of Latitude boundary; (ii) purported to give oil and gas rights to the private company Soma Oil & Gas Exploration Limited ("**Soma Oil & Gas**")[10] south of the Parallel of Latitude; (iii) declared its EEZ as extending south of the Parallel of Latitude for the first time; (iv) provided further information on its submissions to the UN Commission on the Limits of the Continental Shelf (the "**CLCS**"); and (v) in August 2014, initiated the present proceeding.

15. The Court will see that Somalia's frenzied six-month burst of activity was needed in order for Soma Oil & Gas to exercise its no-bid, no-auction exclusive rights to oil and gas in the now-disputed maritime area. A favourable result for Somalia in this proceeding would inevitably – and apparently by design – greatly enrich certain Somali Government officials.

[10] Soma Oil & Gas Exploration Limited is a wholly owned subsidiary of Soma Oil & Gas Holdings Limited. *See* Annual Return of Soma Oil & Gas Exploration Limited, *UK Companies House*, 11 August 2014, page 6, Annex 161.

It also would benefit foreigners who own interests in Soma Oil & Gas. It is doubtful whether it would benefit Somalia itself or its people.

16. However, as this Court has made clear, "[f]rontier rectifications cannot in law be claimed on the ground that a frontier area has turned out to have an importance not known or suspected when the frontier was established."[11] Put differently, whatever its new motivations or interest in the now-disputed maritime area, Somalia cannot avoid the legal consequences of its at least 35-year agreement on the Parallel of Latitude maritime boundary. That would be contrary to fundamental principles of public international law. It would undermine the principles of stability, predictability, fairness and good faith that must govern international relations.

17. The new evidence described in **Chapter III** confirms that, independently of Somalia's undisputable acquiescence, the Parallel of Latitude is, in any event, the most equitable delimitation in this case. The three-step delimitation method is not mandatory. Nor is it appropriate to achieve an equitable solution in this case. Applying the three-step methodology as Somalia proposes would contradict the views expressed by the Parties at all relevant times. It would also disregard the geographical and regional context. Further, Somalia's security situation has prevented Somalia from identifying reliable basepoints. This prevents the Court from drawing a reliable equidistance line. Ultimately, applying the three-step methodology as advanced by Somalia – and merely for the sake of securing an artificial methodological uniformity – would lead to an inequitable result.

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11 *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports 1962*, p. 6, page 23.

18. Therefore, in the unlikely scenario that it does not find acquiescence, the Court should delimit the maritime boundary based on the latitudinal delimitation method. That method is reliable and feasible in this case. It is also consistent with the general configuration of the Eastern African coast and with the regional context and practices. It is true to the Parties' long-standing will and actions. It does not prejudice either of the Parties. Rather, it enables them to extend their maritime territory as far seaward as international law permits, avoiding encroachment and cut-off effects. That method also avoids marked disproportions between the maritime zones allocated to each of the disputing Parties. Importantly, using the latitudinal method would strengthen the principles of transparency and predictability in international relations.

19. The evidence described in **Chapter IV** undermines Somalia's claim that Kenya has neither challenged the way in which Somalia has applied the three-step methodology nor argued "that applying [that] method yields the parallel of latitude that Kenya claims."[12] While that methodology is ill-suited for this case, correctly applied (based on the new evidence) it would nonetheless lead to the conclusion that the Parties' maritime boundary should follow the Parallel of Latitude. Indeed, Somalia has manifestly misapplied the three-step delimitation method in multiple ways.

20. The provisional equidistance line, constructed by Somalia under the first stage of the three-step methodology, is afflicted by deficiencies in the underlying charted data. These deficiencies require limited but nonetheless necessary changes to the provisional equidistance line proposed by Somalia.

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[12] SR, paragraph 3.45.

21. Correctly applying the second stage of the three-step methodology also requires adjusting the provisional equidistance line. Specifically, the new evidence contained in this Appendix proves that there are at least five relevant or special circumstances that call for the adjustment of that line to the Parallel of Latitude.[13]

22. First, an equidistance line would produce a severe cut-off effect on Kenya's maritime areas. The cut-off effect becomes increasingly pronounced past the 200 nautical miles ("**M**") limit. It becomes so severe that it entirely cuts off Kenya from the outer limit of its continental shelf. By contrast, a boundary line along the Parallel of Latitude would not produce any severe cut-off effect on either Kenya or Somalia.

23. Second, the regional context also requires adjusting the provisional equidistance line. This relevant circumstance has two dimensions. One concerns the regional practice of Eastern African Coastal States. In particular, all relevant States on the Eastern African coast that have delimited their maritime boundaries have done so using parallels of latitude.

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[13] The Court and other international tribunals have referred to both "special" and "relevant" circumstances depending on the maritime area to be delimited. However, nowadays those terms are considered to be broadly equivalent. For the purposes of this Appendix, Kenya will therefore refer only to "relevant circumstances". *See*, e.g., S. Fietta and R. Cleverly, *A Practitioner's Guide to Maritime Boundary Delimitation* (Oxford University Press, 2016), page 54 ("[t]he second stage requires consideration of whether there are factors calling for the adjustment or shifting of the provisional equidistance or median line in order to achieve an equitable result. Such factors are commonly referred to as 'relevant circumstances' (and are broadly equivalent to the 'special circumstances' requiring adjustment of a provisional equidistance line in territorial sea delimitation under Article 15 of UNCLOS)"); M. Evans, *Relevant Circumstances*, in MARITIME BOUNDARY DELIMITATION: THE CASE LAW: IS IT CONSISTENT AND PREDICTABLE?, ed. A. G. Oude Elferink et al. (Cambridge University Press, 2018), page 228 ("[a]lthough the courts have not been consistent and, indeed, have recently upturned the language of the 1958 Convention, this has probably been a helpful development since it removes the scope for arguing that 'relevant' circumstances might be different in some ways from 'special' circumstances. Even if once they may have been different (and this is by no means obvious), today they are not.").

They considered that parallel boundaries would lead to an equitable division of their maritime territories in light of the general coastal configuration of the region. The other, narrower dimension, concerns the Kenya-Tanzania maritime boundary. This boundary, which was agreed in 1976, essentially follows a parallel of latitude emanating from the Kenya-Tanzania land border.

24. Somalia now appears to argue that the Kenya-Tanzania maritime boundary is fundamentally disadvantageous to Kenya, that Kenya erred in agreeing that boundary with Tanzania and that Kenya is now unreasonably attempting to claim unjustified maritime areas from Somalia in order to compensate itself for the consequences of its error. The implication seems to be that, had Kenya insisted on an equidistance boundary *vis-à-vis* Tanzania, as Somalia now seeks to do *vis-à-vis* Kenya, then Kenya would not need to advance a latitudinal claim against Somalia.

25. This fundamentally misconceives the situation. Kenya and Tanzania agreed their maritime boundary *bona fide*, in accordance with both international law and the contemporaneous views expressed by all relevant States, including Somalia. Further, the boundary is in some respects more favourable and in other respects less favourable to Kenya than an equidistance Kenya-Tanzania boundary would have been. In particular, an equidistance boundary would have given Kenya substantially less maritime territory from its coastline to a distance of some 200M, though more maritime territory beyond that distance. Somalia's argument is therefore unfounded both on the facts and in equity.

26. In these circumstances, blindly and mechanically drawing the Parties' maritime boundary along an equidistance line would be unreasonably

punitive for Kenya, inequitable and inconsistent with the general coastal configuration of the region.

27. Third, security concerns vital for both the Parties and the international community at large are yet another relevant circumstance that calls for the adjustment of the provisional equidistance line to the Parallel of Latitude. The threats emanating from terrorism, piracy and other crimes regularly committed off Somalia's coast are greater than any other security concerns ever presented to this august Court in a maritime delimitation case. Unfortunately, Somalia's admitted inability to both police and prevent crime in its own land and waters means that there is no foreseeable end to those threats. In stark contrast, Kenya can police and prevent – and, in fact, has policed and prevented – crimes in the now-disputed maritime area. Therefore, granting the now-disputed maritime area to Somalia would allow pirates, terrorists and other criminals to operate undisturbed in a significantly larger maritime area. Unlike in any other case ever brought before this Court, the adjustment of the provisional equidistance line in this case would help protect lives in Kenya, Somalia and other regions of the world.

28. Fourth, the Parties' long-standing conduct in relation to oil concessions, fishing activities, naval patrols and other sovereign activities constitutes an additional relevant circumstance. Even if Somalia had not acquiesced in Kenya's claim (*quod non*), the Parties' conduct on the ground reflects, at a minimum, a *de facto* boundary along the Parallel of Latitude. Somalia and Kenya would not have acted in accordance with that *de facto* boundary for over three decades if they considered it to be inequitable. Therefore, that *de facto* line also calls for the adjustment of the provisional equidistance line to the Parallel of Latitude.

29. Fifth, Kenya's fisherfolk historically have relied for their livelihoods upon the fisheries just to the south of the Parallel of Latitude. They continue to do so today. The practical effect of an equidistance boundary line in this case would be catastrophic for those people. It would leave them without a source of income and without access to their staple food. Their equitable access to those resources therefore requires adjusting the provisional equidistance line to the Parallel of Latitude.

30. Somalia also has misapplied the third stage of the three-step methodology. Somalia follows an erroneous methodology to identify both the Parties' relevant coasts and the relevant maritime area. That methodology in effect ignores a significant part of the projections generated by the Parties' relevant coasts.

31. In addition, Somalia then fails to apply its stated methodology to its own calculations of proportionality. If one corrects the inconsistencies in Somalia's calculations, the proportionality analysis turns wholly in Kenya's favour. In particular, correcting Somalia's inconsistencies reveals that, by using the equidistance line, Somalia would be granted about twice the maritime area that would be justified by the length of its relevant coast. This is a significant disproportionality. By contrast, no significant disproportionality exists when using the Parallel of Latitude.

32. The new evidence described in **Chapter V** confirms that Somalia's arguments concerning Kenya's alleged violations of Somalia's sovereign rights in the now-disputed maritime area lack any basis in law or fact.

33. Somalia's claim is entirely premised on an erroneous legal standard. Somalia wrongly claims that "Kenya's exploration activities, insofar as they have been undertaken in an area that the Court could attribute to Somalia,

constitute a violation of Somalia's sovereignty [...] and sovereign rights".[14] However, the delimitation of a continental shelf is constitutive, not merely declaratory. It follows that Kenya's good faith activities in an area that was not even in dispute until 2014 – let alone delimited by this Court – could not possibly have violated Somalia's sovereign rights. That would remain true even if the Court eventually were to find that Kenya conducted its activities in an area that falls on Somalia's side of the boundary drawn in this case. Put differently, any such finding would not create retroactive liability for Kenya.

34. Articles 74(3) and 83(3) of the United Nations Convention on the Law of the Sea ("**UNCLOS**") set out the correct legal standard to assess Somalia's claims. As a threshold matter, the obligations contained in those provisions apply only "[p]ending agreement" between the disputing Parties on the delimitation of their continental shelf and EEZ. Yet, when Kenya conducted the activities complained of by Somalia, the Parties had already agreed that their maritime boundary runs along the Parallel of Latitude. Therefore, Somalia's acquiescence in that maritime boundary is dispositive of the entirety of its claims concerning Kenya's activities in the now-disputed maritime area.

35. In any event, even if the Court were to find that Somalia has not acquiesced in that boundary, Somalia would have failed to meet its burden of proof in multiple ways. Somalia has failed to prove that Kenya has violated any of its obligations under UNCLOS Articles 74(3) and 83(3). Indeed, Kenya has made "every effort to enter into provisional arrangements" with Somalia. In contrast, Somalia has not complied with that obligation. Somalia also has failed to prove that any of Kenya's activities

[14] SR, paragraph 4.13.

"jeopardize[d] or hamper[ed] the reaching of the final agreement" between the Parties. Nor has Somalia proven that Kenya's alleged violations have caused it any injury that requires reparations under international law.

36. Ultimately, Somalia's approach and narrative in this case is not appropriate or accurate in the context of this dispute. Somalia's narrative implies that it should be awarded rights over the now-disputed maritime area as part of a levelling-up exercise that would give it access to "important marine and mineral resources, which Somalia views as keys to its economic development, stability and security."[15] Somalia's submissions attempt to juxtapose Kenya's "lush savannah plains",[16] with its land that is "ideal for agriculture",[17] with barren and "arid"[18] Somalia. Somalia's pleadings digress into such areas as contrasting the Parties' economies by relying on such imperfect measures as GDP per capita in 2013.[19] In other words, Somalia relies on the potential benefits it may gain pursuant to the outcome of this proceeding as a factor that should influence how the dispute is determined by the Court.

37. Kenya recognises the economic hardships that Somalia's people have faced. Indeed, Kenya has done more than any other nation to try and alleviate that suffering.[20] But those hardships must not affect the analysis of the legal merits. Kenya has its own battles with adverse economic difficulties. This proceeding is not an exercise in garnering sympathy from this Court. Nor

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15 MS, paragraph 1.14

16 MS, paragraph 2.18.

17 MS, paragraph 2.19.

18 MS, paragraph 2.16.

19 *See* MS, paragraph 1.10.

20 *See* Chapter II.A.2(i).

is it a comparison between the Parties' resources. Rather, it is about the correct application of public international law to the facts as this Court finds them to be. In any event, as the new evidence confirms, the fact remains that the likely beneficiary of any hypothetical judgment from this Court in Somalia's favour would not be the Somali people. The beneficiaries would be the ultimate beneficial owners of Soma Oil & Gas and, likely, select Somali Government officials connected with the company.[21]

[21] *See* paragraph 200 below.

CHAPTER I: THIS APPENDIX EXPLAINS THE SIGNIFICANT AND RELEVANT NEW EVIDENCE THAT WAS NOT PREVIOUSLY BEFORE THE COURT

38. This Appendix explains significant and relevant new evidence concerning each and every issue in dispute between the Parties. Specifically, the new evidence confirms that: (i) for over three decades, both Parties have acted in a manner that was consistent with Kenya's claim to a maritime boundary along the Parallel of Latitude and inconsistent with Somalia's new claim to an equidistance line; (ii) the three-step methodology is not appropriate in this case, while the latitudinal delimitation method is well suited to achieve an equitable delimitation; (iii) Somalia has misapplied the three-step methodology; and (iv) Somalia's claims regarding the lawfulness of Kenya's activities in the now-disputed maritime area are directly contradicted by the facts.

39. First, the new evidence confirms that Somalia acquiesced in Kenya's long-standing and consistent claim, until suddenly, in 2014, it was in the interests of a private company and of individuals within Somalia's Government that Somalia should do otherwise. The current proceeding must be understood in that context.

40. For example, the new evidence includes the Seismic Option Agreement concluded between Soma Oil & Gas and Somalia in August 2013 (the "**SOA**").[22] This constitutes crucial new evidence that was not previously on the record of this proceeding. The SOA and other new evidence adduced by Kenya in this Appendix are vital in demonstrating how and why Somalia

[22] *See* Seismic Option Agreement between the Government of the Federal Republic of Somalia and Soma Oil & Gas Exploration Limited, a wholly owned subsidiary of Soma Oil & Gas Holdings Limited, 6 August 2013, Annex 162.

suddenly changed its longstanding policy of acquiescence and why it instigated this proceeding.

41. The evidence shows that the founding principle of Soma Oil & Gas was making profits from exploring onshore and offshore Somali oil and gas assets.[23] Soma Oil & Gas obtained highly irregular rights to virtually all of that oil and gas, potentially valued at hundreds of millions or even billions of dollars, without taking any risk of its own.[24] In any independent assessment, the SOA's one-sided terms, all favouring Soma Oil & Gas, show that the SOA was not negotiated at arms' length in a commercial manner.

42. The new evidence also demonstrates that Kenya's 2012 discovery of oil and gas was a significant factor behind Soma Oil & Gas's formation.[25] Soma Oil & Gas kept a steady eye on offshore hydrocarbon developments in Kenya thereafter.[26] The new evidence examines Soma Oil & Gas's opaque ownership.[27] The new evidence puts beyond doubt that Soma Oil & Gas and Somalia initially fully respected the Parallel of Latitude boundary.[28] This confirms that, until 2014, Somalia accepted that boundary.

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23 *See* "UK-based Soma Oil & Gas talks about its plans in Somalia", *How we made it in Africa*, 26 August 2013, Annex 106.

24 *See* Chapter II.A.4.

25 *See* "UK-based Soma Oil & Gas talks about its plans in Somalia", *How we made it in Africa*, 26 August 2013, Annex 106.

26 *See* "Soma Oil & Gas Unlocking Somalia's Potential: Company Presentation", *Soma Oil & Gas*, 7 October 2013, page 8, Annex 163.

27 *See* Chapter II.A.3.

28 *See* "Soma Oil & Gas Unlocking Somalia's Potential: Company Presentation", *Soma Oil & Gas*, 7 October 2013, Annex 163.

43. The new evidence also shows that, after Soma Oil & Gas began exploration off the southern Somali coast, Somalia granted Soma Oil & Gas rights to oil and gas located south of the Parallel of Latitude.[29] In tandem, Somalia claimed that maritime area for the first time and then brought this proceeding at breakneck speed in order to give an appearance of legitimacy to that process.[30]

44. Further, the terms of the SOA reveal that Soma Oil & Gas's statements to the UN Security Council misrepresented the content of the SOA.[31] The new evidence also includes documents that were removed from public viewing on Soma Oil & Gas's website but have been recovered from internet archival sites.[32] This all confirms Soma Oil & Gas's inappropriate interest in this proceeding.

45. There is also significant new evidence of Kenya's sovereign and frequent activities concerning oil concessions in the now-disputed maritime area.[33] The new evidence demonstrates that the Kenyan Navy patrolled up to the

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29 *See* Chapters II.A.4 and II.A.5.

30 *See* Chapters II.A.4 and II.A.5.

31 *See* Letter from the Rt. Hon. Lord Howard of Lympne, CH QC, Chairman, Soma Oil & Gas to His Excellency Mr. Rafael Dario Ramirez Carreno, Chairman of the UN Security Council Committee pursuant to resolutions 751 (1992) and 1907 (2009) concerning Somalia and Eritrea, 17 August 2015, Annex 164.

32 *See* "Shareholders", *Soma Oil & Gas* via the Wayback Machine, 13 March 2016, available at: https://web.archive.org/web/20160313104450/http://www.somaoilandgas.com/shareholders/ (last accessed: 21 December 2020), Annex 165; "Shareholders", *Soma Oil & Gas* via the Wayback Machine, 17 April 2016, available at: https://web.archive.org/web/20160417080104/http://www.somaoilandgas.com:80/shareholders (last accessed: 21 December 2020), Annex 166.

33 *See* "Total renforce son exploration au Kenya avec la prise du permis d'exploration offshore L22, situé dans le Bassin de Lamu", *Total*, 27 June 2012, Annex 107; "The Deloitte Guide to Oil and Gas in East Africa – Where potential lies, 2013 Edition", *Deloitte*, 2013, page 5, Annex 167.

Parallel of Latitude so as to secure this area before and after 1979.[34] It further confirms that the Kenyan Navy understood a parallel of latitude to be the "internationally recognized" maritime boundary with Somalia.[35] Equally, the new evidence contradicts Somalia's claims that it "has always had a different claim, based on equidistance" and that "Somalia has consistently asserted that claim and acted in accordance with it."[36] Indeed, the new evidence confirms that Somalia's oil concession practice between 1979 and 2014 was inconsistent with its new claim to equidistance.[37] This includes Somalia's discussions with Soma Oil & Gas, which respected the maritime boundary until 2014.[38]

46. The new evidence also confirms that the management of Somalia's airspace has always been inconsistent with its claims before this Court. Several maps showing the ICAO official designation demonstrate that the Mogadishu Flight Information Region ("**FIR**") covering the EEZ and continental shelf areas has been delineated, and is still delineated, as generally following a parallel of latitude rather than Somalia's purported equidistance line.[39]

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34 *See* Witness Statement of General (Ret'd) Joseph Raymond Kibwana, EGH, CBS, 11 January 2021, Annex WS1.

35 Memorandum on EEZ Limits and Boundaries from Major Y. S. Abdi, KN/16/OPS/TRG, 11 May 2004, Annex 3.

36 SR, paragraph 2.87.

37 *See* "Somalia signs Shell-ExxonMobil E&P roadmap", *Petroleum Economist*, 3 March 2020, Annex 108.

38 *See* "Soma Oil & Gas Unlocking Somalia's Potential: Company Presentation", *Soma Oil & Gas*, 7 October 2013, Annex163. *See also* "Unlocking Somalia's Potential - Somalia Oil & Gas Summit London, UK", *Soma Oil & Gas*, 20 October 2014, Annex 168.

39 *See* "Air Navigation Plan, Africa – Indian Ocean Region", Vol. I, 2nd edition, *ICAO*, 2010, pages 302-311, Annex 29; "Report of the African Region (AFI) – Asia/Pacific Region (APAC) – Middle East Region (MID) Air Traffic Management (ATM) Special

47. The new evidence also confirms that, had Somalia disagreed with Kenya's claim, Somalia had both a duty and countless opportunities to protest against it. For example, even during its civil war, Somalia took many actions in order to preserve its rights with respect to other, less significant issues. These include actions and protests issued by Somalia between 1991 and 2012 before the UN.[40]

Coordination Meeting (AAMA/SCM)", *ICAO*, 19-20 January 2017, Appendix C and Appendix E, Annex 30; "Aeronautical Information Publication, Somalia, Part 2, En-route (ENR)", *ICAO*, February 2018, en-route chart -Mogadishu fir, Annex 31; "Aeronautical Information Publication, Somalia, Part 3, Aerodromes (AD)", *ICAO*, February 2018, AD 1.3-2 index to aerodromes and heliports – AD index chart, Annex 32.

[40] These include: (i) Letter from the Prime Minister of Somalia to the President of the Security Council, S/2001/263, 21 March 2001, Annex 8; (ii) Letter from the Permanent Representative of Somalia to the UN addressed to the President of the Security Council (transmitting letter from the Minister for Foreign Affairs of Somalia to the President of the Security Council), S/2002/550, 16 May 2002, Annex 9; (iii) Letter from the Permanent Representative of Somalia to the UN addressed to the Chairman of the Security Council Committee established pursuant to resolution 1267 (1999) concerning Al-Qaida and the Taliban and associated individuals and entities, S/AC.37/2004/(1455)/28, 31 March 2004, Annex 10; (iv) Letter from the *Chargé d'affaires* of the Permanent Mission of Somalia to the UN addressed to the President of the Security Council (transmitting agreement signed by the President of Somalia and the Speaker of the Transitional Federal Parliament), S/2006/14, 9 January 2006, Annex 11; (v) Letter from the Ministry of Foreign Affairs of the Permanent Mission of Somalia addressed to the President of the Human Rights Council, A/HRC/5/G/13, 13 June 2007, Annex 12; (vi) Letter from the Permanent Representative of Somalia to the UN addressed to the President of the Security Council, S/2008/323, 12 May 2008, Annex 13; (vii) Letter from the Permanent Representative of Somalia to the UN addressed to the President of the Security Council, S/2009/251, 14 May 2009, Annex 14; (viii) Letter from the Permanent Representative of Somalia to the UN adrssed to the President of the Security Council, S/2011/107, 28 February 2011, Annex 15; (ix) Letter from the Permanent Representative of Somalia to the UN addressed to the President of the Security Council (transmitting communiqué following the Somalia Reconciliation Meeting held in Nairobi from 1 to 4 November 2001), S/2001/1063, 6 November 2001, Annex 16; and (x) Letter from the Permanent Representative of Somalia to the UN adrsssed to the President of the Security Council (transmitting letter dated 4 January 2012 from the Permanent Representative of Somalia to the UN addressed to the President of the Security Council), S/2012/4, 4 January 2012, Annex 17.

48. The new evidence also confirms that, between 1979 and 2014, the Parties enjoyed good and intense bilateral relations.[41] The channels of communication between the two countries were open at all times. Neither the civil war nor any other circumstance justifies Somalia's lack of protest. Rather, it was a conscious choice that was entirely consistent with Somalia's so-called policy of "accommodation" towards Kenya. And Somalia benefited from that choice.

49. Indeed, the new evidence highlights Kenya's unwavering support for its neighbour, including during the Somali civil war. For example, it confirms that Kenya had a leading role in consolidating Somalia's internal affairs and acted as a mediator in Somalia's national reconciliation process.[42] The evidence also confirms Kenya's leadership of the Intergovernmental

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41 *See* Chapter II.A. The new evidence includes numerous examples of bilateral meetings and conferences, as well as expressions of gratitude from Somalia to Kenya. *See also* A. Tekle, "Peace and Stability in the Horn of Africa: Problems and Prospects", *Northeast African Studies*, 1989, p. 88, Annex 183; Letter from the Permanent Representative of Somalia to the UN addressed to the President of the Security Council (transmitting communiqué following the Somalia Reconciliation Meeting held in Nairobi from 1 to 4 November 2001), S/2001/1063, 6 November 2001, paragraph 6, Annex 16; "Somalia PM thanks Kenya for solid support", *Capital News*, 13 June 2012, Annex 109.

42 *See*, e.g., Report of the UN Secretary-General on the situation in Somalia, S/2003/231, 26 February 2003, Annex 33; Letter from the Permanent Representative of Somalia to the UN addressed to the President of the Security Council (transmitting communiqué following the Somalia Reconciliation Meeting held in Nairobi from 1 to 4 November 2001), S/2001/1063, 6 November 2001, paragraph 6, Annex 16; *Note verbale* from the Permanent Mission of Kenya to the UN addressed to the President of the Security Council (transmitting Declaration on Cessation of Hostilities and the Structures and Principles of the Somalia National Reconciliation Process, signed in Eldoret, Kenya, 27 October 2002), S/2002/1359, 11 December 2002, Annex 18; Letter from the Permanent Mission of Kenya to the UN addressed to the President of the Security Council (transmitting communiqué issued at the conclusion of the Extraordinary Summit of the Heads of State and Government of the Intergovernmental Authority on Development, held at Nairobi, on 8 and 9 July 1997), S/1997/535, 10 July 1997, Annex 19; Letter from the Permanent Representative of Kenya to the UN addressed to the President of the Security Council (transmitting communiqué of the sixth Summit of the Heads of State and Government of the Intergovernmental Authority on Development, held in Djibouti on 16 March 1998), S/1998/247, 17 March 1998, Annex 20.

Authority on Development (the "**IGAD**").[43] It encompasses accounts of meetings and initiatives launched by Kenya to foster the cessation of hostilities in Somalia.[44] Equally, the new evidence shows that Kenya hosted in its territory a significant number of Somali core institutions.[45] In that same vein, the new evidence demonstrates Kenya's prominent role in handling the Somali refugee crisis during the civil war, providing Somalia and the Somali people key support when they needed it.[46] Notably, the new

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43 *See* Report of the UN Secretary-General on the situation in Somalia, S/2003/231, 26 February 2003, Annex 33; Letter from the Permanent Mission of Kenya to the UN addressed to the President of the Security Council (transmitting communiqué issued at the conclusion of the Extraordinary Summit of the Heads of State and Government of the Intergovernmental Authority on Development, held at Nairobi, on 8 and 9 July 1997), S/1997/535, 10 July 1997, Annex 19; Letter from the Permanent Representative of Kenya to the UN addressed to the President of the Security Council (transmitting communiqué of the sixth Summit of the Heads of State and Government of the Intergovernmental Authority on Development, held in Djibouti on 16 March 1998), S/1998/247, 17 March 1998, Annex 20; *Note verbale* from the Permanent Mission of Kenya to the UN addressed to the President of the Security Council (transmitting Declaration on Cessation of Hostilities and the Structures and Principles of the Somalia National Reconciliation Process, signed in Eldoret, Kenya, 27 October 2002), S/2002/1359, 11 December 2002, Annex 18; UN Security Council Resolution 1725 (2006), S/RES/1725, 6 December 2006, Annex 34.

44 *See Note verbale* from the Permanent Mission of Kenya to the UN addressed to the President of the Security Council (transmitting Declaration on Cessation of Hostilities and the Structures and Principles of the Somalia National Reconciliation Process, signed in Eldoret, Kenya, 27 October 2002), S/2002/1359, 11 December 2002, Annex 18; UN Security Council Resolution 1725 (2006), S/RES/1725, 6 December 2006, Annex 34.

45 Most international organisations assisting Somalia during the civil war had their head offices in Nairobi. These included the UN Political Office for Somalia, the UN Development Program and the Civil Aviation Caretaker Authority for Somalia. *See* "Somalia: UN envoy re-establishes office in Mogadishu after 17-year hiatus", *UN News*, 24 January 2012, Annex 35; "Assessment of Development Results: Somalia, Evaluation of UNDP Contribution", *Evaluation Office of the UN Development Programme*, July 2010, page 85, Annex 36; "Civil Aviation Caretaker Authority for Somalia (Project SOM/03/016), Project Evaluation: Final Report", *UN Development Programme, ICAO*, 24 July 2009, Annex V – Data Gathering Forms, Page A – 47, Annex 37.

46 *See*, e.g., "In Kenya, UN refugee chief urges support for Somali refugees and host communities", *UN High Commissioner for Refugees*, 21 December 2017, Annex 38.

evidence includes expressions of gratitude by Somalia for Kenya's support during the most terrible years of its history.[47]

50. Second, this Appendix contains significant and relevant new evidence confirming that, even if Somalia had not acquiesced in Kenya's claim, the three-step methodology advocated by Somalia is not appropriate in this case. Rather, latitudinal delimitation is the most suitable method to achieve an equitable solution to the Parties' competing maritime claims.

51. For example, the evidence confirms that Somalia's security situation has prevented Somalia from identifying reliable basepoints.[48] This prevents the Court from drawing a reliable equidistance line. Equally, the new evidence demonstrates that Somalia's novel equidistance claim is inequitable because Kenya has relied on, and Somalia has benefited from, the previous *status quo* in multiple ways.[49] For example, the new evidence confirms that Kenya has invested significant time and resources in the now-disputed maritime area. Similarly, the evidence suggests that, for decades, Somalia chose not to contest Kenya's boundary claim in order to secure significant support from Kenya in relation to other matters.[50]

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47 *See*, e.g., "Somalia PM thanks Kenya for solid support", *Capital News*, 13 June 2012, Annex 109; "In Kenya, UN refugee chief urges support for Somali refugees and host communities", *UN High Commissioner for Refugees*, 21 December 2017, Annex 38; Letter from the Permanent Representative of Somalia to the UN addressed to the President of the Security Council (transmitting communiqué following the Somalia Reconciliation Meeting held in Nairobi from 1 to 4 November 2001), S/2001/1063, 6 November 2001, paragraph 6, Annex 16.

48 *See* Chapter III.A.

49 *See* Chapters II.A.1 and II.A.2.

50 *See* Chapters I and II.A.1.

52. Third, this Appendix also contains new evidence confirming that, in any event, correctly applying the three-step methodology to the facts of this case requires delimiting the Parties' maritime boundary along the Parallel of Latitude.

53. As previously explained, the evidence proves the unreliable basis of the provisional equidistance line that Somalia has constructed at the first stage of the three-step methodology.[51] The new evidence also concerns the second stage of the three-step methodology. It confirms the existence of multiple special circumstances that require the adjustment of the provisional equidistance line to the Parallel of Latitude.

54. For example, the new evidence confirms that such adjustment would protect thousands of lives in Kenya, Somalia and other regions of the world. As repeatedly emphasised by the UN Security Council, the threats emanating from terrorism, piracy and other crimes regularly committed off Somalia's coast have imminent and far-reaching implications for both Kenya and the entire Eastern African region.[52] The new evidence includes testimony from the former Chief of General Staff of Kenya, proving that the Kenyan navy has patrolled up to the Parallel of Latitude for decades and must continue to do so to protect against piracy, banditry and terrorism.[53]

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51 *See* Chapter IV.A.

52 *See*, e.g., UN Security Council Resolution 2520 (2020), S/RES/2520, 29 May 2020, pages 1 and 3, Annex 39 (noting that "Al-Shabaab poses a serious threat to the stability of Somalia and its neighbours" and that "the situation in Somalia continues to constitute a threat to international peace and security").

53 *See* Witness Statement of General (Ret'd) Joseph Raymond Kibwana, EGH, CBS, 11 January 2021, Annex WS1.

55. Indeed, among other things, the new evidence confirms that: (i) Al-Shabaab regularly uses Somali waters near the border with Kenya as a means to conduct its operations, launch attacks and facilitate criminal activities;[54] (ii) piracy and other forms of maritime crime thrive in Somali waters;[55] (iii) Somalia is unable to police and prevent those activities in its own land and waters;[56] and (iv) in stark contrast, Kenya can police and prevent crimes in the now-disputed waters.[57]

56. The new evidence also confirms that a maritime boundary along an equidistance line would entail devastating repercussions for the livelihoods and economic well-being of Kenya's fisherfolk.[58] In particular, Annex 4 contains a report issued by Kenya's State Law Office regarding fishing activities and patterns of communities living along Kenya's northern coast

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54 *See* Chapter IV.B.3(i).

55 *See* Chapter IV.B.3(ii).

56 *See*, e.g., Note by the Secretary-General of the International Maritime Organization on the Relations with the UN and the specialized agencies on Piracy and armed robbery against ships in waters off the coast of Somalia, IMO A 25/19(a)/1/Add.1, 16 November 2007, page 3, Annex 40 (noting that "piracy and armed robbery against ships in waters off the coast of Somalia, unlike in other parts of the world, is caused by the lack of lawful administration and inability of the authorities to take affirmative action against the perpetrators, which allows the 'pirate command centres' to operate without hindrance at many points along the coast of Somalia").

57 *See*, e.g., "Kenya – KDF", *African Union Mission to Somalia*, available at: https://amisom-au.org/kenya-kdf/ (last accessed: 21 December 2020), Annex 41. Among others, Kenya also cooperates with the Global Maritime Crime Programme and the Indian Ocean West team of the UN Office on Drugs and Crime and Kenya. In addition, Kenya currently chairs the Contact Group on Piracy off the Coast of Somalia; "Global Maritime Crime Programme: Indian Ocean West", *UN Office on Drugs and Crime*, available at: https://www.unodc.org/unodc/en/piracy/Indian-Ocean.html (last accessed: 21 December 2020), Annex 42; Report of the UN Secretary-General on the situation with respect to piracy and armed robbery at sea off the coast of Somalia, S/2019/867, 8 November 2019 (the "**2019 UN Piracy in Somalia Report**"), paragraphs 29 and 70, Annex 43; Witness Statement of General (Ret'd) Joseph Raymond Kibwana, EGH, CBS, 11 January 2021, Annex WS1.

58 *See* Chapter IV.B.5.

(the "**Fishing Report**"). That report confirms that Somalia's proposed application of the three-step delimitation method would entail catastrophic repercussions for those communities.[59] The Fishing Report includes numerous witness interviews of fisherfolk and other individuals.[60]

57. The new evidence also confirms that Somalia would be incapable of preventing illegal fishing and maintaining security within the disputed waters.[61] It demonstrates that the adoption of Somalia's proposed maritime boundary would allow pirates, terrorists and other criminals to operate undisturbed in a larger maritime area.[62] These constitute special circumstances that neither Party has previously addressed in this proceeding.

58. The fact that local Kenyan fisherfolk and their communities are critically dependent on fisheries for their livelihoods is a matter of utmost political importance within Kenya. No single factor has more significantly and urgently jeopardised the livelihoods of local fishing communities than the disruption and insecurity that has plagued them owing to threats emanating from Somalia.

59. As noted above, the new evidence also identifies additional examples of the Parties' conduct that reflect a *de facto* boundary line along the Parallel of Latitude.[63] That evidence therefore confirms that an adjustment of the

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59 *See* Report on Fishing Activities and Patterns in Lamu County, Republic of Kenya, State Law Office of the Republic of Kenya ("**Fishing Report**"), 23 December 2020, Annex 4.

60 *See* Fishing Report, Annexes FR18 to FR43, Annex 4.

61 *See* Chapter IV.B.3.

62 *See* Chapter IV.B.3.

63 *See* paragraphs 40-46 above.

provisional equidistance line to the Parallel of Latitude is called for in this case.

60. This Appendix also contains new evidence confirming that Somalia has misapplied the third stage of the three-step methodology.[64]

61. Lastly, the new evidence confirming that Somalia has long acquiesced in the Parallel of Latitude boundary is dispositive of Somalia's entire claims regarding Kenya's alleged illegal activities in the now-disputed maritime area.[65]

64 *See* Chapter IV.C.

65 *See* Chapter V.

CHAPTER II: THE EVIDENCE CONFIRMS THAT SOMALIA ACQUIESCED IN KENYA'S CLAIM TO A MARITIME BOUNDARY ALONG THE PARALLEL OF LATITUDE BEFORE THE CRYSTALLISATION OF THE PRESENT DISPUTE

62. The new evidence explained in this Appendix confirms that Somalia has acquiesced in Kenya's claim to a boundary line running along the Parallel of Latitude.

63. **Section A** of this Chapter contains an accurate chronology of facts based on new evidence. It confirms that, having retreated from its prior aggressive claims to a "Greater Somalia", from 1979 to 1991 Somalia pursued a policy of amicable and friendly relations with Kenya. That policy of "accommodation" included accepting Kenya's maritime boundary claim.

64. Somalia's acquiescence continued from 1991 to 2012 as Somalia sought and obtained significant benefits from Kenya in terms of support and aid. Starting in 2012, Kenya discovered offshore oil and gas close to the now-disputed maritime area. This led to Soma Oil & Gas's incorporation. From its inception, Soma Oil & Gas took a keen interest in Kenya's oil and gas assets. Notably, Soma Oil & Gas was given highly irregular rights to all Somali oil and gas without cost or risk. Initially, the agreements between Somalia and Soma Oil & Gas assumed that the maritime boundary ran along the Parallel of Latitude.

65. However, in February 2014, Somalia suddenly protested against Kenya's claim to the latitudinal boundary. Tellingly, Somalia did so just before it extended Soma Oil & Gas's rights south of the Parallel of Latitude. That extension took place in circumstances that UN bodies have described as a

"pattern of corruption".[66] Then, in the following six months, Somalia not only refused to negotiate its new position with Kenya, it also declared and submitted the coordinates of its EEZ, made a CLCS submission and, in August 2014, started this proceeding.

66. **Section B** of this Chapter shows that the international law norms governing acquiescence apply to maritime boundaries and therefore establishes the relevance of the new evidence. Somalia's arguments to the contrary lack any basis in international law and are clearly at odds with well-established jurisprudence of this Court and other international tribunals.

67. **Section C** of this Chapter explains that the new evidence confirms that the Parties' acts and conduct since 1979 meet each of the three requirements for a finding of acquiescence.

68. As explained in **Section C.1**, the new evidence confirms that since 1979, Kenya has consistently and repeatedly claimed that the Parties' maritime boundary runs along the Parallel of Latitude. Importantly, for 35 years, Kenya acted in accordance with its boundary claim. Kenya's "act[s] [and] course of conduct" were therefore clearly "indicative of its view of the content of the applicable legal rule".

69. **Section C.2** shows that the new evidence confirms that Somalia had full "knowledge (actual or reasonably to be inferred) of" Kenya's claim.

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[66] Letter from the Coordinator of the Somalia and Eritrea Monitoring Group mandated pursuant to paragraph 46 of Security Council resolution 2182 (2014) to the Chair of the Security Council Committee pursuant to resolutions 751 (1992) and 1907 (2009) concerning Somalia and Eritrea, reporting the initial findings of the Monitoring Group's investigation into the operations of Soma Oil & Gas Holdings Limited (Soma), S/AC.29/2015/SEMG/OC.31, 28 July 2015, pages 23-25, KCM, Annex 101.

Indeed, Somalia was directly and repeatedly notified of Kenya's claims through the most appropriate channels.

70. Yet, as explained in **Section C.3**, for at least 35 years, the new evidence also confirms that Somalia failed "within a reasonable time to reject, or dissociate itself from, the position taken by [Kenya]" on the Parties' maritime boundary. Somalia's silence by itself confirms that Somalia acquiesced in Kenya's claim. However, Somalia did not just remain silent. Rather, from 1979 to 2014, Somalia's conduct was both consistent with the existence of a maritime boundary along the Parallel of Latitude and manifestly inconsistent with its novel claim to the equidistance line.

71. Somalia now seeks to resile from its unquestionable consent to Kenya's claim. However, Somalia simply cannot escape the legal consequences of the position that it chose to take. As Sir Hersch Lauterpacht explained, "the far-reaching effect of the failure to protest is not a mere artificiality of the law" but an "essential requirement of stability" in the international arena.[67]

72. Further, as explained in **Section D**, allowing Somalia unilaterally to withdraw from the Parties' agreement would be contrary to other general principles of international law for at least two additional reasons. First, for at least 35 years, Kenya consistently relied on Somalia's acquiescence, to its own detriment, in multiple and significant ways. Second, throughout that period, Somalia benefited enormously from its own acquiescence and Kenya's reliance. This further confirms that the Court should reject Somalia's claim to a boundary along the equidistance line. As Judge Alfaro

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[67] H. Lauterpacht, "Sovereignty over Submarine Areas", *British Yearbook of International Law*, 1950, pages 395-396.

succinctly and categorically explained, "a State must not be permitted to benefit by its own inconsistency to the prejudice of another State".[68]

A. Somalia acquiesced in Kenya's claim when it benefited its beleaguered people; it is now seeking to retract that acquiescence to benefit private interests

73. This Section explains how the new evidence confirms that Somalia acquiesced in Kenya's claim when it benefited its beleaguered people, and that Somalia is now seeking to retract that acquiescence to benefit private interests. However, acquiescence is consent. Having consented to the latitudinal boundary, Somalia cannot now unilaterally revoke that consent.

1. 1970s to 1991: Somalia acquiesced in Kenya's claim in the context of an improvement of its bilateral relations with Kenya

74. From 1979 to 1991, Somalia acquiesced in the maritime boundary claimed by Kenya in the context of improving friendly relations between the two countries.

75. The evidence discussed in **Section II.A.1(i)** confirms that the relations between Kenya and Somalia dramatically improved in the late 1970s when Somalia abandoned its irredentist territorial claims.

76. The evidence discussed in **Section II.A.1(ii)** confirms that Kenya made clear in the 1970s that it considered maritime claims based on equidistance as "malicious". Kenya therefore advocated the use of latitudinal boundaries

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[68] *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports 1962*, p. 6, Separate Opinion of Vice-President Alfaro, page 40.

with its neighbours, including through its 1979 EEZ Proclamation and its boundary agreement with Tanzania.

77. The evidence discussed in **Section II.A.1(iii)** confirms that, from 1980 to 1991, Somalia did not protest either Kenya's 1979 EEZ Proclamation or Kenya's consistent activities as far north as the Parallel of Latitude, even as the two countries were engaging in numerous bilateral exchanges.

(i) In the late 1970s, Somalia dramatically improved its relations with Kenya by abandoning its irredentist claims; at that time, initial oil and gas exploration in the relevant maritime areas was not promising

78. The post-colonial history of the Parties provides important contextual background to Somalia's acquiescence in Kenya's maritime boundary claim. Somalia gained independence in 1960. Kenya's independence came in 1963. The two States initially did not enjoy good relations. Somalia rejected the borders between the two States and made irredentist claims to Kenya's northern territory.[69] This led to the 1963-1967 Shifta War.[70] Somalia's policy of "Greater Somalia" persisted in the years that followed, until the mid-1970s.[71]

79. Nevertheless, as explained in the witness statement of General (Ret'd) Joseph Raymond Kibwana, EGH, CBS (the former Chief of General Staff of the Kenyan Armed Forces and one of the first ten recruits to the Kenyan Navy after independence), even before 1979, the Kenyan Navy patrolled up to the Parallel of Latitude. It did so initially under the command of the

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69 *See* KCM, paragraph 36.

70 *See* KCM, paragraphs 36 and 258.

71 KCM, paragraph 68.

British Royal Naval Training Team and, after 1972, under its own initiative.[72]

80. In the latter half of the 1970s, Somalia and Kenya's relations improved significantly because Somalia abandoned its aggressive territorial claims. During and after the 1977-1978 Ogaden war against Ethiopia, Somalia retreated from its catastrophic irredentist policy.[73] In July 1977, Kenya and Somalia pledged to maintain peace along their border and agreed to set up a border commission to "normalize and restore tranquillity" in the region.[74]

81. Starting from around 1977, Somalia abandoned its "Greater Somalia" policy and started its so-called policy of "accommodation" towards Kenya.[75] As the New York Times reported in 1977, while Somalia had historically claimed a large section of northern Kenya, recently, "it ha[d] not pressed the claim".[76] Kenya welcomed this change in policy. The end of the 1970s therefore initiated a period of reconciliation and cooperation.[77]

82. During this same period, Somalia and Kenya started actively to explore for offshore oil and gas resources. In August 1970, the Kenyan Ministry of Foreign Affairs noted the need to legislate on the maritime areas in order to

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72 *See* Witness Statement of General (Ret'd) Joseph Raymond Kibwana, EGH, CBS, 11 January 2021, paragraphs 6-9, Annex WS1.

73 *See* KCM, paragraph 68.

74 "Kenya and Somalia agree on plan to maintain peace along border", *The New York Times*, 21 July 1977, Annex 110.

75 KCM, paragraph 258.

76 "Kenya and Somalia agree on plan to maintain peace along border", *The New York Times*, 21 July 1977, Annex 110.

77 *See* KCM, paragraph 68, footnote 71.

issue licences for oil and other minerals in these areas.[78] Subsequently, in 1972, both States adopted laws on the territorial sea.[79]

83. These initial efforts to extract offshore oil and gas resources did not prove particularly successful. An industry publication confirms that "[t]he earliest offshore exploration activities [in Kenya] were 2D seismic data acquisition programs, beginning in 1970".[80] As a study prepared by the Oxford Institute of Energy Studies shows, "[a]ltogether, a total of 15 wells were drilled in Kenya throughout the 1960s and 70s".[81] However, these efforts had "no commercial success".[82]

84. Similarly, a World Bank report confirms that, during the 1970s, Somalia had "a large oil and gas potential" which, however, remained "largely untested" and "no commercial discovery was made".[83] The report also confirms that "[t]he petroleum potential of Somalia, though still not fully

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78 *See* KCM, page 17, footnote 37; Confidential Memorandum from the Minister of Foreign Affairs to the Cabinet, *Territorial Waters Legislation*, containing the 1970 Territorial Waters Bill, 8 August 1970, paragraph 2, KCM, Annex 2.

79 *See* Somali Democratic Republic, Law No. 37, *Law on the Somali Territorial Sea and Ports* (10 Sept. 1972), MS, Annex 9; Republic of Kenya, Law No. 2 of 1972, *Territorial Waters Act* (16 May 1972), MS, Annex 16.

80 Nina Rach, "Kenya forges ahead", *oedigital.com* (1 July 2013), MS, Annex 113. *See also* "Kenyan explorers look deeper offshore", *Offshore Engineer*, 21 July 2014, Annex 111.

81 "Kenya: An African oil upstart in transition", *The Oxford Institute for Energy Studies*, October 2014, page 8, Annex 112.

82 "Kenya: An African oil upstart in transition", *The Oxford Institute for Energy Studies*, October 2014, page 8, Annex 112.

83 "Project Completion Report, Democratic Republic of Somalia, Petroleum Exploration Promotion Project (Credit 1043-SO)", Report No. 7533, *The World Bank*, 8 December 1988, page 2, Annex 44.

evaluated, was deemed sufficiently interesting to warrant the organized effort of promoting the various sedimentary basins".[84]

(ii) In the 1970s, Kenya's position was that any maritime boundaries claims by Somalia and Tanzania based on equidistance lines would be inequitable, prompting the use of parallels of latitude

85. When the Third UN Conference on the Law of the Sea ("**UNCLOS III**") began in 1972, Kenya and Somalia were very active in the negotiations that led to the adoption of UNCLOS.[85] This is unsurprising, given the two States' history and the fact that their maritime boundaries remained undelimited. During those negotiations, Somalia and Kenya concurred that equitable principles, as opposed to equidistance, should apply to maritime delimitation in the EEZ and continental shelf.[86] Ignoring these facts, Somalia now argues that "Kenya and Somalia had different views on how the boundary should be delimited".[87] The historical record contradicts Somalia's position.

86. States participating in UNCLOS III were, on this issue, divided in two opposing groups.[88] The first group wished to retain, and extend to the EEZ, the rule set out in Article 6 of the 1958 Geneva Convention on the

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84 "Project Completion Report, Democratic Republic of Somalia, Petroleum Exploration Promotion Project (Credit 1043-SO)", Report No. 7533, *The World Bank*, 8 December 1988, page 2, Annex 44.

85 *See* KCM, paragraphs 69-75.

86 *See* KCM, paragraphs 69-70; KR, paragraph 131.

87 SR, paragraph 2.30.

88 *See* KCM, paragraph 70; Third UNCLOS, *Informal Suggestions* NG7/4, NG7/10, NG7/10/Rev.1 and NG7/10/Rev.2, 1978-1980, Third United Nations Conference on the Law of the Sea: Documents by Renate Platzöder, Oceana Publications, 1986, Vol. IX, KCM, Annex 69.

Continental Shelf and its reference to the median or equidistance line.[89] This was the "equidistance" group.

87. The second group wished to remove any reference to equidistance and refer, instead, to equity or equitable principles. The States in this group relied, *inter alia*, on the then recent judgment in the 1969 *North Sea Continental Shelf Cases* and on the 1977 decision in the *Anglo-French Continental Shelf* case.[90] This was the "equity/equitable principles" group.

88. Both Kenya and Somalia belonged to the "equity/equitable principles" group. The Somali delegates taking the floor in 1980 and again in 1982 at the Plenary of the Conference summarised clearly the Parties' positions. President Yusuf, then acting as Somalia's representative to UNCLOS III, stated that delimitation of the EEZ and the continental shelf "should be effected in accordance with equitable principles and all the relevant circumstances".[91] Mr Robleh stated that:

> [h]is delegation considered that such delimitation should be determined on the basis of the principle of equity. It was convinced that a serious analysis of customary international law, as articulated in the 1969 North Sea cases and the 1977 arbitral decision on the Channel case

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89 *See* KCM, paragraph 70; Third UNCLOS, *Informal Suggestions* NG7/4, NG7/10, NG7/10/Rev.1 and NG7/10/Rev.2, 1978-1980, Third United Nations Conference on the Law of the Sea: Documents by Renate Platzöder, Oceana Publications, 1986, Vol. IX, KCM, Annex 69. *See also* Convention on the Continental Shelf, 29 April 1958, 499 UNTS 311, 10 June 1964, Status as at 26 October 2020.

90 *See North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment of 20 February 1969, I.C.J. Reports 1969*, p. 3; *Delimitation of Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic (UK, France)*, Award, 30 June 1977, RIAA, Volume XVIII, p. 3.

91 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, p. 35 and p. 44, paragraph 43, KCM, Annex 71.

> between France and the United Kingdom, would prove that equity and equitable principles rather than the purely geometric methods of the median or equidistance line had become consecrated as the general rule in international law in delimitation matters.[92]

89. Kenya's representatives took the same position. Reporting to the Kenyan Ministry of Foreign Affairs on 14 March 1980, the Kenyan Permanent Mission to the UN stated that:

> Kenya has been a supporter of the equitable principles group and continues to do so. The current international law would tend to support our view that delimitation of the areas in question should be effected through the employment of equitable principles rather than the median or equidistance criterion employed in the 1958 Law of the Sea Conventions.[93]

90. As the Court knows, the States supporting "equity" or "equitable principles" prevailed in this diplomatic battle. Indeed, the final draft of Articles 74 and 83 of UNCLOS does not include any reference to equidistance.

91. The Parties have addressed a report from the Kenyan Permanent Mission to the UN dated 1974, in which the authors stated that Tanzania and Somalia would "have had the malicious intention of distorting the marine borders"

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92 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, pp. 55-6, page 56, paragraph 73, KCM, Annex 72 (footnote omitted). *See also* the intervention by the same delegate at the 192nd Plenary meeting, 9 December 1982, A/CONF.62/SR.192, *Official Records of the Third United Nations Conference on the Law of the Sea*, Volume XVII, Resumed Eleventh Session and Final Part Eleventh Session and Conclusion, p. 127, paragraph 159, KCM, Annex 73.

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

using an equidistance or median line.[94] This report confirms that, as early as 1974, Kenya had already made perfectly clear that any claim based on an equidistance line by either Somalia or Tanzania would be viewed as inequitable.

92. In 1976, in that well-known and well-understood context, Kenya and Tanzania concluded their Maritime Agreement on the Territorial Sea Boundary, generally using a parallel of latitude as their maritime boundary.[95] Thus, Tanzania accepted and agreed that the equidistance line was not the equitable solution in the circumstances of the coastal geography of the three States. The Kenya-Tanzania Agreement was circulated to all UN Member States, including Somalia.[96]

93. After describing the equidistance line as "malicious" in 1974, Kenya then publicly proclaimed the Parallel of Latitude as its maritime boundary with Somalia. For example, in 1976, the Survey of Kenya issued a map indicating the Parallel of Latitude as the maritime boundary in the EEZ up to 200M.[97] On 28 February 1979, Kenya issued the 1979 EEZ

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94 KCM, paragraph 70; SR, paragraph 2.97. *See also* 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, Extract, page 64, KCM, Annex 11.

95 *See* KCM, paragraphs 42-49.

96 *See* KCM, paragraph 44; Letter from the Permanent Mission of Kenya to the United Nations to the United Nations Secretary-General (KMUN/LAW/MSC/23A/7) forwarded to the Ministry of Foreign Affairs, *Agreement on the Territorial Sea Boundary between Kenya and Tanzania*, 18 April 1977, KCM, Annex 14.

97 *See* KCM, paragraph 57; Kenya Territorial Sea and Economic Zone, Survey of Kenya, SK-90 Edition 1, 1976, KCM, Figure 1-7.

Proclamation, declaring an EEZ extending to 200M and using the Parallel of Latitude as the maritime boundary between Kenya and Somalia.[98]

94. The 1979 EEZ Proclamation was widely circulated. On 5 March 1979, Kenya asked the UN Secretary-General to transmit the text of the 1979 EEZ Proclamation to all the Permanent Missions of UN Member States.[99] On 19 July 1979, the UN Secretary-General confirmed that the transmittal had been completed.[100] The UN thereafter included the 1979 EEZ Proclamation in its publication on national legislation relating to the EEZ.[101]

95. It is no coincidence that, just a year later, in 1980, Somalia opposed equidistance as a method of delimitation during the UNCLOS III negotiation sessions.[102] Presumably, the position of its southerly neighbour influenced that decision, at least in part.

96. In addition to Kenya, Tanzania and Somalia, numerous other African States, on both the eastern and western coasts, have adopted parallels of latitude as their maritime boundaries guided by the region's coastal

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98 *See* Republic of Kenya, *Presidential Proclamation of 28 February 1979* (28 Feb. 1979), MS, Annex 19.

99 *See* KCM, paragraph 64; Letter from the Permanent Mission of Kenya to the United Nations to the United Nations Secretary-General (KMUN/LAW/MSC/23A/49), 9 March 1979, Cover letter from the Permanent Mission of Kenya to the United Nations to the Ministry of Foreign Affairs (KMUN/LAW/MSC/23A/50), *Proclamation of the President of the Republic of Kenya on Kenya's Exclusive Economic Zone*, 9 March 1979, KCM, Annex 19.

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

101 *See* KCM, paragraph 66.

102 *See* KCM, paragraphs 69 and 71; KR, paragraph 28; 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, p.35 and p.44, KCM, Annex 71.

geographies. This confirms a consistent regional practice according to which Africa's unique coastal geography is often most equitably delimited in this manner and not necessarily using an equidistance line. In addition to Kenya, Tanzania and Somalia, parallels of latitude have been used by:

(i) Gambia and Senegal in 1975;[103]

(ii) Mauritania and Morocco in 1976;[104]

(iii) Mozambique and Tanzania in 1988;[105] and

(iv) Angola and Namibia in 2002.[106]

97. This provides further evidence confirming that Somalia acquiesced in the Parallel of Latitude: on the eastern and western coasts of Africa, latitudinal delimitation was and still is considered an equitable solution.

(iii) Somalia did not protest against Kenya's latitudinal claim or against Kenya's activities in the now-disputed maritime area from 1980 to 1991, even as the two States engaged in numerous other diplomatic exchanges

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103 *See* Agreement between The Gambia and the Republic of Senegal, 4 June 1975, JI Charney & LM Alexander (eds), *International Maritime Boundaries I* (Nijhoff 1993), p. 854, KCM, Annex 132.

104 *See* Convention concerning the State frontier line established between the Islamic Republic of Mauritania and the Kingdom of Morocco (with map), 14 April 1976, 1035 UNTS 120, KCM, Annex 134.

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

106 *See* Treaty between the Government of the Republic of Angola and the Government of the Republic of Namibia regarding the Delimitation and Demarcation of the Maritime Borders between the Republic of Angola and the Republic of Namibia, 4 June 2002, JI Charney & LM Alexander (eds), *International Maritime Boundaries V* (Nijhoff 2005), p. 3719, KCM, Annex 148.

98. As explained above, as of July 1979, Somalia had been formally and fully notified of Kenya's claim that the two States' maritime boundary ran along the Parallel of Latitude. Somalia did not protest against that claim in 1979, or indeed at any time before 2014.[107] In all those years, Somalia said nothing in protest or objection and it presented no alternative maritime boundary claim. This is confirmed by the UN.[108]

99. Yet, throughout the 1980s, and in the context of dramatically improved relations, Kenya and Somalia discussed numerous issues of mutual concern. On multiple occasions, Somalia raised other matters bilaterally with Kenya.

100. For example, on 20 April 1980, Somalia's Vice President met with Kenya's Vice President in Nairobi. They discussed matters such as cooperation on marine exploitation but Somalia lodged no protest against the 1979 EEZ Proclamation.[109] The minutes of this meeting indicate that the areas for cooperation with Kenya would include security matters, road construction, shipping arrangements, business and trade.[110] Relevantly, the minutes also explain that "on oil exploitation it was noted [...] though this was in

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107 *See* KCM, paragraph 67.

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

109 *See* KCM, paragraph 68; Letter from the Permanent Secretary to the Vice President, Minister for Finance and the Office of the President (MFA.231/21/001A/92), 6 May 1980, enclosing the minutes of a meeting held at the Inter-continental Hotel Nairobi on 20th April 1980 between H.E. Kenya's Vice President Mr. Mwai Kibaki and H.E. the Somali Vice President Mr. Hussein Kulmie Afrah, page 2, KCM, Annex 24.

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

progress, there was nothing substantial to report".[111] Put differently, Somalia did not consider that the 1979 EEZ Proclamation, which had at least the potential of having implications for "oil exploitation", constituted a notable development. Indeed, the 1979 EEZ Proclamation was consistent with both Parties' views.

101. In fact, in 1981, Kenya's President visited Mogadishu and received assurances that Somalia had no irredentist interests in the Northern Frontier District of Kenya.[112] Further, on 29 June 1981, the Presidents of the two countries met to discuss a series of important bilateral issues. During this meeting, Somalia indicated that it was "not seeking any territory from Kenya".[113] This statement is vital. It confirms that Somalia knew that territorial or maritime claims that conflicted with Kenya's claims would disrupt the ongoing amicable relations. Kenya could have perceived these claims as a return to the "Greater Somalia" policies. The statement must also be understood by reference to Kenya's position, in 1974, that an equidistance claim by Somalia would be "malicious".[114] This provides further evidence of Somalia's motives in acquiescing in the maritime boundary.

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

112 *See* A. Tekle, "Peace and Stability in the Horn of Africa: Problems and Prospects", *Northeast African Studies*, 1989, p. 88, Annex 183.

113 KCM, page 29 footnote 71; P. B. Gupte, Somalia Calls for Talks with Ethiopia, *New York Times*, 30 June 1981, KCM, Annex 105.

114 *See* paragraph 91 above.

102. In the absence of any protest by Somalia, and in light of Somalia's repeated assurances, Kenya acted consistently with its 1979 EEZ Proclamation. For instance, Kenya continued to deploy military resources as far north as the Parallel of Latitude. In 1980, the Kenyan Navy included all maritime areas as far north as the Parallel of Latitude in its "Naval Command Areas of Responsibility".[115] Somalia never objected to the actions of Kenya's Navy. This is further confirmed by the witness statement of General Kibwana, who also relates Kenya continued naval patrols up to the Parallel of Latitude from 1979 onwards. As General Kibwana explains, even though Somalia's Navy was well-equipped by the USSR and able to object at the time, Somalia's Navy did not object to those patrols.[116]

103. Kenya's military activities intensified in the late 1980s and early 1990s. This coincided with the beginning of the Somali civil war in 1991.[117] As the internal situation deteriorated in Somalia, the Kenyan Navy immediately sought to protect Kenya's northern maritime territory. In February 1990, Kenya deployed naval units that patrolled as far north as the Parallel of Latitude, including in the territorial sea waters.[118] General

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115 KCM, paragraphs 120-121; Kenya Naval Command Areas of Responsibility (Map of 23 May 1980), KCM, Figure 1-12.

116 *See* Witness Statement of General (Ret'd) Joseph Raymond Kibwana, EGH, CBS, 11 January 2021, paragraphs 13-14, Annex WS1.

117 *See* KCM, paragraph 124.

118 *See* KCM, paragraph 125; Report of Proceeding of KNS JAMHURI on a North and South Coast Patrol from 20 February to 25 February 1990, Kenya Navy, Report dated 28 February 1990, KCM, Annex 32; Report of Proceedings of KNS JAMHURI on a North Coast Patrol from 4 September to 10 September 1990 (KNS/32/Ops/Trg), Kenya Navy, Report dated 16 September 1990, KCM, Annex 33; Report of Proceedings of KNS NYAYO while on a North Coast Patrol from 12th Sept 90 to 18 Sept 90, KNS NYAYO at Mkunguni, Kenya Navy, 29 September 1990, KCM, Annex 34; Report of Proceedings of KNS UMOJA while on a North/South Patrol from 19 September 1990 to 25 September 1990, Kenya Navy, Report dated 12 October 1990, KCM, Annex 35.

Kibwana also confirms that Kenyan naval patrols up to the Parallel of Latitude increased after 1991, to address piracy and banditry as the Somali civil war started.[119]

104. Somalia did not protest against any of these military deployments, even though some of them took place in areas that Somalia now claims as part of its territorial sea. It is untenable to believe that a sovereign State would not have objected to a military encroachment into its territorial sea. The appropriate conclusion is that Somalia did not consider there was any such encroachment.

105. But Somalia did not simply remain silent. Rather, it actively took steps confirming that it agreed with Kenya's claim and with its position regarding the principles governing maritime delimitation. Indeed, in 1979, after Elf-Aquitaine relinquished its Somali-granted exploration permits for an oil concession block along a line perpendicular to the general direction of the coast,[120] Somalia simply abandoned this licensing block.[121]

106. Crucially, none of the oil concession licences subsequently offered by Somalia in the 1980s went further south than the Parallel of Latitude.[122] For example, an industry publication confirms that all Shell/ExxonMobil concession blocks granted by Somalia (both legacy blocks offered before

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119 *See* Witness Statement of General (Ret'd) Joseph Raymond Kibwana, EGH, CBS, 11 January 2021, paragraphs 18-19, Annex WS1.

120 *See* KCM, paragraph 141; P. Giorgio Scorcelletti and B. M. Abbott, Petroleum Developments in Central and Southern Africa in 1978, *The American Association of Petroleum Geologists Bulletin* V. 63, No. 10, pp. 1689-1742, October 1979, at p. 1694, page 1694, KCM, Annex 104; Somali Concession Blocks for the year 1978, KCM, Figure 1-20.

121 *See* KCM, paragraph 141; KR, paragraph 95.

122 *See* KCM, paragraphs 141-142.

1991 and those offered subsequently) stopped at the Parallel of Latitude.[123] Somalia did not offer an exploration licence south of the Parallel of Latitude until it raised its new claim to an equidistance line in 2014.[124]

107. During the 1980s, Somalia's marine fisheries policy was also consistent with a maritime boundary along the Parallel of Latitude. In 1987, a Somali official map depicted Somalia's Fisheries Development Region 1 stopping at the Parallel of Latitude.[125] The same year, Somalia consented to and participated in the Georgy Ushakov survey, conducted under the auspices of the UNESCO.[126] The survey's investigations recognised the Parallel of Latitude as the maritime boundary and stopped just north of the Parallel of Latitude.[127]

108. Kenya's oil and other activities during the 1980s also were consistent with the existence of a maritime boundary along the Parallel of Latitude. In 1984, the Survey of Kenya issued a map showing a licensing block whose northern boundary coincided with the Parallel of Latitude.[128] Further, in

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123 *See* "Somalia signs Shell-ExxonMobil E&P roadmap", *Petroleum Economist*, 3 March 2020, Annex 108.

124 *See* paragraph 468 below.

125 *See* KCM, paragraph 129; KR, paragraph 89; Fishery Development Regions of Somalia, KCM, Figure 1-14.

126 *See* KCM, paragraphs 131-132; KR, paragraphs 91-92; Yearly Fisheris [*sic*] and Marine Transport Report 1987/1988, Somali Democratic Republic, Ministry of Fisheries and Marine Transport, KCM, Annex 50; 1987 Ushakov Fishery Survey Locations, KCM, Figure 1-16.

127 *See* KCM, paragraphs 131-132; KR, paragraphs 91-92; Yearly Fisheris [*sic*] and Marine Transport Report 1987/1988, Somali Democratic Republic, Ministry of Fisheries and Marine Transport, KCM, Annex 50; 1987 Ushakov Fishery Survey Locations, KCM, Figure 1-16.

128 *See* KCM, paragraph 143; Map showing Kenya's EEZ and prospective licensing blocks for oil exploration along the Parallel of Latitude, Survey of Kenya, 1984, KCM, Figure 1-23.

the 1980s, Kenya developed its marine fisheries industry in its EEZ as far north as the Parallel of Latitude.[129] Between 1980 and 1983, the survey conducted by the Nansen Program investigated Kenyan fisheries as far north as 3.5M south of the Parallel of Latitude boundary.[130]

109. The record also suggests that, as of 1989, Somalia's own legislation recognised the Parallel of Latitude as the Parties' maritime boundary. On 26 January 1989, Somalia adopted Law No. 5, approving the Somali Maritime Law of 1988 (the "**1988 Maritime Law**").[131] Article 4(6) of the 1988 Maritime Law provides that, in the absence of an agreement:

> the Somali Democratic Republic shall consider that the border between the Somali Democratic Republic and the Republic of Djibouti and the Republic of Kenya ***is a straight line toward the sea from the land as indicated on the enclosed charts***.[132] (Emphasis added).

110. Somalia has not produced those "enclosed charts". Despite strenuous efforts by Kenya, the charts have not been found in the records of a number of potentially relevant libraries. Unfortunately, Somalia's non-disclosure can only be described as conduct that deviates from its obligation to litigate this dispute in good faith. Somalia should not be permitted to obtain any tactical advantage from this non-disclosure. On the contrary, the Court

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129 *See* KCM, paragraphs 133-135.

130 *See* KCM, paragraphs 133-134.

131 *See* Somali Democratic Republic, Ministry of Fisheries and Sea Transport, *Somali Maritime Law* (1988), MS, Annex 10; Somali Democratic Republic, Law No. 5, *Somali Maritime Law* (26 Jan. 1989), MS, Annex 11.

