INTERNATIONAL COURT OF JUSTICE

CASE CONCERNING
MARITIME DELIMITATION IN THE INDIAN OCEAN

SOMALIA
v.
KENYA

REPLY OF SOMALIA

VOLUME I

18 JUNE 2018

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CHAPTER 1
INTRODUCTION

1.1. This Reply supplements the arguments of law and fact presented in Somalia's Memorial, and responds to the arguments set forth in Kenya's Counter-Memorial. Somalia maintains its previous position in full. None of the contentions Kenya advances have caused Somalia to change its approach to this case in any respect.

Section I. Procedural History

1.2. Somalia instituted these proceedings by means of an Application dated 28 August 2014. In accordance with the Court's Order of 16 October 2014, Somalia filed its Memorial on 13 July 2015.

1.3. Kenya submitted its Preliminary Objections to the Court's jurisdiction on 7 October 2015. Somalia submitted its Written Observations on Kenya's Preliminary Objections on 5 February 2016, and the Court held oral hearings from 19 September to 23 September 2016. By Judgment dated 2 February 2017, the Court rejected Kenya's Preliminary Objections in their entirety.[1]

1.4. Pursuant to the 2 February 2017 Order of the Court, Kenya submitted its Counter-Memorial on 18 December 2017. On 2 February 2018, the Court authorised a second round of written pleadings. Somalia submits this Reply in accordance with that Order.

[1] *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, Preliminary Objections, Judgment, I.C.J. Reports 2017 (hereinafter "*Somalia v. Kenya*, Preliminary Objections, Judgment"), para. 145.

Section II. Issues in Dispute and Summary of Somalia's Argument

1.5. Consistent with Article 49(3) of the Rules of Court, Somalia will not repeat the arguments it made in its Memorial, but rather will focus this Reply on "the issues that still divide" the Parties.

1.6. Somalia observes at the outset that the arguments Kenya offers in the Counter-Memorial are not only contradictory but fatal to one another. In the second paragraph of its Introduction, for example, the Counter-Memorial asserts that the dispute between the Parties has *already been settled* because "Somalia has acquiesced in a maritime boundary".[2] In the very next paragraph, however, Kenya suggests that the boundary *remains to be delimited*, and is "best resolved by a negotiated solution".[3]

1.7. The latter position, although inconsistent with the former, is similar to the argument Kenya made in its Preliminary Objections; that is, that there was no existing boundary, that the location of the boundary was in dispute and that the Parties had committed to settle the issue exclusively by negotiations. Remarkably, in the Counter-Memorial Kenya seems to have jettisoned, or at least forgotten, what it argued during the Preliminary Objections phase. Contradicting what it argued previously, Kenya's lead argument in the Counter-Memorial is that there is already a legally binding maritime boundary, and that it was established by Kenya's unilateral claim to a parallel of latitude and Somalia's alleged "acquiescence" in that claim. Kenya makes no effort to explain its reversal of position.

[2] Counter-Memorial of the Republic of Kenya (hereinafter "KCM"), para. 2.

[3] KCM, para. 3.

1.8. Other elements of the Counter-Memorial are equally contradictory. Kenya recognises, for instance, that the equidistance/relevant circumstances method is "commonly applied" in adjudicated maritime delimitations "in order to achieve an equitable result".[4] But then it declines to engage with that method on the pretext that it is inconsistent with the relevant provisions of the U.N. Convention on the Law of the Sea ("UNCLOS or the "Convention"), its negotiation history and State practice. In other words, Kenya argues that by "commonly" applying the three-step method, the Court has gotten the law wrong. Somalia does not share that view. To the contrary, it is Somalia's view that, consistent with the Court's well-established jurisprudence, the boundary in this case should be delimited by the three-step equidistance/relevant circumstances method.

1.9. Setting Kenya's evident difficulties aside, the Counter-Memorial exposes the three principal areas of dispute between the Parties:

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

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

[4] KCM, para. 276.

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

1.10. This Reply will demonstrate that Kenya's assertion that the Parties' maritime boundary was established by virtue of Somalia's alleged acquiescence in Kenya's unilateral claim is unsustainable in both law and fact.

1.11. As a matter of law, maritime boundaries cannot be established by a unilateral act. Kenya notably cites no law to support its argument, because there is none. Under UNCLOS, delimitations can either be effected by agreement or by adjudication. Acquiescence is neither.

1.12. On the facts, Kenya's argument is untenable in light of its previous position that there was never an agreed or settled maritime boundary, and that the Parties' dispute remained to be resolved by negotiation. Moreover, the evidence shows that (a) Kenya itself did not consistently treat the parallel of latitude as the Parties' maritime boundary; (b) the existence of the dispute, including Somalia's claim to a boundary based on equidistance, was widely recognised; and (c) Somalia never accepted Kenya's claim, whether explicitly or implicitly.

1.13. As a fall-back to its acquiescence argument, Kenya contends that the "application of the principle of equitable delimitation"[5] also leads to the parallel boundary it claims. Yet because Kenya cannot justify its claim under the standard three-step method, it chooses to eschew that method altogether. Instead, it simply re-purposes its acquiescence argument to suggest that the Court should dispense with the three-step method because the Parties have already indicated that they

[5] KCM, para. 275.

consider the parallel to be equitable. This fall-back argument fails for all the same reasons as Kenya's acquiescence claim. In particular, there are no grounds for dispensing with the three-step method, and there is no evidence that Somalia ever considered the parallel to be equitable.

1.14. The Court has made clear that the three-step method must be applied unless the construction of a provisional equidistance line is not feasible, which is not the case here. Kenya does not dispute that an equidistance line can be drawn. Somalia demonstrated in the Memorial that application of the standard method leads to the conclusion that the equidistance line is an equitable solution. There are no relevant circumstances that warrant an adjustment to the provisional equidistance line and it does not result in any disproportionality between the Parties' relevant coastal lengths and the maritime spaces appertaining to them. Therefore, Somalia maintains its submission that the Court should delimit the maritime boundary between the Parties by means of an equidistance line.

1.15. This Reply also responds to Kenya's attempts to argue that it did not violate Somalia's sovereign rights by authorising and engaging in seismic and drilling activities in the disputed area between the equidistance line and the parallel. Again, Somalia has the law and the facts on its side. As Somalia will show, even transient activities can violate Article 83 of the Convention when, as here, they jeopardise or hamper the reaching of a final agreement. And the evidence shows that Kenya and its contractors were well-aware of the existence of a dispute when it authorised the exploration activities on Somalia's side of the equidistance line, and sought to take advantage of Somalia's weakened position during years of civil strife.

1.16. For these reasons, as more fully detailed below, Somalia respectfully submits that all of Kenya's arguments should be rejected and the Court should establish the Parties' maritime boundary along an unadjusted equidistance line. It

should also find that Kenya violated Somalia's sovereignty and sovereign rights, and make full reparation, including compensation, to Somalia for those violations.

Section III. Structure of the Reply

1.17. This Reply consists of two volumes. Volume I comprises the main text of the Reply and selected figures. Volume II contains a full set of figures, organised in the order they are referenced in the main text. It also contains 46 documentary annexes supporting the Reply.

1.18. This Volume consists of four chapters, followed by Somalia's Submissions. Following this Introduction, **Chapter 2** responds to Kenya's arguments that Somalia has acquiesced in Kenya's claimed parallel of latitude and demonstrates that Kenya's argument is not only unfounded in law, but also unsustainable on the facts. Next, **Chapter 3** explains why the Court's standard delimitation method must be applied and how its application leads to an unadjusted equidistance line. **Chapter 4** shows that Kenya has violated Somalia's sovereignty and sovereign rights by engaging in activities in the disputed area that hampered the reaching of a boundary agreement.

1.19. Volume I concludes by setting out Somalia's Submissions.

CHAPTER 2
SOMALIA HAS NOT ACQUIESCED IN A MARITIME BOUNDARY WITH KENYA

2.1. Somalia and Kenya are both Parties to UNCLOS. Articles 15, 74 and 83 provide the law applicable to the delimitation of the territorial sea, the exclusive economic zone ("EEZ") and the continental shelf, respectively. All three provisions make clear that delimitation is to be effected by *agreement*. Yet Kenya's main argument in the present proceedings is that its maritime boundary with Somalia was somehow effected without agreement, but rather by a unilateral act of Kenya—a Presidential Proclamation—to which Somalia's alleged failure to protest constituted acquiescence.

2.2. Kenya's submission fails on many grounds, as this Chapter shows. It is manifestly wrong in law (**Section I**). It is unsupported by the evidence before the Court: Kenya's own legal positions, as repeatedly set out in many international and domestic fora, directly contradict its claim that the boundary was established (**Section II**). Kenya's claim is also contradicted by other independent sources, including the United Nations Security Council and the African Union Mission to Somalia (**Section III**). Despite Kenya's assertions to the contrary, Kenya has not exercised authority over the disputed maritime area north of the equidistance line since 1979 (**Section IV**). Finally, and, in any event, Somalia has consistently and emphatically asserted that the maritime boundary should follow an equidistance line. It has objected to any claims by Kenya that the boundary follows a parallel line, as long as it has been able to do so (**Section V**).

Section I. Kenya's Legal Aporias

2.3. Kenya's central argument is that its maritime boundary with Somalia, from the coast to the outer limit of the continental shelf, was established by virtue of

Kenya's Presidential Proclamations of 1979 and 2005.[6] According to Kenya, this unilateral claim was perfected in law by reason of Somalia's failure to protest.[7] This, according to Kenya, is delimitation by acquiescence.[8] But Kenya's assertion is unsupported by law or international practice, and is contradicted by the facts.

2.4. Somalia notes at the outset that Kenya does not argue that there is a tacit agreement between the Parties. It is aware that "[t]he establishment of a permanent maritime boundary is a matter of grave importance and agreement is not easily to be presumed".[9] It also knows that "[e]vidence of a tacit legal agreement must be compelling",[10] a threshold it cannot meet. Aware that it cannot satisfy the conditions imposed by the applicable law, Kenya chooses to ignore it and invent an entirely novel approach: delimitation by acquiescence in a unilateral claim.

2.5. Although it invokes acquiescence as an autonomous ground, Kenya does not explain how this differs from a tacit agreement or from estoppel. Yet it frequently refers to case-law on tacit agreement, apparently believing it to be relevant to its novel argument.[11]

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[6] KCM, para. 23.

[7] *Ibid*., para. 21.

[8] *Ibid*., para. 237.

[9] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 2007, p. 659 (hereinafter "*Nicaragua v. Honduras*"), para. 253. *See also Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, p. 61 (hereinafter "*Romania v. Ukraine*"), para. 68; *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar), Judgment of 14 March 2012*, ITLOS Reports 2012 (hereinafter "*Bangladesh/Myanmar*"), para. 95; *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 (hereinafter "*Ghana/Côte d'Ivoire*"), para. 212.

[10] *Nicaragua v. Honduras*, para. 253. *See also Ghana/Côte d'Ivoire*, para. 212.

[11] *See, e.g.*, KCM, paras. 210, 263, 312, 316-317.

2.6. Even assuming that acquiescence could ever be invoked as a principle of delimitation under UNCLOS—and it cannot—stringent requirements would have to be met. There is no reason the threshold would be different from, or lower than, the high burden needed to establish the existence of a tacit agreement. In the *Gulf of Maine* case, the Chamber of the Court considered these concepts to be "different aspects of one and the same institution".[12] The Eritrea/Ethiopia Boundary Commission identified at least three requirements, common to tacit agreement, preclusion, *estoppel* and acquiescence:

> "(1) an act, course of conduct or omission by or under the authority of one party indicative of its view of the content of the applicable legal rule … ;
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> (2) the knowledge (actual or reasonably to be inferred) of the other party of such conduct or omission … ; and
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> (3) a failure by the latter party within a reasonable time to reject, or dissociate itself from, the position taken by the first …".[13]

2.7. It should be emphasised that there can be no presumption that a unilateral act of a State can ever create a boundary under international law. Such an approach would run directly contrary to the fundamental rule that delimitation is established by agreement. Moreover, it would contradict the elementary principle according to which "[n]o obligation may result for other States from the unilateral declaration

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[12] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, Judgment, I.C.J. Reports 1984, p. 246 (hereinafter "*Gulf of Maine*"), para. 130. *See also Delimitation of the Border between Eritrea and Ethiopia (Eritrea/Ethiopia), Decision of 13 April 2002*, UNRIAA, Vol. XXV, p. 83 (hereinafter "*Eritrea/Ethiopia*"), para. 3.9.

[13] *Ibid.*, p. 85.

of a State".[14] As the ICJ held in the *Gulf of Maine* case, the principle according to which the boundary shall be determined by agreement

> "is simple, yet its importance must not be underestimated. It must not be seen as a mere 'self-evident truth'. The thrust of this principle is to establish by implication that any delimitation of the continental shelf effected unilaterally by one State regardless of the views of the other State or States concerned is in international law not opposable to those States".[15]

2.8. Yet Kenya considers that its common maritime border with Somalia was somehow established simply by virtue of a unilateral act, in the form of two Presidential Proclamations made in 1979 and 2005. This amounts to a clear rejection of the law of maritime delimitation, and the law on unilateral acts of States. Kenya's Presidential Proclamations are mere claims. They cannot entail "rights and obligations for other States",[16] as Kenya would have them do. As Charles de Visscher (from whom Kenya quotes rather selectively[17]) aptly

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[14] International Law Commission, *Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, with commentaries thereto* in *Report of the International Law Commission on the work of its fifty-eighth session (1 May-9 June and 3 July-11 August 2006)*, U.N. Doc. A/61/10 (2006), p. 379. Reply of Somalia (hereinafter "RS"), Vol. II, Annex 33.

[15] *Gulf of Maine*, para. 87. In the same vein: "*[L]e Tribunal ne saurait prendre en considération une délimitation qui ne résulte pas de négociations ou d'un acte équivalent conformément au droit international. Or, en l'espèce, la prétendue délimitation a été effectuée par un acte juridique relevant du seul pouvoir de la Guinée et susceptible, comme ceux qui ont été pris par cette même Guinée au nord, et à la même période, de faire l'objet de modifications unilatérales*". ("[T]he Tribunal cannot take into consideration a delimitation which does not result from negotiations or an equivalent act in accordance with international law. In the present case, however, the alleged delimitation was carried out by a legal act within Guinea's sole power and liable, like those taken by Guinea in the north, and at the same time, to be the subject of unilateral amendments".) *Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau, Decision of 14 February 1985*, UNRIAA, Vol. XIX, p. 149 (hereinafter "*Guinea/Guinea-Bissau*"), para. 94. *See also Fisheries Case (United Kingdom v. Norway)*, Judgment, I.C.J. Reports 1951, p. 116, p. 132.

[16] KCM, para. 224.

[17] *See ibid.*, para. 218.

explained, notifications of claims "*ne sont pas des actes juridiques autonomes, c'est-à-dire des actes générateurs par eux-mêmes d'effets de droit. … [L]a notification par elle-même n'engendre pas d'effets juridiques*".[18] Consequently, notifications of claims do not require a protest: "*une notification peut ne susciter aucune réaction; le destinataire peut garder le silence sans que l'on soit autorisé à en induire une conséquence juridique à son détriment. On ne peut obliger les Etats à protester invariablement contre toutes les inductions que le calcul politique peut attribuer à leur silence*".[19]

2.9. Lack of protest to a notification of a claim cannot amount automatically (or otherwise) to an acceptance of the validity and effectiveness of that claim. On the contrary, for acquiescence to arise, Kenya must prove "a very definite, very consistent course of conduct on the part of a State [here Somalia] … , that is to say if there had been a real intention to manifest acceptance or recognition"[20] of Kenya's claim that the boundary should run along the parallel of latitude.

2.10. Kenya tries to reverse the burden of proof by treating its unilateral proclamations as creating a boundary and by attempting to impose upon Somalia a duty to protest. Instead of establishing Somalia's real intention to manifest its

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[18] Charles de Visscher, PROBLEMES D'INTERPRETATION JUDICIAIRE EN DROIT INTERNATIONAL PUBLIC (1963), pp. 182, 184. KCM, Vol. III, Annex 118 ("[notifications of claims] are not autonomous legal acts, amenable to produce legal effects by themselves. … A notification does not create by itself a legal effect".). *See also ibid*., p. 184 ("*C'est qu'en effet les conséquences qu'elle peut entrainer dépendent de prises de position ultérieures du destinataire, prises de position que la notification a précisément pour but de provoquer et de rende publiques*".) (Obviously, its possible legal consequences depend upon the reactions expressed subsequently by its addressee, reactions which the notification purports to provoke and make public".).

[19] *Ibid*., pp. 184-185 ("*a notification may as well trigger no reaction; the addressee may keep silent, and no inference to its detriment should be made on the basis of this silence. One cannot require from States to invariably protest against all inductions which the political calculations seek to attribute to its silence*".).

[20] *North Sea Continental Shelf*, Judgment, I.C.J. Reports 1969, p. 3 (hereinafter "*North Sea Continental Shelf*"), para 28.

acceptance, Kenya presumes that the absence of formal protest to its Presidential Proclamations amounts to a form of acquiescence.

2.11. To support its far-reaching assertion, according to which unilateral claims that remain unprotested establish a boundary, Kenya offers only selective examples of State practice in relation to protests for all sorts of unilateral claims.[21] But Kenya fails to mention that there is no generalized practice in relation to protests. On the African continent, in particular, protests to claims, far from being systematic, are rather sporadic.[22] Thus, no inference can be drawn from the absence of an official protest to claims and proclamations, and none should be. In the face of similar claims advanced by Denmark and the Netherlands in the *North Sea Continental Shelf*, the ICJ warned against this: "The dangers of the doctrine here advanced by [the Applicants], if it had to be given general application in the international law field, hardly need stressing".[23]

2.12. In any event, protest may be called for when one of the two States has adopted for a long time a consistent conduct that indicates its views on the location of a maritime boundary. "[A]cquiescence … presupposes clear and consistent acceptance".[24] Yet Kenya's conduct is not only wildly inconsistent in this case, but also it has in no way demonstrated Somalia's so-called acceptance of it. Thus, even

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[21] KCM, para. 237.

[22] According to the DOALOS website, out of the 38 coastal States in the African region, only six of them had their claims protested by one or more States (Comoros, Egypt, Equatorial Guinea, Gabon, Mauritius, Sudan). There were no formal protests registered for the claims of the other 32 coastal States, even though the maritime boundaries of some of them were established by a judicial or arbitral decision, *see. e.g.*, *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, I.C.J. Reports 1982, p. 18 (hereinafter "*Tunisia/Libya*"); *Territorial Sovereignty and Scope of the Dispute (Eritrea and Yemen), Decision of 9 October 1998*, UNRIAA, Vol. XXII, p. 209 (hereinafter "*Eritrea/Yemen*"); and *Ghana/Côte d'Ivoire*).

[23] *North Sea Continental Shelf*, para. 33.

[24] *Gulf of Maine*, para. 145 (citing *North Sea Continental Shelf*, para. 30).

supposing that Kenya's unilateral notification of claims could as such create an obligation to protest on the part of Somalia (*quod non*), this alleged obligation has no effect here since Kenya's conduct has not been clear and consistent. Indeed, "silence may also speak, but only if the conduct of the other State calls for a response".[25] *Qui tacet consentire videtur si loqui debuisset ac potuisset*—in this case, there was of course no obligation for Somalia which faced Kenya's totally inconsistent behaviour.

Section II. Kenya's Inconsistent Position

2.13. Kenya's own public statements and positions directly contradict its claim that the Parties have already delimited their maritime boundary along a parallel of latitude. These include (a) Kenya's written and oral pleadings before the Court in support of its Preliminary Objections; (b) the terms of the Memorandum of Understanding ("MOU") signed by the Parties in April 2009; (c) Kenya's submissions to the Commission on the Limits of the Continental Shelf ("CLCS" or "Commission"); (d) the record of the bilateral negotiations on the maritime boundary between Kenya and Somalia; and (e) official reports and presentations by the Kenyan Government, the Kenyan National Assembly and Kenya's International Boundaries Office.

2.14. These statements, most of which were made on the international level, totally undermine the factual basis of Kenya's claim that the Parties' maritime boundary has been conclusively delimited along a parallel of latitude through a process of unilateral assertion (by Kenya) and acquiescence (by Somalia).

[25] *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, Judgment, I.C.J. Reports 2008, p. 12, para. 121.

A. KENYA'S STATEMENTS TO THE COURT

2.15. Kenya's Preliminary Objections made clear that there is no established maritime boundary. Kenya argued that, long before Somalia filed its Application to the Court, the Parties had reached a binding agreement that they

> "would delimit the full extent of their maritime boundary, both within and beyond 200 NM:
>
> > a) Only after the CLCS has made its recommendations concerning establishment of the continental shelf; and
> >
> > b) By means of a negotiated agreement …".[26]

2.16. Kenya's Preliminary Objections asserted that "[t]he Parties expressly agreed … on a negotiated settlement of their maritime boundary. This was consistent with Kenya's legislation requiring delimitation by agreement with Somalia. It was also consistent with the provisions of UNCLOS".[27] In this regard, Kenya claimed that it was both "committed" and "obligated" to "negotiate a delimitation agreement with Somalia based on international law".[28] Kenya's insistence that the maritime boundary must be delimited by a negotiated agreement on some future date led Kenya to allege that Somalia had wrongly "attempted to circumvent its obligation to negotiate an agreement on delimitation after CLCS review" by filing its Application with the Court.[29]

2.17. During the oral pleadings in that phase, Kenya's counsel similarly told the Court that, "Kenya [has] consistently maintained the view that maritime boundary

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[26] Preliminary Objections of the Republic of Kenya (hereinafter "KPO"), para. 3.

[27] *Ibid.*, para. 17.

[28] *Ibid.*, para. 21.

[29] *Ibid.*, para. 149.

delimitation would be effected by agreement" between the Parties at some time in the future after the CLCS had provided its recommendations on the delineation of the outer continental shelf.[30] Kenya's Attorney-General and Agent explicitly and unambiguously insisted that delimitation of the Parties' maritime boundary "call[s] for time, until Somalia achieves greater stability"[31] since "maritime boundary delimitation between Kenya and Somalia requires sensitive bilateral negotiations".[32] He stated that the process of reaching a negotiated delimitation had only begun with "preliminary discussions in 2014" following "a volatile transitional period in Somalia",[33] and he made clear that in Kenya's view it was not over. Kenya's Co-Agent likewise insisted that the Parties' determination of their maritime boundary would involve "a complex delimitation that requires sensitive bilateral negotiations". She, too, stated that, "it cannot be said that the Parties ever entered into proper negotiations, let alone exhausted them".[34]

2.18. Despite Kenya's explicit and repeated statements to the Court that the Parties had agreed that their maritime boundary would be delimited (a) in the future, and (b) by a process of negotiation, Kenya has now changed tack. It improbably argues in its Counter-Memorial that the Parties had, in fact, already conclusively delimited their maritime boundary as a result of Kenya having "decided to adopt" a parallel of latitude in 1979 and Somalia's subsequent alleged

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[30] Verbatim Record, *Public sitting held on Wednesday 21 September, at 4:30 p.m. at the Peace Palace, President Abraham presiding, in the case concerning* Maritime Delimitation in the Indian Ocean (Somalia v. Kenya), *Preliminary Objections*, I.C.J. Doc. CR 2016/12 (21 Sept. 2016) (hereinafter "CR 2016/12"), p.16, para. 8 (Akhavan).

[31] Verbatim Record, *Public sitting held on Monday 19 September 2016, at 10 a.m. at the Peace Palace, President Abraham presiding, in the case concerning* Maritime Delimitation in the Indian Ocean (Somalia v. Kenya), *Preliminary Objections*, I.C.J. Doc. CR 2016/10 (19 Sept. 2016) (hereinafter "CR 2016/10"), p. 17, para. 10 (Muigai).

[32] CR 2016/12, p. 40, para. 3 (Muigai).

[33] *Ibid.*, p. 40, para. 3 (Muigai).