132 KCM, paragraph 81; Somali Democratic Republic, Ministry of Fisheries and Sea Transport, *Somali Maritime Law* (1988), MS, Annex 10; Somali Democratic Republic, Law No. 5, *Somali Maritime Law* (26 Jan. 1989), MS, Annex 11.

should draw the required inference that Somalia's non-production of the chart means that the chart is damaging to its case.[133]

111. Somalia has argued before this Court that, in Somali, the expression "straight line" (or "xariiq toosan") in the 1988 Maritime Law was meant to refer to the median or equidistance line.[134] Kenya respectfully maintains that the expression "straight line" could never faithfully be interpreted as an equidistance line.[135] An equidistance line is almost never a straight line. Certainly, Somalia's proposed equidistance line in this proceeding is not a straight line. Further, Somalia's interpretation is inconsistent with the terms of the 1988 Maritime Law themselves.[136] Somalia's description of its boundary with Yemen uses the phrase "median line" ("xariiq dhexe oo u dhaxeysa ballar isku mid ah"; in English, literally, central line between them at an equal distance) in Article 4(6) of the same law.[137] Thus, Somalia's own translation of the 1988 Maritime Law shows that Somali

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133 *See Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania), Merits, Judgment of 9 April 1949, I.C.J. Reports 1949*, p. 4, page 18 ("the fact of this exclusive territorial control exercised by a State within its frontiers has a bearing upon the methods of proof available to establish the knowledge of that State as to such events. By reason of this exclusive control, the other State, the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. Such a State should be allowed a more liberal recourse to inferences of fact and circumstantial evidence").

134 SR, paragraph 2.99.

135 KCM, paragraphs 84-85; KR, paragraph 105.

136 *See* KCM, paragraph 84; KR, paragraph 105.

137 Somali Democratic Republic, Ministry of Fisheries and Sea Transport, *Somali Maritime Law* (1988), Article 4(6), MS, Annex 10; KR, paragraph 105; Certified Translation from Absolute Translations (15 October 2018), KR, Annex 14; Report from Absolute Translations (26 October 2018), KR, Annex 15. *See also* KR, paragraph 105.

uses different terms to refer to a median line than the term "xariiq toosan" (or straight line).[138]

112. In all events, Somalia could easily show what the expression "straight line" means in the statute by disclosing the related charts. It has chosen not to do so. Respectfully, that appears to tell this Court all it needs to know.

113. On 25 August 1989, Kenya adopted its 1989 Maritime Zones Act, implementing UNCLOS into its national legislation.[139] Kenya and Somalia ratified UNCLOS the same year, in 1989.[140] In other words, both States were paying close attention to maritime issues throughout the 1980s. Nonetheless, Somalia did not protest against the Parallel of Latitude as the maritime boundary.

2. 1991 to 2012: Somalia continued to acquiesce in Kenya's claim while it benefited from Kenya's support

114. The evidence also clearly indicates that, from 1991 to 2012, Somalia continued to acquiesce in Kenya's claim while it benefited from Kenya's support.

115. The evidence discussed in **Section A.2(i)** below confirms that Kenya provided Somalia with significant levels of assistance during its civil war. **Section A.2(ii)** demonstrates that Kenya's activities in the now-disputed maritime area increased in the 2000s. The evidence discussed in **Section A.2(iii)** confirms that the Somali Government continued to engage in

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138 *See* KCM, paragraph 84; KR, paragraph 105.

139 *See* KCM, paragraphs 77-79; Republic of Kenya, Chapter 371, *Maritime Zones Act* (25 Aug. 1989), MS, Annex 20.

140 *See* KCM, paragraph 77.

significant international relations and acts, without ever protesting against Kenya's increasing activities in the now-disputed maritime area.

(i) Kenya provided Somalia with significant assistance during Somalia's civil war from 1991 to 2012

116. Kenya greatly assisted the Somali people and Government in the twenty-year period of the Somali civil war, from 1991 to 2012. Kenya went beyond its obligations under international law, as a responsible actor in the international sphere. Kenya is proud to have done so. Kenya provided humanitarian assistance, including by responsibly hosting over 500,000 refugees. Kenya brought the Somali combatants together to attempt to resolve the civil war from virtually the start of the conflict. Kenya hosted UN organisations dedicated to helping Somalia. At times, Nairobi was the seat of the Somali Government.

117. From 1992 to 1994, in the first two years of the civil war, approximately 300,000 Somali refugees entered Kenya.[141] During the war, Kenya strove to ensure safe conditions in its refugee camps. Starting in 1993, Kenya's local police worked with the UN High Commissioner for Refugees to implement the Women Victims of Violence Project in Kenya.[142] From

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141 *See* "Review of UNHCR's Kenya-Somalia Cross-border Operation", EVAL/CROS/14, *UN High Commissioner for Refugees*, 1 December 1994, Annex 45 ("[b]y mid-year, more than 300,000 Somali refugees had entered Kenya and their number increased assistance the rate of 1,000 per day").

142 *See* "UNHCR's Women Victims of Violence Project in Kenya: An Evaluation Summary", EC/1995/SC.2/CRP.22, *UN High Commissioner for Refugees*, 8 June 1995, paragraph 6, Annex 46.

1994 onward, protections were extended to all Somali refugees, regardless of their sex or the nature of their problems.[143]

118. In 2011, the UN Secretary-General commended Kenya "for continuing to provide support to refugees from Somalia, and welcomed the additional security measures taken in the camps hosting them."[144] In 2017, during his visit to Kenya, the UN High Commissioner for Refugees "expresse[d] his gratitude to Kenya for hosting almost half a million refugees and keeping its borders open to people fleeing war".[145] To this day, Kenya continues to host hundreds of thousands of Somali refugees.[146]

119. Kenya also has consistently used its offices to pursue Somali peace and security. As early as 24 March 1994, Kenya hosted a national reconciliation conference for Somalia. This resulted in a signed declaration where Somali faction leaders agreed to make the necessary arrangements to form a transitional government and expressed their support for the concept of voluntary disarmament.[147] Then, in 1996, the Somali national reconciliation process was "launched under the auspices of IGAD and led

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143 *See* "UNHCR's Women Victims of Violence Project in Kenya: An Evaluation Summary", EC/1995/SC.2/CRP.22, *UN High Commissioner for Refugees*, 8 June 1995, paragraph 12, Annex 46.

144 "Somali and Sudanese issues top discussions between Ban and Kenyan leaders", *UN News*, 8 December 2011, Annex 47.

145 "In Kenya, UN refugee chief urges support for Somali refugees and host communities", *UN High Commissioner for Refugees*, 21 December 2017, Annex 38.

146 *See* "Horn of Africa Somalia Situation", *UN High Commissioner for Refugees Operational Portal – Refugee Situations*, available at: https://data2.unhcr.org/en/situations/horn (last accessed: 21 December 2020), Annex 48.

147 *See* Annex I: Declaration by the leaders of the Somali political organizations, S/1994/614, 24 March 1994, Annex 49.

by Kenya".[148] The President of the UN Security Council expressly "commend[ed] the Government of Kenya for its crucial role in facilitating the Somali National Reconciliation Process".[149]

120. From 1997 on, Kenya, as the IGAD leader, reported to the UN Security Council on the peacekeeping and national reconciliation activities that were key to Somalia's transformation.[150] At a summit held in March 1998, IGAD, led by Kenya, reaffirmed "the need to continue to assist the Somali people in finding a peaceful solution to the conflict".[151]

121. From 1 to 4 November 2001, Kenya sought to arrange an end to the civil war by hosting a meeting of Somalia's political leaders and by acting as a mediator in the Somali national reconciliation process.[152]

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148 Report of the UN Secretary-General on the situation in Somalia, S/2003/231, 26 February 2003, Annex 33.

149 Statement by the President of the Security Council, S/PRST/2003/2, 12 March 2003, page 1, Annex 50.

150 *See* Letter from the Permanent Mission of Kenya to the UN addressed to the President of the Security Council (transmitting communiqué issued at the conclusion of the Extraordinary Summit of the Heads of State and Government of the Intergovernmental Authority on Development, held at Nairobi, on 8 and 9 July 1997, S/1997/535, 10 July 1997), Annex 19; Letter from the Permanent Representative of Kenya to the UN addressed to the President of the Security Council transmitting communiqué of the sixth Summit of the Heads of State and Government of the Intergovernmental Authority on Development, held in Djibouti on 16 March 1998, S/1998/247, 17 March 1998, Annex 20; *Note verbale* from the Permanent Mission of Kenya to the UN addressed to the President of the Security Council (transmitting Declaration on Cessation of Hostilities and the Structures and Principles of the Somalia National Reconciliation Process, signed in Eldoret, Kenya, 27 October 2002), S/2002/1359, 11 December 2002, Annex 18.

151 Letter from the Permanent Representative of Kenya to the United Nations addressed to the President of the Security Council transmitting communiqué of the sixth Summit of the Heads of State and Government of the Intergovernmental Authority on Development, held in Djibouti on 16 March 1998, S/1998/247, 17 March 1998, paragraph 6, Annex 20.

152 During this meeting, the Somali leaders "expressed their gratitude and appreciation to H.E. Daniel T. arap Moi, the Government and the people of Kenya for hosting the Reconciliation Meeting and for the hospitality extended to them." Letter from the Permanent Representative of Somalia to the UN addressed to the President of the Security

122. On 27 October 2002, Kenya, as the chair of IGAD, hosted a meeting of Somali leaders that resulted in the signing of a Declaration on Cessation of Hostilities and the Structures and Principles of the Somalia National Reconciliation Process.[153]

123. In 2003, Kenya appointed a Special Envoy for Somalia. This appointment was marked by the UN Security Council as "a welcome development and [...] expected to help to infuse renewed vigour in the peace process."[154]

124. In 2004, the President of the UN Security Council acknowledged that "[t]he Government of Kenya has borne a heavy burden in hosting a large number of Somali delegates and representatives at [another conference seeking peace] for a protracted period."[155]

125. On 29 January 2004, at a meeting again hosted by Kenya, Somali leaders signed the Declaration on the Harmonization of the Various Issues by the Somali Delegates at the Somali Consultative Meetings.[156] In 2004, the

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Council (transmitting communiqué following the Somalia Reconciliation Meeting held in Nairobi from 1 to 4 November 2001), S/2001/1063, 6 November 2001, paragraph 6, Annex 16.

153 *Note verbale* from the Permanent Mission of Kenya to the UN addressed to the President of the Security Council (transmitting Declaration on Cessation of Hostilities and the Structures and Principles of the Somalia National Reconciliation Process, signed in Eldoret, Kenya, 27 October 2002), S/2002/1359, 11 December 2002, Annex 18.

154 Report of the UN Secretary-General on the situation in Somalia, S/2003/231, 26 February 2003, paragraph 51, Annex 33.

155 Report of the UN Secretary-General on the situation in Somalia, S/2004/115, 12 February 2004, paragraph 60, Annex 51.

156 *See* Statement of the President of the Security Council at the 4915th meeting of the Security Council, S/PRST/2004/3, 25 February 2004, Annex 52.

President of the UN Security Council lauded this development as "an important step towards lasting peace and reconciliation in Somalia".[157]

126. Kenya also fostered peace in Somalia by urging other countries to support the Somali peace process. For example, in 2012, Kenya's Prime Minister "call[ed] upon South Korea to be steadfast in support for the reconstruction in Somalia".[158]

127. While it was receiving this considerable aid and support, including significant military support, Somalia never protested Kenya's claim to a maritime boundary at the Parallel of Latitude. At the same time, Somalia and Kenya had close and positive interactions. For example, in 2012, Somalia's Prime Minister "paid a courtesy call on President Mwai Kibaki" to thank him for Kenya's role in the restoration of peace in Somalia.[159]

128. Kenya also hosted numerous international organisations dedicated to supporting Somalia as well as the Somali Government. For example, from 1995 onwards, Kenya hosted the UN Political Office for Somalia.[160] Similarly, the UN Development Programme and most of the other organisations assisting Somalia had their head offices in Nairobi.[161] Starting in 1995, Kenya also hosted the Civil Aviation Caretaker Authority

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157 Statement of the President of the Security Council at the 4915th meeting of the Security Council, S/PRST/2004/3, 25 February 2004, Annex 52.

158 "Kenya's PM urges S. Korea to support peace in Somalia", *Dow Jones Institutional News*, 10 July 2012, Annex 113.

159 "Somalia PM thanks Kenya for solid support", *Capital News*, 13 June 2012, Annex 109.

160 *See* "Somalia: UN envoy re-establishes office in Mogadishu after 17-year hiatus", *UN News*, 24 January 2012, Annex 35.

161 *See* "Assessment of Development Results: Somalia, Evaluation of UNDP Contribution", *Evaluation Office of the UN Development Programme*, July 2010, page 85, Annex 36.

for Somalia.[162] Moreover, the Transitional Federal Government (the "**TFG**") of Somalia itself was based in Nairobi from its creation until June 2005.[163]

129. Equally, Kenya organised and participated in providing security and peacekeeping in Somalia. For example, in 2006, under Kenya's leadership, IGAD prepared a Deployment Plan for a Peacekeeping Mission of IGAD in Somalia.[164] As a direct consequence of Kenya's initiatives, the UN Security Council authorised the establishment of a protection and training mission in Somalia.[165] The same year, Kenya further provided hands-on support to Somalia by committing to train Somali policemen in Kenya.[166] Kenya also agreed to help Somalia with natural disasters and with the management and delivery of humanitarian aid.[167] From 2011 onwards, Kenya has provided troops to restore peace in Somalia. These troops later

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162 *See* "Civil Aviation Caretaker Authority for Somalia (Project SOM/03/016), Project Evaluation: Final Report", *UN Development Programme, ICAO*, 24 July 2009, (Extracts), Annex 37.

163 *See* United Nations Security Council, Report of the Secretary-General on the situation in Somalia, S/2005/642, 11 October 2005, paragraph 4, KCM, Annex 91. *See also* KCM, paragraph 96 and footnote 111.

164 *See* UN Security Council Resolution 1725 (2006), S/RES/1725 (2006), 6 December 2006, page 2, Annex 34.

165 *See* UN Security Council Resolution 1725 (2006), S/RES/1725 (2006), 6 December 2006, paragraph 3, Annex 34.

166 *See* Memorandum of Understanding between the Government of Kenya and the Transitional Federal Government of the Republic of Somalia on Training of Somali Policemen in Kenya, 3 May 2006, KCM, Annex 151. *See also* KCM, paragraph 96 and footnote 110.

167 *See* Agreement on Natural Disasters Prevention, Management and Humanitarian Relief Aid Delivery Cooperation between the Government of the Republic of Kenya and the Transitional Federal Republic of Somalia, 8 March 2006, KCM, Annex 150. *See also* KCM, paragraph 96, footnote 110.

became a large part of the African Union Mission to Somalia ("**AMISOM**").[168]

130. During Somalia's decades-long civil war, Kenya also expended significant resources to deter and prevent piracy and armed robbery at sea off the coast of Somalia. Kenya facilitated the prosecution of suspected pirates by naval forces of other maritime nations. In 2009, Kenya started to host piracy trials. As the Austrian representative to the UN Security Council acknowledged at a UN Security Council meeting of 18 November 2009, "the prosecution of suspected pirates apprehended off the coast of Somalia is a burden for regional States, especially Kenya and the Seychelles."[169] At the same meeting, the United Kingdom representative to the UN Security Council "[paid] tribute to Kenya for its leadership within the region in taking forward the detention and prosecution of pirates."[170]

131. Other leading international actors equally recognised the importance of Kenya's involvement in the fight against maritime piracy in Somalia. These

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168 *See* "Kenya – KDF", *African Union Mission to Somalia*, available at: https://amisom-au.org/kenya-kdf/ (last accessed: 21December 2020), Annex 41; UN Security Council Resolution 2036 (2012), S/RES/2036, 22 February 2012, Annex 53.

169 Security Council, 64th year: 6221st meeting, New York, S/PV.6221, 18 November 2009, page 19, Annex 54.

170 Security Council, 64th year: 6221st meeting, New York, S/PV.6221, 18 November 2009, page 4, Annex 54.

include the United States,[171] Vietnam,[172] Japan,[173] Croatia,[174] Russia,[175] France,[176] Costa Rica,[177] Austria[178] and Sweden.[179]

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171 *See* Security Council, 64th year: 6221st meeting, New York, S/PV.6221, 18 November 2009, page 6, Annex 54 ("Ms. DiCarlo (United States of America): And we should especially like to commend States, in particular Kenya, that have taken the lead in prosecution.").

172 *See* Security Council, 64th year: 6221st meeting, New York, S/PV.6221, 18 November 2009, page 8, Annex 54 ("Mr. Le Luong Minh (Viet Nam): We commend the significant efforts undertaken by the Government of Kenya to prosecute suspected pirates captured by the international community in its national courts. We also urge all States, especially those directly harmed by piracy, to provide the Kenyan Government with the logistical and financial support to address the challenges of prosecuting suspected pirates.").

173 *See* Security Council, 64th year: 6221st meeting, New York, S/PV.6221, 18 November 2009, page 9, Annex 54 ("Mr. Takasu (Japan): In particular, efforts by the States in the region, such as Kenya, Yemen and Seychelles, to ensure prosecution for piracy deserve the support and assistance of the international community.").

174 *See* Security Council, 64th year: 6221st meeting, New York, S/PV.6221, 18 November 2009, page 14, Annex 54 ("Mr. Skračić (Croatia): We commend the Government of Kenya for its significant efforts in that regard, and especially for its readiness to detain and prosecute pirates apprehended by other participants in the common efforts against piracy.").

175 *See* Security Council, 64th year: 6221st meeting, New York, S/PV.6221, 18 November 2009, page 15, Annex 54 ("Mr. Churkin (Russian Federation): We note the significance of efforts to resolve this problem at the level of the national judiciary, and particularly cooperation on the part of authorities in Kenya and other countries in the region.").

176 *See* Security Council, 64th year: 6221st meeting, New York, S/PV.6221, 18 November 2009, page 15, Annex 54 ("Mr. Araud (France): Here, France commends Kenya's endeavours in that regard and supports the trust fund that the Contact group decided on 10 September to establish, to which we shall be making a contribution.").

177 *See* Security Council, 64th year: 6221st meeting, New York, S/PV.6221, 18 November 2009, page 16, Annex 54 ("Mr. Urbina (Costa Rica): Here, we commend Kenya for its action to put suspects on trial, and we urge other countries, including Somalia, to strengthen their legislation, procedures and capacities so that they can hold such trials.").

178 *See* Security Council, 64th year: 6221st meeting, New York, S/PV.6221, 18 November 2009, page 19, Annex 54 ("The President (*acting in his national capacity*): As the Secretary-General noted in his report (S/2009/590), the prosecution of suspected pirates apprehended off the coast of Somalia is a burden for regional States, especially Kenya and the Seychelles.").

179 *See* Security Council, 64th year: 6221st meeting, New York, S/PV.6221, 18 November 2009, page 20, Annex 54 ("Mr. Lidén (Sweden): Kenya has made a very significant contribution through the transfer agreement with the European Union regarding

132. Kenya has also provided extensive support to Somalia in its fight against the terrorist entity, Al-Shabaab. As the Special Representative of the Secretary-General for Somalia observed during a UN Security Council meeting in 2012, Kenyan armed forces worked side by side with the TFG's forces in carrying out "a steady ground offensive, supported by Kenyan air and sea assets" against Al-Shabaab.[180] Kenya further assisted Somalia with the training of its troops to address the Al-Shabaab threat.[181]

(ii) Kenya confirmed its claims to the Parallel of Latitude, yet again, throughout the 2000s

133. In the 2000s, Kenya's maritime activities in the now-disputed maritime area continued, without protest from Somalia. For example, the Kenyan Navy increased its presence in the northern part of Kenya's territorial sea and EEZ and as far north as the Parallel of Latitude.[182] This, again, is also confirmed by the witness statement of General Kibwana.[183]

134. On 11 May 2004, the Kenyan Navy circulated a memorandum entitled "EEZ Limits and Boundaries".[184] The memorandum included an

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prosecution. Kenya has so far agreed to detain and prosecute 75 suspected pirates whom the European Union has apprehended.").

180 Security Council, 67th year: 6729th meeting, New York, S/PV.6729, 5 March 2012, page 5, Annex 55. *See also* Security Council, 66th year: 6674th meeting, New York, S/PV.6674, 5 December 2011, page 5, Annex 56.

181 *See* Security Council, 65th year: 6386th meeting, New York, S/PV.6386, 16 September 2010, page 6, Annex 57.

182 *See* KCM, paragraphs 123-124; Kenyan Naval Patrols and Interceptions in the Territorial Sea, KCM, Figure 1-13.

183 *See* Witness Statement of General (Ret'd) Joseph Raymond Kibwana, EGH, CBS, 11 January 2021, paragraphs 20-23, Annex WS1.

184 Memorandum on EEZ Limits and Boundaries from Major Y. S. Abdi, KN/16/OPS/TRG, 11 May 2004, Annex 3.

"illustration of Kenya's EEZ and Boundaries Co-ordinates".[185] This illustration is reproduced as Figure 1 below. It distinctly pictures Kenya's maritime boundary with Somalia along a parallel of latitude, with coordinates also indicated in handwriting.[186] The 11 May 2004 memorandum specified that these coordinates were intended to show "the internationally recognized Kenya's EEZ Limits and Boundaries."[187]

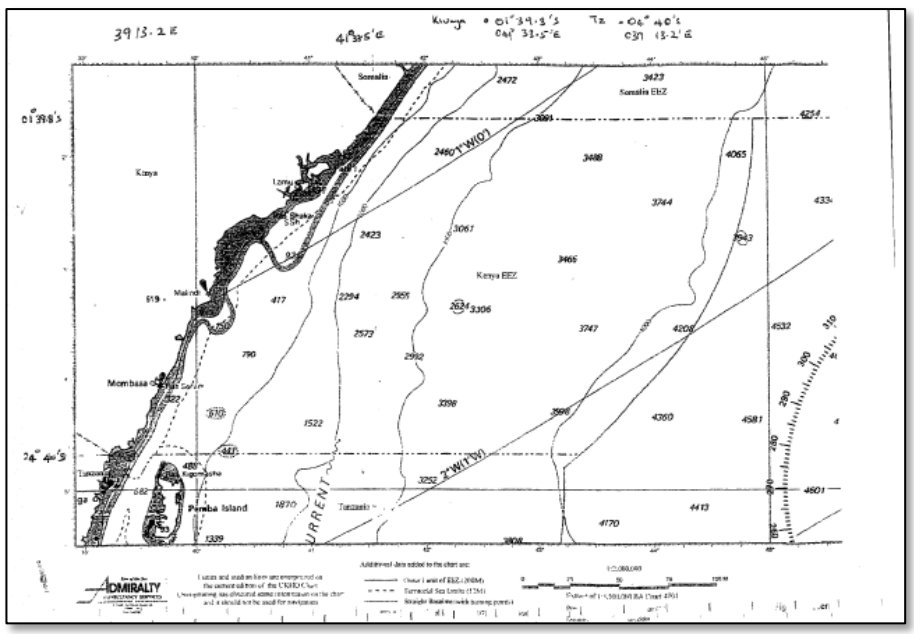

Figure 1: Kenya's EEZ and Boundaries Coordinates as per 11 May 2004 Memorandum

185 Memorandum on EEZ Limits and Boundaries from Major Y. S. Abdi, KN/16/OPS/TRG, 11 May 2004, page 1, Annex 3.

186 *See* Memorandum on EEZ Limits and Boundaries from Major Y. S. Abdi, KN/16/OPS/TRG, 11 May 2004, page 2, Annex 3.

187 Memorandum on EEZ Limits and Boundaries from Major Y. S. Abdi, KN/16/OPS/TRG, 11 May 2004, page 1, Annex 3.

135. This memorandum confirms that a parallel of latitude was understood by the Kenyan Navy to be the "internationally recognized […] EEZ Limit[] and Boundar[y]" with Somalia.[188]

136. Somalia claims that Kenya relied only on "logs of a handful of Kenyan vessels" to prove activity of the Kenyan Navy up to the parallel of latitude.[189] Figures 2 and 3 below, based on additional logs from the Kenyan Navy, further confirm that there was considerable activity by naval patrols in the now-disputed maritime area up to Kenya's northern maritime border, i.e., the Parallel of Latitude.[190] This includes significant naval patrols in the territorial sea.

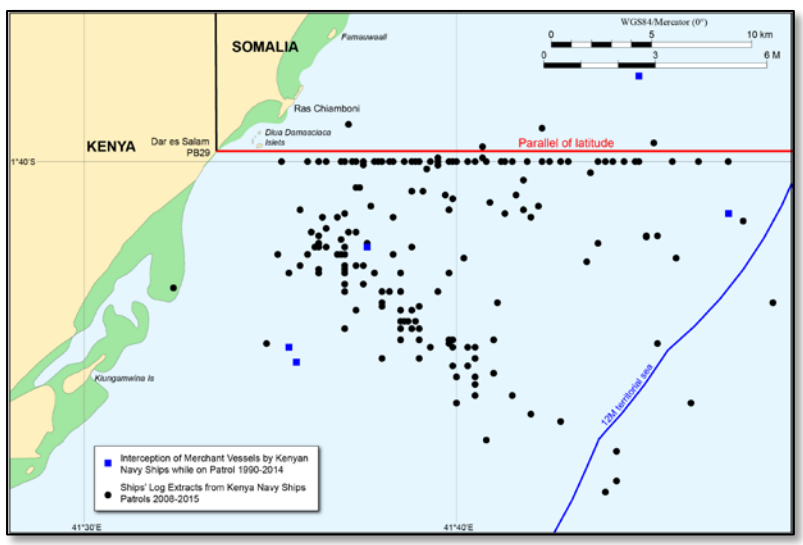

Figure 2: KCM, Figure 1-13 (revised)

188 Memorandum on EEZ Limits and Boundaries from Major Y. S. Abdi, KN/16/OPS/TRG, 11 May 2004, page 1, Annex 3.

189 SR, paragraph 2.58, referring to KCM, paragraph 125; Kenyan Naval Patrols and Interceptions in the Territorial Sea, KCM Figure 1-13.

190 *See* Letter from M. R. Atodonyang to Ms Juster Nkoroi, Kenya International Boundaries Office, KN/56/OPS/TRG, 16 May 2017, Annex 21.

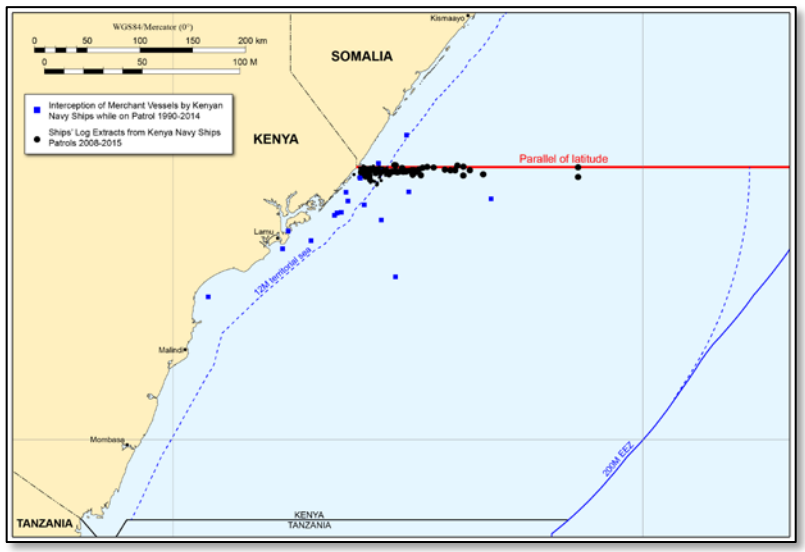

Figure 3: Kenyan Naval Patrols and Interceptions in the EEZ

137. In addition, Kenya extended its offshore oil and gas blocks as far north as the Parallel of Latitude, including in its territorial sea and EEZ.[191] Kenya also started to put more efforts into the exploration and exploitation of offshore resources. In 2000, Kenya signed its first Production Sharing Agreement ("**PSA**") with Star Petroleum International.[192] This agreement later led to activities by Woodside Energy Ltd. in 2006 and 2007.[193]

138. In 2005, Kenya issued a renewed official EEZ Proclamation yet again confirming its claim that the Parties' maritime boundary followed the Parallel of Latitude (the "**2005 EEZ Proclamation**"). The 2005 EEZ Proclamation replaced the 1979 EEZ Proclamation without "affect[ing] or

191 *See* KCM, paragraph 147; KR, paragraph 99.

192 *See* KCM, paragraphs 148-149; Production Sharing Contract between the Government of the Republic of Kenya and Star Petroleum International (Kenya) Limited for Block L-5 Lamu Basin, 11 July 2000, KCM, Annex 39.

193 *See* KCM, paragraph 151.

[...] derogat[ing] [...] the vested rights of [Kenya] over the Continental Shelf as defined in the Continental Shelf Act, 1973 [*sic*] [1975]".[194] The 2005 EEZ Proclamation included precise coordinates as well as maps that provided a detailed description of the maritime boundary.

139. In April 2006, the UN Secretary-General circulated the 2005 EEZ Proclamation to UN Member States and UNCLOS States Parties and published it in the Law of the Sea Bulletin.[195] The UN Secretary-General also published the 2005 EEZ Proclamation on the website of the Division for Ocean Affairs and the Law of the Sea ("**DOALOS**").[196]

140. On 26 September 2007, Kenya sent a *note verbale* to Somalia. As previously noted to this Court,[197] the *note verbale* unambiguously stated that "[t]he boundaries between our two countries [...] have been drawn using the parallel of latitude, in accordance with Articles 74, 83 of the UNCLOS."[198] This left no doubt that Kenya considered the boundary as

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194 Republic of Kenya, Legal Notice No. 82, *Proclamation by the President of the Republic of Kenya* (9 June 2005), *published in Kenya Gazette Supplement No. 55 (Legislative Supplement No. 34)* (22 July 2005), MS, Annex 21. *See also* KCM, paragraphs 87-92 and 220-224; KR, paragraph 22.

195 *See* KCM, paragraphs 92-93; United Nations, Division for Ocean Affairs and the Law of the Sea, *Deposit by the Republic of Kenya of lists of geographical coordinates of points, pursuant to article 16, paragraph 2, and article 75, paragraph 2, of the Convention*, U.N. Doc. M.Z.N. 58.2006.LOS (25 Apr. 2006), MS, Annex 56; Kenya's 2005 EEZ Proclamation with Coordinates, *Law of the Sea Bulletin* No. 61, Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, 2006, pp. 96-7, KCM, Annex 92.

196 *See* KCM, paragraphs 66 and 93; Letter from the Office of Legal Affairs of the United Nations to the Permanent Mission of the Republic of Kenya to the United Nations, received 8 November 2017, KCM, Annex 65.

197 *See* KR, paragraphs 75-80.

198 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), KR, Annex 9; 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), KR, Annex 12.

settled.[199] The *note verbale* informed Somalia that a Kenyan contractor would be engaged in continental shelf explorations in the "months of October 2007 to May 2008", on the basis of the settled delimitation.[200] The *note verbale* sought further confirmation of the settled maritime boundary and acknowledgement of the survey.[201] Somalia acknowledged receipt of Kenya's 2007 *note verbale* and did not protest or in any way reject Kenya's position.[202] This was plainly because it had no objection to the settled maritime boundary at that time, as it had had no objection for decades.

141. On 4 July 2008, Kenya sent a second *note verbale* to Somalia.[203] As also previously noted to this Court, the 2008 *note verbale* reiterated that "the boundaries within the maritime area of Kenya have been drawn using the parallel of latitudes".[204] Again, Somalia did not protest or object to Kenya's assertions.

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199 *See* 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), page 3, KR, Annex 9.

200 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), page 3, KR, Annex 9.

201 *See* KR, paragraphs 75-80; 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), page 4, KR, Annex 9.

202 *See* KR, paragraph 77; 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), KR, Annex 11; KR, paragraph 77. According to H. Lauterpacht, "any such duty to protest is especially incumbent upon states directly interested-in the case of the proclamations relating to submarine areas in particular upon neighbouring states". H. Lauterpacht, "Sovereignty over Submarine Areas", *The British International Yearbook of International Law*, 1950, p. 397.

203 *See* KR, paragraph 78.

204 KR, paragraph 78; 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), KR, Annex 12.

142. On 7 April 2009, Kenya and Somalia signed a Memorandum of Understanding (the "**2009 MOU**") prepared by Norway.[205] This act is wholly consistent with the good relations and support Kenya extended to Somalia throughout the civil war.

143. Somalia's positions with regard to the 2009 MOU have been inconsistent. Somalia previously argued that the sole subject matter of the 2009 MOU was the extended continental shelf and that the 2009 MOU did not address the continental shelf within 200M.[206] Now, however, Somalia argues differently. Now it claims that the 2009 MOU concerns the entire continental shelf.[207] On that basis, it argues that, as of 2009, Somalia had not acquiesced in the Parallel of Latitude.[208]

144. Kenya has already convincingly refuted this new position.[209] In summary, this Court has already found, in line with the positions Somalia itself took to support this Court's jurisdiction, that: (i) the 2009 MOU did not concern the Parties' maritime delimitation as it was intended merely to allow Somalia and Kenya to make their CLCS submissions imminently, prior to the coming deadline;[210] and (ii) in preparing the 2009 MOU, Norway

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205 *See* Memorandum of Understanding between the Government of the Republic of Kenya and the Transitional Federal Government of the Somali Republic to Grant to Each Other No-Objection in Respect of Submissions on the Outer Limits of the Continental Shelf beyond 200 Nautical Miles to the Commission on the Limits of the Continental Shelf, 2599 U.N.T.S. 35 (7 Apr. 2009), entered into force 7 Apr. 2009, MS, Annex 6; *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya), Preliminary Objections, Judgment of 2 February 2017, I.C.J. Reports 2017*, p. 3, paragraph 101.

206 *See* KR, paragraph 71.

207 *See* SR, paragraph 2.22.

208 *See* SR, paragraph 2.22.

209 *See* KR, paragraphs 71-74.

210 *See Maritime Delimitation in the Indian Ocean (Somalia v. Kenya), Preliminary Objections, Judgment of 2 February 2017, I.C.J. Reports 2017*, p. 3, paragraphs 101-102.

"t[ook] no position on" the matter of Somalia's maritime delimitations with any of its neighbours.[211]

145. The fact that Norway, the 2009 MOU's drafter, had no position on the maritime delimitation confirms that the 2009 MOU is irrelevant to the question of acquiescence between Somalia and Kenya. Indeed, the Court confirmed in its Judgment on Preliminary Objections that the 2009 MOU's "references to maritime delimitation 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".[212] It is also surprising that Somalia relies on the 2009 MOU today as documenting its formal objection to the maritime boundary. In February 2014, Somalia informed the UN Secretary-General that it did not consider the 2009 MOU had any legal force.[213]

146. The reality is that the 2009 MOU contemplated and incorporated Somalia's acquiescence. It said that any maritime delimitation dispute would be resolved "on the basis of international law", without limitation.[214] Acquiescence is a well-established form of agreement under international law. Of course, by the time of the 2009 MOU, Somalia had not protested

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211 *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya), Preliminary Objections, Judgment of 2 February 2017, I.C.J. Reports 2017*, p. 3, paragraph 104.

212 *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, Preliminary Objections, *Judgment of 2 February 2017, I.C.J. Reports 2017*, p. 3, paragraph 77.

213 *See Letter* from Dr. Abdirahman Beileh, Minister of Foreign Affairs and International Cooperation of the Somali Federal Republic, to H.E. Ban Ki-Moon, Secretary-General of the United Nations, No. MOFA/SFR/MO/259/2014 (4 Feb. 2014), MS, Annex 41.

214 Memorandum of Understanding between the Government of the Republic of Kenya and the Transitional Federal Government of the Somali Republic to Grant to Each Other No-Objection in Respect of Submissions on the Outer Limits of the Continental Shelf beyond 200 Nautical Miles to the Commission on the Limits of the Continental Shelf, 2599 U.N.T.S. 35 (7 Apr. 2009), entered into force 7 Apr. 2009, page 38, MS, Annex 6.

the latitudinal delimitation (despite numerous opportunities and notices) for at least thirty years. Even if the MOU could be considered an objection by Somalia to the maritime boundary (somehow drafted by and through Norway) as of that date, that would not change the acquiescence analysis.

147. On 8 April 2009, Somalia sent its submission to the CLCS. In its submission, Somalia did not protest or dispute the latitudinal delimitation. Somalia also did not put forward an alternative boundary line.[215] Kenya sent its own submission to the CLCS on 6 May 2009.[216]

148. Kenya's activities in the now-disputed maritime area continued to increase at the end of the 2000s. In 2008 and 2012, Kenya signed two further PSAs for blocks along the Parallel of Latitude, with Sohi-Gas Dodori Ltd and Eni Exploration and Production Holding B.V, respectively.[217] By the beginning of the 2010s, there was already an "extensive seismic activity in the EEZ up to the parallel of latitude" on the Kenyan side of the maritime

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215 Somalia's submission only stated that "[a]ll information and maps contained in this submission are without prejudice to issues of maritime delimitation" and that there remained "unresolved questions [...] in relation to bilateral delimitation of the continental shelf with neighbouring States". By contrast, Kenya's submission dated April 2009 explicitly mentioned 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. It also explained that this area 'has been determined on the basis of the provisions of the Convention". KCM, paragraph 106; Federal Republic of Somalia, *Preliminary Information Indicative of the outer limits of the continental shelf and Description of the status of preparation of making a submission To the Commission on the Limits of the Continental Shelf for Somalia* (14 Apr. 2009), Section 6, MS, Annex 66; Republic of Kenya, *Submission on the Continental Shelf Submission beyond 200 nautical miles to the Commission on the Limits of the Continental Shelf: Executive Summary* (Apr. 2009), pages 3-4, MS, Annex 59.

216 *See* KCM, paragraphs 99-105; Republic of Kenya, *Submission on the Continental Shelf Submission beyond 200 nautical miles to the Commission on the Limits of the Continental Shelf: Executive Summary* (Apr. 2009), MS, Annex 59.

217 *See* KCM, paragraph 153; KR, paragraph 99; 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), KR, Annex 1.

boundary.[218] Also in 2012, Kenya awarded oil concessions to Total in respect of Block L-22, located partially in the now-disputed maritime area.[219] As a Deloitte report dated January 2013 confirms, by then, Kenya had awarded oil concessions also to ENI, SwissOil, Statoil and FAR with respect to blocks located in the now-disputed maritime area.[220] Somalia did not protest against any of these awards by Kenya.

149. During the same period, Kenya also issued fishing licences to foreign vessels indicating the Parallel of Latitude as the maritime boundary with Somalia.[221] Similarly, Kenya undertook maritime research activities along the coast of Lamu Island as far north as the Parallel of Latitude.[222]

150. The necessary conclusion is that the period from 2000 to 2013 saw Kenya proclaim the Parallel of Latitude as the maritime boundary and act in conformity with that proclamation, just as it did in the period from 1979 to 2000. As discussed below, in all that time, there still was not any protest or objection from Somalia.

(iii) During the civil war, Somalia continued to engage in significant international relations and acts, without ever protesting against Kenya's 1979 and 2005 EEZ Proclamations or against Kenya's increasing activities in the now-disputed maritime area

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218 KCM, paragraph 154.

219 *See* "Total renforce son exploration au Kenya avec la prise du permis d'exploration offshore L22, situé dans le Bassin de Lamu", *Total*, 27 June 2012, Annex 107.

220 *See* "The Deloitte Guide to Oil and Gas in East Africa – Where potential lies, 2013 Edition", *Deloitte*, 2013, page 5, Annex 167.

221 *See* KCM, paragraph 137.

222 *See* "SOLSTICE Project Group, SOLSTICE implementation plan version 4", *SOLSTICE-WIO*, 26 March 2018, pages 15 and 16, Annex 114.

151. Over the course of the present proceeding, Somalia repeatedly has invoked its alleged "practical inability to acquiesce in any maritime boundary during the civil war that engulfed the country."[223] According to Somalia, it is "particularly unjustified to expect" that, during that war, Somalia would be able "to lodge formal diplomatic protests against a purported claim to a parallel boundary line which is made through a unilateral declaration".[224] But the reality is that Somalia was perfectly capable of lodging such diplomatic protests before, during and after its civil war. Indeed, during and despite its civil war, Somalia continued to play an active role in international relations.

152. For example, as Kenya noted in previous pleadings, Somalia actively participated in drafting resolutions and sponsored over 280 diplomatic texts relating to a wide array of issues including Palestine, human rights, the protection of the environment, the situation of civilians in times of war and cooperation between the UN and regional organisations.[225] Further, in the early 2000s, Somalia became a party to a number of international conventions. These included:

(i) the Vienna Convention for the Protection of the Ozone Layer, which Somalia ratified on 1 August 2001;[226]

(ii) the International Convention for the Suppression of the Financing

223 SR, paragraph 2.109.

224 SR, paragraph 2.113.

225 *See* KCM, footnote 108.

226 *See* Vienna Convention for the Protection of the Ozone Layer, 22 March 1985, 1513 UNTS 293, 22 September 1988, Status as at 26 October 2020.

of Terrorism, which Somalia signed on 19 December 2001;[227] and

(iii) the Convention on the Rights of the Child, which Somalia signed on 9 May 2002.[228]

153. Somalia also negotiated and adopted international agreements with Kenya,[229] including:

(i) an Agreement on Technical and Economic Cooperation between Kenya and the TFG, dated 6 September 2005;[230]

(ii) an Agreement on Natural Disasters Prevention, Management and Humanitarian Relief Aid Delivery Cooperation between Kenya and the TFG, dated 8 March 2006;[231]

(iii) a Memorandum of Understanding between Kenya and the TFG on Training of Somali Policemen in Kenya, dated 3 May 2006;[232] and

(iv) a Memorandum of Understanding on Technical Assistance and

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227 *See* International Convention for the Suppression of the Financing of Terrorism, 9 December 1999, 10 April 2002, 2178 UNTS 197, Status as at 26 October 2020.

228 *See* Convention on the Rights of the Child, 20 November 1989, 2 September 1990, 1577 UNTS 3, Status as at 26 October 2020. Somalia ratified this Convention on 1 October 2015.

229 *See* KCM, paragraphs 95-96; KR, paragraph 67.

230 *See* Agreement on Technical and Economic Co-Operation between the Government of the Republic of Kenya and the Transitional Federal Government of the Republic of Somalia, 6 September 2005, KCM, Annex 149.

231 *See* Agreement on Natural Disasters Prevention, Management and Humanitarian Relief Aid Delivery Cooperation between the Government of the Republic of Kenya and the Transitional Federal Republic of Somalia, 8 March 2006, KCM, Annex 150.

232 *See* Memorandum of Understanding between the Government of Kenya and the Transitional Federal Government of the Republic of Somalia on Training of Somali Policemen in Kenya, 3 May 2006, KCM, Annex 151.

Capacity Building between Kenya and the TFG, dated 18 March 2009.[233]

154. Moreover, in the midst of the civil war, Somalia sent numerous letters and other diplomatic correspondence to the UN with respect to a wide range of issues. These included comprehensive updates on the situation in Somalia.[234] Among other diplomatic correspondence:

(i) on 6 November 2001, the Permanent Representative of Somalia to the UN sent a letter to the President of the UN Security Council. That letter explained that, "[a]t the invitation of H.E. President Daniel T. arap Moi of the Republic of Kenya, the political leaders of the Republic of Somalia attended the Reconciliation Meeting on Somalia held in Nairobi from 1 to 4 November 2001."[235] The letter incorporated an agenda intended to serve "as the basis for future deliberations" among Somali leaders.[236] Among other matters, the

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233 *See* Memorandum of Understanding between the Government of the Republic of Kenya and the Transitional Federal Government of the Republic of Somalia on Technical Assistance and Capacity Building, 18 March 2009, KCM, Annex 153.

234 *See* Letter from the Permanent Representative of Somalia to the UN addressed to the President of the Security Council (transmitting communiqué following the Somalia Reconciliation Meeting held in Nairobi from 1 to 4 November 2001), S/2001/1063, 6 November 2001, Annex 16; Letter from the *Chargé d'affaires* of the Permanent Mission of Somalia to the UN addressed to the President of the Security Council (transmitting agreement signed by the President of Somalia and the Speaker of the Transitional Federal Parliament), S/2006/14, 9 January 2006, Annex 11; Letter from the Ministry of Foreign Affairs of the Permanent Mission of Somalia addressed to the President of the Human Rights Council, A/HRC/5/G/13, 13 June 2007, Annex 12.

235 Letter from the Permanent Representative of Somalia to the UN addressed to the President of the Security Council (transmitting communiqué following the Somalia Reconciliation Meeting held in Nairobi from 1 to 4 November 2001), S/2001/1063, 6 November 2001, paragraph 1, Annex 16.

236 Letter from the Permanent Representative of Somalia to the UN addressed to the President of the Security Council (transmitting communiqué following the Somalia Reconciliation Meeting held in Nairobi from 1 to 4 November 2001), S/2001/1063, 6 November 2001, paragraph 4, Annex 16.

agenda lists: "[c]ommitment to international principles of peaceful coexistence, good neighbourly relations and respect for the sovereignty and territorial integrity of the countries in the region"; the "[d]ispute over land, public and private property"; and "other business."[237] It does not, however, mention the maritime boundary between Somalia and Kenya. Somali leaders pursuing the "unity, sovereignty and territorial integrity of Somalia"[238] simply did not consider that Somalia's maritime boundary with Kenya was a live issue. Indeed, it had already been settled;

(ii) in 2001 and 2002, Somalia sent multiple letters to the UN expressing Somalia's concerns over the alleged interference of Ethiopia in its internal affairs.[239] Somalia alerted the UN Security Council to Ethiopia's military presence on Somali territory. It claimed that this presence constituted "a clear and present danger to [Somalia's] unity, territorial integrity and political

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237 Letter from the Permanent Representative of Somalia to the UN addressed to the President of the Security Council (transmitting communiqué following the Somalia Reconciliation Meeting held in Nairobi from 1 to 4 November 2001), S/2001/1063, 6 November 2001, paragraph 4, Annex 16.

238 Letter from the Permanent Representative of Somalia to the UN addressed to the President of the Security Council (transmitting communiqué following the Somalia Reconciliation Meeting held in Nairobi from 1 to 4 November 2001), S/2001/1063, 6 November 2001, paragraph 3, Annex 16.

239 *See*, e.g., Letter from the Prime Minister of Somalia to the President of the Security Council, S/2001/263, 21 March 2001, Annex 8; Letter from the Permanent Representative of Somalia to the UN addressed to the President of the Security Council (transmitting letter from the Minister for Foreign Affairs of Somalia to the President of the Security Council), S/2002/550, 16 May 2002, Annex 9; Letter from the Chairman of the Security Council Committee established pursuant to resolution 751 (1992) concerning Somalia (transmitting letter dated 16 May 2002 from Somalia) to the President of the Security Council, S/2002/570, 21 May 2002, Annex 22; Letter from the Chairman of the Security Council Committee established pursuant to resolution 751 (1992) concerning Somalia (transmitting letter dated 17 June 2002 from Somalia to the Chairman of the Security Council Committee concerning Somalia), S/2002/684, 19 June 2002, Annex 23.

independence."[240] Somalia never made any such declaration regarding Kenya's activities in the now-disputed maritime area. Notably, it omitted any reference to Kenya's naval presence in areas that Somalia now claims are part of its territorial sea and other maritime areas;[241]

(iii) in 2004, Somalia actively sought the UN's assistance in combatting terrorism,[242] as well as international help and intervention with respect to acts of piracy and armed robbery at sea.[243] From at least 2001 onwards, Kenya's Navy had been providing that assistance. Somalia did not object to Kenya's assistance up to the Parallel of Latitude, as confirmed by General Kibwana;[244]

(iv) in 2009, when Iran "dispatch[ed] two naval vessels to the region off the coast of Somalia and the Gulf of Aden affected by piracy, in order to carry out protective escorts and anti-piracy related

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240 Letter from the Prime Minister of Somalia to the President of the Security Council, S/2001/263, 21 March 2001, paragraph 7, Annex 8.

241 *See* Letter from the Prime Minister of Somalia to the President of the Security Council, S/2001/263, 21 March 2001, page 1, Annex 8.

242 *See*, e.g., Letter from the Permanent Representative of Somalia to the UN addressed to the Chairman of the Security Council Committee established pursuant to resolution 1267 (1999) concerning Al-Qaida and the Taliban and associated individuals and entities, S/AC.37/2004/(1455)/28, 31 March 2004, Annex 10.

243 *See*, e.g., Letter from the Permanent Representative of Somalia to the UN addressed to the President of the Security Council, S/2008/323, 12 May 2008, Annex 13; Letter from the Permanent Representative of Somalia to the UN addressed to the President of the Security Council, S/2011/107, 28 February 2011, Annex 15.

244 *See* Witness Statement of General (Ret'd) Joseph Raymond Kibwana, EGH, CBS, 11 January 2021, paragraph 23, Annex WS1.

operations", Somalia was quick to write a separate letter to the UN regarding the incident;[245] and

(v) in early January 2012, Somalia addressed all UN Member States to seek support for its "ban on the production of charcoal by prohibiting the importation of charcoal from Somalia."[246]

155. Tellingly, at the same time as it was receiving considerable support from Kenya to de-escalate its civil war, Somalia's oil concession practice between 2000 and 2013 followed the Parallel of Latitude. A report by the Petroleum Service Group of Deloitte showed that, in 2007, the southernmost block (Jorre) granted by Somalia laid entirely north of the Parallel of Latitude.[247] In 2008, Somalia adopted its Petroleum Law.[248] This Law preserved the pre-1991 *status quo* by only recognising the validity of oil concession blocks licensed either prior to 30 December 1990 or after 7 August 2008.[249] And, in 2010, an assessment report by Agulhas and the Somali Current Large Marine Ecosystems Project confirms that Somalia's oil and gas activities extended no further south than the Parallel of Latitude.[250]

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245 *See* Letter from the Permanent Representative of Somalia to the UN addressed to the President of the Security Council, S/2009/251, 14 May 2009, Annex 14.

246 Letter from the Permanent Representative of Somalia to the UN addressed to the President of the Security Council (transmitting letter dated 4 January 2012 from the Permanent Representative of Somalia to the UN addressed to the President of the Security Council), S/2012/4, 4 January 2012, page 2, Annex 17.

247 *See* KCM, paragraph 155; African Oil Concession Map - April 2007, KCM, Figure 1-27.

248 *See* KCM, paragraph 156.

249 *See* KCM, paragraph 156.

250 *See* KCM, paragraph 157; Map of the Oil and Gas Activities in Somalia (adapted from Deloitte, 2009), KCM, Figure 1-28.

156. The management of Somalia's airspace is also telling. It is inconsistent with Somalia's new claim that the Parties' EEZ and continental shelf boundary should follow an equidistance line. The publicly available maps of the Mogadishu FIR from this period indeed depict the airspace limit over these areas as generally following a parallel of latitude.[251] Yet, to this day, Somalia has never protested or otherwise challenged this FIR delimitation.[252]

157. In sum, while being active on the international stage during its civil war, Somalia did not protest against Kenya's maritime boundary claim. Somalia sent no diplomatic notes, raised no issues at the UN and never proclaimed or publicised any different maritime boundary. To the contrary, Somalia acted consistently with an understanding that the maritime boundary had been agreed at the Parallel of Latitude. Somalia therefore continued to acquiesce in the latitudinal maritime boundary that had been consolidated prior to the beginning of its civil war. Given the support that Somalia received from Kenya throughout its civil war and the two States' intense international relations, that acquiescence must have been deliberate and

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251 *See* "Air Navigation Plan, Africa – Indian Ocean Region", Vol. I, 2nd edition, *ICAO*, 2010, pages 302-311, Annex 29; "Report of the African Region (AFI) – Asia/Pacific Region (APAC) – Middle East Region (MID) Air Traffic Management (ATM) Special Coordination Meeting (AAMA/SCM)", *ICAO*, 19-20 January 2017, Appendix C to the Report, Appendix E to the Report, pages 30 and 32, Annex 30; "Aeronautical Information Publication, Somalia, Part 2, En-route (ENR)", *ICAO*, February 2018, en-route chart - Mogadishu fir, Annex 31; "Aeronautical Information Publication, Somalia, Part 3, Aerodromes (AD)", *ICAO*, February 2018, AD 1.3-2 index to aerodromes and heliports – AD index chart, Annex 32; "ICAO Meetings Papers, Air Traffic Management (ATM) Contingency Plan Applicable to Mogadishu Flight Information Region (FIR)", *Civil Aviation Caretaker Authority for Somalia*, 18 January 2015, Annex 58.

252 The most recent publications by the Somalia Civil Aviation Authority depict an unchallenged Mogadishu FIR following generally the Parallel of Latitude. *See*, e.g., "SCAA Aeronautical Information Publication", Somalia Civil Aviation Authority, 2020, available at: http://aip.scaa.gov.so/ (last accessed: 21 December 2020), Annex 6.

informed. Indeed, this acquiescence persisted even as internal groups in Somalia started to lobby against Somalia's agreement and good relationship with Kenya.[253]

3. 2012 to 2013: Kenya's discovery of offshore oil triggered interest in Somalia by the private entity Soma Oil & Gas

158. As discussed below, Somalia only sought to revoke its acquiescence to the maritime boundary in February 2014. The events of 2012 and 2013 reveal why it did so.

159. The evidence discussed in **Section II.A.3(i)** confirms that, in 2012, international companies became interested in Somali offshore oil and gas after commercial discoveries in Kenya's neighbouring maritime area confirmed the potential viability of Somali offshore reserves.

160. The evidence discussed in **Section II.A.3(ii)** confirms that, in 2013, Somalia signed an SOA that gave exclusive and lucrative rights to both its onshore and offshore oil and gas to Soma Oil & Gas. The terms of this questionable agreement wholly favour Soma Oil & Gas. The SOA, as well as other new evidence concerning Somalia's relationship with Soma Oil & Gas, confirms that Somalia chose to assert claims to the now-disputed maritime area in 2014 to give an even greater windfall to Soma Oil & Gas and to the individuals who benefit from Somalia's agreement with that company.

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253 *See* KCM, paragraph 107.

(i) In 2012, Kenya's efforts led to the discovery of oil and gas in its offshore areas, triggering Somalia's interest in its own offshore areas

161. In September 2012, Tullow Oil announced that its exploratory surveys had revealed strong indications of commercially available oil and gas reserves in offshore Kenya.[254] This was well publicised in the media.[255] Tullow Oil acknowledged that Kenya's "cooperation and support" had been instrumental in this historic development.[256] This confirms the efforts and resources that Kenya put into the project.[257]

162. In late 2012, Kenya terminated the rights of Norwegian oil company Statoil on commercial grounds after the Norwegian state oil company failed to conduct a survey of its licensed offshore Block L-26 required by the Ministry of Energy.[258] It is perhaps no coincidence that, in April 2013, a Somali parliamentary delegation visited Oslo to discuss co-operation, development and the management of natural resources. According to the Financial Times, "these talks included discussion of a triangle of water disputed between Kenya and Somalia."[259] However, at this juncture, Somalia had raised no formal dispute in relation to the latitudinal boundary.

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254 *See* "Tullow Oil discovers gas pay at Mbawa 1 well offshore Kenya", *NS Energy*, 10 September 2012, Annex 115.

255 *See* "Tullow Oil discovers gas pay at Mbawa 1 well offshore Kenya", *NS Energy*, 10 September 2012, Annex 115.

256 "Tullow Oil discovers gas pay at Mbawa 1 well offshore Kenya", *NS Energy*, 10 September 2012, Annex 115.

257 *See* Chapter II.D.

258 *See* "Kenya: An African oil upstart in transition", *The Oxford Institute for Energy Studies*, October 2014, page 18, Annex112.

259 *See* "Somalia: oil thrown on the fire", *Financial Times*, 13 May 2013, Annex 116.

163. As the Financial Times also reported, in 2013, "Norway, whose state oil company Statoil is exploring off east Africa, has made various commitments to Somalia."[260] For instance, Norway installed solar-powered lamps on the streets of Mogadishu and set up a special USD 30 million financing facility donor fund.[261]

164. At the very least, the Oslo meeting is indicative of the strong international interest in Somali offshore oil and gas. As discussed below, despite that strong international interest, only Soma Oil & Gas obtained exclusive rights to virtually all Somali onshore and offshore oil and gas.

(ii) In 2013, Soma Oil & Gas was given exclusive rights to oil and gas in all of Somalia, in exchange for virtually nothing

165. In April 2013, just six months after Tullow Oil's offshore Kenya discovery, Soma Oil & Gas Holdings Limited was incorporated in the UK, followed by the incorporation of its wholly owned subsidiary Soma Oil & Gas in July 2013.[262] Soma Oil & Gas's Chief Executive Officer, Rob Sheppard, noted

260 "Somalia: oil thrown on the fire", *Financial Times*, 13 May 2013, Annex 116.

261 *See* "Somalia: oil thrown on the fire", *Financial Times*, 13 May 2013, Annex 116.

262 *See* "UK-based Soma Oil & Gas talks about its plans in Somalia", *How we made it in Africa*, 26 August 2013, Annex 106; Company overview of Soma Oil & Gas Holdings Limited, *UK Companies House*, 26 November 2020, available at: https://find-and-update.company-information.service.gov.uk/company/08506858 (last accessed: 21 December 2020), Annex 169; Certificate of Incorporation of Soma Oil & Gas Holdings Limited, *UK Companies House*, 26 April 2013, Annex 170; Certificate of Incorporation of Soma Oil & Gas Exploration Limited, *UK Companies House*, 22 July 2013, Annex 171; Consolidated Annual Report and Financial Statements for the period from Incorporation (26 April 2013) to 31 December 2013 of Soma Oil & Gas Holdings Limited, *UK Companies House*, 17 September 2014, page 6, Annex 173. Soma Oil & Gas Holdings Limited was also initially called Soma Oil & Gas Limited; it was renamed in July 2013. *See also* Special Resolution of Soma Oil & Gas Limited, *UK Companies House*, 19 July 2013, Annex 172.

that it was the discoveries by Kenya that triggered the company's desire to explore the "relatively under-explored" Somalia.[263]

166. Soon after Soma Oil & Gas's formation, the company reportedly received an equity investment of USD 50 million from British Virgin Islands-registered private investment company Winter Sky Investments Limited ("**Winter Sky**").[264] Winter Sky is reportedly controlled by Alexander Dzhaparidze, a billionaire Russian oligarch.[265] On 31 December 2016, Winter Sky was declared as Soma Oil & Gas's ultimate controlling party.[266]

167. In August 2013, less than four months after its incorporation, Soma Oil & Gas concluded the SOA with Somalia.[267] There was no public tender process.[268] There is no indication that any of the other companies that had expressed an interest in Somalia's oil and gas were invited to bid for these

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263 "UK-based Soma Oil & Gas talks about its plans in Somalia", *How we made it in Africa*, 26 August 2013, Annex 106.

264 *See* Consolidated Annual Report and Financial Statements for the period from Incorporation (26 April 2013) to 31 December 2013 of Soma Oil & Gas Holdings Limited, *UK Companies House*, 17 September 2014, page 6, Annex 173; "Soma wins funding for Somali seismic survey", *African Energy*, 30 January 2014, Annex 117. Winter Sky provided USD 30 million more in funding in 2014 and 2015. See Consolidated Annual Report and Financial Statements for the period from Incorporation (26 April 2013) to 31 December 2013 of Soma Oil & Gas Holdings Limited, *UK Companies House*, 17 September 2014, page 4, Annex 173; Consolidated Annual Report and Financial Statements of Soma Oil & Gas Holdings Limited for the year ended 31 December 2015, *UK Companies House*, 30 September 2016, page 23, Annex 174.

265 *See* "Inquiry puts survival in doubt, says African oil explorer", *The Times*, 14 October 2016, Annex 118.

266 *See* Consolidated Annual Report and Financial Statements of Soma Oil & Gas Holdings Limited for the year ended 31 December 2016, *UK Companies House*, 27 September 2017, page 42, Annex 176; Soma Oil & Gas Holdings Limited, Consolidated Annual Report and Financial Statements of Soma Oil & Gas Holdings Limited for the year ended 31 December 2018, *UK Companies House*, 30 September 2019, page 33, Annex 175.

267 *See* KCM, paragraph 159.

268 *See* "EAEF moves to oppose Soma Oil and Gas deal", *Hiraan Online*, 15 August 2013, Annex 119.

rights.[269] The newly incorporated company Soma Oil & Gas became the first company to "sign an oil deal" with the Somali Government following the civil war.[270]

168. The SOA was not previously available to this Court or Kenya. This is an important and troubling document. Two parties operating at arms' length would not have signed an agreement that is this one-sided. Moreover, particularly by omission, the Chairman of Soma Oil & Gas appears to have misstated the SOA's terms to the UN Security Council Committee established pursuant to resolutions 751 (1992) and 1907 (2009) concerning Somalia and Eritrea ("**UN Security Council Committee on Somalia and Eritrea**").

169. The SOA is not limited to certain blocks or areas. It grants Soma Oil & Gas exclusive rights to virtually all oil and gas on all Somali land or waters. The SOA does so by defining the "Exploration Area" as:

> onshore and offshore areas within Somalia which are [...] not the subject of a prior grant of petroleum rights by the Government or a predecessor of the Government, other than prior grants which the grantee has acknowledged to have terminated or which have been terminated by the Government other than pursuant to Part VIII of the Petroleum Law 2008.[271]

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269 *See* "Somalia: oil thrown on the fire", *Financial Times*, 13 May 2013, Annex 116.

270 "UK-based Soma Oil & Gas talks about its plans in Somalia", *How we made it in Africa*, 26 August 2013, Annex 106.

271 Seismic Option Agreement between the Government of the Federal Republic of Somalia and Soma Oil & Gas Exploration Limited, a wholly owned subsidiary of Soma Oil & Gas Holdings Limited, 6 August 2013, pages 4-5 (definition of "Exploration Area"), Annex 162.

170. Under the SOA, Somalia was barred from even discussing the possibility of any other contracts in the extensive Exploration Area with any other company, for at least eight months.[272] Soma Oil & Gas was therefore provided a significant first-mover advantage over more established oil and gas entities. Yet, it does not appear to have paid any upfront amount, or anything at all, for that advantage.

171. From there, the SOA requires Somalia and Soma Oil & Gas to agree on where in the Exploration Area Soma Oil & Gas would conduct exploration. This agreed-upon area was called the Evaluation Area.[273] The record confirms that the Evaluation Area was later agreed to be, at minimum, the entire offshore area of Somalia south of the Horn of Africa except for the blocks granted to certain companies before 1990.[274] In other words, Somalia did not limit the Evaluation Area in any meaningful sense.

172. Remarkably, the SOA gave Soma Oil & Gas an exclusive first right over any oil and gas discoveries it made in the Evaluation Area (i.e., as noted above, virtually the entire available offshore area). Specifically, Soma Oil & Gas had the exclusive right, under Article 2 of the SOA, "to be awarded

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272 *See* Seismic Option Agreement between the Government of the Federal Republic of Somalia and Soma Oil & Gas Exploration Limited, a wholly owned subsidiary of Soma Oil & Gas Holdings Limited, 6 August 2013, Article 12.2, Annex 162.

273 *See* Seismic Option Agreement between the Government of the Federal Republic of Somalia and Soma Oil & Gas Exploration Limited, a wholly owned subsidiary of Soma Oil & Gas Holdings Limited, 6 August 2013, page 4 (definition of "Evaluation Area"), Annex 162. In handwriting, an exception was made for onshore areas subject to the control of constituent states of Somalia.

274 *See* "The Story of Soma Oil & Gas, Company Presentation", *Soma Oil & Gas*, October 2015, page 35, Annex 177; "Exploring and Developing Hydrocarbons offshore Somalia: Corporate Update", *Soma Oil & Gas*, December 2016, pages 10-11, Annex 178; "Production Sharing Agreement (PSA)", *Soma Oil & Gas*, via the Wayback Machine, 10 July 2017, available at: https://web.archive.org/web/20170710021850/http://www.somaoilandgas.com/production-sharing-agreement-psa/ (last accessed: 21 December 2020), Annex 179.

and granted by the Government" production and sharing agreements to any areas it wanted, up to a maximum area of a staggering 60,000 km^2.[275]

173. A production and sharing agreement gives a private company the exclusive right to extract and sell oil and gas from a designated area. The SOA does not require Soma Oil & Gas to apply for those agreements, much less to compete for them with other potentially interested parties. It gives Soma Oil & Gas the right to demand those agreements if it so chooses. Soma Oil & Gas can do so wherever it deems will be the most attractive sites for oil and gas. Soma Oil & Gas did not pay anything for these highly valuable rights.

174. By agreeing to production and sharing agreement terms in the SOA's Schedules, Somalia renounced its ability to apply different economic terms to different blocks in its offshore areas. It could not calibrate the economic terms of the blocks based on their prospects for oil. Simply put, the most valuable blocks were essentially sold to Soma Oil & Gas at the same cost as less valuable ones.

175. Three questions emerge: for these resounding billions-of-dollar rights, which would be of interest to virtually any major oil company, what did the young company Soma Oil & Gas give, what activities did it promise to perform itself and what risks did it take on? The answers are simple: nothing, none and none.

176. In the SOA, Soma Oil & Gas did not agree to make any upfront payments to Somalia for the SOA rights. Soma Oil & Gas also did not agree to

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275 Seismic Option Agreement between the Government of the Federal Republic of Somalia and Soma Oil & Gas Exploration Limited, a wholly owned subsidiary of Soma Oil & Gas Holdings Limited, 6 August 2013, Article 2.2.2, Annex 162.

perform any work or take the risk of any work. The facial purpose of the SOA is for Soma Oil & Gas to conduct surveys for oil and gas in Somalia and provide the resulting "Data" to the Government of Somalia in a data room.[276] But Soma Oil & Gas had no technical capacity to do this itself. As a result, the SOA did not actually require Soma Oil & Gas to either perform the work itself or take on the risk if the work was not performed adequately. Instead, the SOA states that Soma Oil & Gas: (i) could simply hire subcontractors to do its work for it;[277] and (ii) had no liability whatsoever for the content of that Data or how it was gathered.[278]

177. The last point deserves emphasis. The SOA's purpose is said to be to have Soma Oil & Gas gather Data for Somalia. Remarkably, however, the SOA then noted that "the Government acknowledge[d] and accepts that the Data provided [...] is supplied 'as is.'"[279] In other words, in the SOA, Soma Oil & Gas does not give any warranty of quality or performance. In handwriting, it was added that Soma Oil & Gas's sole obligation was to have its subcontractors agree that their warranties would accrue to the benefit of the Government.[280] The SOA did not require Soma Oil & Gas

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276 Seismic Option Agreement between the Government of the Federal Republic of Somalia and Soma Oil & Gas Exploration Limited, a wholly owned subsidiary of Soma Oil & Gas Holdings Limited, 6 August 2013, Article 2.1.3, Annex 162.

277 *See* Seismic Option Agreement between the Government of the Federal Republic of Somalia and Soma Oil & Gas Exploration Limited, a wholly owned subsidiary of Soma Oil & Gas Holdings Limited, 6 August 2013, Article 7, Annex 162.

278 *See* Seismic Option Agreement between the Government of the Federal Republic of Somalia and Soma Oil & Gas Exploration Limited, a wholly owned subsidiary of Soma Oil & Gas Holdings Limited, 6 August 2013, Article 10.3, Annex 162.

279 Seismic Option Agreement between the Government of the Federal Republic of Somalia and Soma Oil & Gas Exploration Limited, a wholly owned subsidiary of Soma Oil & Gas Holdings Limited, 6 August 2013, Article 10.3, Annex 162.

280 *See* Seismic Option Agreement between the Government of the Federal Republic of Somalia and Soma Oil & Gas Exploration Limited, a wholly owned subsidiary of Soma Oil & Gas Holdings Limited, 6 August 2013, Article 10.3, Annex 162.

actually to obtain any warranties from its subcontractors. And it equally made clear that Soma Oil & Gas would not pay anything to the Government for its subcontractors' failures. The Government would have to pursue the subcontractors directly. Put differently, Soma Oil & Gas refused even to stand by its selection of subcontractors, much less the performance of the work.

178. Schedule 6 of the SOA lists Soma Oil & Gas Holdings Limited's shareholders.[281] The list includes multiple highly experienced executives and politicians with international standing in the oil and gas world.[282] Schedule 6 omitted one name (referring instead only to an investor of British nationality). This was the journalist Aidan Harley, whose involvement in the company was later publicly disclosed in 2016.[283]

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281 As indicated above, Soma Oil & Gas Holdings Limited fully owns Soma Oil & Gas. *See* paragraph 165.