[34] CR 2016/10, p. 53, paras. 20-21 (Muchiri).

"acquiescence" in that boundary. Yet this cannot be the case, since it would mean that Kenya knowingly argued its Preliminary Objections on a false premise: that the Parties each recognised that delimitation of the maritime boundary had not yet occurred and would need to occur in the future.

2.19. Kenya's position is all the more remarkable given its post-hearing statement to the Court that "negotiations between the Parties prior to the recommendation of the CLCS, even if it resulted in one or more interim agreements on delimitation covering some or all maritime areas in dispute, *would still be subject to finalization under the MOU's agreed procedure*".[35] Kenya also stressed in that statement that:

> "[I]t should also be noted that, at the first meeting [in 2014], the Parties considered 'several options and methods for equitable delimitation, including bisector, perpendicular, median and parallel of latitude' as potential maritime boundaries, and that these methods were considered in regard to all maritime areas in dispute".[36]

2.20. Continuing, Kenya wrote to the Court in September 2016:

> "There was no commitment or expectation that negotiations would result in an agreed boundary for all maritime areas at once. Given the complex circumstances prevailing between the Parties, it was entirely possible that agreements, whether conceived as temporary or permanent components of the boundary regime between Kenya and Somalia, may have initially covered one or more maritime areas (such as the territorial sea, or waters within, say, 50 nautical miles off the coast) and with one or more

[35] *Letter* from H.E. Githu Muigai, Attorney-General and the Agent of the Republic of Kenya, to H.E. Mr. Philippe Couvrer, Registrar of the International Court of Justice, No. AG/CONF/19/153/2VOL.IV (26 Sept. 2016), p. 2 (emphasis added). RS, Vol. II, Annex 13.

[36] *Ibid.*, p. 4.

> purposes (such as law enforcement, anti-piracy patrols, enforcement of fisheries regulations, scope of hydro-carbon exploration licenses, joint development zones, etc.) before the conclusion of a comprehensive, final agreement. There was, and is, no pressing need to settle the entire maritime boundary immediately …".[37]

2.21. Even in the Counter-Memorial itself, Kenya cannot escape its own contradictions. Despite its main argument that the boundary had already been delimited, Kenya also states that "delimitation of the maritime boundary between the Parties is a complex issue that is best resolved by a negotiated solution".[38] Somalia does not understand how Kenya can, in the same proceedings, make such contradictory arguments: arguing first that there was no established maritime boundary and now that there is.

B. THE 2009 MEMORANDUM OF UNDERSTANDING

2.22. The clear terms of the MOU that Kenya and Somalia signed on 7 April 2009 also contradict Kenya's suggestion that the Parties had delimited their maritime boundary on the basis of Somalia's "acquiescence" in a parallel of latitude. The second paragraph of the MOU stated expressly that the Parties had *not* delimited the continental shelf:

> "The delimitation of the continental shelf between the Republic of Kenya and the Somali Republic (hereinafter collectively referred to as 'the two coastal States') *has not yet been settled.* This *unresolved delimitation issue* between the two

[37] *Ibid*, p. 5.

[38] KCM, para. 3.

> coastal States is to be considered as a 'maritime dispute'".[39]

2.23. The MOU went on to state that the Parties had a common interest in establishing the outer limits of the continental shelf beyond 200 M "without prejudice to *the future delimitation* of the continental shelf between them".[40] The fourth paragraph of the MOU stated that Somalia's submission of preliminary information indicative of the outer limits of the continental shelf "shall be without prejudice to *the future delimitation* of maritime boundaries in the area under dispute, including the delimitation of the continental shelf beyond 200 nautical miles".[41] The fifth paragraph of the MOU provided that the recommendations of the CLCS "shall not prejudice the positions of the two coastal States with respect to the maritime dispute between them and shall be without prejudice to *the future delimitation* of maritime boundaries in the area under dispute, including the delimitation of the continental shelf beyond 200 nautical miles".[42]

2.24. As the Court noted in its decision on Kenya's Preliminary Objections, Kenya "emphasize[d] that … the Parties referred to the 'future delimitation'" several times in the MOU.[43] Although the Court did not accept Kenya's submission that the MOU created a binding obligation to delimit the maritime boundary exclusively through a process of negotiation rather than judicial determination, the

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[39] 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) (hereinafter "2009 Memorandum of Understanding"), p. 37 (emphasis added). Memorial of Somalia (hereinafter "MS"), Vol. III, Annex 6.

[40] *Ibid.*, p. 37 (emphasis added).

[41] *Ibid.*, p. 38 (emphasis added).

[42] *Ibid.* (emphasis added).

[43] *Somalia v. Kenya*, Preliminary Objections, Judgment, para. 54.

Court did observe that it was the position of the Parties that, "at least from the point in time of signing the MOU, any such delimitation *would be in the future*".[44]

2.25. According to Kenya's Counter-Memorial, despite entering an agreement in 2009 which expressly acknowledged that the Parties' maritime boundary was "unresolved" and "has not yet been settled", and which expressly recorded the Parties' intention to delimit that boundary in "the future", and despite the position it took in the Preliminary Objections phase, the Parties' maritime boundary had in fact been delimited well before that date through a process of unilateral assertion (by Kenya) and passive acquiescence (by Somalia). Quite apart from the fact that Kenya's acquiescence argument is wrong as a matter of law,[45] the clear words of the MOU demonstrate that this argument is also unsustainable on the facts.

C. KENYA'S SUBMISSIONS TO THE CLCS AND STATEMENTS TO THE UNITED NATIONS

2.26. In addition to Kenya's repeated statements to the Court and the unambiguous terms of the MOU, Kenya's statements to the CLCS also expressly acknowledge the absence of any delimitation by acquiescence. In the Executive Summary to Kenya's 2009 Submission to the Commission, Kenya referred to "the unsettled boundary line between Kenya and Somalia".[46] The Submission referred to Kenya's "overlapping maritime claims"[47] with Somalia and explained that:

> "Section 4(4) of the *Maritime Zones Act, 1989* provides that the exclusive economic zone boundary

[44] *Ibid.*, para. 78 (emphasis added).

[45] *See supra* paras. 2.3-2.12.

[46] 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), para. 8-4. MS, Vol. III, Annex 59.

[47] *Ibid.*, para. 7-1.

> between Kenya and Somalia shall be delimited by notice in the Gazette by the Minister pursuant to an agreement between Kenya and Somalia on the basis of international law".[48]

2.27. Kenya orally presented its submission to the CLCS on 3 September 2014. Kenya's delegation before the Commission was headed by the Attorney-General (and Agent in this case), who "observed that Kenya had yet to conclude a maritime boundary agreement with Somalia, although negotiations were ongoing".[49]

2.28. After Somalia lodged its objection to Kenya's Submission, Kenya sent a *note verbale* to the Secretary-General of the United Nations on 24 October 2014. The *note* referred to the "unresolved delimitation" with Somalia, and stressed that Kenya "remains committed and continues to pursue more legitimate avenues to have the delimitation of the maritime boundary amicably resolved, most preferably through a bilateral agreement with the Somali Federal Republic".[50]

2.29. Again, Kenya's repeated references to the unsettled status of the Parties' maritime boundary, as well as its unequivocal assurances to the CLCS and United Nations that delimitation of the boundary would take place by agreement in future, directly contradict its current claim; namely, that Somalia has engaged in

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[48] *Ibid.*, para. 7-3.

[49] United Nations, Commission on the Limits of the Continental Shelf, *Progress of work in the Commission on the Limits of the Continental Shelf; Statement by the Chair*, U.N. Doc. CLCS/85 (24 Sept. 2014), para. 60. MS, Vol. IV, Annex 71.

[50] *Note Verbale* from the Permanent Mission of the Republic of Kenya to the United Nations to H.E. Ban Ki-Moon, Secretary-General of the United Nations, No. 586/14 (24 Oct. 2014). MS, Vol. III, Annex 50. *See also Note Verbale* from the Permanent Mission of the Republic of Kenya to the United Nations to H.E. Ban Ki-Moon, Secretary-General of the United Nations, No. 141/15 (4 May 2015). MS, Vol. III, Annex 51.

"prolonged acquiescence" in a parallel maritime boundary with "binding legal effect".[51]

D. NEGOTIATIONS ON THE BOUNDARY

2.30. During the Third U.N. Conference on the Law of the Sea, Kenya's representative noted that Kenya and Somalia had different views on how the boundary should be delimited:

> "We should remain very vigilant in this respect as our neighbours—both Tanzania *and Somalia*—seem to have had the malicious intention of distorting the marine borders when they extended their territorial sea, *specifying the median line as the dividing line* …".[52]

2.31. Later, Somalia and Kenya restated their positions in the context of their bilateral negotiations on the maritime boundary. In 2013, Kenya's Cabinet Secretary for Foreign Affairs and Somalia's Deputy Prime Minister issued a joint press release that made clear that the maritime boundary had not yet been delimited: "The two Ministers underlined the need to work on a framework of modalities for embarking on maritime demarcation".[53]

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[51] KCM, paras. 4, 6.

[52] Permanent Mission to the United Nations of the Republic of Kenya, *Report of the Work of the Second Session of the Third United Nations Conference on the Law of the Sea, held in Caracas, Venezuela (20 June-29 Aug. 1974)*, Doc. No. 273/430/001A/15 (28 Oct. 1974), p. 64 (emphasis added). KCM, Vol. II, Annex 11.

Kenya is thus wrong to state that Somalia's claim to equidistance first emerged in 2014, *see, e.g.*, KCM, paras. 2, 4, 21, 180.

[53] Secretary for Foreign Affairs, Republic of Kenya & Deputy Prime Minister, Minister of Foreign Affairs and International Cooperation, Federal Republic of Somalia, *Joint Press Release* (31 May 2013). KPO, Vol. II, Annex 31.

2.32. In February 2014, Kenya invited Somalia to discuss "the existing dispute relating to the delimitation of the maritime boundary between the two countries".[54] Between February and August 2014, negotiations were held both at the political level (between the two States' respective Ministers of Foreign Affairs) and at a technical level.[55] In March and July 2014, the two delegations exchanged views over the location of their maritime boundary. Somalia articulated its position that the "principle of equidistance" was well established in international law and jurisprudence,[56] while Kenya emphasized considerations of "equity and fairness" which, it maintained, would yield the "parallel of latitude" reflected in its 2005 Presidential Proclamation.[57]

2.33. These negotiations are telling not only for what they reveal—that Somalia restated its claim to an equidistance boundary and Kenya to a parallel of latitude—but also for what they do not show: any reference by Kenya to an agreed or acquiesced boundary. Not once during the political or technical meetings did

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[54] *Letter* from H.E. Dr. Abdirahman Beileh, Minister of Foreign Affairs and International Cooperation of the Federal Republic of Somalia, to H.E. Ms. Amina Mohamed, Minister of Foreign Affairs & International Trade of the Republic of Kenya, No. MOFA/SER/MO/ /2014 (13 Mar. 2014). MS, Vol. III, Annex 43.

[55] On negotiations, *see* MS, paras. 3.43-3.56.

[56] 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), p. 2. MS, Vol. III, Annex 24. *See also* Government of Somalia and Government of Kenya, *Joint Report on the Kenya-Somali Maritime Boundary Meeting, 26-27 Mar. 2014* (1 Apr. 2014), p. 5. MS, Vol. III, Annex 31; *Note Verbale* from the Ministry of Foreign Affairs and International Trade of the Republic of Kenya to the Ministry of Foreign Affairs and Investment Promotion of the Federal Republic of Somalia, No. MFA. PROT 7/17A VOL. IV(18) (11 July 2014). MS, Vol. III, Annex 44.

[57] Government of Somalia and Government of Kenya, *Joint Report on the Kenya-Somali Maritime Boundary Meeting, 26-27 Mar. 2014* (1 Apr. 2014), p. 3. MS, Vol. III, Annex 31; Federal Republic of Somalia, *Report on the Meeting between The Federal Republic of Somalia and The Republic of Kenya On Maritime Boundary Dispute, Nairobi, Kenya, 26-27 March 2014* (1 Apr. 2014), p. 2. MS, Vol. III, Annex 24. *See also* Government of Somalia and Government of Kenya, *Joint Report on the Kenya-Somalia Maritime Boundary Meeting, 28-29 July 2014* (July 2014). MS, Vol. III, Annex 32.

Kenya refer to this argument. According to the ITLOS Special Chamber in *Ghana/Côte d'Ivoire*: "[T]he fact that the bilateral exchanges and negotiations on the delimitation of a maritime boundary took place between the Parties indicates the absence, rather than the existence, of a maritime boundary".[58]

E. KENYA'S LEGISLATION AND STATEMENTS BY KENYAN OFFICIALS

2.34. As shown, Kenya has made multiple representations at the international and bilateral level to the effect that the boundary was not established, and that it still had to be negotiated and settled by agreement. It has also done the same at the internal level as well. Numerous official instruments and statements from Kenyan government ministries, including the National Assembly of Kenya and the Director of Kenya's International Boundaries Office, confirm that Somalia and Kenya had different views on the maritime boundary, and that the dispute remained to be settled.

2.35. In 1980, one year after the 1979 Presidential Proclamation, Kenya's representative to the UNCLOS negotiations declared before the Kenyan Parliament that the boundary with Somalia was to be solved by bilateral discussions and ultimately by a formal agreement (a convention):

> "*Although this subject of delimitation is still being discussed*, as far as we are concerned here in Kenya, *this point is for the purpose of the proposed convention …*".[59]

[58] *Ghana/Côte d'Ivoire*, para. 243.

[59] Republic of Kenya, *The National Assembly Official Report: Fourth Parliament Inaugurated*, Vol. LII (1980), col. 1281 (quoted in KCM, para. 73) (emphasis added). KCM, Vol. II, Annex 5.

2.36. In 1989, ten years after the 1979 Presidential Proclamation, Kenya adopted its Maritime Zones Act, which provides that:

> "The northern boundary of the exclusive economic zone with Somalia *shall be delimited* by notice in the *Gazette* by the *Minister pursuant to an agreement between Kenya and Somalia* on the basis of international law".[60]

2.37. The 1989 Maritime Zones Act was notified to DOALOS, and it remains in force today. It is still available on the DOALOS website.[61] Kenya refers to it in its international representations[62] and in several other pieces of domestic legislation.[63]

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[60] Republic of Kenya, Chapter 371, *Maritime Zones Act* (25 Aug. 1989), § 4(4). MS, Vol. III, Annex 20 (quoted in KCM, para. 79) (emphasis added). The portion of the 1989 Maritime Zones Act relating to the delimitation of the territorial sea is equally inconsistent with Kenya's 1979 Presidential Proclamation. It provides that the boundary in the territorial sea "shall extend to a median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial waters" are measured. Republic of Kenya, Law No. 2 of 1972, *Territorial Waters Act* (16 May 1972), § 2(4). MS, Vol. III, Annex 16.

[61] U.N. Office of Legal Affairs, Division for Ocean Affairs and the Law of the Sea, "Kenya", *available at* http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/KEN.htm (last updated 14 Oct. 2014). RS, Vol. II, Annex 22.

[62] *See, e.g.*, 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), para. 7-3. MS, Vol. III, Annex 59.

[63] *See* Republic of Kenya, Laws of Kenya, Chapter 2, *The Interpretation and General Provisions Act* (1983, revised ed. 2008), § 3(a). MS, Vol. III, Annex 23; Republic of Kenya, *Coast Development Authority Act* (18 Jan. 1990), *reprinted in* LAWS OF KENYA, Chapter 449 (rev. ed. 2012), § 2. RS, Vol. II, Annex 2; *c.* Section 2 of the Fisheries Act 1991 provides: "'Kenya fishery waters' means the inland waters and the waters of the maritime zones described in the Maritime Zones Act (Cap. 371)" (Republic of Kenya, *Fisheries Act* (25 Aug. 1989), *reprinted in* LAWS OF KENYA, Chapter 378 (rev. ed. 2012), § 2. RS, Vol. II, Annex 1); Republic of Kenya, *Environmental Management and Co-ordination Act* (14 Jan. 2000), *reprinted in* LAWS OF KENYA, Chapter 387 (rev. ed. 2012), § 2. RS, Vol. II, Annex 3; Republic of Kenya, *Energy Act* (2006), § 2. RS, Vol. II, Annex 4; Republic of Kenya, *Mining Act*, Act No. 12 of 2016 (27 May 2016), § 4. RS, Vol. II, Annex 5. Official publications by the Kenyan Government also systematically refer to the Maritime Zones Act. *See, e.g.*, Republic of Kenya, National Environment Management Authority, *State of the Coast Report: Towards Integrated Management of Coastal and Marine Resources in Kenya* (2009), p. 60, para. 7.1.4.5. RS, Vol. II, Annex 8.

2.38. Kenya's interpretation of these instruments in its Counter-Memorial is *contra textum*: according to Kenya, they do nothing more than recognize that "there was no formal agreement".[64] But Kenya's internal and international representations clearly do more than this. They recognize that the maritime boundary with Somalia was still to be delimited. In this manner, they wholly undermine Kenya's acquiescence argument. They also acknowledge that this delimitation *ought to* be done by a formal treaty, notice of which should be in the *Gazette* published by the Minister of Foreign Affairs. It is indeed difficult to see how an informal agreement could be published in the *Gazette*. Thus, Kenya's own legislation sets out that delimitation with Somalia can be done only by agreement.

2.39. Numerous statements by Kenyan officials similarly confirm that there was an unresolved boundary dispute with Somalia. For example, in 2012, in the wake of the deadline for submissions to the CLCS, Kenya's Ministry of Foreign Affairs stated that the absence of an agreement on the boundary was a problem for Kenya's maritime ambitions:

> "The lack of a boundary agreement between Kenya and Somalia and the continuing instability in the latter country is likely to delay Kenya's quest to add 150 additional nautical miles to its territorial waters in the Indian Ocean. … The Ministry of Foreign Affairs, in a report to Treasury, says the bid is facing a challenge meeting international approval because of the above factors".[65]

[64] KCM, paras. 79-80, 102, 246, 264.

[65] F. Oluoch & M. Kimani, "War hits Kenya's bid to expand waters", *The East African* (29 Jan. 2012). RS, Vol. II, Annex 36.

2.40. In 2013, the Kenyan Ministry of Mining issued a *Sector Plan for Oil and Other Minerals 2013-2017*, which explained that:

> "*Kenya has a maritime boundary dispute with Somalia*, in the Indian Ocean Waters. There is also gazetted oil and gas exploration blocks that are located in *the disputed area* offshore the Lamu basin, and resolution of the dispute will be required to avoid resource-fuelled disputes, which are even harder to mediate than others".[66]

2.41. In October 2014, after Somalia submitted its Application instituting these proceedings, the Department Committee on Defence and Foreign Relations of the Kenyan National Assembly "held a joint workshop with various government agencies to deliberate on Somalia and Kenya's International Boundaries on [the] 9th to 12th October 2014 in Mombasa".[67] During the four-day governmental workshop, the 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., delivered a presentation entitled *Kenya's International Boundaries—Legal Challenges/Issues*. During that presentation, Mrs Nkoroi explained that, "to-date, Kenya's maritime space had not yet been finalized because of claims of it overlapping Somalia's maritime zone". Mrs Nkoroi had nothing to say about "acquiescence". Rather, she "informed the meeting of the need to urgently complete the process of defining Kenya's boundaries".[68]

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[66] Republic of Kenya, Ministry of Mining, *Sector Plan for Oil and Other Minerals 2013-2017* (2013), pp. 4-5 (emphasis added). RS, Vol. II, Annex 10.

[67] Republic of Kenya, National Assembly, Departmental Committee on Defence and Foreign Relations, *Report of the Workshop on Somalia and International Boundaries* (Oct. 2014), p. 5. RS, Vol. II, Annex 11.

[68] *Ibid.*, p. 21.

2.42. In addition to making it clear that the Parties' maritime boundary had not been delimited, Mrs Nkoroi candidly explained the basis of Kenya's objection to an equidistant maritime boundary with Somalia. It was, she said, based on Kenya's desire to exploit the "immense amount of wealth potential" in the area of the outer continental shelf that falls on Somalia's side of the equidistance line:

> "[T]o-date, Kenya's maritime space had not yet been finalized because of claims of it overlapping Somalia's maritime zone …. Somalia's insistence on the use of a median line to delimit the maritime zone in the Indian Ocean would result in Kenya losing a considerable amount of area in the outer continental shelf (OCS). This is to be avoided as an immense amount of wealth potential is to be found in the seas".[69]

2.43. In the same vein, the Director of Committee Services, Ms Florence Atenyo-Abonyo, informed the Kenyan Parliament that "the matter regarding disputes over international terrestrial and maritime boundaries had been with us for a long time".[70] The report of the final session similarly noted that the key theme of the meeting was "the need for Kenya to urgently complete the process of defining its boundaries".[71]

2.44. Based on its own repeated and recent positions, Kenya's new-found argument on acquiescence is implausible and unarguable.

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[69] *Ibid.*

[70] *Ibid.*, p. 11.

[71] *Ibid.*, p. 22.

Section III. The Absence of an Agreed Boundary Was Widely Recognized

2.45. Kenya is not alone in recognising that the Kenya-Somalia maritime boundary remains to be delimited. This is also the view of many other States and international organisations, including the United Nations.

2.46. On 11 April 2011, for example, the U.N. Security Council issued Resolution 1976, which referred to the need for Somalia's maritime boundaries to be delimited as soon as possible. It:

> "Invite[d] States and regional organizations to continue their support and assistance to Somalia in its efforts to develop national fisheries and port activities in line with the Regional Plan of Action, and in this regard emphasize[d] *the importance of the earliest possible delimitation of Somalia's maritime spaces in accordance with the Convention*".[72]

Given the Security Council's role in the fight against piracy and smuggling in the waters off the coast of Somalia, it knew, and was concerned, that the maritime boundary with Kenya remained to be delimited.

2.47. In August 2011, the absence of a delimited maritime boundary was acknowledged in a *note verbale* from Norway[73] to the United Nations. This *note* referred to Resolution 1976 and underscored the existence of "unresolved issues of maritime delimitation between Somalia and neighbouring coastal States". In this context, Norway drew attention to the terms of the MOU between Somalia and

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[72] U.N. Security Council, *Resolution 1976 (2011)*, U.N. Doc. S/RES/1976 (11 Apr. 2011), p. 3 (emphasis added). KCM, Vol. III, Annex 95.

[73] The Court will recall the important role Norway played in the preparation of Somalia's CLCS submission and in the drafting of the MOU. *See Somalia v. Kenya*, Preliminary Objections, Judgment, paras. 100-104.

Kenya, noting that the Parties' CLCS submissions "shall be without prejudice to the future delimitation of maritime boundaries in the areas under dispute". Norway emphasised the importance of a timely delimitation of Somalia's unresolved maritime boundaries to "lay the foundation for the protection and future exploitation by Somalia of its natural resources, and thus safeguard important interests of future Somali generations".[74]

2.48. In July 2013, the U.N. Monitoring Group on Somalia published a report which discussed the existence of a "conflict" over the Parties' maritime boundary and made specific reference to the two Parties' different claims:

> "Conflict between Somalia and Kenya over the maritime boundary
>
> 27. Somalia and Kenya have differing interpretations of their maritime boundary and associated offshore territorial rights. Currently, Somalia claims its maritime boundary with Kenya lies perpendicular to the coast, though this boundary is not enshrined in a mutually accepted agreement with Kenya, which envisages the maritime boundary as being defined by the line of latitude protruding from its boundary with Somalia".[75]

It was further underlined that "Somalia and Kenya would be required to initiate a separate process to negotiate a mutually acceptable maritime boundary".[76]

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[74] *Note Verbale* from the Permanent Mission of Norway to the United Nations to the Secretariat of the United Nations (17 Aug. 2011). KPO, Vol. II, Annex 4.

[75] 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), para. 27. MS, Vol. III, Annex 64.

[76] *Ibid*., para. 32.

2.49. The maritime zone of intervention of the African Union Mission in Somalia ("AMISOM") off the coast of Somalia covers, in their southern district, an area running virtually along an equidistance line, as seen in **Figure R2.1** (following this page). Kenya could not have been unaware of this, since it joined the AMISOM forces in 2007[77] and was in charge of the Southern District.[78]

2.50. These statements and actions reflect a recognition by the international community that the Parties had not delimited their maritime boundary before Somalia's Application to the Court in 2014, and certainly had not established a boundary along a parallel of latitude.

Section IV. Kenya's Alleged Activities in the Disputed Area

2.51. Although Kenya bases its acquiescence argument on its own Presidential Proclamations of 1979 and 2005, it also invokes its alleged *effectivités*—that is, its activities in the disputed area which Somalia allegedly did not protest—as confirmation of the parallel boundary it claims.[79] This argument is wrong both in law and on the facts.

2.52. As a matter of legal principle, *effectivités* cannot constitute an element to be taken into account for purposes of maritime delimitation. Maritime *effectivités*, unlike displays of sovereignty over land territory, can only be taken into account if they reflect a tacit agreement.[80] If they do, they might constitute a relevant

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[77] KCM, para. 96.

[78] Fred Oluoch, "UN unveils new look Amisom as Kenya joins up", *The East African* (11 Feb. 2012). RS, Vol. II, Annex 37.

[79] *See* KCM, paras. 115-154.

[80] *See Gulf of Maine*, paras. 126-154; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, I.C.J. Reports 2002, p. 303, para. 304; *Romania v. Ukraine*, para. 197; *Territorial and Maritime Dispute (Nicaragua v. Colombia)*,

Source: Security Council document S/2012/544, p. 225 (2012).

Figure R2.1

circumstance for delimitation under the standard three-step method. As noted above, Kenya makes no argument that there has been a tacit agreement in this case.[81]

2.53. Kenya surprisingly invokes the award of the arbitral tribunal in *Guyana v. Suriname*, which effectively contradicts its argument. The tribunal there observed that the jurisprudence "reveal[s] a marked reluctance of international courts and tribunals to accord significance to the oil practice of the parties in the determination of the delimitation line".[82] Indeed, as ITLOS recently observed:

> "international courts and tribunals have been consistent in their reluctance to consider oil concessions and oil activities as relevant circumstances justifying the adjustment of the provisional delimitation line".[83]

2.54. This reluctance applies not only in relation to oil activities, but also when the alleged display of public or state authority concerns fishing or policing. As noted by the arbitral tribunal in *Barbados v. Trinidad and Tobago*:

> "In examining the record of this case, the Tribunal does not find activity of determinative legal significance by Barbados in the area claimed by Trinidad and Tobago north of the equidistance line. Seismic surveys sporadically authorised, oil concessions in the area and patrolling, while relevant do not offer sufficient evidence to establish estoppel

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Judgment, I.C.J. Reports 2012, p. 624 (hereinafter "*Nicaragua v. Colombia*"), para. 220; *Ghana/Côte d'Ivoire*, paras. 467-481.

[81] *See supra* para. 2.4.

[82] *Arbitration regarding the delimitation of the maritime boundary between Guyana and Suriname, Award of 17 September 2007*, UNRIAA, Vol. XXX, p. 1 (hereinafter "*Guyana v. Suriname*"), para. 390 (cited in KCM, paras. 367, 370).

[83] *Ghana/Côte d'Ivoire*, para 476.

> or acquiescence on the part of Trinidad and Tobago. Nor, on the other hand, is there proof of any significant activity by Trinidad and Tobago relevant to the exercise of its own claimed jurisdiction north of the equidistance line.
>
> Moreover, Trinidad and Tobago's argument to the effect that, as held by the International Court of Justice in *Cameroon v. Nigeria* (I.C.J. Reports 2002, p. 303), oil wells are not in themselves to be considered as relevant circumstances, unless based on express or tacit agreement between the parties, finds application in this context. While the issue of seismic activity was regarded as significant by the International Court of Justice in the *Aegean Sea* case (I.C.J. Reports 1976, p. 3), the context of that decision on an application for provisional measures is not pertinent to the definitive determination of a maritime boundary".[84]

2.55. Therefore, as a matter of principle, the activities that Kenya claims to have undertaken in the disputed maritime area cannot be invoked to support the existence of a maritime boundary along a parallel of latitude in which Somalia has allegedly acquiesced.

2.56. Kenya's claim is not only refuted by the jurisprudence, but also by the evidence Kenya invokes. The evidence establishes that Kenya's purported displays of authority in the disputed maritime area were, at most, sporadic, infrequent and recent. They were also undertaken when, due to civil war, there was no functioning Somali government that was able to monitor or inform itself about the activities of other States in the maritime areas off Somalia's coast, let alone exercise effective

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[84] *Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them, Decision of 11 April 2006*, UNRIAA, Vol. XXVII, p. 147 (hereinafter "*Barbados v. Trinidad and Tobago*"), paras. 363-364.

control over them. Further, some of the purported displays of authority that Kenya relies on were undertaken pursuant to express authorisation by the U.N. Security Council to enter Somalia's maritime space—which was depicted as extending up to an equidistance line with Kenya—for the purpose of multinational U.N. peacekeeping operations.

A. ALLEGED *EFFECTIVITÉS*: NAVAL PATROLS

2.57. In support of its claim to have exercised authority over the maritime space up to a parallel line since 1979, Kenya relies on a "secret" naval command map purportedly issued in 1980.[85] Kenya has notably not adduced any evidence to show whether (if at all) the Kenyan Navy undertook patrols up to the parallel line between the 1979 Proclamation and the enactment of Kenya's Maritime Zones Act in 1989, a decade later. It certainly does not suggest that the "secret" map was ever communicated to Somalia.

2.58. Instead, Kenya relies on logs of a handful of Kenyan vessels that, it claims, show "considerable activity" in the vicinity of the claimed parallel boundary in 1990 and 1991.[86] Kenya's reliance on this evidence is a telling reflection of the weakness of its case. In particular:

a) The logs in question simply refer to vessels patrolling in the vicinity of Kenya's "north border". They cast no light on where that border was considered to be. The contents of the logs are therefore equally consistent with the existence of an equidistant boundary as a parallel boundary.

[85] KCM, para. 120

[86] *Ibid.*, para. 125.

b) In any event, as Kenya has recognized, in the early 1990s Somalia was afflicted by a devastating civil war that destroyed the basic infrastructure of the State. In those circumstances, Somalia could not detect incursions into its maritime space, much less take active and effective steps to prevent them. Indeed, Kenya's Counter-Memorial expressly highlights "the absence of Somalia's maritime enforcement capacity" and "Somalia's manifest inability to control her land and maritime territory"[87]—an absence and inability that were even more marked in the early stages of a civil war that would last two decades. Kenya's evidence of maritime patrols in the disputed areas is confined to the period when it recognises that Somalia had no ability to control entry into those waters.

2.59. Kenya also shows a diagram purportedly depicting Kenyan naval patrols and interceptions in the territorial sea between 1990 and 2014.[88] Several key aspects of this diagram reveal the shortcomings in Kenya's case.

a) Nearly all of the points plotted on the map are merely described as "Ships' Logs Extracts from Kenya Navy Ships Patrols 2008-2015". They thus purport to describe the transient[89] locations of Kenyan naval vessels in the disputed maritime space after the maritime boundary dispute had arisen between the Parties. Nor is there any suggestion that

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[87] KCM, para. 183.

[88] *Ibid.*, para. 123 and Figure 1-13. Despite the title of the diagram, a small number of alleged patrols depicted in the diagram purportedly occurred beyond the 12 M limit of the territorial sea.

[89] The table of "Ship Log Extracts" on which the map of Kenyan naval patrols was purportedly based shows that the vessels were present at particular locations for less than 45 minutes in the vast majority of cases, and in some instances were present for as little as 5 minutes. *See Brief* from Lt. Col. J.S. Kiswaa, Kenya Navy, to Commander, Kenya Navy, No. KN/56/Ops/Trg (July 2015), Annex A, *Ship Log Extracts from Kenya Navy Ships Patrol Within the Common Border* (June 2015). KCM, Vol. II, Annex 44.

these vessels were engaged in any activity other than in the exercise of the internationally recognised rights of freedom of navigation (between 12 M and 200 M from the coast) and innocent passage (within 12 M). This transient presence of Kenyan vessels in the disputed maritime space therefore cannot constitute evidence of *effectivités* in support of Kenya's claim.

b) The map shows several alleged "Interception[s] of Merchant Vessels by Kenyan Navy Ships while on Patrol 1990-2014". This graphic is based on a table of 22 alleged interception points produced by Kenya. Kenya's map deliberately focuses on just some interceptions and does not show all 22 recorded in the underlying table.[90] Unlike Kenya's Figure 1-13, **Figure R2.2** (following page 36) shows the location of all 22 of the alleged interceptions based on the coordinates provided by Kenya. As can be seen, 14 of the alleged interceptions occurred in maritime space south of the equidistance line. They therefore provide no support for Kenya's claim to a parallel boundary. Two occurred in an area of the territorial sea *north of the parallel line*, suggesting that the Kenyan navy undertook interceptions without regard to the existence of any maritime boundary. Just four interceptions allegedly occurred in the area between the equidistance line and the parallel line during a period of nearly a quarter of a century. Of those four, two allegedly occurred in the 1990s (when there was no effective government in Somalia) and the other two allegedly occurred in 2008

[90] *Brief* from Lt. Col. J.S. Kiswaa, Kenya Navy, to Commander, Kenya Navy, No. KN/56/Ops/Trg (July 2015), Annex C, *Interception of Merchant Vessels by Kenya Navy Ships while on Patrol in the Common Border FM 1990-2014* (23 July 2015). KCM, Vol. II, Annex 44.

and 2011, by which time the dispute over the maritime boundary had plainly arisen between the Parties.[91]

2.60. From at least 2012 onwards patrols and interceptions by the Kenyan Navy in Somalia's maritime space took place under the auspices of AMISOM, pursuant to express authorisation by the U.N. Security Council. On 5 January 2012, the Peace and Security Council of the African Union extended AMISOM's area of operations in Somalia to four sectors. Those sectors included the "Maritime Zone: South" sector, which extended up to an equidistance line both within and beyond the territorial sea, as seen in Figure R2.1 (following page 30).

2.61. On 22 February 2012, the U.N. Security Council adopted Resolution 2036 welcoming "the willingness of the Government of Kenya for Kenyan forces to be incorporated into AMISOM". It authorised AMISOM to "establish[] a presence in the four sectors set out in the AMISOM strategic Concept of 5 January" and "to take all necessary measures as appropriate in those sectors", while acting "in full respect of the sovereignty [and] territorial integrity" of Somalia.[92] Thus, from 2012 onwards Kenya was authorised to patrol Somalia's maritime space as part of a U.N.-approved multinational peacekeeping mission premised on full respect for Somalia's sovereignty over its maritime space. Even before that point, it appears that Kenya engaged in activities in Somalia's maritime space as part of AMISOM's peacekeeping remit, rather than in the purported exercise of any sovereign authority by Kenya.[93]

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[91] *Ibid.* In any case, the accuracy of the underlying data is undermined by the fact that the coordinates supplied by Kenya would place the remaining four alleged naval interceptions *on land*.

[92] U.N. Security Council, *Resolution 2036 (2012)*, U.N. Doc. S/RES/2036 (22 Feb. 2012), p. 3, para. 1. RS, Vol. II, Annex 20.

[93] As Kenya emphasises: "From January 2007, Kenya played a key role in the African Union Mission in Somalia ('AMISOM'). Its participation in AMISOM included a maritime component,

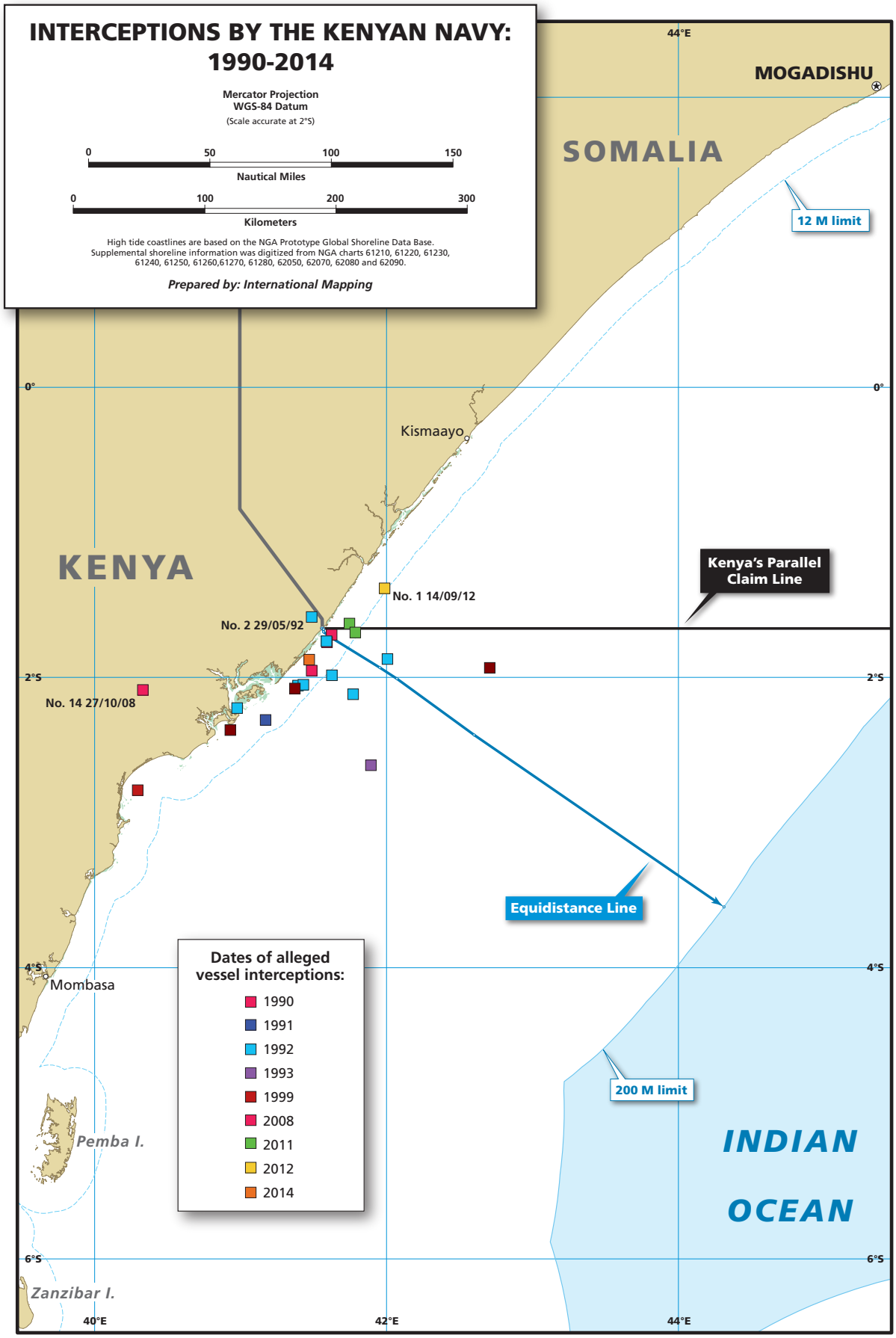
INTERCEPTIONS BY THE KENYAN NAVY: 1990-2014
Mercator Projection
WGS-84 Datum
(Scale accurate at 2°S)
0 50 100 150
Nautical Miles
0 100 200 300
Kilometers
High tide coastlines are based on the NGA Prototype Global Shoreline Data Base. Supplemental shoreline information was digitized from NGA charts 61210, 61220, 61230, 61240, 61250, 61260,61270, 61280, 62050, 62070, 62080 and 62090.
Prepared by: International Mapping
44°E
MOGADISHU
SOMALIA
12 M limit
0°
Kismaayo
KENYA
Kenya's Parallel Claim Line
No. 1 14/09/12
No. 2 29/05/92
2°S
No. 14 27/10/08
Equidistance Line
4°S
Mombasa
Dates of alleged vessel interceptions:
1990
1991
1992
1993
1999
2008
2011
2012
2014
200 M limit
INDIAN OCEAN
Pemba I.
6°S
Zanzibar I.
40°E
42°E
44°E

Figure R2.2

2.62. Accordingly, far from supporting Kenya's claim, the naval patrols in fact affirm Somalia's entitlement to an equidistant maritime boundary.

2.63. The fundamental weakness of Kenya's case is further demonstrated by its reliance on a letter from a Kenyan naval officer dated 5 October 2017, just in time for Kenya's Counter-Memorial. The letter, which contains only uncorroborated assertions—is the only evidence Kenya offers for its argument that its Navy "is guided by" the 1979 and 2005 Proclamations.[94] A self-serving and unsubstantiated assertion made for litigation purposes in 2017 about alleged historical practice regarding the location of a disputed boundary has no probative value in a case commenced in 2014. This was made clear by ITLOS in *Bangladesh/Myanmar*.[95]

B. ALLEGED *EFFECTIVITÉS*: FISHERIES JURISDICTION AND MARINE SCIENTIFIC RESEARCH

2.64. Kenya's purported evidence concerning marine scientific research and fisheries activities in the disputed maritime area equally lacks any probative weight.

2.65. *First*, it is notable that (a) most of the marine scientific activities that Kenya relies on were in fact activities of international organisations, rather than activities undertaken by Kenya; and (b) with one exception, Kenya makes no claim that any of those activities by international organisations actually took place within the disputed maritime area. On the contrary, Kenya's reliance on those marine scientific activities is largely limited to pointing to a handful of maps produced by

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and the Kenyan navy incurred significant costs in patrolling both Somali and Kenyan maritime areas north and south of the parallel of latitude". KCM, para. 96.

[94] KCM, para. 127 (citing *Letter* from Lt. Col. M.R. Atodonyang. Kenya Navy, to Ms. Juster Nkoroi, Head, Kenya International Boundaries Office (5 Oct. 2017). KCM, Vol. II, Annex 48).

[95] *Bangladesh/Myanmar*, paras. 114-115.

those organisations in connection with their research. Not one purports to show the Parties' maritime boundary.

2.66. In any event, even if some of those marine scientific research activities had been undertaken within the disputed area, Kenya makes no claim to have authorised them, which would be necessary in order for those activities to constitute potential evidence of the exercise of authority over the disputed area by Kenya.[96] As such, those activities are incapable of providing any support for a claim that Kenya has engaged in *effectivités* in the disputed maritime area.

2.67. *Second*, even if (*quod non*) Kenya had undertaken marine scientific research activities in the disputed maritime area, they would be legally incapable of providing any support for a claim to a particular maritime boundary. Article 241 of UNCLOS makes this explicit:

> "Marine scientific research activities shall not constitute the legal basis for any claim to any part of the marine environment or its resources".

2.68. *Third*, notwithstanding their legal irrelevance, an analysis of the evidence demonstrates that the marine scientific research activities identified by Kenya provide no arguable factual support for the existence of a parallel maritime boundary:

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[96] Under Article 246(1) of UNCLOS, "Coastal States, in the exercise of their jurisdiction, have the right to regulate, authorize and conduct marine scientific research in their exclusive economic zone and on their continental shelf in accordance with the relevant provisions of this Convention". Similarly, Article 245 of UNCLOS states that "Coastal States, in the exercise of their sovereignty, have the exclusive right to regulate, authorize and conduct marine scientific research in their territorial sea. Marine scientific research shall be conducted only with the express consent of and under the conditions set forth by the coastal State". Kenya does not claim to have authorised any marine scientific research activities undertaken in the disputed areas of the territorial sea, EEZ or continental shelf.

a) Kenya relies on a diagram produced by the Dr Fridtjof Nansen Programme in its survey of fishing routes and stations in September 1982.[97] But (i) the survey did not purport to record the location of Kenya's maritime boundaries; (ii) horizontal and vertical lines were used throughout the diagram for ease of visual representation of the various areas surveyed; and (iii) the particular horizontal line on which Kenya relies corresponds to a location several miles south of the claimed parallel maritime boundary, as Kenya recognises.[98]

b) Kenya also refers to the fact that a survey of fisheries by the UNESCO Intergovernmental Oceanographic Commission ("UNESCO IOC") in 1987-88 referred to seven points in Somalia's EEZ, one of which was roughly parallel with the land boundary terminus.[99] Yet the survey did not purport to record or reflect the location of the Parties' maritime boundary. Nor does it provide any information as for how or why the seven points for examination, six of which were far north of the parallel boundary line now claimed by Kenya, were selected.

c) In addition, Kenya relies on a diagram contained in a report published in 1998 by the UNESCO IOC.[100] The basis on which that diagram was produced is unclear (an ambiguity which is reinforced by the reference to a "MEDIAN LINE" in the legend of the map). Subsequent maps produced by the UNESCO IOC show an equidistant, rather than parallel, boundary line. For example, in 2006 the UNESCO IOC

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[97] KCM, paras. 134-135 and Figure 1-17.

[98] Kenya acknowledges that the northern limit of the "investigated area" was "3.5M south of the parallel of latitude line claimed in the 1979 EEZ Proclamation". KCM, para. 134.

[99] KCM, para. 132 and Figure 1-16.

[100] *See* KCM, para. 136 and Figure 1-18.

produced a report on a workshop on marine biodiversity data mobilisation containing a diagram showing the concentration of poriferan species in the EEZs of coastal states in Africa. The map, reproduced as **Figure R2.3** (in Volume II only) depicts the boundary between Kenya's EEZ and Somalia's EEZ as an equidistance line.[101]

2.69. As for its alleged *effectivités* relating to the exercise of fisheries jurisdiction, Kenya cannot produce a map more persuasive than Figure 1-14. That map—published by the Somali Ministry of Fisheries and Marine Resources on an unknown date before 1987—depicts seven fishery development regions.[102] It does not show (nor does it purport to show) any maritime boundary with Kenya. Nor does it evidence any activities by Kenya.[103]

2.70. Kenya also claims that it "issued fishing licences to foreign vessels indicating the parallel of latitude as the maritime boundary with Somalia".[104] The licenses were, however, issued in 2011-2012,[105] well after Kenya had recognised the existence of a maritime boundary dispute with Somalia. In any event, there is

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[101] U.N. Educational, Scientific & Cultural Organization, Intergovernmental Oceanographic Commission, *Training Course Report No. 89: ODINAFRICA: Marine Biodiversity Data Mobilisation Workshop on Sponges*, U.N. Doc. IOC/2006/TCR/89 (4-18 Nov. 2006). RS, Vol. II, Annex 17. In 2007 the UNESCO IOC produced a materially identical map showing that the boundary between Kenya's EEZ and Somalia's EEZ follows an equidistance line. *See* U.N. Educational, Scientific & Cultural Organization, Intergovernmental Oceanographic Commission, *Nineteenth Session of the IOC Committee on International Oceanographic Data and Information Exchange (IODE-XIX): Ocean Data and Information Network for Africa (ODINAFRICA)*, U.N. Doc. IOC/IODE-XIX/35 (22 Feb. 2007). RS, Vol. II, Annex 18.

[102] KCM, para. 129, Figure 1-14.

[103] Far from supporting the existence of a parallel boundary line, the lines which are shown further up the east coast of Somalia follow a south-easterly direction. This suggests that if the map had included a line for the edge of the southernmost fishery region (which it did not) then that line would have also followed a south-easterly course.

[104] KCM, para. 137.

[105] *Ibid.*

no evidence that Somalia was ever aware that Kenya had issued fishing licences encroaching on Somalia's maritime space.

2.71. In this regard 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. In 2015 the U.N. Monitoring Group on Somalia highlighted the extent of the illegal activities in Somalia's maritime space and Somalia's practical inability to prevent them from occurring. It wrote:

> "Taking 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".[106]

2.72. This purported activity cannot, therefore, support Kenya's claim.

C. ALLEGED *EFFECTIVITÉS*: OIL CONCESSION PRACTICE

2.73. Kenya also tries to found its *effectivités* argument on its oil concession practice in the disputed area. An analysis of the evidence, however, proves that Kenya's historical conduct undermines, rather than supports, its claim to have consistently exercised authority up to a parallel maritime boundary.