282 *See* Seismic Option Agreement between the Government of the Federal Republic of Somalia and Soma Oil & Gas Exploration Limited, a wholly owned subsidiary of Soma Oil & Gas Holdings Limited, 6 August 2013, Schedule 6, Annex 162.

283 *See* Seismic Option Agreement between the Government of the Federal Republic of Somalia and Soma Oil & Gas Exploration Limited, a wholly owned subsidiary of Soma Oil & Gas Holdings Limited, 6 August 2013, Schedule 6, Annex 162; Jay Bahadur's post (@PuntlandPirates) at 9:22 am 20 January 2016, *Twitter*, 20 January 2016, , available at: https://twitter.com/puntlandpirates/status/689739858579963905 (last accessed: 21 December 2020), Annex 197; "Shareholders", *Soma Oil & Gas* via the Wayback Machine, 13 March 2016, available at: https://web.archive.org/web/20160313104450/http://www.somaoilandgas.com/shareholders/ (last accessed: 21 December 2020), Annex 165; "Shareholders", *Soma Oil & Gas* via the Wayback Machine, 17 April 2016, available at: https://web.archive.org/web/20160417080104/http://www.somaoilandgas.com:80/shareholders (last accessed: 21 December 2020), Annex 166; Confirmation Statement of Soma Oil & Gas Holdings Limited up to 19 December 2016, *UK Companies House*, 19 January 2017, page 3, Annex 181; "Exploring and Developing Hydrocarbons offshore Somalia: Company Update", *Soma Oil & Gas*, December 2016, page 13, Annex 180. It is wholly unclear what role or experience a journalist like Mr Harley has in oil and gas development (and Mr Harley's initial anonymity in the SOA schedules also raises an eyebrow).

179. It is surprising that not one of the other individuals listed in Schedule 6 would rely on their own experience to let their company, Soma Oil & Gas, take on any contractual responsibility for the performance of its so-called obligations. When Soma Oil & Gas refused to provide its own warranties for the "Data", these experienced professionals and businessmen washed their and Soma Oil & Gas's hands of any potential liability or responsibility for Soma Oil & Gas's work. Conversely, Somalia agreed simply to forfeit the benefits of these individuals' collective experience for nothing in return.

180. Notably, the actual terms of the SOA reveal, at best, unfortunate material omissions and misstatements in the representations made by the Chairman of Soma Oil & Gas in his 17 August 2015 letter to the UN Security Council Committee on Somalia and Eritrea. For example, the Chairman said that, prior to Soma Oil & Gas's involvement, "[international oil companies] were resisting requests to return to the country to explore for hydrocarbons".[284] He then continued to say that:

> [t]he agreement committed Soma to carry out a work programme that included seismic surveying, collation and analysis of data relating to uncontested areas under the jurisdiction of the Federal Government in Somalia's offshore waters.[285]

181. This was misleading in at least three ways. First, as noted above, international oil companies were reportedly quite interested in Somali

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284 Letter from the Rt. Hon. Lord Howard of Lympne, CH QC, Chairman, Soma Oil & Gas to His Excellency Mr. Rafael Dario Ramirez Carreno, Chairman of the UN Security Council Committee pursuant to resolutions 751 (1992) and 1907 (2009) concerning Somalia and Eritrea, 17 August 2015, page 1, Annex 164.

285 Letter from the Rt. Hon. Lord Howard of Lympne, CH QC, Chairman, Soma Oil & Gas to His Excellency Mr. Rafael Dario Ramirez Carreno, Chairman of the UN Security Council Committee pursuant to resolutions 751 (1992) and 1907 (2009) concerning Somalia and Eritrea, 17 August 2015, page 1, Annex 164.

offshore exploration at the time.[286] Second, the SOA extended to onshore areas as well, a fact that would have been of obvious relevance to the Committee. Third, "Soma" was not "committed" to do anything, much less a seismic exploration program. Soma Oil & Gas's sole commitment was to find other subcontractors to do that work for it; work for which Soma Oil & Gas then disclaimed any contractual responsibility.

182. In the SOA, Soma Oil & Gas is also facially required to pay for exploration work, up to a minimum amount.[287] As noted above, it appears to have obtained the funds to do so from a private company owned by a Russian national. But even this limited funding obligation was subject to a highly suspect caveat. Article 2.2.4 of the SOA says that all of Soma Oil & Gas's expenditures can later be recovered by Soma Oil & Gas from the oil and gas it will discover. That Article permits the company to:

> recover all direct costs and expenses incurred under this Agreement and paid to arm's length third parties for the conduct of the Exploration Services as recoverable costs under any Production Sharing Agreements awarded to Soma [...].[288]

183. Put differently, Soma Oil & Gas only took on the slight risk that the exploration activities for which it would pay would find no commercially available gas anywhere in Somali soil or waters. That was virtually no risk at all. As noted above, Kenya's activities had already confirmed the

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286 *See* paragraph 164 above.

287 *See* Seismic Option Agreement between the Government of the Federal Republic of Somalia and Soma Oil & Gas Exploration Limited, a wholly owned subsidiary of Soma Oil & Gas Holdings Limited, 6 August 2013, Article 10.5, Annex 162 ("Soma will conduct the Exploration Programme and the Exploration Services at no cost to the Government.").

288 Seismic Option Agreement between the Government of the Federal Republic of Somalia and Soma Oil & Gas Exploration Limited, a wholly owned subsidiary of Soma Oil & Gas Holdings Limited, 6 August 2013, Article 2.2.4, Annex 162.

presence of oil and gas in neighbouring offshore areas by 2012. And Soma Oil & Gas did not have limited acres for exploration; the SOA's Evaluation Area ended up being virtually the entire offshore area available to Somalia south of the Horn of Africa. Greater acreage, of course, substantially reduces the risk that exploration activities will be entirely fruitless.

184. The terms of the SOA also confirm that the Chairman's letter to the UN Security Council Committee on Somalia and Eritrea conveniently omitted to mention that the sums expended on exploration would be recovered under the terms of the SOA through later production.[289] In addition, the Chairman's letter stated that Soma Oil & Gas might spend more on exploration "***should*** Production Sharing Agreements [...] be granted in the future". (Emphasis added).[290] The strategic use of the word "should" is legalistic double-speak. The Chairman's language strategically concealed that the SOA gave Soma Oil & Gas an absolute right to be granted exclusive production agreements if Soma Oil & Gas decided to seek them, wherever it saw fit.[291] The Chairman's letter thus deftly obscured that it was Soma Oil & Gas, and not Somalia, that had the full right to decide whether or not the production and sharing agreements should be granted.

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289 *See* Letter from the Rt. Hon. Lord Howard of Lympne, CH QC, Chairman, Soma Oil & Gas to His Excellency Mr. Rafael Dario Ramirez Carreno, Chairman of the UN Security Council Committee pursuant to resolutions 751 (1992) and 1907 (2009) concerning Somalia and Eritrea, 17 August 2015, Annex 164.

290 Letter from the Rt. Hon. Lord Howard of Lympne, CH QC, Chairman, Soma Oil & Gas to His Excellency Mr. Rafael Dario Ramirez Carreno, Chairman of the UN Security Council Committee pursuant to resolutions 751 (1992) and 1907 (2009) concerning Somalia and Eritrea, 17 August 2015, page 2, Annex 164.

291 *See* paragraph 172 above.

185. Other terms in the SOA are also lopsidedly to Somalia's detriment and Soma Oil & Gas's benefit, in highly unusual ways. For example:

(i) an Economic Stabilisation clause gives Soma Oil & Gas absolute rights to demand full compensation if there is any change in law impacting the contract;[292]

(ii) an Interest in Areas outside of the Evaluation Area clause (amended by handwriting from the prior term Exploration Area) provides mechanisms for Soma Oil & Gas to have the Government seek to obtain rights to areas near the surveyed areas;[293]

(iii) the Termination clause grants Soma Oil & Gas full compensation for the Government's material breach of contract. However, it contains no parallel clause permitting the Government to seek full compensation for Soma Oil & Gas's material breach;[294]

(iv) the Limitation of Liability clause essentially excludes any liability for Soma Oil & Gas for its breaches[295] but ensures full

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292 *See* Seismic Option Agreement between the Government of the Federal Republic of Somalia and Soma Oil & Gas Exploration Limited, a wholly owned subsidiary of Soma Oil & Gas Holdings Limited, 6 August 2013, Article 17, Annex 162.

293 *See* Seismic Option Agreement between the Government of the Federal Republic of Somalia and Soma Oil & Gas Exploration Limited, a wholly owned subsidiary of Soma Oil & Gas Holdings Limited, 6 August 2013, Article 20, Annex 162.

294 *See* Seismic Option Agreement between the Government of the Federal Republic of Somalia and Soma Oil & Gas Exploration Limited, a wholly owned subsidiary of Soma Oil & Gas Holdings Limited, 6 August 2013, Article 18, Annex 162.

295 This relevant clause might permit a claim for direct damages but the Government is unlikely to have any such damages, given the structure and content of the contract.

indemnification of all damages caused to Soma Oil & Gas by the Government's breaches;[296]

(v) the Assignment clause is drafted broadly to permit Soma Oil & Gas to capitalise on its valuable rights. For instance, it permits Soma Oil & Gas to enter into an initial public offering of its shares notwithstanding the traditional limitation on unapproved assignments. Additionally, it provides expansive qualifications to permit Soma Oil & Gas to farm out (i.e., sell) production and sharing rights to more experienced companies;[297] and

(vi) Somalia provides a broad waiver of sovereign immunity, extending not only to waivers for the purpose of arbitration and litigation but also (as is less common) to execution against all Somali State property. There is no exclusion of diplomatic and military assets from this broad waiver.[298]

186. The cumulative impact of these additional clauses is clear. Soma Oil & Gas gained all the economic benefit of the contract, including the sale of its rights in easy-to-comply-with terms. Conversely, at no point would Soma Oil & Gas be liable for any damages based on its own performance (if it can be called that) of the SOA. Somalia, however, was handcuffed to the

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296 *See* Seismic Option Agreement between the Government of the Federal Republic of Somalia and Soma Oil & Gas Exploration Limited, a wholly owned subsidiary of Soma Oil & Gas Holdings Limited, 6 August 2013, Article 23, Annex 162.

297 *See* Seismic Option Agreement between the Government of the Federal Republic of Somalia and Soma Oil & Gas Exploration Limited, a wholly owned subsidiary of Soma Oil & Gas Holdings Limited, 6 August 2013, Article 14, Annex 162.

298 *See* Seismic Option Agreement between the Government of the Federal Republic of Somalia and Soma Oil & Gas Exploration Limited, a wholly owned subsidiary of Soma Oil & Gas Holdings Limited, 6 August 2013, Article 29.6, Annex 162.

contract and its terms under threat of significant damages and the seizure of any of its assets, of any type, anywhere in the world.

187. Soma Oil & Gas paid nearly half a million dollars to a prominent Canadian lawyer, who was acting as an official legal adviser to the Somali Government when it was negotiating its contract with Soma Oil & Gas. This constitutes further evidence that the negotiations were not at arms' length.[299]

188. The Financial Governance Committee (the "**FGC**"), a hybrid Somali-international advisory body to the Somali Government, criticised the terms of the SOA in April 2014.[300] The FGC was established in early 2014 by agreement between the Somali Government, donors and international organisations, with the aim of improving financial governance in Somalia.[301]

189. In its 31 October 2015 report, the FGC noted that there were "troublesome clauses" in the SOA that had warranted advising the Somali Government to renegotiate the SOA.[302] The FGC observed that "the core issue with the

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299 *See* Letter from the Coordinator of the Somalia and Eritrea Monitoring Group mandated pursuant to paragraph 46 of Security Council resolution 2182 (2014) to the Chair of the Security Council Committee pursuant to resolutions 751 (1992) and 1907 (2009) concerning Somalia and Eritrea, reporting the initial findings of the Monitoring Group's investigation into the operations of Soma Oil & Gas Holdings Limited (Soma), S/AC.29/2015/SEMG/OC.31, 28 July 2015, page 3, KCM, Annex 101.

300 *See* "Public Sector Contracts and Concessions: the FGC and the Confidential Assessments, Second Bi-Annual Report", *Financial Governance Committee*, 31 October 2015, page 11, Annex 59, referring to a "Confidential Assessment of April 23, 2014".

301 *See* "About FGC", *Federal Government of Somalia*, November 2020, available at: https://mof.gov.so/fgc (last accessed: 21 December 2020), Annex 7.

302 "Public Sector Contracts and Concessions: the FGC and the Confidential Assessments, Second Bi-Annual Report", *Financial Governance Committee*, 31 October 2015, page 11, Annex 59.

Soma contract" is that "the contract embodies exclusivity".[303] The FGC described this as an "undesirable" precedent for the oil sector.[304] The FGC also recommended that the Somali Petroleum Corporation take "an increased share in the PSAs" provided for under the SOA.[305]

190. Yet, as of 2015, "no attempt ha[d] been made by the Federal Government to renegotiate the terms of this concession"[306] and the FGC was "still awaiting the Ministry's reaction" to its recommendations.[307] In 2016, the FGC further noted that the MoPMR "made it clear that it did not intend to renegotiate the Soma contract."[308] Notably, the FGC added that "the only instance in which the Government preferred not to follow the FGC's suggestions was in the case of the Soma Oil and Gas Exploration Limited concession."[309]

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303 "Public Sector Contracts and Concessions: the FGC and the Confidential Assessments, Second Bi-Annual Report", *Financial Governance Committee*, 31 October 2015, paragraph 49, Annex 59.

304 "Public Sector Contracts and Concessions: the FGC and the Confidential Assessments, Second Bi-Annual Report", *Financial Governance Committee*, 31 October 2015, paragraph 49, Annex 59.

305 "Public Sector Contracts and Concessions: the FGC and the Confidential Assessments, Second Bi-Annual Report", *Financial Governance Committee*, 31 October 2015, paragraph 43, Annex 59.

306 "Public Sector Contracts and Concessions: the FGC and the Confidential Assessments, Second Bi-Annual Report", *Financial Governance Committee*, 31 October 2015, paragraph 44, Annex 59.

307 "Public Sector Contracts and Concessions: the FGC and the Confidential Assessments, Second Bi-Annual Report", *Financial Governance Committee*, 31 October 2015, page 11, Annex 59.

308 "Public Sector Contracts, Concessions and Procurement, Third Report", *Financial Governance Committee*, 30 August 2016, pages 22-23, Annex 60.

309 "Public Sector Contracts, Concessions and Procurement, Third Report", *Financial Governance Committee*, 30 August 2016, page 6, Annex 60. *See also* "Financial Governance Report", *Financial Governance Committee*, May 2018, page 34, Annex 61; "Financial Governance Report", *Financial Governance Committee*, July 2019, page 65, Annex 62; "Financial Governance Report", *Financial Governance Committee*, July 2020,

191. Further, the FGC indicated that it had reviewed a draft PSA that "adjusted the original draft PSA attached to the agreement of August 6, 2013 and awarded Soma 90% of the earnings from the PSA".[310] This draft PSA had probably been "sent to the Ministry by Soma in December 2014."[311]

192. The SOA remains fully effective and in force to this day. Indeed, when Somalia's latest February 2020 Petroleum Law nullified all prior oil and gas contracts signed after 1991, it made sure not to nullify the SOA.[312] Article 9(1) of that law states that:

> [a]ll agreements pertaining to petroleum that were signed with administrations existing in parts of Somalia or previous provisional governments in the period between December 1990 ***up to September 2012*** are considered null and void.[313] (Emphasis added).

193. The SOA was signed in August 2013. This Court will recognise that, through careful wording, Article 9(1) of the 2020 Petroleum Law protects the SOA's effectiveness.

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page 43, Annex 63; Somalia, Financial Governance Committee, "List of contracts and concessions reviewed by the FGC since 2014", *Financial Governance Committee*, October 2018, page 2, Annex 64 (noting that the SOA "did not incorporate FGC recommendations").

310 "Public Sector Contracts and Concessions: the FGC and the Confidential Assessments, Second Bi-Annual Report", *Financial Governance Committee*, 31 October 2015, page 11, Annex 59.

311 "Public Sector Contracts and Concessions: the FGC and the Confidential Assessments, Second Bi-Annual Report", *Financial Governance Committee*, 31 October 2015, page 11, Annex 59.

312 *See* Federal Republic of Somalia, Ministry of Petroleum and Mineral Resources, Somali Petroleum Law, February 2020, Annex 2.

313 Federal Republic of Somalia, Ministry of Petroleum and Mineral Resources, Somali Petroleum Law, February 2020, Article 9(1), Annex 2.

194. The SOA's execution was expressly said to be intricately tied to the discovery of oil and gas by Kenya in 2012.[314] Soma Oil & Gas admitted as much. It said, in an October 2013 company presentation, that recent acreage licensing in "adjacent Kenya offshore" was "[l]ikely to indicate strong technical interest in southern parts of Somalia offshore."[315] The same presentation itemised and recorded "industry activity in offshore Kenya".[316]

195. Notably, as shown in Figure 4 below, in that same presentation, Soma Oil & Gas showed the Parallel of Latitude – not the equidistance line – as the maritime boundary and the limits of its newly acquired rights.

314 *See* paragraphs 182 and 184 above.

315 "Soma Oil & Gas Unlocking Somalia's Potential: Company Presentation", *Soma Oil & Gas*, 7 October 2013, page 3, Annex 163.

316 "Soma Oil & Gas Unlocking Somalia's Potential: Company Presentation", *Soma Oil & Gas*, 7 October 2013, page 8, Annex 163.

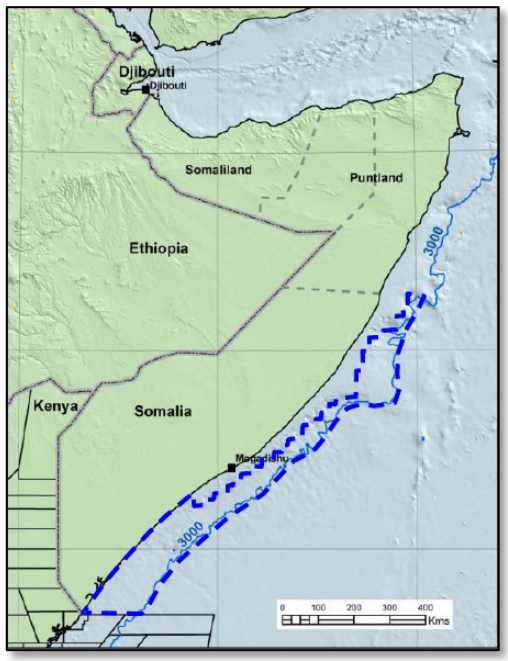

Figure 4: South Somalia Offshore (Soma Oil & Gas, *Unlocking Somalia's Potential*, Company Presentation, 7 October 2013)

196. In its Reply, Somalia seeks to undermine the significance of two other maps showing the maritime boundary along the Parallel of Latitude.[317] These maps were issued by Soma Oil & Gas and produced by Kenya in its Counter-Memorial.[318] Somalia's argument is that these maps "were presented at a conference in Kenya in [April] 2014 (well after the dispute had arisen between the Parties)."[319]

197. The evidence confirms that Somalia's submission is both irrelevant and incomplete. Figure 4 demonstrates that Soma Oil & Gas was presenting

317 *See* SR, paragraph 2.105.

318 *See* SR, paragraph 2.105 citing KCM, paragraphs 160-162; Soma Oil and Gas Offshore Evaluation Area, KCM, Figure 1.30; Hydrocarbons in South Somalia and Adjacent Areas, KCM, Figure 1-31.

319 SR, paragraph 2.105.

maps showing the maritime boundary along the Parallel of Latitude in October 2013, before the dispute had arisen between the Parties in February 2014. In fact, Figure 5 below shows that Soma Oil & Gas used essentially the same map in its October 2013 and April 2014 presentations.

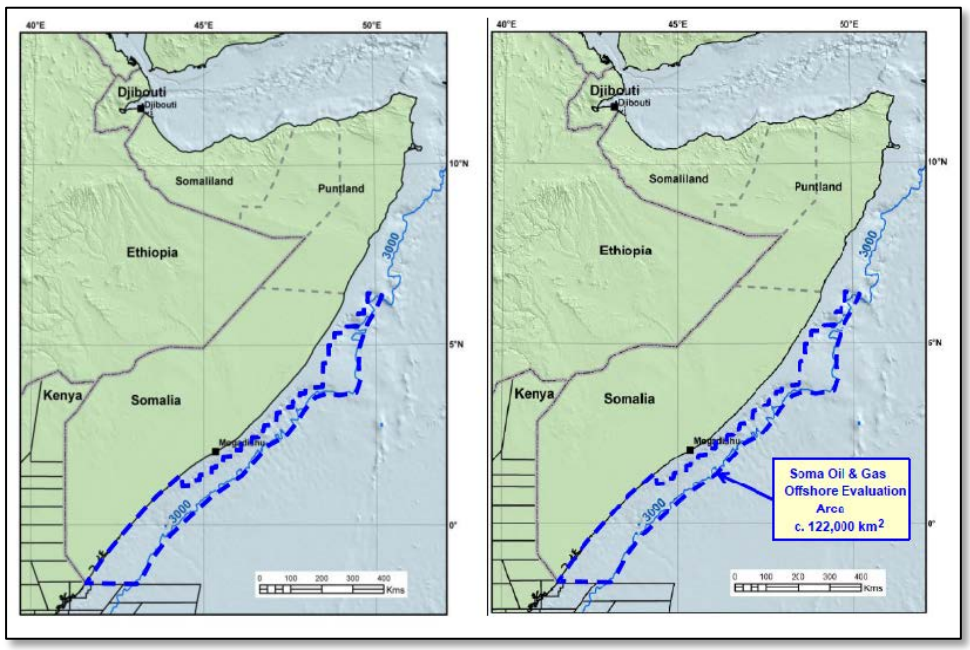

Figure 5: Comparison between: (i) South Somalia Offshore (Soma Oil & Gas, *Unlocking Somalia's Potential*, Company Presentation, 7 October 2013); and (ii) Soma Oil & Gas Offshore Evaluation Area (Source: Soma Oil. Unlocking Somalia's Potential Eastern African Oil, Gas – LNG Energy Conference, Nairobi, Kenya, 29 – 30 April 2014, Kenya), KCM, Figure 1-30.

198. Moreover, Soma Oil & Gas's October 2013 presentation includes two additional maps that also depict the maritime boundary along the Parallel of Latitude. These are reproduced as Figures 6 and 7 below. Both figures demonstrate that Soma Oil & Gas, undoubtedly following Somalia's lead, considered that Somalia's offshore area stopped at the Parallel of Latitude.

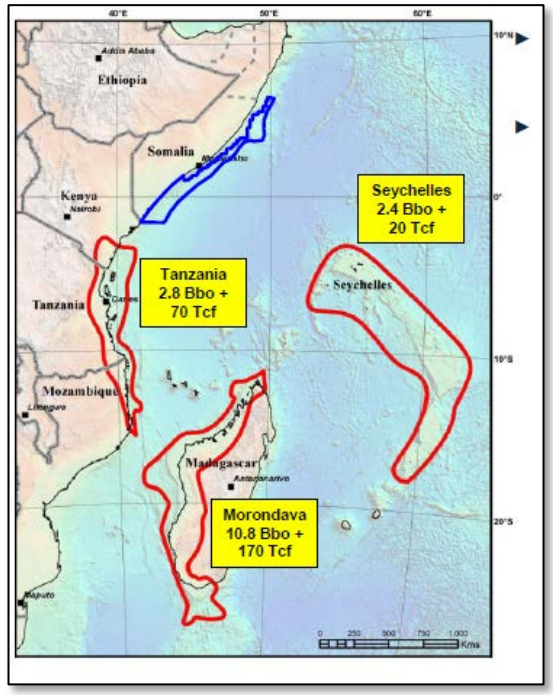

Figure 6: USGS Estimated Undiscovered Resources (2012) (Soma Oil & Gas, *Unlocking Somalia's Potential*, Company Presentation, 7 October 2013).

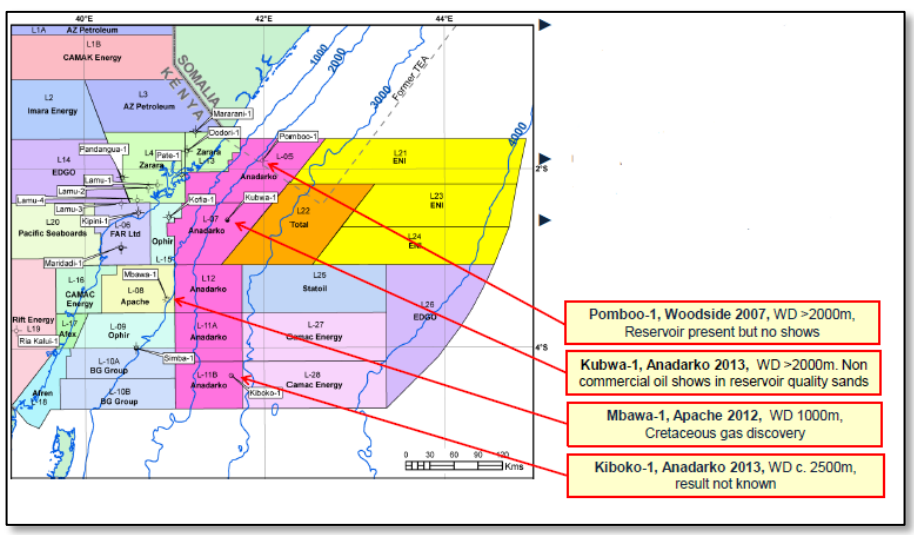

Figure 7: Industry Activity in Offshore Kenya (Soma Oil & Gas, *Unlocking Somalia's Potential*, Company Presentation, 7 October 2013).

199. These maps are particularly important given the SOA's definition of the Exploration Area: extending to all offshore areas of Somalia, as noted above.[320] The evidence is that: (i) in 2013, Somalia signed a contract granting exclusive rights to all of its offshore area to Soma Oil & Gas; and (ii) in 2013, Soma Oil & Gas, and therefore Somalia, understood and stated that this offshore area extended only to the Parallel of Latitude and not beyond it.

200. In effect, then, Soma Oil & Gas was given exclusive economic rights to at least any available offshore Somali oil and gas (as well as significant onshore rights), without any kind of bidding, auction or public appraisal. Small wonder that the nature and transparency of Soma Oil & Gas's deal not only caused public questioning;[321] it also attracted the attention of the Monitoring Group on Somalia and Eritrea (the "**UN Monitoring Group**") in its 2015 report (the "**2015 UN Report**"). Kenya has already outlined the concerning findings of the 2015 UN Report in relation to the activity between Somalia and Soma Oil & Gas.[322] The 2015 UN Report demonstrated that, shortly after its incorporation, Soma Oil & Gas gained an irregular influence over the Somali Government, and in particular, the Ministry of Petroleum and Mineral Resources (the "**MoPMR**").[323]

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320 *See* paragraph 169 above.

321 *See* "EAEF moves to oppose Soma Oil and Gas deal", *Hiraan Online*, 15 August 2013, Annex 119.

322 *See* KCM, paragraphs 186-191.

323 *See* KCM, paragraphs 188-189.

201. Some of the individuals identified by the UN experts as having received questionable payments from Soma Oil & Gas continue to hold prominent roles within the Somali Government and MoPMR.[324]

202. Furthermore, former Soma Oil & Gas's director Hassan Khaire became Somali Prime Minister in February 2017.[325] Mr Khaire was previously the Executive Director of the African department of Soma Oil & Gas.[326] The ultimate foreign shareholders of Soma Oil & Gas and the directors of its holding company are also listed in Schedule 6 of the SOA.[327] Not one of them has, to Kenya's knowledge, ever publicly explained how they obtained such a favourable deal as the SOA. The entire agreement is shrouded in mystery.

203. Yet, even as Soma Oil & Gas was given considerable rights in Somalia's offshore areas, neither Somalia nor Soma Oil & Gas sought or asserted rights south of the Parallel of Latitude. As late as 2013, Somalia

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324 *See* Letter from the Coordinator of the Somalia and Eritrea Monitoring Group mandated pursuant to paragraph 46 of Security Council resolution 2182 (2014) to the Chair of the Security Council Committee pursuant to resolutions 751 (1992) and 1907 (2009) concerning Somalia and Eritrea, reporting the initial findings of the Monitoring Group's investigation into the operations of Soma Oil & Gas Holdings Limited (Soma), S/AC.29/2015/SEMG/OC.31, 28 July 2015, pages 8-9, KCM, Annex 101. Individuals listed by the SEMG include Farah Abdi Hassan, Jabril Mohamoud Geddi, Mohamed Ali-nur Hagi, Dr Abdulkadir Abiikar Hussein, Hussein Ali Ahmed, Yusuf Hassan Isack, Abdinor Mohamed Ahmed, Abdullahi Mohamed Warfaa, Mohamed Yousuf Ali, Dr. Abdi Mohamed Siad, Leila Ali Ahmed, Dr. Abdullahi Haider Mohamed, Abdirzak Hassan Awed, and Farah Ahmed Isma'il.

325 *See* "Somalia removes prime minister in no-confidence vote", *The Guardian*, 25 July 2020, Annex 120.

326 *See* "Somalia removes prime minister in no-confidence vote", *The Guardian*, 25 July 2020, Annex 120; "Exploring and Developing Hydrocarbons offshore Somalia: Company Update", *Soma Oil & Gas*, December 2016, page 5, Annex 180.

327 *See* Seismic Option Agreement between the Government of the Federal Republic of Somalia and Soma Oil & Gas Exploration Limited, a wholly owned subsidiary of Soma Oil & Gas Holdings Limited, 6 August 2013, Schedule 6, Annex 162.

acknowledged and understood that line as the maritime boundary. In fact, as late as 3 February 2014, Soma Oil & Gas continued to recognise the Parallel of Latitude as the maritime boundary. On that date, the company signed a seismic exploration contract with Seabird Exploration, to produce seismic data offshore of Somalia. The southern edge of that contract stopped at the Parallel of Latitude.[328]

4. February 2014 to August 2014: Somalia protested against Kenya's claim, as it engaged in a six-month flurry of activity to benefit private interests

204. Somalia only sought to revoke its acquiescence to the Parallel of Latitude maritime boundary on 4 February 2014. On that date, the Minister of Foreign Affairs of Somalia issued a *note verbale* to the UN Secretary-General that "expressly rejected Kenya's claim" to the Parallel of Latitude maritime boundary.[329] This was Somalia's first protest against that boundary.

205. It was Kenya, not Somalia, that sought amicable discussions concerning this sudden change of position. On 26 and 27 March 2014, Kenya initiated a meeting with Somalia in Nairobi to discuss the maritime boundary based on the new dispute.[330]

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328 *See* Unlocking Somalia's Potential, Eastern African Oil, Gas – LNG Energy Conference, Soma Oil & Gas Presentation, Nairobi, Kenya, 29-30 April 2014, pages 10-11, KCM, Annex 112.

329 *Letter* from the Permanent Mission of the Somali Republic to the United Nations to H.E. Ban Ki-Moon, Secretary-General of the United Nations, No. SOM/MSS/253/14, (2 Sept. 2014), MS, Annex 48.

330 *See* Federal Republic of Somalia, *Report on the Meeting between the Federal Republic of Somalia and the Republic of Kenya On Maritime Boundary Dispute, Nairobi, Kenya, 26-27 March 2014* (1 Apr. 2014), MS, Annex 24.

206. On 8 May 2014, and notwithstanding the Parties' discussions, Somalia again granted Soma Oil & Gas further offshore rights in a non-public manner, without any public auction. It now did so by extending Soma Oil & Gas's rights south of the Parallel of Latitude, through a so-called "Evaluation Area Extension".[331] In other words, not nine weeks from its first protest of the Parallel of Latitude, Somalia made sure that Soma Oil & Gas – and only Soma Oil & Gas – benefited from its newfound claims.

207. The existence of this "Evaluation Area Extension" gives the lie to the idea that Somalia had previously understood that its maritime area included areas south of the Parallel of Latitude. As noted above, the SOA defined the relevant area as extending to all available Somali offshore areas (if not subject to a pre-1990 licence).[332] If Somalia had previously understood the now-disputed maritime area south of the parallel to appertain to it, the broadly termed SOA would have included that area by default. The fact that Somalia had to conclude a separate agreement extending Soma Oil & Gas's rights south of the Parallel of Latitude confirms that Somalia was changing its legal position with respect to that area.

208. The UN Monitoring Group has linked this sudden extension of Soma Oil & Gas's rights to questionable "capacity building payments" made to Somali officials at the same time, in May 2014. Those payments were the subject of a so-called Capacity Building Agreement signed on 15 May 2014. According to the UN Monitoring Group, these payments were a significant

331 *See* KCM, paragraph 186.

332 *See* Seismic Option Agreement between the Government of the Federal Republic of Somalia and Soma Oil & Gas Exploration Limited, a wholly owned subsidiary of Soma Oil & Gas Holdings Limited, 6 August 2013, pages 4-5 (definition of "Exploration Area"), Annex 162.

indication of a "pattern of corruption within" the MoPMR.[333] The UN Monitoring Group linked the payments and the extension of Soma Oil & Gas's rights as a corrupt *quid pro quo*. It said:

> [t]he timing of the signing of the Evaluation Area Extension suggests that it may have represented a quid pro quo between the Ministry and Soma. The Minister signed the Evaluation Area Extension on 8 May 2014, fewer than two weeks after agreeing the terms of the Soma Capacity Building Agreement. A week later, on 15 May 2014, Soma countersigned the Capacity Building Agreement.[334]

209. Other international actors and organisations have recognised the high levels of corruption in Somalia, especially in the public procurement sector.[335] For example, in 2019, Transparency International ranked Somalia last in its list of perceived levels of public sector corruption in 180 countries and

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333 Letter from the Coordinator of the Somalia and Eritrea Monitoring Group mandated pursuant to paragraph 46 of Security Council resolution 2182 (2014) to the Chair of the Security Council Committee pursuant to resolutions 751 (1992) and 1907 (2009) concerning Somalia and Eritrea, reporting the initial findings of the Monitoring Group's investigation into the operations of Soma Oil & Gas Holdings Limited (Soma), S/AC.29/2015/SEMG/OC.31, 28 July 2015, page 23, KCM, Annex 101.

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

335 *See* "Corruption perceptions index 2019", *Transparency International*, 2020, Annex 121; "Somalia corruption report", *Risk & Compliance Portal Powered by GAN*, July 2020, Annex 122; "2020 Ibrahim index of African governance, index report", *Mo Ibrahim Foundation*, Index Report, Annex 123.

territories around the world.[336] In 2020, GAN Integrity noted a common practice of lack of transparency in public procurement in Somalia.[337]

210. A significant document related to these events is a memorandum drafted by the law firm Akin Gump on 17 August 2015, as sent to Soma Oil & Gas. This document was not previously on the record of this proceeding. The memorandum is drafted in response to the UN Monitoring Group's investigation of Soma Oil & Gas's questionable May 2014 payments. In the memorandum, Akin Gump purports to describe the "usual and customary practice regarding capacity building arrangements in the oil and gas industry".[338]

211. What is remarkable about this document is what it does not do. Soma Oil & Gas did not have Akin Gump provide an opinion or conduct an independent investigation as to whether Soma Oil & Gas's own capacity building payments were lawful or were unlawful, i.e., were legal or corrupt. In other words, Soma Oil & Gas did not seek or obtain an independent law firm investigation into its own practices. Yet this is a common and widely used means of evaluating whether a company has engaged in unlawful activities, including bribery. Soma Oil & Gas merely asked a law firm to opine on other arrangements without commenting on its own.

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336 *See* "Corruption perceptions index 2019", *Transparency International*, 2020, page 3, Annex 121.

337 *See* "Somalia corruption report", *Risk & Compliance Portal Powered by GAN*, July 2020, page 3, Annex 122.

338 Memorandum on Capacity Building in the Oil & Gas Industry from Akin Gump Strauss Huer & Feld to Robert Sheppard and Philip Wolfe of Soma Oil and Gas, 17 August 2015, paragraph 1.3, Annex 182.

212. Of course, Soma Oil & Gas would not be able to exercise its questionably obtained rights south of the Parallel of Latitude unless Somalia concretised its claims to that area through formal processes – in particular by claiming an EEZ as a matter of international law.[339] On 30 June 2014, just six weeks after the questionable extension of Soma Oil & Gas's rights, Somalia proclaimed an EEZ that included the now-disputed maritime area.[340] On that day, Somalia also deposited a list of geographical coordinates with the UN, setting forth the limits of its EEZ claim.[341] These were necessary steps for Soma Oil & Gas's exercise of any potential newly acquired rights to the now-disputed maritime area.

213. On 21 July 2014, just three weeks after its EEZ proclamation and the deposit of the corresponding coordinates, Somalia submitted information on its claims to an extended continental shelf to the CLCS.[342]

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339 *See* U. Leanza and M. N. Caracciolo, *The Exclusive Economic Zone*, in THE IMLI MANUAL ON INTERNATIONAL MARITIME LAW: VOLUME I: THE LAW OF THE SEA, ed. D. J. Attard et al. (Oxford Scholarly Authorities on International Law, 2014), page 185, Annex 184 ("coastal State jurisdiction in the EEZ may be exercised only after a specific declaration by the State concerned"); D. Nelson, "Exclusive Economic Zone" in *Max Planck Encyclopedia of Public International Law*, Oxford University Press, 2008, paragraph 23, Annex 185 ("the rights of the coastal State over the superjacent waters of its EEZ are not inherent but will have to be declared and this has been the practice of States in this matter."); J. Crawford et al., *Brownlie's Principles of Public International Law* (Oxford University Press, 9th edition, 2019), Part VI, 11, page 262 ("[t]here can be no doubt that the EEZ forms part of customary law, as has been recognized by the International Court […]. Both under UNCLOS and customary law, the zone is optional and its existence depends on an actual claim.").

340 *See* Federal Republic of Somalia, Office of the President, *Proclamation by the President of the Federal Republic of Somalia* (30 June 2014), MS, Annex 14.

341 *See* Federal Republic of Somalia, *Outer Limit of the Exclusive Economic Zone of Somalia* (30 June 2014), MS, Annex 15.

342 *See* Federal Republic of Somalia, *Continental Shelf Submission of the Federal Republic of Somalia: Executive Summary* (21 July 2014), MS, Annex 70.

214. On 28 to 29 July 2014, i.e., the very next week, representatives of the Governments of Somalia and Kenya met again to discuss the maritime boundary. Those discussions did not lead to significant progress. The Parties agreed to meet again on 25 to 26 August 2014 to continue discussions.[343]

215. Somalia did not attend that planned third meeting. After asserting claims to the now-disputed maritime area for a period of only six months (February to August), it gave up on negotiations and discussions. Instead, it filed the 28 August 2014 Application Instituting Proceedings before this Court. This proceeding, too, is a necessary step to maximise the possibility that Soma Oil & Gas can freely exercise the valuable rights that Somalia granted it, without auction or competition, in May 2014.[344]

216. Tellingly, it was only as of October 2014 that Soma Oil & Gas presented again a map very similar to Figure 4 above; only, this time, the map had been modified to depict the maritime boundary at the equidistance line. This map is reproduced on the right side of Figure 8 below. The difference between the two maps demonstrates, conclusively, that there was a

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343 *See* MS, paragraph 3.52; KCM, paragraph 196; Government of Somalia and Government of Kenya, *Joint Report on the Kenya-Somalia Maritime Boundary Meeting, 28-29 July 2014* (July 2014), MS, Annex 32.

344 The Norwegian company Spectrum ASA (now TGS-NOPEC Geophysical Company ASA) reportedly also has strong interests in this proceeding and in the Somali oil licensing process. In September 2015, Spectrum ASA signed an agreement with the Somali government to acquire 28,000 km of 2D seismic data. Spectrum ASA was awarded the rights to sell Exploration Data on behalf of Somalia. Spectrum ASA assisted the Somali Government in promoting Somalia Offshore Round at a conference held in London on 7 February 2019. *See* Soma Oil & Gas Exploration, Ltd., *Unlocking Somalia's Potential: Company Presentation Q2 2016* (2016), Slide 43, SR, Annex 30; "Press Release: Spectrum signs seismic data agreement to kick-start oil exploration offshore somalia", *Spectrum*, 7 September 2015, Annex 124; "Spectrum press statement on Somalia offshore round", *Garowe Online*, 19 February 2019, Annex 125; "Senate declares London summit on Somalia Oil 'unconstitutional'", *Garowe Onlin*e, 6 February 2019, Annex 126.

significant shift in Somalia's position on the maritime boundary between October 2013 and October 2014. That shift started, as noted above, in February 2014.

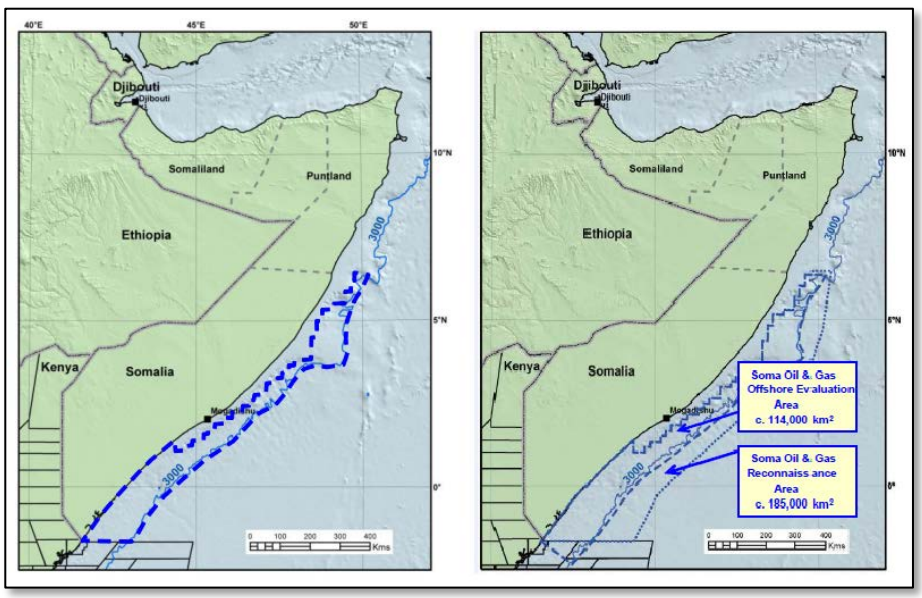

Figure 8: Comparison between: (i) South Somalia Offshore (Soma Oil & Gas, *Unlocking Somalia's Potential*, Company Presentation, 7 October 2013); and (ii) South Somalia Offshore vs North Sea (Soma Oil & Gas, *Unlocking Somalia's Potential*, Somalia Oil & Gas Summit, 20 October 2014).

217. In the last few months of 2020, the Somali Government has engaged in discussions with a successor entity to Soma Oil & Gas and a US company called Liberty Petroleum Exploration to sign new PSAs over Somali oil blocks on Somali offshore areas.[345] The negotiations are reportedly taking place in a hurry under suspicious circumstances, again without public

345 *See* "About to happen Somali petroleum corruption", *Somali Atlantic Council*, 3 December 2020, Annex 127.

tender.[346] The US company is reported to have links with Somali officials that represent a significant conflict of interest.[347] Yet again, the beneficiary of Somalia's conduct is a select group of foreign private individuals and Somali Government officials and not Somalia itself or its population.

5. Conclusion

218. This chronology speaks for itself. From 1979 until February 2014, Somalia was aware of Kenya's maritime claim, knew of its legal significance, did not protest against it and even acted in accordance with that claim. Until Kenya's discoveries in 2012, prospectivity for oil and gas in Kenya's claimed offshore areas was considered low and Somalia also had no established finding that its offshore areas had oil and gas. Not coincidentally, in that three-decade period, Somalia sought and relied on good relations with Kenya and on Kenya's aid and support.

219. Then, suddenly, on 4 February 2014, that all changed. In just six months, Somalia protested the Parallel of Latitude maritime boundary; extended Soma Oil & Gas's rights south of that parallel; declared an EEZ accordingly and filed its coordinates; and provided information for its CLCS submissions. It eschewed negotiations with Kenya and then started this proceeding. If this Court's judgment turns in Somalia's favour (which it should not), Soma Oil & Gas and its shadowy beneficial owners would be the beneficiaries of that conduct.

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346 *See* "About to happen Somali petroleum corruption", *Somali Atlantic Council*, 3 December 2020, Annex 127.

347 *See* "About to happen Somali petroleum corruption", *Somali Atlantic Council*, 3 December 2020, Annex 127.

220. Where Somalia fails, however, is that the six months from February to August 2014 cannot oust the preceding 35 years. If it were starting from a clean slate, Somalia might perhaps be entitled to make maritime claims for any reason it deemed appropriate – the public good or, as is the case here, the benefit of a narrow band of Somali private officials and well-placed and exceedingly fortunate foreign interests. But Somalia does not start from a clean slate. Somalia acquiesced in a maritime boundary for 35 years in the context of obtaining considerable goodwill and support from its southern neighbour. Somalia cannot now try to revoke that acquiescence when convenient for it or, more specifically, for a subset of private actors. As discussed below, *qui tacet consentit*. And such consent, having been given, cannot be unilaterally revoked.

B. Maritime boundaries can and do form through acquiescence

221. This new evidence remains pertinent even though Somalia wrongly asserts that acquiescence cannot "be invoked as a principle of delimitation under UNCLOS".[348] It also claims that Kenya has "invent[ed] an entirely novel approach: delimitation by acquiescence in a unilateral claim."[349] Somalia's arguments are directly contradicted by the wording of UNCLOS, by general principles of international law and by the jurisprudence of international courts and tribunals.

222. Articles 15, 74 and 83 of UNCLOS prioritise States' agreements as a method for boundary delimitation.[350] Article 15 provides that the rule

348 SR, paragraph 2.6.

349 SR, paragraph 2.4.

350 *See* UNCLOS, Articles 15, 74 and 83.

preventing the disputing States to extend their territorial sea beyond the median line applies only "failing agreement between them". For their part, Articles 74(1) and 83(1) provide that:

> [t]he delimitation of [the EEZ and the 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.[351]

223. Acquiescence is a widely accepted form of "agreement" under multiple sources of international law listed in Article 38 of the Statute of the Court. These include "the general principles of law", "judicial decisions" and "the teachings of the most highly qualified publicists".

224. Indeed, the general principles of international law do not limit agreements between States to formal written agreements.[352] As noted in the Report by Special Rapporteur G. G. Fitzmaurice on the Law of Treaties in 1956, "a State may not deny the reality of its consent apparently regularly given" by "inference".[353]

225. The same applies to "judicial decisions". For example, in *Pedra Branca/Pulau Batu Puteh*, this Court stated that:

> [a]ny 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

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351 UNCLOS, Article 74.

352 *See* KR, paragraph 39.

353 Law of Treaties [Agenda item 4]: Document A/CN.4/101, Third Report by G.G. Fitzmaurice, Special Rapporteur, A/CN.4/101, 14 March 1956, page 108, Annex 65.

> conduct of the Parties. International law does not, in this matter, impose any particular form.[354]

226. The jurisprudence of international courts and tribunals has also recognised the importance of acquiescence and tacit agreements specifically in the context of maritime boundaries.[355] For example, in *Peru v. Chile*, the Court found that the two countries had reached a "shared understanding" concerning their maritime boundary that took the form of a "tacit agreement".[356] The Court concluded that this tacit agreement existed several years before the parties entered into a subsequent treaty.[357]

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354 *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment of 23 May 2008, I.C.J. Reports 2008*, p. 12, paragraph 120.

355 *See*, e.g., *Arbitration between Newfoundland and Labrador and Nova Scotia concerning portions of the limits of their offshore areas as defined in the Canada – Nova Scotia Offshore Petroleum Resources Accord Implementation Act and the Canada – Newfoundland Atlantic Accord Implementation Act*, Award of the Tribunal in the Second Phase, Ottawa, 26 March 2002, page 52 ("in order to establish that a boundary (not settled or determined by agreement) has been established through conduct, it is necessary to show an unequivocal pattern of conduct as between the two parties concerned, relating to the area and supporting the boundary, or the aspect of the boundary, which is in dispute"); *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment of 3 June 1985, I.C.J. Reports 1985*, p. 13, paragraph 25 ("[i]t is however unable to discern any pattern of conduct on either side sufficiently unequivocal to constitute either acquiescence or any helpful indication of any view of either Party as to what would be equitable differing in any way from the view advanced by that Party before the Court"). *See also Decision of the Permanent Court of Arbitration in the Matter of the Maritime Boundary Dispute between Norway and Sweden*, (1910) 4 American Journal of International Law 226, pages 233-234, Annex 195; *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America), Judgment of 12 October 1984, I.C.J. Reports 1984*, p. 246; *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile), Judgment of 1 October 2018, I.C.J. Reports 2018*, p. 506; *Fisheries case (United Kingdom v. Norway), Judgment of 18 December 1951, I.C.J. Reports 1951*, p. 116; *Maritime Dispute (Peru v. Chile), Judgment of 27 January 2014, I.C.J. Reports 2014*, p. 3; *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports 1962*, p. 6.

356 *Maritime Dispute (Peru v. Chile), Judgment of 27 January 2014, I.C.J. Reports 2014*, p. 3, paragraph 43.

357 *See*, e.g., *Maritime Dispute (Peru v. Chile), Judgment of 27 January 2014, I.C.J. Reports 2014*, p. 3, paragraphs 43, 69 and 91.

Similarly, in *Gulf of Maine*, the Chamber recalled that the concept of acquiescence "follow[s] from the fundamental principles of good faith and equity".[358]

227. Equally, "highly qualified publicists" have explained that an agreement on a maritime boundary can be based on "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."[359] Those publicists also have confirmed that international law protects the fair reliance of States on the apparent

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358 *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America), Judgment of 12 October 1984, I.C.J. Reports 1984*, p. 246, paragraph 130. *See also Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award, 18 March 2015, PCA Case No. 2011-03, paragraph 435 ("the general requirement that States act in their mutual relations in good faith and [...] the legitimate expectations of a State that acts in reliance upon the representations of another").

359 N. S. Marques Antunes, "Acquiescence" in *Max Planck Encyclopedia of Public International Law*, Oxford University Press, 2006, paragraph 2. *See also* J. Crawford et *al*., *Brownlie's Principles of Public International Law* (Oxford University Press, 9th edition, 2019), Part VI, 18, page 405; B. H. Oxman, "International Maritime Boundaries: Political, Strategic and Historical Considerations", *The University of Miami Inter-American Law Review*, 1994/1995, p. 245, Annex 186 (on maritime delimitation, B. H. Oxman states: "[t]he basic choices governments have for avoiding confrontation arising from overlapping claims are explicit or tacit agreement on a permanent or interim boundary, explicit or tacit joint management within a defined area, explicit or tacit agreement on mutual restraint with respect to the exercise of jurisdiction over at least each other's nationals within a defined area, or unreciprocated unilateral restraint"); D. P. Riesenberg, "Recent Jurisprudence Addressing Maritime Delimitation Beyond 200 Nautical Miles from the Coast", *The American Society of International Law*, 2014, Annex 187 ("[w]hile the Barents Sea and Bering Sea treaties are both particularly explicit about transferring maritime jurisdiction over the "Special Areas" from one state to the other, it is also conceivable that states might create similar arrangements by tacit agreement."); K. H. Kaikobad, "Problems of Adjudication and Arbitration in Maritime Boundary Disputes", *Kluwer Law International*, 2002, p. 287 ("[i]t remains, finally, to underline, once again, the role of agreement and consent in the matter of single, integrated maritime boundary delimitation. Evidence of agreement, it is important to note, may appear in ways other than the standard express authorisation in arbitral or special agreements, as was the case in *Gulf of Maine* and *St. Pierre and Miquelon*. Where there exists no express clause to this effect, as was the case in *Jan Mayen*, success in persuading a tribunal to effect a single integrated line will depend upon submitting other kinds of evidence to prove agreement consistent with that task").

acquiescence of others.[360] In fact, any other approach would risk rewarding States' opportunistic behaviours. As stated by Bin Cheng:

> [t]he protection of good faith extends equally to the confidence and reliance that can reasonably be placed not only in agreements but also in communications or other conclusive acts from another State.[361]

228. Leading authorities also have underlined that acquiescence is an "essential requirement of stability" in the international order. To recall, Sir Hersch Lauterpacht explained that:

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

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360 *See* H. Lauterpacht, "Sovereignty over Submarine Areas", *British International Yearbook of International Law*, 1950, pages 395-396. *See also* R. Kolb, *Good Faith in International Law* (Hart 2017), pp. 92-5, p. 91, KCM, Annex 125; B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge University Press, 1987), page 137; T. M. Franck and D. M. Sughrue, "The International Role of Equity-as-Fairness", *Georgetown Law Journal*, 1993, p. 568, Annex 188 ("[a]cquiescence, or prescription, is another form of equitable estoppel recognized as a general principle of law-as-fairness. Silence or absence of protest may preclude a state from later challenging another state's claim"); S. Reinhold, "Good Faith in International Law", *UCL Journal of Law and Jurisprudence*, 2013, p. 56, Annex 189("[a]cquiescence and estoppel ascribe substantial legal consequences to the inactivity of a State; as such, these institutions should be restrictively interpreted and applied. They find their justification in the reasonable reliance of one State (based on good faith) on the representation or conduct of another.").

361 B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge University Press, 1987), page 137.

> protest, and the relevance of the failure to protest, are especially conspicuous in the international sphere.[362]

229. In that same vein, Ian Mac Gibbon emphasised that:

> it is scarcely to be doubted that failure by a State to profess and practise some standard of consistency in its international relations would be viewed unfavourably both by other States and by any international tribunal called upon to adjudicate in a dispute in which such conduct was in issue.[363]

230. Certainly, consistency and stability of maritime boundaries are paramount to the peaceful use of the oceans and the efficient utilisation and conservation of marine resources.[364] An erratic maritime boundary line can also have dramatic consequences for the security of the relevant maritime areas. Thanks to acquiescence, "the obstacles created by the negligence of some States can be overcome".[365]

C. The evidence confirms that the Parties' conduct between 1979 and 2014 plainly satisfies the three requirements for acquiescence

231. The new evidence is also pertinent because the Parties agree that a finding of acquiescence requires: (i) "an act, course of conduct or omission by [...] one party indicative of its view of the content of the applicable legal

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362 H. Lauterpacht, "Sovereignty over Submarine Areas", *British International Yearbook of International Law*, 1950, pages 395-396.

363 I. C. MacGibbon, "Estoppel in international law", *International and Comparative Law Quarterly*, 1958, p. 469, Annex 190.

364 *See* UNCLOS, preamble.

365 Seventh Report on Unilateral Acts of States By Victor Rodríguez Cedeño, Special Rapporteur, A/CN.4/542, 22 April 2004, page 207, paragraph 189, Annex 66.

rule";[366] (ii) "the knowledge (actual or reasonably to be inferred) of the other party of such conduct or omission";[367] and (iii) "a failure by the latter party within a reasonable time to reject, or dissociate itself from, the position taken by the first".[368]

232. This Section confirms that the Parties' conduct between 1979 and 2014 plainly satisfies these three requirements for acquiescence. The evidence discussed in **Section C.1** confirms that, since 1979, Kenya's acts and course of conduct have clearly indicated that Kenya claims a maritime boundary along the Parallel of Latitude. The evidence discussed in **Section C.2** confirms that Somalia had actual knowledge of, and a duty to protest against, Kenya's claim if it wished to prevent acquiescence. The evidence discussed in **Section C.3** confirms that Somalia failed to reject, or dissociate itself from, Kenya's claim within a reasonable time.

1. Since 1979, Kenya's acts and course of conduct have clearly indicated that Kenya claims a maritime boundary along the Parallel of Latitude

233. The first requirement for a finding of acquiescence is fully satisfied.[369] Since 1979, Kenya has engaged in "act[s] [and] course[s] of conduct [...]

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366 SR, paragraph 2.6 citing *Delimitation of the Border between Eritrea and Ethiopia (Eritrea/Ethiopia)*, Award, 13 April 2002, RIAA, Vol. XXV, p. 83, page 85; KR, paragraph 44.

367 SR, paragraph 2.6 citing *Delimitation of the Border between Eritrea and Ethiopia (Eritrea/Ethiopia)*, Award, 13 April 2002, RIAA, Vol. XXV, p. 83, page 85; KR, paragraph 45.

368 SR, paragraph 2.6, citing *Delimitation of the Border between Eritrea and Ethiopia (Eritrea/Ethiopia)*, Award, 13 April 2002, RIAA, Vol. XXV, p. 83, page 85. *See also* KR, paragraphs 46-67.

369 The first requirement for a finding of acquiescence is "an act, course of conduct or omission by [...] one party indicative of its view of the content of the applicable legal rule".

indicative of its view of the content of the applicable rule".[370] That is, Kenya formally, repeatedly and publicly expressed its view that the Parties' maritime boundary follows the Parallel of Latitude. Kenya did so through official proclamations and consistent practice.

234. The most notable and obvious example of Kenya's claim to the maritime boundary was the 1979 EEZ Proclamation.[371] That Proclamation was sent to the UN and distributed to all UN Member States, including Somalia.[372] It was also published both in a 1986 official UN publication and on the website of DOALOS.[373]

235. Thereafter, Kenya routinely issued official maps picturing its northern maritime boundary at the Parallel of Latitude, consistent with its 1979 claim. These maps include:

(i) the map of Kenya Naval Command Areas of Responsibility, produced by the Kenyan Navy in 1980;[374]

See paragraph 231 above, citing *Delimitation of the Border between Eritrea and Ethiopia (Eritrea/Ethiopia)*, Award, 13 April 2002, RIAA, Vol. XXV, p. 83, page 85.

370 KR, paragraph 44; SR, paragraph 2.6, citing *Delimitation of the Border between Eritrea and Ethiopia (Eritrea/Ethiopia)*, Award, 13 April 2002, RIAA, Vol. XXV, p. 83, page 85.

371 *See* Chapter II.A, paragraph 93 above; Letter from the United Nations Secretary-General (LE 113 (3-3)), 19 July 1979, forwarded by the Permanent Mission of Kenya to the United Nations to the Ministry of Foreign Affairs (KMUN/LAW/MSC/23/18), *Proclamation of Kenya's Exclusive Economic Zone*, 25 October 1979, KCM, Annex 20.

372 *See* Chapter II.A, paragraph 94 above; KCM, paragraph 66; Letter from the United Nations Secretary-General (LE 113 (3-3)), 19 July 1979, forwarded by the Permanent Mission of Kenya to the United Nations to the Ministry of Foreign Affairs (KMUN/LAW/MSC/23/18), *Proclamation of Kenya's Exclusive Economic Zone*, 25 October 1979, KCM, Annex 20.

373 *See* Chapter II.A, paragraph 139 above; KCM, paragraphs 65-66.

374 *See* KCM, paragraph 120; Kenya Naval Command Areas of Responsibility (Map of 23 May 1980), KCM, Figure 1-12.

(ii) the map of Kenya Territorial Sea and Economic Zone produced by the Survey of Kenya in 1983;[375]

(iii) the map showing Kenya's EEZ and prospective licensing blocks for oil exploration along the Parallel of Latitude, produced by the Survey of Kenya in 1984;[376]

(iv) the map of Kenya's transport network produced by the Survey of Kenya in 1989;[377]

(v) the map of the Outer Limits of the Continental Shelf of Kenya, accompanying Kenya's 2009 submission to the CLCS;[378] and

(vi) the map of the Outer Limit of the Extended Continental Shelf of Kenya showing the Provisions of Article 76 and the Statement of Understanding invoked, which accompanied Kenya's 2009 submission to the CLCS.[379]

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375 *See* KCM, paragraph 62; Kenya Territorial Sea and Economic Zone, Survey of Kenya, SK-90 Edition 2, 1983, KCM, Figure 1-8. The same map was printed again in 1984 and 2004. *See* Kenya Territorial Sea Economic Zone Map, SK 90 Edition 3, Survey of Kenya, 1984, KCM, Annex M2; Kenya Territorial Sea Economic Zone Map, SK 90 Edition 4, Survey of Kenya, 2004, KCM, Annex M4.

376 *See* KCM, paragraphs 143-144; KR, paragraph 98; Map showing Kenya's EEZ and prospective licensing blocks for oil exploration along the Parallel of Latitude, Survey of Kenya, 1984, KCM, Figure 1-23.

377 *See* KCM, paragraph 117; Railway and Road Map, Kenya Territorial Sea/Economic Zone, Eaux Territoriales/La Zone Economique du Kenya, Kenia Landwehrmann See/Okonomisch erdgurtel, Edition 1 SK 118, Survey of Kenya, 1989, KCM, Annex M3.

378 *See* KCM, paragraph 104; The Outer Limit of the Extended Continental Shelf of Kenya, KCM, Figure 1-10.

379 *See* KCM, paragraph 104; The Outer Limit of the Extended Continental Shelf of Kenya showing the Provisions of Article 76 and the Statement of Understanding invoked, KCM, Figure 1-11.

236. Kenya also publicly and prominently acted in accordance with a latitudinal maritime boundary by, among other things:

(i) authorising fisheries up to the Parallel of Latitude;[380]

(ii) authorising marine research activities up to the Parallel of Latitude;[381] and

(iii) developing its oil concession practice in the now-disputed maritime area, including by entering into highly publicised contracts with oil operators in 2000, 2008 and 2012.[382]

237. In addition, the Kenyan Navy patrolled and intercepted vessels in both the territorial sea and the EEZ as far north as the Parallel of Latitude, for decades.[383] Military activities in the territorial sea – a zone where the coastal State enjoys full and exclusive sovereignty and jurisdiction[384] – constitute unequivocal displays of sovereignty.[385] As such, they would be precisely the form of activities that should have triggered a response from Somalia, if it had any objection to Kenya's claimed maritime boundary.[386]

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380 *See* Chapter II.A, paragraph 149 above.

381 *See* Chapter II.A, paragraph 149 above.

382 *See* Chapter II.A, paragraphs 137 and 148 above.

383 *See* Chapter II.A, paragraphs 103 and 133 above. *See also* Witness Statement of General (Ret'd) Joseph Raymond Kibwana, EGH, CBS, 11 January 2021, paragraphs 8-23, Annex WS1.

384 *See* UNCLOS, Article 2.

385 *See Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment of 19 November 2012, I.C.J. Reports 2012*, p. 624, paragraph 80 ("[t]he Court recalls that acts and activities considered to be performed *à titre de souverain* are in particular, but not limited to [...] naval patrols as well as search and rescue operations.").

386 *See Territorial Sovereignty and Scope of the Dispute (Eritrea and Yemen)*, Award, 9 October 1998, RIAA, Vol. XXII, p. 209, paragraph 307 ("the failure of Yemen to protest the considerable presence of Ethiopian naval forces around and sporadically on the Islands

238. Kenya also confirmed its maritime claims, including through:

(i) its 2005 EEZ Proclamation, which was circulated to UN Member States as well as UNCLOS States Parties and published both in the Law of the Sea Bulletin and on the website of DOALOS;[387]

(ii) depositing the 2005 EEZ Proclamation's map and precise geographical coordinates with the UN in 2006;[388]

(iii) its two *notes verbales* to Somalia in 2007[389] and 2008[390], which unambiguously mentioned that "[t]he boundaries between our two

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over a period of years is capable of other interpretations. […] If Yemen did know of this Ethiopian presence, and if, as the record shows, did not protest it, that could be interpreted as an indication that Yemen did not regard itself as having sovereignty over the Islands, or, at any rate, as an acknowledgment by Yemen that it lacked effective control over them.").

387 *See* Chapter II.A, paragraph 138 above. *See also* KCM, paragraphs 92-93; United Nations, Division for Ocean Affairs and the Law of the Sea, *Deposit by the Republic of Kenya of lists of geographical coordinates of points, pursuant to article 16, paragraph 2, and article 75, paragraph 2, of the Convention*, U.N. Doc. M.Z.N. 58.2006.LOS (25 Apr. 2006), MS, Annex 56; Kenya's 2005 EEZ Proclamation with Coordinates, *Law of the Sea Bulletin* No. 61, Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, 2006, pp. 96-97, KCM, Annex 92.

388 *See* Chapter II.A, paragraph 138 above. *See also* KCM, paragraph 92; United Nations, Division for Ocean Affairs and the Law of the Sea, *Deposit by the Republic of Kenya of lists of geographical coordinates of points, pursuant to article 16, paragraph 2, and article 75, paragraph 2, of the Convention*, U.N. Doc. M.Z.N. 58.2006.LOS (25 Apr. 2006), MS, Annex 56.

389 *See* Chapter II.A, paragraph 140 above. *See also* KR, paragraph 76; 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), KR, Annex 9.

390 *See* Chapter II.A, paragraph 141 above. *See also* KR, paragraph 78; 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), KR, Annex 12.

countries [...] have been drawn using the parallel of latitudes";[391] and

(iv) its *note verbale* to the UN Secretary-General dated 9 January 2014, which restated that "Kenya proclaimed her Exclusive Economic Zone (EEZ) through a Presidential Proclamation of June 9, 2005."[392]

239. In light of this evidence, Somalia's suggestion that Kenya grounds its acquiescence only on the 1979 (and later 2005) EEZ Proclamation must fail.[393] Somalia further argues that "Kenya's Presidential Proclamations" are "mere claims [that] cannot entail rights and obligations for other States".[394] This not only conveniently ignores Kenya's other evidence, as set forth above, but also is incorrect. The jurisprudence of international courts and tribunals leaves no doubt that the 1979 EEZ Proclamation, and all the foregoing acts and courses of conduct, are sufficient to satisfy the first requirement of acquiescence.

240. For example, in the *Temple of Preah Vihear* case, a French survey team had issued a number of maps representing parts of the boundary line. One map clearly depicted the Temple area on the French (and later Cambodian) side

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391 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), KR, Annex 12. *See also* 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), KR, Annex 9; Chapter II.A, paragraph 140 above.

392 KCM, paragraph 167; *Note Verbale* from the Permanent Mission of the Republic of Kenya to the United Nations to the Secretary-General of the United Nations, No. 7/14 (9 Jan. 2014), page 1, MS, Annex 40.

393 *See* SR, paragraph 2.51.

394 SR, paragraph 2.8.

of the boundary line.[395] These maps had been officially published and communicated to the Siamese Government. Importantly, the Court underlined that a "mere interchange between the French and Siamese Governments [...] could have sufficed in law" to trigger acquiescence.[396] However, the Court found that the Siamese Government was especially bound to react because "the maps were given wide publicity in all technically interested quarters", including "by being also communicated to the leading geographical societies in important countries, and to other circles regionally interested."[397] The same principles apply *a fortiori* to the 1979 and 2005 EEZ Proclamations and related maps, which were published and distributed to all UN Member States.

241. Similarly, in the *Honduras Borders* case, the tribunal noted that Guatemala had included the disputed area as part of its territory in several pieces of its legislation as well as on a map that had been officially published.[398] The tribunal concluded that Honduras was required to react because "th[e] assertions of authority by Guatemala [...] were public, formal acts and show clearly the understanding of Guatemala that [the disputed area] was her territory".[399] The tribunal further held that "[t]hese assertions invited opposition on the part of Honduras if they were believed to be

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395 *See Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports 1962*, p. 6, pages 20-21.

396 *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports 1962*, p. 6, page 23.

397 *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports 1962*, p. 6, page 23.

398 *See Honduras Borders* (*Guatemala, Honduras*), Award, 23 January 1933, RIAA, Vol. II, p. 1307, pages 1326-1327.

399 *Honduras Borders* (*Guatemala, Honduras*), Award, 23 January 1933, RIAA, Vol. II, p. 1307, page 1327.

unwarranted."[400] Yet again, the same reasoning applies *a fortiori* to the 1979 EEZ Proclamation and other Kenyan acts.

242. Further, where a State has made a formal claim, consistent practice in pursuance of that claim undoubtedly strengthens it. This is clear, for instance, from the award in the *Newfoundland, Labrador and Nova Scotia* case. The tribunal in that case observed that a boundary line on a map can "follow[] the line of actual exploration and exploitation based on oil concessions granted by one party and not protested by the other over a significant period of time."[401] The tribunal then confirmed the relevance of "a line established by paper acts" that is "consolidat[ed] [...] in practice by conduct referable to it".[402] Similarly, in the *Fisheries* case, this Court accepted that Norway's practice was significant because "the Norwegian authorities [had] applied [it] consistently and uninterruptedly from 1869 until the time when the dispute arose."[403]

243. Here, Kenya has proven that it publicly and prominently acted in accordance with the latitudinal maritime boundary proclaimed in its 1979 and 2005 EEZ Proclamations, including by authorising fisheries, marine

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400 *Honduras Borders* (*Guatemala, Honduras*), Award, 23 January 1933, RIAA, Vol. II, p. 1307, page 1327.

401 *Arbitration between Newfoundland and Labrador and Nova Scotia concerning portions of the limits of their offshore areas as defined in the Canada – Nova Scotia Offshore Petroleum Resources Accord Implementation Act and the Canada – Newfoundland Atlantic Accord Implementation Act*, Award of the Tribunal in the Second Phase, Ottawa, 26 March 2002, paragraph 3.5.

402 *Arbitration between Newfoundland and Labrador and Nova Scotia concerning portions of the limits of their offshore areas as defined in the Canada – Nova Scotia Offshore Petroleum Resources Accord Implementation Act and the Canada – Newfoundland Atlantic Accord Implementation Act*, Award of the Tribunal in the Second Phase, Ottawa, 26 March 2002, paragraph 3.5.

403 *Fisheries case (United Kingdom v. Norway), Judgment of 18 December 1951, I.C.J. Reports 1951*, p. 116, page 138.

research activities, granting oil and gas concessions and patrolling and intercepting vessels in both the territorial sea and the EEZ as far north as the Parallel of Latitude.[404] This certainly constitutes "a line established by paper acts" that is "consolidat[ed] [...] in practice by conduct referable to it".[405]

244. Somalia argues that Kenya's activities in the now-disputed maritime area "cannot be invoked to support the existence of a maritime boundary along a parallel of latitude"[406] because "*effectivités* cannot constitute an element to be taken into account for purposes of maritime delimitation."[407] Somalia might be referring to the use of *effectivités* in the context of the three-step methodology.[408] This is not Kenya's argument. Kenya's argument is that its consistent practice on the ground should be taken into account as part of its "course of conduct [...] indicative of its view of the content of the applicable legal rule".[409]

245. Somalia also seeks to undermine the legal significance of Kenya's oil concession practice by referring to the *Guyana v. Suriname* award.[410] Somalia cites to a paragraph of the award referring to oil concessions used

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404 *See*, e.g., Chapter II.A, paragraphs 133-149 above.

405 *Arbitration between Newfoundland and Labrador and Nova Scotia concerning portions of the limits of their offshore areas as defined in the Canada – Nova Scotia Offshore Petroleum Resources Accord Implementation Act and the Canada – Newfoundland Atlantic Accord Implementation Act*, Award of the Tribunal in the Second Phase, Ottawa, 26 March 2002, paragraph 3.5.

406 SR, paragraph 2.55.

407 SR, paragraph 2.52.

408 *See* SR, paragraph 2.52.

409 *Delimitation of the Border between Eritrea and Ethiopia (Eritrea/Ethiopia)*, Award, 13 April 2002, RIAA, Vol. XXV, p. 83, page 85.

410 *See* SR, paragraph 2.53.

as relevant circumstances under the three-step methodology. This is also entirely irrelevant to acquiescence. In fact, in this same award, the tribunal cited to several cases supporting the argument that oil concessions practices may serve as indicia "available of the line or lines which the parties themselves may have considered equitable or acted upon as such".[411] Here, Kenya's activities in the now-disputed maritime area, including its oil concessions practice, consolidated and confirmed its view on the maritime boundary.

246. There can be no real doubt that Kenya's acts and course of conduct satisfied the legal requirements set forth above. The 1979 EEZ Proclamation, by itself, was an official proclamation of international importance. After its issuance, Kenya conducted itself entirely consistently with its maritime claims, on many occasions (including, in 2005 onwards, through a further Proclamation and *notes verbales* to Somalia). The facts establish, beyond any doubt, that Kenya's acts and course of conduct were consistent, uninterrupted and set forth its legal position.

247. Finally, despite Somalia's protestations, this is not a case where internal legislation alone was relied on without "official proclamation or any other publication", such as in the *Gulf of Maine* case.[412] Far less is this a case resembling *Tunisia v. Libya*, where both parties relied on internal legislation

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411 *Arbitration regarding the delimitation of the maritime boundary between Guyana and Suriname*, Award, 17 September 2007, RIAA, Vol. XXX, p. 1, paragraphs 381-384, citing *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment of 24 February 1982, I.C.J. Reports 1982*, p. 18, paragraph 118; *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment of 3 June 1985, I.C.J. Reports 1985*, p. 13, paragraph 25.

412 *Delimitation of the Maritime Boundary in the Gulf of Maine (Canada v. United States of America), Judgment of 12 October 1984, I.C.J. Reports 1984*, p. 246, paragraph 134.

alone.[413] To the contrary, Kenya's acts were – by design – intended to be international declarations of its rights, including through two EEZ Proclamations sent to the UN and distributed to all UN Member States. Somalia cannot pretend that EEZ Proclamations sent using the established mechanisms for international distribution are mere internal claims.[414] Indeed, when Somalia declared its own EEZ in 2014, it did so using the precise same mechanisms as Kenya.[415]

248. Nor can Somalia suggest, as it attempts to, that Kenya conducted itself in any manner that was inconsistent with its declared EEZ rights, including by conceding the absence of a maritime boundary.[416] This position is simply illogical: having declared the EEZ in 1979, there was no reason for Kenya to deviate from its established maritime boundary. Nor did Kenya do so.

249. As an initial matter, Somalia notes that other international actors (though these never include Somalia itself) did not acknowledge the maritime boundary as the Parallel of Latitude.[417] Somalia engages in questionable "hindsight" analysis to suggest that certain statements show that the

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413 *See Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment of 24 February 1982, I.C.J. Reports 1982*, p. 18, paragraph 92.

414 *See* SR, paragraph 2.8 ("Kenya's Presidential Proclamations are mere claims. They cannot entail "rights and obligations for other States", as Kenya would have them do.").

415 *See* Federal Republic of Somalia, Office of the President, *Proclamation by the President of the Federal Republic of Somalia* (30 June 2014), MS, Annex 14; Federal Republic of Somalia, *Outer Limit of the Exclusive Economic Zone of Somalia* (30 June 2014), MS, Annex 15; United Nations, Division for Ocean Affairs and the Law of the Sea, *Deposit by the Federal Republic of Somalia of a list of geographical coordinates of points, pursuant to article 16, paragraph 2 and article 75, paragraph 2 of the Convention*, U.N. Doc. M.Z.N. 106.2014.LOS (3 July 2014), MS, Annex 68.

416 *See* SR, paragraph 2.33.

417 *See* SR, paragraphs 2.46-2.49.

maritime boundary was not settled.[418] From a 30-odd-year history, it can find and cite only the following three instances:

(i) a very general statement from the 2011 UN Security Council Resolution 1976 that "emphasizes the importance of the earliest possible delimitation of Somalia's maritime spaces",[419] without any indication that the delimitation in question concerned Kenya and at a time when Somalia had neither claimed an EEZ nor delimited its maritime boundaries with Djibouti and Yemen;[420]

(ii) a 2011 *note verbale* from Norway to the UN in which Norway mentions "the future delimitation of maritime boundaries" between Somalia and Kenya;[421] and

(iii) the 2013 UN Monitoring Group Report that mentions a "conflict between Somalia and Kenya over the maritime boundary".[422]

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418 SR, Chapter II.E.

419 SR, paragraph 2.46, citing UN Security Council Resolution 1976 (2011), S/RES/1976, 11 April 2011, p. 3, KCM, Annex 95. (Emphasis omitted).

420 Somalia claimed its EEZ for the first time on 30 June 2014. Somalia's EEZ Proclamation triggered protest by Yemen and Djibouti. Both countries sent formal protests to the UN, claiming that Somalia's claimed EEZ extends over waters that are under their sovereignty and jurisdiction. Federal Republic of Somalia, Office of the President, *Proclamation by the President of the Federal Republic of Somalia* (30 June 2014), MS, Annex 14; Letter from the Permanent Mission of the Republic of Yemen to the UN addressed to Legal Affairs Division for Ocean Affairs and the Law of the Sea, ROY/047/SANAA/7.14, 25 July 2014, Annex 24; Letter from the Permanent Mission of the Republic of Yemen to the UN addressed to Legal Affairs Division for Ocean Affairs and the Law of the Sea, ROY/097/SANAA/12.14, 10 December 2014, Annex 25; *Note verbale* from the Permanent Mission of the Republic of Djibouti to the UN, DJSU/4-1, 31 January 2017, Annex 26.

421 SR, paragraph 2.47; *Note verbale* from the Permanent Mission of Norway to the United Nations to the Secretariat of the United Nations, 17 August 2011, KPO, Annex 4.

422 SR, paragraph 2.48; United Nations Monitoring Group on Somalia and Eritrea, *Report of the Monitoring Group on Somalia and Eritrea pursuant to Security Council Resolution*

250. But these examples only confirm Somalia's failure to object. The fact that third parties might have suggested, in passing, that the maritime boundary was not formalised through a treaty merely demonstrates that Somalia could and should have rejected Kenya's claim if it wished to prevent acquiescence. For at least 35 years, it never did.

251. Somalia also relies on occasions when Kenya sought to formalise the maritime boundary though a treaty as alleged proof of the lack of acquiescence.[423] However, as this Court has confirmed, a State's willingness to negotiate a formal, written agreement cannot invalidate the legal effects of another State's acquiescence.[424]

252. In *Peru v. Chile*, the Court found that the parties had reached a tacit agreement as to their maritime boundary before 1954.[425] In 1986, Peru sent a memorandum to Chile, asking to discuss "the formal and definitive delimitation of the [parties'] marine spaces".[426] Peru contended that this memorandum evidenced that the maritime boundary between the parties had not been settled as of 1986. The Court rejected Peru's argument and concluded that the language of the memorandum could not affect the parties' pre-existing agreement.[427]

2060 (2012): Somalia, U.N. Doc. S/2013/413 (12 July 2013), paragraph 27, MS, Annex 64.

423 *See* SR, paragraphs 2.35-2.43.

424 *See* KR, paragraph 85.

425 *See Maritime Dispute (Peru v. Chile), Judgment of 27 January 2014, I.C.J. Reports 2014*, p. 3, paragraph 91.

426 *Maritime Dispute (Peru v. Chile), Judgment of 27 January 2014, I.C.J. Reports 2014*, p. 3, paragraph 141.

427 *See Maritime Dispute (Peru v. Chile), Judgment of 27 January 2014, I.C.J. Reports 2014*, p. 3, paragraph 141.

253. Similarly, in *Pedra Branca/Pulau Batu Puteh*, the parties conducted two rounds of consultations before submitting their dispute to the Court.[428] These consultations did not prevent the Court from concluding that Malaysia had already acquiesced in Singapore's sovereignty claim.[429] Somalia itself acknowledges the difference between the existence of an agreement and its formalisation.[430]

254. Somalia's arguments merely confirm this Court's prior findings. For example, Somalia relies on one isolated statement made in 1980 by the Kenyan Representative to the UNCLOS negotiations.[431] However, in that speech, the Kenyan Representative explained that "with regard to [the Kenyan] boundary with Somalia [...] we had to take into account the equitable principle of putting a parallel line".[432] Properly considered, this speech is yet another act indicating Kenya's legal position on the maritime boundary, to which Somalia simply never objected.

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428 *See Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge* (*Malaysia/Singapore*), Memorial of Singapore, 25 March 2004, paragraphs 4.8-4.9.

429 *See Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, Judgment of 23 May 2008, I.C.J. Reports 2008, p. 12, paragraph 276.

430 *See* SR, paragraph. 2.38.

431 *See* SR, paragraph 2.35, citing Republic of Kenya, *The National Assembly Official Report: Fourth Parliament Inaugurated*, Vol. LII, 4th December 1979 First Session, Tuesday, 4th December 1979, Second Session, Tuesday, 4th December 1979 to Wednesday, 18th June 1980, Records of 27 May 1980, col. 1281, KCM, Annex 5 ("[a]lthough this subject of delimitation is s[t]ill [*sic*] being discussed, as far as we are concerned here in Kenya, this point is for the purpose of the proposed convention [...].").

432 Republic of Kenya, *The National Assembly Official Report: Fourth Parliament Inaugurated*, Vol. LII, 4th December 1979, First Session, Tuesday, 4th December 1979, Second Session, Tuesday, 4th December 1979 to Wednesday, 18th June 1980, Records of 22 May 1980, col. 1225, KCM, Annex 5.

255. In all events, even Somalia's mistaken interpretation of this event is easily refuted: Kenya does not claim that by 1980 all requirements for acquiescence had been meet. Nor does acquiescence fail simply because, fifteen months after the 1979 EEZ Proclamation, one representative declared before the Kenyan Parliament that "this subject of delimitation is still being discussed" and that "this point is for the purpose of the proposed convention".[433] Somalia initiated this proceeding in 2014, 35 years after the 1979 EEZ Proclamation. The position in 1980 is hardly indicative of Somalia's acquiescence after the course of three-and-a-half decades. At best, the statement would evidence Kenya's good faith openness to further negotiations with Somalia at the time it made its 1979 EEZ Proclamation and for a reasonable time thereafter.[434]

256. Next, Somalia argues that Kenya's 1989 Maritime Zones Act contradicts Kenya's claim.[435] Somalia argues that Article 4(4) of this Act "sets out that delimitation with Somalia can be done only by agreement."[436] Somalia misrepresents the content and significance of Article 4(4). That Article states that:

> [t]he northern boundary of the exclusive economic zone with Somalia shall be delimited by notice in the *Gazette* by the Minister pursuant to an agreement between Kenya and Somalia on the basis of international law.[437]

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433 SR, paragraphs 2.34-2.35; Republic of Kenya, The National Assembly Official Report: Fourth Parliament Inaugurated, Vol. LII, 4th December 1979, First Session, Tuesday, 4th December 1979, Second Session, Tuesday, 4th December 1979 to Wednesday, 18th June 1980, Records of 22 May 1980, col. 1225, KCM, Annex 5.

434 *See* paragraph 254 above.

435 *See* SR, paragraphs 2.36-2.38.

436 SR, paragraph 2.38.

437 Republic of Kenya, Chapter 371, *Maritime Zones Act* (25 Aug. 1989), Article 4(4), MS, Annex 20.

257. This Article only confirms Kenya's anticipation that its boundary with Somalia may be further formalised. Article 4(4) of the Act only means that, as a matter of Kenyan law, the agreement between Kenya and Somalia should be formally published "in the *Gazette* by the Minister". And, as demonstrated in **Section II.B**, acquiescence is a well-established form of "agreement" reached "on the basis of international law".

258. Kenya's 2007 and 2008 *notes verbales* are other examples that Kenya was willing to enter into a written agreement setting forth the established boundary, at the Parallel of Latitude. The 2007 *note verbale* unambiguously stated that "[t]he boundaries between our two countries however have been drawn using the parallel of latitudes".[438] It also "request[ed] the Transitional Federal Government of Somalia [...] to confirm [...] that [it] agrees with the way the maritime boundaries between the two countries are drawn".[439]

259. The 2008 *note verbale* equally referred to the maritime boundary at the Parallel of Latitude and requested "the Transitional Federal Government of Somalia [...] to state [...] that [...] Somalia agrees with the maritime boundaries between the two countries as drawn and deposited with the United Nations".[440] These statements clearly confirm that Kenya considered that the maritime boundary had already been "drawn" pursuant

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438 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), KR, Annex 9.

439 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), KR, Annex 9.

440 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), KR, Annex 12.

to Kenya's previous proclamations. Kenya's *notes verbales* are therefore fully compatible with its acquiescence claim, particularly given that Somalia failed to reject the statements made by Kenya in those *notes verbales*.

260. Somalia next claims that the provisions of the 2009 MOU "contradict Kenya's suggestion that the Parties had delimited their maritime boundary" because the 2009 MOU refers to a "future delimitation".[441] This argument also must fail. As demonstrated in **Section II.A.2**, the 2009 MOU was prepared by Norway for the sole purpose of allowing the Parties to make their submissions to the CLCS.[442] Both Norway and this Court confirmed that the 2009 MOU did not concern the issue of maritime delimitation.[443]

261. Indeed, Somalia itself claimed that the 2009 MOU was "intended solely to facilitate the Commission's delineation of the continental shelf beyond 200 M—a process that has no connection with or implications for the territorial sea, EEZ or continental shelf up to 200M".[444] By arguing now that the 2009 MOU did have "implications" for the maritime delimitation, Somalia is changing positions in relation to a matter that was material for this Court's earlier adjudication. Moreover, as explained above, Kenya could very well negotiate the 2009 MOU without questioning the validity of its 1979 EEZ

441 SR, paragraph 2.22.

442 *See* Chapter II.A, paragraphs 142 and 144 above. *See also Maritime Delimitation in the Indian Ocean (Somalia v. Kenya), Preliminary Objections, Judgment of 2 February 2017, I.C.J. Reports 2017*, p. 3, paragraph 101.

443 *See* Chapter II.A, paragraphs 142, 144 and 145 above. *See also Maritime Delimitation in the Indian Ocean (Somalia v. Kenya), Preliminary Objections, Judgment of 2 February 2017, I.C.J. Reports 2017*, p. 3, paragraphs 101, 105.

444 SPO, paragraph 1.7.

Proclamation.[445] What is more, the 2009 MOU does not include any express protest by Somalia against the latitudinal boundary, let alone a claim to an alternative maritime boundary. Indeed, the language of the 2009 MOU stands in stark contrast with Somalia's actual objection to Kenya's claims in 2014.[446] Further emphasising the contrast between the rationale underlying Somalia's actions in 2009 and 2014, Somalia's actual objection in 2014 expressly rejected the validity of the 2009 MOU.[447]

262. Somalia also claims that, in 2012, "Kenya's Ministry of Foreign Affairs stated that the absence of an agreement on the boundary was a problem for Kenya's maritime ambitions".[448] This informal statement, expressed in a hearsay media report, does not evidence that the Ministry did not believe that there was an agreement by acquiescence. The 2007 and 2008 *notes verbales* plainly set forth Kenya's position in that regard. As reported in the media, the Minister was only referring to the lack of a formalised written statement of the already agreed maritime boundary. Somalia's numerous changes of position in the last few years indeed confirm that a written agreement would have been safer for all parties involved. The media report

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445 *See* paragraphs 142 and 146 above.

446 *See Letter* from the Permanent Mission of the Somali Republic to the United Nations to H.E. Ban Ki-Moon, Secretary-General of the United Nations, No. SOM/MSS/253/14 (2 Sept. 2014), MS, Annex 48 ("Somalia has expressly rejected Kenya's claim […] [t]he alleged memorandum of understanding, ratification of which was rejected by the Transitional Federal Parliament of Somalia […] lacks legal force and does not impose obligations on either party").

447 *See Letter* from the Permanent Mission of the Somali Republic to the United Nations to H.E. Ban Ki-Moon, Secretary-General of the United Nations, No. SOM/MSS/253/14 (2 Sept. 2014), MS, Annex 48 ("Somalia has expressly rejected Kenya's claim […] [t]he alleged memorandum of understanding, ratification of which was rejected by the Transitional Federal Parliament of Somalia […] lacks legal force and does not impose obligations on either party").

448 SR, paragraph 2.39.

was right: the absence of a written agreement on the boundary and, more specifically, Somalia's opportunistic *volte-face* have proven to be a problem for Kenya.

263. Somalia's assertion that the 2014 negotiations between the Parties prove "the absence, rather than the existence, of a maritime boundary" must also fail.[449] Somalia's reliance on Kenya's conduct during the 2014 negotiations betrays its misunderstanding of the concept of acquiescence and of the international law obligations applicable to parties in negotiations. What matters is whether acquiescence existed before the crystallisation of the Parties' dispute, which occurred on 4 February 2014.[450]

264. Further, in the 2014 negotiations, Kenya adopted a conciliatory and open attitude to discussion. This cannot work to Kenya's detriment. As this Court has noted, the legal obligation in negotiations is to "conduct [oneself so] that negotiations are meaningful, which will not be the case when either [State] insisted upon its own position without contemplating any modification".[451]

265. Somalia claims that the 2014 negotiations are "telling" because they "do not show […] any reference by Kenya to an agreed or acquiesced boundary."[452] This is simply untrue. The Joint Report of the 2014

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449 SR, paragraph 2.33.

450 *See* KR, paragraphs 48-51. For the same reason, Somalia cannot pretend to rely on an October 2014 presentation from Director of Kenya's International Boundaries Office and Chairperson of the Taskforce on Delineation of Kenya's Outer Continental Shelf, Mrs Juster Nkoroi E.B.S. *See* SR, paragraphs 2.41-2.43.

451 *Continental Shelf cases*, ICJ Reports 1969, 3, paragraph 85. *See also* KR, paragraph 85.

452 SR, paragraph 2.33.

discussions makes clear that Kenya entered these negotiations with the view that:

> the Government of Kenya established her maritime zones in accordance with UNCLOS and taking the initiative by the two countries to initiate discussion on the same ***and finalizing on an agreed maritime boundary***.[453] (Emphasis added).

266. "Finalizing" means consolidating an existing agreed boundary that was already established by international law. Indeed, Kenya's position on the maritime boundary was already very clear in March 2014, when the Parties initiated these negotiations.[454]

267. Kenya's position was clearly set out in its 2007 and 2008 *notes verbales*.[455] On 9 January 2014, Kenya sent another *note verbale* to the UN Secretary-General, for general distribution to all UN Member States including Somalia, to "convey general information on Kenya's terrestrial and maritime boundaries."[456] In that *note verbale*, Kenya stated that it "ha[d] proclaimed her Exclusive Economic Zone (EEZ) through a Presidential Proclamation of June 9, 2005". Kenya added that it "ha[d] exercised and w[ould] continue to exercise sovereignty and jurisdiction over the said

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453 Government of Somalia and Government of Kenya, *Joint Report on the Kenya-Somali Maritime Boundary Meeting, 26-27 Mar. 2014* (1 Apr. 2014), page 5, MS, Annex 31.

454 *See* KR, paragraph 83.

455 *See* KR, paragraphs 76-78 and 83; 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), KR, Annex 9; 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), KR, Annex 12.

456 KR, paragraph 83; *Note Verbale* from the Permanent Mission of the Republic of Kenya to the United Nations to the Secretary-General of the United Nations, No. 7/14 (9 Jan. 2014), page 1, MS, Annex 40.

area".[457] In addition, the Joint Report of the March 2014 negotiations confirms that, from the outset of the negotiations, the Kenyan delegation insisted that the 1979 EEZ Proclamation had adopted the Parallel of Latitude as boundary line, "in the spirit of the discussions and negotiations which were underway on UNCLOS III and State practice".[458] Therefore, both right before and during the 2014 negotiations, there was no ambiguity as to the fact that Kenya considered the Parallel of Latitude as the settled maritime boundary between the Parties.

268. The reality is that Somalia's alleged inconsistencies in Kenya's position are just a handful of statements that do not contradict Kenya's clear and repeated claims to a maritime boundary along the Parallel of Latitude. As the jurisprudence of the Court confirms, those alleged inconsistencies lack any legal relevance.

269. Indeed, in the *Fisheries* case, the Court noted that "too much importance need not be attached to the few uncertainties or contradictions, real or apparent, which the United Kingdom Government claims to have discovered in Norwegian practice".[459] The Court added that "it is impossible to rely upon a few words [...] to draw the conclusion that the Norwegian Government had abandoned a position which its earlier official documents had clearly indicated."[460] That reasoning applies with greater

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457 KR, paragraph 83; *Note Verbale* from the Permanent Mission of the Republic of Kenya to the United Nations to the Secretary-General of the United Nations, No. 7/14 (9 Jan. 2014), pages 1-2, MS, Annex 40.

458 KCM, paragraphs 174 – 176; KR, paragraph 83; Government of Somalia and Government of Kenya, Joint Report on the Kenya-Somali Maritime Boundary Meeting, 26-27 Mar. 2014 (1 Apr. 2014), page 3, MS, Annex 31.

459 *Fisheries case (United Kingdom v. Norway), Judgment of 18 December 1951, I.C.J. Reports 1951*, p. 116, page 138.

460 *Fisheries case (United Kingdom v. Norway), Judgment of 18 December 1951, I.C.J. Reports 1951*, p. 116, page 138.

force in this case. None of the isolated statements that Somalia has cherry-picked from a period of over 35 years leads to the conclusion that Kenya had abandoned a position which it indicated clearly in the 1979 and 2005 EEZ Proclamations and other official documents.

270. The above demonstrates that, since 1979, Kenya's acts and course of conduct have clearly indicated that Kenya claims a maritime boundary along the Parallel of Latitude. There was thus no ambiguity that Kenya's official view on the maritime boundary called for a response from Somalia to prevent acquiescence.

2. Somalia had both full knowledge of Kenya's claim and a duty to protest against it if it wished to prevent acquiescence

271. The second requirement for a finding of acquiescence is also fully satisfied.[461] It is beyond doubt that Somalia had full "knowledge" of Kenya's claim to a maritime boundary along the Parallel of Latitude. Therefore, Somalia had a duty to protest against that claim if it wished to prevent acquiescence.

(i) Somalia had full "knowledge" of Kenya's claim to a maritime boundary along the Parallel of Latitude

272. A finding of acquiescence requires that Somalia's knowledge of Kenya's claim be "actual" or "reasonably [...] inferred".[462] In this case, nothing even

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461 The second requirement for a finding of acquiescence is "the knowledge (actual or reasonably to be inferred) of the other party of such conduct or omission". *See* paragraph 231 above, citing *Delimitation of the Border between Eritrea and Ethiopia (Eritrea/Ethiopia)*, Award, 13 April 2002, RIAA, Vol. XXV, p. 83, page 85.

462 Paragraph 231 above. *See also Delimitation of the Border between Eritrea and Ethiopia (Eritrea/Ethiopia)*, Award, 13 April 2002, RIAA, Vol. XXV, p. 83, page 85, paragraph

needs to be inferred. A State cannot plead ignorance when it has received direct notification of a claim or fact.[463] And Kenya has already demonstrated that Somalia received formal and direct notifications of Kenya's boundary claim. Somalia received such notifications on, at least, the following six occasions:

(i) in July 1979, when the UN Secretary-General transmitted the 1979 EEZ Proclamation to all Permanent Missions of UN Member States;[464]

(ii) in April 2006, when the UN Secretary-General transmitted the 2005 EEZ Proclamation to all UN Member States and States Parties to UNCLOS;[465]

(iii) on 26 September 2007, when Kenya sent a first *note verbale* to Somalia;[466]

3.9. *See also Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgement of 15 June 1962, I.C.J. Reports 1962*, p. 6, page 23.

463 Kenya has already underlined that the effect of a direct notification is "celui de porter légalement les faits qui en sont l'objet à la connaissance de l'Etat à qui elle est adressée, de sorte que cet Etat ne pourra plus en alléguer l'ignorance". KCM, paragraph 218 citing D. Anzilotti, *Cours de droit international* (Sirey, 1929), page 347, KCM, Annex 116.

464 *See* Chapter II.A, paragraph 139 above. *See also* KCM, paragraph 64; Letter from the United Nations Secretary-General (LE 113 (3-3)), 19 July 1979, forwarded by the Permanent Mission of Kenya to the United Nations to the Ministry of Foreign Affairs (KMUN/LAW/MSC/23/18), *Proclamation of Kenya's Exclusive Economic Zone*, 25 October 1979, KCM, Annex 20.

465 *See* Chapter II.A, paragraph 139 above. *See also* KCM, paragraph 92; Letter from the Office of Legal Affairs of the United Nations to the Permanent Mission of the Republic of Kenya to the United Nations, received 8 November 2017, KCM, Annex 65.

466 *See* Chapter II.A, paragraph 140 above. *See also* KR, paragraphs 76-77; 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), KR, Annex 9.

(iv) on 4 July 2008, when Kenya sent a second *note verbale* to Somalia;[467]

(v) in 2009, when the UN Secretary-General circulated the Executive Summary of Kenya's CLCS submission to all UNCLOS Member States;[468] and

(vi) in January 2014, when Kenya sent a *note verbale* to the UN Secretary-General and asked that it be circulated to all UN Member States.[469]

273. Somalia thus cannot deny its "actual" knowledge of Kenya's maritime boundary claim. This, by itself, is all that is required to confirm that the second requirement for acquiescence has been met in this case.

274. However, Kenya did do more. Indeed, Somalia's knowledge of Kenya's acts and course of conduct can also be inferred from both Parties' conduct. Among other things:

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467 *See* Chapter II.A, paragraph 141 above. *See also* KR, paragraph 78; 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), KR, Annex 12.

468 *See* Chapter II.A, paragraph 147 above. *See also* KCM, paragraph 105; Republic of Kenya, *Submission on the Continental Shelf Submission beyond 200 nautical miles to the Commission on the Limits of the Continental Shelf: Executive Summary* (Apr. 2009), MS, Annex 59.

469 *See* KCM, paragraphs 167-168; *Note Verbale* from the Permanent Mission of the Republic of Kenya to the United Nations to the Secretary-General of the United Nations, No. 7/14 (9 Jan. 2014), page 1, MS, Annex 40.

(i) Somalia consented to and had access to the results of the survey of Kenyan fisheries performed by the Dr Fridtjof Nansen Program in the early 1980s;[470]

(ii) Somalia was, or should have been aware (because it was public) that, in July 2000, Kenya signed a PSA with Star Petroleum International (Kenya) Limited for Block L-5, which lies along the Parallel of Latitude;[471]

(iii) Somalia was, or should have been aware (because it was public) of Woodside's first drilling in the now-disputed maritime area in 2006-2007.[472] Somalia itself indicated in its Memorial that "the well turned up dry";[473]

(iv) Somalia was, or should have been aware (because it was public) that in 2008 Kenya awarded Block L-13, which lies on both sides of the

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470 *See* Chapter II.A, paragraph 108 above. The results of this survey were published by the UN FAO and the UN Development Programme and thus widely available. *See also* KCM, paragraph 133; KR, paragraph 93.

471 *See* MS, paragraph 8.21. *See also* Chapter II.A, paragraph 137 above; KCM, paragraph 148; Production Sharing Contract between the Government of the Republic of Kenya and Star Petroleum International (Kenya) Limited for Block L-5 Lamu Basin, 11 July 2000, KCM, Annex 39.

472 *See* MS, paragraph 8.21. *See also* Chapter II.A, paragraph 137 above; KCM, paragraphs 151-152; Kenya Offshore Exploration Drilling Blocks L-5 and L-7, Environmental Audit Report, Woodside, March 2007, KCM, Annex 111.

473 MS, paragraph 8.21, referring to Republic of Kenya, National Assembly, *Official Report* (24 Apr. 2007), page 858, MS, Annex 26; Republic of Kenya, National Assembly, *Official Report* (8 Aug. 2007), page 3057, MS, Annex 27.

equidistance line now proposed by Somalia, to Sohi-Gas Dodori Limited;[474]

(v) Somalia was, or should have been aware (because it was public) that Kenya offered a contract for surface exploration and drilling of Block L-5 to Anadarko Kenya Corporation in 2009;[475] and

(vi) Somalia was, or should have been aware (because it was public) that in 2012 Kenya awarded to Eni S.p.A Blocks L-21, L-23 and L-24, which lie predominantly on the Somali side of the equidistance line.[476]

275. In fact, Somalia's knowledge of Kenya's claim to the latitudinal boundary is confirmed by its own behaviour. For many years, Somalia limited its own activities to that boundary. The following are some pertinent examples:

(i) in 1979, Somalia adjusted its oil exploration blocks by abandoning an oil concession block that followed the equidistance line;[477]

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474 *See* MS, paragraph 8.20. *See also* Chapter II.A, paragraph 148 above; KR, paragraph 99; Production Sharing Contract between the Government of the Republic of Kenya and Sohi-Gas Dodori Ltd Relating to Block L13 (3 September 2008), KR, Annex 1.

475 *See* MS, paragraph 8.22 citing IHS Inc., EDIN Database, *Kenya: Contracts Block L-05/Block L05* (2015), MS, Annex 133. *See also* Nina Rach, "Kenya forges ahead", *oedigital.com* (1 July 2013), MS, Annex 113; Deloitte, "Kenya", in THE DELOITTE GUIDE TO OIL AND GAS IN EAST AFRICA: UNIQUELY STRUCTURED (2014), page 10, MS, Annex 116; Anadarko Petroleum Corporation, *Second-Quarter 2013 Operations Report* (29 July 2013), page 13, MS, Annex 115.

476 *See* MS, paragraph 8.24. *See also* Chapter II.A, paragraph 148 above; KCM, paragraph 153; Production Sharing Contract between the Government of the Republic of Kenya and Eni Exploration and Production Holding B.V. relating to Block L21, 29 June 2012, Extracts, KCM, Annex 42.

477 *See* Chapter II.A, paragraph 105 above. *See also* KCM, paragraphs 141 and 266; KR, paragraph 95; P. Giorgio Scorcelletti and B. M. Abbott, Petroleum Developments in

(ii) in the 1980s, Somalia's Fisheries Development Region 1 was cut off at the Parallel of Latitude;[478]

(iii) in 1987, Somalia authorised and participated in the Georgy Ushakov survey, which studied fisheries positions along the Parallel of Latitude;[479]

(iv) the area covered by the SOA that Somalia concluded with Soma Oil & Gas in August 2013 stopped at the Parallel of Latitude;[480] and

(v) in February 2014, Soma Oil & Gas entered into a seismic exploration contract with Seabird Exploration that stopped seismic testing at the Parallel of Latitude.[481]

276. In sum, Somalia simply cannot deny that it had full knowledge of Kenya's claim that the maritime boundary followed the Parallel of Latitude. As

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Central and Southern Africa in 1978, *The American Association of Petroleum Geologists Bulletin* V. 63, No. 10, pp. 1689-1742, October 1979, at p. 1694, KCM, Annex 104; Somali Concession Blocks for the year 1986, KCM, Figure 1-21; Somali Republic Concessions and Key 1987 Wells, KCM, Figure 1-34; Somali Republic Concessions and Key 1988 Wells, KCM, Figure 1-35.

478 *See* Chapter II.A, paragraph 107 above. *See also* KCM, paragraph 129; KR, paragraphs 89; Fishery Development Regions of Somalia, KCM, Figure 1-14.

479 *See* Chapter II.A, paragraph 107 above. *See also* KCM, paragraphs 131-132; KR, paragraphs 91-92; Yearly Fisheris [*sic*] and Marine Transport Report 1987/1988, Somali Democratic Republic, Ministry of Fisheries and Marine Transport, KCM, Annex 50; 1987 Ushakov Fishery Survey Locations, KCM, Figure 1-16.

480 *See* Chapter II.A, paragraphs 199 and 203 above. *See also* KCM, paragraph 160; Unlocking Somalia's Potential, Eastern African Oil, Gas – LNG Energy Conference, Soma Oil & Gas Presentation, Nairobi, Kenya, 29-30 April 2014, KCM, Annex 112.

481 *See* Chapter II.A, paragraph 203 above. *See also* KCM, paragraph 160; KR, paragraph 96; Unlocking Somalia's Potential, Eastern African Oil, Gas – LNG Energy Conference, Soma Oil & Gas Presentation, Nairobi, Kenya, 29-30 April 2014, KCM, Annex 112.

explained below, Somalia therefore had a duty to protest against that claim if it wished to prevent acquiescence.

(ii) Somalia had a duty to protest against Kenya's claim if it wished to prevent acquiescence

277. Somalia claims that its position in favour of the equidistance line dates back to the 1970s.[482] By Somalia's own admission, Kenya's claim to a maritime boundary along the Parallel of Latitude therefore had the potential to affect some of Somalia's crucial interests. Indeed, Somalia has referred in this proceeding to the presence of "substantial living and non-living resources" in the now-disputed maritime area.[483] In fact, Somalia has expressly described them as "important marine and mineral resources which Somalia views as keys to its economic development, stability and security".[484] Further, Somalia has taken a clear interest in law of the sea developments, both during UNCLOS III and thereafter. Notably, at the time Kenya notified its formal claim in 1979, Somalia was deeply involved in the drafting of UNCLOS.[485]

278. In these circumstances, it is undeniable that Somalia had a duty to protest against Kenya's claim if it wished to prevent acquiescence. Indeed, international jurisprudence makes clear that the more a claim directly affects the interests of a State, the more that State is required to protest in order to prevent acquiescence.

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482 *See* SR, paragraph 2.97.

483 MS, paragraph 1.8.

484 MS, paragraph 1.14.

485 *See* KCM, paragraphs 71-76.

279. For instance, in the *Fisheries* case, the United Kingdom claimed to be unaware of the Norwegian system of delimitation.[486] The Court rejected this argument. It found that, as a coastal State "greatly interested in the fisheries in this area" and "traditionally concerned with the law of the sea", the United Kingdom "could not have been ignorant" of Norway's position on the delimitation of its maritime space.[487] Applying the same reasoning to this case, as a coastal State that both was involved in law of the sea developments and had strong interests in the resources present in the relevant maritime area, Somalia simply "could not have been ignorant" of Kenya's 1979 EEZ Proclamation and all other relevant actions described above.

280. In addition, in the *Honduras Border* case, the Court stated that:

> [i]f it had been considered that Honduras was being deprived of territory to which she was entitled, and especially that Guatemala was asserting authority over territory which was, or prior to independence had been, under the administrative control of Honduras, it can hardly be doubted that these assertions by Guatemala would have aroused immediate antagonism and would have been followed by protest and opposition on the part of Honduras.[488]

281. Similarly, in the *Temple of Preah Vihear* case, the Court concluded that Thailand should have reacted "in the face of an obvious rival claim" to

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486 *See Fisheries case (United Kingdom v. Norway), Judgment of 18 December 1951, I.C.J. Reports 1951*, p. 116, page 138.

487 *Fisheries case (United Kingdom v. Norway), Judgment of 18 December 1951, I.C.J. Reports 1951*, p. 116, page 139.

488 *Honduras Borders* (*Guatemala, Honduras*), Award, 23 January 1933, RIAA, Vol. II, p. 1307, page 1328.

sovereignty over the Temple area.[489] As the Court explained, the failure to react to such a claim meant that "either Siam did not in fact believe she had any title [...] or else she decided not to assert it, which again means that she accepted the French claim, or accepted the frontier at Preah Vihear as it was drawn on the map."[490]

282. As noted above, Somalia argues in this proceeding that its claim to a maritime boundary along the equidistance line dates back to the 1970s.[491] Therefore, the Court's reasoning in the above cases applies with equal force to Somalia's failure to react to the multiple "obvious rival" claims that Kenya has formally and publicly made since 1979 to a maritime boundary along the Parallel of Latitude.

3. Somalia failed to protest against Kenya's claim within a reasonable time

283. The third and last requirement for a finding of acquiescence is also fully satisfied. Somalia completely failed "within a reasonable time to reject, or dissociate itself from" Kenya's claim.[492] Yet, it had the capacity and numerous opportunities to do so.

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489 *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports 1962*, p. 6, page 31.

490 *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports 1962*, p. 6, page 31.

491 *See* paragraph 277 above. *See also* SR, paragraph 2.97.

492 KCM, paragraphs 242-247; KR, paragraph 32.

(i) Public international law requires objections to State claims to be timely, formal, precise, effective and persistent

284. Kenya has proved that the Parties' conduct meets the first two requirements for a finding of acquiescence. It also has proven that Somalia failed to protest against Kenya's claims. Somalia disagrees. Somalia must therefore prove that it did issue a valid protest.

285. Somalia seeks to meet that burden by claiming that Kenya has not "established Somalia's real intention to manifest its acceptance".[493] That argument is both inconsistent with the principle of acquiescence and insufficient to rebut Kenya's arguments.

286. By definition, acquiescence does not require proving that a State has "manifest[ed] its acceptance". Equally, establishing acquiescence does not require proving a State's "real intention". Put differently, it does not require "going into psychological inquiries into the underlying intention of the parties".[494] That would set a burden impossible to meet. As leading commentators have underlined:

> one takes into account solely the exteriorized will—either that which is formally expressed, or that which stems from the behaviour of the concerned party or parties.[495]

287. This Court and international tribunals have also explained the requirements necessary before this "exteriorized will" is deemed a valid objection to

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493 SR, paragraph 2.10.

494 M. G. Cohen and S. Heathcote, *Commentary to Article 45 of the 1969 Vienna Convention*, in THE VIENNA CONVENTIONS ON THE LAW OF TREATIES, ed. Olivier Corten and Pierre Klein, 2011, page 1080.

495 M. G. Cohen and S. Heathcote, *Commentary to Article 45 of the 1969 Vienna Convention*, in THE VIENNA CONVENTIONS ON THE LAW OF TREATIES, ed. Olivier Corten and Pierre Klein, 2011, page 1080.

another State's claim. Specifically, a State's objection to another State's sovereign claim must be reasonably timely, as well as made formally, precisely, effectively and persistently.

288. First, the protest "must be made by, or on behalf of, a State".[496] Self-evidently, statements by third parties cannot possibly amount to the "exteriorized will" of the State.

289. Second, objections to a State's claim must be reasonably timely. Even though there is no specific period for acquiescence to have effect,[497] the Court explained in the *Temple of Preah Vihear* case that a State should protest "within a reasonable period" in order to prevent acquiescence.[498]

290. In certain circumstances, acquiescence can be a speedy process. As Sir G. Fitzmaurice explained, a new obligation "can in fact emerge very quickly, and even almost suddenly, if new circumstances have arisen that

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496 I. C. MacGibbon, "Some Observations on the Part of Protest in International Law", *British Yearboook of International Law*, 1953, p. 294, Annex 191 ("a protest, to merit treatment as a factor in the legal relations of States, must be made by, or on behalf of, a State. In so far as protests purport to reserve the rights of the protesting State, it is reasonable that they should […] be acts which a State has either authorized at the time of their performance or adopted subsequently.").

497 *See Fisheries case (United Kingdom v. Norway), Judgment of 18 December 1951, I.C.J. Reports 1951*, p. 116, Individual Opinion of Judge Alvarez, page 152 ("[f]or prescription to have effect, it is necessary that the rights claimed to be based thereon should be well established, that they should have been uninterruptedly enjoyed and that they should comply with the conditions set out in 2 above. International law does not lay down any specific duration of time necessary for prescription to have effect. A comparatively recent usage relating to the territorial sea may be of greater effect than an ancient usage insufficiently proved.").

498 *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment of 15 June 1962, I.C. J. Reports 1962*, p. 6, pages 23 and 34.

imperatively call for legal regulation".[499] Similarly, Sir Hersch Lauterpacht recognised that a consistent and uniform usage "can be packed within a short space of years" and does not "need [to] be spread over decades".[500] In this proceeding, acquiescence occurred over more than three decades.

291. In the *Arbitral Award* case, the tribunal found that Nicaragua could not impugn the validity of an arbitral award after only six years of silence corroborated by several acts signalling acceptance.[501] In the *Temple of Preah Vihear* case, when a map showed the Temple on the French (later Cambodian) side, Thailand failed to protest "officially" for four decades. In the words of this Court, Thailand merely had "tak[en] certain local action, [but] was not prepared to deny the French and Cambodian claim at the diplomatic level" over 40 years.[502] That is roughly the same as the over-35-year period in this case. In this case, Somalia did not even take "certain local action".

292. Third, objections to a State's claim must be formal and precise. For example, in the *Minquiers and Ecrehos* case, France claimed it had objected to the inclusion of the Ecrehous Rocks within the limits of the Jersey Port in a UK legislative act on the basis that the inclusion violated the Fishery Convention of 1839. Such a roundabout statement, without further

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499 G. Fitzmaurice, "The Law and Procedure of the International Court of Justice, 1951-54: General Principles and Sources of Law", *British Yearbook of International Law*, 1953, page 31.

500 H. Lauterpacht, "Sovereignty over submarine areas", *British Yearbook of International Law*, 1950, page 393, referring to the *Asylum case (Columbia v. Peru), Judgment of 20 November 1950, I.C.J. Reports 1950*, p. 266.

501 *See Case concerning the Arbitral Award made by the King of Spain on 23 December* 1906 *(Honduras v. Nicaragua), Judgment of 18 November 1960, I.C.J. Reports 1960*, p. 192, page 213.

502 *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports 1962*, p. 6, page 32.

precision, was held to be insufficient to constitute a proper objection to a State's claim.[503]

293. Fourth, objections to a State's claim must be effective and persistent. In the case concerning the *Interpretation of the Air Transport Services Agreement*, the tribunal concluded that France had failed to protest effectively. According to the tribunal, France's conduct revealed many examples where:

> the interested party has not in fact raised an objection that it may have had the possibility of raising, or it has abandoned, or not renewed at a time when the opportunity occurred, the objection that it raised at the outset; or while objecting in principle, it has in fact consented to the continuance of the action in respect of which it has expressed the objection; or again, it has given implied consent, resulting from the consent expressed in connection with a situation related to the subject matter of the dispute.[504]

294. In the *Legal Status of Eastern Greenland* case, the Court noted that Denmark had been exercising governmental functions over the territory in dispute, including by regulating navigation, hunting and fishing in the area.[505] The Court noted that Norway had showed some reluctance in recognising Denmark's sovereignty over all of Greenland. For example, Norway had: (i) refused to issue a written statement "that the Norwegian

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503 *See The Minquiers and Ecrehos case (France/United Kingdom), Judgment of 17 November 1953, I.C.J. Reports 1953*, p. 47, page 66.

504 *Interpretation of the air transport services agreement between the United States of America and France)*, Award, 22 December 1963, RIAA, Vol. XVI, p. 5, pages 63-64.

505 *See Legal Status of Eastern Greenland (Denmark v. Norway)*, Judgment of 5 April 1933, PCIJ, Report Series A/B-No. 53, page 62.

Government recognized Danish sovereignty over all Greenland";[506] and (ii) sent a note that stated that "the Norwegian Government had not recognized, and could not recognize, an extension of Danish sovereignty".[507] Again, such roundabout, imprecise objections were held to be insufficient. The Court found that the legal significance of the Danish acts establishing Denmark's sovereignty over maritime areas in Eastern Greenland "is not altered by the protests or reserves which, from time to time, were made by the Norwegian Government."[508]

(ii) Somalia has not pointed to any pre-2014 objection to Kenya's claim, much less one that satisfies the standards set forth by public international law

295. Before 2014, Somalia had never protested against Kenya's maritime claim, much less in the manner required by public international law. Of particular note, Somalia never protested against the 1979 and 2005 EEZ Proclamations. Indeed, in 2017, the UN Office of Legal Affairs confirmed that both Proclamations had been widely publicised and communicated to all UN Member States, including Somalia.[509] Yet, "[a]fter an extensive research in the archives of the Office of Legal Affairs no communications from other States concerning the two Proclamations were found."[510]

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506 *Legal Status of Eastern Greenland (Denmark v. Norway)*, Judgment of 5 April 1933, PCIJ, Report Series A/B-No. 53, pages 60-61.

507 *Legal Status of Eastern Greenland (Denmark v. Norway)*, Judgment of 5 April 1933, PCIJ, Report Series A/B-No. 53, page 60.

508 *Legal Status of Eastern Greenland (Denmark v. Norway)*, Judgment of 5 April 1933, PCIJ, Report Series A/B-No. 53, page 62.

509 *See* KCM, paragraph 242; KR, paragraphs 7 and 20; Letter from the Office of Legal Affairs of the United Nations to the Permanent Mission of the Republic of Kenya to the United Nations, received 8 November 2017, KCM, Annex 65.

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

296. Nonetheless, in clear contradiction with its position that Kenya did not unambiguously claim the Parallel of Latitude as the Parties' maritime boundary, Somalia suggests that it did in fact "repeatedly and unequivocally" protest against Kenya's claim. Specifically, Somalia argues that:

> Somalia has always had a different claim, based on equidistance. Somalia has consistently asserted that claim and acted in accordance with it. Moreover, even if the absence of protest to a unilateral claim by a State were capable of giving rise to a maritime boundary delimitation—which it is not—this would be irrelevant in the context of this case, as Somalia has repeatedly and unequivocally protested against Kenya's assertion of a parallel maritime boundary.[511]

297. Somalia's arguments do not stand up to scrutiny. They are devoid of supporting evidence. Indeed, despite Somalia having plainly undertaken a very extensive search of its records, it is unable to put forward any examples of what can even arguably be called a "consistent" assertion of its claim to the equidistance line at any point since Kenya's EEZ 1979 Proclamation to 2009.

298. One of the few examples offered by Somalia is the stance taken in 1974 by Somalia during the UNCLOS negotiations.[512] But as Somalia is well aware, this predates Kenya's 1979 EEZ Proclamation by five years and therefore falls outside of the relevant period in this proceeding. The assertion made by Somalia in 1974 took place whilst it still held onto its irredentist "Greater Somalia" policy. As such, it has little relevance to the issues before the Court, other than suggesting that this proceeding is an

511 SR, paragraph 2.90.

512 *See* SR, paragraph 2.97.

indication that Somalia is lapsing back into that irredentism. Somalia's position in the 1974 UNCLOS negotiations amounts to little more than an example of how Somalia sought constant expansion pursuant to its "Greater Somalia" policy until the changes brought about by the 1977-1978 Ogaden war against Ethiopia.

299. Indeed, as General Kibwana explains, even before 1979, Somalia did not object to Kenyan naval patrols up to the Parallel of Latitude.[513]

300. The only other examples offered by Somalia of the alleged fact that it has "consistently asserted" its equidistance line claim during the 1979 to 2009 period are: (i) a reference to its 1988 Maritime Law; and (ii) a private presentation delivered by the then-oil company TotalFinaElf to Somalia in 2001 in which several maps were produced "which all showed the Jorre concession block extending to the equidistance line."[514]

301. The 1988 Maritime Law is dealt with extensively in Kenya's pleadings.[515] The reference in the 1988 Maritime Law to a "straight line" refers to the Parallel of Latitude, and not an equidistance line, for several reasons, not least because Somalia's proposed line of equidistance in this proceeding is not straight and because the 1998 Maritime Law uses a different Somali expression for equidistance line than straight line. As that should be accepted, this point must fall away for Somalia.

302. The 2001 private presentation by TotalFinaElf cannot seriously be described as consistent assertion of Somalia's claim. It was not even made

513 *See* Witness Statement of General (Ret'd) Joseph Raymond Kibwana, EGH, CBS, 11 January 2021, paragraph 15, Annex WS1.

514 SR, paragraph 2.103.

515 See Chapter II.A.1(iii) below.

by Somalia but by overseas investors seeking to target Somalia's resources. In those circumstances, it is hardly surprising that TotalFinaElf elected to expand the potential area of interest as far as possible, as Soma Oil & Gas seeks to do now.

303. Indeed, what is most telling about this 2001 episode is that despite being prompted by TotalFinaElf, Somalia still did not seek to make a claim to the now-disputed maritime area. It is inconceivable that Somalia would not have acted if it had not been acquiescing in the maritime boundary along the Parallel of Latitude.

304. Somalia's argument that it "has repeatedly and unequivocally protested against Kenya's assertion of a parallel maritime boundary" is equally unfounded.[516] For example, the section in Somalia's Reply entitled "Kenya's erroneous claim that Somalia made no protest until 2014"[517] is remarkable for the fact it concentrates solely on the period from 2009 to 2014. The prior key 30-year period (from 1979 to 2009) is entirely overlooked. This is an implicit acceptance that Somalia did nothing that was even arguably a protest in that period.

305. In all events, none of the documents that Somalia relies on in the period of 2009 to February 2014 actually constitutes a formal protest of the maritime boundary that satisfies the standards of public international law. None of them is timely, formal, precise, effective and persistent, as required by international law. To the contrary:

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516 SR, paragraph 2.90.

517 SR, paragraphs 2.88-2.95.

(i) Somalia discusses a letter sent to the UN Secretary-General on 19 August 2009.[518] But that letter was only sent in the context of Somalia's assertion that "any action of the [CLCS] shall, in accordance with UNCLOS, Annex II, Article 9, not prejudice matters relating to the delimitation of the continental shelf".[519] In addition to being completely untimely, this is neither precise nor effective, nor persistent. This purported objection to a sovereign claim resembles, in fact, France's imprecise "objection" to British claims to the Ecrehous Rocks in the *Minquiers and Ecrehos* case, which was similarly roundabout and unavailing;[520]

(ii) Somalia relies on an article by Reuters dated April 2012 that mentions that "[t]he two coastal nations disagree over the location of their boundary line".[521] This document was not issued by Somalia. Nor does it report that Somalia had made its position known to Kenya. A press report cannot be considered formal notice of an objection to a sovereign claim. It is far less formal that the purported objections set forth in the relevant authorities above, which were all rejected by the relevant tribunals. As properly noted by the tribunal in *Kardassopoulos v. The Republic of Georgia*

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518 *See* SR, paragraph 2.89; *Letter* from H.E. Omar Abdirashid Ali Sharmarke, Prime Minister of the Transitional Federal Government of the Somali Republic, to H.E. Ban Ki-Moon, Secretary-General of the United Nations, No. XRW/00506/08/09 (19 Aug. 2009), MS, Annex 37.

519 *Letter* from H.E. Omar Abdirashid Ali Sharmarke, Prime Minister of the Transitional Federal Government of the Somali Republic, to H.E. Ban Ki-Moon, Secretary-General of the United Nations, No. XRW/00506/08/09 (19 Aug. 2009), page 3, MS, Annex 37.

520 *The Minquiers and Ecrehos case (France/United Kingdom), Judgment of 17 November 1953, I.C.J. Reports 1953*, p. 47, page 66.

521 SR, paragraph 2.91; Kelly Gilblom, "Kenya, Somalia border row threatens oil exploration", *Reuters* (20 Apr. 2012), MS, Annex 104.

(comprised of Mr Yves Fortier, Professor Orrego Vicuña and Professor Vaughan Lowe), "[b]ack-door press reports are the opposite of" appropriate notice;[522]

(iii) Somalia cites another article by Reuters dated July 2012.[523] Again, this press report was not issued by Somalia and provides no evidence of any formal protest by Somalia;

(iv) Somalia discusses a report by Stimson, a policy research centre in the United States, produced in July 2012.[524] The report contains a map of "Jurisdictional Claims in the Indian Ocean Region" and mentions that Somalia has an "unresolved maritime boundary with Kenya".[525] Yet again, Somalia does not rely on formal objections. It merely looks over the heads of the full crowd of historical facts to find the one or two documents that, taken out of context, might be its friend. An independent policy research centre's inaccurate and incomplete position is hardly indicative of the position under public international law;

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522 *Ioannis Kardassopoulos and Ron Fuchs v. The Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award, 3 March 2010 (Fortier, Orrego Vicuña, Lowe), paragraph 402 ("[t]he Tribunal agrees with the Claimants that "[b]ack-door press reports are the opposite of due process.").

523 *See* SR, paragraph 2.92; Kelly Gilblom, "Somalia challenges Kenya over oil blocks", *Reuters* (6 July 2012), MS, Annex 107.

524 *See* SR, paragraph 2.93; Caitlyn Antrim, "International Law and Order: The Indian Ocean and South China Sea" in INDIAN OCEAN RISING: MARITIME SECURITY AND POLICY CHALLENGES (D. Michel & R. Sticklor eds., 2012), p. 68, SR, Annex 34.

525 SR, paragraph 2.93; Caitlyn Antrim, "International Law and Order: The Indian Ocean and South China Sea" in INDIAN OCEAN RISING: MARITIME SECURITY AND POLICY CHALLENGES (D. Michel & R. Sticklor eds., 2012), p. 68, SR, Annex 34.

(v) Somalia cites to the 2013 Report of the UN Monitoring Group.[526] This report does not contain any indication that Somalia made any direct objection to Kenya. It is possible that Somalia was reconsidering its position in July 2013, in anticipation of the February 2014 notice raising a dispute for the first time, and that the UN Monitoring Group was so informed. But that does not constitute a formal objection or notice of the claim to Kenya. Far from it. Somalia chose the moment it would make that formal objection – February 2014 – and that is the relevant date. In all events, Somalia's acquiescence is not affected if the critical date of the dispute is moved from February 2014 to July 2013 only; and

(vi) Somalia last argues that "Somalia's protests against the claim to a parallel maritime boundary resulted in Kenya's suspension of one oil operator in 2012".[527] But the suspension of Statoil from Block L-26 was linked to the unwillingness of Statoil to meet certain of its financial obligations, not to a formal protest by Somalia.[528] This event is no evidence of Somalia's objection or maritime claims.

306. None of the matters Somalia raises – two third-party press reports, one UN report, a third-party research report and only one of its own letters – even comes close to the purported objections to sovereign claims raised before prior international tribunals. Prior international tribunals have been

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526 *See* SR, paragraph 2.94; United Nations Monitoring Group on Somalia and Eritrea, *Report of the Monitoring Group on Somalia and Eritrea pursuant to Security Council Resolution 2060 (2012): Somalia*, U.N. Doc. S/2013/413 (12 July 2013), MS, Annex 64.

527 SR, paragraph 2.95; United Nations Monitoring Group on Somalia and Eritrea, *Report of the Monitoring Group on Somalia and Eritrea pursuant to Security Council resolution 2060 (2012): Somalia*, U.N. Doc. S/2013/413 (12 July 2013), MS, Annex 64.

528 *See* United Nations Monitoring Group on Somalia and Eritrea, *Report of the Monitoring Group on Somalia and Eritrea pursuant to Security Council resolution 2060 (2012): Somalia*, U.N. Doc. S/2013/413 (12 July 2013), MS, Annex 64.

confronted with actual statements by States asserting that another State's sovereign claim was a violation of a treaty (*Minquiers and Ecrehos* case) or that the State did not recognise another State's extension of its sovereignty (*Legal Status of Eastern Greenland* case). Yet, even those statements were held to be insufficient. *A fortiori*, Somalia's purported objections, which were far less rigorous and, in four out of five instances, are third-party reports and not statements by Somalia itself, do not come close to satisfying the standards established by international law for objecting to a sovereign claim.

307. Somalia's position merely emphasises the dangers of a Party, *ex post*, using hindsight to select those sparse historical examples that are in its favour. The great weight of evidence, taken in its totality, wholly contradicts Somalia's arguments.

308. Somalia's other gambit is to claim that it could not object to the maritime boundary in the period of the 1991-2012 Somali civil war. Of course, the civil war cannot explain Somalia's lack of protest between 1979 and 1991, or in 2012 and 2013.[529]

309. In addition, the fact remains that the civil war did not actually frustrate Somalia's ability to object to Kenya's claim. The evidence discussed in **Section A.2** of this Chapter confirms how, in fact, Somalia participated in

[529] *See* KCM, paragraph 231; KR, paragraph 63. Somalia had many obvious opportunities to reject Kenya's view on the maritime boundary during this period, including: (i) when it received direct notification of the 1979 EEZ Proclamation, (ii) when it signed UNCLOS in 1982; and (iii) when it incorporated UNCLOS into its domestic legislation through the 1988 Somali Maritime Law. Undoubtedly, both the signing of UNCLOS and the enactment of the 1988 Somali Maritime Law required Somalia to engage in deeper legal analysis and to devote sufficient additional resources to send an official communication to Kenya setting out its alleged position on the Parties' boundary.

international relations in numerous ways even in the midst of the civil war. It confirms that, in fact, Somalia and Kenya engaged in extensive bilateral relations during those 21 years. The relevant evidence includes, but is not limited to:

(i) several bilateral agreements and conventions adopted by Somalia during its civil war;[530]

(ii) letters sent by Somalia to the UN expressing Somalia's concerns over a wide range of issues, including concerns over Ethiopia's alleged interference in Somali affairs;[531]

(iii) requests for assistance and notifications sent by Somalia to the UN and UN Member States;[532]

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530 *See* Chapter II.A.2, paragraphs 151 and 153 above.

531 *See* Chapter II.A.2, paragraph 154 above. Letter from the Prime Minister of Somalia to the President of the Security Council, S/2001/263, 21 March 2001, Annex 8; Letter from the Permanent Representative of Somalia to the UN addressed to the President of the Security Council (transmitting letter from the Minister for Foreign Affairs of Somalia to the President of the Security Council), S/2002/550, 16 May 2002, Annex 9; Letter from the Chairman of the Security Council Committee established pursuant to resolution 751 (1992) concerning Somalia to the President of the Security Council (transmitting letter dated 16 May 2002 from Somalia), S/2002/570, 21 May 2002, Annex 22; Letter from the Chairman of the Security Council Committee established pursuant to resolution 751 (1992) concerning Somalia (transmitting letter dated 17 June 2002 from Somalia to the Chairman of the Security Council Committee concerning Somalia), S/2002/684, 19 June 2002, Annex 23.

532 *See* Chapter II.A.2, paragraph 154 above. Letter from the Permanent Representative of Somalia to the UN addressed to the Chairman of the Security Council Committee established pursuant to resolution 1267 (1999) concerning Al-Qaida and the Taliban and associated individuals and entities, S/AC.37/2004/(1455)/28, 31 March 2004, Annex 10. *See also* Letter from the Permanent Representative of Somalia to the UN addressed to the President of the Security Council, S/2008/323, 12 May 2008, Annex 13; Letter from the Permanent Representative of Somalia to the UN addressed to the President of the Security Council, S/2011/107, 28 February 2011, Annex 15.

(iv) Somalia's acknowledgment of receipt of Kenya's 2007 *note verbale*;[533]

(v) Somalia's involvement in the conclusion of the 2009 MOU and subsequent submission of its Preliminary Information to the CLCS;[534] and

(vi) Somalia's public expressions of gratitude with respect to Kenya's support during the Somali civil war.[535]

310. The fact that Somalia could and did engage in international relations during its civil war is consistent with the practice of numerous other States facing similar situations. For example, while fully immersed in a civil war of its own, Yemen submitted several formal protests to the UN against Somalia's EEZ declaration and its submission to the CLCS.[536] Sudan and Ethiopia equally persistently protested against actions of other States in situations of civil war.[537] While in the midst of a civil war, the Democratic Republic of Congo (the "**DRC**") instituted proceedings before this Court against

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533 *See* Chapter II.A.2, paragraph 140 above. 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), KR, Annex 11.

534 *See* Chapter II.A.2, paragraphs 142-147 above.

535 *See* Chapter II.A.2, paragraphs 121 and 127 above.

536 *See* Chapter A.2, paragraph 249 above. Letter from the Permanent Mission of the Republic of Yemen to the UN addressed to the UN Legal Affairs Division for Ocean Affairs and the Law of the Sea, ROY/047/SANAA/7.14, 25 July 2014, Annex 24; Letter from the Permanent Mission of the Republic of Yemen to the UN addressed to the Secretary-General of the UN, ROY/096/SANAA/12.14, 10 December 2014, Annex 27; Letter from the Permanent Mission of the Republic of Yemen to the UN addressed to the Secretary-General of the UN, ROY/175/SANAA/8.19, 7 August 2019, Annex 28.

537 *See* KR, paragraph 66, footnote 122.

Burundi, Uganda and Rwanda.[538] In the same year, during an ongoing armed conflict, the Federal Republic of Yugoslavia instituted proceedings before this Court against Belgium, Canada, France, Germany, Italy, the Netherlands, Portugal, Spain, the United Kingdom and the United States of America.[539]

311. This evidence confirms the cogency of the decision in *Eritrea/Yemen*, precluding reference to a State's own political instability as a basis for failing to take required steps in international law.[540] The arbitral tribunal considered relevant that Ethiopia had failed to issue a protest with regard to a published Petroleum Agreement between Yemen and Shell.[541] The argument that Ethiopia was a poor country riven by civil war[542] did not alter its finding.[543] As Robert Kolb confirms, this decision stands for the proposition that "an improper organisation of the state is [...] not an

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538 *See Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda).*

539 *See Legality of Use of Force (Yugoslavia v. Spain)*; *Legality of Use of Force (Serbia and Montenegro v. Belgium)*; *Legality of Use of Force (Serbia and Montenegro v. Canada)*; *Legality of Use of Force (Serbia and Montenegro v. France)*; *Legality of Use of Force (Serbia and Montenegro v. Germany)*; *Legality of Use of Force (Serbia and Montenegro v. Italy)*; *Legality of Use of Force (Serbia and Montenegro v. Netherlands)*; *Legality of Use of Force (Serbia and Montenegro v. Portugal)*; *Legality of Use of Force (Serbia and Montenegro v. United Kingdom)*; *Legality of Use of Force (Yugoslavia v. United States of America).*

540 *See* KCM, paragraphs 229-230.

541 *See Territorial Sovereignty and Scope of the Dispute (Eritrea and Yemen)*, Award, 9 October 1998, RIAA, Vol. XXII, p. 209, paragraphs 400, 520 and 524.

542 *See Territorial Sovereignty and Scope of the Dispute (Eritrea and Yemen)*, Award, 9 October 1998, RIAA, Vol. XXII, p. 209, paragraph 400.

543 Somalia seeks to misconstrue the tribunal's findings on this issue in footnote 150 of its Reply. It fails to state that while the tribunal considered Eritrea's arguments concerning its civil war, it nevertheless held ultimately that the disputed territories are subject to territorial sovereignty of Yemen.

argument for dispensing that state from the internationally applicable legal duties".[544]

312. The Court's findings in *Democratic Republic of the Congo v. Rwanda* lead to the same conclusion. In that case, the Democratic Republic of the Congo (the "**DRC**") sought to initiate proceedings before this Court based on Article 29(1) of the Convention on Discrimination against Women.[545] This article requires negotiations or arbitration as prerequisites for this Court's jurisdiction.[546] The DRC argued that the armed conflict between the parties had made it impossible to commence negotiations with Rwanda on specific aspects of this Convention.[547] In response, Rwanda observed that the DRC had not raised the question of this Convention in any of the two parties' bilateral meetings.[548] Rwanda also noted that the DRC's Minister of Telecommunication had been able to raise a technical issue with the Secretary-General of the International Telecommunication Union in the middle of the armed conflict.[549] Eventually, this Court concluded that the

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544 R. Kolb, *Good Faith in International Law* (Hart 2017), pp. 92-5, p. 95, KCM, Annex 125. *See also* KR, footnote 121.

545 *See Armed Activities on the Territory of the Congo (New Application: 2002) (The Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment of 3 February 2006, I.C.J. Reports 2006*, p. 6, paragraph 80.

546 *See Armed Activities on the Territory of the Congo (New Application: 2002) (The Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment of 3 February 2006, I.C.J. Reports 2006*, p. 6, paragraph 80.

547 *See Armed Activities on the Territory of the Congo (New Application: 2002) (The Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment of 3 February 2006, I.C.J. Reports 2006*, p. 6, paragraph 83.

548 *See Armed Activities on the Territory of the Congo (New Application: 2002) (The Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment of 3 February 2006, I.C.J. Reports 2006*, p. 6, paragraph 83.

549 *See Armed Activities on the Territory of the Congo (New Application: 2002) (The Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment of 3 February 2006, I.C.J. Reports 2006*, p. 6, paragraph 83.

Convention on Discrimination against Women could not serve to found the jurisdiction of the Court as the DRC had not sought to negotiate with Rwanda on particular aspects of it.[550]

313. For all the foregoing reasons, the three requirements of acquiescence are plainly satisfied in this proceeding. In the words of the *Dubai-Sharjah* tribunal, "a State must react [...] when it considers that one of its rights is threatened by the action of another State".[551] Failure to do so means that "either the State does not believe that it really possesses the disputed right, or for its own private reasons, it decides not to maintain it".[552] Here, Somalia deliberately chose not to protest against Kenya's claim. Either it did not really believe that it had any rights to the maritime area claimed by Kenya or it decided not to maintain those rights in order to implement its policy of "accommodation" towards Kenya and enjoy the benefits that came with it. Either way, Somalia cannot now deny that it has acquiesced in Kenya's claim.