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[106] 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), paras. 34-35. RS, Vol. II, Annex 23.

2.74. As Somalia explained in its Memorial,[107] a map of Kenya's oil concessions produced by Petroconsultants S.A. in 1978 shows the northern limit of Kenya's northernmost offshore concession block following a line that closely resembles an equidistance line. Similar maps produced by oil services companies covering the years 1979, 1982, 1984, 1985, 1994, 1995 and 1996 all demonstrate that Kenya's northernmost concession blocks continued to respect an equidistance line until the late 1990s.[108]

2.75. Kenya contests the relevance of those maps in its Counter-Memorial, in part on the (telling) basis that, "during this period, Kenya did not award blocks in that maritime area".[109] Kenya thus admits to having non-*effectivités* in the disputed area. Kenya recognises, however, that several of the maps "do appear to show Block L-5 drawn at the equidistance line in the territorial sea" for several years in the 1990s.[110]

2.76. Indeed, one of the maps that Kenya's cites in support of its claim to a parallel maritime boundary—a map produced by the National Oil Corporation *of Kenya* in 1995—shows clearly that the perimeter of the northernmost concession

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[107] MS, para. 3.21 and Figure 3.5A.

[108] *See* MS, Vol. II, Annexes M2-M7: Petroconsultants S.A., *Kenya (Coastal Area): Synopsis 1979* (Feb. 1980). MS, Vol. II, Annex M2; Petroconsultants S.A., *Kenya (Coastal Area): Synopsis 1982* (Jan. 1983). MS, Vol. II, Annex M3; Petroconsultants S.A., *Kenya: Synopsis 1984* (Jan. 1985). MS, Vol. II, Annex M4; Petroconsultants S.A., *Kenya: Synopsis 1985 (Including Current Activity)* (Apr. 1986). MS, Vol. II, Annex M5; Petroconsultants S.A., *Kenya: Synopsis 1994* (Jan. 1995). MS, Vol. II, Annex M6; Petroconsultants S.A., *Kenya: Synopsis 1995* (July 1996). MS. Vol. II, Annex M7; Petroconsultants S.A., *Kenya: Current Status and Synopsis 1996* (June 1997). MS. Vol. II, Annex M8.

[109] KCM, para. 143.

[110] *Ibid.*, para. 144.

block (L-5) was tailored precisely so that it followed an equidistance line.[111] About that block, Kenya explains in the Counter-Memorial: "Within the EEZ, the block was extended southwards away from the Somali maritime boundary (rather than eastwards along the parallel)".[112] But this only highlights that "the focus of offshore activity [was] in the *southern* portion of the Lamu basin"[113]— that is, away from the disputed area.

2.77. Thus, for two decades following the 1979 Presidential Proclamation, Kenya's practice with respect to the granting of offshore oil concessions was limited to concessions that occasionally went up to—but never beyond—an equidistance line. Indeed, Kenya does not claim in its Counter-Memorial that it awarded oil concessions north of the equidistance line at any point between attaining independence in 1963 and the turn of the century almost four decades later.

2.78. As Somalia has explained in its Memorial, it was only mid-way through Somalia's two-decade long civil war, in the mid-2000s, that Kenya first began to award oil concessions in the area north of the equidistance line.[114] Kenya candidly acknowledges that its expansion into this area in the new millennium was driven by "rising commercial interest".[115]

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[111] *See ibid.*; National Oil Corporation of Kenya, *Hydrocarbon Potential of the Coastal Onshore and Offshore Lamu Basin of South-East Kenya: Integrated Report* (1995). KCM, Vol. II, Annex 38.

[112] KCM, para. 144 (emphasis in original).

[113] *Ibid.* (emphasis added).

[114] MS, para. 3.22.

[115] KCM, para. 146.

2.79. Kenya is notably vague about these activities. While it states that Block L-5 was "reconfigured"[116] on an unspecified date in the early 2000s, it was only in December 2006 that the first exploratory well was drilled in the expanded Block L-5.[117] And even then, the well was just north of the equidistance line, at a point approximately 17.5 M south of the claimed parallel boundary line.[118] Kenya also states that it established a new Block L-13 "along the parallel".[119] Again, no date is provided by Kenya; however, it appears that the first grant of a concession for this block did not occur until 2008.[120]

2.80. Kenya's Counter-Memorial does not refer to any drilling activities or granting of oil concessions between the drilling of the exploratory well in Block L-5 marginally north of the equidistance line in December 2006 and the conclusion of a production sharing contract for Block L-21 on 29 June 2012.[121] By that date, of course, both Parties had long since clearly recognised the existence of a maritime boundary dispute. Indeed, they concluded an MOU about that dispute in 2009. Moreover, the purported extension of those blocks up to a parallel line prompted vigorous formal protests by the Somali Government.[122]

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[116] *Ibid.*, para. 147.

[117] *Ibid.*, para. 151.

[118] *See Ibid.*, para. 151 and Figure 1-25.

[119] KCM, para. 147.

[120] *See* MS, para. 8.20.

[121] As Somalia notes in its Memorial, it appears that Kenya offered a re-drawn Block L-5 for surface exploration and drilling in April 2009. In 2015 (after Somalia's claim was filed before the Court) it was reported that exploratory drilling was scheduled to take place in this block sometime later in 2015. *See ibid*., para. 8.22.

[122] *See ibid*., para. 8.27.

2.81. Accordingly, it can be seen that Kenya's oil concession practice amounted to no more than:

a) Over two decades of not carrying out any activities in the area between the parallel line and the equidistance line, consistent with the existence of an equidistant boundary line;

b) The purported "extension" of only two concession blocks up to a parallel line at a time when Somalia had been afflicted by a decade-long civil war that had destroyed all effective government and enforcement capacity in the country; and

c) The awarding of additional oil concessions covering the disputed area only at various points in time after the Parties had formally recognised the existence of a maritime boundary dispute.

D. OFFICIAL KENYAN MAPS SHOWING AN EQUIDISTANT MARITIME BOUNDARY IN THE TERRITORIAL SEA

2.82. Kenya's position is also contradicted by the fact that since 1979 Kenya has published various maps that depict the maritime boundary with Somalia along an equidistant line, rather than a parallel of latitude. Those maps provide additional evidence that Kenya has not consistently claimed jurisdiction up to a parallel line.

2.83. In 1980 the Kenyan Ministry of Agriculture published a detailed map of Kenya which clearly showed an equidistant maritime boundary in the territorial sea. That map is reproduced as **Figure R2.4** (in Volume II only).[123]

[123] Republic of Kenya, Ministry of Agriculture, *Exploratory Soil Map of Kenya* (1980). RS, Vol. II, Annex 6.

2.84. Fifteen years later, in 1995 the National Oil Corporation of Kenya produced a report on the hydrocarbon potential of the Lamu Basin. The report contains a map which also shows an equidistant maritime boundary in the territorial sea. It is reproduced as **Figure R2.5** (in Volume II only).[124]

2.85. Similarly, in 2003 the Survey of Kenya produced a National Atlas on behalf of the Government of Kenya which contained several maps which all showed a south-easterly boundary with Somalia in the territorial sea,[125] including **Figure R2.6** (in Volume II only).

2.86. Consistent with the terms of the Territorial Waters Act 1972 and the Maritime Zones Act 1989, the website of the Kenyan Marine and Fisheries Research Institute even now contains maps showing an equidistant maritime boundary in the territorial sea. Two of those maps, one showing coral reefs on the Kenyan coastline and the other showing fish landing sites there, are reproduced in Volume II as **Figures R2.7** and **R2.8**.[126]

Section V. Somalia's Conduct Does Not Amount to Acquiescence in Kenya's Claim

2.87. The absence of any consistent pattern of conduct by Kenya in respect of its maritime boundary is fatal to any claim based on alleged "acquiescence". However,

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[124] National Oil Corporation of Kenya, *Hydrocarbon Potential of the Coastal Onshore and Offshore Lamu Basin of South-East Kenya: Integrated Report* (1995). KCM, Vol. II, Annex 38.

[125] *See* Republic of Kenya, Survey of Kenya, NATIONAL ATLAS OF KENYA (5th ed., 2003), pp. 66, 69. RS, Vol. II, Annex 7.

[126] Kenya Marine and Fisheries Research Institute, Kenya Coastal Development Project, *Integrated Coastal Biodiversity Management System: Kenyan Coral Reefs* (4 Oct. 2017), *available at* http://icbims.kmfri.co.ke/maps/221/view. RS, Vol. II, Annex 15; Kenya Marine and Fisheries Research Institute, Kenya Coastal Development Project, *Integrated Coastal Biodiversity Management System: Fish Landing Sites* (4 Oct. 2017), *available at* http://icbims.kmfri.co.ke/maps/231/view. RS, Vol. II, Annex 14.

even if Kenya had engaged in a consistent pattern of conduct (*quod non*), it has put forward no plausible evidence that Somalia has committed any acts or omissions that could conceivably be characterised as "acquiescence" in such conduct. On the contrary (and as Kenya is well aware), 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.

A. KENYA'S ERRONEOUS CLAIM THAT SOMALIA MADE NO PROTEST UNTIL 2014

2.88. Kenya's claim that Somalia failed to protest against Kenya's assertion of a parallel maritime boundary until 2014[127] contradicts Kenya's own pleadings at an earlier stage in these proceedings. In its Preliminary Objections Kenya stated that: "It was only *in 2009* that Somalia first *disputed* Kenya's 1979 EEZ maritime boundary".[128]

2.89. The suggestion that Somalia did not lodge any formal objection prior to 2014 is manifestly untenable given the letter from the Prime Minister of Somalia to the Secretary-General of the United Nations dated 19 August 2009, which stated:

> "The delimitation of the continental shelf between the Somali Republic and the Republic of Kenya has not yet been settled. It would appear that Kenya claims an area extending up to the latitude of the

[127] Kenya makes this erroneous assertion a number of times throughout its Counter-Memorial. *See* KCM, paras. 10, 27, 200.

[128] KPO, para. 18 (emphasis added).

> point where the border reaches the coast, while, instead, in accordance with the international law of the sea, *an equidistance line* normally constitutes the point of departure for delimitation of the continental shelf between two States with adjacent coasts. *Somalia bases itself on the latter view. This unresolved delimitation issue is to be considered as a 'maritime dispute'…*".[129]

2.90. Numerous independent sources confirm that Kenya's claim that Somalia expressed no protest against Kenya's assertion of a parallel maritime boundary until 2014 is manifestly wrong. The evidence before the Court shows that Somalia protested much earlier—consistent with the position it has long adopted on an equidistance boundary—once it resumed having a functioning government after the long civil war.

2.91. In April 2012 *Reuters* published an article reporting on the "row between Kenya and Somalia over their maritime border". The article explained that Somalia's position was that the maritime border "continues into the ocean diagonally southeast and that a horizontal border would be unfair".[130]

2.92. Three months later, *Reuters* reported that Somalia had protested against Kenya's decision to award offshore oil and gas concessions for maritime areas north of the equidistance line. The article explained that the Government of Somalia had "accused Kenya … of awarding offshore oil and gas exploration blocks illegally to multinationals Total and Eni because the concessions lie in

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[129] *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) (emphasis added). MS, Vol. III, Annex 37.

[130] Kelly Gilblom, "Kenya, Somalia border row threatens oil exploration", *Reuters* (20 Apr. 2012). MS, Vol. IV, Annex 104.

waters claimed by Somalia". It added that, "Somalia says the boundary should extend perpendicular to the coastline". [131]

2.93. In July 2012, Stimson, an independent policy research centre in the United States, produced a report entitled *Indian Ocean Rising: Maritime Security and Policy Challenges*. The report contained a map of "Jurisdictional Claims in the Indian Ocean Region", which showed an equidistant Kenya/Somalia EEZ boundary.[132] The Stimson report also stated that Somalia had an "Unresolved maritime boundary with Kenya", while Kenya had an "Unresolved boundary with Somalia".[133]

2.94. Somalia's opposition to a parallel maritime boundary was also recorded by the U.N. Monitoring Group on Somalia in its July 2013 report, in the section entitled "Conflict between Somalia and Kenya over the maritime boundary":

> "The FGS has thus refused to recognise oil licenses granted to multinational companies by Kenya and which protrude into waters defined as Somali according to that perpendicular demarcation line. Oil multinational companies affected by the FGS opposition have included French oil company Total (Kenyan license L22), Italian major ENI (Kenyan licenses L21, L23 and L24), US oil firm Anadarko (Kenyan license L5) and Norway's majority state-funded Statoil (Kenyan license L26) ….
>
> The FGS has persuaded Statoil, Anadarko and Total to withdraw their claims that partially infringe on

[131] Kelly Gilblom, "Somalia challenges Kenya over oil blocks", *Reuters* (6 July 2012). MS, Vol. IV, Annex 107.

[132] 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. RS, Vol. II, Annex 34.

[133] *Ibid*., p. 83.

> Somalia's demarcation line. However, ENI, which has been allocated three licenses that fall within the [*sic*] Somalia's definition of Somali waters has yet to withdraw its claims at the time of submission of this report.[134] The remaining dispute between ENI and the FGS, and the persistence of a contested perpendicular line of demarcation, may serve to create further animosity between the Governments of Somalia and Kenya at a time when both are at loggerheads over the creation of a political administration in Jubaland.
>
> This territorial dispute could exacerbate tensions between Somalia and Kenya that have already been sharpened by political disagreements over the control of Kismayo and the Jubaland territory …".[135]

2.95. Somalia's protests against the claim to a parallel maritime boundary resulted in Kenya's suspension of one oil operator in 2012:

> "Kenya suspended Norwegian oil company Statoil from block L26 in late 2012, as the company was unwilling to meet financial obligations of developing exploration activities in the block while legal uncertainty prevailed over the Kenyan-Somali maritime boundary".[136]

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[134] Footnote 27 in the original, which stated: "In November 2012, an FGS oil official informed ENI in writing that the three other oil majors had withdrawn their claims from Kenyan waters. In February 2013, the FGS was still in negotiations with ENI regarding the withdrawal of their claim, but in email correspondence also left open the possibility of negotiating a prior license which is situated in Puntland". U.N. 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), p. 249, at fn. 27. MS, Vol. III, Annex 64.

[135] *Ibid.*, pp. 248-249, paras. 28-30 (internal footnotes omitted).

[136] *Ibid.*, p. 249, para. 33 (internal footnotes omitted).

B. SOMALIA'S LONGSTANDING POSITION THAT THE PARTIES' MARITIME BOUNDARY SHOULD FOLLOW AN EQUIDISTANCE LINE

2.96. As explained in the Memorial, Somalia has long claimed that the Parties' maritime boundary should follow an equidistance line.[137]

2.97. As long ago as 1974, Somalia articulated its claim to an equidistance line during the UNCLOS negotiations. Kenya was aware of this position. As Kenya's representative noted during the third session of the Conference:

> "We should remain very vigilant in this respect as our neighbours—both Tanzania *and Somalia*—seem to have had the malicious intention of distorting the marine borders when they extended their territorial sea, *specifying the median line as the dividing line* …".[138]

2.98. Consistent with that position, as Kenya notes in its Counter-Memorial, in 1978 the Somali Government offered an oil and gas concession block which followed a south-easterly line that closely tracked an equidistance line for approximately 100 M.[139]

2.99. The claim to an equidistant maritime boundary was formally enshrined in Article 4(6) of the Somali Maritime Law of 1988, which provided that the maritime boundary with Kenya "is a straight line towards the sea".[140] As Somalia has

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[137] *See, e.g.*, MS, paras. 3.6, 3.21 n. 95.

[138] Permanent Mission to the United Nations of the Republic of Kenya, *Report on the Work of the Second Session of the Third United Nations Conference on the Law of the Sea, held in Caracas, Venezuela (20 June-29 Aug. 1974)*, Doc. No. 273/430/001A/15 (28 Oct. 1974), para. 80 (emphasis added). KCM, Vol. II, Annex 11.

[139] KCM, para. 141.

[140] Somali Democratic Republic, Ministry of Fisheries and Sea Transport, *Somali Maritime Law* (1988), Art. 4(6). MS, Vol. III, Annex 10.

explained—and as Kenya notably disregards in its Counter-Memorial—while the Somali language has no word precisely equivalent to the English word "equidistance", it is clear that the language of the 1988 Law was intended to describe an equidistance line.[141] At no time after the 1988 Law was enacted did Kenya lodge any objection to the existence of such a boundary line. On the contrary, Kenya explicitly endorsed the principle of an equidistant maritime boundary the following year (at least in the territorial sea) when it enacted the Maritime Zones Act 1989—a legislative endorsement that remains in force today.[142]

2.100. The position reflected in Somalia's 1988 Law is consistent with its repeated objections to Kenya's claim to a parallel boundary. In contrast to Kenya, there is no conflict between the position that Somalia advances before the Court and the content of Somalia's own maritime legislation for the last 30 years.

2.101. In this regard, various maps produced by independent third parties during the period of Somalia's alleged acquiescence show a maritime boundary along an equidistance line, not a parallel of latitude. Those maps reflect and are consistent with Somalia's longstanding support for a boundary with Kenya based on equidistance, and undermine again Kenya's claim that Somalia acquiesced, with binding effect, in the parallel.

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[141] MS, para. 3.6, fn. 62. In the Somali language no word bears precisely the same meaning as "equidistance". The Somali Maritime Law uses the expression "straight line toward the sea". The Government of Somalia considers that this expression was clearly intended to describe an equidistance line rather than (as Kenya suggests) a parallel line.

[142] The Maritime Zones Act 1989 provides in section 3(4) that: "On the coastline adjacent to neighbouring States, the breadth of the territorial waters shall extend to every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial waters of each of respective states is measured". Republic of Kenya, Chapter 371, *Maritime Zones Act* (25 Aug. 1989). MS, Vol. III, Annex 20.

2.102. For example, a 1992 study of *The Maritime Boundaries of the Indian Ocean Region*[143] depicts the Somalia-Kenya boundary along an equidistance line, not the parallel of latitude (reproduced in Volume II as **Figure R2.9**).

2.103. In 2001 the multinational oil company TotalFinaElf delivered a presentation to the Government of Somalia. The presentation contained several maps which all showed the Jorre concession block extending to the equidistance line.[144] An example is reproduced as **Figure R2.10** (following page 54).

2.104. As noted above, in 2012 the U.N. Monitoring Group on Somalia published a map illustrating the AMISOM monitoring sectors.[145] The map, at Figure R2.1 (following page 30), clearly shows the southern sector extending up to an equidistance line between Somalia's and Kenya's maritime zones.

2.105. Kenya makes much in its Counter-Memorial of a handful of graphics produced by Soma Oil, a private company incorporated in the United Kingdom, which depict a parallel line.[146] But the graphics were presented at a conference in Kenya *in 2014* (well after the dispute had arisen between the Parties). The maps simply reflect that, given the maritime boundary dispute, Somalia has complied with its obligations under Article 83(3) of UNCLOS by refraining from undertaking any measures in the disputed area that might jeopardise or hamper the reaching of a final agreement on the Parties' maritime boundary. That Somalia has complied with its obligations under UNCLOS, while Kenya has not, provides no

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[143] Vivian Louis Forbes, THE MARITIME BOUNDARIES OF THE INDIAN OCEAN REGION (1995), p. 159. RS, Vol. II, Annex 32.

[144] Total Fina Elf, *Meeting with Authorities of Somalia* (3 Feb. 2001), slides 2, 32, 34, 35, 38. RS, Vol. II, Annex 25.

[145] *See supra* para. 2.48.

[146] *See* KCM, paras. 160-162.

support for Kenya's claim. Indeed, as Article 83(3) expressly states, Somalia's compliance with its obligations under that article "shall be without prejudice to the final delimitation".

2.106. As a result, Kenya's claim that "Somalia did not either protest that line [the parallel line asserted by Kenya] or claim a contrary equidistance line as its maritime boundary until 2014",[147] is unsupported by the evidence before the Court and is wrong. In fact, Somalia has consistently claimed that the maritime boundary should follow an equidistance line and has repeatedly and emphatically objected to Kenya's claim to a parallel maritime boundary. Apart from the many contradictions in Kenya's own conduct and legislation, its claim that Somalia has acknowledged the existence of a parallel maritime boundary is manifestly unsustainable on the evidence.

C. SOMALIA'S PRACTICAL INABILITY TO REGULATE ITS MARITIME SPACE DURING THE LONG CIVIL WAR

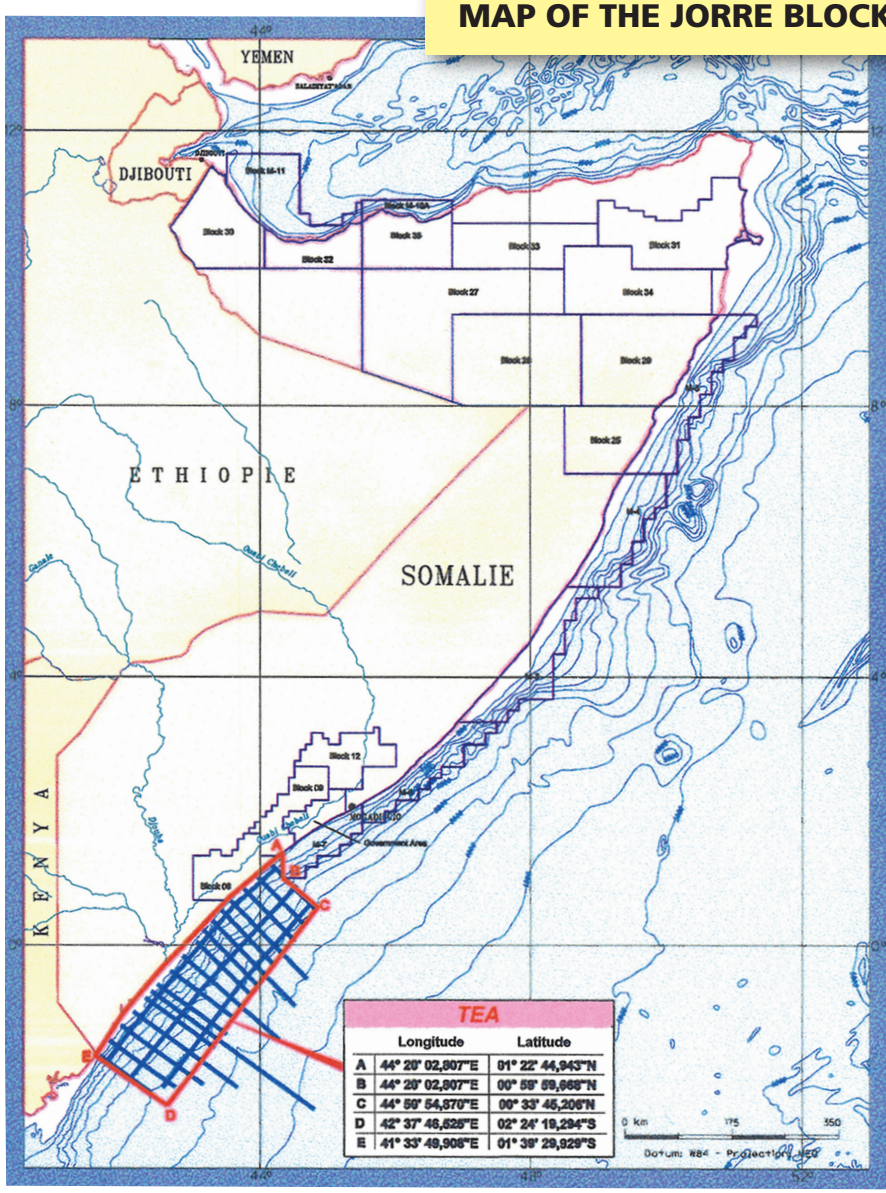
2.107. Finally, the assessment of Somalia's actions and inactions in relation to Kenya's unilateral claims and activities cannot be divorced from the circumstances prevailing in Somalia during this period, in particular the devastating and long-lasting civil war, including the lack of a central governmental authority for approximately two decades.