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550 *See Armed Activities on the Territory of the Congo (New Application: 2002) (The Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment of 3 February 2006, I.C.J. Reports 2006*, p. 6, paragraphs 91-93.

551 *Dubai-Sharjah Border Arbitration*, Award, 13 October 1981, (1993) 91 International Law Reports 543, page 623, Annex 196.

552 *Dubai-Sharjah Border Arbitration*, Award, 13 October 1981, (1993) 91 International Law Reports 543, page 623, Annex 196.

D. Somalia benefited from and Kenya relied on Somalia's acquiescence

315. The above sections explain how the new evidence confirms that Somalia acquiesced in Kenya's claim to a maritime boundary along the Parallel of Latitude. On that basis alone, the Court can and should reject the entirety of Somalia's claims.

316. Of course, acquiescence does not require benefit, reliance or other estoppel-like considerations. Nonetheless, acquiescence derives from the concept of good faith and this Court has referred, indirectly, to the roles of benefit, reliance and estoppel in explaining why acquiescence is but one aspect of good faith.[553] For example, in the *Temple of Preah Vihear* case, a map showed the boundary line leaving the Temple to Cambodia. The Court noted that, "for fifty years, [Thailand] enjoyed such benefits as the Treaty of 1904 conferred on her, if only the benefit of a stable frontier."[554] It also noted that "France, and through her Cambodia, relied on Thailand's acceptance of the map."[555] As Judge Alfaro explained in a separate opinion, "a State must not be permitted to benefit by its own inconsistency to the prejudice of another State".[556]

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553 *See Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America), Judgment of 12 October 1984, I.C.J. Reports 1984*, p. 246, paragraph 130 ("in any case the concepts of acquiescence and estoppel, irrespective of the status accorded to them by international law, both follow from the fundamental principles of good faith and equity").

554 *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports 1962*, p. 6, page 32.

555 *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports 1962*, p. 6, page 32.

556 *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports 1962*, p. 6, Separate Opinion of Vice-President Alfaro, page 40.

317. In a similar line of reasoning, in the *Chagos Marine Protected Area Arbitration*, the tribunal found that the United Kingdom was "estopped from denying the binding effect" of a number of undertakings it had made to Mauritius.[557] In reaching that decision, the Tribunal found that these undertakings had given a number of benefits to the United Kingdom. These included Mauritius's restraint in the "assertion of its sovereignty", a "productive and friendly relationship" between both States and Mauritius's "cooperation on other matters that the Tribunal believe[d] would otherwise have been withheld" by Mauritius.[558]

318. Similar considerations apply *a fortiori* to the present dispute. Somalia's acquiescence created "the benefit of a stable frontier"[559] from which Somalia benefited and on which Kenya relied. This stable frontier is documented, *inter alia*, by: (i) Somalia's consistent licensing of oil and gas blocks only up to the Parallel of Latitude until 2014;[560] (ii) a stable fisheries border, permitting Kenya and Somalia to license fishing activities to the

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557 Such undertakings included to "return the Chagos Archipelago to Mauritius when no longer needed for defense purposes" and to "preserve the benefit of any minerals or oil discovered [...] for the Mauritius Government". *See Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award, 18 March 2015, PCA Case No. 2011-03, paragraph 448.

558 *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award, 18 March 2015, PCA Case No. 2011-03, paragraphs 442-443. *See also Shufeldt claim (Guatemala v. USA)*, Award, 24 July 1930, RIAA, Vol. II, p. 1079, page 1094. In that case, the United States contended that Guatemala, having for six years recognised the validity of the claimant's contract, and received all the benefits to which she was entitled thereunder, and having allowed Shufeldt to continue to spend money on the concession, was precluded from denying its validity, even if the contract had not received the necessary approval of the Guatemalan legislature. The Arbitrator held the contention to be "sound and in keeping with the principles of international law".

559 *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports 1962*, p. 6, page 32.

560 *See* paragraphs 105 and 468.

benefit of their economies;[561] and (iii) the Kenyan Navy's consistent patrols up to the Parallel of Latitude, for decades, to establish regional security and defence against pirates, bandits and terrorists.[562]

319. As demonstrated in **Section A** above, so too did Somalia enjoy, from 1979 onwards, a highly "productive and friendly relationship" [563] with Kenya. This was in no small part because of Somalia's decision to withdraw its sovereign claims to Kenyan territory and, indeed, not to object to the Parallel of Latitude as the maritime boundary. Somalia's significant benefits included: (i) the friendly relations between the two countries in the 1980s;[564] (ii) Kenya's active role in the Somali national reconciliation process from the earliest stages of the civil war;[565] (iii) the resettlement of Somalia's own government in Nairobi;[566] (iv) the establishment of multiple international organisations' headquarters in Nairobi;[567] (v) Kenya's extensive support with humanitarian aid and responsible hosting of refugees, beyond its international law obligations;[568] and (v) again, Kenya's great involvement in addressing security threats off the coast of Somalia.[569]

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561 *See* paragraphs 108, 236 and 274-275 above.

562 Witness Statement of General (Ret'd) Joseph Raymond Kibwana, EGH, CBS, 11 January 2021, paragraphs 12-23, Annex WS1.

563 *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award, 18 March 2015, PCA Case No. 2011-03, paragraphs 442-443.

564 *See* Chapter II.A.1 above.

565 *See* Chapter II.A, paragraphs 119-127 above.

566 *See* Chapter II.A, paragraphs 116 and 128 above.

567 *See* Chapter II.A, paragraphs 128-129 above.

568 *See* Chapter II.A, paragraphs 116-117 and 129 above.

569 *See* Chapter II.A, paragraph 130 above.

320. Somalia's acquiescence to the maritime boundary also created reasonable reliance by Kenya. Kenya acted based on legitimate expectations in numerous ways, often to its own detriment and cost. As **Section A** of this Chapter addressed in depth, this included: (i) licensing the then-undisputed maritime area to private operators for expensive exploration activities;[570] (ii) permitting and supporting marine fisheries;[571] and (iii) expending significant sums and effort to deploy its naval resources as far north as the Parallel of Latitude, in both the territorial sea and the EEZ, to fight against piracy, smuggling, terrorism and other threats to international security.[572]

321. In summary, if the jurisprudence of international courts and tribunals and the applicable general principles of international law are given any weight, the case for Somalia's acquiescence is strong. That case relies on at least three-and-a-half decades of clear, formal, precise, repeated and publicly expressed claims by Kenya. It relies on Somalia's failure within a reasonable time to object to those claims, which were specifically notified to Somalia. It relies on a consistent course of conduct, performance and understanding by the Parties from 1979 onwards – until 2014 in Kenya's case and at least 2009, if not 2014, in Somalia's. It relies, above all, on Somalia's clear acceptance of the Parallel of Latitude maritime boundary when beneficial for it, notwithstanding its sudden revocation of that acceptance when beneficial for the owners of Soma Oil & Gas and other individuals. As Judge Alfaro succinctly explained, "a State party to an international litigation is bound by its previous acts or attitude when they

570 *See* Chapter II.A, paragraphs 137 and 148 above.

571 *See* Chapter II.A, paragraph 149 above.

572 *See* Chapter II.A, paragraphs 130-133 above. *See also* Letter from Lt-Col Atodonyang to Ms Juster Nkoroi, Kenya Navy, *Evidence Gathering in Respect of Maritime Border Dispute between Kenya and Somalia*, 1 September 2017, KCM, Annex 47.

are in contradiction with its claims in the litigation."[573] The Parallel of Latitude is for that reason, and many others, the maritime boundary by acquiescence of Somalia.

573 *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports 1962*, p. 6, Separate Opinion of Vice-President Alfaro, page 39.

CHAPTER III: INDEPENDENTLY OF SOMALIA'S ACQUIESCENCE, THE EVIDENCE CONFIRMS THAT AN EQUITABLE SOLUTION REQUIRES THE APPLICATION OF THE LATITUDINAL DELIMITATION METHOD

322. Even if the Court were to find that Somalia did not acquiesce in the maritime boundary proclaimed by Kenya since 1979, the new evidence confirms that the latitudinal delimitation method is the most appropriate way to reach an equitable solution in this case.

323. The three-step methodology advocated by Somalia in this case is not mandatory.[574] That methodology was first articulated in the *Black Sea* case judgment of 2009. Since then, the Court has described it as a methodology "normally" or "usually" employed in maritime delimitations.[575] However, the Court has never referred to it as either a treaty or customary international law rule. Indeed, it lacks the pre-requisites of those rules. It is widely accepted that UNCLOS does not establish a compulsory delimitation methodology.[576] Nor has the three-step methodology been developed by State practice and *opinio juris*. In fact, the majority of maritime boundaries agreed or adjudicated around the world are not based on that method.[577]

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574 *See* KR, paragraphs 113-127; KCM, paragraphs 308-313.

575 *See Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment of 19 November 2012, I.C.J. Reports 2012*, p. 624, paragraph 190; *Maritime Dispute (Peru* v. *Chile), Judgment of 27 January 2014, I.C.J. Reports 2014*, p. 3, paragraphs 180 and 184.

576 *See The Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)*, Award, 7 July 2014, PCA Case No. 2010-16, paragraph 339; *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment of 3 June 1985, I.C.J. Reports 1985*, p. 13, paragraph 28; *Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar), Judgment of 14 March 2012*, ITLOS Reports 2012, p. 4, paragraph 235; *Arbitration between Barbados and the Republic of Trinidad and Tobago*, Award, 11 April 2006, RIAA, Vol. XXVII, p. 147, paragraph 244.

577 *See* KCM, paragraphs 304-306 and 313.

Simply put, unless accepted by both parties to a dispute, that methodology is not binding.[578] Therefore, the only requirement that the Court is bound to follow is the obligation set out in UNCLOS that its delimitation method achieve an "equitable solution".

324. In its Counter-Memorial and Rejoinder, Kenya demonstrated that the latitudinal delimitation method produces an equitable outcome for at least four reasons. First, that method is consistent with the international law principles on maritime delimitation that prevailed in the late 1970s and 1980s, when Kenya first proclaimed that the Parties' maritime boundary followed the Parallel of Latitude.[579] Second, it is consistent with the regional geographical context.[580] Third, it is consistent with the Parties' contemporaneous practice and understanding of what they considered to be an equitable maritime boundary delimitation.[581] And fourth, it produces a proportionate division of the now-disputed maritime area once the relevant area is properly identified.[582]

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578 *See* KR, paragraphs 113-127; KCM, paragraphs 314-320. *See also Maritime Dispute (Peru v. Chile), Judgment of 27 January 2014, I.C.J. Reports 2014*, p. 3, paragraphs 180-182 (showing that the Court used the three-step method because Peru requested its application and that was not objected to by Chile); *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, p. 4, paragraph 360 (where the Special Chamber of ITLOS found that "the two parties agree[d], in principle, on the three-stage approach").

579 *See* KR, paragraphs 129-134.

580 *See* KCM, paragraphs 326-332; KR, paragraphs 135-148.

581 *See* KCM, paragraphs 333-338; KR, paragraphs 149-161.

582 *See* KR, paragraphs 162-186.

325. Kenya maintains its position in full. As explained below, the evidence contained in this Appendix further confirms that only a maritime boundary along the Parallel of Latitude yields a result that is equitable to both Parties.

326. First, at the critical time when Kenya first proclaimed the Parties' maritime boundary, neither Somalia nor Kenya accepted the three-step methodology.[583] Rather, Kenya and Somalia agreed that the delimitation of the EEZ and continental shelf should be effected through the employment of equitable principles and not through the equidistance criterion.[584] Somalia's eleventh-hour support for the three-step methodology therefore imposes the construction of an equidistance line that both Parties rejected when negotiating the wording of UNCLOS Articles 74 and 83. This further confirms that the three-step methodology is unwarranted and inconsistent with the "equitable solution" that UNCLOS requires.

327. Second, the application of the three-step methodology is inappropriate in this case because the security situation in Somalia makes it very challenging to identify reliable basepoints. The Court has recognised that variations or errors in situating the basepoints could "become disproportionately magnified in the resulting equidistance line."[585] Somalia itself agrees that "the provisional equidistance line should generally be constructed using

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583 *See* SR, paragraph 3.21 (where Somalia itself acknowledges that the three-step methodology "had not crystallized into law 36 years ago").

584 *See* KCM, paragraph 299 ("[t]he clear position adopted by Kenya and Somalia (and indeed by many other African States) during UNCLOS III was that maritime delimitation must be based *not* on equidistance, but on the principle of 'equitable result'."). *See also* KCM, paragraphs 69-76 and 300-301; KR, paragraphs 131-134.

585 *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment of 8 October 2007, I.C.J. Reports 2007*, p. 659, paragraph 277.

'the most appropriate basepoints on the coasts of the Parties'."[586] However, Somalia concedes that the "security situation" has made it impossible to conduct a field visit to confirm the land boundary terminus (the "**LBT**") that determined its basepoints.[587] Somalia's basepoints have instead been determined on the basis of coordinates "derived through astronomical readings" that "cannot be directly converted to WGS-84."[588] There is therefore no guarantee that the basepoints selected by Somalia are "the most appropriate".

328. Indeed, maritime delimitation disputes call for courts and tribunals to rely on "the best evidence available and not to restrict themselves to charted data alone."[589] For example, in *Guyana v. Suriname*, the tribunal appointed its own hydrographer for the selection of basepoints and the construction of a reliable equidistance line.[590] Notably, that hydrographer conducted a site visit to select precise basepoints to construct the final equidistance line.[591]

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586 MS, paragraph 6.39 citing *Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment of 3 February 2009, I.C.J. Reports 2009*, p. 61, paragraphs 116-117 and *Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment of 19 November 2012, I.C.J. Reports 2012*, p. 624, paragraph 191.

587 *See* MS, paragraph 4.19, footnote 168.

588 MS, paragraph 4.18. Somalia's basepoints in this case derive from a LBT derived, in turn, from the coordinates included in a 1927 agreement between colonial powers. *See also* Agreement between Italy and the United Kingdom in which are recorded the decisions of the Commission appointed under Article 12 of the Treaty between His Britannic Majesty and His Majesty the King of Italy, signed at London on July 15, 1924, regulating certain questions concerning the boundaries of their respective territories in East Africa (17 Dec. 1927), MS, Annex 3; Government of the United Kingdom and Government of Italy, *Minutes of the Twenty-First Meeting* (17 Dec. 1927), MS, Annex 33.

589 S. Fietta and R. Cleverly, *A Practitioner's Guide to Maritime Boundary Delimitation* (Oxford University Press, 2016), page 39.

590 *See Arbitration regarding the delimitation of the maritime boundary between Guyana and Suriname*, Award, 17 September 2007, RIAA, Vol. XXX, p. 1, paragraph 309.

591 *See Arbitration regarding the delimitation of the maritime boundary between Guyana and Suriname*, Award, 17 September 2007, RIAA, Vol. XXX, p. 1, paragraph 309.

Similarly, the UNCLOS Annex VII tribunal in the *Bangladesh v. India* case conducted a five-day visit to the delimitation area, together with its expert, to confirm all the basepoints proposed by the parties. The evidence collected during that site visit was admitted into the record and influenced the tribunal's final determination.[592]

329. Without a physical ground survey, it is challenging to draw reliably the provisional equidistance line required as a first step pursuant to the three-step methodology. This requires relying on unknown low-tide features that have not been confirmed through a field visit. By contrast, a maritime boundary along the Parallel of Latitude is both a reliable method and eminently feasible in this case.

330. Third, a maritime boundary along the Parallel of Latitude would ensure that both Parties are allotted access to areas approaching the maximum distance from the coast permitted by international law for each zone. Conversely, Somalia's claimed equidistance line results exactly in what the Court has directed parties to avoid in maritime delimitation: encroachment.[593] Somalia's encroachment increases with distance. Eventually, it entirely cuts off Kenya from any entitlement at the outer limits of the continental shelf.[594]

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592 *See The Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)*, Award, 7 July 2014, PCA Case No. 2010-16, paragraph 24.

593 *See Territorial and Maritime Dispute (Nicaragua v Colombia), Judgment of 19 November 2012, I.C.J. Reports 2012*, p. 624, paragraph 215; *Maritime Delimitation in the Black Sea* (*Romania v. Ukraine), Judgment of 3 February 2009, I.C.J. Reports 2009*, p. 61, paragraph 201; *Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh v. Myanmar), Judgment of 14 March 2012*, ITLOS Reports 2012, p. 4, paragraph 292.

594 *See* KCM, paragraphs 344-346; Cut-off Effect due to Equidistance, KCM, Figure 3-1; Division of Maritime Areas based on a Parallel of Latitude, KCM, Figure 3-2; KR, paragraph 141.

331. The *Guinea/Guinea-Bissau* tribunal rejected equidistance as an appropriate delimitation method under similar circumstances. The tribunal explained that:

> [w]hen in fact – as is the case here, if Sierra Leone is taken into consideration – there are three adjacent States along a concave coastline, the equidistance method has the other drawback of resulting in the middle country being enclaved by the other two and thus prevented from extending its maritime territory as far seaward as international law permits. In the present case, this is what would happen to Guinea, which is situated between Guinea-Bissau and Sierra Leone. Both equidistance lines envisioned arrive too soon at the parallel of latitude drawn from the land boundary between Guinea and Sierra Leone which Guinea has unilaterally taken as its maritime boundary.[595]

332. In the present case, there are also "three adjacent States along a concave coastline". As in *Guinea/Guinea-Bissau,* Somalia's claimed equidistance line "arrive[s] too soon at the parallel of latitude drawn from the land boundary between [Tanzania] and [Kenya]".[596] This prevents Kenya "from extending its maritime boundary as far seaward as international law

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595 *Delimitation of the maritime boundary between Guinea and Guinea-Bissau*, Award, 14 February 1985, RIAA, Vol. XIX, p. q149, paragraph 104 (unofficial translation) (original French: "[q]uand en fait il y a — comme c'est ici le cas si l'on songe à la Sierra Leone — trois États limitrophes le long d'un littoral concave, l'équidistance a cet autre inconvénient d'avoir pour résultat que 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. C'est ce qui se passerait dans la présente affaire pour la Guinée, située entre la Guinée-Bissau et la Sierra Leone. Chacune des deux lignes d'équidistance envisagées rejoindrait trop vite le parallèle de latitude mené à partir de la frontière terrestre entre la Guinée et la Sierra Leone, dont la Guinée a fait unilatéralement sa frontière maritime.").

596 *Delimitation of the maritime boundary between Guinea and Guinea-Bissau*, Award, 14 February 1985, RIAA, Vol. XIX, p. 149, paragraph 104 (unofficial translation).

permits."[597] Indeed, Somalia's claimed equidistance line would cut Kenya off from 58% of its coastal projection at 200M.[598] It would further cut off 98% of Kenya's potential entitlement to the continental shelf beyond 200M and deprive Kenya entirely from any entitlement to the outer limits of the continental shelf at 350M from the Kenyan coast.[599] The severe cut-off effect produced by Somalia's claimed equidistance line prevents the achievement of an equitable solution.[600]

333. In stark contrast, the Parallel of Latitude boundary does not encroach or cut off Somalia. It allows Somalia to continue to enjoy uncontested sovereign rights over 94% of its potential EEZ and 91% of its potential continental shelf.[601] The latitudinal delimitation method also ensures Somalia's continued and unrestricted access to the outer limits of the continental shelf. It yields an equitable result because it gives effect to the principle of "maximum reach" and, at the same time, avoids any encroachment or cut-off effects.

334. Fourth, as addressed in more detail in **Section IV.C** of the next Chapter, the principle of proportionality confirms that the latitudinal method yields an equitable outcome. Proportionality as a test of equity can be applied to any line no matter the methodology by which it was developed. It is an

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597 *Delimitation of the maritime boundary between Guinea and Guinea-Buissau*, Award, 14 February 1985, RIAA, Vol. XIX, p. 149, paragraph 104. *See also The Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)*, Award, 7 July 2014, PCA Case No. 2010-16, paragraph 417.

598 *See* KCM, paragraph 343; KR, paragraph 141.

599 *See* KCM, paragraphs 344-346; KR, paragraph 141.

600 *See The Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)*, Award, 7 July 2014, PCA Case No. 2010-16, paragraph 417.

601 *See* KCM, paragraph 349.

objective way to confirm whether that methodology results in an equitable solution. An equitable result avoids marked disproportions between the coastal lengths and the area of the relevant maritime zones.[602] The resulting ratio of the relevant coastal lengths in this case is approximately 1:1.4 in Somalia's favour.[603] Somalia's claimed equidistance line produces significant disproportions, regardless of the approach used to identify the maritime area (i.e., coastal projections or overlapping entitlements).

335. If the relevant area is defined by the seaward projection from all of the relevant coastal lengths,[604] there is no reason in principle for Kenya's and Somalia's maritime areas to differ significantly from the ratio of their relevant coastal lengths (i.e., 1:1.43 in Somalia's favour). Yet, Somalia's equidistance line results in a ratio of 1:2.99 in Somalia's favour.[605] This affords more than twice the relevant area to Somalia as the ratio of the relevant coastal lengths would suggest is appropriate – a significant disproportion.[606] By contrast, the proportion of the relevant area as apportioned between the Parties by the Parallel of Latitude boundary yields a result of 1:1.04 in Somalia's favour – not a significant disproportion from the coastal lengths ratio of 1:1.43 in Somalia's favour.[607]

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602 *See Maritime Dispute (Peru v. Chile), Judgment of 27 January 2014, I.C.J. Reports 2014*, p. 3, paragraph 180. *See also 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, p. 4, paragraphs 533-535.

603 *See* KR, paragraph 165.

604 *See* KR, paragraphs 169-171.

605 *See* Chapter IV.C.3, paragraph 537 below.

606 *See* Chapter IV.C.

607 *See* Division of the relevant area, including the area beyond 200M, using the parallel of latitude, KR, Figure KR 2-11.

336. The disproportionality test favours the Parallel of Latitude boundary even under Somalia's overlapping entitlements approach. Somalia has misidentified the relevant maritime area to disguise the marked disproportionality produced by its equidistance claim line.[608] It calculated the relevant area within 200M based on overlapping entitlements and the relevant area beyond the 200M line based on Kenya's actual claims.[609] That unprecedented, inconsistent and self-serving approach has the effect of distorting the relevant area. It creates the false impression that Somalia's claimed equidistance line does not produce marked disproportions. But the reality is that Somalia's equidistance line creates a maritime area ratio of 1:2.28 in Somalia's favour, if its relevant area were constructed in accordance with its own stated legal standards.[610] That ratio affords to Somalia almost twice the maritime area as its relevant coast would suggest – a marked disproportion. The latitudinal delimitation method – as applied to the relevant area that Somalia should have calculated based on its own standards – yields a maritime area ratio of 1:1.47 in Kenya's favour. When compared to the coastal length ratio of 1:1.40 in Somalia's favour, the Parallel of Latitude does not produce a marked disproportion.[611]

337. Fifth, the latitudinal delimitation method is consistent with principles of transparency and predictability. Somalia effectively recognises that its equidistance claim line encroaches upon Kenya's maritime entitlements and produces a severe cut-off for Kenya. It asks this Court to disregard those effects because Kenya "effectively renounced a part of its

608 *See* Chapter IV.C.

609 *See* Chapter IV.C.

610 *See* Chapter IV.C.

611 *See* Chapter IV.C.

entitlement" when it delimited its southern maritime boundary with Tanzania at a parallel of latitude.[612]

338. However, Kenya and Tanzania's maritime boundary was adopted in accordance with international law as it then stood.[613] Moreover, that maritime boundary, as compared with the equidistance line that Somalia appears to consider that Kenya and Tanzania should have adopted, avoids disadvantaging Kenya in some significant respects.[614]

339. As explained in paragraph 88 above, the evidence also confirms that the Kenya-Tanzania boundary is consistent with the very same principles that Somalia defended at UNCLOS III.[615] Notably, that conference took place a few years after Kenya and Tanzania agreed on their maritime boundary and only one year after the 1979 EEZ Proclamation. Kenya and Somalia were cognisant of Kenya's boundary with Tanzania as they developed their own boundary.[616] And it was precisely the concern to ensure that Kenya was not deprived of its maritime entitlements that motivated the adoption of the Parallel of Latitude as an equitable solution.[617]

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612 MS paragraph 7.53. *See also* SR, paragraphs 3.78, 3.80 and 3.87; KR, paragraph 140.

613 *See* KR, paragraphs 129-161.

614 *See* Chapter IV.B.1, especially paragraphs 389 and 391, and Chapter IV.B.2, especially paragraph 408.

615 *See* KCM, paragraphs 69-76; KR, paragraphs 129-143; 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, pp. 55-6, paragraph 73, KCM, Annex 72; 192nd Plenary Meeting, 9 December 1982, A/CONF.62/SR.192, *Official Records of the Third United Nations Conference on the Law of the Sea*, Volume XVII, Resumed Eleventh Session and Final Part Eleventh Session and Conclusion, p. 127, paragraph 159, KCM, Annex 73.

616 *See* KR, paragraph 137.

617 *See* KCM, paragraphs 51-63 and 69-76; KR, paragraph 137. *See also* MFA Internal Memo from A.S Legal to Dr Adede on the Consultative Interministerial Meeting of the Law of

340. The problem here is not the equitable maritime boundary agreed between Kenya and Tanzania.[618] The problem is Somalia's recent introduction of equidistance, after more than 35 years of agreement with the Parties' maritime boundary along the Parallel of Latitude. The record shows that, until Somalia's *volte-face* in 2014, the Parallel of Latitude served as an equitable maritime boundary between Kenya and Somalia.[619] Disregarding delimitations established lawfully and reasonably in the past as if they simply never existed would be inconsistent with the principles of transparency and predictability.[620]

341. Sixth, a maritime boundary along the Parallel of Latitude ensures consistency with the regional geographical context and practice of delimiting boundaries by following parallels of latitude. When selecting an appropriate delimitation method, the Court has taken into account the overall geographical framework in which the delimitation must take place[621] and "any other continental shelf delimitations between adjacent

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the Sea Group held at Harambee House on 12 August 1975 (MFA. 273/430/001A/66), 26 August 1975, KCM, Annex 12.

618 *See* KR, paragraph 136.

619 *See* Chapters II.A.1 and II.A.2. *See also* KR, paragraphs 88-109. Somalia's abrupt decision to revoke its acquiescence to the Parallel of Latitude was informed by Kenya's discovery of oil and gas in its offshore areas. *See also* Chapters II.A.3 and II.A.4.

620 *See* KR, paragraphs 158-161. *See also The Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)*, Award, 7 July 2014, PCA Case No. 2010-16, paragraph 339 ("transparency and the predictability of the delimitation process as a whole are additional objectives to be achieved in the process").

621 *See Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment of 3 June 1985, I.C.J. Reports 1985*, p. 13, paragraph 69 ("[i]n the present case, the Court has also to look beyond the area concerned in the case, and consider the geographical context in which the delimitation will have to be effected […]").

States in the same region."[622] In this case, that regional geographical context and practice can be seen in the east coast of Africa and in the boundaries agreed between: (i) Tanzania and Mozambique; (ii) Kenya and Tanzania; and (iii) Kenya and Somalia.[623]

342. None of those States was engaged in the microscopic exercise of identifying basepoints clustered in the immediate vicinity of the relevant land boundary terminus in order to draw an equidistance line. They argued adamantly against equidistance because they were looking at their geographic relationship in the broadest of terms.[624] And, as shown in Figure 9, in light of their general coastal configuration they concluded that parallel of latitude boundaries would lead to an equitable division of their maritime areas.

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622 *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment of 20 February 1969, I.C.J. Reports 1969*, p. 3, paragraph 101(D)(3).

623 *See* Agreement between the Government of the United Republic of Tanzania and the Government of the People's Republic of Mozambique Regarding the Tanzania/Mozambique Boundary, 28 December 1988, JI Charney and LM Alexander (eds), *International Maritime Boundaries I* (Nijhoff 1993) p. 898, KCM, Annex 143; Agreement on the Delimitation of the Maritime Boundary between the Republic of Mozambique and the United Republic of Tanzania, 5 December 2011 (not yet in force), CG Lathorp (ed), *International Maritime Boundaries VII* (Brill Nijhoff 2016) p. 4800, KCM, Annex 155; Exchange of Notes between the United Republic of Tanzania and Kenya Concerning the Delimitation of the Territorial Waters Boundary between the Two States, 9 July 1976, JI Charney and LM Alexander (eds), *International Maritime Boundaries I* (Nijhoff 1993), p. 881, KCM, Annex 136; Agreement between the United Republic of Tanzania and the Republic of Kenya on the delimitation of the maritime boundary of the exclusive economic zone and the continental shelf, 2603 U.N.T.S. 37 (23 June 2009), entered into force 23 June 2009, MS, Annex 7.

624 *See* KCM, paragraphs 69-76; KR, paragraph 131.

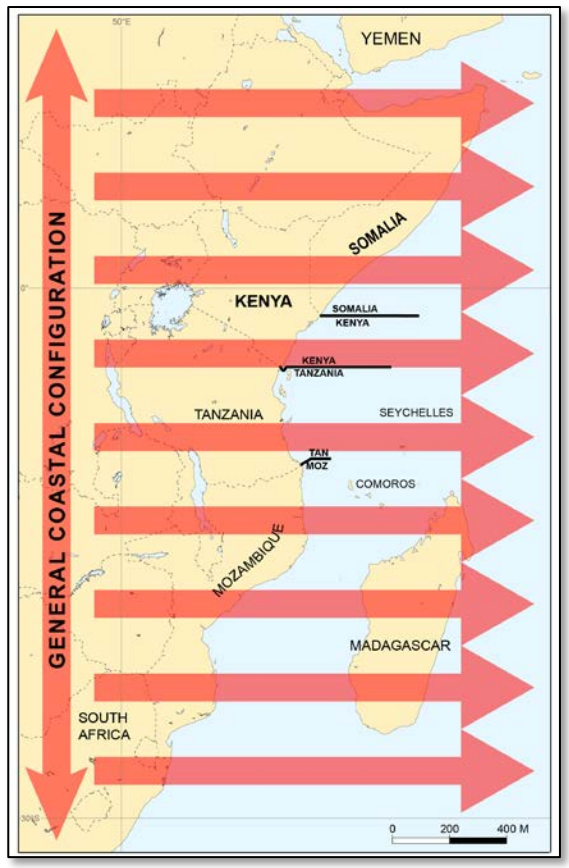

Figure 9: General Coastal Configuration of the East Coast of Africa Facing Due East

343. Somalia's recent myopic assessment of the general coastal configuration is flawed and detached from reality. As shown in Figure 10, the entire universe of basepoints used to construct its equidistance line is found within 13 kilometres ("**km**") of the LBT. Somalia's accounting of "the general configuration of the coasts of the Parties" thus accounts for only 24 km (i.e., 2%) of the Parties' relevant coasts. Yet, it results in a claimed maritime boundary extending for 350M.[625]

625 The combined length of the relevant coasts, based on Somalia's arguments, is 1,244 km: 733 km for Somalia and 511 km for Kenya. Somalia inconsistently excludes a 30 km

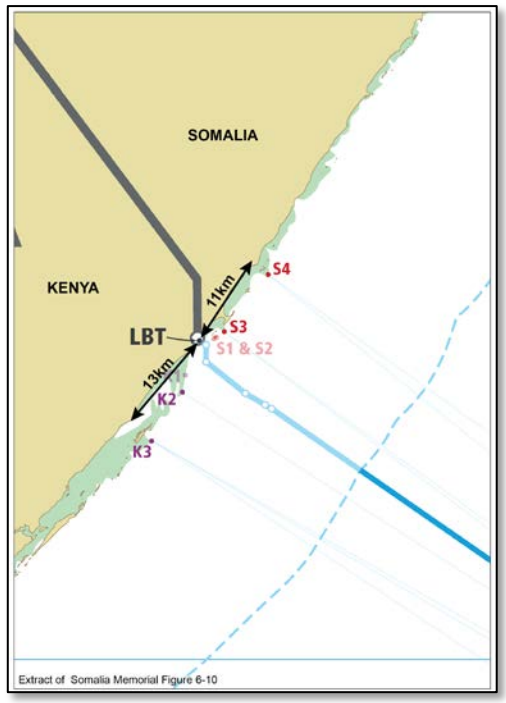

Figure 10: The Short Segment of the Coast Incorrectly Used by Somalia to Calculate Its Line

344. That micro-geographic perspective of the coastal configuration is in direct contradiction to the Parties' broader perspective of their geography as they considered delimiting their maritime areas in the 1970s. It would be unsuitable to impose an equidistance line mechanically in a region that has adopted the latitudinal delimitation method for decades.

345. Seventh, the Parties' conduct on the ground also confirms that they saw the maritime boundary at the Parallel of Latitude as an equitable solution for over 35 years. When determining the appropriate methodology to achieve an equitable solution, the Court takes into account any indicia of the parties'

segment of the Kenyan coast for certain calculations but not for others. With that 30 km segment, the coastal length for Kenya is 511 km.

will or of their views on what constitutes an equitable solution.[626] For example, in *Tunisia/Libya*, the Court confirmed that, when considering "what method of delimitation would ensure an equitable result":

> [I]t is evident that the Court must take into account whatever indicia are available of the line or lines which the Parties themselves may have considered equitable or acted upon as such – if only as an interim solution affecting part only of the area to be delimited.[627]

346. The Court made that same point in *Libya/Malta*. It stressed that taking into account the abovementioned indicia is a "duty" of the Court.[628] In the present case, the evidence confirms that the Parties have acted in accordance with the existence of a *de facto* maritime boundary along the Parallel of Latitude. As explained in detail in **Chapter II**, the Parties' conduct includes oil concessions, fishing and maritime scientific activities, and naval patrols. Somalia and Kenya would not have acted in a manner that was consistent with the existence of that *de facto* boundary for over three decades if they had considered that boundary to be inequitable. Therefore, that *de facto* line also supports the view that the Parallel of Latitude yields an equitable solution, independently of whether the Court finds that Somalia has acquiesced in Kenya's claim.

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626 *See Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment of 3 June 1985, I.C.J. Reports 1985*, p. 13, paragraph 25 ("[t]he Court has considered the facts and arguments brought to its attention in this respect, particularly from the standpoint of its duty to 'take into account whatever indicia are available of the [delimitation] line or lines which the Parties themselves may have considered equitable or acted upon as such'[…]").

627 *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment of 24 February 1982, I.C.J. Reports 1982*, p. 18, paragraph 118.

628 *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment of 3 June 1985, I.C.J. Reports 1985*, p. 13, paragraph 25.

347. Eighth, Somalia's claimed equidistance line is inequitable because, as set out in detail in **Section II.D** of the previous Chapter, Somalia has benefitted from, and Kenya has relied on, Somalia's acceptance of the Parallel of Latitude boundary. Like in the *Temple of Preah Vihear* case,[629] both Parties relied on, and benefited from, a "stable frontier." For example, they issued licences for oil and gas blocks and fishing activities that benefited their economies.[630] Kenya also relied on Somalia's acquiescence when adopting measures that ensured the protection and safeguard of the now-disputed maritime area. Those measures were public and Somalia was, or should have been, aware of them. Among others, Kenya: (i) supported marine fisheries, including through maritime conservation activities, just to the south of the Parallel of Latitude;[631] (ii) deployed naval resources up to the Parallel of Latitude;[632] and (iii) conducted maritime research activities along the coast of Lamu Island up to the Parallel of Latitude.[633]

348. Somalia itself benefited from a number of actions that Kenya adopted on the basis of that reliance. For example, Kenya: (i) adopted an active role in the Somali national reconciliation process from the earliest stages of the civil war; (ii) allowed Somalia's own government temporarily to resettle in Nairobi; (iii) granted extensive humanitarian aid to Somalia; (iv) responsibly hosted Somali refugees; and (v) deployed its naval resources to

629 *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports 1962*, p. 6, page 32.

630 *See* Chapter II.A, paragraph 318.

631 *See* Chapters II.A and IV.B.5.

632 *See* Chapters II.A and IV.B.3.

633 *See* Chapter II.A.

help Somalia tackle piracy and terrorism.[634] All those activities were possible thanks to Kenya's efforts and resources.

349. Deviating from the maritime boundary at the Parallel of Latitude would be incompatible with the good faith that must prevail in international relations. It would send a message that States can escape their international obligations by adopting opportunistically a new position that is inconsistent with decades of conduct, whenever it suits their interests and regardless of the prejudice that such reversal causes to other States. Such an outcome would contradict the fundamental principle that "a State party to an international litigation is bound by its previous acts or attitude when they are in contradiction with its claims in the litigation."[635]

350. Conversely, respecting the Parties' longstanding conduct regarding the location of their maritime boundary at the Parallel of Latitude would be:

> in accordance with equity inasmuch as it protects a State from the contingency of incurring responsibilities and expense, in reliance on the apparent acquiescence of

634 *See* Chapter II.A.

635 *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports 1962*, p. 6, Separate Opinion of Vice-President Alfaro, page 39. *See also Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award, 18 March 2015, PCA Case No. 2011-03, paragraphs 442-448; *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment of 3 February 1994, I.C.J. Reports 1994*, p. 6, Separate Opinion of Judge Ajibola, paragraphs 96-114; *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America), Judgment of 12 October 1984, I.C.J. Reports 1984*, p. 246, paragraph 130; *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports 1962*, p. 6, page 32; *Fisheries case (United Kingdom v. Norway), Judgment of 18 December 1951, I.C.J. Reports 1951*, p. 116, pages 138-139; *Decision of the Permanent Court of Arbitration in the Matter of the Maritime Boundary Dispute between Norway and Sweden*, (1910) 4 American Journal of International Law 226, pages 233-234, Annex 195.

> others, and being subsequently confronted with a challenge on the part of those very States.[636]

351. Ninth, the maritime boundary along the Parallel of Latitude safeguards the continued access by Kenyan fishing communities to fisheries of the relevant coast. The Court can consider equitable access to natural resources, such as fisheries resources, when delimiting maritime boundaries.[637] In the *Gulf of Maine* case, the Chamber identified "equitable criteria" that had to be considered when a proposed maritime delimitation would be "likely to entail catastrophic repercussions for the livelihoods and economic well-being of the population" of a State.[638] Among those criteria, the Chamber referred to the: (i) "preservation of existing fishing patterns which are vital to the coastal communities in the area concerned"; and (ii) "optimum conservation and management of living resources".[639]

352. In this case, the Court should be mindful of the repercussions that its decision will have on the Parties' traditional fishing communities.[640] Somalia itself recognised the importance of the fisheries sector and declared

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636 H. Lauterpacht, "Sovereignty over Submarine Areas", *British International Yearbook of International Law*, 1950, pages 395-396.

637 *See Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), Judgment of 14 June 1993, I.C.J. Reports 1993*, p. 38, paragraph 76 (in that case, the Court adjusted the equidistance line eastwards to ensure that the parties would have equitable access to a specific type of fish). *See also* S. Fietta and R. Cleverly, *A Practitioner's Guide to Maritime Boundary Delimitation* (Oxford University Press, 2016), page 89 (noting that natural resource factors are useful "to confirm the equitable nature of a delimitation line dictated by considerations of geography or to assess the overall equitableness of a solution […]").

638 *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v.United States of America), Judgment of 12 October 1984, I.C.J. Reports 1984*, p. 246, paragraph 237. *See also Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment of 3 February 2009, I.C.J. Reports 2009*, p. 61, paragraph 198.

639 *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America), Judgment of 12 October 1984, I.C.J. Reports 1984*, p. 246, paragraph 110.

640 *See* Chapter IV.B.5.

that it "has sought to take advantage of these natural resources".[641] The Court should also pay due regard to the interests of the Kenyan coastal communities living just to the south of the Parallel of Latitude.[642] Those communities are among the most remote and marginalised communities living on Kenya's coast and lack anything but the most rudimentary navigational tools.[643]

353. As explained in further detail in **Section IV.B.5** of next Chapter, the new evidence, including the Fishing Report and the representative sampling of witness testimonies attached to it, confirm that fishing is vital for those communities. Indeed, it has been for centuries. It is essential for their overall household well-being, provides their main source of income, contributes to their food security and supports their livelihoods and traditions.[644]

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641 MS, paragraph 2.12.

642 The Kiunga area is located in the northernmost part of the Kenyan coast, bordering Somalia in the north and stretching to the Lamu archipelago in the south. *See* "Natural resource dependence, livelihoods and development: Perceptions from Kiunga, Kenya", *IUCN Eastern and Southern Africa Regional Office*, 2008, page 7 and Figure 1, Annex 67.

643 *See* "Natural resource dependence, livelihoods and development: Perceptions from Kiunga, Kenya", *IUCN Eastern and Southern Africa Regional Office*, 2008, page 9, Annex 67; R. M. Oddenyo et al., *Kenyan sharks baseline assessment report for the national plan of action for the conservation and management of sharks* (Kenya Fisheries Service, 2018), page 7, Annex 5 ("[a] major proportion of the coastal fishery in Kenya is artisanal (small scale mostly operated using canoes) with few motorised artisanal boats especially in the Northern Coast of Kenya."); "Kenya Marine Fisheries and Socio-Economic Development Project (KEMFSED) (P163980) - Combined Project Information Documents / Integrated Safeguards Datasheet (PID/ISDS)", *The World Bank*, 25 April 2019, page 5, Annex 68 ("[t]he artisanal sector is characterized by small crafts propelled by sail, outboard motors, and paddles […].").

644 *See also* R. M. Oddenyo et al., *Kenyan sharks baseline assessment report for the national plan of action for the conservation and management of sharks* (Kenya Fisheries Service, 2018), page 34, Annex 5 (noting that "[i]n Kiunga, 100% of income was from fishing […]"). *See also* "Kenya Marine Fisheries and Socio-Economic Development Project

354. The fact that local Kenyan fisherfolk and their communities are critically dependent on fisheries for their livelihoods is a matter of utmost political importance within Kenya. As set out below, no single factor has more significantly jeopardised the livelihoods of local fishing communities than the disruption and insecurity that has plagued them owing to threats emanating from Somalia. For many decades, Kenyan authorities alone have protected the interests of these fishing communities. Indeed, as explained in detail in **Chapter IV.B.5** below, Somalia openly admits that it is incapable of controlling the relevant maritime area and of preventing widespread illegal, unreported and unregulated fishing ("**IUU Fishing**") in its waters.[645] Somalia is equally incapable of maintaining security within its land territory and waters.[646] Changing abruptly and permanently the Parties' maritime boundary would magnify the threat of unchecked piracy, IUU Fishing and other grave forms of maritime crime, with catastrophic effects upon local Kenyan fishing communities.[647]

355. In sum, the three-step methodology should not be applied simply for the sake of artificially securing universal methodological uniformity. That methodology is not mandatory. Most importantly, it is not suitable to achieve an equitable solution in this case. Somalia's precarious security situation has prevented it from identifying reliable basepoints. Further, relying on the three-step methodology in this case would disregard the

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(KEMFSED) (P163980) - Combined Project Information Documents / Integrated Safeguards Datasheet (PID/ISDS)", *The World Bank*, 25 April 2019, page 4, Annex 68.

645 *See*, e.g., SR, paragraphs 2.71 and 2.107-2.113.

646 Indeed, as recently as 2 December 2020, Somalia again wrote to the UN transmitting an official request for assistance to counter piracy off the Somali coast: *see* UN Security Council Resolution 2554 (2020), S/RES/2554 (2020), 4 December 2020, page 1, Annex 69.

647 *See* Chapter IV.B.5.

geographical and regional context. It would also contradict the Parties' will expressed at the relevant time. Ultimately, it would lead to an anachronistic and inequitable result.

356. In the unlikely event that the Court considers that Somalia has not acquiesced in Kenya's claim, the evidence in this case therefore calls for the Court to delimit the maritime boundary based on the latitudinal delimitation method. That method is true to the Parties' contemporaneous will and actions. It does not prejudice either of the Parties. Rather, it enables them to extend their maritime boundaries as far seaward as international law permits while avoiding any encroachment or cut-off effect. It guarantees transparency and predictability in the delimitation process. At the same time, it ensures consistency with the regional context and practices. It also yields a proportionate allocation of the Parties' maritime areas and grants equitable access to vital fisheries resources for Kenyan coastal communities. Put differently, it allows the Court to fulfil its mandate to achieve an equitable solution.

357. However, if the Court were to disregard all those factors and favour the three-step delimitation method, then, as explained in the following Chapter, the equidistance line proposed by Somalia would need to be adjusted significantly to ensure an equitable solution.

CHAPTER IV: THE NEW EVIDENCE CONFIRMS THAT, CORRECTLY APPLIED, THE THREE-STEP DELIMITATION METHOD ALSO WOULD REQUIRE THE PARTIES' MARITIME BOUNDARY TO FOLLOW THE PARALLEL OF LATITUDE

358. Even if the Court were to apply the three-step delimitation method, the new evidence demonstrates that the Court should still delimit the Parties' maritime boundary along the Parallel of Latitude.

359. The evidence discussed in **Section IV.A** of this Chapter, confirms the deficiencies in the charted data from which Somalia calculates its proposed basepoints require the provisional equidistance line proposed by Somalia to be modified. As a result, Kenya sets out a new provisional equidistance line using basepoints calculated from the most reliable available charted data.

360. The evidence discussed in **Section IV.B** confirms that, contrary to Somalia's arguments, multiple relevant circumstances call for adjusting the provisional equidistance line at the second stage of the three-step methodology in order to achieve an equitable solution. In its previous submissions, Kenya already pointed to a number of those circumstances in the context of its arguments on acquiescence and the latitudinal delimitation method.[648] However, to assist the Court in the event that it decides to apply the three-step methodology, **Section IV.B** addresses those and other

[648] *See*, e.g., KCM, paragraphs 343-352 and KR, paragraphs 138-142 (addressing the cut-off effect caused by the equidistance line on Kenya's maritime areas); KCM, Chapter III.D.1 and KR, Chapter II.B.2 (highlighting the importance of the regional context in this case); KCM, paragraphs 181-185 (addressing Kenya's legitimate security concerns regarding its boundary with Somalia); KCM, Chapter I.F; KR, Chapter I.D (showing that the Parties' conduct in relation to oil concessions, fishing activities and naval patrols reflects a tacit agreement as to the localisation of the disputed boundary); KCM, Chapter I.F.3; and KR, Chapter I.D.1 (noting the importance of fisheries for Kenya's coastal communities).

relevant circumstances in the specific context of the second stage of the three-step methodology.

361. As explained below, there are at least five relevant circumstances that call for adjusting the provisional equidistance line in this case. Those circumstances are: (i) the pronounced cut-off effect that an equidistance line would produce on Kenya's maritime areas; (ii) the regional context of the Kenya-Somalia maritime boundary; (iii) Kenya's vital security concerns emanating from terrorism, piracy and other maritime crimes regularly committed off the coast of Somalia; (iv) the Parties' long-standing conduct in relation to oil concessions, fishing activities, naval patrols and other activities; and (v) the need to ensure Kenya's equitable access to fishery resources in the now-disputed maritime area.

362. As explained in **Section IV.C**, correctly applying the third stage of the three-step methodology, or even just correcting the inconsistencies between Somalia's actual calculations and its stated methodology, reveals that the application of the equidistance line proposed by Somalia, using either its own standards or Kenya's, would lead to a significant disproportionality in maritime areas. By contrast, the Parallel of Latitude would not lead to a marked disproportionality in all scenarios.

A. Deficiencies in the charted data from which Somalia calculates its proposed basepoints require the provisional equidistance line proposed by Somalia to be reconstructed anew

363. The first stage of the three-step methodology for maritime boundary

delimitation is drawing a provisional equidistance or median line.[649] UNCLOS Article 15 provides that such line is formed as:

> the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured.[650]

364. Constructing an equidistance line is a "geometrically objective" process.[651] It is "based on the geography of the Parties' coasts and mathematical calculations."[652] To begin with, it requires identifying the LBT.[653] This is the point where the land boundary between the two countries ends and where the maritime boundary commences.[654] Constructing an equidistance line also requires identifying relevant basepoints.[655] Basepoints are those points:

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649 *See* J. Crawford et al., *Brownlie's Principles of Public International Law* (Oxford University Press, 9th edition, 2019), page 273. *See also Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment of 8 October 2007, I.C.J. Reports 2007*, p. 659, paragraph 268.

650 UNCLOS, Article 15.

651 *Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment of 3 February 2009, I.C.J. Reports 2009*, p. 61, paragraph 116.

652 *Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar), Judgment of 14 March 2012*, ITLOS Reports 2012, p. 4, paragraph 240.

653 *See*, e.g., *The Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)*, Award, 7 July 2014, PCA Case No. 2010-16, paragraph 58; *Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar), Judgment of 14 March 2012*, ITLOS Reports 2012, p. 4, paragraph 157.

654 *See The Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)*, Award, 7 July 2014, PCA Case No. 2010-16, paragraph 58.

655 *See*, e.g., *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Merits, Judgment of 16 March 2001, I.C.J. Reports 2001*, p. 40, paragraph 178.

> which mark a significant change in the direction of the coast, in such a way that the geometrical figure formed by the line connecting all these points reflects the general direction of the coastlines.[656]

365. In selecting its proposed basepoints, Somalia fails to proceed from the most reliable available charted data. Somalia has chosen to proceed from NGA Nautical Chart 61220.[657] However, NGA Nautical Chart 61220 indicates clearly that it contains no new or independent charted data. Rather, as its source listing makes clear, NGA Nautical Chart 61220 derives its charted data from the relevant British Admiralty or Italian charts.[658] In respect of the coastline relevant to the calculation of basepoints, NGA Nautical Chart 61220 derives its charted data entirely from British Admiralty Chart 3362.[659] Thus, the basepoints and provisional equidistance line proposed by Somalia are necessarily based upon British Admiralty Chart 3362.

366. NGA Nautical Chart 61220 and British Admiralty Chart 3362 therefore ought to be identical. However, there are in fact differences for which no explanation appears readily available. Notably, Somalia's choice of basepoint S3 appears nowhere when basepoints are calculated using British Admiralty Chart 3362. Its appearance from NGA Nautical Chart 61220 seems to be by error, which is then incorporated into Somalia's provisional equidistance line.

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656 *Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment of 3 February 2009, I.C.J. Reports 2009*, p. 61, paragraph 127.

657 *See* MS, paragraphs 5.18 and 6.41. *See also* SR, paragraph 3.58; United States National Geospatial-Intelligence Agency, *Chart 61220: Manda Island to Kismaayo* (20 Jan. 2014) SR, Annex 42.

658 *See* United States National Geospatial-Intelligence Agency, *Chart 61220: Manda Island to Kismaayo* (20 Jan. 2014), SR, Annex 42.

659 *See* United Kingdom Hydrographic Office, British Admiralty Chart 3362: Lamu to Kismaayo, 28 August 1997, Annex M1.

367. Constructed using British Admiralty Chart 3362, the relevant basepoints and provisional equidistance line are as follows:

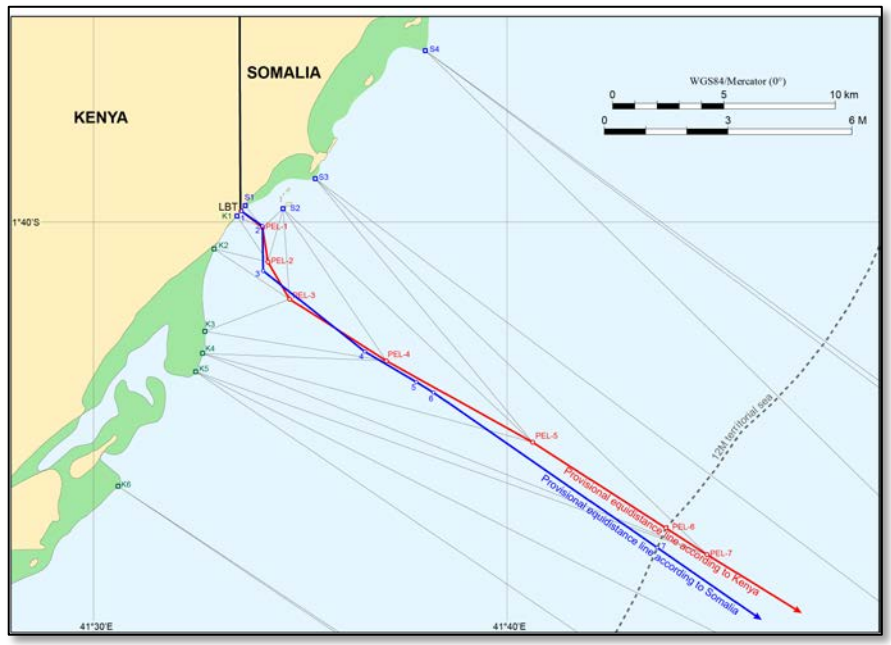

Figure 11: Construction of the Provisional Equidistance Line in the Territorial Sea

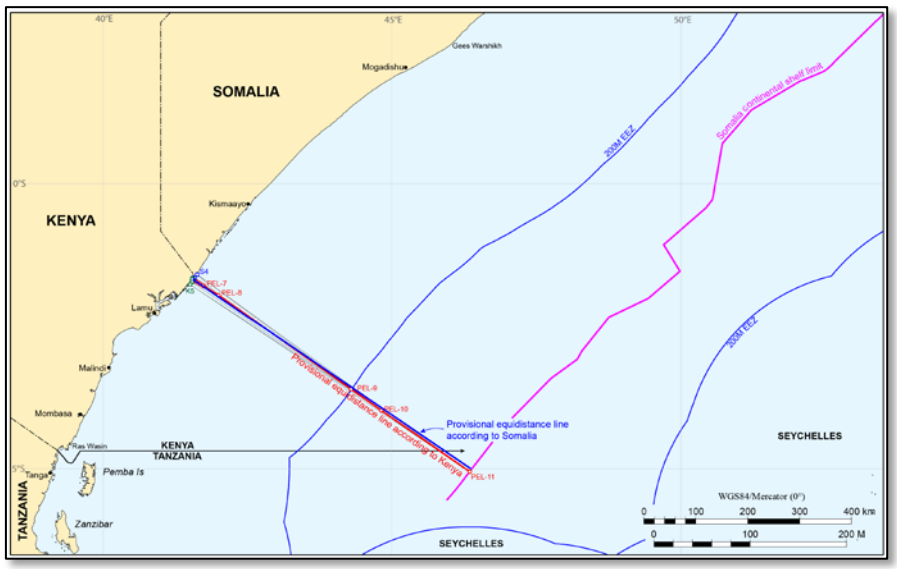

Figure 12: Construction of the Provisional Equidistance Line in the EEZ and Continental Shelf

368. Figures 11 and 12 show Kenya's provisional equidistance line calculated using CARIS software based on British Admiralty Chart 3362.[660] The relevant basepoints are also shown. Kenya's provisional equidistance line begins from an LBT on the low-water line extending south-east from PB29. It comprises 10 segments extending from the coast to the 350M limit. The specific geographic coordinates of the provisional equidistance line's turning points and the relevant coastal basepoints from which they are derived are as follows:[661]

660 *See* United Kingdom Hydrographic Office, British Admiralty Chart 3362: Lamu to Kismaayo, 28 August 1997, Annex M1.

661 All coordinates are referred to WGS84.

Coordinates of the provisional equidistance line – or PEL – as constructed by Kenya:

Point	Latitude	Longitude
LBT	1° 39’ 44.0” S	41° 33’ 34.4” E
PEL1	1° 40’ 08.5” S	41° 34’ 05.4” E
PEL2	1° 40’ 58.7” S	41° 34’ 13.4” E
PEL3	1° 41’ 53.1” S	41° 34’ 44.8” E
PEL4	1° 43’ 23.2” S	41° 37’ 05.1” E
PEL5	1° 45’ 22.0” S	41° 40’ 37.2” E
PEL6 (12M)	1° 47’ 27.3” S	41° 43’ 50.4” E
PEL7	1° 48’ 06.2” S	41° 44’ 50.4-” E
PEL8	1° 57’ 32.1” S	41° 59’ 59.1” E
PEL9 (200M)	3° 36’ 15.1” S	44° 17’ 41.4” E
PEL10	3° 58’ 39.5” S	44° 48’ 56.7” E
PEL11 (350M)	5° 03’ 05.6” S	46° 20’ 48.7” E

Kenya’s basepoints used for the provisional equidistance line:

Basepoint	Latitude	Longitude
K1	1° 39’ 51.6” S	41° 33’ 28.4” E
K2	1° 40’ 39.6” S	41° 32’ 55.3” E
K3	1° 42’ 40.1” S	41° 32’ 41.8” E
K4	1° 43’ 12.2” S	41° 32’ 38.5” E
K5	1° 43’ 39.0” S	41° 32’ 28.4” E
K6	1° 46’ 26.3” S	41° 30’ 36.2” E

Somalia’s basepoints used for the provisional equidistance line:

Basepoint	Latitude	Longitude
S1	1° 39’ 36.3” S	41° 33’ 40.4” E
S2	1° 39’ 40.9” S	41° 34’ 35.4” E
S3	1° 38’ 57.0” S	41° 35’ 21.9” E
S4	1° 35’ 49.9” S	41° 38’ 1.8” E

369. Thus, as established from the best available charted data (i.e., British Admiralty Chart 3362), Kenya's proposed provisional equidistance line shows only slight differences from that proposed by Somalia. As constructed above, beyond the third turning point, the line follows a virtually constant bearing of about 125° all the way to the 350M limit. It intersects the 200M EEZ limit at the point located at 3° 36' 15.1" S, 44° 17' 41.4" E and the 350M outer continental shelf limit at the point located at 5° 03' 05.6" S, 46° 20' 48.7" E. Due to the geographical circumstances, the provisional equidistance line thrusts in a south-easterly direction across the coastal front of Kenya, uncurbed by any countervailing protuberance from Kenya's coastal front. It thus results in a pronounced and significant cut-off effect with respect to Kenya's maritime areas and outer continental shelf. This is caused by the concavity of the coastlines of Kenya and Tanzania.[662]

370. For the avoidance of doubt, Kenya presents the above provisional equidistance line without prejudice to its position that the maritime boundary has already been delimited by acquiescence along the Parallel of Latitude and that, even if that were not the case, the Court should rely on the latitudinal delimitation method.

B. The evidence confirms that there are multiple relevant circumstances that require the provisional equidistance line to be adjusted to follow the Parallel of Latitude

371. As the Court explained in its most recent maritime delimitation judgment:

> [a]fter constructing the provisional equidistance line, 'the Court will at the next, second stage consider whether

662 *See* Chapter IV.B.1.

there are factors calling for the adjustment or shifting of the provisional equidistance line in order to achieve an equitable result.'[663]

372. The Court has confirmed in numerous cases that the adjustment or shifting may be "necessary to take account of those circumstances". These cases include *Peru v. Chile*;[664] the *Black Sea* case;[665] *Cameroon v. Nigeria*;[666]

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663 *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua)* and *Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua), Judgment of 2 February 2018, I.C.J. Reports 2018*, p. 139, paragraph 146. *See also Maritime Dispute (Peru v. Chile), Judgment of 27 January 2014, I.C.J. Reports 2014*, p. 3, paragraph 180; *Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment of 3 February 2009, I.C.J. Reports 2009*, p. 61, paragraph 120; *The Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)*, Award, 7 July 2014, PCA Case No. 2010-16, paragraph 344; *Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar), Judgment of 14 March 2012*, ITLOS Reports 2012, p. 4, paragraph 240; *Arbitration between Barbados and the Republic of Trinidad and Tobago*, Award, 11 April 2006, RIAA, Vol. XXVII, p. 147, paragraph 242.

664 *See Maritime Dispute (Peru v. Chile), Judgment of 27 January 2014, I.C.J. Reports 2014*, p. 3, paragraph 191 ("[t]he Court must now determine whether there are any relevant circumstances calling for an adjustment of the provisional equidistance line, with the purpose, it must always be recalled, of achieving an equitable result.").

665 *See Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment of 3 February 2009, I.C.J. Reports 2009*, p. 61, paragraph 120 ("the Court will at the next, second stage consider whether there are factors calling for the adjustment or shifting of the provisional equidistance line in order to achieve an equitable result").

666 *See Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment of 10 October 2002, I.C.J. Reports 2002*, p. 303, paragraph 288 ("[t]his method, which is very similar to the equidistance/special circumstances method applicable in delimitation of the territorial sea, involves first drawing an equidistance line, then considering whether there are factors calling for the adjustment or shifting of that line in order to achieve an 'equitable result'.").

Qatar v. Bahrain;[667] the *Jan Mayen* case;[668] *Libya/Malta*;[669] and the *Gulf of Maine* case.[670] Other international tribunals have also acknowledged the principle that relevant circumstances might require adjusting the provisional equidistance line.[671]

373. Somalia agrees with this principle.[672] However, it claims that "there are no

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667 *See Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Merits, Judgment of 16 March 2001, I.C.J. Reports 2001*, p. 40, paragraph 232 ("[t]he Court will now examine whether there are circumstances which might make it necessary to adjust the equidistance line in order to achieve an equitable result.").

668 *See Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), Judgment of 14 June 1993, I.C.J. Reports 1993*, p. 38, paragraph 51 ("it is in accord with precedents to begin with the median line as a provisional line and then to ask whether 'special circumstances' require any adjustment or shifting of that line.").

669 *See*, e.g., *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment of 3 June 1985, I.C.J. Reports 1985*, p. 13, paragraph 73 ("[t]he position reached by the Court at this stage of its consideration of the case is therefore the following. It takes the median line (ignoring Filfla as a basepoint) as the first step of the delimitation. But relevant circumstances indicate that some northward shift of the boundary line is needed in order to produce an equitable result.").

670 *See Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America), Judgment of 12 October 1984, I.C.J. Reports 1984*, p. 246, paragraph 112 ("delimitation is to be effected by the application of equitable criteria and by the use of practical methods capable of ensuring, with regard to the geographic configuration of the area and other relevant circumstances, an equitable result.").

671 *See*, e.g., *The Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)*, Award, 7 July 2014, PCA Case No. 2010-16, paragraph 344 ("[i]n the second stage of the equidistance/relevant circumstances method, the provisional equidistance line may be adjusted to reflect the particularities of the case."); *Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar), Judgment of 14 March 2012*, ITLOS Reports 2012, p. 4, paragraph 240 ("the Tribunal will proceed in the following stages: at the first stage it will construct a provisional equidistance line, based on the geography of the Parties' coasts and mathematical calculations. Once the provisional equidistance line has been drawn, it will proceed to the second stage of the process, which consists of determining whether there are any relevant circumstances requiring adjustment of the provisional equidistance line"); *Arbitration between Barbados and the Republic of Trinidad and Tobago*, Award, 11 April 2006, RIAA, Vol. XXVII, p. 147, paragraph 242 ("[t]he second step accordingly requires the examination of this provisional line in the light of relevant circumstances, which are case specific, so as to determine whether it is necessary to adjust the provisional equidistance line in order to achieve an equitable result").

672 *See* SR, paragraph 3.65. *See also* MS, paragraph 6.45.

special circumstances in the territorial sea or relevant circumstances in the EEZ/continental shelf that warrant an adjustment to the provisional equidistance line in this case."[673] Somalia's position is incorrect.

374. While the types of relevant circumstances that warrant such adjustment are "case specific",[674] the case law of international courts and tribunals provides useful guidance to determine what circumstances might be "relevant".[675] That case law and the evidence and arguments contained in

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673 SR, paragraph 3.66. *See also* MS, paragraphs 5.22-5.26 and 6.45-6.53.

674 *Arbitration between Barbados and the Republic of Trinidad and Tobago*, Award, 11 April 2006, RIAA, Vol. XXVII, p. 147, paragraph 242.

675 The Court, as well as other international tribunals, have previously identified a series of relevant circumstances that are present in this case. Those circumstances are: (i) the so-called "cut-off" effect (*see*, e.g., *Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar*), Judgment of 14 March 2012, ITLOS Reports 2012, p. 4, paragraph 292; *The Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)*, Award, 7 July 2014, PCA Case No. 2010-16, paragraph 402); (ii) the regional context (*see*, e.g., *Delimitation of the maritime boundary between Guinea and Guinea-Bissau*, Award, 14 February 1985, RIAA, Vol. XIX, p. 149, paragraph 108; *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment of 20 February 1969, I.C.J. Reports 1969*, p. 3, paragraph 101(D); *Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment of 3 February 2009, I.C.J. Reports 2009*, p.61, paragraph 177); (iii) the parties' security considerations (*see*, e.g., *Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment of 3 February 2009, I.C.J. Reports 2009*, p. 61, paragraph 204; *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment of 3 June 1985, I.C.J. Reports 1985*, p. 13, paragraph 51); (iv) the parties' conduct, including in relation to oil concessions, fishing activities and naval patrols (*see*, e.g., *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment of 10 October 2002, I.C.J. Reports 2002*, p. 303, paragraph 304; *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment of 24 February 1982, I.C.J. Reports 1982*, p. 18, paragraphs 96 and 117-118); (v) the parties' equitable access to natural resources (*see*, e.g., *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), Judgment of 14 June 1993, I.C.J. Reports 1993*, p. 38, paragraph 72; *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v.United States of America), Judgment of 12 October 1984, I.C.J. Reports 1984*, p. 246, paragraph 237); and (vi) the navigational interests and historic titles of the parties (*see*, e.g., *Arbitration regarding the delimitation of the maritime boundary between Guyana and Suriname*, Award, 17 September 2007, RIAA, Vol. XXX, p. 1, paragraphs 297, 306 and 313; *Delimitation of Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic (UK, France)*, Award, 30 June 1977, RIAA, Vol. XVIII, p. 3, paragraph 188).

this Appendix clarify that there are at least five relevant circumstances that call for an adjustment of the provisional equidistance line to the Parallel of Latitude. These are:

(i) the severe cut-off effect that an equidistance line would produce on Kenya's maritime areas;

(ii) the regional context (i.e., in light of the general configuration of the coast and the fact that all relevant maritime boundaries in the eastern coast of Africa follow parallels of latitude);

(iii) vital security interests, concerning both the Parties and the international community at large, that emanate from terrorism, piracy and other maritime crimes regularly committed off the coast of Somalia;

(iv) the Parties' longstanding conduct in relation to oil concessions, fishing activities, naval patrols and other activities, which, at the very minimum, reflects the existence of a *de facto* boundary along the Parallel of Latitude; and

(v) the need to ensure equitable access of Kenya's fisherfolk to vital fishery resources located immediately south of the Parallel of Latitude.

375. The following subsections address each of these relevant circumstances in turn.

1. The severe cut-off effect that the provisional equidistance line produces on Kenya's maritime areas requires that line to be adjusted to the Parallel of Latitude

376. It is well established under international law that a maritime delimitation should avoid, as far as possible, any cut-off on the maritime areas of a State. Ever since the *North Sea Continental Shelf Cases*, the Court has highlighted the importance of avoiding pronounced encroachments or cut-offs when effecting a delimitation. In that case, the Court observed that:

> the continental shelf of any State must be the natural prolongation of its land territory and must not encroach upon what is the natural prolongation of the territory of another State.[676]

377. Subsequent jurisprudence has developed this principle.[677] For example, in *Nicaragua v. Colombia*, the Court recently stated that:

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676 *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment of 20 February 1969, I.C.J. Reports 1969*, p. 3, paragraph 85(c).

677 *See*, e.g., *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment of 3 June 1985, I.C.J. Reports 1985*, p. 13, paragraph 46; *Delimitation of maritime areas between Canada and France*, Award, 10 June 1992, RIAA, Vol. XXI, p. 265, paragraph 58; *Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar), Judgment of 14 March 2012*, ITLOS Reports 2012, p. 4, paragraphs 292, 293 and 297; *The Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)*, Award, 7 July 2014, PCA Case No. 2010-16, paragraph 408; *Delimitation of the maritime boundary between Guinea and Guinea-Bissau*, Award, 14 February 1985, RIAA, Vol. XIX, p. 149, paragraphs 103-104; *Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment of 19 November 2012, I.C.J. Reports 2012*, p. 624, paragraph 215; *Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment of 3 February 2009, I.C.J. Reports 2009*, p. 61, paragraph 201; *Arbitration regarding the delimitation of the maritime boundary between Guyana and Suriname*, Award, 17 September 2007, RIAA, Vol. XXX, p. 1, paragraph 392; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment of 10 October 2002, I.C.J. Reports 2002*, p. 303, paragraph 297; *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Judgment of 23 September 2017*, ITLOS Reports 2017, p. 4, paragraphs 423-426.

> the cut-off effect is a relevant consideration which requires adjustment or shifting of the provisional median line in order to produce an equitable result.[678]

378. In that case, the Court made a significant adjustment to the provisional equidistance line to avoid the cut-off produced by a number of islands on Nicaragua's maritime areas.[679] Equally, in the *Black Sea* case, the Court explained that delimitation lines should avoid cut-off by allowing "the adjacent coasts of the Parties to produce their effects, in terms of maritime entitlements, in a reasonable and mutually balanced way."[680]

379. Similarly, in the *Bangladesh/Myanmar* case, the International Tribunal for the Law of the Sea ("**ITLOS**") considered that:

> when an equidistance line drawn between two States produces a cut-off effect on the maritime entitlement of one of those States, as a result of the concavity of the coast, then an adjustment of that line may be necessary in order to reach an equitable result.[681]

380. In that case, the application of an equidistance line coupled with the concave nature of Bangladesh's coast produced a significant cut-off effect on Bangladesh's maritime areas.[682] The ITLOS tribunal found that such cut-

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678 *Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment of 19 November 2012, I.C.J. Reports 2012*, p. 624, paragraph 215.

679 *See Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment of 19 November 2012, I.C.J. Reports 2012*, p. 624, paragraphs 215 and 232-238.

680 *Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment of 3 February 2009, I.C.J. Reports 2009*, p. 61, paragraph 201.

681 *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment of 14 March 2012*, ITLOS Reports 2012, p. 4, paragraph 292.

682 *See Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment of 14 March 2012*, ITLOS Reports 2012, p. 4, paragraphs 323-324.

off constituted a relevant circumstance that required "an adjustment [...] to its provisional equidistance line".[683]

381. Equally, the UNCLOS Annex VII tribunal in the *Bangladesh v. India* case adjusted a provisional equidistance line to avoid the cut-off effect it produced on Bangladesh's maritime areas.[684] The Annex VII tribunal observed that:

> as a result of the concavity of the coast, the provisional equidistance line it constructed in fact produces a cut-off effect on the seaward projections of the coast of Bangladesh. For that reason, the Tribunal considers the cut-off to constitute a relevant circumstance which may require the adjustment of the provisional equidistance line it constructed.[685]

382. The tribunal then proceeded to adjust the provisional equidistance line noting that:

> the provisional equidistance line it has constructed must be adjusted in order to avoid an unreasonable cut-off effect to the detriment of Bangladesh.[686]

383. The *Bangladesh v. India* decision is particularly illuminating because it explained that a provisional equidistance line should be adjusted when the cut-off prevents: (i) a State "from extending its maritime boundary as far seaward as international law permits"; and (ii) the achievement of an

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683 *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myan*mar), *Judgment of 14 March 2012*, ITLOS Reports 2012, p. 4, paragraph 325.

684 *See Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)*, Award, 7 July 2014, PCA Case No. 2010-16, paragraph 421.

685 *Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)*, Award, 7 July 2014, PCA Case No. 2010-16, paragraph 408.

686 *Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)*, Award, 7 July 2014, PCA Case No. 2010-16, paragraph 421.

"equitable solution".[687] In the present case, the cut-off produced by the application of an equidistance line would prevent both things.

384. Somalia admits that a "cut-off effect appreciated within the general geographical context" is a relevant circumstance "for the purposes of adjusting the provisional equidistance line".[688] However, it claims that no adjustment is required in this case. Somalia's argument lacks any merit.

385. Indeed, Kenya has already explained that 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."[689] As reflected in Figure 13 below, a boundary along an equidistance line would substantially narrow Kenya's coastal projection into its EEZ from a coastal length (measured as a straight line) of 424 km to merely 180 km measured at the 200M limit. This would represent a reduction of 58% or 65% if one takes the natural configuration used by Somalia (i.e., 511 km to 180 km measured at the 200M limit).[690] In any view, that severe reduction in Kenya's coastal projection constitutes a pronounced and unreasonable cut-off. In proportional terms, it is not far from the cut-off produced in Bangladesh's maritime areas, which led the tribunal to adjust the provisional equidistance line in the *Bangladesh v. India* case.[691]

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687 *Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)*, Award, 7 July 2014, PCA Case No. 2010-16, paragraph 417.

688 *See*, e.g., MS, paragraph 6.47.

689 KR, paragraph 138. *See also* KR, paragraphs 138-143; KCM, paragraphs 343-352.

690 *See* KCM, paragraph 344, citing Figure 3-1; KR, paragraph 141(b).

691 In that case, Bangladesh claimed that: "[a]t just 75 M from shore, the breadth of Bangladesh's maritime space has been reduced by nearly 40%, from 188 M to just 117 M. At 150 M from shore, it is far worse: the breadth has been reduced to a mere 45 M, only 24% of the near-shore figure. At 200M, it is just 26 M, less than 1/7th as much as its original

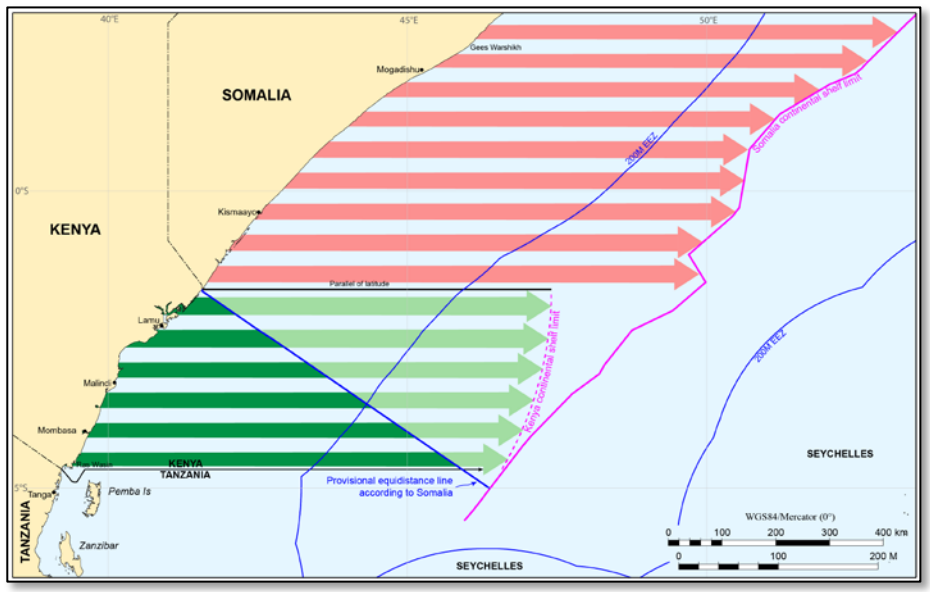

Figure 13: Cut-off Effect on Kenya's Maritime Projection

386. Moreover, the cut-off effect produced by the equidistance line is severely exacerbated past the 200M limit, essentially to the point that Kenya would be completely cut off from the outer limit of the continental shelf.[692] It would be as if Kenya did not exist and the relevant area at the outermost limit of the continental shelf were generated only by the coastal projections of Somalia and Tanzania. In other words, the evidence confirms that the cut-off effect past the 200M limit clearly would not allow Kenya to "extend[] its maritime boundary as far seaward as international law permits".[693] It also would not allow "the adjacent coasts of the Parties to

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extent. And at approximately 235 M, it terminates completely." *Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)*, Reply of Bangladesh, Vol. I, PCA Case No. 2010-16, paragraph 4.79.

692 *See* KCM, paragraph 344; KR, paragraph 141(b).

693 *Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)*, Award, 7 July 2014, PCA Case No. 2010-16, paragraph 417.

produce their effects, in terms of maritime entitlements, in a reasonable and mutually balanced way".[694]

387. Somalia effectively admits that its proposed boundary line would severely cut off Kenya's maritime areas, particularly past the 200M limit. In its Memorial, Somalia openly concedes that "Kenya's entitlements may appear reduced beyond 200 M".[695] Despite that, Somalia argues that the cut-off to Kenya's maritime areas "is not a relevant circumstance opposable to Somalia" because it stems from Kenya's delimitation agreement with Tanzania.[696] However, the suggestion that the Court should completely ignore the Kenya-Tanzania boundary agreement as if it were a self-inflicted wound is not tenable.[697]

388. Kenya has already provided ample reasons to explain why the Kenya-Tanzania boundary agreement cannot be ignored. To wit, that agreement: (i) 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";[698] (ii) "informed Kenya's adoption of a similar parallel of latitude maritime boundary with Somalia" to which Somalia acquiesced for at least 35 years;[699] (iii) "was consistent with regional practice in respect of maritime boundary delimitations";[700] and (iv) was based on the views

694 *Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment of 3 February 2009, I.C.J. Reports 2009*, p. 61, paragraph 201.

695 MS, paragraph 7.44.

696 MS, paragraph 7.44.

697 *See* paragraphs 389-392 below.

698 KR, paragraph 143.

699 KR, paragraph 143.

700 KR, paragraph 143.

expressed by all relevant States (including Somalia) at the relevant time, including during the UNCLOS III negotiations.[701]

389. In addition, as illustrated in Figure 14 below, an equidistance boundary between Kenya's and Tanzania's maritime areas would have been excessively disadvantageous to Kenya in the areas both within and beyond 200M from the relevant coastline. The combined effect of both equidistance lines would have exacerbated the cut-off in the maritime areas within 200M, greatly restricting Kenya's maritime space as compared to its coastal length.

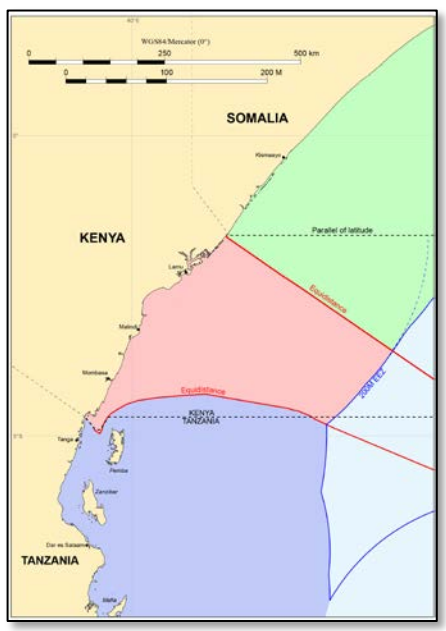

Figure 14: Cut-off Effect on Kenya's Maritime Areas within 200M Arising from the Kenya-Tanzania Equidistance Line

701 *See*, e.g., KCM, paragraphs 201 and 227.

390. Indeed, the same injurious effect of using equidistance lines continues even beyond the 200M line, as shown in Figure 15 below.

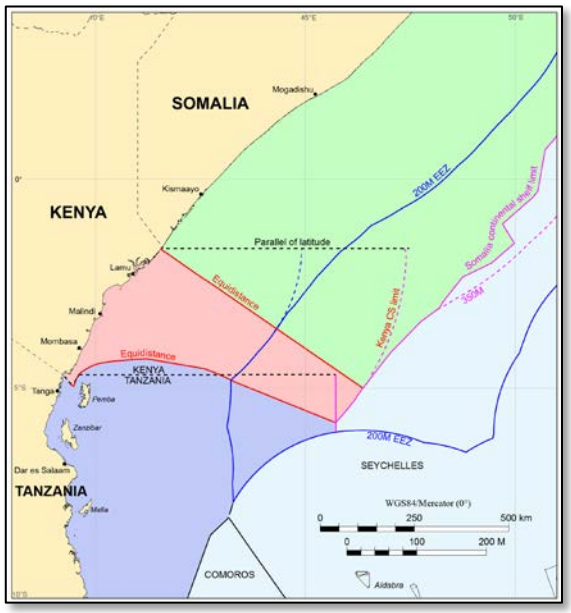

Figure 15: Cut-off Effect on Kenya's Maritime Areas beyond 200M Arising from the Kenya-Tanzania Equidistance Line

391. Far from a self-inflicted wound, the Kenya-Tanzania boundary agreement was a compromise between both States. This compromise was reached in full consistency with equitable and international law principles of maritime boundary delimitation prevailing at the time. To fully appreciate this, it is necessary to engage with the relevant States' contemporaneous views of the applicable international law, rather than assessing the situation through the narrow lens of the law as it stands today. This follows from the principle of inter-temporal law, according to which "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."[702]

392. Somalia cannot tenably deny that the Kenya-Tanzania boundary agreement concluded in 1975-1976[703] was fully consistent with contemporaneous international law principles of maritime boundary delimitation. As Kenya explained above and in its Counter-Memorial, during the course of the UNCLOS III negotiations that took place between 1978 and 1980, Somalia itself (alongside Kenya and other delegations) submitted proposals indicating its preference for delimitation based on equitable principles rather than equidistance.[704]

393. Indeed, speaking at UNCLOS III on 3 April 1980, Somalia's representative, while rejecting the proposal to refer to equidistance in draft Articles 74 and 83, categorically urged that:

> delimitation [of the exclusive economic zone and continental shelf] 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.[705]

394. Likewise, on 26 August 1980, at the Resumed Ninth Session of UNCLOS III, the Somali delegation:

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702 *Island of Palmas Case (Netherlands, USA)*, Award, 4 April 1928, RIAA, Vol. II, p. 829, page 845.

703 *See* KCM, Chapter I.B.3; KR, Chapter II.B2.

704 *See* KCM, Chapter I.C.2 and paragraph 257.

705 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, p. 35 and p. 44, paragraph 43, KCM, Annex 71.

> considered that such delimitation should be determined on the basis of the principle of equity. It was convinced that a serious analysis of customary international law, as articulated in the 1969 North Sea cases and the 1977 arbitral decision on the Channel case between France and the United Kingdom, would prove that equity and equitable principles rather than the purely geometric methods of the median or equidistance line had become consecrated as the general rule in international law in delimitation matters.[706]

395. It is notable that Somalia made those unequivocal statements in the years immediately following the conclusion of the Kenya-Tanzania boundary agreement in 1975-1976 and one year after the 1979 EEZ Proclamation. To the same effect, in 1974, Tanzania co-signed a proposed provision put forward by African States according to which:

> [t]he delimitation of the exclusive economic zone between adjacent or opposite States shall be done by agreements between them on the basis of principles of equity, the median line not being the only method of delimitation.[707]

396. The evidence therefore makes it abundantly clear that all relevant States – Kenya, Somalia and Tanzania – shared a clear common understanding, at the time when the Kenya-Tanzania boundary was agreed, that public

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706 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, pp. 55-6, page 56, paragraph 73, KCM, Annex 72.

707 Gambia, Ghana, Ivory Coast, Kenya, Lesotho, Liberia, Libyan Arab Republic, Madagascar, Mali, Mauritania, Morocco, Senegal, Sierra Leone, Sudan, Tunisia, United Republic of Cameroon, United Republic of Tanzania and Zaire: draft articles on the exclusive economic zone, A/CONF.62/C.2/L.82, 26 August 1974, page 241, Article 8(1), Annex 70. *See also* an earlier draft: Kenya and Tunisia: draft article on the delimitation of the continental shelf or the exclusive economic zone, A/CONF.62/C.2/L.28, 30 July 1974, page 205, Annex 71. A similar text was presented by France. *See* France: draft article on the delimitation of the continental shelf or of the economic zone, A/CONF.62/C.2/L.74, 22 August 1974, page 237, Annex 72.

international law required maritime boundary delimitations to be effected on the basis of equity. As explained in further detail below, the historical and regional context of Kenya, Somalia and Tanzania's boundaries cannot simply be ignored for the sake of securing a universal methodological uniformity through the retrospective application of the three-step methodology. That is all the more so considering that Somalia itself acknowledges that the "equidistance/relevant circumstances method had not crystallized into law 36 years ago".[708] It fact, it still has not.

397. Adjusting the provisional equidistance line to the Parallel of Latitude would prevent any pronounced cut-off on either Kenya or Somalia's maritime areas.[709] As illustrated in Figure 16 below, such adjustment would not prevent Somalia from extending its maritime areas "as far seaward as international law permits".[710] It also would not prevent Kenya from extending its maritime areas to the 350M limit of the continental shelf. In other words, adjusting the provisional equidistance line to the Parallel of Latitude would "allow[] the adjacent coasts of the Parties to produce their effects, in terms of maritime entitlements, in a reasonable and mutually balanced way."[711]

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708 SR, paragraph 3.21. *See also* SR, paragraph 3.36 and footnote 195 (describing 1982 as "well-before the three-step method became settled" and citing in this context the decisions in *Delimitation of the maritime boundary between Guinea and Guinea-Bissau*, Award, 14 February 1985, RIAA, Vol. XIX, p. 149 and *Delimitation of maritime areas between Canada and France*, Award, 10 June 1992, RIAA, Vol. XXI, p. 265 as pre-dating the three-step method.

709 *See* KCM, paragraphs 348-351 (where Kenya explains why Somalia's alleged cut-off is on a scale that is appropriate in achieving an equitable delimitation where cut-off effects are addressed in "a reasonable and mutually balanced way").

710 *Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)*, Award, 7 July 2014, PCA Case No. 2010-16, paragraph 417.

711 *Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment of 3 February 2009, I.C.J. Reports 2009*, p. 61, paragraph 201.

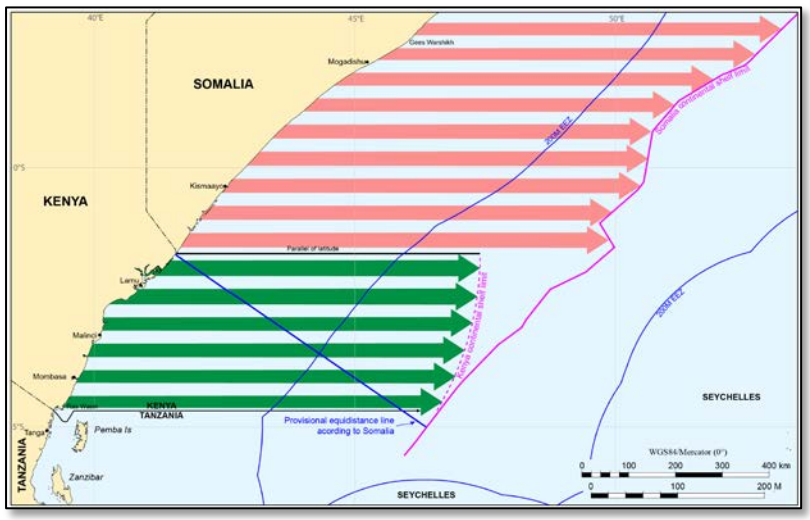

Figure 16: The Parallel of Latitude Boundary Would Not Cut-off Somalia

398. In sum, an equitable outcome in this case is not possible unless the pronounced cut-off effect produced on Kenya's maritime areas by the application of an equidistance line is avoided. That cut-off is a relevant circumstance that necessarily calls for the adjustment of the provisional equidistance line. The most appropriate way to avoid a pronounced cut-off in this case is to adjust that line to the Parallel of Latitude.

2. The regional context requires the adjustment of the provisional equidistance line to the Parallel of Latitude

399. The regional practice of using parallels of latitude to define the maritime boundaries of the Eastern African coast constitutes an additional relevant circumstance that requires adjusting the provisional equidistance line to the Parallel of Latitude.

400. Since the *North Sea Continental Shelf Cases*, the Court has noted the importance of the regional context when effecting a maritime delimitation

on multiple occasions. In that case, the Court highlighted the significance of taking into account "the effects, actual or prospective, of any other continental shelf delimitations between adjacent States in the same region."[712]

401. Relying on regional context, subsequent tribunals have also departed from provisional equidistance lines. For example, in the *Guinea/Guinea-Bissau* arbitration, the tribunal relied heavily on the regional context to depart from the equidistance line proposed by Guinea-Bissau. The tribunal adopted a solution that took "overall account of the shape of [the West African] coastline" and was consistent with the regional practice of delimitation agreements.[713] Indeed, the tribunal emphasised the need to ensure that its delimitation would:

> be suitable for equitable integration into the existing delimitations of the West African region, as well as future delimitations which would be reasonable to imagine from a consideration of equitable principles and the most likely assumptions.[714]

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712 *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment of 20 February 1969*, *I.C.J. Reports 1969*, p. 3, paragraph 101(D)(3). *See also* S. Fietta and R. Cleverly, *A Practitioner's Guide to Maritime Boundary Delimitation* (Oxford University Press, 2016), page 91 ("[f]urther non-geographical relevant circumstances might include: […] the regional context, in the form of delimitations already made or still to be made between other States in the region").

713 *Delimitation of the maritime boundary between Guinea and Guinea-Bissau*, Award, 14 February 1985, RIAA, Vol. XIX, p. 149, paragraph 108 (unofficial translation) (original French: "Une méthode valable pour le Tribunal consiste à commencer par embrasser d'un coup d'œil l'ensemble de la région de l'Afrique occidentale et à rechercher une solution tenant compte d'une façon globale de la forme de ses côtes").

714 *Delimitation of the maritime boundary between Guinea and Guinea-Bissau*, Award, 14 February 1985, RIAA, Vol. XIX, p. 149, paragraph 109 (unofficial translation) (original French: "soit susceptible d'être insérée équitablement dans les délimitations actuelles de la région ouest-africaine et dans ses délimitations futures telles qu'on peut raisonnablement les imaginer en recourant à des principes équitables et d'après les hypothèses les plus vraisemblables […]").

402. Notably, the tribunal also explained that the application of equidistance lines in cases where there are three adjacent States along a concave coastline is not appropriate. The tribunal rightly explained that the application of an equidistance line in those cases is likely to result "in the middle country being enclaved by the other two and thus prevented from extending its maritime territory as far seaward as international law permits."[715] As explained in **Section IV.B.1**, that is precisely the effect that the application of the provisional equidistance line would have on Kenya.[716]

403. Moreover, in *Tunisia/Libya*, the Court found that "the existence and interests of other States in the area, and the existing or potential delimitations between each of the Parties and such States" was a relevant circumstance for the purpose of its delimitation.[717] Similarly, in *Libya/Malta*, the Court noted that "the practice of States as reflected in the delimitation agreements [previously] concluded and published" could constitute a relevant circumstance.[718]

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715 *Delimitation of the maritime boundary between Guinea and Guinea-Bissau*, Award, 14 February 1985, RIAA, Vol. XIX, p. 149, paragraph 104 (unofficial translation) (original French: "[q]uand en fait il y a — comme c'est ici le cas si l'on songe à la Sierra Leone — trois États limitrophes le long d'un littoral concave, l'équidistance a cet autre inconvénient d'avoir pour résultat que 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.").

716 *See* paragraphs 330 – 333, 376 – 398 above.

717 *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment of 24 February 1982, I.C.J. Reports 1982*, p. 18, paragraph 81. *See also Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment of 3 June 1985, I.C.J. Reports 1985*, p. 13, paragraph 69 (where the Court considered the regional context making clear that it had "to look beyond the area concerned in the case, and consider the general geographical context in which the delimitation will have to be effected.").

718 *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment of 3 June 1985, I.C.J. Reports 1985*, p. 13, paragraph 69.

404. Kenya has already explained that an equitable delimitation in this case necessarily requires taking into account the regional context.[719] There are two points to be made here. One concerns the broader regional context of the States located in the relevant part of the Eastern African coast. The other concerns the more specific context of the Kenya-Tanzania maritime boundary.

405. Turning to the first point, there are five adjacent States with maritime boundaries on the Eastern African coast, and four adjacent boundaries between them. Three of those States (i.e., Kenya, Tanzania and Mozambique) have indisputably agreed to delimit their boundaries using parallels of latitude.[720] The use of parallels of latitude to delimit those boundaries was not accidental. It represented what those States regarded as equitable and was an instance of States adjusting their overlapping claims in a peaceful manner and in accordance with international law. Somalia shared that view until 2014.

406. As already explained, those States were not interested in engaging in the microscopic exercise of identifying basepoints to draw equidistance lines.[721] Quite the contrary, all of those States adamantly opposed equidistance, as did Somalia. They did so because they were looking at their regional and geographic relationship in broad terms.[722] Ultimately,

719 *See* KCM, paragraphs 326-332; KR, paragraphs 135-148.

720 *See* KR, paragraph 146.

721 *See* Chapter III.

722 *See* KCM, paragraphs 69-76; KR, paragraph 131.

they considered that parallel boundaries would lead to an equitable division of their maritime areas in light of the general coastal configuration.[723]

407. Against this backdrop, the retroactive imposition of an equidistance line in a region that has always used parallels of latitude would be inequitable and would ignore the "general geographical context in which the [Kenya-Somalia] delimitation [has] to be effected."[724] That is all the more so considering that the three-step methodology did not even exist at the time when neighbouring maritime boundaries in the region were agreed (namely, the 1975-1976 Kenya-Tanzania agreement[725] and the 1988 Tanzania-Mozambique maritime agreement[726]).

408. Turning to the second point, Kenya respectfully refers the Court to its previous submissions where it has already explained why the existence of the Kenya-Tanzania maritime boundary cannot be ignored.[727] Suffice it to recall that the Kenya-Tanzania boundary brought advantages to both States and was agreed in full compliance with equitable and international law principles prevailing at the time. More importantly, it was agreed on the basis of the contemporaneous views expressed by all relevant States,

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723 *See* Chapter III. *See also* KCM, paragraphs 69-76; KR, paragraph 131.

724 *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment of 3 June 1985, I.C.J. Reports 1985*, p. 13, paragraph 69.

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

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

727 *See* paragraphs 387-398 above.

including during the UNCLOS III negotiations.[728] Thus, Kenya fully expected that Somalia would agree to settle the Kenya-Somalia boundary equitably, as the Parties understood that term at the time (i.e., certainly not on the basis of equidistance).

409. Ignoring the Kenya-Tanzania maritime boundary in this case would be inequitable and would severely undermine the objectives of "transparency" and "predictability" highlighted by the *Bangladesh v. India* UNCLOS Annex VII tribunal.[729] In this case, transparency and predictability necessarily entail taking into account the existence of the Kenya-Tanzania maritime boundary, which Somalia acknowledged and regarded as equitable for almost half a century.

410. In sum, the regional context constitutes an additional relevant circumstance that calls for the adjustment of the provisional equidistance line to the Parallel of Latitude in order to ensure that the Kenya-Somalia boundary is "suitable for equitable integration into the existing delimitations of the [East] African region".[730]

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728 *See* paragraphs 391-396 above.

729 *See Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)*, Award, 7 July 2014, PCA Case No. 2010-16, paragraph 339.

730 *Delimitation of the maritime boundary between Guinea and Guinea-Bissau*, Award, 14 February 1985, RIAA, Vol. XIX, p. 149, paragraph 109 (unofficial translation) (original French: "susceptible d'être insérée équitablement dans les délimitations actuelles de la région ouest-africaine").

3. Vital security interests concerning both the Parties and the international community at large require the provisional equidistance line to be adjusted to the Parallel of Latitude

411. As already explained, Kenya faces continuous and existential security threats from terrorist and other criminal groups operating in Somalia's land and waters.[731] To aggravate matters, Somalia openly admits that it cannot control, regulate or enforce its maritime jurisdiction over the disputed area – not even in its territorial sea. Indeed, Somalia concedes that:

> it has been widely recognised that, as a result of Somalia's lack of maritime enforcement capacity, vessels from many States have engaged in illegal fishing in Somalia's territorial waters and EEZ—activities that Somalia has been unable to prevent.[732]

412. As a result, as ably summarised by General Kibwana, the former Chief of General Staff of Kenya and a decorated naval officer with an illustrious career:

> [i]t is very important that the Kenya Navy be allowed to patrol the entire territorial waters, up to the parallel of latitude. Terrorist incursions, and incursions by pirates and bandits, often occur by sea. For example, as a naval officer, I am keenly aware that the November 2008 terrorist attacks in Mumbai, killing at least 174 people and injuring another 300, were conducted by terrorists who entered India using a hijacked fishing trawler. Kenya Navy's patrols are important to limit the risk of such terrorist acts occurring on Kenyan soil. If the Kenya Navy is stopped from patrolling up to the parallel of latitude, both within and beyond the territorial sea limit, the security situation for Kenya will decrease substantially. Terrorist activity in East Africa and Kenya,

731 *See* KCM, paragraphs 183-185; KR, paragraph 86; KPO, paragraph 16.

732 SR, paragraph 2.71.

> as well as piracy, would be expected to increase. This is a substantial risk to the lives of Kenyan and other civilians.[733]

413. As discussed directly below, other evidence fully confirms General Kibwana's conclusion that any maritime delimitation south of the Parallel of Latitude would exacerbate the security threats of terrorism and piracy and endanger global security. Those vital security interests are a relevant circumstance that confirms the need to adjust the provisional equidistance line to the Parallel of Latitude.

(i) Security interests may constitute a relevant circumstance requiring adjustment of a provisional equidistance line

414. The Court and other international tribunals have recognised that security interests may constitute a relevant circumstance requiring adjustment of a provisional equidistance line. The type of security interests that may require such adjustment include "navigational defence"[734] issues and "law enforcement considerations"[735] required to prevent illegal activities in a particular area.

415. In *Nicaragua v. Colombia*, for example, the parties invoked various defence and law enforcement considerations. This included, on Colombia's part, responsibility for the exercise of jurisdiction in relation to drug trafficking

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733 Witness Statement of General (Ret'd) Joseph Raymond Kibwana, EGH, CBS, 11 January 2021, paragraph 24, Annex WS1.

734 *Delimitation of Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic (UK, France), Award, 30 June 1977*, RIAA, Vol. XVIII, p. 3, paragraphs 188.

735 *Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment of 19 November 2012, I.C.J. Reports 2012*, p. 624, paragraphs 221-222.

and related crimes in the disputed area.[736] In this context, the Court accepted that:

> legitimate security concerns might be a relevant consideration if a maritime delimitation was effected particularly near to the coast of a State and the Court will bear this consideration in mind in determining what adjustment to make to the provisional median line or in what way that line should be shifted.[737]

416. For its part, the arbitral tribunal in the *Guinea/Guinea Bissau* case emphasised that:

> [i]ts primary objective has been to avoid that, for one reason or another, one of the Parties would find itself faced with the exercise of rights, which might interfere with its right to development or compromise its security in front of its coasts and in their immediate vicinity.[738]

417. Similarly, in the *Libya/Malta* and *Black Sea* cases, the Court made clear that "the legitimate security considerations of the Parties may play a role in

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736 *See Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment of 19 November 2012, I.C.J. Reports 2012*, p. 624, paragraph 221.

737 *Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment of 19 November 2012, I.C.J. Reports 2012*, p. 624, paragraph 222.

738 *Delimitation of the maritime boundary between Guinea and Guinea-Bissau*, Award, 14 February 1985, RIAA, Vol. XIX, p. 149, paragraph 124 (unofficial translation) (original French: "[s]on objectif premier a été d'éviter que, pour une raison ou pour une autre, une des Parties voie s'exercer en face de ses côtes et dans leur voisinage immédiat des droits qui pourraient porter atteinte à son droit au développement ou compromettre sa sécurité"). *See also Sovereignty and Maritime Delimitation in the Red Sea (Eritrea/Yemen), Award, 17 December 1999*, RIAA, Vol. XXII, p. 335, paragraph 157 ("[i]f any further were needed to reject the Yemen suggestion of enclaving the Eritrean islands in this area beyond a limit of 12 miles from the high-water line of the mainland coast, it may be found in the principle of non-encroachment which was described by Judge Lachs in the Guinea/Guinea-Bissau Award in the following terms: As stated in the award, our principal concern has been to avoid, by one means or another, one of the Parties finding itself faced with the exercise of rights, opposite to and in the immediate vicinity of its coast, which might interfere with its rights to development or put its security at risk").

determining the final delimitation line."[739] Bearing this in mind, in the *Black Sea* case, the Court noted that it had drawn a provisional equidistance line "fully respect[ing] the legitimate security interests of either Party."[740] For that reason, no further adjustment to the provisional equidistance line was required. It follows that, in the present case, anything less than "full[] respect [for] the legitimate security interests" of Kenya calls for the adjustment of the provisional equidistance line.

418. In the same vein, in the *UK-France Continental Shelf* arbitration, the tribunal took both parties' navigational, defence and security interests into account in its delimitation.[741] According to France, those interests included the coastal States' "defence [plans], sea rescue, control of navigation, responsibility for lights and buoys, civil air navigation zones and measures against pollution", as well as various arrangements between France and the United Kingdom dating back several decades.[742]

419. The tribunal considered that the weight of such interests was "somewhat diminished by the very particular character of the English Channel as a major route of international maritime navigation serving ports".[743]

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739 *Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment of 3 February 2009, I.C.J. Reports 2009*, p. 61, paragraph 204. *See also Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment of 3 June 1985, I.C.J. Reports 1985*, p. 13, paragraph 51.

740 *Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment of 3 February 2009, I.C.J. Reports 2009*, p. 61, paragraph 204.

741 *See Delimitation of Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic (UK, France)*, Award, 30 June 1977, RIAA, Vol. XVIII, p. 3, paragraph 188.

742 *Delimitation of Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic (UK, France)*, Award, 30 June 1977, RIAA, Vol. XVIII, p. 3, paragraph 163, read in conjunction with paragraph 188.

743 *Delimitation of Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic (UK, France)*, Award, 30 June 1977, RIAA, Vol. XVIII, p. 3, paragraph 188.

However, the tribunal nonetheless confirmed that those factors could "support and strengthen [...] any conclusions that are already indicated by the geographical, political and legal circumstances of the region".[744] The tribunal also took into account the "predominant interest of the French Republic in the southern areas of the English Channel".[745] Having regard to the relevant factors, the tribunal concluded that the special features of the Channel Islands region "call for an intermediate solution that effects a more appropriate and a more equitable balance between the respective claims and interests of the Parties."[746]

420. It is therefore indisputable that, under international law, security interests can constitute a special circumstance requiring the adjustment of a provisional equidistance line. For the reasons below, the exceptional factual circumstances underlying this case confirm that respecting "the legitimate security interests of [Kenya]" calls for the adjustment of the provisional equidistance line to the Parallel of Latitude.[747]

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744 *Delimitation of Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic (UK, France)*, Award, 30 June 1977, RIAA, Vol. XVIII, p. 3, paragraph 188.

745 *Delimitation of Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic (UK, France)*, Award, 30 June 1977, RIAA, Vol. XVIII, p. 3, paragraph 188. *See also Arbitration regarding the delimitation of the maritime boundary between Guyana and Suriname*, Award, 17 September 2007, RIAA, Vol. XXX, p. 1, footnote 353.

746 *Delimitation of Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic (UK, France)*, Award, 30 June 1977, RIAA, Vol. XVIII, p. 3, paragraph 198.

747 *Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment of 3 February 2009, I.C.J. Reports 2009*, p. 61, paragraph 204.

(ii) Terrorism emanating from groups operating in Somalia constitutes a threat to the vital interests of Kenya and of many other countries in the world

421. Al-Shabaab's control of large swathes of Somali land and waters constitutes an imminent threat to international peace and security.[748] In particular, delimiting the maritime boundary along an equidistance line, as Somalia suggests, will provide Al-Shabaab with greater access to launch attacks into Kenya and will serve to enrich and enlarge Al-Shabaab, all at the cost of international peace and security and human life.

422. There is no doubt that Al-Shabaab constitutes a grave threat to international peace and security. In May 2020, the UN Security Council reiterated that "Al-Shabaab poses a serious threat to the stability of Somalia and its neighbours" and that "the situation in Somalia continues to constitute a threat to international peace and security".[749] Similarly, in a 13 August 2020 Report on the situation in Somalia, the UN Secretary-General confirmed that the situation "remained volatile" owing to "crime-related killings and shootings and Al-Shabaab attacks".[750]

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748 *See* UN Security Council Resolution 2520 (2020), S/RES/2520, 29 May 2020, Annex 39; UN Security Council Resolution 2498 (2019), S/RES/2498, 15 November 2019, Annex 73; 2019 UN Piracy in Somalia Report, paragraph 18, Annex 43.

749 UN Security Council Resolution 2520 (2020), S/RES/2520, 29 May 2020, Annex 39. *See also*, e.g., UN Security Council Resolution 2498 (2019), S/RES/2498, 15 November 2019, Annex 73 ("[c]ondemning Al-Shabaab attacks in Somalia and beyond, expressing grave concern that Al-Shabaab continues to pose a serious threat to the peace, security and stability of Somalia and the region"). (Emphasis omitted).

750 Report of the UN Secretary-General on the Situation in Somalia, S/2020/798, 13 August 2020, paragraph 18, Annex 74.

423. Moreover, in a UN Security Council meeting held on 20 August 2020, the UN Special Representative of the Secretary-General for Somalia and Head of the UN Assistance Mission in Somalia stressed that he:

> remain[ed] concerned at the threat of Al-Shabaab across Somalia, which is demonstrated by the extremist group's sustained attacks against Government officials, businesses, civilians, security forces and international personnel.[751]

424. He also noted a preoccupying increase in Al-Shabaab attacks in the following terms:

> [w]e are now witnessing a worrisome upsurge in attacks by Al-Shabaab, particularly in Mogadishu but also in several regions. The vicious Al-Shabaab attack on innocent civilians at the Elite Hotel on 16 August was one of an increasing number of recent attacks across Somalia and is a tragic reminder of the continued imperative to improve security in Somalia.[752]

425. Even more recently, the 2020 UN Panel of Experts Report on Somalia declared that:

> [t]he threat posed by Al-Shabaab to peace, security and stability in Somalia goes beyond the impact of the group's conventional military action and asymmetric warfare to include sophisticated extortion and "taxation" systems, child recruitment practices and an effective propaganda machine. Similarly, Al-Shabaab's control of populations extends beyond the areas in which it has a geographical presence, through threats and violence enacted against individuals or communities, infiltration and control of

751 Security Council, 75th year: 8755th meeting, New York, S/PV.8755, 20 August 2020, page 5, Annex 75.

752 Security Council, 75th year: 8755th meeting, New York, S/PV.8755, 20 August 2020, page 3, Annex 75.

> information sources, and the manipulation of formal institutions such as the financial sector.[753]

426. There is also no doubt that Al-Shabaab operates with virtual impunity in Somalia to extract significant funds for its terrorist activities. The 2020 UN Panel of Experts Report on Somalia notes that Al-Shabaab "taxation" is enabled by, *inter alia*, "the group's access to information sources such as business registrations, property assets and shipping cargo manifests."[754] The same Report confirms that Al-Shabaab "remains in a strong financial position", "is generating a significant budgetary surplus" and "has transitioned from a cash-based economy to using the nascent formal financial sector in Somalia to collect and transfer funds".[755] In relation to the latter point, the Report expresses concerns that Al-Shabaab is expected to exploit Somalia's financial system, "which has consistently operated a flexible business model and is likely institution agnostic."[756]

427. Notably, Al-Shabaab has been able to exploit Somalia's incapacity to police its coasts and "derives its domestic revenue through [*inter alia*] the 'taxation' of imports at major seaports".[757] This includes the same major seaports that would necessarily be used for oil and gas operations in the now-disputed maritime area if this area were to be awarded to Somalia. For

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753 Final Report of the UN Panel of Experts on Somalia to the UN Security Council, S/2020/949, 28 September 2020 (the "**2020 UN Panel of Experts Report on Somalia**"), page 3, Annex 76.

754 2020 UN Panel of Experts Report on Somalia, pages 3, 13-14, Annex 76 (the Report refers to allegations that the Chair of the Benadir Chamber of Commerce was providing to Al-Shabaab "a comprehensive database of businesses operating in Mogadishu."). *See also* "Government dissolves Benadir chamber of commerce over link to Al-Shabaab", *Radio Dalsan*, 26 January 2020, Annex 128.

755 2020 UN Panel of Experts Report on Somalia, page 3, Annex 76.

756 2020 UN Panel of Experts Report on Somalia, page 8, Annex 76.

757 2020 UN Panel of Experts Report on Somalia, page 7, Annex 76.

instance, there is evidence that Al-Shabaab "infiltrated Mogadishu port, accessing data held by commercial shipping agents and demanding 'taxation' payments from businesses who import goods into the port."[758] The 2020 UN Panel of Experts Report on Somalia notes that Al-Shabaab is understood to operate multiple bank accounts to facilitate "taxation" payments at Mogadishu port. It concludes that a single one of those accounts is capable of drawing more than USD 3 million annually.[759]

428. As such, companies operating in Somalia are forced to pay "taxes" (or extortion payments, to be precise) to Al-Shabaab in order to operate.[760] These include significant payments made at major ports and other similar checkpoints. According to a Report on Somalia sent to the UN Security Council by the UN Monitoring Group, in 2016-2017 "Al-Shabaab monthly taxation varied from $10 paid by market traders to as much as $70,000 paid by major companies".[761]

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758 2020 UN Panel of Experts Report on Somalia, page 9, Annex 76.

759 *See* 2020 UN Panel of Experts Report on Somalia, pages 9-10, Annex 76.

760 *See* Letter from the Chair of the Security Council Committee pursuant to resolutions 751 (1992) and 1907 (2009) concerning Somalia and Eritrea addressed to the President of the Security Council, S/2017/924, 2 November 2017, page 14, paragraph 30, Annex 95 ("Al-Shabaab also continues to tax goods at checkpoints along major supply routes, particularly imports and exports along routes to major ports, including goods destined for Kenya."). *See also* 2019 UN Panel of Experts Report on Somalia, paragraph 18, Annex 79, ("Al-Shabaab functions as a shadow government even in areas that it does not physically control, collecting "taxes" and providing some basic services"); "Feared Shabab exploit Somali banking and invest in real estate, U.N. says", *The New York Times*, 11 October 2020, Annex 148 ("[d]uring the reporting period, from last December to this August, the report's authors found evidence that the Shabab had generated about $13 million in revenue. This included an estimated $2.4 million from checkpoints in the Lower Juba region in southern Somalia and $5.8 million from charging businesses in the southern port city of Kismayo.").

761 Letter from the Chair of the Security Council Committee pursuant to resolutions 751 (1992) and 1907 (2009) concerning Somalia and Eritrea addressed to the President of the Security Council, S/2017/924, 2 November 2017, page 13, paragraph 28, Annex 95.

429. If the maritime boundary is delimited on the basis of equidistance, the companies authorised by Somalia to carry out oil and gas activities in those waters and their various subcontractors will inevitably contribute to terrorist financing. They will be forced to do so.

430. Thus, Al-Shabaab's capacity to collect funds in Somalia and transfer those funds across the globe using Somalia's nascent financial system with impunity endangers global security and the stability of the Eastern African region and is directly implicated in this proceeding.

431. In addition to the raising of revenue, Al-Shabaab has succeeded in securing weapons, ammunition and logistical support from senior Somali businessmen and political figures.[762] For instance, Musa Haji Mohamed "Ganjab", an influential advisor to former President Hassan Sheikh Mohamud, has been involved in systematically diverting weapons and ammunition from Somali National Army stockpiles and facilitating logistical support (including diversion of food aid) to Al-Shabaab.[763]

432. The evidence also confirms that Kenya and regional security faces an existential threat from Al-Shabaab's long-term expansionist strategy. That

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762 *See*, e.g., Report of the Monitoring Group on Somalia and Eritrea pursuant to Security Council resolution 2111 (2013), S/2014/726, 13 October 2014, paragraphs 68 and 79, Annex 77. *See also* Report of the Monitoring Group on Somalia and Eritrea pursuant to Security Council resolution 2111 (2013), S/2014/726, Annex 5.1, 13 October 2014, paragraph 16, Annex 77. *See also* Report of the Monitoring Group on Somalia and Eritrea pursuant to Security Council resolution 2111 (2013), Annex 6.4, S/2014/726, 13 October 2014, paragraphs 1-16, Annex 78.

763 *See* Report of the Monitoring Group on Somalia and Eritrea pursuant to Security Council resolution 2111 (2013), S/2014/726, 13 October 2014, paragraphs 68 and 79, Annex 77. *See also* Report of the Monitoring Group on Somalia and Eritrea pursuant to Security Council resolution 2111 (2013), S/2014/726, Annex 5.1, 13 October 2014, paragraph 16, Annex 77. *See also* Report of the Monitoring Group on Somalia and Eritrea pursuant to Security Council resolution 2111 (2013), Annex 6.4, S/2014/726, 13 October 2014, paragraph 1, Annex 78.

strategy resembles past irredentist claims to a Greater Somalia.[764] In this sense, Al-Shabaab is well-known for having the notorious long-term strategic objective of creating a Caliphate of the Wahhabi Islamic Sect in the Horn of Africa region. That Caliphate would be an Islamic State spread through, *inter alia*, Somalia and Kenya.[765]

433. In that context, Al-Shabaab has launched hundreds of terrorist attacks in Kenya, including via Somali waters, and continues to be an imminent security threat to Kenya.[766] Among other things, Al-Shabaab's leaders have engaged in belligerent propaganda declaring and promoting Kenya as a "war zone".[767] The 2020 UN Panel of Experts Report on Somalia confirms that "Al-Shabaab continues to pose a threat inside Kenya" and "retains the ability to launch attacks that span the length of the 700 km border between Kenya and Somalia from Mandera in the north to Lamu in the south".[768] By way of example, a recent wave of Al-Shabaab's terrorist attacks was

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764 Indeed, following Kenya's independence, Somalia attempted to annex Kenya's entire Northern Frontier District (which included the Counties of Lamu, Garissa, Mandera and Wajir). Although Somalia's military defeat in the 1977-78 Ogaden war forced it to withdraw from its irredentist policy, irredentism still remains a latent political force in Somalia to this day. *See* KCM, paragraph 36.

765 *See* KCM, paragraph 184.

766 *See* 2019 UN Piracy in Somalia Report, paragraph 18, Annex 43; K. Lindskov Jacobsen and J. Høy-Carrasco, "Navigating Changing Currents –A forward-looking evaluation of efforts to tackle maritime crime off the Horn of Africa", University of Copenhagen Centre for Military Studies, September 2018 (the "**CMS Maritime Crime Report**"), page 34, Annex 129; Final Report of the UN Panel of Experts on Somalia to the UN Security Council, S/2019/858, 1 November 2019 (the "**2019 UN Panel of Experts Report on Somalia**"), page 3 and paragraph 13, paragraphs 36-55 and Annexes 1.1, 1.6 and 1.8, Annex 79; "ACLED Resources: Al Shabaab in Somalia and Kenya, Political Violence Involving Al Shaabab", *ACLED*, 2020, Annex 134.

767 *See*, e.g., Report of the Monitoring Group on Somalia and Eritrea pursuant to Security Council resolution 2111 (2013), Annex 2.1, S/2014/726, 13 October 2014, paragraph 5, Annex 80.

768 2020 UN Panel of Experts Report on Somalia, page 17, Annex 76.

reportedly aimed at entrenching the terrorist group in Kenya's northeast region "to annex [it] as part of a de facto 'Greater Somalia'".[769] As can be evidenced from the Figure 17 below, Al-Shabaab is actively present in the coastline that runs along the Kenya-Somalia boundary. Its support and attack zones span both sides of the coast near the Kenya-Somalia boundary.[770]

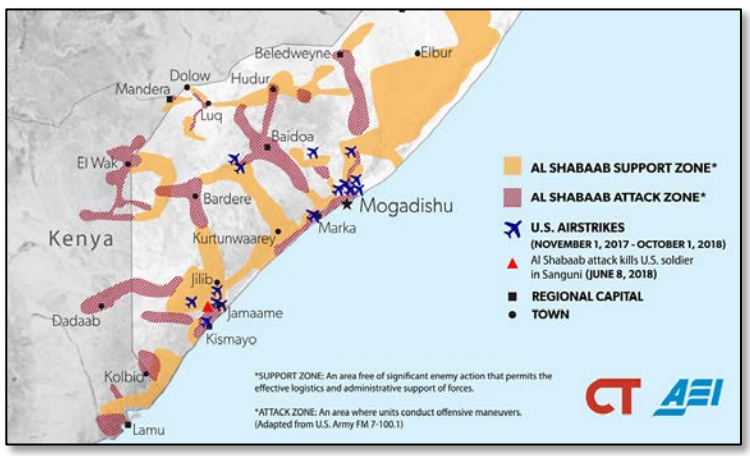

Figure 17: Al-Shabaab's Areas of Operation (2018)

434. Al-Shabaab also regularly uses Somali waters near the border with Kenya as a means to conduct its operations, launch attacks and facilitate criminal activities. As the UN Security Council noted in its 2019 UN Piracy in Somalia Report:

> [n]ational and transnational criminal syndicates, pirate action groups and Al-Shabaab exploit porous borders and

769 *See*, e.g., "Civilians in Kenya's northeast targeted by both jihadists and the state", *The New Humanitarian*, 16 June 2020, Annex 130.

770 *See* "Al Shabaab area of operations: October 2018", *Critical Threats*, 5 October 2018, Annex 131.

> a weak rule of law to move people, arms and illicit goods through Somalia and its waters.[771]

435. Al-Shabaab has even established a branch of operations in Kenya under the name "Jaysh al-Ayman".[772] That branch has predominantly launched attacks in northern Kenya, with militants regularly crossing over from Somalia.[773]

436. Between January 2010 and January 2020, Al-Shabaab orchestrated no fewer than 416 violent attacks in Kenya.[774] Those attacks led to the deaths of more than 1,400 people. More than 760 of them were civilians.[775] In 2013, the notorious multi-day attack on the Westgate Shopping Mall claimed the lives of 67 people and left another 200 injured.[776] During the

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771 2019 UN Piracy in Somalia Report, paragraph 18, Annex 43.

772 "Jaysh al-Ayman: Kenyan unit of jihadi's poses threat to homeland", *The African Criminology Journal*, 21 January 2019, Annex 132; S. West, "Jaysh al-Ayman: a 'local' threat in Kenya", Terrorism Monitor Volume: 16 Issue: 8, *The Jamestown Foundation 8*, 23 April 2018, Annex 133.

773 *See* S. Africa, *Al-Shabaab as a Transnational Security Threat*, in WAR AND PEACE IN SOMALIA: NATIONAL GRIEVANCES, LOCAL CONFLICT AND AL-SHABAAB, ed. M. Keating and M. Waldman (Oxford University Press, 2018), page 408, Annex 192; "Jaysh al-Ayman: Kenyan unit of jihadi's poses threat to homeland", *The African Criminology Journal*, 21 January 2019, Annex 132; S. West, "Jaysh al-Ayman: a 'local' threat in Kenya", Terrorism Monitor Volume: 16 Issue 8, *The Jamestown Foundation*, 23 April 2018, Annex 133.

774 *See* "ACLED Resources: Al Shabaab in Somalia and Kenya, political violence involving Al Shaabab", *ACLED*, 2020, Annex 134.

775 *See* "ACLED Resources: Al Shabaab in Somalia and Kenya, political violence involving Al Shaabab", *ACLED*, 2020, Annex 134

776 *See* Report of the Monitoring Group on Somalia and Eritrea pursuant to Security Council resolution 2111 (2013), Annex 2.1, S/2014/726, 13 October 2014, paragraphs 1-2, Annex 80. *See also* "Al-Shabaab five years after westgate: Still a Menace in East Africa", Africa Report No. 265, *International Crisis Group*, 21 September 2018, pages i and 1, Annex 135; Report of the Monitoring Group on Somalia and Eritrea pursuant to Security Council resolution 2111 (2013), Annex 2.1, S/2014/726, 13 October 2014, Annex 80 for a detailed account of the facts leading to the Westgate Mall attack and a worrying indication of Al-Shabaab's ability to coordinate and execute its plans..

months of June and July 2019, Al-Shabaab carried out 30 attacks in Kenya's northernmost region (including the County of Lamu), close to the border with Somalia.[777]

437. Al-Shabaab's attacks on Kenya persist to date. In fact, "[f]rom December 2019 to July 2020, Al-Shabaab carried out 67 attacks in the border region."[778] The effects of Al-Shabaab's attacks on Kenya are manifest and "have had a significant impact on public services, especially schools, many of which have closed owing to teachers leaving because of insecurity in the border region."[779]

438. Al-Shabaab has also forged an alliance with the Muslim Youth Centre in Kenya (later known as Al Hijra).[780] From 24 October 2011 until November 2012, Al Hijra fighters from Somalia, with support from their Kenya-based members, have been responsible for grenade and improvised explosive device attacks in Kenya as part of Al-Shabaab's campaign within the region.[781] The UN Monitoring Group has described this tendency by Al Hijra to seek complex and spectacular attacks as "indicative of Al-Shabab's capacity to internationalize its violent extremism through its regional affiliates".[782] The UN Monitoring Group has emphasised that Al Hijra,

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777 *See* 2019 UN Panel of Experts Report on Somalia, paragraph 52, Annex 79.

778 2020 UN Panel of Experts Report on Somalia, paragraph 55, Annex 76.

779 2020 UN Panel of Experts Report on Somalia, paragraph 58, Annex 76.

780 *See* Report of the Monitoring Group on Somalia and Eritrea pursuant to Security Council resolution 2060 (2012), Annex 2.1, S/2013/413, 12 July 2013, paragraph 1, Annex 81.

781 *See* Report of the Monitoring Group on Somalia and Eritrea pursuant to Security Council resolution 2060 (2012), Annex 2.1, S/2013/413, 12 July 2013, paragraph 20, Annex 81.

782 Report of the Monitoring Group on Somalia and Eritrea pursuant to Security Council resolution 2060 (2012), Annex 2.1, S/2013/413, 12 July 2013, paragraph 20, Annex 81. *See also* Report of the Monitoring Group on Somalia and Eritrea pursuant to Security Council resolution 2060 (2012), S/2013/413, 12 July 2013, page 7, Annex 82.

"like Al-Shabaab, is striving to remain a credible threat to peace and security both in Somalia and outside."[783]

439. Those are but a few illustrative examples of the threat that Al-Shabaab poses for Kenya and the region as a whole. Unfortunately, Al-Shabaab's heinous crimes do not end there. That terrorist organisation takes pride in carrying out mass executions,[784] performing public beheadings,[785] dismembering its victims,[786] torturing and raping women,[787] and the list goes on.

440. The Kenyan coastal county of Lamu, which as seen in Figure 18 below is adjacent to the Somali border, is the coastal area most gravely affected by Al-Shabaab's transborder operations.

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783 Report of the Monitoring Group on Somalia and Eritrea pursuant to Security Council resolution 2060 (2012), S/2013/413, 12 July 2013, page 15, paragraph 31, Annex 82. *See also* Report of the Monitoring Group on Somalia and Eritrea pursuant to Security Council resolution 2060 (2012), Annex 2.1, S/2013/413, 12 July 2013, paragraph 3, Annex 81.

784 *See*, e.g., "Al-Shabab kills 18 in surge of executions", *Voice of America News*, 8 July 2019, Annex 136. *See*, e.g., "Al-Shabab executes two girl 'spies'", *Al Jazeera*, 28 October 2010, Annex 137.

785 *See*, e.g., "Suspected Al Shabaab militants behead four in Kenya's Lamu county: official", *Reuters*, 6 September 2017, Annex 138.

786 *See*, e.g., "Inside Kenya shopping mall, a house of horrors", *USA Today News*, 27 September 2013, Annex 139.

787 *See* "At al Shabaab's mercy: woman narrates gang rapes, drug abuse at camps", *The Star*, 23 November 2017, Annex 140.

Figure 18: Location of Lamu County

441. By way of example, in 2014, Lamu became the subject of at least nine attacks committed by Al-Shabaab groups of between 15 and 300 armed assailants. The over 80 victims of those attacks were surprised by a heavily armed group that came at night, struck the local police station, torched homes and businesses and targeted men on a killing spree that lasted for hours. In almost all cases, the attackers announced themselves as Al-Shabaab fighters.[788] Earlier this year, Al-Shabaab perpetrated a sophisticated attack on a US military base near the coastal port of Lamu, resulting in several US fatalities and the loss of aircrafts, helicopters and multiple vehicles.[789]

442. Al-Shabaab's threats are not limited to terror and physical destruction. As noted by a Report prepared by the Panel of Experts on Somalia addressed to the Chair of the UN Security Council, Al-Shabaab is "seeking to exploit"

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788 *See*, e.g., J. Lind et al., "Tangled ties: Al-Shabaab and political volatility in Kenya", *Institute of Development Studies*, April 2015, page 17, Annex 141.

789 *See* "Extremists attack Kenya military base, 3 Americans killed", *AP News*, 5 January 2020, Annex 142; "3 Americans die in Shabab attack on Kenyan base", *The New York Times*, 5 January 2020, Annex 143.

the Kenya-Somalia maritime dispute.[790] To that effect, it has carried out numerous attacks and has deployed its propaganda machine to the detriment of the peaceful settlement of the present dispute. Indeed, as explained in Kenya's Counter-Memorial, Al-Shabaab deliberately circulated inflammatory rumours that Somalia would be "selling the sea" to Kenya by concluding the 2009 MOU.[791] As a result of that, Somalia's delegation refused to discuss the MOU. It also refused to recognise the 1924-33 Anglo-Italian Agreement on the land boundary and Somalia's prolonged acquiescence to the Parallel of Latitude boundary.

443. As explained below, unlike Kenya, Somalia is admittedly unable to police its own waters.[792] It follows that a maritime boundary along an equidistance line would benefit Al-Shabaab. Put simply, an equidistance line would swing the boundary of Somalia's maritime territory in significant closer proximity to Kenya's coastline and territorial sea. The practical effect of that is that Al-Shabaab would have much better access to Kenya's coastline. Al-Shabaab also would obtain financial benefits when it inevitably diverts funds and goods used for oil and gas operations offshore southern Somalia. In other words, a delimitation based on the equidistance line would put Al-Shabaab in an enhanced position to launch its terrorist operations against Kenya and therefore "compromise [Kenya's] security in front of its coasts and in their immediate vicinity."[793] This threat goes far beyond any of the

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790 *See* 2019 UN Panel of Experts Report on Somalia, paragraph 54, Annex 79.

791 *See* KCM, paragraph 185.

792 *See* paragraphs 453-459 below.

793 *Delimitation of the maritime boundary between Guinea and Guinea-Bissau*, Award, 14 February 1985, RIAA, Vol. XIX, p. 149, paragraph 124 (unofficial translation) (original French: "en face de ses côtes et dans leur voisinage immédiat des droits qui pourraient porter atteinte à son droit au développement ou compromettre sa sécurité"). *See also Sovereignty and Maritime Delimitation in the Red Sea (Eritrea/Yemen)*, Award, 17

previous security considerations that have been presented to this Court in a maritime boundary delimitation.[794]

444. The threat posed by this proceeding cannot be understated. The adjustment of the provisional equidistance line to the Parallel of Latitude would help maintain international peace and security, deprive a terrorist entity of more self-sustaining finance and resources and, therefore, protect thousands of predominantly civilian lives. Failing to adjust the provisional equidistance line would lead to regional insecurity and greater loss of life by terrorist attacks, in Kenya and Somalia. This is the unfortunate and unassailable reality as it stands today – and that reality should bear considerable weight in the Court's considerations.

December 1999, RIAA, Vol. XXII, p. 335, paragraph 157 ("[i]f any further were needed to reject the Yemen suggestion of enclaving the Eritrean islands in this area beyond a limit of 12 miles from the high-water line of the mainland coast, it may be found in the principle of non-encroachment which was described by Judge Lachs in the Guinea/Guinea-Bissau Award in the following terms: As stated in the award, our principal concern has been to avoid, by one means or another, one of the Parties finding itself faced with the exercise of rights, opposite to and in the immediate vicinity of its coast, which might interfere with its rights to development or put its security at risk").

794 For example, in the Black Sea case, Romania's alleged security interest involved the reduction of its maritime entitlement and consequent denial of access to natural resources (*see Maritime Delimitation in the Black Sea (Romania v. Ukraine), Romania Reply*, 22 December 2006, paragraphs 9.37-9.41). In *Nicaragua v. Colombia*, Nicaragua raised certain security considerations regarding "drug trafficking and related crimes", while Colombia raised considerations regarding the "control over the exclusive economic zone and the continental shelf". To recall, the Court in that case recognised that "legitimate security concerns might be a relevant consideration if a maritime delimitation was effected particularly near to the coast of a State" and then stated that it would "bear this consideration in mind in determining what adjustment to make to the provisional median line or in what way that line should be shifted" (*Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment of 19 November 2012, I.C.J. Reports 2012*, p. 624, paragraphs 221-222).

(iii)Piracy and other forms of maritime crime that regularly take place in Somali waters affect global security, Kenya's vital security interests and the entire Eastern African region's stability

445. A maritime boundary along the provisional equidistance line would also result in heightened threats of piracy and other forms of maritime crime that pervade Somalia's waters. This is not least because, as Kenya explained in its Counter-Memorial, Al-Shabaab has links with other criminal actors engaged in piracy, human trafficking and small arms proliferation.[795]

446. As explained in a World Bank Report on piracy in Somalia:

> the potential scope and actual extent of mutually beneficial cooperation between pirates and some members of the Islamist insurgent group al-Shabaab is significant; because it might contribute to instability in Somalia, the possibility of enhanced cooperation between pirates and al-Shabaab is a threat to global security.[796]

447. Evidence confirms that maritime crime thrives in Somali waters. Piracy is one of the most notorious criminal activities pervading Somalia. It is no secret that Somali piracy is a legitimate security consideration that affects global trade, Kenya and the entire Eastern African region.[797] Somali piracy is still nowhere close to being eradicated. As noted by the International Maritime Bureau, "Somali pirates still retain the capability and capacity to

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795 *See* KCM, paragraph 183.

796 "The Pirates of Somalia: Ending the Threat, Rebuilding a Nation", *The World Bank*, 2013, page xxiv, Annex 83.

797 *See* 2019 UN Piracy in Somalia Report, paragraph 7, Annex 43; UN Security Council Resolution 2500 (2019), S/RES/2500, 4 December 2019, page 1, Annex 84. *See also* Report of the Monitoring Group on Somalia and Eritrea pursuant to Security Council resolution 2060 (2012), Annexes 4.4-4.10, S/2013/413, 12 July 2013, Annex 85, where the UN identifies a number of the main piracy networks operating in Somalia and details how they conduct their operations by, *inter alia*, engaging with ransom facilitators and other criminal actors.

carry out incidents."[798] Indeed, as recently as December 2020, the UN Security Council affirmed that "piracy off the coast of Somalia has been repressed but not eradicated".[799] It also warned of "the ongoing threat that resurgent piracy and armed robbery at sea poses"[800] and that the activity of pirate groups in Somalia continues to pose "a threat to international peace and security in the region".[801]

448. The 2019 UN Piracy in Somalia Report confirms that criminal groups previously involved in piracy have the intent and capability to conduct pirate attacks should the opportunity arise.[802] In addition to that, many senior pirates and facilitators have not been arrested and have now diversified into other forms of organised crime.[803] Therefore, there can be no question that there is a high probability (if not a certainty) that piracy

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798 "Piracy and armed robbery against ships – report for the period 1 January – 31 December 2019", *ICC International Maritime Bureau*, January 2020, page 18, Annex 144.

799 UN Security Council Resolution 2554 (2020), S/RES/2554 (2020), 4 December 2020, page 1, Annex 69.

800 UN Security Council Resolution 2554 (2020), S/RES/2554 (2020), 4 December 2020, page 1, Annex 69.

801 UN Security Council Resolution 2554 (2020), S/RES/2554 (2020), 4 December 2020, pages 3-4, Annex 69.

802 *See* 2019 UN Piracy in Somalia Report, paragraph 8, Annex 43.

803 *See* Report of the UN Secretary-General on the situation with respect to piracy and armed robbery at sea off the coast of Somalia, S/2015/776, 12 October 2015, paragraph 29, Annex 86; Report of the Monitoring Group on Somalia and Eritrea pursuant to Security Council resolution 2060 (2012), S/2013/413, 12 July 2013, page 22, paragraph 65, Annex 82; K. Scott, "Prosecuting pirates: lessons learned and continuing challenges", *Oceans Beyond Piracy*, 2014, pages 5, 17 and 18, Annex 145; "Pirate trails: Tracking the Illicit Financial Flows from Pirate Activities Off the Horn of Africa", *The World Bank*, 2013, page 67, Annex 87.

will resurge once AMISOM withdraws from the now-disputed maritime area in 2021.[804]

449. The evidence also confirms that piracy functions as a gateway to other forms of maritime crime, especially in light of an increased demand for smugglers in the region.[805] Therefore, it "is only one of [the] many threats to maritime security off the coast of Somalia."[806] Other maritime crimes associated with piracy include the smuggling of people, narcotics, weapons and charcoal.[807] Pirates active in the region engage in kidnappings in return for ransom payments often exceeding several million US dollars.[808]

450. Increasing instances of maritime crime in Somali waters have led to instability and have allowed terrorist organisations (including Al-Shabaab) to acquire weapons and tax ongoing trade in illegal substances.[809] As

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804 *See*, e.g., UN Security Council Resolution 2500 (2019), S/RES/2500, 4 December 2019, page 1, Annex 84; 2019 UN Piracy in Somalia Report, paragraphs 7-8 and 65, Annex 43; "Piracy and armed robbery against ships – report for the period 1 January – 31 December 2019", *ICC International Maritime Bureau*, January 2020, pages 21-22, Annex 144; 2019 UN Panel of Experts Report on Somalia, paragraphs 87-88, Annex 79.

805 *See* CMS Maritime Crime Report, pages 3-4 and 17 and Section 1.2, Annex 129.

806 2019 UN Piracy in Somalia Report, paragraph 66, Annex 43. *See also* CMS Maritime Crime Report, page 3, Annex 129.

807 *See* 2019 UN Piracy in Somalia Report, paragraph 8, Annex 43; KCM, paragraph 183; "Global Maritime Crime Programme: Gulf of Aden and the Red Sea", *UN Office on Drugs and Crime*, available at: https://www.unodc.org/unodc/piracy/horn-of-africa.html (last accessed: 21 December 2020), Annex 88; CMS Maritime Crime Report, pages 19-33, Annex 129.

808 *See*, e.g., Report of the Monitoring Group on Somalia and Eritrea pursuant to Security Council resolution 2060 (2012), S/2013/413, 12 July 2013, page 20, paragraph 54, Annex 82 (noting that: "[i]n 2012, Somali pirates extorted and received an estimated USD 31.75 million in ransom payouts"). *See also* Report of the Monitoring Group on Somalia and Eritrea pursuant to Security Council resolution 2060 (2012), Annexes 4.4-4.10, S/2013/413, 12 July 2013, Annex 4.4, paragraph 8 and Annex 4.5, paragraph 1, Annex 85.

809 *See* S. D. Farquhar, "When Overfishing Leads to Terrorism", *World Affairs: The Journal of International Issues 2*, 2017, pages 74 and 76, Annex 193.

explained in greater detail in **Section IV.B.5**, an additional type of criminal activity that permeates Somali waters and significantly affects Kenya is illegal fishing. Not surprisingly, that is an activity in which former pirates and smugglers are heavily involved.[810]

451. Notably, incidents of Somali piracy confirm a significant trend of geographic expansion over time. This presents an even graver threat to Kenya's security interests. Whereas in 2005 successful piracy attacks took place on average only 109 km from the Somali coast, by 2012 they took place on average 746 km away.[811] As the UN Office on Drugs and Crime has confirmed:

> [t]he area subject to pirate predation has expanded considerably over time. Greater geographic reach was necessary as ships were warned to avoid the Somali coast, and international maritime patrols made attacks in the Gulf of Aden harder to carry out. Greater geographic reach was possible due to the adoption of "mother ships": larger craft, such as fishing boats and dhows, rented or hijacked in advance, from which the pirates can launch their attack skiffs.[812]

452. Somali piracy has a devastating impact on Kenya. It threatens the livelihoods and economic well-being of Kenya's population and undermines the security and stability of the entire Eastern African region.[813]

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810 *See* Report of the Monitoring Group on Somalia and Eritrea pursuant to Security Council resolution 2060 (2012), S/2013/413, 12 July 2013, Annex 3.1, Annex 82; CMS Maritime Crime Report, page 27, Annex 129.