2.108. Kenya is particularly dismissive about this situation and denies that any legal consequence may stem from it with respect to a so-called duty to protest.[148] Yet when "a lack of protest would normally appear to suggest a degree of acquiescence, [several] elements need to be weighed by the Tribunal in considering

[147] *Ibid.*, para. 200.

[148] *Ibid.*, paras. 228-229.

MAP OF THE JORRE BLOCK



Source: Map from presentation delivered by TotalFinaElf to the Government of Somalia (2001).

Figure R2.10

the evidence … [including] the fact that civil hostilities were in progress".[149] In the same vein, the *Eritrea/Yemen* tribunal considered it to be unreasonable to oppose to Eritrea its lack of protest when considering the circumstances in which the 1990 Sharing Agreement between Yemen and British Petroleum was concluded:

> "Ethiopia was then locked in its final struggle with the Eritrean liberation movement, the Mengistu regime was close to collapse, and to suggest that Eritrea today should be taxed with Ethiopia's failure during that period to find and protest the terms of the agreement may be unreasonable".[150]

2.109. Kenya has recognised Somalia's practical inability to acquiesce in any maritime boundary during the civil war that engulfed the country. Kenya's Attorney-General himself described the situation in his closing submission before the Court at the hearing on Kenya's Preliminary Objections: "Somalia has only recently begun to emerge from a long period of instability caused by civil war, humanitarian disaster and widespread terrorism. In particular, Somalia has no maritime enforcement capacity".[151] Indeed, Kenya's counsel noted that even today, "Somalia is still in the midst of a fragile post-conflict transition".[152]

2.110. Over a decade earlier, in 2005, the Transitional Federal Government of Somalia and the Government of Kenya signed an Agreement on Technical and Economic Co-Operation which expressly "[r]ecogniz[ed] that the conflicts that have ravaged Somalia for a decade and a half have spared little of the country's

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[149] *Eritrea/Yemen*, para. 306.

[150] *Ibid*., para. 415. *See also ibid*., para. 520 ("These agreements were not protested by Ethiopia (though it should be remembered that the Hunt agreement was made at a time when the Ethiopian civil war was still raging)").

[151] CR 2016/12, p. 40, para. 3 (Muigai).

[152] CR 2016/10, pp. 25-26, para. 25 (Akhavan).

natural and man-made assets" and that "the destruction of Somalia's infrastructure … is overwhelming".[153]

2.111. The breakdown in the infrastructure of the State made it impossible for Somalia to govern and protect its natural assets. As the U.N. Secretary-General explained in 2011: "Since the overthrow of the Siad Barre regime in 1991, there has been little or no national framework for environmental and natural resource governance in Somalia due to the absence of an effective central government".[154] In particular, "[t]he lack of State control or governance results in widespread misuse of Somalia's natural resources".[155] Moreover, "a weak legal and institutional framework and the inability of the Transitional Federal Government to enforce laws within Somali waters, makes the [Somali maritime] area attractive for illegal, unreported and unregulated fishing".[156]

2.112. The Secretary-General's report continued:

> "Although Somalia has signed a number of applicable international and regional agreements, the Government and regional administrations lack implementation and enforcement capacity. The challenges are enormous: political instability; inadequate baseline data; absence of research and monitoring capabilities; weak technical capacity;

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[153] 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 Sept. 2005). KCM, Vol. IV, Annex 149.

[154] 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), para. 22. RS, Vol. II, Annex 19.

[155] *Ibid.*, para. 5.

[156] *Ibid.*, para. 18. In this respect, the Report explained that: "According to a number of Somalia and international observers, with the fall of the Siad Barre regime, foreign-flagged industrial fishing trawlers began encroaching on the resource-rich Somali waters …. According to a 2005 FAO estimate, approximately 700 foreign-flagged trawlers were engaged in illegal, unreported and unregulated fishing in and around Somali waters". *Ibid.*, para. 40.

> and lack of funding. Somalia's lack of monitoring and law enforcement capabilities makes it vulnerable to criminal activities, including the illegal dumping of toxic waste".[157]

2.113. Against this backdrop, Kenya's suggestion that Somalia should have promptly objected—"within no more than a few weeks or months"[158]—to any maritime claim advanced by Kenya in the 1990s or 2000s is as unrealistic as it is without legal foundation. It is particularly unjustified to expect a State ravaged by civil war and with no functioning government to lodge formal diplomatic protests against a purported claim to a parallel boundary line which is made through a unilateral declaration, in direct contradiction of Kenya's own maritime legislation, and at stark variance with the absence of any *effectivités* in the maritime space up to the claimed boundary line.

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2.114. For all of the foregoing reasons, Kenya's claim to a maritime boundary consisting of a parallel of latitude based on Somalia's purported acquiescence in such a boundary must be rejected. As Kenya has offered no other purported justification for the boundary it has proposed, the Court should delimit the maritime boundary between Somalia and Kenya in accordance with the now-standard three-step method, as described in the next Chapter.

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[157] 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), para. 61. RS, Vol. II, Annex 19.

[158] KCM, para. 237.

CHAPTER 3
DELIMITATION OF THE MARITIME BOUNDARY

3.1. Chapter III of Kenya's Counter-Memorial argues that even if Somalia did not acquiesce in its parallel boundary claim, the "application of the principle of equitable delimitation under international law would lead to the same result".[159] The argument appears as a fall-back, premised on the evident weakness of the submissions on "acquiescence". This Chapter explains why the alternative argument fails as badly as its main one.

3.2. **Section I** exposes the many errors in Kenya's presentation. In particular, it shows that the reasons Kenya offers for attempting to bypass the three-step method regularly used by the Court to delimit maritime boundaries is unpersuasive. The text and negotiating history of the Convention, State practice and jurisprudence do not support Kenya's attempt to jettison the Court's now well-established method.

3.3. **Section II** addresses the application of the standard three-step method and confirms that it leads inevitably to the conclusion that the most equitable boundary is an unadjusted equidistance line, as Somalia has proposed. None of Kenya's arguments against the equitableness of the equidistance line withstands scrutiny. In the circumstances of this case, the equidistance line does not inequitably cut off the maritime entitlements of either Party and is plainly proportionate.

Section I. Kenya Has Provided No Good Reason to Ignore the Court's Standard Method

3.4. Kenya argues that application of the principle of equitable delimitation leads to precisely the same parallel boundary as that upon which its improbable

[159] KCM, para. 275.

"acquiescence" claim is based. Its argument turns on three core assertions, none of which withstands scrutiny:

- *First*, Kenya argues that the now-standard three-step method—i.e., the equidistance/special circumstances rule (in the territorial sea) and the equidistance/relevant circumstances rule (in the EEZ and continental shelf)—is not mandatory;[160]

- *Second*, it contends that the Parties have shown through their practice that they consider Kenya's parallel of latitude to be an equitable result, and that such practice should be respected; and

- *Third*, it maintains that the "parallel of latitude is in any event objectively an equitable solution, taking into account all the relevant circumstances in this maritime delimitation".[161]

3.5. Somalia addresses each of these arguments in turn.

A. THE EQUIDISTANCE/RELEVANT CIRCUMSTANCES METHOD IS THE STANDARD METHOD APPLICABLE BEFORE THE COURT

3.6. Kenya acknowledges that the equidistance/relevant circumstances method is "commonly applied in order to achieve an equitable result".[162] The Court's most recent maritime boundary delimitation decision—*Costa Rica v. Nicaragua*—

[160] Kenya's Counter-Memorial does not separately address the delimitation of the territorial sea under Article 15 of the Convention and the EEZ/continental shelf under Articles 74 and 83. Because the Court's approach to the delimitation of these zones is functionally identical, Somalia too will not give them separate treatment in this Reply.

[161] *See* KCM, para. 278(e).

[162] *Ibid.*, para. 276.

reaffirmed that the three-step method is the "established methodology".[163] And in the immediately preceding delimitation case—*Peru v. Chile*—the Court similarly recognized that the equidistance/relevant circumstances method is "[t]he usual methodology applied by the Court".[164]

3.7. Despite Kenya's recognition that the three-step method is the "established" and "usual" approach, it nevertheless contends that it is not "mandatory or … appropriate in all circumstances".[165] According to Kenya, "[a]n equidistance line … is only one method among others that may be deployed to achieve the overriding objective of an equitable solution".[166]

3.8. The Court will immediately note the conceptual confusion at the heart of Kenya's argument: it erroneously equates the equidistance/relevant circumstances method, on the one hand, with an equidistance line, on the other. As the Court well knows, however, the two are not the same.

3.9. The equidistance/relevant circumstances "method" (which is perhaps more accurately described as a "process") is the approach international courts and tribunals follow to achieve the equitable result UNCLOS requires.[167] An equidistance line, in contrast, is a particular delimitation method that may—or may

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[163] *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua)*, Merits, Judgment, I.C.J. Reports 2018 (hereinafter "*Costa Rica v. Nicaragua*"), para. 135.

[164] *Maritime Dispute (Peru v. Chile)*, Judgment, I.C.J. Reports 2014, p. 3, para. 184.

[165] KCM, para. 276.

[166] *Ibid.*, para. 296.

[167] Following that process, the Court (1) draws a provisional equidistance line, (2) determines whether there are relevant circumstances that warrant an adjustment to that line and (3) confirms that the delimitation achieved by application of the first two steps does not result in a marked disproportion and is not otherwise inequitable. *See Romania v. Ukraine*, paras. 115-122.

not—result from the application of the equidistance/relevant circumstances process.

3.10. Accordingly, while there is truth to Kenya's assertion that "[n]on-equidistance methods … are also admitted by international law",[168] that cannot itself be a reason to abandon the three-step method. Whether or not an equidistance line is the proper *end-point* of the delimitation process, the Court has long made clear that, with only very limited exceptions, it must be the *starting point* (subject to later adjustment if warranted). Indeed, the Court has indicated that the only time it will *not* be appropriate to start the delimitation process with an equidistance line is when "the construction of [an equidistance line] is not feasible".[169]

3.11. Notably, Kenya makes no argument that the construction of an equidistance line is not feasible in this case. Instead, it attempts to argue that its refusal to begin the delimitation with an equidistance line and follow the rest of the three-step process is supported by the relevant provisions of UNCLOS and its negotiating history, State practice and jurisprudence.

3.12. Before addressing each of these erroneous assertions, a preliminary observation is required. Specifically, Kenya's lengthy discussion of UNCLOS, the State practice and the jurisprudence is presented at an entirely theoretical level. The purpose is, as stated, to show generally that the three-step method is not mandatory in all cases.

3.13. When it comes to explaining why the three-step method should be set aside in the particular circumstances of this case, however, Kenya's Counter-Memorial

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[168] KCM, para. 296.

[169] *Nicaragua v. Colombia*, para. 195.

is notably restrained. It limits itself to the argument that "in the present case application of the 'three-stage' methodology is not appropriate because the parties have already indicated what is an equitable solution, namely the parallel of latitude".[170] But it offers no practical or juridical impediment to the use of the "three-stage" method in this case.

3.14. In other words, Kenya says, since the Parties' have both nominally recognized the parallel of latitude as fair, the Court need not waste its time with the three-step method. This, of course, is an obvious re-purposing of Kenya's acquiescence argument in a different guise. As such, it can and should be rejected for all the reasons expressed in the previous chapter. Somalia has never acquiesced in Kenya's parallel claim, or otherwise done anything ever to indicate that it considers the parallel to be an equitable solution.[171]

3.15. The reason Kenya offers for setting aside the three-step method in this case thus fails. As a result, Kenya's effort to argue that the three-step method is not mandatory in all cases is beside the point. Since Kenya has not shown any valid reason to dispense with the method in this case, Somalia respectfully invites the Court to apply that method.

3.16. That said, in the interest of completeness, and so as not to let Kenya's presentation go unanswered, Somalia will respond to Kenya's irrelevant assertions concerning the text and negotiating history of UNCLOS, State practice and jurisprudence in the sections that follow.

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[170] KCM, para. 308(a).

[171] *See supra* paras. 2.44-2.48, 2.86-2.112.

B. THE REASONS KENYA GIVES FOR IGNORING THE THREE-STEP METHOD ARE UNPERSUASIVE

1. The Provisions and Negotiating History of UNCLOS

3.17. With respect to the provisions of UNCLOS, Kenya states that Articles 73 and 84 of the Convention "do not prescribe any mandatory methodology to achieve an equitable solution".[172] It then points to the fact that during the negotiations, a number of States took the view that "that maritime delimitation must be based *not* on equidistance, but on the principle of 'equitable result'".[173]

3.18. The fact that Articles 73 and 84 do not prescribe any mandatory delimitation method may be correct, but it is also irrelevant. The Court's jurisprudence, and that of other international tribunals, has brought structure and predictability to the delimitation process in the 36 years since the signing of the Convention. For the Court, the three-step method represents the "develop[ment] [of] its case law in the direction of greater certainty".[174]

3.19. Kenya's argument that some States took the view that "maritime delimitation must *not* be based on equidistance"[175] is equally irrelevant, and reflects the same conceptual confusion mentioned above. That is, the three-step process and the equidistance method are not the same. Applying the three-step method is not the same as insisting on equidistance. The three-step method is consistent with

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[172] KCM, para. 298.

[173] *Ibid.* (emphasis in original).

[174] Speech by H.E. Judge Gilbert Guillaume, President of the International Court of Justice, to the Sixth Committee of the General Assembly of the United Nations (31 Oct. 2001), p. 8. KCM, Vol. III, Annex 120.

[175] KCM, para. 298 (emphasis in original).

the possibility that, in appropriate circumstances (which are not present in this case), the final delimitation line will be something other than an equidistance line.

3.20. With respect to the negotiating history, Kenya also points to comments made by Somali representatives to the effect that the delimitation process should be guided by "equitable principles".[176] Kenya appears to consider that there is some contradiction between equitable principles, on the one hand, and the equidistance/relevant circumstances method on the other. There is not. The equidistance/relevant circumstances method was developed by the Court precisely to ensure that the delimitation process achieves an equitable solution. Kenya itself admits that the standard three-step method is a means of "achiev[ing] an equitable result".[177] There is therefore nothing in the statements by Somalia's representatives that preclude Somalia (and the Court) from relying on the three-step method in this case.

3.21. Moreover, even if Somalia's negotiating position during UNCLOS III could somehow be said to be inconsistent with the application of the equidistance/relevant circumstances method (*quod non*), it would not be reasonable, necessary or consistent with the law to reject the application of that method on such a tenuous basis now. The equidistance/relevant circumstances method had not crystallized into law 36 years ago, but it has now. Kenya offers no reason not to apply it here.

[176] *Ibid.*, para. 300.

[177] *Ibid.*, para. 276.

2. State Practice

3.22. Concerning State practice, Kenya argues that "States use a range of methods in order to achieve an equitable solution".[178] Kenya considers this "highly significant" for the Court's choice of a method of delimitation[179] for two reasons: (a) "State practice is a constituent element of customary international law", and (b) it constitutes "'subsequent practice' within the meaning of Article 31(3)(b) of the Vienna Convention on the Law of Treaties".[180] Kenya is misguided on both counts.

3.23. *First*, agreements between other States cannot be indicative of the law applicable in the context of an adjudicated delimitation. Agreement is one of two means of delimitation under UNCLOS; the other is third-party dispute resolution. In the case of agreements, the fairness of the result is evidenced by the parties' decision to enter into the agreement itself. In the case of adjudicated delimitations, the three-step method is the established approach for reaching an equitable result.

3.24. It is also far from clear that such agreements can, as such, be said to reflect rules of customary international law, much less customary law that might warrant a departure from the three-step process in this case. Maritime delimitation agreements are frequently influenced by extra-legal considerations—political, historical, economic and so on.[181] Each agreement turns on its own facts. Moreover,

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[178] *Ibid.*, para. 302.

[179] *Ibid.*, paras. 302-303.

[180] *Ibid.*, para. 303.

[181] Kenya shares this view. *See* CR 2016/10, p. 17, para. 10 (Muigai) (arguing that a "full and final settlement will have to contain several important elements that call for a negotiated agreement", some of which apparently cannot be taken into account in a legal proceeding); CR 2016/12, p. 40, para. 3 (Muigai) ("This maritime boundary dispute arises in a delicate political context. … The maritime boundary delimitation between Kenya and Somalia requires sensitive bilateral negotiations that can encompass not just strictly legal issues, but also our very real political and security concerns, as well as practical arrangements to address them".); *Letter* from H.E. Githu Muigai, Attorney-General and the Agent of the Republic of Kenya, to H.E. Mr. Philippe Couvrer,

Kenya has not explained how the delimitation agreements it refers to manifest the requisite *opinio juris*.

3.25. *Second*, Kenya also says that State practice constitutes "'subsequent practice' … relevant to the interpretation of UNCLOS".[182] This argument is equally unsupportable.

3.26. Article 31(3)(b) of the Vienna Convention provides that subsequent practice shall "be taken into account" in interpreting UNCLOS if it "establishes the agreement of the parties regarding [the treaty's] interpretation".[183] Somalia does not see how State practice in reaching bilateral maritime delimitation agreements can be considered indicative of any agreement regarding legal interpretation of Articles 74 or 83. This is especially so in light of the fact, mentioned above, that bilateral agreements are often influenced by non-legal factors.

3.27. Moreover, whatever the nominal state or characterization of State practice, the Court has been categorical. Insofar as delimitation method is concerned, "[t]he legal rule is now clear": "[i]n all cases, the Court" follows the standard method unless it is not feasible.[184]

3.28. In another strained attempt to extract something from the State practice, Kenya conjures up a "rule" of regional custom in favour of delimiting maritime

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Registrar of the International Court of Justice, No. AG/CONF/19/153/2VOL.IV (26 Sept. 2016). RS, Vol. II, Annex 13.

[182] KCM, para. 303.

[183] Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 332 (23 May 1969), entered into force 27 Jan. 1980, Art. 31(3)(b). Written Statement of Somalia (hereinafter "WSS") (5 Feb. 2016), Vol. II, Annex 1.

[184] Speech by H.E. Judge Gilbert Guillaume, President of the International Court of Justice, to the Sixth Committee of the General Assembly of the United Nations (31 Oct. 2001), p. 11. KCM, Vol. III, Annex 120.

boundaries by parallels of latitude.[185] It asserts that the "parallel of latitude has all along been considered a solution that would 'be suitable for equitable integration into the existing delimitations of the [East] African region'".[186]

3.29. That is not true. Parallels of latitude have not "all along been considered a[n] [equitable] solution"[187] in East Africa, and Kenya has provided no compelling evidence to support its claim. The only agreements Kenya points to are Tanzania's two maritime boundaries—with Kenya in the north and Mozambique in the south. These two agreements account for just a tiny number of the many potential maritime boundaries on the "African coast of the Indian Ocean".[188] Regional custom cannot be built on the odd example or two.

3.30. More fundamentally, the agreements Kenya points to can have no bearing on the delimitation between Somalia and Kenya. In its most recent maritime boundary decision in *Costa Rica v. Nicaragua*, the Court made it clear that nearby delimitations, whether effected by agreement or by adjudication, can have no bearing on the delimitation at hand.

3.31. In response to Costa Rica's argument that its agreement with Panama was relevant to the delimitation with Nicaragua, the Court stated that a

> "judgment rendered by the Court between one of the Parties and a third State or between two third States cannot per se affect the maritime boundary between the Parties. *The same applies to treaties concluded*

[185] *See* KCM, paras. 312, 325, 342.

[186] *Ibid.*, para. 325.

[187] *See ibid.*

[188] *Ibid.*, para. 323.

> *between one of the Parties* and a third State or between third States".[189]

3.32. Accordingly, Kenya's attempt to invoke a "rule" of regional practice—especially one that does not exist—is unavailing.

3. Jurisprudence

3.33. Kenya argues that "[t]he jurisprudence of the Court demonstrates that: (a) [t]he three-stage approach is a common but not mandatory methodology; and that (b) [o]ther methods may be and are used, including delimitation using the parallel of latitude".[190] It also argues that "[a] mechanical application of equidistance, including the 'three-stage' methodology, would be contrary to the relevant provisions of UNCLOS and inconsistent with State practice".[191]

3.34. By asserting that a "mechanical application of … the 'three-stage' methodology … would be contrary to the relevant provisions of UNCLOS and inconsistent with State practice", Kenya appears to be suggesting that the Court has gotten the law wrong all these years. Somalia disagrees with that proposition. As indicated above, the Court has rightly made it clear that the three-step method is now the "usual" and "established" method it applies to achieve an equitable solution.[192]

3.35. As former President Guillaume stated more than 15 years ago in his 2001 address to the Sixth Committee of the U.N. General Assembly (a speech on which

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[189] *Costa Rica v. Nicaragua*, para. 123 (emphasis added).

[190] KCM, para. 307.

[191] *Ibid.*, para. 308.

[192] *See supra* paras. 3.6-3.11.

Kenya itself relies[193]): "The legal rule is now clear": "In all cases, the Court … must first determine provisionally the equidistance line … [and] then ask itself whether there are special or relevant circumstances requiring this line to be adjusted with a view to achieving equitable results".[194]

3.36. Kenya can therefore obtain no advantage from citing to cases dating back to 1982 and earlier, well-before the three-step method became settled, to support its unorthodox view of the jurisprudence.[195] For this reason, Somalia sees no need to burden the Court with a case-by-case examination of the jurisprudence Kenya cites.

3.37. Moreover, the only justification the Counter-Memorial offers for departing from the three-step method in this case is unpersuasive. As stated, it argues that "in the present case application of the 'three-stage' methodology is not appropriate because the Parties have already indicated what is an equitable solution, namely the parallel of latitude".[196]

3.38. Kenya purports to base this argument on the Court's observation in its 1982 Judgment in *Tunisia/Libya* that "'the Court must take into account whatever indicia are available of the line or lines which the Parties themselves may have considered

[193] *See* KCM, para. 282, fn. 380.

[194] Speech by H.E. Judge Gilbert Guillaume, President of the International Court of Justice, to the Sixth Committee of the General Assembly of the United Nations (31 Oct. 2001), p. 11. KCM, Vol. III, Annex 120.

[195] These cases include: the 1969 *North Sea Continental Shelf* cases, cited at KCM, para. 312; the ICJ's 1982 *Tunisia/Libya* and 1984 *Gulf of Maine* decisions, cited at KCM, para. 313; and decisions of *ad hoc* arbitral tribunals in *Guinea/Guinea-Bissau* (1985) and *St. Pierre & Miquelon* (1992), also discussed at KCM, para. 313.

[196] KCM, para. 308(a).

equitable or acted upon as such'".[197] According to Kenya, since both Kenya and Somalia have, through their practice, indicated that they consider the parallel of latitude to be equitable, the Court must give effect to the parallel.

3.39. Somalia showed in Chapter 2 of this Reply that it has never indicated that it considered the parallel boundary to be equitable.[198] Kenya's argument based on *Tunisia/Libya* therefore fails on the evidence before the Court.

3.40. But even if there were some limited concordant practice (which there is not), Kenya's argument would still fail. The recent judgment of the ITLOS Special Chamber in *Ghana/Côte d'Ivoire* is particularly instructive in this regard. In that case, there was an undisputed record of mutual, concordant and substantive practice (including in the issuance of oil concessions) around the same delimitation line over the course of four decades—conduct that was much more consistent and uniform than Kenya even argues is the case here.

3.41. Ghana first argued that there was a tacit agreement between the parties. The Special Chamber rejected that argument.[199] Ghana also argued in the alternative exactly what Kenya argues here: that the parties' indication of the line they considered equitable must be given effect, or at least considered a "relevant circumstance" requiring adjustment of the provisional equidistance line.[200]

3.42. The Special Chamber dismissed Ghana's arguments as an unjustifiable "attempt to revive a tacit maritime boundary that was rejected by the Special

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[197] *Ibid.*, para. 314 (citing *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, I.C.J. Reports 1982, p. 18, para. 118).

[198] *See supra* paras. 2.87-2.106.