811 *See* "Transnational organised crime in eastern Africa: a threat assessment", *UN Office on Drugs and Crime*, September 2013, page 5, Annex 89.

812 "Transnational organised crime in eastern Africa: a threat assessment", *UN Office on Drugs and Crime*, September 2013, page 38, Annex 89.

813 *See* "Situation Report – Kenya and the pest of piracy – a prospective partner for peace", *Institute for Security Studies*, 22 February 2012 (the "**ISS Kenya and Piracy Report**"), page 2, Annex 146; CMS Maritime Crime Report, page 42, Annex 129; "Fetching them

It also severely affects the fishing and tourism sectors of the region.[814] To provide some perspective, a study produced by the Institute of Security Studies estimated that piracy costs Kenya's shipping and tourism industries alone approximately USD 400 million per year during 2008-2012.[815]

453. The current security situation in Somali waters and coasts is so critical that, on their own admission, representatives of Somalia could not visit a coastal region close to Kenya to verify the exact location of a coastal beacon for the purposes of this case. To recall Somalia's own words, "[t]he security situation in the area at the moment prevents a field visit to confirm the location of the beacon."[816]

454. Indeed, Somalia openly admits that it cannot control, regulate or enforce its maritime jurisdiction over the now-disputed maritime area.[817] In other words, Somalia acknowledges that it cannot address – let alone eradicate – the imminent security threats emanating from Al-Shabaab, Somali piracy and/or any other maritime crimes for that matter. Extending Somalia's maritime territory would only make it more difficult or impossible for Somalia to prevent any type of crime within its waters. As the Secretary-General of the International Maritime Organization noted, the unfortunate reality is that:

> piracy and armed robbery against ships in waters off the coast of Somalia, unlike in other parts of the world, is

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on the beaches - Tourist abductions from Kenyan resorts mark the expansion of Somali piracy", *The Economist*, 8 October 2011, Annex 147.

814 *See* Report of the Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia, S/2011/30, 24 January 2011, paragraph 26, Annex 90.

815 *See* ISS Kenya and Piracy Report, page 2, Annex 145.

816 MS, page 58, footnote 168.

817 *See* paragraph 411 above.

> caused by the lack of lawful administration and inability of the authorities to take affirmative action against the perpetrators, which allows the "pirate command centres" to operate without hindrance at many points along the coast of Somalia.[818]

455. To make matters worse, it is a well-known fact that the Somali National Army faces major setbacks as a result of corruption and lack of civilian oversight over its budget. As noted by a Report of the UN Monitoring Group, the "lack of effective civilian oversight over the budget of the Somali National Army has enabled opportunities for systemic misappropriation, including of soldiers' wages."[819]

456. Kenya's capacities stand in stark contrast to Somalia's acknowledged inability to police and prevent crime in its maritime territory. For years, the Kenyan Navy (as part of AMISOM) has been patrolling the now-disputed waters preventing terrorism, piracy, arms and drugs smuggling, illegal fishing and other forms of maritime crime.[820] Kenya has sacrificed the lives of its citizens and soldiers to protect both the Kenyan and Somali people from the grave threats of maritime crime emanating from Somalia. Kenya

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818 Note by the Secretary-General of the International Maritime Organization on the Relations with the United Nations and the specialized agencies on Piracy and armed robbery against ships in waters off the coast of Somalia, IMO A 25/19(a)/1/Add.1, 16 November 2007, page 3, Annex 40.

819 Report of the Monitoring Group on Somalia and Eritrea pursuant to the UN Security Council Resolution 2182 (2014): Somalia, S/2015/801, 19 October 2015, page 7, Annex 91.

820 *See* "Kenya – KDF", *African Union Mission to Somalia*, available at: https://amisom-au.org/kenya-kdf/ (last accessed: 21 December 2020), Annex 41. Among others, Kenya also cooperates with the Global Maritime Crime Programme, the Indian Ocean West team of the UN Office on Drugs and Crime and Kenya currently chairs the Contact Group on Piracy off the Coast of Somalia until 31 December 2021; "Global Maritime Crime Programme: Indian Ocean West", *UN Office on Drugs and Crime*, available at: https://www.unodc.org/unodc/en/piracy/Indian-Ocean.html (last accessed: 21 December 2020), Annex 42; 2019 UN Piracy in Somalia Report, paragraphs 29 and 70, Annex 43.

is still committed to protecting the lives of innocent civilians and, to that effect, still has hundreds of soldiers serving in AMISOM.

457. Kenya has been at the forefront of bringing pirates to justice for their international crimes. Among other things, on 1 January 2020, Kenya was elected to serve as the Chair of the Contact Group on Piracy off the Coast of Somalia.[821] As recently as 4 December 2020, the UN Security Council specifically commended Kenya's leadership role in chairing the efforts of the CGPCS to counter maritime threats off the coast of Somalia.[822] In addition, the UN Security Council has repeatedly commended Kenya for its efforts to prosecute Somali piracy and other forms of maritime crime.[823]

458. Kenya is mindful of the fact that it might have to continue carrying the burden of protecting Somali waters for many years to come. As observed by the UN Office on Drugs and Crime, Somalia simply lacks the capacity to manage its maritime space:

> [t]he Federal Government of Somalia (FGS) is [...] concerned over the lack of capacity to manage Somali maritime space effectively, whose vulnerability has been highlighted by piracy.[824]

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821 *See* 2019 UN Piracy in Somalia Report, paragraph 29, Annex 43.

822 *See*, e.g., UN Security Council Resolution 2554 (2020), S/RES/2554 (2020), 4 December 2020, page 2, Annex 69.

823 *See*, e.g., UN Security Council Resolution 2442 (2018), S/RES/2442, 6 November 2018, page 4, Annex 92; UN Security Council Resolution 2383 (2017), S/RES/2383, 7 November 2017, page 4, Annex 93; UN Security Council Resolution 2316 (2016), S/RES/2316, 9 November 2016, page 4, Annex 94.

824 "Global Maritime Crime Programme: Gulf of Aden and the Red Sea", *UN Office on Drugs and Crime*, available at: https://www.unodc.org/unodc/piracy/horn-of-africa.html (last accessed: 21 December 2020), Annex 88.

459. It is an unfortunate but undisputed reality that Kenya alone, and not Somalia, can take effective action to defend regional and international peace and security as well as Kenya's land and maritime territory from the threats described above.

460. In those circumstances, any delimitation south of the Parallel of Latitude would severely and inequitably jeopardise Kenya's active and ongoing efforts to suppress the grave threats of terrorism, piracy and other forms of maritime crime in the region. Put differently, it would not "fully respect [...] the legitimate security interests" of Kenya.[825] It also would constitute a threat to global maritime trade and security and would no doubt destabilise the Eastern African region. In light of this, Kenya respectfully invites the Court to exercise its role of furthering the broader objective of maintaining international peace and security. To recall the Court's landmark finding in the *Nicaragua v. United States* case:

> [i]t is for the Court, the principal judicial organ of the United Nations, to resolve any legal questions that may be in issue between parties to the dispute; and the resolution of such legal questions by the Court may be an important, and sometimes decisive, factor in promoting the peaceful settlement of the dispute.[826]

461. In sum, any failure to adjust the provisional equidistance line would severely and inequitably exacerbate threats to Kenya's vital security interests emanating from terrorism, piracy and other maritime crimes regularly committed in Somali waters. In contrast with delimiting the

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825 *Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment of 3 February 2009, I.C.J. Reports 2009*, p. 61, paragraph 204.

826 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment of 26 November 1984, I.C.J. Reports 1984*, p. 392, paragraph 93.

boundary along the Parallel of Latitude, the practical effect of the provisional equidistance line would be to swing the boundary in significantly closer proximity to Kenya's coastline and territorial sea. This would expand the zone of uncontrolled terrorism, piracy and other forms of maritime crime directly towards Kenya's coastline and its territorial sea. To use the Court's own terminology in *Nicaragua v. Colombia*, it would therefore fail to respect Kenya's "legitimate security considerations".[827] In light of the above, Kenya's, Eastern Africa's and the world's vital security interests constitute a relevant circumstance that calls for the adjustment of the provisional equidistance line to the Parallel of Latitude.

4. The evidence of the Parties' conduct reflects a *de facto* boundary line that requires the adjustment of the provisional equidistance line to the Parallel of Latitude

462. The evidence of the Parties' long-standing and consistent conduct in relation to oil concessions, fishing activities, naval patrols and other activities reflects the existence of a *de facto* maritime boundary along the Parallel of Latitude. This constitutes yet another relevant circumstance that calls for the adjustment of the provisional equidistance line to the Parallel of Latitude.

827 *Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment of 19 November 2012, I.C.J. Reports 2012*, p. 624, paragraph 222. *See also Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment of 3 February 2009, I.C.J. Reports 2009*, p. 61, paragraph 204; *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment of 3 June 1985, I.C.J. Reports 1985*, p. 13, paragraph 51.

463. The Court has previously recognised that State conduct that is consistent with a *de facto* boundary can play a determinative role in maritime delimitations. For instance, in *Tunisia/Libya*, the Court stated that a:

> line of adjoining concessions, which was tacitly respected for a number of years, and which approximately corresponds furthermore to the line [...] which had in the past been observed as a *de facto* maritime limit, does appear to constitute a circumstance of great relevance.[828]

464. The Court also made clear that, to reach an equitable solution, it had to "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".[829] Ultimately, the Court adjusted the equidistance line by reference to the *de facto* line.[830]

465. Similarly, in *Cameroon v. Nigeria*, the Court made clear that the oil concessions practice of States can constitute a relevant circumstance if it is "based on express or tacit agreement between the parties".[831] International tribunals have subsequently relied on that finding in the context of fisheries and naval patrols.[832] For example, in the *Black Sea* case, the Court

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828 *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment of 24 February 1982, I.C.J. Reports 1982*, p. 18, paragraph 96.

829 *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment of 24 February 1982, I.C.J. Reports 1982*, p. 18, paragraph 118. *See also Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment of 3 June 1985, I.C.J. Reports 1985*, p. 13, paragraph 25.

830 *See Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment of 24 February 1982, I.C.J. Reports 1982*, p. 18, paragraph 118.

831 *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment of 10 October 2002, I.C.J. Reports 2002*, p. 303, paragraph 304.

832 *See*, e.g., *Arbitration between Barbados and the Republic of Trinidad and Tobago*, Award, 11 April 2006, RIAA, Vol. XXVII, p. 147, paragraphs 363-364; *Arbitration regarding the delimitation of the maritime boundary between Guyana and Suriname*, Award, 17 September 2007, RIAA, Vol. XXX, p. 1, paragraphs 200, 218 and 390.

acknowledged that State conduct (regarding oil concessions, fishing activities and naval patrols) can constitute a relevant circumstance when it reflects a tacit agreement regarding the location of the boundary in question.[833] This is also implicit in the Court's more recent statement in *Nicaragua v. Colombia* that "conduct might need to be taken into account as a relevant circumstance in an appropriate case."[834] Further, in *Peru v. Chile*, the Court used the location of historic fishing practices to determine the location of a maritime boundary established by tacit agreement.[835]

466. Kenya has already explained that the Parties' conduct in relation to oil concessions, fishing activities, naval patrols and other activities is consistent with Somalia's acquiescence to the maritime boundary at the Parallel of Latitude.[836] Those arguments alone are dispositive of Somalia's entire equidistance claim. However, should the Court find that the evidence of Somalia's acquiescence is insufficient (*quod non*), then the Parties' conduct would still reflect a *de facto* line that both indicates what the Parties regarded as equitable and confirms that an adjustment of the provisional equidistance line to the Parallel of Latitude is called for in this case.

467. Most of Kenya's factual arguments on acquiescence, including that the Parties' conduct is consistent with the existence of a maritime boundary at the Parallel of Latitude, apply *mutatis mutandis* here.[837] Kenya will

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833 *See Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment of 3 February 2009, I.C.J. Reports 2009*, p. 61, paragraphs 197-198.

834 *Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment of 19 November 2012, I.C.J. Reports 2012*, p. 624, paragraph 220.

835 *See Maritime Dispute (Peru v. Chile), Judgment of 27 January 2014, I.C.J. Reports 2014*, p. 3, paragraphs 102-117.

836 *See*, e.g., KCM, Chapter I.F.4; KR, paragraphs 88-100.

837 *See* KCM, paragraphs 138-164; KR, paragraphs 95-99.

therefore refrain from rehearsing those arguments again. Rather, it respectfully refers the Court to its previous submissions and summarises below only the most salient facts for the purposes of the second stage of the three-step methodology.

468. First, the Parties' oil concession practice from 1979 to 2013 was consistent with the existence of a maritime boundary located at the Parallel of Latitude. It was only in 2014, just before commencing proceedings before the Court, that Somalia departed from that longstanding practice by extending Soma Oil & Gas's Evaluation Area south of the Parallel of Latitude.[838]

469. To recall, Kenya has shown that, from 1979 and during the 1980s, both Parties used the Parallel of Latitude as a limit to the oil concessions that they granted along the now-disputed maritime area.[839] That pattern remained unchanged during the 1990s[840] and continued from 2000 to 2013.[841] Kenya has also shown that Somalia itself commissioned certain

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838 *See* KCM, paragraphs 164.

839 *See* KCM, paragraphs 141-145 (citing Figures 1-21, 1-22 and 1-23). In particular, Kenya explained that the existence of "Block M-1" (a Licence Block created by Somalia in 1986) is a clear example of how Somalia agreed that its most southernmost boundary was at the Parallel of Latitude (*see* KCM, paragraph 141-142, citing Figures 1-21 and 1-22). As for Kenya, its oil concession "Block L5" unequivocally ran along the Parallel of Latitude (*see* KCM, paragraph 143, citing Figure 1-23).

840 *See* KR, paragraph 98, citing 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 (showing, *inter alia*, that Block L5 still ran along the Parallel of Latitude).

841 Particularly, Kenya showed that during such period the limit of Somalia's "Jorre Block" (i.e., Somalia's most southernmost block) ran along the Parallel of Latitude (*see*, e.g., KCM, paragraphs 155 (citing Figure 1-27), 157 (citing Figure 1-28) and 158 (citing Figure 1-29). *See also* KR, paragraph 95, citing Figure 1-27). Meanwhile, Kenya's oil concessions practice significantly increased from 2000 onwards, particularly in the northern part of the EEZ that runs along the Parallel of Latitude (*see* KCM, paragraph 146). In particular, during such time Kenya's "Block L5" was extended eastwards along the Parallel of Latitude. A new block (i.e., "Block L13") covered both the offshore and the territorial sea following the Parallel of Latitude. And an addition new block in the outer

seismic testing activities that were consistent with the *de facto* boundary located at the Parallel of Latitude.[842] Moreover, Kenya has demonstrated that it signed a series of offshore agreements that authorised oil activities as far north as the Parallel of Latitude.[843] Those activities were public and supported by, *inter alia*, highly publicised contracts,[844] parliamentary discussions,[845] national laws[846] and official maps.[847] Yet, for over three decades, Somalia not only "tacitly respected [...] a *de facto* maritime limit" at the Parallel of Latitude;[848]it also did not protest Kenya's oil concessions practice even once.

470. Second, the Parties' conduct in relation to fishing and maritime scientific research activities also reflects a "tacit agreement" on the location of a *de facto* boundary at the Parallel of Latitude. For example, Kenya has produced an official fisheries map issued by Somalia's own Ministry of Fisheries and Marine Resources. That map shows that, by 1987, Somalia had never made a claim to fishery resources south of the Parallel of Latitude.[849] Kenya also has submitted a series of fishing licences that demonstrate how Kenya authorised vessels to fish in areas that extend north

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regions of the EEZ (i.e., "Block L21") extended up to the 200M limit also along the Parallel of Latitude (*see* KR, paragraph 99).

842 *See* KCM, paragraphs 159-162.

843 *See*, e.g., MS, Annex 99 and Annex 113.

844 *See*, e.g., KCM, paragraphs 148-154.

845 *See*, e.g., KCM, paragraph 152.

846 *See*, e.g., Republic of Kenya, Gazette Notice no. 9800 of 1 December 2006, The Petroleum (Exploration and Production) Act, Cap. 308, pp. 2861-75, page 2870, KCM, Annex 7.

847 *See*, e.g., KCM, paragraphs 138-164 (citing Figures 1-20 to 1-32).

848 *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment of 24 February 1982, I.C.J. Reports 1982*, p. 18, paragraph 96.

849 *See* KCM, paragraphs 129-130, citing Figures 1-14 and 1-15; KR, paragraph 89, citing Figures 1-14 and 1-15.

of the equidistance line as far as the Parallel of Latitude.[850] In addition, as explained in detail in **Section IV.B.5**, Kenyan fishermen have traditionally harvested as far north as the Parallel of Latitude. Those fishing activities and historical fishing patterns further confirm the existence of a *de facto* boundary at the Parallel of Latitude.

471. Third, Kenya has provided evidence of two maritime scientific surveys that indicate that the Kenya-Somalia maritime boundary was located at the Parallel of Latitude.[851] Those are reputable and reliable surveys. One of them was carried out under the auspices of the Intergovernmental Oceanographic Commission of UNESCO. The other one was carried out under the auspices of the UN Food and Agriculture Organisation (the "**UN FAO**") and the UN Development Program. In addition, Kenya has produced a Marine Science Country Profile that shows that Kenya's marine science activities and areas extended as far north as the Parallel of Latitude.[852] That document was prepared by the UNESCO Intergovernmental Oceanographic Commission and the Western Indian Ocean Marine Science Association.

472. Fourth, the Parties' conduct in relation to their naval patrols also is consistent with the existence of a maritime boundary along the Parallel of Latitude. The areas in which the Kenyan Navy patrols and enforces maritime jurisdiction extend well north of the equidistance line and as far as the Parallel of Latitude.[853] To recall, Kenya has produced a series of

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850 *See* KCM, paragraph 137, citing Figure 1-19.

851 *See* KCM, paragraphs 131-135.

852 *See* KCM, paragraphs 136.

853 *See* KCM, paragraphs 119-127; KR, paragraph 100.

navy patrol logs that unmistakably show how the Kenyan Navy has patrolled and intercepted vessels as far north as the Parallel of Latitude well before Somalia's official claim to the equidistance line.[854] New evidence in this Appendix further confirms that the Kenyan Navy engaged in considerable activity in the now-disputed maritime area and along the Parallel of Latitude for decades before 2014.[855] By way of significant contrast, Somalia has produced no actual evidence that it ever patrolled and/or exercised jurisdiction over any area south of the Parallel of Latitude after Kenya's 1979 EEZ Proclamation. Nor has Somalia presented any evidence proving that it ever protested against the activities of Kenya's Navy in the now-disputed maritime area.

473. Lastly, Somalia's conduct in relation to oil concessions, fishing activities, naval patrols and other activities must be viewed in the light of Somalia's conduct during UNCLOS III and its absence of protest for over 30 years to Kenya's 1979 EZZ Proclamation. As already explained, Somalia's official position at the UNCLOS III negotiations was that the international law applicable to maritime delimitation was that of equity and equitable principles "rather than the purely geometric methods of the median or equidistance line".[856] In this context, the numerous activities of the Parties

854 *See* KCM, paragraph 123, citing Figure 1-13.

855 *See* Chapter II.A.2, paragraph 136 above; Letter from M. R. Atodonyang to Ms Juster Nkoroi, Kenya International Boundaries Office, KN/56/OPS/TRG, 16 May 2017, Annex 21; Figure KCM 1-13 (revised), Figure 2; Naval Patrols and Interceptions in the Exclusive Economic Zone, Figure 3.

856 *See* KCM, paragraphs 74, 254 and 256.

over the last four decades must be understood as clear "indicia [...] of the line [...] which the Parties themselves [...] considered equitable".[857]

474. In sum, the Parties' longstanding conduct regarding the location of their maritime boundary at the Parallel of Latitude is legally significant, independently of the Court's findings on acquiescence. As acknowledged by the Court in *Tunisia/Libya*, the existence of a *de facto* boundary that is tacitly respected by the parties for a prolonged period of time is a "circumstance of great relevance".[858] Two States are unlikely to accept tacitly a *de facto* boundary for a prolonged period of time unless they regard it as equitable. In this case, Somalia and Kenya acted for over three decades in a manner that was consistent with the existence of a *de facto* boundary at the Parallel of Latitude. The only reasonable explanation for that consistent conduct is that both Somalia and Kenya considered that that boundary was equitable. At the very minimum, such voluntary State conduct represents indicia or *prima facie* evidence of the equitableness of the result which "the Parties themselves [...] acted upon".[859] That common and consistent practice is therefore a relevant circumstance that calls for the adjustment of the provisional equidistance line to the Parallel of Latitude.

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857 *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment of 24 February 1982, I.C.J. Reports 1982*, p. 18, paragraph 118. *See also Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment of 3 June 1985, I.C.J. Reports 1985*, p. 13, paragraph 25.

858 *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment of 24 February 1982, I.C.J. Reports 1982*, p. 84, paragraph 118 (where the Court made clear that, to reach an equitable solution, it had to "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"). *See also Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment of 3 June 1985, I.C.J. Reports 1985*, p. 13, paragraph 25.

859 *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment of 24 February 1982, I.C.J. Reports 1982*, p. 18, paragraph 118. *See also Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment of 3 June 1985, I.C.J. Reports 1985*, p. 13, paragraph 25.

5. The evidence confirms that Kenya's fisherfolk currently and historically have critically relied for their livelihoods upon the fisheries just to the south of the Parallel of Latitude; their equitable access to those natural resources requires the adjustment of the provisional equidistance line to the Parallel of Latitude

475. The provisional equidistance line would deny Kenya equitable access to fisheries resources that are vital to its population. This would entail devastating repercussions for the livelihoods and economic well-being of Kenya's fisherfolk who depend on those fisheries. Their equitable access to those natural resources therefore requires the adjustment of the provisional equidistance line to the Parallel of Latitude.

476. The Court has confirmed that the need to ensure equitable access to fishery resources constitutes a relevant circumstance that may require adjustment of a provisional equidistance line. In the *Jan Mayen* case, the Court considered:

> whether any shifting or adjustment of the median line, as fishery zone boundary, would be required to ensure equitable access to the capelin fishery resources for the vulnerable fishing communities concerned.[860]

477. After finding that a provisional equidistance line would deny Denmark equitable access to capelin fisheries, the Court went on to adjust the provisional equidistance line to guarantee Denmark equitable access to those fisheries. Specifically, the Court noted:

> [i]t appears however to the Court that the median line is too far to the west for Denmark to be assured of an equitable access to the capelin stock, since it would

860 *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), Judgment of 14 June 1993, I.C.J. Reports 1993*, p. 38, paragraph 75.

> attribute to Norway the whole of the area of overlapping claims. For this reason also the median line thus requires to be adjusted or shifted eastwards.[861]

478. Kenya is mindful that determining an international maritime boundary on the basis of equitable access to natural resources is "altogether exceptional."[862] As explained by the Chamber of the Court in the *Gulf of Maine* case, a provisional equidistance line should be adjusted on that basis only if that is required to prevent "catastrophic repercussions for the livelihoods and economic well-being of the population of the countries concerned."[863] In that case, the Chamber considered that, to determine whether a delimitation would entail "catastrophic repercussions", it was necessary to consider equitable criteria such as: (i) the "preservation of existing fishing patterns which are vital to the coastal communities in the area concerned"; and (ii) the "optimum conservation and management of living resources".[864]

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861 *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), Judgment of 14 June 1993, I.C.J. Reports 1993*, p. 38, paragraph 76. *See also Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America), Judgment of 12 October 1984, I.C.J. Reports 1984*, p. 246, paragraph 237 (where the Chamber of the Court also recognised that "activities connected with fishing – or navigation, defence or, for that matter, petroleum exploration and exploitation" may, in exceptional cases, constitute relevant circumstances).

862 *Arbitration between Barbados and the Republic of Trinidad and Tobago*, Award, 11 April 2006, RIAA, Vol. XXVII, p. 147, paragraph 269.

863 *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America), Judgment of 12 October 1984, I.C.J. Reports 1984*, p. 246, paragraph 237. *See also Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment of 3 February 2009, I.C.J. Reports 2009*, p. 60, paragraph 198, citing the *Gulf of Maine* case; *Arbitration between Barbados and the Republic of Trinidad and Tobago*, Award, 11 April 2006, RIAA, Vol. XXVII, p. 147, paragraph 241, citing the *Gulf of Maine* case.

864 *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America), Judgment of 12 October 1984, I.C.J. Reports 1984*, p. 246, paragraph 110.

479. As explained below, a failure to adjust the provisional equidistance line to the Parallel of Latitude would indeed have catastrophic repercussions for the livelihoods and economic well-being of Kenya's northernmost coastal communities, as well as for the conservation and management of living resources inside and near the now-disputed maritime area.

480. The evidence confirms that, for centuries, fishing has been a vital activity for the livelihoods and economic well-being of coastal communities living in Kenya's northernmost region.[865] Those communities have a long history of dependence on fishing as a source of work and food.[866] In Lamu, artisanal fishing has been the main source of income for local communities for generations spanning hundreds of years.[867] Fishing is the "most important economic pillar" in the region, contributing approximately 90

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865 *See* KCM, paragraph 128. *See also*, "Fishery and Aquaculture Country Profiles: The Republic of Kenya", *UN FAO*, 2016 ("**UN FAO Fishery Profile of Kenya**"), available at: http://www.fao.org/fishery/facp/KEN/en (last accessed: 21 December 2020), Annex 96.

866 *See*, e.g., Fishing Report, page 9, Annex 4 ("[i]n Lamu County, marine fisheries comprise 75 percent of the local economy (with inland fishing comprising the remaining 25 percent) and have been the main livelihood strategy for generations, perhaps hundreds of years.").

867 *See*, e.g., Fishing Report, page 12, Annex 4 ("[f]ishing in Lamu County evidently has been an intergenerational as well as an intragenerational aspect. As one report noted, the Lamu people have historically been well-known for their skills in fish production, boat building, sailing and other marine activities, even among Kenya's coastal people who have been involved in trans-Indian ocean trade for more than 1,200 years. Many of the fishermen interviewed expressed that they had been fishermen for many years, and this was something inherited from their fathers before them."); Fishing Report, page 10, Annex 4 ("[i]t is only fair to say that fishing is part of Lamu County DNA. The Lamu County Biocultural Community Protocol is a document procured by two community-based organisations, Lamu Environmental Protection and Conservation as well as Save Lamu. The document was created based on community participation from over 46 villages in the county, including the indigenous communities such as the Bajun, Swahili and Sanye, as well as other recently migrated communities. There is great emphasis given to the cultural, historical and generational importance of fishing to these communities. A significant number of them rely on their nature-based livelihoods for their survival, and they assert that it has been the same throughout their ancestry, making specific reference to fishing.").

percent of household incomes.[868] In some villages that are closer to the Kenya-Somalia border – e.g., Kiunga and Kizingitini – fishing contributes up to 100 percent of the inhabitants' income.[869] Such dependence is, in part, attributable to the scarcity of other sources of employment in the region.[870]

481. Somalia itself has noted the importance of those fishery resources for the livelihoods of those communities. It has asserted that:

> [c]oastal communities, including the Baajuun and Reer Maanyo ethnic groups, have traditionally harvested the waters off Somalia's coast, making a livelihood as fishermen and seafarers.[871]

482. Fish and other marine products are also the main source of food in Lamu as well as in other coastal areas near the Kenya-Somalia boundary.[872] Indeed, as noted in the Fishing Report (a report issued by Kenya's State Law Office regarding fishing activities and patterns of communities living along Kenya's northern coast that forms part of the new evidence), the "fishing

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868 *See* Fishing Report, page 7, Annex 4.

869 *See* Fishing Report, page 13, Annex 4 ("Lamu county relies on fishing activity as the main economic activity and mainstay with some villages such as Kiunga and Kizingitini contributing to more than 90 percent of income and employment of the entire coastal fishing sector extending 640km. Dependence on fishing within the Kiunga village, close to the Kenya-Somalia border, for example, has been clearly highlighted by the International Union for Conservation of Nature and Natural Resources. The Union indicates that within the community, fishing contributes 95-100 percent of it's inhabitants' livelihoods.").

870 *See* Fishing Report, page 14, Annex 4 ("[f]ishing seems to be the source of livelihood that is resorted to, in part, because of the scarcity of other sources of employment in Lamu.").

871 MS, paragraph 2.11.

872 *See* Fishing Report, page 16, Annex 4 ("[t]he fishing ecosystem not only puts food on the tables of the inhabitants of Lamu County, but fish is in fact the main dietary staple and source of income for thousands of women who are fishmongers and cowrie collectors and traders.").

sector remains an imperative source of food to the 144,000 dwellers in Lamu county."[873] The dietary importance of fish and other marine species for Kenya's fisherfolk is echoed across the testimonies of fisherfolk who live in the region, which are now available to this Court. As noted by one fisher, "[f]ish is our main food. We can't eat any meal which has no fish served because it's what we are used to. It's a meal we so much depend on."[874]

483. The new evidence contained in the Fishing Report also confirms that local Kenyan fishing communities close to the Kenyan-Somali border have long relied upon fishing for their livelihoods and continue to do so today, including within the now-disputed waters.[875] The application of an equidistance line would have catastrophic effects on their access to vital fisheries on which their livelihoods and economic well-being depend.[876]

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873 Fishing Report, page 16, Annex 4.

874 Fishing Report, Annex FR40, Video interview of Mr Barkale Madi Amidi, minute 3:12 to 3:20, Annex 4.

875 *See*, e.g., Fishing Report, Annex FR38, Video interview of Sharif Bwanaheri, minute 0:34 to 0:38, Annex 4 ("[w]e fish at the Kenya-Somalia border because it has better fish. Any […]. We will experience a lot of suffering if we are barred from fishing at the border."); Fishing Report, Annex FR40, Video interview of Barkale Madi Amidi, minute 0:32 to 0:50, Annex 4 ("[w]e fish from West of Ishakani towards the border with Somalia. That's where we get fish in large numbers."); Fishing Report, Annex FR41, Video interview of Raya Ahmed, minute 4:03 to 4:20, Annex 4 ("We will be seriously affected because they depend on the border areas for huge and better catches"); Fishing Report, Annex FR20, Video interview of Ahmed Islam, minute 0:22 to 0:30 and 1:28 to 2:00, Annex 4 ("[o]ur fishing zones are from Kiunga to Daresalam point. We head to Daresalam point every time because there is plenty of fish there […]. So, we urge the government to remain firm because these areas from Daresalam point to Kiunga are ours. And we say that they rightfully belong to us. We have known them to be ours since the times of our great grandfathers. And there are landmarks indicating the areas are in Kenya's territory. Even our great grandfathers and the colonial government found those landmarks existing. So, it's very shocking that Somalia is claiming those areas today.").

876 *See* Fishing Report, page 20, Annex 4 ("[i]f the fishing community in Lamu County were restricted in their current access and historical areas, the effects would be devastating.

Those catastrophic effects are perhaps best illustrated by some of the testimonies of Kenya's fisherfolk.[877] For example, Mr Barkale Madi Amidi, a village elder and Chairman of a local Beach Management Unit of Ishinkani (a village near the LBT), notes:

> [w]e rely so much on fishing around the border with Somalia. That's where we get fish in large numbers. Life will be hard if we won't be allowed to access the border area […]. Everybody here depend on fishing as a means of livelihood. The sea is the farm to the people of Ishakani. It's our farm where we get our daily food. There's no other economic activity we're engaged in. We don't farm. Fishing is our way of life […]. If you fail to earn from fishing, you will have no choice but to sleep hungry.[878]

484. Mr Suluhu Aweso, a local fisher from Kiunga (a town just 15 km from the LBT) is equally unambigious. Referring to the consequences of being unable to fish in the waters near the Parallel of Latitude, he notes:

> [w]e will suffer especially residents of Kiunga. We will seriously be affected in terms of income since we don't have any other economic activity here in Kiunga. We are not employed anywhere else. The sea is what we depend on. The sea is what we've seen our fathers depend on since we were young. It's what gives us income and what our lives depend on.[879]

Many of the fishermen fear that they could lose prime fishing spots the communities have identified over the centuries, reducing their household as well as individual incomes.").

877 *See*, generally, Fishing Report, Annexes FR18 to FR43, Annex 4.

878 Fishing Report, Annex FR40, Video interview of Mr Barkale Madi Amidi, minute 1:10 to 1:20, 2:37 to 2:52 and 4:26 to 4:34, Annex 4.

879 Fishing Report, Annex FR39, Video interview of Mr Suluhu Aweso, at minute 0:32 to 0:54, Annex 4.

485. Similarly, Mr Lali Mohamed, another fisher from Ishakani notes that, if he were barred from fishing near the border, he "will be seriously affected."[880] He also explains that, if that were to happen, "[p]eople will resort to killing one another and stealing".[881] In the same vein, Ms Mwansomo Athman Arasin, a fishmonger from Lamu asserts that, if Kenyans were prevented from fishing near the border, "men will resort to stealing while women will get into prostitution".[882] That is the degree of dependence of those communities on fishing.

486. Notably, the catastrophic consequences of adopting Somalia's proposed equidistance line would not only affect the communities living near the Kenya-Somalia boundary. They would also affect numerous other communities that are further away from the border but nonetheless rely on the fishery resources located in waters near the boundary. Indeed, as explained in the Fishing Report, because some areas south of Lamu have less fishery resources, some fisherfolk are compelled to travel from places as far south as Malindi to harvest the resource-rich waters of Kiunga and Ishakani.[883] This is corroborated by testimony of Kenya's fisherfolk contained in the Fishing Report.[884]

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880 Fishing Report, Annex FR30, Video interview of Mr Lali Mohamed, at minute 0:25 to 0:30, Annex 4.

881 Fishing Report, Annex FR30, Video interview of Mr Lali Mohamed, at minute 0:25 to 0:30, Annex 4.

882 Fishing Report, Annex FR35, Video interview of Ms Mwanasomo Athman Arasin, at minute 2:51 to 3:00, Annex 4.

883 *See* Fishing Report, page 17, Annex 4 ("[t]he fishermen have noted their closeness to the border when fishing, citing it as beneficial to the activity. Indeed, fishermen come from all over to fish in areas like Kiunga and Ishakani. One fisherman indicated that some come from Faza, Kizingitini, and even Malindi, to fish in the area.").

884 *See*, e.g., Fishing Report, Annex FR39, Video interview of Suluhu Aweso, minute 1:17 to 1:29, Annex 4 ("[r]ight now, fishermen from Faza, Kizingitini all come to fish here. All of

487. Further, the dependence of Kenya's coastal communities on fishing is well documented in other sources. For example, the UN FAO confirms Kenyan fishing within the disputed zone, noting that "[t]he major fishing areas" include "the length of Kiunga coastline and the Lamu islands in the North",[885] close to the Kenyan-Somali border. The UN FAO also explains that:

> [f]isheries and aquaculture play a significant role in the development and stabilization of Kenya's rural communities, both coastal and riparian. The combined sector provides employment and income to large numbers of men and women, and food and social cohesion to entire families. […] Communities living along Kenya's lakes and coastline benefit further in terms of food security, as small-scale fishing is essential to their overall household wellbeing, providing both income and nutrient-rich food.[886]

488. In 2016, the UN Environment Programme and the Western Indian Ocean Marine Science Association estimated that the marine fisheries sector within Kenya employed about 27,000 people in sea and shore-based activities, including over 13,000 artisanal fishers.[887] Engaging largely in subsistence fishing, fishers usually take part of their catch to their relatives for food.[888] The number of people supported indirectly by the fisheries sector in Kenya is much higher. Beyond artisanal and industrial fishing, the

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them rely on these areas. These are the areas with plenty of fish. A fisherman may use fuel worth ksh 20,000 to travel from those areas to here.").

885 UN FAO Fishery Profile of Kenya, page 7, Annex 96.

886 UN FAO Fishery Profile of Kenya, page 17, Annex 96.

887 *See* "Regional State of the Coast Report: Western Indian Ocean, Social and Economic Impacts of Capture Fisheries and Mariculture", UN Environment Programme, 2016, page 308, Annex 97.

888 *See* UN FAO Fishery Profile of Kenya, Annex 96.

evidence confirms that the fisheries sector generates employment for over two million Kenyans, through boat building, equipment repair, fish processing and other related activities.[889] Moreover, fishing enables Kenyans to maintain a viable agricultural sector, which is critical to maintaining a stable society and economy.

489. In addition, Somalia's admitted inability to police its waters and prevent IUU Fishing underscores the need to adjust the provisional equidistance line to the Parallel of Latitude to ensure the optimum conservation of living resources. As recently as 4 December 2020, the UN Security Council again "[e]xpress[ed] serious concern over reports of illegal, unreported and unregulated fishing (IUU) in Somalia's Exclusive Economic Zone (EEZ)".[890] IUU Fishing has a number of devastating implications.[891] It severely contributes to the overexploitation of fish stocks and hinders the recovery of fish populations and ecosystems. Indeed, as explained by the UN FAO, "IUU fishing can lead to the collapse of a fishery or seriously

889 *See* "Leveraging the Blue Economy for Inclusive and Sustainable Growth", *UN Development Programme Policy Briefs*, 2018, page 5, Annex 98. *See also* Fishing Report, pages 9-10, Annex 4 ("[i]n addition, the fisheries sector indirectly gives employment, such as boat building, equipment repair and fish processing to over two million Kenyans").

890 UN Security Council Resolution 2554 (2020), S/RES/2554 (2020), 4 December 2020, page 3, Annex 69.

891 IUU Fishing has been defined by the UN FAO in its International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing. *See* International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, *UN FAO*, 2001, paragraphs 3-6, Annex 99. Illegal fishing refers to fishing activities conducted in territorial waters without permission, the failure to observe conservation and management measures, and fishing on the high seas in violation of the UNCLOS. Unreported fishing involves any fishing activities that are not reported or are misreported to a relevant agency. Unregulated fishing includes fishing in areas where reporting is not mandated, where management does not exist or is not enforced, or where detailed knowledge of fishery resources is lacking. *See* S. M. Glaser et al., "Securing Somali fisheries", *One Earth Future Foundation*, 2015 ("**Securing Somali Fisheries Report**"), page 23, Annex 149.

impair efforts to rebuild stocks that have already been depleted".[892] The negative impact of overfishing on Somali fisheries can be evidenced by a 2015 report, which noted that "8 of the 17 fish groups [...] analyzed [were being] fished at unsustainable levels" due to IUU Fishing.[893] The same report estimated that "foreign IUU vessels catch three times as many fish as the Somali artisanal fishing sector, and [...] cause significant environmental damage."[894]

490. Moreover, the evidence confirms that IUU Fishing constitutes a direct threat to marine ecosystems, food security and the livelihoods of fishing communities. As the UN Security Council stated, referring specifically to the situation in Somalia's EEZ and "noting the complex relationship between IUU fishing and piracy", "IUU fishing can contribute to destabilization among coastal communities".[895] Equally, Secure Fisheries has emphasised that "[o]verfishing [in Somali waters] not only negatively impacts marine ecosystems; it also threatens coastal livelihoods in communities that cannot compete with foreign vessels' efficient gear."[896] In the same vein, the former Director-General of the UN FAO has warned about the threats of IUU Fishing, noting that it "not only jeopardizes marine

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892 International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, *UN FAO*, 2001, paragraph 1, Annex 99.

893 Securing Somali Fisheries Report, page 78, Annex 149. The fish analysed include swordfish, striped marlin, emperors, goatfish, snappers, sharks, groupers and grunts.

894 Securing Somali Fisheries Report, page xiii, Annex 149.

895 UN Security Council Resolution 2554 (2020), S/RES/2554 (2020), 4 December 2020, page 3, Annex 69. The UN Security Council further "recognize[d] that piracy exacerbates instability in Somalia by introducing large amounts of illicit cash that fuels additional crime, corruption, and terrorism". *See also* UN Security Council Resolution 2554 (2020), S/RES/2554 (2020), 4 December 2020, page 4, Annex 69.

896 C. Devlin et al., "Rough seas — the causes and consequences of fisheries conflict in Somali waters", *One Earth Future Foundation*, 2020, page 3, Annex 150.

ecosystems but also threatens the livelihoods and food security of millions of fish workers around the world".[897]

491. Similarly, the UN FAO South West Indian Ocean Fisheries Commission has observed that:

> in the SWIO region, IUU is estimated to be around 400 million/year threatening fish stocks, distorting markets, undermining governance structures, and imposing considerable costs on the economies of developing countries, including the livelihoods of coastal fishing communities.[898]

492. The negative consequences of IUU Fishing in Somalia are exacerbated by Somalia's corruption and mismanagement. For example, a 2006 report of the UN Monitoring Group found that local authorities, administration leaders and warlords sell fishing licences for profit to foreign vessels at rates of as much as USD 150,000 per boat. Foreign vessels then use those licences without restriction, thus causing severe depletion of the environment and relevant ecosystem.[899] The same report also notes that:

> [p]ermits are issued in complete disregard for any international regulations or long-term sustainability of the fisheries, resulting in indiscriminate fishing and severe long-term degradation of the Somali fishery.[900]

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897 "UN agency urges implementation of accord to tackle illegal fishing", *UN News*, 12 July 2016, Annex 100.

898 "Ten Years Promoting and Strengthening Regional Cooperation For Securing Sustainable Fisheries In South West Indian Ocean (SWIO) Region", *UN FAO South West Indian Ocean Fisheries Commission (SWIOFC)*, pages 8-9, Annex 101.

899 *See* Report of the Monitoring Group on Somalia pursuant to Security Council resolution 1630 (2005), S/2006/229, 4 May 2006, paragraphs 71-75, Annex 102.

900 Report of the Monitoring Group on Somalia pursuant to Security Council resolution 1630 (2005), S/2006/229, 4 May 2006, paragraph 75, Annex 102.

493. The corruption and rent-seeking practices of Somalia in relation to its maritime resources have not improved since then. In 2015, the UN Monitoring Group "identified the illicit sale of fishing licences to foreign clients as an avenue for Federal Government of Somalia and other Somali officials to misappropriate public resources." [901] More recently, the UN Security Council:

> express[ed] concern at continued reports of illegal, unreported and unregulated fishing in waters where Somalia has jurisdiction, and encourage[d] the FGS, with support from the international community, to ensure fishing licenses [were] issued in accordance with the appropriate Somali legislation.[902] (Emphasis omitted.)

494. Given Somalia's "weak legal and institutional framework" and its "inability [...] to enforce laws within Somali waters",[903] extending the maritime boundary south of the Parallel of Latitude would be fatal for Kenya's fisherfolk.[904] That decision would be tantamount to increasing the maritime

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901 Report of the Monitoring Group on Somalia and Eritrea pursuant to Security Council resolution 2182 (2014): Somalia, S/2015/801, 19 October 2015, page 18, Annex 91.

902 UN Security Council Resolution 2498 (2019), S/RES/2498, 15 November 2019, pages 1-2, Annex 73.

903 U.N. Security Council, *Report of the Secretary-General on the protection of Somali natural resources and waters*, U.N. Doc. S/2011/661 (25 Oct. 2011), paragraph 18, SR, Annex 19. *See* U.N. Monitoring Group on Somalia and Eritrea, *Report of the Monitoring Group on Somalia and Eritrea pursuant to Security Council resolution 2182 (2014): Somalia*, U.N. Doc. S/2015/801 (19 Oct. 2015), paragraphs 34-35, SR, Annex 23 ("[t]aking advantage of the limited maritime surveillance capability of the Federal Government of Somalia, many foreign vessels fish in Somali waters in contravention of international law and the Federal Government of Somalia Fisheries Law, either without licences or with forged documents, and without reporting data to any Somali authority […] Illegal, unreported and unregulated fishing represents a significant threat to peace and security in Somalia […]").

904 *See* Fishing Report, page 25, Annex 4 ("[f]or conservation purposes, there is a widely-shared fear that if Somalia is granted the disputed waters, there will be increased impunity for illegal fishing and pollution that will jeopardise Kenya's conservation efforts and coastal communities.").

area where the rule of law is weak – if not inexistent. Rampant IUU Fishing will cause an accelerated degradation of the living resources in that area and, consequently, of Kenyan coastal communities' vital fishing patterns.

495. Indeed, fishing stock will be significantly harmed by increased pollution. In addition to depleting the stock of fish, illegal foreign fishing trawlers are known for polluting Somali waters by dumping nuclear and toxic waste.[905] Those actions have devastated the livelihoods of numerous Somali fishermen and pushed them to turn to piracy.[906] The same would happen to Kenya's fisherfolk if the maritime boundary is extended south of the Parallel of Latitude and illegal foreign fishing trawlers are allowed to operate there with the same impunity.

496. Indeed, there is ample evidence that Somalia's inability to prevent IUU Fishing has catastrophic repercussions for the livelihoods and economic well-being of coastal communities. For example, Mr Abdullah Bidhan Warsame, Somalia's own Minister of Fisheries and Maritime Resources, has admitted that:

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905 *See* "Causes of maritime piracy in Somalia waters", *Marine Insight*, 20 May 2018, Annex 151; "Somali fishermen struggle to compete with foreign vessels", *VOA News*, 20 May 2018, Annex 152.

906 *See*, e.g., "Kenya targets 'fish thieves' with new coastguard", *CGTN Africa*, 20 November 2018, Annex 153; "Somali perspectives on piracy and illegal fishing, Oceans Beyond Piracy", *Oceans Beyond Piracy*, available at: http://oceansbeyondpiracy.org/publications/somali-perspectives-piracy-and-illegal-fishing (last accessed: 21 December 2020), Annex 154; "Somali Fishermen Struggle to Compete with Foreign Vessels", *VOA News*, 20 May 2018, Annex 152; "Somalia threatened by illegal fishermen after west chases away pirates", *The Guardian*, 31 October 2005, Annex 155 (noting that "[o]verfishing, which devastated the livelihoods of coastal communities a decade ago, is regarded as the principal reason for the initial outbreak of piracy"). *See also* "Piracy and armed robbery against ships – report for the period 1 January-31 December 2019", *ICC International Maritime Bureau*, January 2020, page 18, Annex 144 (explaining that Somali pirates constitute an ongoing and serious threat in the region and that there is a risk for fishermen to be confused with pirates).

> the presence of Iranian vessels in Somali waters is an ongoing concern. Illegal, unreported and irregular fishing in Somali waters seriously threatens food security, economic development and Somalia's sovereignty.[907]

497. The UN Security Council itself has expressed serious concerns about "continued reports of illegal, unreported and unregulated fishing in waters where Somalia has jurisdiction."[908]

498. In significant contrast, Kenya has taken a series of active steps to combat IUU Fishing and champion marine conservation. For example, for the last decades, Kenyan authorities, such as the Kenya Wildlife Service, have protected the interests of those fishing communities, including by establishing the Kiunga Marine National Reserve in 1979.[909] In addition, Kenya recently launched a new Coast Guard Service (the "**KCGS**") specifically to fight IUU Fishing.[910] The KCGS's efforts have already paid dividends. Only a mere six months after the KCGS initiated its operations, fishing stock in certain Kenyan waters had already increased by 155,000 tonnes.[911]

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907 "Somalia: when illegal fishing threatens national and regional economy", *Ressources Magazine*, 11 July 2020, Annex 156.

908 UN Security Council Resolution 2498 (2019), S/RES/2498, 15 November 2019, pages 1-2, Annex 73.

909 *See* "Natural resource dependence, livelihoods and development: Perceptions from Kiunga, Kenya", *IUCN Eastern and Southern Africa Regional Office*, 2008, pages 7-9, Annex 67.

910 "Kenya strives to end illegal fishing, ramp up seafood production", *Seafood Source*, 22 August 2019, Annex 157.

911 *See* "Fish stocks double after launch of Kenya coast guard services", *Nation Africa*, 14 July 2019 (updated 29 June 2020), Annex 158. ("the service has maintained daily patrols of Kenya's waters to guard against illegal, unregulated and unreported fishing, provide safety to seafarers and prevent drug smuggling and the illegal movement of people and goods.").

499. In addition, Kenya is a founding Member of Aquaculture Network for Africa.[912] The purpose of that network is essentially to provide States with a platform to discuss the importance of fisheries in Africa and to promote the better use of fishery resources.

500. In a 2019 Report titled Kenya Marine Fisheries and Socio-Economic Development Project, the World Bank noted that:

> Kenya has recently begun introducing management of fishing effort in the artisanal and commercial sectors by implementing measures articulated in national fisheries regulations, national fisheries management plans (FMP), and local co-management area (CMA) plans, some of which were prepared under the World Bank-financed Kenya Coastal Development Project (KCDP, P094692).[913]

501. The World Bank also has recognised that the "elimination of IUU fishing in Kenyan waters is [...] a priority" and that:

> [a] major step towards achieving this was initiated under the KCDP through the development of a monitoring, control, and surveillance (MCS) strategy that included the implementation of a vessel monitoring system (VMS) that is currently being used to monitor licensed foreign-flagged vessels.[914]

502. Kenya has taken similar steps to protect its marine ecosystems. For example, it created a number of Marine Protected Areas ("**MPAs**")

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912 *See* UN FAO Fishery Profile of Kenya, Annex 96.

913 "Kenya Marine Fisheries and Socio-Economic Development Project (KEMFSED) (P163980) - Combined Project Information Documents / Integrated Safeguards Datasheet (PID/ISDS)", *The World Bank*, 25 April 2019, page 6, Annex 68.

914 "Kenya Marine Fisheries and Socio-Economic Development Project (KEMFSED) (P163980) - Combined Project Information Documents / Integrated Safeguards Datasheet (PID/ISDS)", *The World Bank*, 25 April 2019, page 7, Annex 68.

specifically aimed at "protect[ing] and conserv[ing] marine and coastal biodiversity".[915] Four of those areas are "no-take marine national park[s] that are protected from any form of extractive activities."[916] No-take MPAs in Kenya have been acknowledged as "successful in restoring fish biomass and biodiversity" and cited "as the most effective in the region".[917] Similarly, Kenya has adopted a system of Beach Management Units to manage artisanal fisheries, deter over-exploitation of fisheries and enable Kenyan fisherfolk to have a say in the regulation of the fisheries important to their communities and livelihoods. As noted by Secure Fisheries, "[l]ocal management of small-scale fisheries has been successful in Kenya, resulting in an increase in fish biomass and diversity."[918]

503. In addition, Kenya has adopted a series of domestic laws specifically aimed at marine conservation, including the 2016 Fisheries Management and Development Act (the "**2016 FMDA**").[919] The Government also has adopted a number of international projects aimed at enhancing marine conservation. Among other initiatives, it recently developed the "Kenya Coast Development Project" in conjunction with the World Bank with the aim of "[s]trengthen[ing] conservation and sustainable use of marine and

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915 R. M. Oddenyo et al., *Kenyan sharks baseline assessment report for the national plan of action for the conservation and management of sharks* (Kenya Fisheries Service, 2018), page 28, Annex 5.

916 R. M. Oddenyo et al., *Kenyan sharks baseline assessment report for the national plan of action for the conservation and management of sharks* (Kenya Fisheries Service, 2018), page 28, Annex 5.

917 R. M. Oddenyo et al., *Kenyan sharks baseline assessment report for the national plan of action for the conservation and management of sharks* (Kenya Fisheries Service, 2018), page 28, Annex 5.

918 P. M. Roberts et al., "An exploration of federal fisheries management agencies in Eastern Africa", *Secure Fisheries*, February 2017, p. 18, Annex 159.

919 *See* Republic of Kenya, Kenyan Fisheries Management and Development Act No. 35, 9 September 2016, Annex 1.

coastal biodiversity".[920] Kenya also launched, together with the UN FAO, the so-called Blue Growth Initiative ("**BGI**"), which is aimed at benefiting select areas in Kenya's coastal region. BGI is a UN FAO flagship initiative promoting more productive, sustainable and socioeconomically responsible fisheries, and aquaculture sectors.[921]

504. Kenya has been internationally commended for its environmental conservation efforts. For instance, the UNESCO has noted that the Kenya Wildlife Service and the World Wildlife Fund are collaborating to procure "the conservation of the outstanding biodiversity, natural resources and ecology" in certain marine reserves.[922] Similarly, the World Bank celebrated the "key regulatory and policy changes" derived from Kenya's 2016 FMDA, which focus specifically on conservation, management and development of Kenya's fishery resources.[923] Further, the International Union for Conservation of Nature (the "**IUCN**") has praised the

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920 "Implementation Completion and Results Report on a credit in the amount of SDR 23.8 million (USD 35 million equivalent) and on a grant from the Global Environment Facility Trust Fund in the Amount of USD 5.0 million to the Republic of Kenya for the Kenya Coastal Development Project (P094692), ICR00004272", *The World Bank*, 31 December 2017, page 8, Annex 103.

921 *See* "Developing sustainable fisheries and healthy oceans for food and nutrition security", *UN FAO*, 27 July 2015, Annex 104.

922 "Silk Roads Programme: Kiunga", *UN Educational, Scientific and Cultural Organization*, available at: https://en.unesco.org/silkroad/silk-road-themes/biosphere-reserve/kiunga (last accessed: 21 December 2020), Annex 105 (noting that Kenya Wildlife Service and the World Wildlife Fund research and monitor "the status of coral reefs [and] their threats such as fishing, shell collecting, sedimentation, and pollution in the Kenyan marine reserves.").

923 "Kenya Marine Fisheries and Socio-Economic Development Project (KEMFSED) (P163980), Combined Project Information Documents / Integrated Safeguards Datasheet (PID/ISDS)", *The World Bank*, 25 April 2019, page 5 and footnote 11, Annex 68.

"[m]anagement and conservation interventions" by several institutions in Kenya's national parks, including the Kiunga Marine National Reserve.[924]

505. There is more. Failing to adjust the provisional equidistance line to the Parallel of Latitude will also increase insecurity and threaten the lives of civilian Kenyan fisherfolk. As explained in **Section IV.B.3**, just as Somalia is unable to control IUU Fishing, Somalia is equally unable to maintain security within its land territory and waters.[925] Local Kenyan fisherfolk in the areas close to the Kenyan-Somali border face perennial and existential security threats emanating from Somalia.[926] Those threats are confirmed by the testimonies of Kenya's fisherfolk contained in the Fishing Report. Those threats would only increase if Somalia's proposed equidistance line were accepted.

506. By way of example, Mr Ali Salim Waroi, recalls how he "was once kidnapped and [his] boat confiscated" while fishing at a point located near the LBT. He notes how "[p]irates held [him] hostage together with 17 other fishermen" and how he "was held in water tanks" facing a "serious threat" to his life.[927] Similarly, Mr Mohamed Athman Mkokoni warns that, "if

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924 "Natural resource dependence, livelihoods and development Perceptions from Kiunga, Kenya", *IUCN Eastern and Southern Africa Regional Office*, 2008, page 5, Annex 67; "Coral bleaching response and monitoring in the Kiunga marine national reserve", *Reef Resilience Network*, 16 June 2014, Annex 160.

925 *See* UN Security Council Resolution 2554 (2020), S/RES/2554 (2020), 4 December 2020, page 1, Annex 69, showing that, as recently as 2 December 2020, Somalia again wrote to the UN transmitting an official request for assistance to counter piracy off the Somali coast.

926 *See*, e.g., Fishing Report, page 21, Annex 4 ("[t]he Lamu CSP notes that attacks against settler communities linked to the Al-Shabaab terror group have negatively affected agro-production and commerce within the County. This necessarily affected the fisherman population, an example of which is the night fishing ban declared in 2011.").

927 Fishing Report, Annex FR21, Video interview of Mr Ali Salim Waroi, minute 2:17 to 2:57, Annex 4.

Somalia [were to] take away [Kenya's] areas, the security situation will worsen. There will never be peace."[928] He then vividly recalls how his son, "who went to fish at the Somalia border", returned home saying that "he saw blood" and that "there [were] gun shots everywhere".[929] Others fear that, if Somalia's proposed boundary were to be accepted, then "the pirates will abduct [them]".[930]

507. As Kenya has already explained, no other State suffers as much from the security threats emanating from Somalia as Kenya.[931] No single factor has more significantly jeopardised the livelihoods of local fishing communities than the insecurity flowing directly from Somalia's admitted lack of territorial and maritime enforcement capacity. To delimit the maritime boundary along an equidistance line would swing the boundary of Somalia's maritime territory in significant closer proximity to Kenya's coastline and local fishing communities. This would severely affect their security. By magnifying the threat of uncontrolled maritime terrorism, piracy and related crime, such a delimitation would also catastrophically disrupt the ability of entire communities to maintain their livelihoods through fishing.

508. In sum, any failure to adjust the provisional equidistance line to the Parallel of Latitude would deprive Kenyan communities of vital fishing grounds. It would exacerbate Somalia's inability to safeguard its waters from piracy,

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928 Fishing Report, Annex FR34, Video interview of Mr Mohamed Athman Mkokoni, Annex 4.

929 Fishing Report, Annex FR34, Video interview of Mr Mohamed Athman Mkokoni, Annex 4.

930 Fishing Report, Annex FR30, Video interview of Mr Lali Mohamed, minute 0:45 to 0:50, Annex 4.

931 *See* Chapter IV.B.3.

IUU Fishing and other grave forms of maritime crime. It would also severely affect marine conservation and threaten the lives and security of Kenyan fisherfolk. International law therefore requires adjusting the provisional equidistance line to the Parallel of Latitude. This would prevent "catastrophic repercussions" for Kenya's fisherfolk and allow Kenya to continue working towards the "optimum conservation and management of living resources" in the now-disputed maritime area.[932]

C. The Parallel of Latitude line leads to no significant disproportionality; the equidistance line leads to significant disproportionality

509. As the Court explained in the *Black Sea* case, the third and last stage of the three-step delimitation method is to "check, *ex post facto*, on the equitableness of the delimitation line [...] constructed."[933] To do so, the Court will confirm:

> that the result thus far arrived at, so far as the envisaged delimitation line is concerned, does not lead to any significant disproportionality by reference to the respective coastal lengths and the apportionment of the areas that ensue.[934]

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932 *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America), Judgment of 12 October 1984, I.C.J. Reports 1984*, p. 246, paragraph 237. *See also* paragraphs 354-356 above; SR, paragraph 2.71 ("it has been widely recognised that, as a result of Somalia's lack of maritime enforcement capacity, vessels from many States have engaged in illegal fishing in Somalia's territorial waters and EEZ—activities that Somalia has been unable to prevent.").

933 *Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment of 3 February 2009, I.C.J. Reports 2009*, p. 61, paragraph 211.

934 *Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment of 3 February 2009, I.C.J. Reports 2009*, p. 61, paragraph 210.

510. Any significant disproportionality is revealed through a three-step process. The Court will first establish the relevant maritime area.[935] Then, the Court will consider the relative lengths of the relevant coasts.[936] Finally, the Court will compare the ratio of the allocation of the relevant areas by the delimitation line against the relative coastal lengths.[937] However, the proportionality test is not a mathematical exercise.[938] Instead, as noted by the tribunal in the *Bangladesh v. India* case, only "a significant disproportionality is to be avoided."[939]

511. Somalia argues that its proposed equidistance line leads to a more proportionate result than the Parallel of Latitude. This is not the case. Somalia can only reach this result by engaging in a proportionality analysis that is internally inconsistent with its own legal submissions. As Kenya has explained in previous submissions, Somalia incorrectly calculates the relevant area and relevant coastal lengths. However, even if one defines the relevant area and the coastal lengths as Somalia should have constructed them based on its own legal standards, the equidistance line also leads to a disproportionate result, just as it does with Kenya's correct calculations of

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935 *See*, e.g., *The Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)*, Award, 7 July 2014, PCA Case No. 2010-16, paragraph 490.

936 *See The Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)*, Award, 7 July 2014, PCA Case No. 2010-166, paragraph 495.

937 *See The Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)*, Award, 7 July 2014, PCA Case No. 2010-166, paragraph 496.

938 *Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment of 3 February 2009, I.C.J. Reports 2009*, p. 61, paragraphs 210-211 (citing *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic (UK, France)*, Award, 30 June 1977, RIAA, Vol. XVIII, p. 3, paragraph 101). *See also The Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)*, Award, 7 July 2014, PCA Case No. 2010-16, paragraph 492.

939 *The Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)*, Award, 7 July 2014, PCA Case No. 2010-16, paragraph 493.

the relevant area and relevant coasts. In contrast, the Parallel of Latitude never leads to a significant disproportionality, whether one uses Kenya's correct calculations or Somalia's stated methodology consistently applied.

1. Somalia's calculations regarding the scope of the relevant maritime area are inconsistent with its own legal submissions

512. With regard to the southernmost portion of the relevant area, both Parties have accepted that maritime areas south of the Kenya/Tanzania delimitation are not part of the relevant area.[940] To recall, Somalia claims that, "since Kenya renounced any claim in this area as a result of its Agreement with Tanzania, this cannot be considered as part of the relevant area for the present dispute".[941]

513. From there, however, the Parties disagree about the definition of the relevant area north of the Kenya-Tanzania boundary. As the evidence confirms, the relevant area is defined by the seaward projection from all of the relevant coastal lengths,[942] in which case the Parallel of Latitude delimits 51% of the relevant area to Somalia and 49% to Kenya.[943] In this case, the relevant area is as set forth in Kenya's Rejoinder: the maritime

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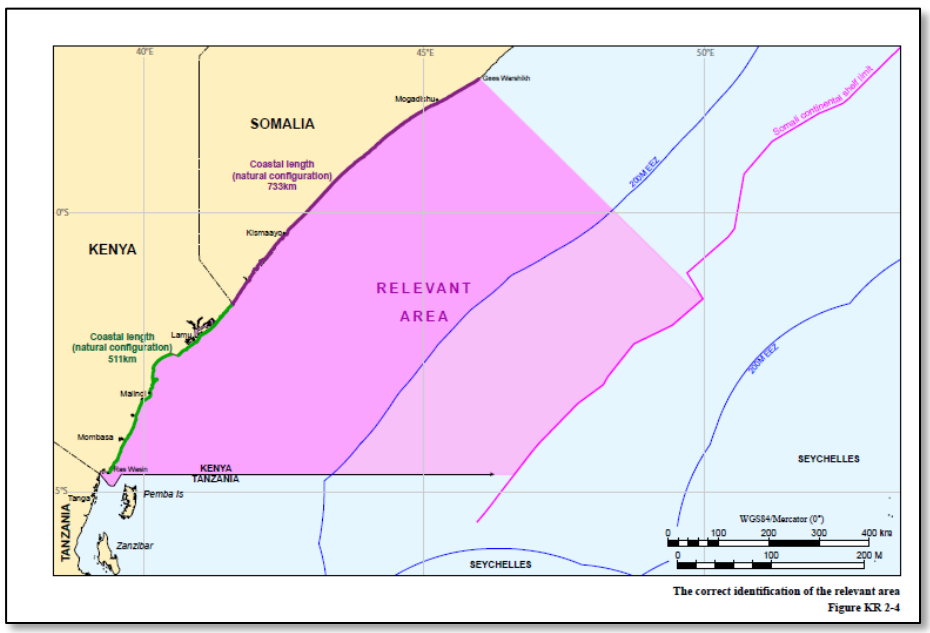
940 *See* KR, paragraph 172(d); MS, paragraphs 6.36 and 7.24. *See also* S. Fietta and R. Cleverly, *A Practitioner's Guide to Maritime Boundary Delimitation* (Oxford University Press, 2016), page 602 ("[t]he court [...] excluded from the relevant area, first, the maritime space to the north of the boundary delimited a few years earlier in the Nicaragua/Honduras case and, second, maritime space that was already subject to boundary agreements between Colombia and third States (Panama, Jamaica, and Costa Rica)"); *Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment of 19 November 2012, I.C.J. Reports 2012,* p. 624, paragraph 163.

941 MS, paragraph 7.64.

942 *See* KR, paragraphs 169-171.

943 *See* KR, paragraph 183; Division of the relevant area, including the area beyond 200M, using the parallel of latitude, KR, Figure KR 2-11.

areas lying off the coast between Gees Warshikh, Somalia, in the north to Ras Wasin, Kenya, in the south. In its northernmost point, the projection generated by these coasts advances outwards from the coast towards the continental shelf. In the south, the projection follows the Kenya-Tanzania maritime delimitation line[944] (as Somalia also accepts[945]). The relevant area is therefore as follows:



KR, Figure 2-4

514. In contrast, Somalia uses an incorrect methodology for defining the relevant maritime area – and then, notably, fails to apply its own stated methodology in a consistent manner.

944 *See* KR, paragraph 172.

945 *See* MS, paragraphs 6.36 and 7.24.

515. Somalia first asserts that "[t]he 'relevant area' is limited to the maritime area where the projections of the Parties' relevant coasts overlap" in all cases.[946] As noted directly above, Kenya disagrees. Yet, even accepting Somalia's position (*quod non*), its delimitation line would be disproportionate.

516. Somalia concedes that the 200M line (between the so-called "inner" and "outer" continental shelves) is of no legal relevance in constructing a relevant area.[947] This is because there is only one continental shelf.[948] Despite accepting this position, Somalia still states in its very next breath that the "Court may find it convenient to proceed with the examination of the relevant area in two steps", first within 200M and then beyond the 200M line.[949] There is no explanation in Somalia's submissions as to why dividing the continental shelf in this manner might be "convenient".

517. Somalia then applies one approach to define the relevant area within 200M and a different approach to define the area beyond 200M. Within 200M, Somalia constructs a 200M radial projection from the LBT, resulting in a semi-circular area of overlapping entitlements.[950] This is shown by Somalia as follows:[951]

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946 MS, paragraph 6.32.

947 *See* MS, paragraph 6.35.

948 *See The Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)*, Award, 7 July 2014, PCA Case No. 2010-16, paragraph 299 ("In keeping with its view that there is a single continental shelf [...] this Tribunal sees no basis for distinguishing between projections within 200 nm and those beyond that point.").

949 *See* MS, paragraph 6.35.

950 *See* MS, Figure 6.8.

951 *See* MS, Figure 6.8.

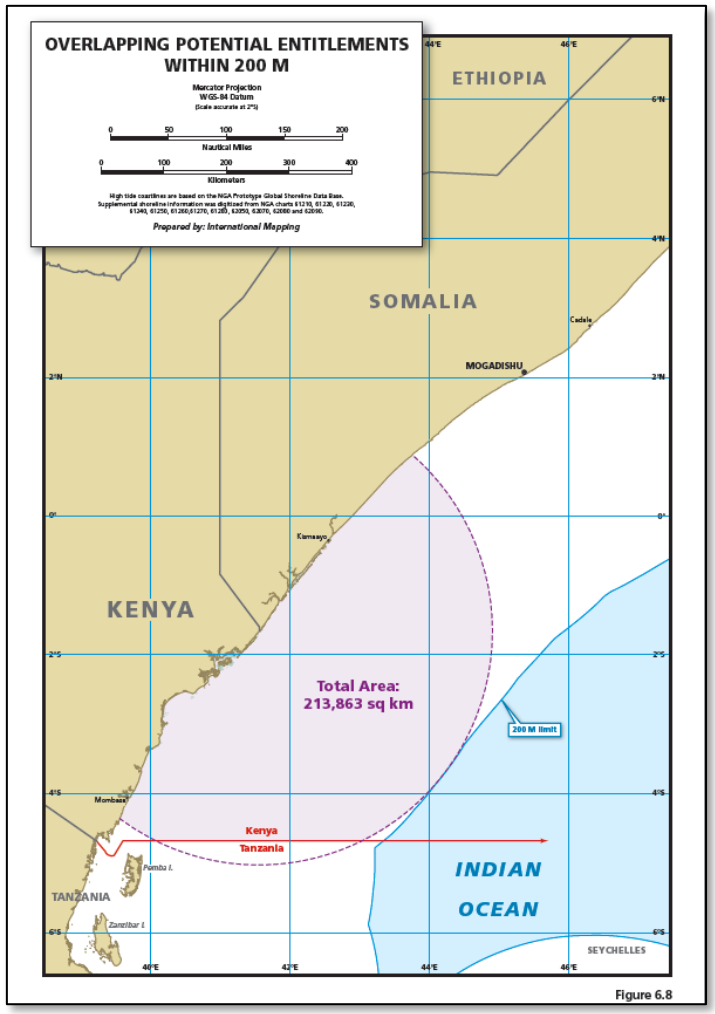

Figure 6.8

MS, Figure 6.8

518. Since Somalia concedes that there is no distinction between the continental shelf within 200M and beyond the 200M line, one might expect that Somalia would use the same radial projection method to establish the overlapping entitlements to the "outer" continental shelf. However, it does not do so. Having used one approach within 200M, Somalia switches to a different approach beyond the 200M line.