[199] *Ghana/Côte d'Ivoire*, paras. 211-228.

[200] *Ibid.*, paras. 102, 104, 457-460.

Chamber by circumventing the high standard of proof required for the existence of a tacit agreement". In rejecting Ghana's alternative argument, the Chamber explained that to accept it "would, in effect, undermine its earlier finding on the existence of a tacit agreement".[201]

3.43. The Court should do the same here. Kenya cannot revive its unpersuasive acquiescence argument by dressing it up in the garb of "equitable principles".

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3.44. For all these reasons, Kenya has offered no reason why the Court should depart from the standard three-step method in this case.

Section II. The Three-Step Method Shows the Equidistance Line to Be an Equitable Solution

3.45. Because it resists the application of the equidistance/relevant circumstances approach, Kenya's Counter-Memorial makes no argument that applying the standard method yields the parallel of latitude that Kenya claims. Nor does it offer any criticism of the manner in which Somalia applied the method in its Memorial.

3.46. Kenya has nothing to say about the definition of the relevant coasts and relevant area, the construction of the provisional equidistance line or Somalia's conduct of the disproportionality test. The reason Kenya fails to engage with the three-step method is obvious: no faithful application of that process could possibly result in the parallel of latitude, or anything close to it.

[201] *Ibid.*, para. 478.

3.47. To the contrary, the result of the three-step method is the unadjusted equidistance line identified in Somalia's Memorial. Somalia will briefly show again below how applying the three-step method results in an unadjusted equidistance line, and not the parallel of latitude Kenya claims.

A. THE CONSTRUCTION OF THE PROVISIONAL EQUIDISTANCE LINE

1. Starting Point of the Maritime Boundary

3.48. The construction of a provisional equidistance line begins with the identification of the land boundary terminus ("LBT"). There is little difference between the Parties on this point.

3.49. In March 2014, the Parties agreed that they would "rely on Pillar BP29 as reflected in the 1924 Anglo-Italian Treaty to constitute the starting point solely for the purposes of establishing a maritime boundary".[202] There are therefore just two issues for the Court to resolve: (1) the precise location of BP29 and (2) how to connect BP29 (which is located slightly inland) to the low-water line.

3.50. With respect to the first issue, Somalia explained how it determined the location of BP29 in its Memorial.[203] Kenya takes no issue with Somalia's method but comes up with slightly different coordinates. Whereas Somalia places BP29 at 1°39'43.30" S - 41°33'33.49" E, Kenya claims that it is located at 1°39'43.22" S - 41°33'33.19" E. The difference between the two coordinates is *de minimis*, just some 10 metres.

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[202] Government of Somalia and Government of Kenya, *Joint Report on the Kenya-Somali Maritime Boundary Meeting, 26-27 Mar. 2014* (1 Apr. 2014), pp. 3-4. MS, Vol. III, Annex 31.

[203] MS, paras. 4.18-4.20.

3.51. The discrepancy between the two points, such as it is, appears to relate to the imprecision of geo-rectifying different satellite images.[204] Because the difference is so small, Somalia would be content for the Court to adopt Kenya's proposed coordinates for BP29.

3.52. BP29 cannot, however, be the starting point of the maritime boundary because, as stated, it is not located on the coast. This raises the second issue: how to connect BP29 to the low-water line.

3.53. The 1927 Agreement provides that the land boundary extends from BP29 to the sea in a south-easterly direction "in a straight line at right angles to the general trend of coastline at *Dar Es Salam*".[205] Consistent with the agreement, Somalia's Memorial connected BP29 to the low-water line by means of a line perpendicular to the general direction of the coast.[206]

3.54. Kenya agrees that the 1927 Agreement reflects the Parties' understanding on the land boundary.[207] It nevertheless suggests that Somalia's method is erroneous because it connects BP29 to the low-water line, whereas, Kenya says,

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[204] This discrepancy can be seen by comparing **Figures R3.1A** and **R3.2A** (in Volume II only). Figure R3.1A shows Somalia's and Kenya's proposed locations for BP29 plotted on Google Earth imagery from 2010. (**Figure R3.1B** is an unannotated version of the same image.) Figure R3.2A depicts the Parties' proposed locations for BP29 plotted on Digital Globe imagery taken on an unknown date. (**Figure R3.2B** is an unannotated version of the same Digital Globe image.) As the Court can see, the spot on the ground that Somalia identified as the location of BP29 based on the Google Earth imagery (Figure R3.1A) is virtually identical to the location of the same spot on the Digital Globe imagery (Figure R3.2A).

[205] 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), Appendix I, First Part. MS, Vol. III, Annex 3.

[206] MS, para. 4.22.

[207] KCM, para. 29. *See also* MS, para. 4.2, n. 149.

the 1927 Agreement provides that BP29 "must be connected to the 'line of mean sea-level ordinary spring tides'".[208]

3.55. Kenya has misread the 1927 Agreement. The 1924 Treaty between Italy and the United Kingdom originally defined the last segment of the land boundary by means of a line running "due southwards" to a point "on the coast".[209] It then provided: "The coast shall be defined as the line of mean sea level ordinary spring tides".[210]

3.56. But when the Jubaland Boundary Commission surveyed and demarcated the entirety of the new boundary between 1925 and 1927, it decided to move the short section of the boundary running due south slightly to the west, "so that its southern terminal point should be 15 metres inland from high water mark"[211]; i.e., the location of BP29. From that newly defined point, the final section of the boundary was redefined to run in a south-easterly direction "in a straight line at right angles to the general trend of coastline at *Dar Es Salam*".[212] In other words, the 1924 definition of "the coast" as "the line of mean sea level ordinary spring tides" was rendered irrelevant.

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[208] KCM, para. 34.

[209] Treaty between Italy and the United Kingdom regulating certain Questions concerning the Boundaries of their Respective Territories in East Africa, signed at London (15 July 1924), and Exchange of Notes defining a Section of the said Boundaries, Rome (16 & 26 June 1925), 35 L.N.T.S. 380 (1925), p. 388. MS, Vol. III, Annex 2.

[210] *Ibid.*

[211] 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), para. 7. MS, Vol. III, Annex 3.

[212] *Ibid.*, Appendix I, First Part.

3.57. In any event, in the context of modern maritime boundary delimitations, the law is clear: consistent with Article 5 of the Convention, the starting point for a maritime boundary must be "the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State".

3.58. Neither Party appears to have identified its officially recognized charts prior to these proceedings. In its Memorial, Somalia adopted U.S. NGA Nautical Chart 61220, the chart datum for which is lowest low water;[213] that is, the lowest tide observed along that coastline.[214] Kenya's Counter-Memorial does not identify any chart. Nor does Kenya identify where the low-water line according to "mean sea-level ordinary spring tides" would be located. Accordingly, Somalia submits that the low-water line as identified on U.S. NGA Nautical Chart 61220 is the appropriate place to locate the LBT and begin this delimitation.

3.59. Despite its complaint about the need to start the maritime boundary from "the line of mean sea level ordinary spring tides", Kenya notably fails to offer a method for connecting BP29 to that line. It simply avoids the question by arguing that the maritime boundary should "follow the parallel of latitude … extending from Primary Beacon 29".[215] It offers no explanation as to how its approach is consistent with the text of the 1927 Agreement, nor does it provide a basis in fact or law to support its approach.

3.60. Somalia submits that its approach is the one required by the terms of the 1927 Agreement. It is also consistent with the jurisprudence. International courts

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[213] *See* United States National Geospatial-Intelligence Agency, *Chart 61220: Manda Island to Kismaayo* (20 Jan. 2014). RS, Vol. II, Annex 42.

[214] International Hydrographic Organization, *Hydrographic Dictionary* (5th ed., 1994), p. 135. RS, Vol. II, Annex 41.

[215] KCM, Submission No. 2.

and tribunals tend to follow the direction of the last segment of the land boundary until it reaches the low-water line. For example, in *Ghana/Côte d'Ivoire*, the Special Chamber connected the low-water line to the last boundary pillar marking the end of the agreed land boundary by a line following the same azimuth as the line connecting that pillar with the penultimate one.[216] The arbitral tribunal in *Guyana v. Suriname* took a similar approach.[217]

3.61. Following the approach laid out in the 1927 Agreement, Somalia's Memorial identified a point on the low-water line 41 metres distant from BP29, with coordinates 1°39'44.07" S - 41°33'34.57" E. Somalia submits that it is that point where the maritime boundary should begin.[218]

2. The Provisional Equidistance Line

3.62. Once the starting point of the maritime boundary is determined, the equidistance/relevant circumstances method calls for the "establish[ment] [of] a provisional delimitation line, using methods that are geometrically objective and also appropriate for the geography of the area in which the delimitation is to take place".[219] This requires (1) defining the Parties' relevant coasts and the relevant area; (2) identifying the relevant basepoints; and (3) drawing the provisional equidistance line.[220]

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[216] *Ghana/Côte d'Ivoire*, paras. 352-356.

[217] *See Guyana v. Suriname*, paras. 137-138, 308.

[218] If Kenya's proposed coordinates for the location of BP 29 were used to compute the location of the LBT, the LBT would be located at the following coordinates: 1° 39' 44.168" S - 41° 33' 34.52" E. This point is just 3.39 metres southwest of the LBT proposed in Somalia's Memorial.

[219] *Romania v. Ukraine*, para. 116.

[220] *See, e.g., ibid.*, paras. 77-78, 116-118, 127, 153-154; *Nicaragua v. Colombia*, para. 200.

3.63. Somalia presented its views on these issues in its Memorial.[221] Kenya's Counter-Memorial does not dispute any aspect of Somalia's presentation. Remarkably, it does not address the questions of relevant coasts and relevant area, the appropriate basepoints or the drawing of the equidistance line *at all*.

3.64. Because its discussion of these points is entirely unrebutted, Somalia will not burden the Court by repeating it here. It will merely remind the Court that following the conventional approach, Somalia determined the provisional equidistance line to be as depicted in Figure 6.1 of Somalia's Memorial and reproduced as **Figure R3.3** (on the following page).

B. The Absence of Special or Relevant Circumstances

3.65. The second step of the standard delimitation process is to "consider whether there are factors calling for the adjustment or shifting of the provisional equidistance line in order to achieve an equitable result".[222]

3.66. In its Memorial, Somalia showed that there are no 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.[223] Because it does not engage with the three-step method, Kenya does not directly challenge Somalia's analysis. That said, the Counter-Memorial does advert to three considerations that, it says, should inform "the assessment of an equitable solution" in this case and weigh against the adoption of the equidistance line.[224]

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[221] MS, paras. 6.16-6.38.

[222] *Romania v. Ukraine*, para. 120.

[223] MS, paras. 5.22-5.26, 6.45-6.53.

[224] KCM, para. 342.

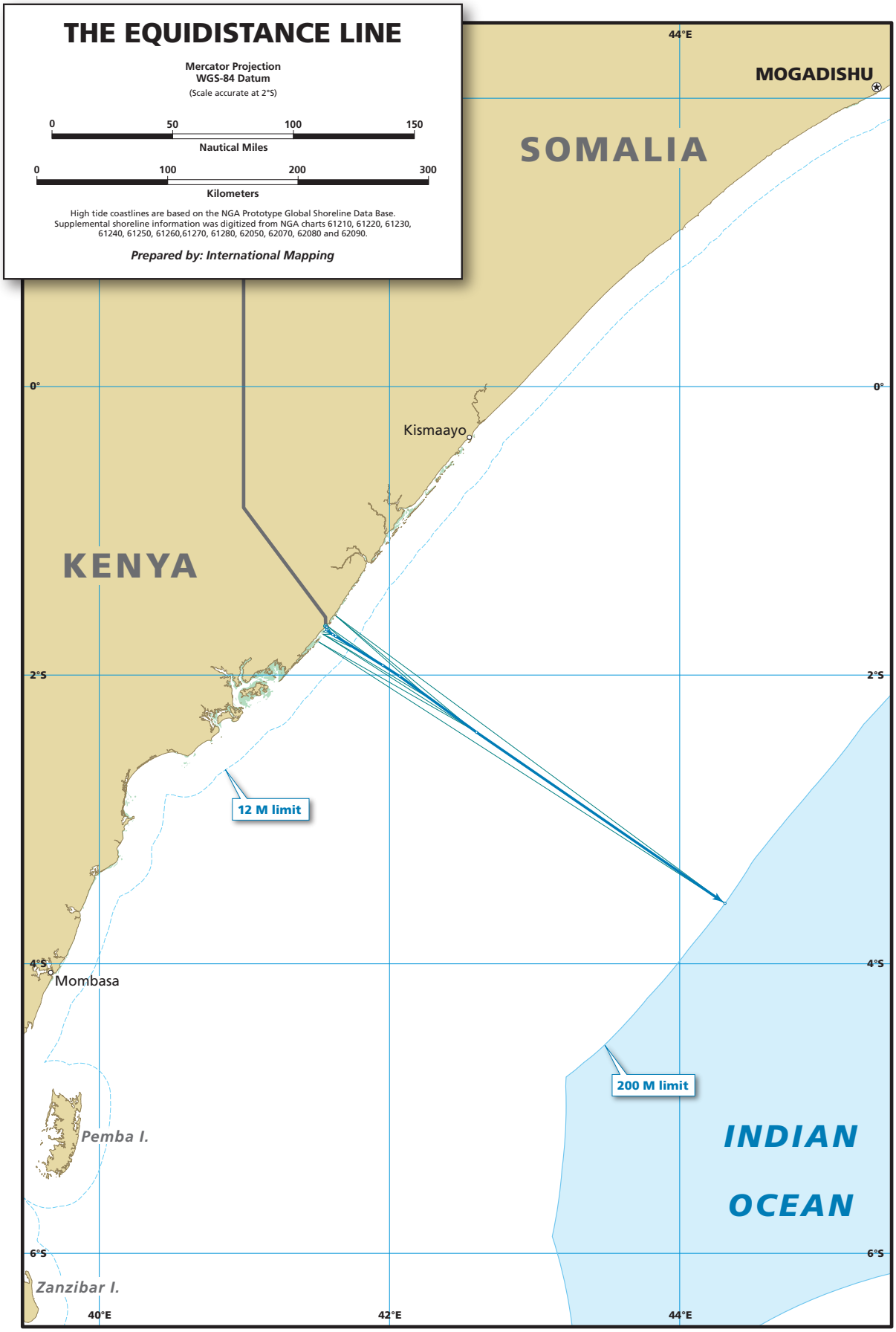
THE EQUIDISTANCE LINE
Mercator Projection
WGS-84 Datum
(Scale accurate at 2°S)
0
50
100
150
Nautical Miles
0
100
200
300
Kilometers
High tide coastlines are based on the NGA Prototype Global Shoreline Data Base.
Supplemental shoreline information was digitized from NGA charts 61210, 61220, 61230, 61240, 61250, 61260,61270, 61280, 62050, 62070, 62080 and 62090.
Prepared by: International Mapping
44°E
MOGADISHU
SOMALIA
0°
Kismaayo
KENYA
2°S
12 M limit
4°S
Mombasa
200 M limit
INDIAN
OCEAN
Pemba I.
6°S
Zanzibar I.
40°E
42°E
44°E

Figure R3.3

3.67. These are: (1) "consideration of the regional context";[225] (2) "a cut-off effect" that equidistance allegedly produces "with respect to the maritime areas of Kenya";[226] and (3) the fact that equidistance would accord Somalia "more maritime area per kilometre of coast than … Kenya".[227] None of these arguments is tenable.

1. The Regional Context

3.68. Kenya's invocation of the regional context according to which "various delimitation agreements in this region of Africa have adopted the same 'parallel of latitude' delimitation methodology as an equitable solution" merely cross-references its earlier discussion of these same agreements as a reason to depart from the three-step process.[228] The argument is no more persuasive in this context than it was there. It therefore can and should be rejected for the reasons stated at paragraphs 3.28 to 3.32 above.

2. The Cut-Off Effect

3.69. Kenya also contends that the equidistance line produces an inequitable cut-off effect in that "it substantially narrows Kenya's coastal projection into its EEZ, from a coastal length (measured as a straight line) of 424km to only 180km measured at the 200M limit, i.e. a reduction of 58%".[229]

3.70. In addition, Kenya says, "[t]he cut-off effect … is even more pronounced beyond 200M. In that sector of the boundary, the application of the equidistance

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[225] *Ibid.*

[226] *Ibid.*, para. 343.

[227] *Ibid.*, para. 352.

[228] *Ibid.*, para. 342 (cross-referencing *ibid.*, paras. 326-332).

[229] *Ibid.*, para. 343.

principle would prevent Kenya from having any entitlement out to the edge of the continental shelf in accordance with UNCLOS Article 76".[230]

3.71. Kenya depicts this alleged cut-off effect in Figure 3-1 of its Counter-Memorial. That figure employs two tricks to create the illusion of a cut-off of Kenya where there is none (or at least none that is relevant to the delimitation with Somalia).

3.72. *First*, the figure depicts Kenya's agreed boundary with Tanzania by means of a dark black line. Kenya recognizes the effect of the delimitation with Tanzania, saying: "The cut-off effect flows *in part* from the maritime boundary between Kenya and Tanzania".[231] "In part" is a substantial understatement. As demonstrated in the annotated version of Kenya's Figure 3-1 reproduced as **Figure R3.4** (on the following page), projections drawn perpendicular to the general direction of Kenya's coast show that any alleged cut-off that Kenya may suffer is *entirely* the result of its agreement with Tanzania, not the equidistance line with Somalia.

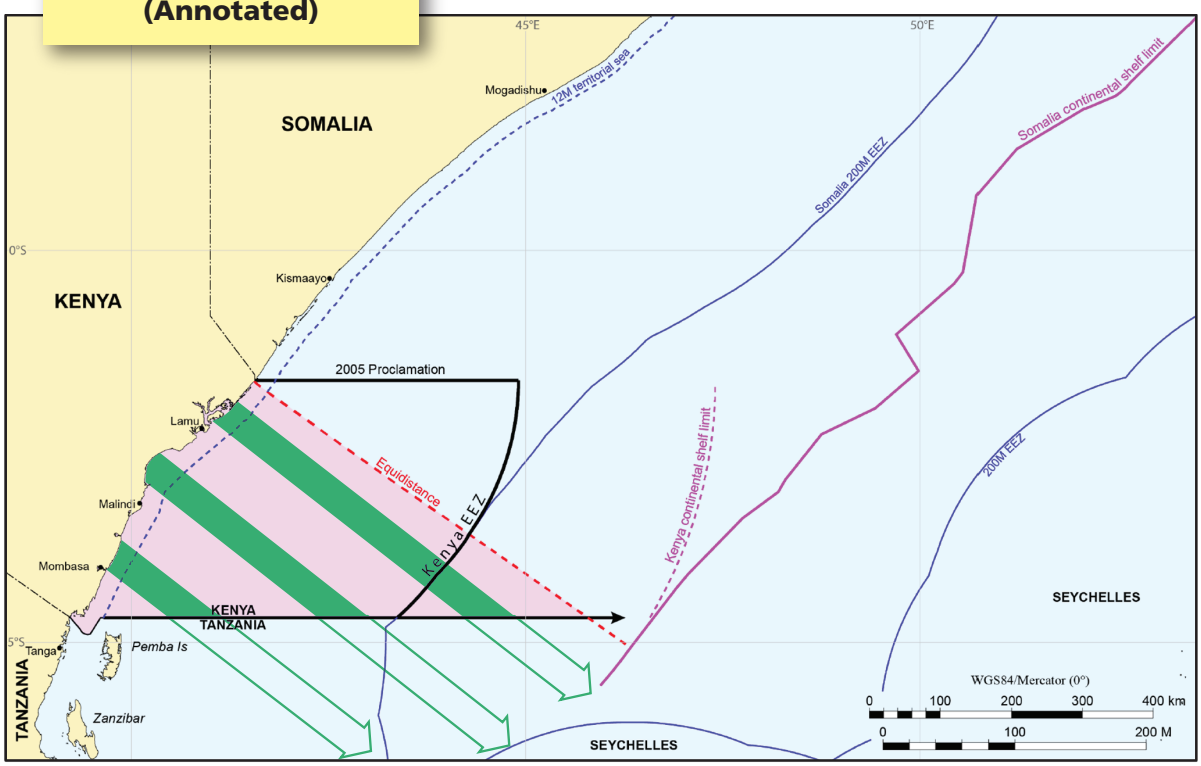
3.73. *Second*, Kenya depicts by means of the same dark black line its claimed parallel of latitude and the 200 M limit that would appertain to Kenya if the boundary were indeed the parallel of latitude. The inclusion of these lines is plainly intended to evoke the impression that the provisional equidistance line deprives Kenya of maritime areas to which it would otherwise be entitled. This is pure fiction.

3.74. Of course the equidistance line reduces Kenya's maritime space as compared to its parallel claim line. Any delimitation produces some degree of cut-

[230] *Ibid.*, para. 344.

[231] *Ibid.*, para. 347 (emphasis added).

KENYA'S FIGURE 3.1
(Annotated)



Source: Kenyan Counter-Memorial, pg. 147.

Figure R3.4

off. The objective is, as the Court has stated, to share out the cut-off in a "reasonable and mutually balanced way".[232] The provisional equidistance line does exactly that.

3.75. Moreover, any cut-off that may result from Kenya's boundary with Tanzania can be of no relevance for the purposes of the delimitation between Somalia and Kenya.

3.76. In the Court's most recent decision in *Costa Rica v. Nicaragua*, Costa Rica argued that an equidistance boundary with Nicaragua, coupled with Costa Rica's agreed boundary with Panama, would inequitably cut it off. It argued for an adjustment of the equidistance line in its favour on this basis.[233] In fact, Costa Rica demonstrated that the combination of equidistance with Nicaragua and its agreed boundary with Panama would cut off its maritime space well short of 200 M—a far more severe cut-off than the one claimed by Kenya, whose maritime space extends well beyond 200 M even with an equidistance boundary with Somalia.

3.77. The Court rejected Costa Rica's argument on the ground that a State's "relations with [one neighbour] cannot justify an adjustment of the equidistance line in its relations with" another.[234] Any cut-off caused as a result of Costa Rica's agreement with Panama, or Kenya's with Tanzania, is therefore of no relevance to third States like Nicaragua or Somalia. It cannot be taken into account for the purposes of the delimitation between Somalia and Kenya.

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[232] *Romania v. Ukraine*, para. 201. *See also Bangladesh/Myanmar*, para. 326.

[233] *Costa Rica v. Nicaragua*, para. 150.

[234] *Ibid.*, para. 156.

3.78. Moreover, any cut-off Kenya may suffer as the result of its delimitation with Tanzania is due to its own actions. Somalia made this point in its Memorial, where it observed:

> "Through this Agreement [with Tanzania], Kenya effectively renounced a part of its entitlement in the continental shelf beyond 200 M. This is obvious when one compares the results of the Agreement with the respective shares of continental shelf if Kenya and Tanzania had simply adopted an equidistance line beyond 200 M. Had they done so, Kenya would have enjoyed considerably more continental shelf beyond 200 M than the 2009 Agreement gives it".[235]

3.79. Kenya does not appear to disagree. Indeed, it does not respond on this point at all. The silence is telling. It effectively admits that Somalia is correct.

3.80. The situation before the Court is analogous to the one in *Barbados v. Trinidad and Tobago*, in which Trinidad and Tobago argued that the combined effect of an equidistance line with Barbados and its agreed delimitation with Venezuela resulted in an inequitable cut-off.[236] The arbitral tribunal rejected this argument, ruling: "Barbados cannot be required to 'compensate' Trinidad and Tobago for the agreements it has made by shifting Barbados' maritime boundary in favour of Trinidad and Tobago".[237] In just the same way, Somalia cannot be made to compensate Kenya for the consequences of its agreement with Tanzania.

3.81. Even setting aside this critical point, Kenya's arguments are still unpersuasive. It complains that the consequences of the combination of its agreed

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[235] MS, para. 7.53.

[236] *Barbados v. Trinidad and Tobago*, para. 339.