519. In particular, Somalia abandons its own legal submission beyond the 200M line. Somalia does state that, in the "overlapping entitlements" approach it purports to advance, the relevant area is not defined based on "the opposite claims" of either Party. Instead, the "overlapping entitlements" approach "consider[s] both the areas of overlapping claims and the area of the overlapping potential entitlement"[952] (i.e., the "part of the maritime space in which the potential entitlements of the parties overlap"[953]). Thus, according to Somalia, "the relevant area covers the overall maritime spaces involved in the delimitation and is not the same as the area of the overlapping claims."[954] As Somalia itself explains, "the area of overlapping potential entitlements consists of those areas [...] that each State would have been able to claim but for the presence of the other."[955]

520. Yet, for unknown reasons, Somalia does not calculate the area of overlapping entitlements beyond the 200M line by reference to entitlements, as it itself states is required and as it did within 200M. Instead, Somalia calculates the relevant area beyond the 200M line by reference only to Kenya's actual claims. Somalia's submissions coyly disclose this sleight of hand. In paragraph 6.37 of its Memorial, Somalia states that it is calculating "the area of overlapping ***entitlements***".[956] (Emphasis added).

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952 MS, paragraph 6.32, citing *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), Judgment of 14 June 1993, I.C.J. Reports 1993*, p. 38, paragraph 59.

953 MS, paragraph 6.33, citing *Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment of 19 November 2012, I.C.J. Reports 2012*, p. 624, paragraph 159.

954 S. Fietta and R. Cleverly, *A Practitioner's Guide to Maritime Boundary Delimitation* (Oxford University Press, 2016), page 600.

955 MS, paragraph 6.37.

956 MS, paragraph 6.37.

At the same time, in the footnote to that same paragraph (footnote 236), Somalia says that:

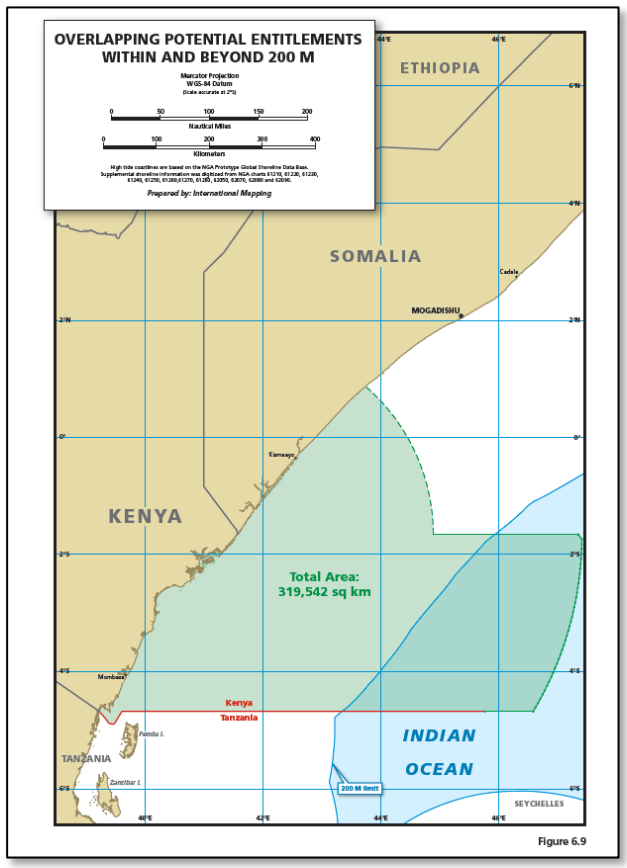
> [t]he area so depicted includes areas ***claimed by Kenya*** as continental shelf beyond 200M that are within 200M of Somalia. Insofar as these ***are claimed by Kenya*** as 'outer' continental shelf, Somalia has included them in its depiction of the area of overlapping potential entitlements.[957] (Emphasis added).

521. In other words, in the text of its Memorial, Somalia expresses the position that the relevant area is calculated based on overlapping potential entitlements, not actual claims. But in a footnote, Somalia explains that it uses actual claims, and not potential entitlements, to construct its proposed relevant area.

522. This can be seen in Somalia's own Figure 6.9, which shows that, in Somalia's view, Kenya's "overlapping entitlement" beyond the 200M line is simply defined as its CLCS claim alone, with no potential entitlement north of the Parallel of Latitude:[958]

957 MS, paragraph 6.37, footnote 236.

958 MS, Figure 6.9.



MS, Figure 6.9

523. Somalia does not explain why it uses Kenya's actual claims to calculate the relevant area when Somalia itself has said that the relevant area should be calculated by entitlements. Most prominently, the potential entitlements approach would, if properly applied, also include Kenya's potential entitlement beyond the 200M line north of the Parallel of Latitude. By relying only on claims beyond the 200M line instead of entitlements, Somalia reduces the relevant area by excluding this northern portion. As a matter of mathematics, this necessarily reduces Somalia's portion of the relevant area in any subsequent disproportionality analysis and, thus, inappropriately imbalances that analysis in Somalia's favour, as long as the

Court draws the maritime boundary at or south of the Parallel of Latitude.

524. If Somalia had acted consistently with its own prior methods, it would have established the overlapping entitlements beyond the 200M line in the same way as it did within 200M: by drawing a radial projection from the LBT. The extent of this radial projection, of course, would be 350M – the maximal limit of the continental shelf under UNCLOS Article 76(5). Consistently applying Somalia's own methodology substantially enlarges the relevant area as follows:[959]

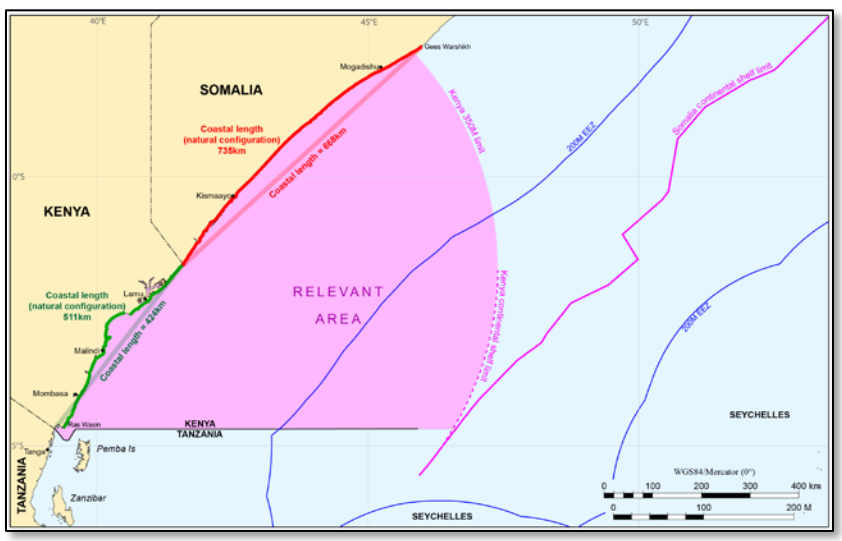


Figure 19: Somalia's Relevant Area Constructed in Accordance with Its Legal Submissions

959 The maximal claims to the outer continental shelf of the Parties' submissions to the CLCS do not intersect this radial projection. Therefore, the radial projection of 350 M does not have to be reduced by those maximal claims, as might be applicable in other delimitations. *See* Republic of Kenya, *Submission on the Continental Shelf Submission beyond 200 nautical miles to the Commission on the Limits of the Continental Shelf: Executive Summary* (Apr. 2009), MS, Annex 59; Federal Republic of Somalia, *Continental Shelf Submission of the Federal Republic of Somalia: Executive Summary* (21 July 2014), MS, Annex 70.

525. As detailed below, it is only through its inconsistent and incorrect calculation of the relevant area that Somalia can claim that the equidistance delimitation is proportionate. If the relevant area and relevant coastal lengths are calculated consistently using Somalia's own legal standards, a proportionate apportionment of the relevant area occurs at the Parallel of Latitude. By contrast, the equidistance line causes a significantly disproportionate apportionment.

2. Somalia's calculations of the lengths of the relevant coasts are inconsistent with its own legal submissions

526. On its face, there appears to be only a minor disagreement between the Parties as to the relevant coastal lengths.[960] Both Parties appear to agree that Somalia's relevant coastal length is 733 km. However, Somalia inconsistently excludes a 30 km segment of the Kenyan coast for certain calculations,[961] but not for others.[962] With that 30 km segment, the coastal length for Kenya is 511 km.[963] The 30 km segment does not materially impact the disproportionality analysis. The relevant coastal lengths also remain essentially constant despite the Parties' slight disagreement on the calculation of the LBT from BP 29.[964] This disagreement is immaterial to the analysis. The resulting ratio of the relevant coastal lengths is approximately 1:1.4 in Somalia's favour.[965]

960 *See* KR, paragraph 165.

961 *See* MS, Figure 6.7.

962 *See* MS, Figure 6.9.

963 *See* KR, paragraph 165.

964 *See* KR, paragraph 166.

965 *See* KR, paragraph 165.

527. This facial similarity belies a significant disparity in approach. Of course, in order for the proportionality analysis to lead to sensible results, the relevant coastal lengths must be related to the relevant area.[966] Only in this way can the proportion of the relevant coastal lengths be compared to the division of the relevant area.

528. Kenya ensures that its definition of the relevant coastal lengths is related to its definition of the relevant area. Because Kenya uses seaward projections from the coast for the relevant area, it also constructs the coastal lengths based on the locations from where those relevant projections begin,[967] as set forth in the *Bangladesh v.Myanmar* and *Bangladesh v. India* cases.[968] The relevant coasts and area are therefore defined by projecting seaward from the coasts of Kenya and Somalia from Was Rasin in the South to Gees Warshikh in the north.[969]

529. Somalia eschews consistency in order to achieve artificially favourable results. Citing this Court's precedent, Somalia correctly notes that:

> [a] State's relevant coast is not necessarily co-extensive with its entire coastline. In order to be considered "relevant" for delimitation purposes, a coast "must generate projections which overlap with projections from the coast of the other Party". This is because "the task of delimitation consists in resolving the overlapping claims

966 *See Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment of 3 February 2009, I.C.J. Reports 2009*, p. 61, paragraph 100.

967 *See* KR, paragraph 169.

968 *See* KR, paragraph 169, (citing *Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar), Judgment of 14 March 2012*, ITLOS Reports 2012, p. 4, paragraph 489; *The Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)*, Award, 7 July 2014, PCA Case No. 2010-16, paragraph 306).

969 *See* KR, paragraph 172; The correct identification of the relevant area, KR, Figure 2-4.

by drawing a line of separation of the maritime areas concerned".[970]

530. This is, indeed, the correct approach, as also adopted by Kenya.[971] But it is only correct when one uses the correct calculation of relevant area based on projections from the coasts. Somalia artificially disconnects the relevant coasts from the relevant areas.

531. In Somalia's use of the radial projection from the LBT to define the relevant area (*see supra* paragraph 524), the relevant coast must be defined as the portion of the coast that generates a projection that overlaps with a potential entitlement of the other Party.[972] This, simply put, is the place where the semicircle created by the radial projection intersects the coast. Only by

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970 MS, paragraph 6.19 (citing *Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment of 19 November 2012, I.C.J. Reports 2012*, p. 624, paragraphs 141 and 150; *Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment of 3 February 2009, I.C.J. Reports 2009*, p. 61, paragraphs 88 and 99. *See also Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua) and Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua), Judgment of 2 February 2018, I.C.J. Reports 2018*, p. 139, paragraph 108; *The Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)*, Award, 7 July 2014, PCA Case No. 2010-16, paragraph 279; *Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar), Judgment of 14 March 2012*, ITLOS Reports 2012, p. 4, paragraph 198 ("[t]he Tribunal notes at the outset that for a coast to be considered as relevant in maritime delimitation it must generate projections which overlap with those of the coast of another party.").

971 *See* KR, paragraph 165.

972 *See Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment of 3 February 2009, I.C.J. Reports 2009*, p. 61, paragraph 99 ("the coast, in order to be considered as relevant for the purpose of the delimitation, must generate projections which overlap with projections from the coast of the other Party"); *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua) and Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua), Judgment of 2 February 2018, I.C.J. Reports 2018*, p. 139, paragraph 108 ("[a]n essential step in maritime delimitation is identifying the relevant coasts: those that "generate projections which overlap with projections from the coast of the other Party"); *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, p. |4, paragraph 361 ("[t]he first step in the construction of the provisional equidistance line is to identify the Parties' coasts of which the seaward projection overlaps").

comparing the total coastal lengths from the LBT to that intersection can one compare the relevant coastal lengths with the relevant areas.

532. In this case, if one uses Somalia's approach as stated – correcting for its inconsistency, i.e., extending the radial projection to 350M – there is a slight overall difference in the relevant coastal lengths. In particular, a small coastal length in the northernmost segment of Somalia's coast is removed. The slight difference is seen in the figures below:

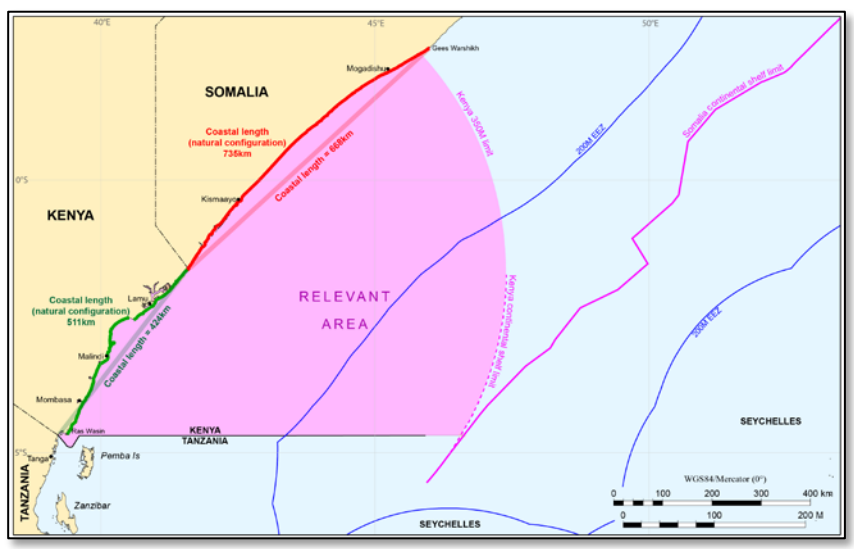

Figure 19: Somalia's Relevant Area Constructed in Accordance with Its Legal Submissions

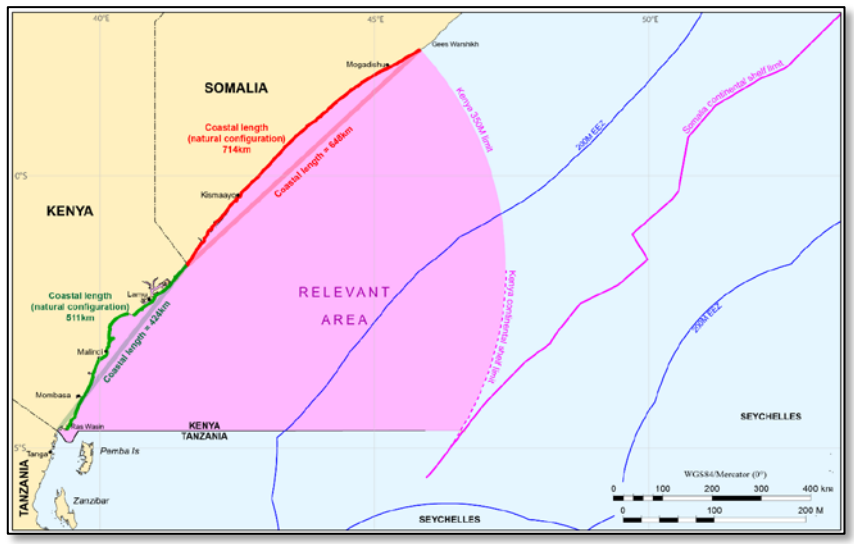

Figure 20: Somalia's Relevant Coastal Lengths (corrected)

533. This coastal length is nearly 20 km shorter than Somalia's initial calculation. Overall, if Somalia's approach is applied consistently, the overall coastal lengths are 511 km for Kenya and 714 km for Somalia, resulting in a proportion of coastal lengths of a ratio of 1:1.40 in Somalia's favour. This 1:1.40 ratio is in fact the same approximate proportion as Kenya's calculations (a ratio of 1:1.43).

534. This is not a significant difference on its face from the Parties' stated relevant coasts. But the inconsistency shows, again, Somalia's haphazard approach to the disproportionality calculations.

3. The equidistance line creates a significant disproportionality both using Kenya's correct methods and applying Somalia's stated methods in a consistent manner

535. As noted above, the relevant proportion of the coastal lengths is approximately 1:1.4 in Somalia's favour, either by using Kenya's correct

construction or by correcting Somalia's stated methodology in order to resolve its inconsistencies.

536. In either Kenya's approach or Somalia's approach with inconsistencies corrected, the equidistance line creates a significant disproportionality. This betrays Somalia's motives for its inconsistent calculations.

537. Using Kenya's correct calculations, the proportion of the relevant area as apportioned between the Parties by the equidistance line proposed by Somalia is 131,600 km^2 and 393,700 km^2 to Kenya and Somalia, respectively, or 1:2.99 in Somalia's favour. This affords more than twice the relevant area to Somalia than the coastal lengths proportion (of 1:1.43) would suggest is appropriate. This is a significant disproportion, as shown in Figure 21 below.

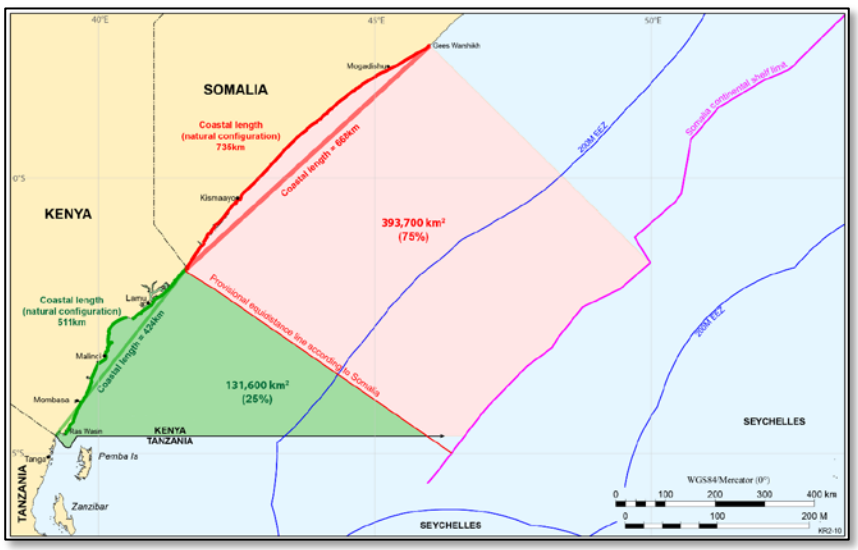

Figure 21: KR, Figure 2-10 (revised)

538. Using Somalia's methodology with its inconsistencies corrected, the proportion of the relevant area as apportioned between the Parties by

Somalia's equidistance line is 131,600 km^2 and 300,300 km^2, to Kenya and Somalia respectively, creating a ratio of 1:2.28 in favour of Somalia. This is more than one-and-a-half times the ratio of the relevant coastal lengths (1:1.40). In other words, the equidistance line affords Somalia almost twice the maritime area that it should receive having regard to the length of its relevant coast. This is also a significant disproportionality, as shown in Figure 22 below.

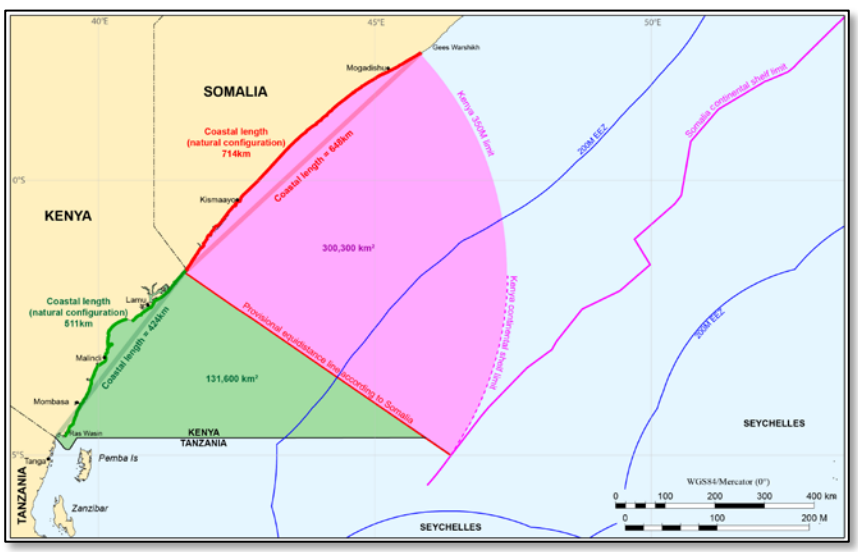

Figure 22: Division of the Relevant Area as per Somalia's Calculations (Once Corrected) by Somalia's Proposed Equidistance line

539. Therefore, on either view, the equidistance line leads to a significantly disproportionate apportionment of the maritime area.

4. The Parallel of Latitude creates no significant disproportionality, regardless of whether the Court uses Kenya's correct methods or Somalia's stated methods in a consistent manner

540. Furthermore, in either Kenya's approach or Somalia's approach with inconsistencies corrected, the Parallel of Latitude does not create a significant disproportionality and always leads to an equitable result.

541. Using Kenya's correct calculations, the proportion of the relevant area as apportioned between the Parties by the Parallel of Latitude is 257,400 km^2 and 267,900 km^2 to Kenya and Somalia, respectively,[973] or 1:1.04 in Somalia's favour. This is not a significant disproportion from 1:1.43 in Somalia's favour (which is the ratio of the relevant coastal lengths using Somalia's calculations), as pictured in Figure 23 below.

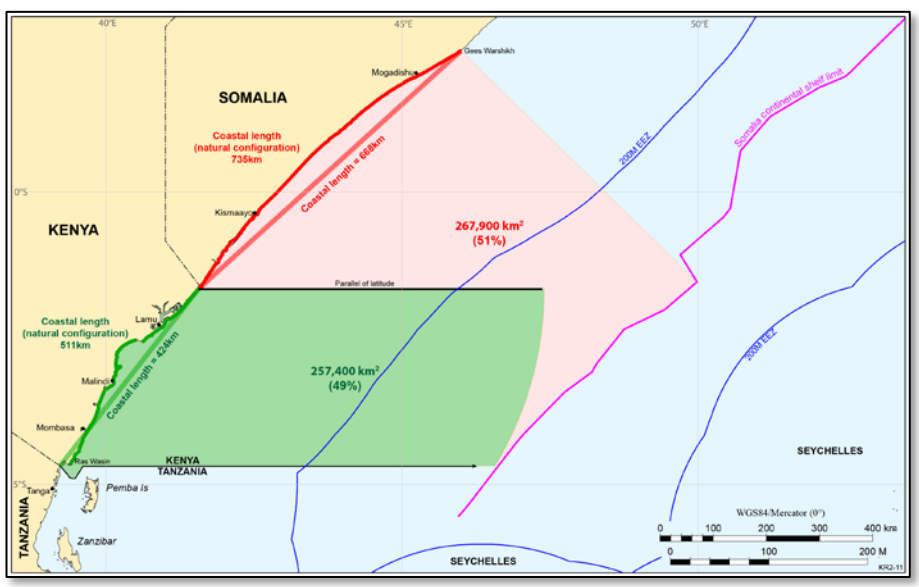

Figure 23: KR, Figure 2-11 (revised)

973 *See* Division of the relevant area, including the area beyond 200M, using the parallel of latitude, KR, Figure 2-11.

542. Using Somalia's methodology with its inconsistencies corrected, the proportion of the relevant area as apportioned between the Parties by the Parallel of Latitude is 257,100 km^2 and 174,800 km^2, to Kenya and Somalia respectively, creating a ratio of 1:1.47 in Kenya's favour. This is not significantly disproportionate compared to the ratio of the coastal lengths, of 1:1.40 in Somalia's favour, as shown in Figure 24 below.

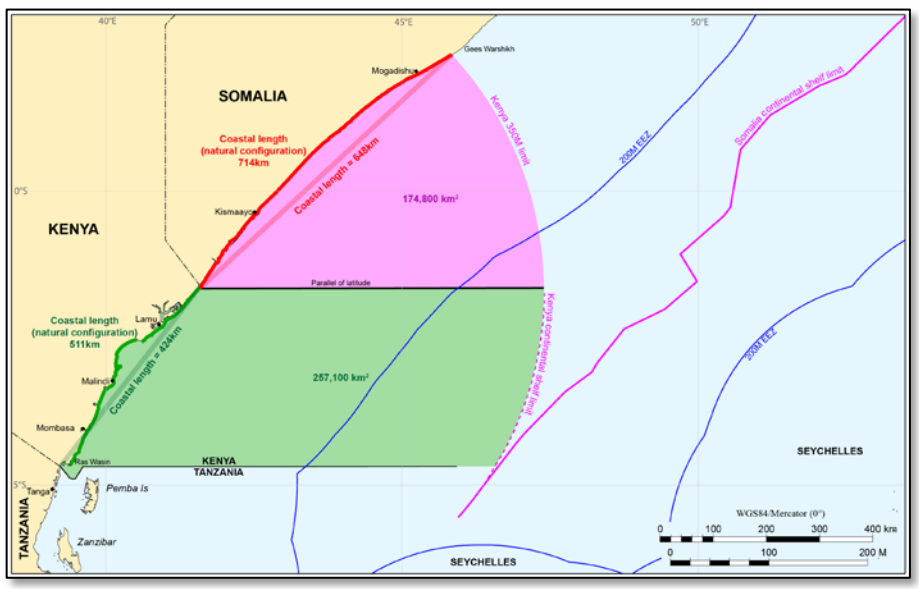

Figure 24: Division of the Relevant Maritime Area as per Somalia's Calculations (Once Corrected) Resulting from the Parallel of Latitude

543. The Parallel of Latitude therefore satisfies the Court's proportionality analysis and leads to an equitable result, under both Kenya's approach or Somalia's approach once corrected. An equidistance line leads to a significant disproportionality under either approach. Thus, Somalia's proposed equidistance line must be rejected.

CHAPTER V: THE EVIDENCE CONFIRMS THAT KENYA'S ACTIVITIES IN THE NOW-DISPUTED MARITIME AREA HAVE AT ALL TIMES COMPLIED WITH APPLICABLE INTERNATIONAL LAW NORMS

544. The new evidence is pertinent because Somalia argues that any of Kenya's prior activities in the now-disputed maritime area will become retroactively wrongful as soon as this Court delimits the maritime area. Somalia advances this argument regardless of the activities' nature, when they occurred or whether Somalia protested those activities at the relevant time. Somalia makes this argument on two incorrect bases.

545. First, Somalia asserts that all of Kenya's activities in the area it now claims breached UNCLOS Articles 74(3) and 83(3). As a threshold matter, the obligations contained in those provisions apply only "[p]ending agreement" between the disputing Parties on the delimitation of their continental shelf and EEZ. Yet, when Kenya conducted the activities complained of by Somalia, the Parties had already agreed that their maritime boundary runs along the Parallel of Latitude. Therefore, Somalia's acquiescence in that maritime boundary is dispositive of the entirety of its claims concerning Kenya's activities in the now-disputed maritime area.

546. In any event, even if the Court were to find that Somalia has not acquiesced in that boundary, Somalia would have failed to meet its burden of proof in multiple ways. Articles UNCLOS Articles 74(3) and 83(3) read, identically:

> [p]ending agreement [of the delimitation of the exclusive economic zone or continental shelf], the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a

> practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.

547. UNCLOS Articles 74(3) and 83(3) therefore create two interlinked obligations: (i) an obligation of conduct to "make every effort to enter into provisional arrangements" concerning the disputed continental shelf or EEZ;[974] and (ii) an obligation of restraint to refrain from acts that "jeopardize or hamper the reaching of the final agreement".[975] Notably, UNCLOS Articles 74(3) and 83(3) do not require the suspension of all activities whatsoever in a disputed maritime area.[976] Rather, they require the suspension only of those activities that would prevent the disputing States from reaching a final agreement.

548. The consequences of Somalia's absolutist position would be highly onerous. About half of the world's maritime boundaries are not delimited.[977] The delimitation of overlapping maritime claims is a lengthy process. At a minimum, it involves complex years-long negotiations based on complicated calculations and competing interests. If such negotiations fail, there may be years of judicial proceedings. Yet, according to Somalia,

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974 KCM, paragraph 365; KR, paragraph 202. *See also Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Judgment of 23 September 2017*, ITLOS Reports 2017, p. 4, paragraph 626.

975 KCM, paragraph 365; KR, paragraph 202. *See also Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Judgment of 23 September 2017*, ITLOS Reports 2017, p. 4, paragraph 626.

976 *See* KCM, paragraph 367. *See also Arbitration regarding the Delimitation of the Maritime Boundary between Guyana and Suriname*, Award, 17 September 2007, RIAA, Vol. XXX, p. 1, paragraph 465 ("this obligation was not intended to preclude all activities in a disputed maritime area").

977 *See* A. Østhagen, "Maritime boundary disputes: What are they and why do they matter?", *Marine Policy*, 2020, pages 1 and 6, Annex 194.

disputed maritime areas are and remain *hic sunt leones* until, at long last, a maritime boundary is delimited.[978]

549. If this Court were to accept Somalia's position, it would frustrate peaceful, transitory and non-permanent activities in vast swathes of the world's oceans, likely for decades, if not indefinitely. These would not only concern commercial activities, such as exploring and exploiting natural mineral resources and fisheries. As interpreted by Somalia, the prohibited activities would also include non-commercial actions, such as marine biology research, scientific oceanography and climate change research. Fortunately, the drafters of UNCLOS specifically avoided prohibiting all activities in a disputed maritime area pending a delimitation.[979]

550. Second, Somalia argues that, because exclusive sovereignty over the continental shelf exists *ab initio*, if a State's good faith claim to a disputed area is not upheld in full, any acts carried out in the disputed area were always wrongful.[980] However, activities in a disputed area do not become internationally wrongful retroactively based on an *ex post* delimitation. Instead, as the tribunal in *Ghana/Côte d'Ivoire* confirmed, delimitation is a constitutive, not a declaratory, act.[981]

551. **Section V.A** of this Chapter explains in further detail why the new evidence demonstrates that Somalia makes two serious errors in its description of the

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978 *See Dispute Concerning the Delimitation of the Maritime Boundary between Ghana and Côte D'Ivoire in the Atlantic Ocean (Ghana/Côte D'Ivoire), Reply of Ghana of 25 July 2016*, ITLOS Case No. 23, paragraph 5.9.

979 *See Arbitration regarding the Delimitation of the Maritime Boundary between Guyana and Suriname,* Award, 17 September 2007, RIAA, Vol. XXX, p. 1, paragraph 465.

980 *See* MS, paragraphs 8.11-8.12.

981 *See Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Judgment of 23 September 2017*, ITLOS Reports 2017, p. 4, paragraph 591; P. Weil, *The Law of Maritime Delimitation: Reflections* (Grotius, 1989), pages 21 and 45.

law applicable to acts in a disputed maritime area. The evidence discussed in **Section V.B** confirms that the evidence does not support Somalia's factual positions. Finally, the evidence discussed in **Section V.C** confirms that Somalia's request for relief not only is entirely unfounded but also betrays its true intentions: to obtain valuable exploration data without payment, cost or effort.

A. Somalia misstates the legal standard for wrongfulness of activities in a disputed maritime area

552. Somalia advances two obviously incorrect legal positions. First, it is not the case that one State's self-serving "perception" of the nature of a given activity determines whether that activity is wrongful. Second, it is not the case that the delimitation of a shared continental shelf establishes retroactive liability.

1. Contrary to Somalia's arguments, one State's self-serving "perception" of the nature of a given activity does not determine whether that activity is wrongful

553. The words of UNCLOS Articles 74(3) and 83(3) are plain. "[D]uring [the] transitional period" the Parties must "not [...] jeopardize or hamper the reaching of the final agreement" on the EEZ or the continental shelf. Those words mean what they say: the obligation of restraint extends only to acts

that "jeopardize or hamper the reaching of the final agreement". UNCLOS's drafters did not ban all activities in the disputed area.[982]

554. Therefore, the obligation not to "jeopardize or hamper the reaching of the final agreement" in UNCLOS Articles 74(3) and 83(3) does not preclude all activities in the disputed area. Taking a "pragmatic approach", those Articles at most only require that a State desist from activities causing "permanent physical change".[983] Indeed, this was the Court's express finding in the *Aegean Sea Continental Shelf* case, which did not grant provisional measures against seismic studies because they were of a "transitory character" and did not cause "any risk of physical damage".[984] This was reiterated by the tribunal in *Guyana v. Suriname*.[985] That tribunal found that internationally wrongful activities in a disputed maritime area consisted of: (i) those that "physical[ly] change[d] [...] the marine environment";[986] and (ii) militaristic activities, such as the threat or use of force.[987]

555. Faced with these long-standing and respected authorities, Somalia can provide no legal authority for its position that "[i]n some cases, non-

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982 *See* KCM, paragraphs 369-370; Report by the Chairman of the Negotiating Group 7 on the work of the Group at its 17th-27th meetings, NG7/24, 14 September 1978, U.N. Doc. A/CONF.62/RCNG/2, UNCLOS III, Official Records Vol. X, pp. 170-2, page 171, KCM, Annex 70. *See also Arbitration regarding the Delimitation of the Maritime Boundary between Guyana and Suriname*, Award, 17 September 2007, RIAA, Vol. XXX, p. 1, paragraph 465.

983 KCM, paragraphs 370-373.

984 *See* KCM, paragraphs 371-372; KR, paragraph 204; *Aegean Sea Continental Shelf (Greece v Turkey), Interim Protection, Order of 11 September 1976, I.C.J. Reports 1976*, p. 11, paragraph 30. *See also Arbitration regarding the Delimitation of the Maritime Boundary between Guyana and Suriname*, Award, 17 September 2007, RIAA, Vol. XXX, p. 1, paragraph 468.

985 *See Arbitration regarding the Delimitation of the Maritime Boundary between Guyana and Suriname*, Award, 17 September 2007, RIAA, Vol. XXX, p. 1, paragraph 466.

invasive acts [...] can be provocative or inflammatory, as States consider them to be a violation of their sovereign rights."[988] No legal authority supports Somalia's view that Kenya's activities are internationally wrongful solely because those activities:

> were ***perceived*** by the Government of Somalia and the Somali population as an attempt to deprive Somalia of its rights under international law, and to contribute to a *de facto* regime that might be irreversible.[989] (Emphasis added).

556. Quite understandably, neither this Court nor ITLOS has ever taken up Somalia's subjective and unilateral "perception" approach to interpret UNCLOS Articles 74(3) and 83(3). Indeed, in the *Aegean Sea Continental Shelf* case, this Court specifically rejected Greece's position that Turkey must desist from "any sort of action":

> on the basis that the activities complained of would, if continued, aggravate the dispute and prejudice the maintenance of friendly relations between the two States.[990]

557. Somalia's reliance on "perception" is simply a restatement of the position that Greece expressed to this Court and which this Court has already rejected.

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986 *Arbitration regarding the Delimitation of the Maritime Boundary between Guyana and Suriname*, Award, 17 September 2007, RIAA, Vol. XXX, p. 1, paragraph 480.

987 *Arbitration regarding the Delimitation of the Maritime Boundary between Guyana and Suriname*, Award, 17 September 2007, RIAA, Vol. XXX, p. 1, paragraph 484.

988 SR, paragraph 4.20.

989 SR, paragraph 4.21.

990 *Aegean Sea Continental Shelf Case (Greece v, Turkey), Interim Protection, Order of 11 September 1976, I.C.J. Reports 1976*, p. 3, paragraph 17(ii).

558. Indeed, Article 31(1) of the Vienna Convention on the Law of Treaties mandates that UNCLOS Articles 74(3) and 83(3) must be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Nothing in Articles 74(3) and 83(3) supports the claim that a State's subjective interpretation of the underlying facts is sufficient to constitute a breach. The Articles refer, in objective terms, to acts that "jeopardize or hamper the reaching of the final agreement". Reference can be made to this Court's rulings on essential security clauses. As this Court has held, such clauses are not deemed to be subjective and "self-judging" unless they contain express language designating them as such.[991] Here, nothing in UNCLOS Articles 74(3) and 83(3) suggests that an act is internationally wrongful based on one Party's subjective self-judgment, either. In all events, as discussed below, Somalia has failed to provide any evidence that it had any subjective perception that Kenya was jeopardizing or hampering a final agreement – or that any such perception had or could have any objective foundation.

559. The irony of Somalia's position is that recently Somalia has also conducted, in the same now-disputed area, activities which it claims are unlawful under UNCLOS Articles 74(3) and 83(3) when conducted by Kenya. In May 2015, Somalia licensed rights to Soma Oil & Gas south of the Parallel of Latitude.[992] Presumably, Somalia itself understood that Articles 74(3) and 83(3) were not as broadly prohibitive as it now maintains.

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991 *See Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment of 27 June 1986, I.C.J. Reports 1986*, p. 116, paragraph 222.

992 *See* KCM, paragraph 186; Letter from the Coordinator of the Somalia and Eritrea Monitoring Group mandated pursuant to paragraph 46 of Security Council resolution 2182 (2014) to the Chair of the Security Council Committee pursuant to resolutions 751 (1992)

2. Contrary to Somalia's arguments, the delimitation of a shared continental shelf does not establish retroactive liability

560. Somalia incorrectly relies on this Court's finding that "'[a] coastal State's rights in the continental shelf' [...] exist *ipso facto* and *ab initio.*"[993] It argues that, therefore, with respect to the territorial sea, continental shelf and the EEZ, "Kenya's exploration activities, insofar as they have been undertaken in an area that the Court could attribute to Somalia, constitute a violation of Somalia's sovereignty [...] and sovereign rights."[994]

561. Somalia's error is plain to see. As this Court has found, the rules defining a continental shelf and a State's sovereign rights over that shelf are distinct from the rules applicable to the delimitation of a shared continental shelf. In the *Libya/Malta* case, the Court stated that there is a:

> distinction between the law applicable to the basis of entitlement to the areas of continental shelf – the rule governing the existence, '*ipso jure* and *ab initio*', and the exercise of sovereign rights of the coastal State over area of continental shelf situate off its coasts – and the law applicable to the delimitation of such areas of shelf between neighbouring States.[995]

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and 1907 (2009) concerning Somalia and Eritrea, reporting the initial findings of the Monitoring Group's investigation into the operations of Soma Oil & Gas Holdings Limited (Soma), S/AC.29/2015/SEMG/OC.31, 28 July 2015, KCM, Annex 101.

993 MS, paragraph 6.9; SR, paragraphs 4.14-4.15.

994 SR, paragraph 4.13.

995 *Case concerning the Continental Shelf (Libyan Arab Jamahiriya v. Malta), Judgment of 3 June 1985, I.C.J. Reports 1985*, p. 13, paragraph 27.

562. This Court emphasised that "the questions of entitlement and of definition of continental shelf, on the one hand, and of delimitation of continental shelf on the other, are [...] distinct."[996]

563. As Professor Prosper Weil correctly discerned therefrom:

> [f]rom now on, even in respect of the continental shelf, it is no longer a question of seeing the delimitation process as amounting to no more than a discovery of maritime areas which belong "already" and *ab initio* to one or other of the States concerned. Whatever the jurisdiction under consideration, it is never nature that fixes, or even suggests, the maritime boundary, and it is never a natural boundary the courts are called on to draw.[997]

564. In other words, the delimitation of a shared continental shelf is a new legal act, not the declaration of a pre-existing natural or legal condition. The delimitation takes legal effect upon the conclusion of a delimitation treaty or the decision of an international court or tribunal. It would be inconceivable to conclude that a State had acted unlawfully in a disputed area based on a retroactive application of a delimitation treaty. The same applies to the findings of this Court on any given maritime delimitation dispute.

565. Indeed, in its well-considered final decision, the tribunal in *Ghana/Côte d'Ivoire* drew the appropriate conclusion: since the delimitation of a continental shelf is constitutive, not declaratory, good faith activities in a disputed area cannot become wrongful on a retroactive basis. This is

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996 *Case concerning the Continental Shelf (Libyan Arab Jamahiriya v. Malta), Judgment of 3 June 1985, I.C.J. Reports 1985*, p. 13, paragraph 27.

997 P. Weil, *The Law of Maritime Delimitation: Reflections* (Grotius, 1989), page 45.

because both States have a potential "entitlement to the relevant continental shelf". As the tribunal in *Ghana/Côte d'Ivoire* said:

> in a case of overlap both States concerned have an entitlement to the relevant continental shelf on the basis of their relevant coasts. Only a decision on delimitation establishes which part of the continental shelf under dispute appertains to which of the claiming States. This means that the relevant judgment gives one entitlement priority over the other. Such a decision accordingly has a constitutive nature and cannot be qualified as merely declaratory.
>
> […] the consequence of the above is that maritime activities undertaken by a State in an area of the continental shelf which has been attributed to another State by an international judgment cannot be considered to be in violation of the sovereign rights of the latter if those activities were carried out before the judgment was delivered and if the area concerned was the subject of claims made in good faith by both States.[998]

566. By definition, claims made in "good faith" cannot demonstrate that one State has jeopardised or hampered a final agreement. Notably, Somalia relies upon the tribunal's provisional measures ruling in *Ghana/Côte d'Ivoire* but at the same time asks this Court to reject the same tribunal's final ruling.[999]

567. The tribunal in *Ghana/Côte d'Ivoire* based this portion of its decision on its respect for this Court's prior decisions. It noted that, in *Nicaragua v. Colombia*, this Court had rejected Nicaragua's request for a declaration of

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998 *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, p. 4, paragraphs 591-592.

999 *See* MS, paragraph 8.15.

a violation of its rights in the disputed area because the request was "made in the context of proceedings regarding a maritime boundary which had not been settled prior to the decision of the Court […]."[1000]

568. As Somalia correctly notes,[1001] this Court did find in the *North Sea Continental Shelf Cases* and in the *Jan Mayen* case that the existence of rights to a particular continental shelf requires no affirmative act or declaration.[1002] But this does not mean, as Somalia asserts, that the settlement of a delimitation "does not establish the authority of the concerned State in the maritime areas recognized as belonging to it […]".[1003] Again, Somalia confuses the *ab initio* basis for the existence of rights over a continental shelf (which requires no affirmative act of a State) with the delimitation of a shared shelf between neighbouring States. Of course, Somalia's argument also would not apply to the EEZ, which does require an affirmative declaration of sovereignty.

569. The meritless nature of Somalia's position is seen in its admission that it only protested Kenya's public activities when it was "in a position to react".[1004] Thus, according to Somalia, Kenya and all other States should desist from any activities in any maritime area they claim as their own, even when no other State objects, solely on the possibility of a potential, future

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1000 *Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment of 19 November 2012, I.C.J. Reports 2012*, p. 624, paragraph 250.

1001 *See* MS, paragraph 8.11.

1002 *See North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark/Netherlands), Judgment of 20 February 1969, I.C.J. Reports 1969*, p. 3, paragraph 19; *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), Judgment of 14 June 1993, I.C.J. Reports 1993*, p. 38, paragraph 64.

1003 MS, paragraph 8.11.

1004 SR, paragraph 4.1.

opposing claim. But, as noted, a complete cessation of activities even in a publicly disputed area was specifically excluded by UNCLOS's drafters.[1005] *A fortiori*, neither UNCLOS nor public international law requires a complete absence of activities in the absence of protest. They only prohibit activities that "jeopardize or hamper" a final agreement once a dispute has arisen. Any other conclusion would make the determination of international wrongfulness retroactive and dependent on a future, unknown condition. That cannot be correct.

570. In sum, Somalia's claims are based on a manifest misconception of the applicable law. As explained below, those claims also lack any factual basis: Kenya's good faith activities in the now-disputed maritime area cannot possibly be construed as jeopardising or hampering the reaching of a final agreement between the Parties.

B. The evidence confirms the lawfulness of Kenya's activities

571. As the evidence confirms, none of Kenya's activities jeopardised or hampered a final agreement or otherwise breached UNCLOS Articles 74(3) and 83(3). This is because: (i) until 2014, Kenya's claim to the relevant area was not disputed; (ii) Kenya then complied with its obligation to seek to enter into provisional arrangements; and (iii) even under its own incorrect standard, Somalia cannot show that Kenya's activities created a reasonable "perception" of a *de facto* irreversible regime.

1005 *See Arbitration regarding the Delimitation of the Maritime Boundary between Guyana and Suriname,* Award, 17 September 2007, RIAA, Vol. XXX, p. 1, paragraph 465.

1. Somalia did not object to Kenya's well-publicised activities in the now-disputed maritime area until 2014

572. When the evidence is considered, Kenya plainly did not commit any internationally wrongful acts in the now-disputed maritime area.

573. As Kenya has already shown, it indeed "had a right to freely engage in activities consistent with its sovereign rights to explore, exploit, conserve and manage the natural resources in th[e] maritime area".[1006] Kenya's activities were publicly declared and were notorious.[1007] Yet, Somalia did not formally protest against Kenya's activities until April 2014 and did not issue any proclamation detailing its claim to an EEZ until June 2014.[1008]

574. As the evidence discussed in **Chapter II** confirmed, Kenya formally and clearly set out its claim to an EEZ twice, in its 1979 and 2005 EEZ Proclamations.[1009] Kenya further made its claim clear in two *notes verbales* addressed to Somalia's Government, in 2007 and 2008.[1010] Somalia failed to protest either Kenya's claims or its activities then.[1011] Crucially, Somalia failed to protest Kenya's activities in any manner when Kenya submitted its

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1006 KCM, paragraphs 355-362 and 373.

1007 *See* MS, paragraph 8.21; KCM, paragraph 376; KR, paragraph 198.

1008 *See* KCM, paragraphs 360-361; KR, paragraph 199(g).

1009 *See* paragraphs 94 and 138 above; KR paragraph 131.

1010 *See* 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), KR, Annex 9; 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), KR, Annex 12.

1011 *See* paragraphs 283 and 295-310 above.

preliminary information to the CLCS in 2009, by which time the activities Somalia now protests had already begun.[1012]

575. Somalia's complaints to this Court centre essentially on licensing and activities that took place before 2014.[1013] Somalia also alleges that some additional drilling took place in 2014 and 2015, but, in fact, no such drilling occurred.[1014] In a display of good faith, in 2014 and after Somalia raised this dispute for the first time, Kenya confirmed to Somalia's authorities the temporary suspension of activities in the now-disputed maritime area.[1015]

576. Somalia itself recognises that its objections to Kenya's activities in the now-disputed maritime area date only from 2014. Indeed, when Somalia purported to impose fines on entities licensed by Kenya, it did so retroactively but with effect only from 30 June 2014[1016] – the date of Somalia's EEZ proclamation.

1012 *See* paragraphs 147 and 304 above; Federal Republic of Somalia, *Preliminary Information Indicative of the outer limits of the continental shelf and Description of the status of preparation of making a submission To the Commission on the Limits of the Continental Shelf for Somalia* (14 Apr. 2009), Section 6, MS, Annex 66.

1013 *See* KR, paragraphs 196 and 198.

1014 *See* KCM, paragraph 376; KR, paragraph 196-197.

1015 *See* KCM, paragraph, 378; KR, paragraph 206.

1016 *See* KCM, paragraphs 360-361.

2. Somalia, not Kenya, is in breach of its obligation to make every effort to enter into provisional arrangements

577. The evidence also confirms that it is Somalia, not Kenya, that is in breach of its obligation under UNCLOS Articles 74(3) and 83(3) to make every effort to enter into provisional arrangements pending the delimitation.

578. As Kenya has shown, it was not until February 2014 that Somalia protested Kenya's activities in the now-disputed maritime area. In May 2014, Somalia then gave exclusive rights to oil and gas in the now-disputed maritime area to Soma Oil & Gas, in clear contradiction with the arguments it has advanced in this case on the lawfulness of Kenya's activities.[1017]

579. In May 2016, Kenya sent formal correspondence to Somalia that: (i) confirmed that Kenya had suspended activities in the now-disputed maritime area;[1018] and (ii) requested that Somalia enter into negotiations towards provisional arrangements regarding activities in that area.[1019]

580. Somalia's response did undertake to stop all activities in the now disputed area. But Somalia then refused to negotiate with regard to provisional

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1017 *See* Chapter II.A.4, paragraphs 206 and 215 above. *See also* KCM, paragraph 186; Letter from the Coordinator of the Somalia and Eritrea Monitoring Group mandated pursuant to paragraph 46 of Security Council resolution 2182 (2014) to the Chair of the Security Council Committee pursuant to resolutions 751 (1992) and 1907 (2009) concerning Somalia and Eritrea, reporting the initial findings of the Monitoring Group's investigation into the operations of Soma Oil & Gas Holdings Limited (Soma), S/AC.29/2015/SEMG/OC.31, 28 July 2015, page 21, KCM, Annex 101.

1018 *See* KCM, paragraph 378; KR, paragraph 206; Letter from the Ministry of Energy & Petroleum, State Department for Petroleum to the Office of the Attorney General & Department of Justice, Professor Muigai (ME/CONF/3/2/1), *Maritime Delimitation in the Indian Ocean (Somalia vs Kenya): Activities in the Disputed Area*, 5 May 2016, KCM, Annex 45.

1019 *See* KCM, paragraph 378; Letter from the Kenyan Ministry of Foreign Affairs to the Somali Ministry of Foreign Affairs, 18 May 2016, sent to the Somali Embassy in Nairobi by *note verbale* (MFA.INT.8/15A) dated 25 May 2016, KCM, Annex 61.

arrangements.[1020] Thus, it was Somalia, not Kenya, that failed to seek to enter into provisional arrangements as required by UNCLOS Articles 74(3) and 83(3).

581. Nonetheless, Somalia argues that Kenya is in breach of this obligation. In support of its position, Somalia suggests that the two-year period which elapsed between February 2014 (when Somalia first formally advanced its claim to the now-disputed areas) and May 2016 (when Kenya first formally sought provisional arrangements) makes Kenya's attempt to seek such arrangements futile and immaterial.[1021] But, notably, Somalia never made any attempt to seek provisional arrangements at all, whether during that two-year period or thereafter.

582. The Court will note the irony of Somalia's positions. When it is in its interest, Somalia claims that a 35 year period of consent and silence while Kenya positively asserted claims to the now-disputed maritime area and conducted activities therein is insufficient to give rise to acquiescence. At the same time, Somalia claims that a two-year period before Kenya confirmed it was seeking provisional arrangements renders that attempt nugatory. These positions cannot both be correct. Indeed, neither is.

1020 *See* KCM, paragraph 379.

1021 *See* SR, paragraph 4.17; KR, paragraph 203.

3. The new evidence is relevant in confirming that Somalia has failed to prove that any of Kenya's actions have hampered or could hamper the reaching of a final agreement; even under its own standard, Somalia has shown no reasonable basis for its so-called "perception" of a *de facto*, irreversible regime

583. The Parties are in full agreement: none of Kenya's impugned activities in the now-disputed maritime area has caused a "permanent physical change to the marine environment".[1022]

584. Nevertheless, as noted above, Somalia argues that even "non-invasive acts such as seismic surveys can be provocative and inflammatory" and thus violate UNCLOS Articles 74(3) and 83(3) as long as the purportedly offended State retrospectively "perceive[s]" them to be so.[1023] Somalia claims that its Government and its people consider any act in the now-disputed maritime area to be "an attempt to deprive Somalia of its rights under international law, and to contribute to a *de facto* regime that might be irreversible."[1024] Thus, according to Somalia, it follows that all activities in the now-disputed maritime area *ipso facto* "jeopardize or hamper the reaching of the final agreement" under UNCLOS Articles 74(3) and 83(3) on the basis of Somalia's subjective perception.

585. Somalia not only fails to apply the correct legal standard, as discussed above. Its legal position is also not supported by the evidence.

586. Although it claims to have a serious perception of irreversible *de facto* regimes in the now-disputed maritime area, Somalia has never sought

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1022 SR, paragraph 4.20.

1023 SR, paragraphs 4.20-4.21.

1024 SR, paragraph 4.21.

provisional measures from this Court to suspend activities in the now-disputed maritime area. It also bears emphasis that Somalia never objected to Kenya's activities as they were occurring.[1025] These facts are incompatible with any claimed perception by Somalia of a *de facto*, irreversible regime.

587. In fact, Somalia provides no evidence that either its Government or its population ever actually "perceived" Kenya's alleged activities "as an attempt to deprive Somalia of its rights under international law, and to contribute to a *de facto* regime that might be irreversible."[1026] The best evidence Somalia can offer is statements made by third parties that the maritime dispute "may serve to create further animosity,"[1027] "could have significant implications for relations"[1028] and "add[s] a layer of complexity to the situation."[1029] These are unremarkable truisms. They should not lead to histrionic conclusions. Indeed, Somalia must self-modulate its perception of Kenya's positions and activities to an objective standard, based on the actual facts.

1025 *See* KR, paragraphs 194, 200.

1026 SR, paragraph 4.21.

1027 SR, paragraph 4.21, citing United Nations, Monitoring Group on Somalia and Eritrea, *Report of the Monitoring Group on Somalia and Eritrea pursuant to Security Council resolution 2060 (2012): Somalia*, U.N. Doc. S/2013/413 (12 July 2013), pages 247-250, MS, Annex 64.

1028 SR, paragraph 4.22, citing U.N. Monitoring Group on Somalia and Eritrea, *Report of the Monitoring Group on Somalia and Eritrea pursuant to Security Council resolution 2244: Somalia*, U.N. Doc. S/2016/919 (31 Oct. 2016), paragraphs 82 and 188, SR, Annex 24.

1029 SR, paragraph 4.23, citing Dominik Balthasar, The Heritage Institute for Policy Studies, *Oil in Somalia: Adding Fuel to the Fire?* (2014), page 8, SR, Annex 35.

589. Any "perception" of Kenya's activities might be influenced by the extremist rhetoric of the most radical elements of the Somali society, such as the terrorist group Al-Shabaab.[1030] Obviously, the views of extremist terrorist groups cannot be relied on as a rational basis for Somalia's perceptions. It is hoped that Somalia has excluded extremist perceptions, and the influence extremism can have on public discourse, when discussing its population's purported perceptions with this Court.

590. In any event, Somalia's alleged perception of an "irreversible" "*de facto* regime" bears no relationship to objective reality. An unreasonable perception, not grounded in a good faith analysis of the facts, cannot make another State's actions internationally wrongful. In the current proceeding, none of Kenya's recently-impugned activities – licensing blocks and exploration activities – could possibly lead to a reasonable perception of an irreversible *de facto* regime. For the same reasons, no activity undertaken by Kenya in the now-disputed maritime area can be said to have "jeopardize[d]" or "hamper[ed]" a final agreement as set forth in UNCLOS Article 74(3) or 83(3).

591. First, consistent with standard international oil and gas practices, none of the blocks was licensed in a manner that could permanently or irreversibly impugn this Court's power to delimit the maritime boundary or the Parties' ability later to delimit the boundary by agreement. For example, and as is quite standard, production and sharing contracts were subject to terms requiring their adjustment by the parties if there was a change in applicable laws. This includes a change in the legal basis of the rights to the block.[1031]

1030 *See* 2019 UN Panel of Experts Report on Somalia, paragraph 106, Annex 79.

1031 *See* Production Sharing Contract between the Government of the Republic of Kenya and Star Petroleum International (Kenya) Limited for Block L5 Lamu Basin, 11 July 2000, page 43, Article 40(3), KCM, Annex 39.

In addition, the exploration-only contracts did not allocate further rights to any of the blocks, much less permanent or irreversible rights.

592. Second, none of the activities complained of by Somalia proceeded beyond the exploration stage or gave rise to any possibility of an irreversible *de facto* regime.

593. For example, there was no permanent drilling or installations – and, indeed, no drilling whatsoever after Somalia's declaration of its claims in 2014. Somalia points to a single exploratory well – in Block L5, very close to its proposed equidistance line[1032] – drilled as early as 2006. That well was dry. In addition, Somalia is incorrect: there was no drilling in Block L5 in 2015[1033] and there was no drilling of seabed core by Total in Block L22 in 2014.[1034] Without any further drilling in the now-disputed maritime area, there was nothing irreversibly done to, nor any *de facto* regime imposed on, the now-disputed maritime area.

594. Somalia argues that 2D and 3D seismic surveys in the relevant blocks, and other even less onerous, non-drilling exploratory activities, are sufficient to give rise to Somalia's perception of "provocative and inflammatory" conduct. By definition, however, exploration activities cannot lead to an irreversible, *de facto* regime. Oceanography is not quantum mechanics and maritime areas do not change simply because they have been previously observed.

1032 *See* Location of Licence Block L5 and Pomboo-1 Exploration Well, KCM, Figure 1-25.

1033 *See* KR, paragraph 197.

1034 *See* Letter from MaryJane Mwangi, CEO of NOCK, to the Attorney-General of Kenya (11 October 2018), page 2, KR, Annex 8.

595. This Court has already found that seismic studies create no permanent change in an affected maritime area or breach UNCLOS Articles 74(3) and 83(3). In the *Aegean Sea Continental Shelf* case, this Court held that seismic studies similar to those in issue in this proceeding created no irreparable prejudice for a State.[1035]

596. As Somalia also admits, Block L26 is unlicensed given its considerable depth.[1036] It is difficult to see how an unlicensed block could lead to any adverse perception. Somalia's perception should also now take into account Kenya's voluntary suspension of further activities in the now-disputed maritime area,[1037] a fact which plainly precludes any attempt at a *de facto* irreversible regime.

597. What Somalia cannot deny is that: (i) there has been no permanent change to any feature of the seabed or continental shelf, or the maritime area generally; (ii) there has been no depletion of a natural resource in the now-disputed maritime area; and (iii) there have been no military or aggressive activities connected with oil and gas exploration in the now-disputed maritime area. The fact that this Court will delimit the final boundary, by itself, undercuts any claim of a *de facto* irreversible regime – and any perception to that effect is unreasonable, to say the least.

598. There is, in fact, a cogent reason why this Court and numerous tribunals have consistently confirmed that mere licensing, exploratory studies, seismic studies and other transitory activities are not by themselves

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1035 *See Aegean Sea Continental Shelf Case (Greece v. Turkey*), *Interim Protection, Order of 11 September 1976, I.C.J. Reports 1976*, p. 3, paragraph 32.

1036 *See* MS, paragraph 8.25.

1037 *See* KCM, paragraph 381; KR, paragraph 206.

sufficient to violate UNCLOS Articles 73(3) and 83(3).[1038] Such activities cannot, by themselves, objectively "jeopardize or hamper the reaching of the final agreement" as set forth in UNCLOS Articles 74(3) and 83(3). In this case, as in many others, nothing permanent has been done in the maritime area. The Parties remain free to delimit the boundary by final agreement, without jeopardy or hampering. At Somalia's insistence, the question of delimitation is now before this Court. That delimitation too is not jeopardised or hampered by any of Kenya's impugned activities in the now-disputed maritime area.

C. Somalia has failed to prove that it is entitled to any type of reparations

599. Somalia requests three forms of reparation for its claim of internationally wrongful acts: (i) satisfaction; (ii) compensation (monetary damages); and, most significantly, (iii) that the exploration data be turned over to it free of charge.

600. As set forth in the PCIJ's decision in the *Factory at Chorzów* case:

> reparation must, as far as possible, wipe out all consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.[1039]

1038 *See Aegean Sea Continental Shelf Case (Greece v. Turkey), Interim Protection, Order of 11 September 1976, I.C.J. Reports 1976*, p. 3, paragraph 30; *Arbitration regarding the Delimitation of the Maritime Boundary between Guyana and Suriname*, Award, 17 September 2007, RIAA, Vol. XXX, p. 1, paragraph 466.

1039 *Case Concerning the Factory at Chorzów (Claim for Indemnity) (Merits), Judgment of 13 September 1928*, PCIJ, Report Series A-No. 17, paragraph 125.

601. Full reparation consists of "restitution, compensation and satisfaction, either singly or in combination".[1040] Out of those three, restitution is awarded unless it is "materially impossible" or involves "a burden out of all proportion" when compared to compensation.[1041] Compensation is to be provided insofar as the "damage is not made good by restitution."[1042] Satisfaction is awarded insofar as the injury "cannot be made good by restitution or compensation."[1043]

602. In order to assess if reparation is due, this Court will determine "whether an injury is established" (existence), whether the injury "is the consequence of wrongful conduct" and whether there is a "sufficiently direct and certain causal nexus between the wrongful act […] and the injury suffered" (causation).[1044] The Court will then also determine the appropriate form and amount or scope of reparation. In accordance with the principle of *onus probandi incumbit actori*, it is the proponent seeking reparation (here, Somalia) that must show the existence of injury, establish the relevant

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1040 International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts, *Yearbook of the International Law Commission*, 2001, vol. II (Part Two), article 34.

1041 International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts, *Yearbook of the International Law Commission*, 2001, vol. II (Part Two), article 35.

1042 International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts, *Yearbook of the International Law Commission*, 2001, vol. II (Part Two), article 36.

1043 International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts, *Yearbook of the International Law Commission*, 2001, vol. II (Part Two), article 37.

1044 *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Compensation, Judgment of 19 June 2012, I.C.J. Reports 2012*, p. 324, paragraphs 14 and 15, citing *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 43, paragraph 462.

causation and then demonstrate the appropriate form and amount or scope of reparation.[1045]

603. Tellingly, Somalia has provided no evidence or basis for why it should be entitled to any of its requested relief. Its pleadings fall far short of the standards established by public international law.

604. On point (i), satisfaction (and, notably, for all three requested forms of relief), Somalia is not entitled to any remedy because Kenya's acts were not internationally wrongful. Indeed, Somalia itself has given Soma Oil & Gas rights in the now-disputed maritime area. Somalia can hardly criticise or seek satisfaction on the basis of Kenya's decision to do the same with respect to other companies.

605. On point (ii), compensation, Somalia has not proven and cannot prove how it has suffered damages from the transitory activities authorised by Kenya in the now-disputed maritime area or what the amount of those damages might be.[1046] In its Memorial, Somalia initially only asserted a conditional right to compensation "***in the event*** Kenya's activities affect Somalia's

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1045 *See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007, I.C.J. Reports 2007*, p. 43, paragraph 462 ("[s]ince [the Court] now has to rule on the claim for reparation, it must ascertain whether, and to what extent, the injury asserted by the Applicant is the consequence of wrongful conduct by the Respondent with the consequence that the Respondent should be required to make reparation for it, in accordance with the principle of customary international law stated above [of *onus probandi incumbit actori*]"); *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Compensation, Judgment of 19 June 2012, I.C.J. Reports 2012*, p. 324, paragraph 15 ("[t]he assessment of compensation owed to Guinea in this case will require the Court to weigh the Parties' factual contentions. The Court recalled in its Judgment of 30 November 2010 that, as a general rule, it is for the party which alleges a particular fact in support of its claims to prove the existence of that fact").

1046 *See* MS, paragraph 8.35.

rights in a permanent manner".[1047] (Emphasis added). Of course, public international law does not provide for conditional compensation and Somalia cited no authority to that effect. In all events, Somalia's condition was not satisfied: none of Kenya's activities constituted permanent changes in the maritime environment. This also defeats the conditional compensation claim.

606. Understanding this, in its Reply, Somalia sought "payment of appropriate compensation" without explaining the existence of injury, its cause or its appropriateness.[1048] *A fortiori*, this must fail. Somalia simply has not articulated any loss of a right or interest of any type that could be subject to either restitution or compensation. It has shown neither existence of injury, nor its cause – much less that compensation is appropriate as reparation. Somalia's request for compensation is, therefore, unfounded.

607. Somalia's true intention in seeking a declaration that Kenya has committed internationally wrongful acts is betrayed by point (iii): Somalia's request for exploration data free of charge. At considerable expense, over considerable time, and without objection from Somalia, Kenya and private parties licensed by Kenya have gathered exploration data relevant to the now-disputed maritime area. Without any basis in international law, Somalia seeks to obtain the benefit of this work without bearing a penny of its cost. Notably, many shadowy private parties and even Government officials would benefit personally from such an injustice, given their

1047 MS, paragraph 8.33.

1048 SR, paragraph 4.25.

shareholding and other interests in Soma Oil & Gas and its offshore licensing and activities.[1049]

608. Turning over seismic data is not a form of reparation recognised by international law. It is not restitution because the data is not being restored to Somalia; Somalia never had the data in the first place. It is not compensation in financial terms. It is also not satisfaction.

609. Somalia is thus advancing an imaginative claim for a novel form of reparation. Its position fails because the relief it seeks fundamentally violates the principle set forth in the *Factory at Chorzów* case. Somalia's requested relief would not "re-establish the situation which would, in all probability, have existed if [Kenya's alleged unlawful activities] had not been committed."[1050] To the contrary. It would turn over to Somalia data which never would have existed if Kenya had not paid for and explored the now-disputed maritime area at its own time and effort. Somalia would be given a windfall of great commercial value, without providing compensation or taking risk in the exploration.

610. Somalia's position is also deeply ironic. As late as June 2015, Somalia had not exercised its contractual right to have Soma Oil & Gas turn over the results of the seismic surveys that that company had conducted offshore of

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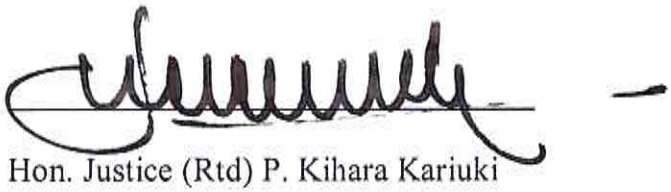
1049 *See* Chapter II.A.4.

1050 *Case Concerning the Factory at Chorzów (Claim for Indemnity) (Merits), Judgment of 13 September 1928*, PCIJ, Report Series A-No. 17, paragraph 125.

Somalia.[1051] Yet Somalia asks for all the data Kenya has procured at its own risk expense, to which Somalia has no right whatsoever.

611. For these reasons, Kenya requests that the new evidence presented be accepted by the Court.

[1051] *See* Letter from the Coordinator of the Somalia and Eritrea Monitoring Group mandated pursuant to paragraph 46 of Security Council resolution 2182 (2014) to the Chair of the Security Council Committee pursuant to resolutions 751 (1992) and 1907 (2009) concerning Somalia and Eritrea, reporting the initial findings of the Monitoring Group's investigation into the operations of Soma Oil & Gas Holdings Limited (Soma), S/AC.29/2015/SEMG/OC.31, 28 July 2015, page 23, KCM, Annex 101.



Hon. Justice (Rtd) P. Kihara Kariuki

Agent of the Republic of Kenya