[237] *Ibid.*, para. 346.

boundary with Tanzania and the equidistance line with Somalia are (1) to "substantially narrow[] [its] coastal projection"[238] and (2) "to prevent [it from] enjoying sovereign rights over the continental shelf … to the full extent authorized by international law".[239] Yet the case law makes clear that these considerations do not justify an adjustment to the equidistance line, let alone an abandonment of the three-step process.

3.82. In the *Bangladesh/Myanmar* and *Bangladesh v. India* cases, both ITLOS and the arbitral tribunal rejected Bangladesh's arguments that the three-step method was inappropriate in a case of pronounced coastal concavity, which—as both tribunals recognized—caused a severe cut-off of Bangladesh's maritime space. Instead, they applied the three-step method and adjusted the provisional equidistance line in favour of Bangladesh due to the effects of that concavity.[240] Even so, the equitable solutions in both cases left Bangladesh with a pronounced narrowing of its seaward projection, from a coastal length of approximately 394 km to just 103 km at the 200 M limit. As shown in **Figure R3.5** (following page 84), this is a much more severe limitation than Kenya claims to suffer in this case.

3.83. The final delimitations also prevented Bangladesh from enjoying sovereign rights over the continental shelf to the full extent authorized by law. Whereas the outer limit of Bangladesh's continental margin as presented in its submission to the CLCS was 417 M from the coast, the combination of the ITLOS judgment and the arbitral award cut off its continental shelf rights just 304 M from the coast. As the arbitral tribunal in *Bangladesh v. India* explained "international jurisprudence on

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[238] KCM, para. 343.

[239] *Ibid.*

[240] *Bangladesh/Myanmar*, paras. 323-340; *The Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)*, Award, 2014, PCA Case No. 2010-16 (hereinafter "*Bangladesh v. India*"), paras. 478-480.

the delimitation of the continental shelf does *not* recognize a general right of coastal States to the maximum reach of their entitlements …".[241]

3.84. Kenya's final effort to salvage its cut-off argument is equally flawed. It argues that the equidistance line would, in percentage terms, reduce its total maritime space more than the parallel of latitude would reduce Somalia's.[242] According to Kenya, the parallel of latitude would reduce Somalia's entire EEZ by 6% and its continental shelf by 9%.[243] In contrast, Kenya says, the equidistance line would reduce Kenya's EEZ by 45% and its continental shelf by 98%.[244]

3.85. Kenya cites no jurisprudence or other authority to support this approach, presumably because there is none. The relative effect on Somalia is less than the effect on Kenya for the simple reason that Somalia has a much longer coastline. Somalia's coast measures nearly 3,000 km in length. In contrast, Kenya's is just over 400 km.

3.86. For purposes of its argument, Kenya takes into account Somalia's *entire* coast, not just its relevant coast, and *all* of the waters and shelf appurtenant to that coast, not just those that are relevant to this delimitation.[245] It is therefore an inevitable—not inequitable—consequence of *any* delimitation that the percentage reduction in Somalia's total maritime space will be smaller than the reduction in Kenya's.

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[241] *Bangladesh v. India*, para. 469 (emphasis added).

[242] *See* KCM, paras. 349-351.

[243] *Ibid.*, para. 349.

[244] *Ibid.*, para. 350.

[245] *See ibid.*, Figure 3-2.

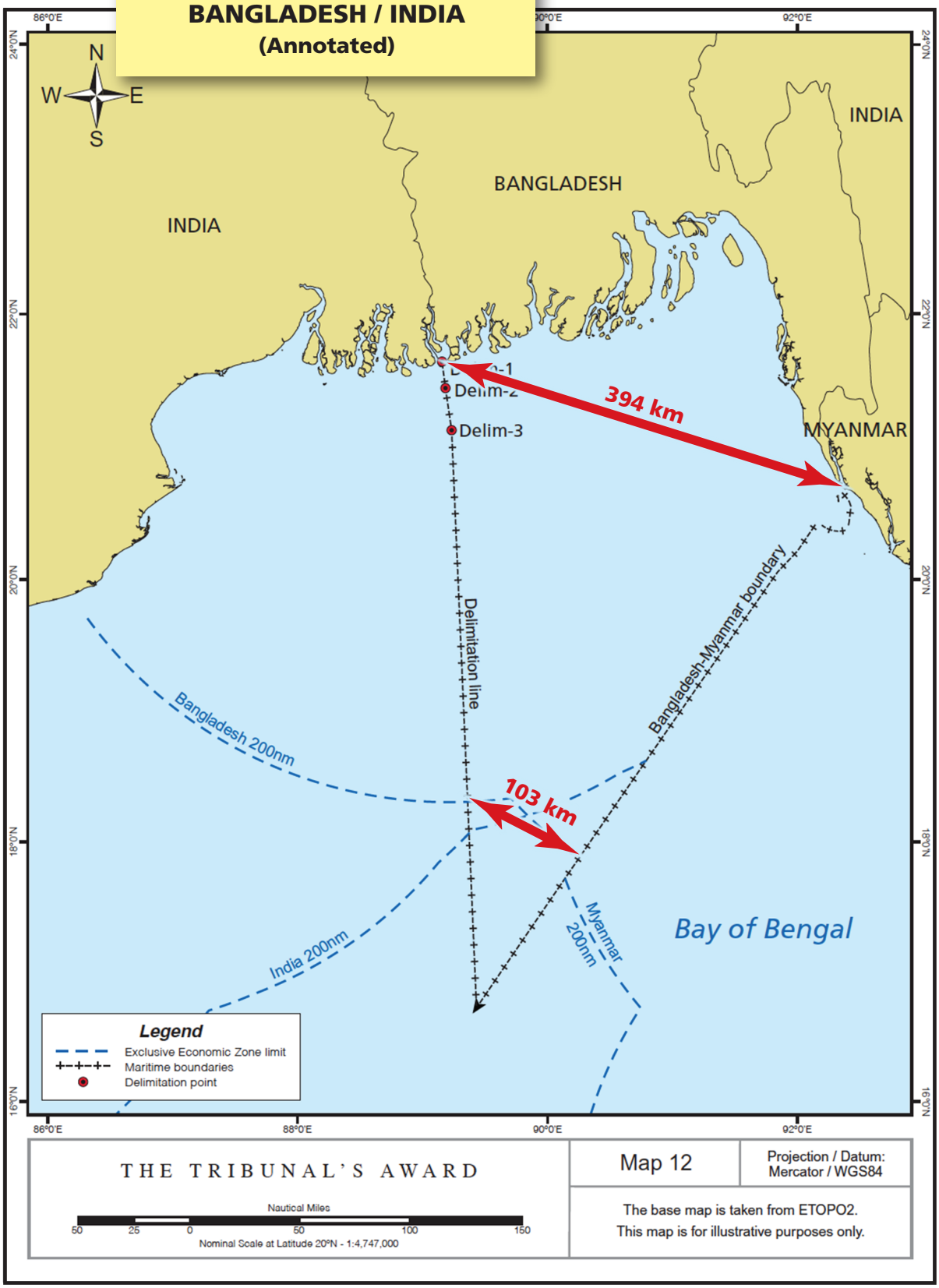
MAP 12 FROM THE AWARD IN BANGLADESH / INDIA
(Annotated)
N
W
E
S
INDIA
BANGLADESH
INDIA
MYANMAR
Delim-3
394 km
Delimitation line
Bangladesh-Myanmar boundary
Bangladesh 200nm
103 km
India 200nm
Myanmar 200nm
Bay of Bengal
Legend
Exclusive Economic Zone limit
Maritime boundaries
Delimitation point
86°0'E
88°0'E
90°0'E
92°0'E
24°0'N
22°0'N
20°0'N
18°0'N
16°0'N
THE TRIBUNAL'S AWARD
Nautical Miles
50 25 0 50 100 150
Nominal Scale at Latitude 20°N - 1:4,747,000
Map 12
Projection / Datum:
Mercator / WGS84
The base map is taken from ETOPO2.
This map is for illustrative purposes only.

Figure R3.5

3.87. Moreover, as is clear from **Figure R3.6** (following page 86), the alleged reduction in Kenya's continental shelf is largely caused by its 2009 agreement with Tanzania to extend their maritime boundary along a parallel of latitude beyond 200 M, to the limit of national jurisdiction, rather than delimit the boundary by means of an equidistance line.[246]

3.88. For these reasons, Kenya has failed to make out any plausible argument that it would suffer an inequitable cut-off if the Court adopts the equidistance line as the maritime boundary between the Parties.

3. Disproportionality Between Coastal Length and Maritime Space

3.89. Finally, Kenya contends that the equidistance line is inequitable because it would give Somalia "far more maritime area per kilometre of coast than [it would give] Kenya".[247] According to Kenya, taking account of Somalia's coast and maritime territory "as far as the Horn of Africa", equidistance would accord 371 km^2 of maritime space per kilometre of coast and Kenya 262 km^2.[248]

3.90. Kenya notably "does not suggest that 'proportionality', which has its proper role as a 'stage three' check on the proposed boundary under the three-stage approach, is a legal principle applicable to determination of an equitable line".[249] It nevertheless considers it "a helpful analytical tool by which to identify and illustrate the degree of a cut-off".[250]

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[246] *See ibid.*, para. 110.

[247] *Ibid.*, para. 352.

[248] *Ibid.*

[249] *Ibid.*

[250] *Ibid.*

3.91. Here again, Kenya cites no jurisprudence or other legal authority to support its "maritime-space-per-kilometre-of-coast" approach. It is pure invention, the evident purpose of which is to invite the Court to take pity on Kenya and compensate it for its comparatively shorter coast. This would, however, violate the Court's consistent admonition, first stated in the *North Sea* cases, that

> "[t]here can never be any question of completely refashioning nature, and equity does not require that a State without access to the sea should be allotted an area of continental shelf, any more than there could be a question of rendering the situation of a State with an extensive coastline similar to that of a State with a restricted coastline. Equality is to be reckoned within the same plane, and it is not such natural inequalities as these that equity could remedy".[251]

3.92. The only coasts and areas that are relevant to the delimitation now at issue are the relevant coasts and the relevant area as properly defined in Somalia's Memorial,[252] to which Kenya makes no objection in its Counter-Memorial. Kenya's attempt to expand the focus is legally unjustifiable. As the Court ruled in the *Black Sea* case, only those coasts that "generate projections which overlap with projections from the coast of the other Party" are "considered as relevant for the purpose of the delimitation" of the maritime boundary.[253]

3.93. When (as discussed below) the disproportionality analysis is performed properly taking account of the relevant coasts and the relevant area in this case, the conclusion is inescapable: the equidistance line is equitable.

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[251] *North Sea Continental Shelf*, para. 91.

[252] MS, paras. 6.16-6.38.

[253] *Romania v. Ukraine*, para. 99.

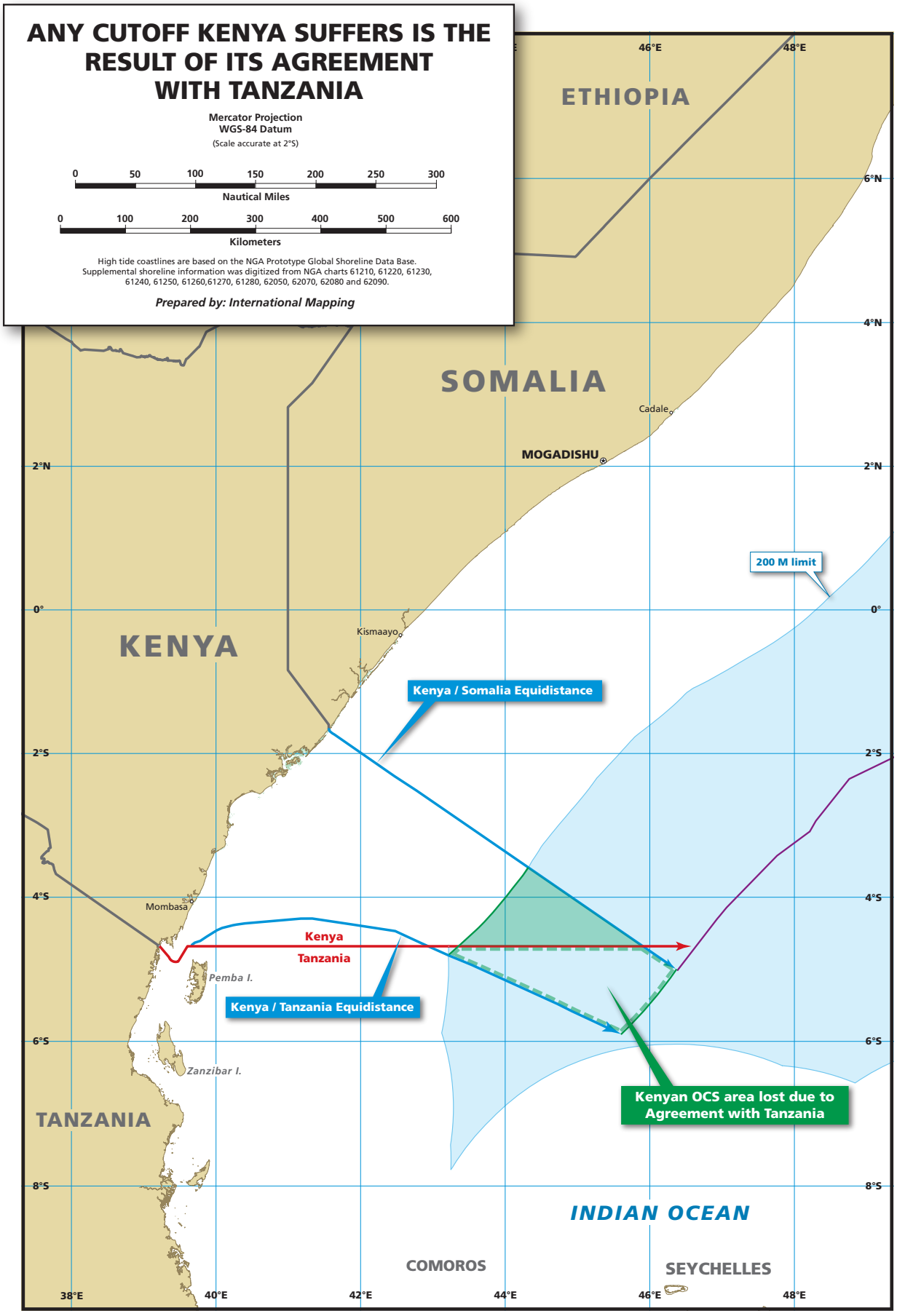
ANY CUTOFF KENYA SUFFERS IS THE RESULT OF ITS AGREEMENT WITH TANZANIA
Mercator Projection
WGS-84 Datum
(Scale accurate at 2°S)
0 50 100 150 200 250 300
Nautical Miles
0 100 200 300 400 500 600
Kilometers
High tide coastlines are based on the NGA Prototype Global Shoreline Data Base. Supplemental shoreline information was digitized from NGA charts 61210, 61220, 61230, 61240, 61250, 61260,61270, 61280, 62050, 62070, 62080 and 62090.
Prepared by: International Mapping
ETHIOPIA
SOMALIA
KENYA
TANZANIA
Cadale
MOGADISHU
Kismaayo
Mombasa
Pemba I.
Zanzibar I.
COMOROS
SEYCHELLES
INDIAN OCEAN
200 M limit
Kenya / Somalia Equidistance
Kenya
Tanzania
Kenya / Tanzania Equidistance
Kenyan OCS area lost due to Agreement with Tanzania
46°E
48°E
6°N
4°N
2°N
0°
2°S
4°S
6°S
8°S
38°E
40°E
42°E
44°E

Figure R3.6

C. THE NON-DISPROPORTIONALITY TEST

3.94. The Court explained in *Romania v. Ukraine* that at the third and final step of the delimitation process it will check whether the delimitation line resulting from the application of the first two steps "lead[s] to any significant disproportionality by reference to the respective coastal lengths and the apportionment of areas that ensue".[254]

3.95. Somalia conducted the required proportionality analysis in its Memorial.[255] Because it rejects the three-step method in its entirety, Kenya did not rebut or otherwise take issue with Somalia's analysis. For purposes of this Reply, Somalia will therefore limit itself to reminding the Court that dividing the area of overlapping entitlements within 200 M by means of the provisional equidistance line results in an allocation of 103,627 km^2 (48.5%) to Somalia and 110,236 km^2 (51.5%) to Kenya. The ratio is **0.94:1** *in favour of Kenya*.[256]

3.96. Including also the area beyond 200 M, equidistance would accord Kenya 41% of the relevant area (including some 16,700 km^2 beyond 200 M) and Somalia 59%.[257] The resulting ratio is **1.44:1** in favour of Somalia.

3.97. These ratios are to be compared to the ratio of the Parties' relevant coasts, which is **1.57:1** in Somalia's favour.[258]

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[254] *Ibid.*, para. 210.

[255] MS, paras. 6.54-6.57.

[256] *Ibid.*, para. 6.56, Figure 6.12.

[257] *Ibid.*, para. 7.58.

[258] *Ibid.*, para. 6.30.

3.98. Neither calculation suggests that there is any disproportionality, gross or otherwise. By way of comparison, in *Nicaragua v. Colombia*, the Court's final delimitation had "the effect of dividing the relevant area between the Parties in a ratio of approximately 1:3.44 in Nicaragua's favour. The ratio of relevant coasts [was] approximately 1:8.2 [in Nicaragua's favour]".[259] Nevertheless, the Court concluded that this outcome did "not entail such a disproportionality as to create an inequitable result".[260]

3.99. An unadjusted equidistance line therefore plainly constitutes an equitable solution in this case.

* * *

3.100. For all the foregoing reasons, Kenya has not shown any compelling—or even plausible—reason to depart from the standard three-step method long used by the Court. And when that method is followed, as it must be, it leads inevitably to the conclusion that an unadjusted equidistance line in the territorial sea, the EEZ and the continental shelf, including the continental shelf beyond 200 M, constitutes the equitable solution that the law requires

[259] *Nicaragua v. Colombia*, para. 243.

[260] *Ibid.*, para. 247.

CHAPTER 4
KENYA'S RESPONSIBILITY FOR ITS UNLAWFUL ACTS IN THE DISPUTED MARITIME AREA

Section I. The Factual Record

4.1. In its Memorial, Somalia provided evidence in support of its claim that, starting in or around 2000, Kenya engaged in unlawful seismic and drilling activities in the disputed maritime area,[261] and that the Somali government protested against these activities when it was informed of them and in a position to react.[262] Kenya's activities violate Somalia's sovereignty and sovereign rights, and Kenya's obligations under Article 83(3) of the Convention.

4.2. Kenya has not challenged the admissibility of this request. Nor has Kenya denied that it has undertaken extensive exploratory activities in the disputed maritime area.[263] Though it challenges the publicly available evidence presented by Somalia in its Memorial,[264] Kenya's Counter-Memorial fails to clarify the factual situation. It declines to present direct evidence concerning the nature and extent of its own activities. In any case, on the basis of the evidence presented in Somalia's Memorial, and further evidence obtained since then and addressed

[261] MS, paras. 3.22-3.24, 8.19-8.27.

[262] MS, paras 8.20, 8.23, 8.24, 8.27.

[263] Kenya denies only once that drilling took place in the disputed area in 2015 (namely for block L-5), as discussed in Somalia's Memorial. *See* MS, para. 8.22; KCM, para. 376(c). However, Kenya offers no evidence to substantiate this denial. *See ibid*. The denial contradicts Total's press release announcing that exploratory drilling was scheduled. *See* Total S.A., *Press Release: Total Enters Exploration in Kenya by Acquiring a 40% Stake in Five Offshore Blocks in the Lamu Basin* (21 Sept. 2011). MS, Vol. IV, Annex 102.

[264] KCM, para. 376.

below, it is indisputable that Kenya has acted in the disputed maritime area in a manner contrary to its obligations under international law.

4.3. As confirmed by a public presentation made by Kenya's Commissioner for Petroleum Energy in 2011, it was around 2000 that Kenya started the "[a]ward of offshore PSC's [Production Sharing Contracts] and reinvigorated exploration".[265] The same document confirms that, since then, intensive seismic testing was undertaken prior to the licencing of the blocks ("Large amounts of 2D data available"). It also shows that as of 2011, "4 wells [had been] drilled in offshore Lamu Basin"[266], one of which (Pomboo-1) was drilled by Woodside in 2007 close to, but on the Somali side of, the equidistance line.[267] The evidence confirms that when Kenya has awarded blocks for exploration, the oil companies' "[e]xploration [o]bligations – Includes [*sic*] seismic data acquisition and drilling obligation with minimum expenditure (Negotiable)".[268]

4.4. After 2012, Kenya intensified its seismic activity in the disputed area. Prior to the organization of further rounds of licencing to oil companies, the National Oil Corporation of Kenya, duly mandated under Kenyan law to represent Kenya's Government, concluded an agreement with Western Geco (an affiliate of

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[265] Martin M. Heya, Ministry of Energy, Republic of Kenya, *Overview of Petroleum Exploration in Kenya: Presentation to the 5th East African Petroleum Conference and Exhibition 2011* (25 Feb. 2011), slide 6. RS, Vol. II, Annex 9. Figure 1-26 in Kenya's Counter-Memorial is taken from this document.

[266] *Ibid*. *See also* Republic of Kenya, Ministry of Energy and Petroleum, *Strategic Environmental and Social Assessment of the Petroleum Sector in Kenya: Final Report* (Dec. 2016), slide 26. Annex 12.

[267] *See* Martin M. Heya, Ministry of Energy, Republic of Kenya, *Overview of Petroleum Exploration in Kenya: Presentation to the 5th East African Petroleum Conference and Exhibition 2011* (25 Feb. 2011), slide 25. RS, Vol. II, Annex 9 (giving the coordinates as 1° 57' 16.15" S 41° 56' 28.02" E). *See also* MS, para. 8.21.

[268] Martin M. Heya, Ministry of Energy, Republic of Kenya, *Overview of Petroleum Exploration in Kenya: Presentation to the 5th East African Petroleum Conference and Exhibition 2011* (25 Feb. 2011), slide 28. RS, Vol. II, Annex 9.

Schlumberger).[269] In particular, it granted Western Geco exclusive rights to obtain, store, interpret and sell to third Parties the data resulting from 2D seismic surveys, notably in the disputed maritime area.

4.5. It is clear from the draft agreement between Kenya and Western Geco, which is readily available online and included as Annex 27 to this Reply, that, at the time of its signature in 2013, Kenya and its commercial partners were fully aware that it covered a disputed area. The maps attached as appendices to the draft 2013 agreement, such as **Figure R4.1** (following page 92), all depict Somalia's and Kenya's claim lines.

4.6. Several clauses of the 2013 draft agreement are specifically applicable to the disputed area. Clause 3.8 obliges the National Oil Corporation of Kenya and Western Geco to seek Somalia's consent for the survey in the disputed area:

> "To the extent Acquisition Work is rendered in an area requiring access, ingress or egress across *waters subject to the claimed exclusive jurisdiction of a state other than Kenya*, National Oil shall assist WesternGeco in their efforts to obtain the required rights of access, ingress and egress to the Area of Operations. If the right of access, ingress or egress

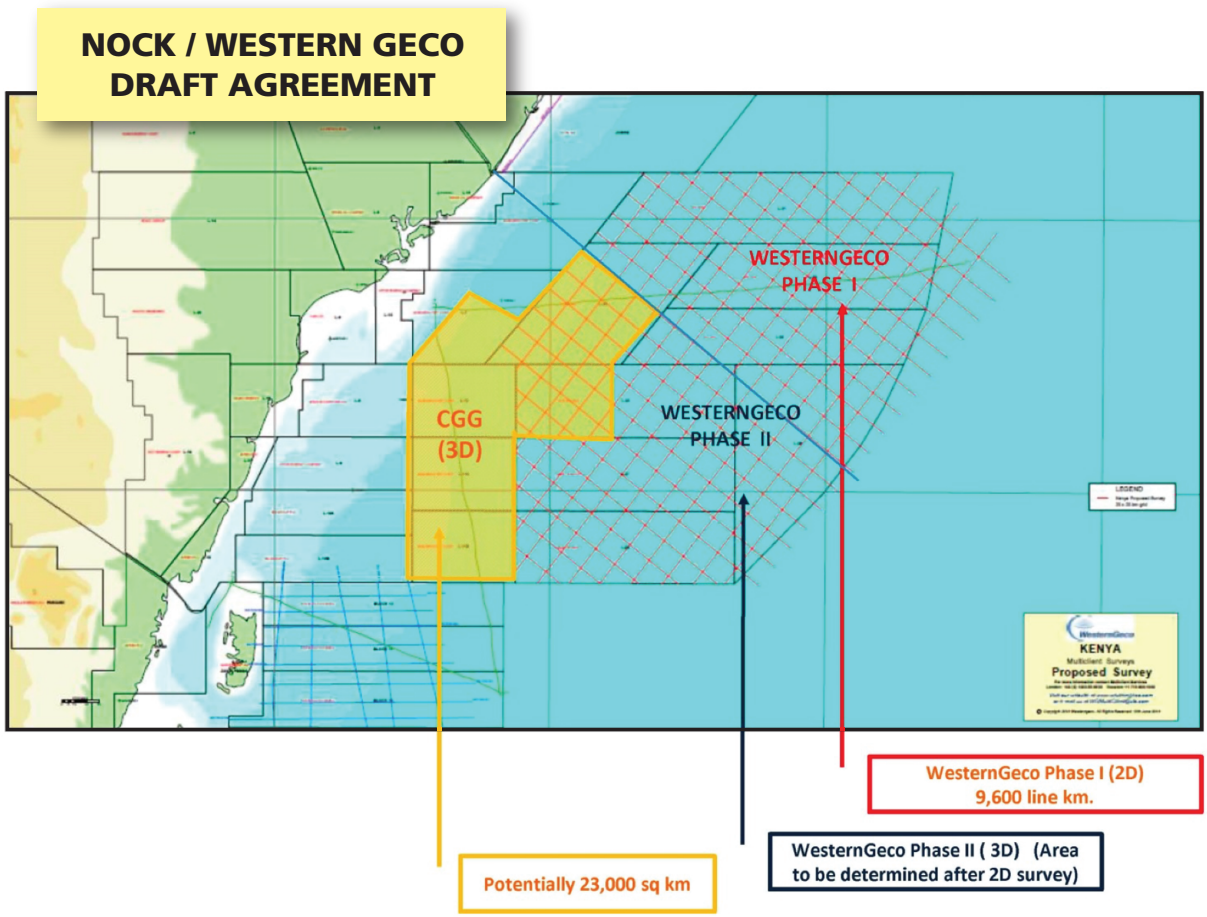
[269] *See* Consumers Federation of Kenya, "How the latest string of National Oil Corporation of Kenya (NOCK) contracts will affect you the consumer" (20 Mar. 2014), *available at* http://www.cofek.co.ke/index.php/news-and-media/399-how-the-latest-string-of-national-oil-corporation-of-kenya-nock-will-affect-you-the-consumer. RS, Vol. II, Annex 43; Samuel Kamau Mbote, "COFEK question National Oil Western Geco contract to store Kenya Oil Data", *Oil News Kenya* (22 Mar. 2014). RS, Vol. II, Annex 38. The Consumers Federation of Kenya's website contains links to the relevant instruments concluded between the National Oil Corporation of Kenya and WesternGeco. *See* Draft Agreement between National Oil Corporation of Kenya and Eastern Echo DMCC (Aug. 2013), *available at* http://cofek.co.ke/Western%20Geco%20and%20National%20Oil%20-%20New%20Acquisition%20Agreement%202013.docx. RS, Vol. II, Annex 27. The agreement was preceded by a Memorandum of Understanding between the National Oil Corporation of Kenya and Eastern Echo DMCC. *See* Memorandum of Understanding between the National Oil Corporation of Kenya and Eastern Echo DMCC (26 July 2013). RS, Vol. II, Annex 26.

> into such waters is denied by the state claiming jurisdiction, the Parties shall without undue delay meet in good faith to agree a course of action mitigating such denial, including the potential release of relevant seismic data to such state. National Oil shall advise WesternGeco of any limitations or restrictions affecting access, ingress and egress to the Area of Operations that they are aware of and WesternGeco shall abide by such limitations or restrictions. *WesternGeco shall not be obliged to enter into disputed territorial waters or the waters of another state* during the performance of this Agreement".[270]

4.7. Clause 8.3 provides for a procedure in case of a dispute over the boundaries of the area:

> "In the event that *a dispute arises in connection with the geographical boundaries of the Area of Operations,* as detailed in Appendix 1, which dispute affects the performance by WesternGeco of its obligations under this Agreement thereto, the Parties shall meet to reach a mutually agreeable resolution of the dispute. Should the Parties to the dispute fail to reach a mutually agreeable resolution within a reasonable timeframe, provided however WesternGeco is prevented from acquiring, processing and/or reprocessing, or marketing the Survey Data and/ or Data as a result of the dispute, WesternGeco reserves the right to terminate Agreement early without any further liabilities to it. In the event of such early termination by WesternGeco, National Oil shall pay Western Geco

[270] Draft Agreement between National Oil Corporation of Kenya and Eastern Echo DMCC (Aug. 2013), *available at* http://cofek.co.ke/Western%20Geco%20and%20National%20Oil%20-%20New%20Acquisition%20Agreement%202013.docx, Art. 3.8 (emphasis added). RS, Vol. II, Annex 27.



Source: Map from Appendix 1 of the 2013 Draft Agreement between NOCK and Western Geco (2013).

Figure R4.1

the totality (100%) of the Survey Costs as detailed in Appendix 2".[271]

4.8. The draft agreement shows that Kenya and Western Geco were fully aware that they had to seek Somalia's consent for these activities. Nevertheless, they did not approach Somalia or otherwise seek that consent. According to the map attached to the draft agreement (Figure R4.1, following page 92), the disputed area was targeted as a priority/Phase 1 area. Without obtaining the consent of Somalia, Western Geco proceeded to obtain data from some 10,000 km of 2D seismic surveys, as Schlumberger, Ltd.'s website confirms.[272]

4.9. The information on the status of resources acquired through exploratory seismic surveys is politically and commercially sensitive. This data, which under the draft agreement is protected by exclusivity and confidentiality clauses, is also capable of generating revenues both for the National Oil Corporation of Kenya and for Western Geco. Somalia has repeatedly protested these activities through letters sent to the oil companies, informing them of the unlawful acts which they were undertaking.[273] It also conveyed directly to Kenya its concern over the deleterious impact of these activities on the ongoing negotiations.[274]

4.10. Despite Kenya's invasive attitude, Somalia has always shown restraint in the disputed maritime area, since it was clear that the Parties had divergent claims. It should be noted that in 1991, all operators that had licences in Somalia's offshore

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[271] *Ibid.*, Art. 8.3 (emphasis added). RS, Vol. II, Annex 27.

[272] *See* Schlumberger, Ltd., "Multiclient Latest Projects: Kenya Deepwater 2D 2013 Multiclient Seismic Survey", *available at* http://www.multiclient.slb.com/latest-projects/africa/kenya_2d.aspx (last accessed 11 May 2018). RS, Vol. II, Annex 31.

[273] MS, paras. 8.20, 8.23, 8.24, 8.27.

[274] *See ibid.*, para. 3.56; Kelly Gilblom, "Somalia challenges Kenya over oil blocks", *Reuters* (6 July 2012). MS, Vol. IV, Annex 107.

waters claimed *force majeure* due to the civil war. It was only in 2013-2014 that the Government of Somalia approached oil companies for new licensing offshore.[275] At that time, the existence of a dispute with Kenya was well-known.[276] Somalia chose the only course of conduct consistent with its international obligations: to refrain from unilateral activities in the disputed area and to firmly maintain its claim to an equidistance boundary. For these reasons all licensing by the Somali government was done outside the disputed area.[277]

Section II. Responses to Kenya's Defence

4.11. The facts speak for themselves and are difficult to challenge. Kenya attempts to legitimise its actions with four arguments, none of which is tenable:

a) Until 2014, there was no disputed area;[278]

b) The only rules applicable are those set forth in Article 83(3), which exclude any obligation to respect sovereignty and sovereign rights;[279]

c) Due to their allegedly transient characteristics, Kenya's unilateral activities do not violate Article 83(3);[280] and

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[275] *See* Soma Oil & Gas Exploration, Ltd., *Unlocking Somalia's Potential: 1st International Forum on Somalia Oil, Gas & Mining* (27-28 Apr. 2015). RS, Vol. II, Annex 28. A more complete version of this presentation dated 2016 is annexed here as Annex 30. *See* Soma Oil & Gas Exploration, Ltd., *Unlocking Somalia's Potential: Company Presentation Q2 2016* (2016). RS, Vol. II, Annex 30.

[276] *See supra* paras. 2.45-2.49, 2.96-2.106.

[277] *See also* Spectrum Geo, "Spectrum signs Seismic Data Agreement to Kick-Start Oil Exploration Offshore Somalia" (7 Sept. 2015). RS, Vol. II, Annex 29; "Spectrum ASA completes the acquisition of 2D seismic data offshore Somalia", *Oil News Kenya* (5 May 2016). RS, Vol. II, Annex 39.

[278] KCM, paras. 359-362.

[279] *Ibid.*, paras. 363-364.

[280] *Ibid.*, para. 376.

d) In any event, Kenya ceased these activities in 2016 (two years after the commencement of these proceedings and over a year after it received Somalia's Memorial).[281]

4.12. Kenya's main argument is there was no area in dispute before 2014.[282] This is not persuasive, since—as shown in Chapter 2—Kenya had been aware since the end of the 1970s that Somalia claimed a boundary running along the equidistance line, different from Kenya's parallel of latitude claim. The two States subsequently maintained their divergent claims. An area of overlapping claims had thus emerged at the latest by the end of the 1970s, and has remained in dispute ever since, a situation recognized *inter alia* by the 2009 MOU.[283]

4.13. In its Memorial, Somalia demonstrated 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 (when activities took place in the territorial sea) and sovereign rights (when they took place in the EEZ/continental shelf). Kenya's only response to this argument is that "the 'principle of exclusivity'… wrongly conflates the sovereignty that the coastal State enjoys in the territorial sea with the more limited 'sovereign rights' in the EEZ and continental shelf".[284]

4.14. Contrary to Kenya's assertion, Article 77 of UNCLOS provides that a State's rights over the continental shelf are exclusive: "The rights [to explore and exploit the continental shelf] referred to in paragraph 1 are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural

[281] *Ibid*, paras. 378-379.

[282] *Ibid*, paras. 355-362.

[283] *See* 2009 Memorandum of Understanding. MS, Vol. III, Annex 6.

[284] KCM, para. 363.

resources, no one may undertake these activities without the express consent of the coastal State". A Special Chamber of ITLOS recently confirmed this, unanimously and without ambiguity:

> "The Special Chamber agrees with the statements of the two Parties that the sovereign rights which coastal States enjoy in respect of the continental shelves off their coasts are exclusive in nature and that coastal States have an entitlement to the continental shelves concerned without the need to make a relevant declaration".[285]

4.15. Insofar as Kenya's activities took place in an area on Somalia's side of the boundary, these activities transgressed upon Somalia's sovereignty (over the territorial sea) and sovereign rights (over the EEZ/continental shelf). As a consequence, Kenya and its partner companies obtained politically and commercially sensitive data relating to the status of resources, their location and their exploitability.

4.16. Kenya's activities also constitute a violation of its obligations under Article 83(3) irrespective of precisely where in the disputed area they were undertaken. Article 83(3) provides:

> "Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such

[285] *Ghana/Côte d'Ivoire*, para. 590. *See also North Sea Continental Shelf*, para. 18; *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, Judgment, I.C.J. Reports 1993, p. 38, para. 64; *Aegean Sea Continental Shelf (Greece v. Turkey)*, Request for the Indication of Interim Measures of Protection, Order, I.C.J. Reports 1976, p. 3, para. 31.

> arrangements shall be without prejudice to the final delimitation".

4.17. In the words of the ITLOS Special Chamber in *Ghana/Côte d'Ivoire*, Article 83(3) "contains two interlinked obligations for the States concerned, namely to 'make every effort to enter into provisional arrangements of a practical nature' and 'during this transitional period, not to jeopardize or hamper the reaching of the final agreement'".[286] The obligation "to make every effort to enter into provisional arrangements" is not in question in the present case. Nevertheless, Kenya argues that in 2016 it made a proposal to Somalia to conclude practical arrangements for exploration and exploitation in the disputed area.[287] The argument is unpersuasive. Kenya's proposal, made two years after Somalia filed the Application introducing these proceedings, is not relevant to the present case. It cannot cure the absence of any equivalent proposal, in 2000 or later. Rather, it confirms that Kenya recognized its obligation, the possibility of making a proposal, and its failure to do so before 2016.

4.18. Kenya violated the second obligation under Article 83(3); namely, that "during this transitional period" it should do nothing "to jeopardize or hamper the reaching of the final agreement". As the Special Chamber in *Ghana/Côte d'Ivoire* held:

> "Article 83, paragraph 3, covers two situations in this transitional period, namely the situation where a provisional arrangement has been reached which would regulate the conduct of the parties in the disputed area and the situation where no such

[286] *Ghana/Côte d'Ivoire*, para. 626.

[287] KCM, para. 378 (citing *Letter* from H.E. Githu Muigai, Attorney-General and Agent of the Republic of Kenya, to H.E. Mr. Philippe Couvreur, Registrar of the International Court of Justice, No. AG/CONF/19/153/2 VOL.III (27 May 2016), para. 10. KCM, Vol. II, Annex 62).

> provisional arrangement has been reached. The obligations States encounter in respect of a disputed maritime area for which no provisional arrangement exists are described by the words 'not to jeopardize or hamper the reaching of the final agreement'. In interpreting these words, account has to be taken of the general obligation under article 83, paragraph 3, of the Convention that in the transitional period States have to act 'in a spirit of understanding and cooperation'".[288]

4.19. In 2016, when it belatedly decided to make a proposal to Somalia to conclude a provisional arrangement, Kenya expressly recognised that it had an obligation of restraint:

> "The Republic of Kenya, in respecting the above obligation [Article 83(3)], has acted with restraint and the activities she has undertaken in the area under contention have been solely of a transitory character in order not to cause irreparable prejudice to Somalia, or to otherwise jeopardize or hamper the conclusion of a final agreement".[289]

4.20. Referring to the arbitral award in *Guyana v. Suriname*,[290] Kenya claims that only activities causing a permanent physical change to the marine environment could amount to a violation of the obligation of restraint.[291] But this test, adopted by the arbitral tribunal in *Guyana* v. *Suriname*,[292] does not constitute an absolute gauge for determining compliance with Article 83(3). The provision refers to

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[288] *Ghana/Côte d'Ivoire*, para. 630.

[289] *Letter* from Amb. (Dr.) Amina Mohamed, Cabinet Secretary of Foreign Affairs of the Republic of Kenya, to H.E. Abdusalam H. Omer, Minister of Foreign Affairs and Investment Promotion of the Federal Republic of Somalia, No. MFA.INT.8/15A (18 May 2016). RS, Vol. II, Annex 16.

[290] *Guyana v. Suriname*, para. 467.

[291] KCM, para. 370.

[292] *Guyana v. Suriname*, para. 467.

activities that may have the effect of "jeopardiz[ing] or hamper[ing] the reaching of the final agreement". Thus, unilateral activities in a disputed area are not judged solely by their physical effects, but also by their likely effect on the reaching of a final agreement. In some cases, non-invasive acts such as seismic surveys can be provocative and inflammatory, as States consider them to be a violation of their sovereign rights. If some show restraint in their reactions, others may adopt strong enforcement actions to prevent them (or even military action, as was the case in *Guyana v. Suriname*[293]).

4.21. In this case, Kenya's unilateral 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. The chairman of the U.N. Monitoring Group on Somalia noted in his 2013 report addressed to the Security Council:

> "Conflict between Somalia and Kenya over the maritime boundary
>
> The FGS [Federal Government of Somalia] has thus refused to recognise oil licenses granted to multinational companies by Kenya and which protrude into waters defined as Somali according to that perpendicular demarcation line. ...
>
> The FGS has persuaded Statoil, Anadarko and Total to withdraw their claims that partially infringe on Somalia's demarcation line. However, ENI, which has been allocated three licenses that fall within the Somalia's definition of Somali waters has yet to withdraw its claims at the time of submission of this report. The remaining dispute between ENI and the FGS, and the persistence of a contested perpendicular line of demarcation, *may serve to*

[293] *Ibid*., para. 445.

> *create further animosity between the Governments of Somalia and Kenya* at a time when both are at loggerheads over the creation of a political administration in Jubaland.
>
> *This territorial dispute could exacerbate tensions between Somalia and Kenya* that have already been sharpened by political disagreements over the control of Kismayo and the Jubaland territory".[294]

4.22. In the same vein, the 2016 Report underlines that:

> "[T]here is a continuing dispute between Kenya and Somalia over their maritime border, where the rights to considerable oil and gas reserves could be at stake. *How the dispute is resolved could have significant implications for relations between Kenya and Somalia, thus also affecting peace and security in the region. ...*
>
> As previously noted by the Monitoring Group in its report for 2013*, a disputed maritime border between Kenya and Somalia could have significant implications for regional peace and securit*y. The disputed area covers a triangle -shaped territory in the Indian Ocean of about 100,000 km^2 with considerable potential for commercial quantities of oil and gas reserves".[295]

4.23. The Heritage Institute for Policy Studies, an independent policy research and analysis institute based in Mogadishu, also noted in a 2014 report that:

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[294] 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), pp. 247-250 (emphasis added). MS, Vol. III, Annex 64.

[295] 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), paras. 82, 188 (emphasis added). RS, Vol. II, Annex 24.

> "While the FGS is hardly in a position to dispense of international partners like Kenya in its fight against al-Shabaab, it seems that Nairobi's desire for near-term hydrocarbon exploration and exploitation in Somalia not only adds a layer of complexity to the situation, but may actually run counter to re-establishing a stable and functioning state".[296]

4.24. It is therefore a matter of international and bilateral concern that Kenya's unilateral activities in the disputed maritime area have generated mistrust and animosity in relations between the Parties. This jeopardizes and hampers the possibility of reaching a final agreement between them and exacerbates the risks to international peace and security.

4.25. For these reasons, Kenya has violated its international obligations towards Somalia. It therefore has a duty to make full reparation, including but not limited to the payment of appropriate compensation.

[296] Dominik Balthasar, The Heritage Institute for Policy Studies, *Oil in Somalia: Adding Fuel to the Fire?* (2014), p. 8. RS, Vol. II, Annex 35.

SUBMISSIONS

On the basis of the facts and law set forth in its Memorial and this Reply, Somalia respectfully requests the Court:

1. To reject Submissions 1 and 2 of Kenya's Counter-Memorial.

2. To determine the complete course of the maritime boundary between Somalia and Kenya in the Indian Ocean, including in the continental shelf beyond 200 M, on the basis of international law.

3. To determine the maritime boundary between Somalia and Kenya in the Indian Ocean on the basis of the following geographical coordinates:

Point No.	Latitude	Longitude
1 (LBT)	1°39'44.07" S	41°33'34.57" E
2	1°40'05.92" S	41°34'05.26" E
3	1°41'11.45" S	41°34'06.12" E
4	1°43'09.34" S	41°36'33.52" E
5	1°43'53.72" S	41°37'48.21" E
6	1°44'09.28" S	41°38'13.26" E
7 (intersection with 12 M limit)	1°47'54.60" S	41°43'36.04" E
8	2°19'01.09" S	42°28'10.27" E
9	2°30'56.65" S	42°46'18.90" S
10 (intersection with 200 M limit)	3°34'57.05" S	44°18'49.83" E

11 (intersection with 350 M limit)	5°00’25.71” S	46°22’33.36” E

4. To adjudge and declare that Kenya, by its conduct in the disputed area, has violated its international obligations and is responsible under international law to make full reparation to Somalia, including inter alia by making available to Somalia all seismic, geologic, bathymetric and other technical data acquired in areas that are determined by the Court to be subject to the sovereignty and/or sovereign rights and jurisdiction of Somalia, and to repair in full all damage that has been suffered by Somalia by the payment of appropriate compensation.

(All points referenced are referred to WGS-84)

18 June 2018

H.E. Ali Said Faqi

Ambassador of the Federal Republic of Somalia to the Kingdom of Belgium and the European Union

Co-Agent of the Federal Republic of Somalia

Certification

I certify that the annexes are true copies of the documents referred to.

H.E. Ali Said Faqi

Ambassador of the Federal Republic of Somalia to the Kingdom of Belgium and the European Union

Co-Agent of the Federal Republic of Somalia

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Annex 25 — Total Fina Elf, *Meeting with Authorities of Somalia* (3 Feb. 2001)

Annex 26 — Memorandum of Understanding between National Oil Corporation of Kenya and Eastern Echo DMCC (26 July 2013)

Annex 27 — Draft Agreement between National Oil Corporation of Kenya and Eastern Echo DMCC (Aug. 2013), *available at* http://cofek.co.ke/Western%20Geco%20and%20National%20Oil%20-%20New%20Acquisition%20Agreement%202013.docx

Annex 28 — Soma Oil & Gas Exploration, Ltd., *Unlocking Somalia's Potential: 1st International Forum on Somalia Oil, Gas & Mining* (27-28 Apr. 2015)

Annex 29 — Spectrum Geo, "Spectrum signs Seismic Data Agreement to Kick-Start Oil Exploration Offshore Somalia" (7 Sept. 2015)

Annex 30 — Soma Oil & Gas Exploration, Ltd., *Unlocking Somalia's Potential: Company Presentation Q2 2016* (2016)

Annex 31 — Schlumberger, Ltd., "Multiclient Latest Projects: Kenya Deepwater 2D 2013 Multiclient Seismic Survey", *available at* http://www.multiclient.slb.com/latest-projects/africa/kenya_2d.aspx (last accessed 11 May 2018)

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Annex 32 — Vivian Louis Forbes, The Maritime Boundaries of the Indian Ocean Region (1995)

Annex 33 — International Law Commission, *Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, with commentaries thereto* in *Report of the International Law Commission on the work of its fifty-eighth session (1 May-9 June and 3 July-11 August 2006)*, U.N. Doc. A/61/10 (2006)

Annex 34 — 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)

Annex 35 — Dominik Balthasar, The Heritage Institute for Policy Studies, *Oil in Somalia: Adding Fuel to the Fire?* (2014)

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Annex 36 — F. Oluoch & M. Kimani, "War hits Kenya's bid to expand waters", *The East African* (29 Jan. 2012)

Annex 37 — Fred Oluoch, "UN unveils new look Amisom as Kenya joins up", *The East African* (11 Feb. 2012)

Annex 38 — Samuel Kamau Mbote, "COFEK question National Oil Western Geco contract to store Kenya Oil Data", *Oil News Kenya* (22 Mar. 2014)

Annex 39 — "Spectrum ASA completes the acquisition of 2D seismic data offshore Somalia", *Oil News Kenya* (5 May 2016)

MISCELLANEOUS

Annex 40 — United Republic of Tanzania, Government Notice No. 209 (24 Aug. 1973), *published in* Gazette of the United Republic of Tanzania, No. 36, Vol. LIV, Supplement No. 48 (7 Sept. 1973)

Annex 41 — International Hydrographic Organization, *Hydrographic Dictionary* (5th ed., 1994)

Annex 42 — United States National Geospatial-Intelligence Agency, *Chart 61220: Manda Island to Kismaayo* (20 Jan. 2014)

Annex 43 — Consumers Federation of Kenya, "How the latest string of National Oil Corporation of Kenya (NOCK) contracts will affect you the consumer" (20 Mar. 2014), *available at* http://www.cofek.co.ke/index.php/news-and-media/399-how-the-latest-string-of-national-oil-corporation-of-kenya-nock-will-affect-you-the-consumer