

**CASE CONCERNING  
MARITIME DELIMITATION IN THE INDIAN OCEAN**

**SOMALIA  
v.  
KENYA**

**MEMORIAL OF SOMALIA**

**VOLUME I**

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## CHAPTER 1. INTRODUCTION

1.1. The Federal Republic of Somalia instituted these proceedings against the Republic of Kenya on 28 August 2014 when it filed an Application to the Court in accordance with Article 36, paragraphs 1 and 2, and Article 40 of the Statute of the Court. As set out in the Application, this case concerns the interpretation and application of the 1982 United Nations Convention on the Law of the Sea (“UNCLOS” or the “Convention”) and customary international law with respect to the establishment of

“the single maritime boundary between Somalia and Kenya in the Indian Ocean delimiting the territorial sea, exclusive economic zone ... and continental shelf, including the continental shelf beyond 200 nautical miles ...”.<sup>1</sup>

1.2. By an Order dated 16 October 2014, the Court fixed the time limit for the filing of the Memorial by Somalia as 13 July 2015 and the time limit for the filing of the Counter-Memorial by Kenya as 17 May 2016. This Memorial is submitted pursuant to that Order.

1.3. Somalia has brought these proceedings in accordance with its firm commitment to the rule of international law, in order to determine its disputed maritime boundary with Kenya in a manner that is peaceful, equitable and legally conclusive.

1.4. Prior to the institution of these proceedings, Somalia sought to resolve the dispute with Kenya through good faith negotiations. Somalia entered that dialogue in a spirit of respect and with a desire to promote friendly relations with

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<sup>1</sup> *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, Application Instituting Proceedings (28 Aug. 2014), para. 2.

its valued neighbour, with whom it shares many historical and cultural ties and common interests. Somalia regrets that these negotiations did not lead to a mutually acceptable solution.

1.5. Somalia's Application to the Court is made in the same spirit of respect and friendly cooperation, consistent with the Convention's aim to "promote the peaceful uses of the seas and oceans".<sup>2</sup> The Application has been brought with the aim of having the Court delimit the boundary that will divide the maritime areas of the two States in accordance with the requirements of international law, and to do so from the land boundary terminus, through the territorial sea, into the exclusive economic zone ("EEZ") and continental shelf up to 200 nautical miles ("M"), and into the continental shelf beyond 200 M.

## **Section I. Reasons for the Institution of Proceedings against Kenya**

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

1.7. Somalia considers Kenya's claim to be inconsistent with international law for the reasons set out in the chapters that follow. A boundary along a line of parallel has no basis the Convention and cannot be justified by reference to any aspect of the history, geography or relevant practice of either Party, all of which

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<sup>2</sup> United Nations Convention on the Law of the Sea (hereinafter "UNCLOS"), Preamble.

instead support a boundary based on equidistance. Kenya's claim notably appears to be contrary to the position enshrined in its own domestic legislation.

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

1.9. As adjacent States on the coast of East Africa, Somalia and Kenya share a common history of imperial conquest and decades of colonial rule by Italy and the United Kingdom (Somalia) and the United Kingdom alone (Kenya). The two States attained independence just a few years apart: Somalia in 1960, Kenya in 1963. In the half-century after the end of colonial rule, however, the fortunes of the two Parties diverged.

1.10. Since independence Kenya has enjoyed relatively stable democratic government and steady economic development. Today it is the largest economy in East Africa, with substantial natural resources and GDP per capita almost ten times that of Somalia.<sup>3</sup>

1.11. In contrast, Somalia has endured decades of civil conflict, humanitarian disasters and terrorism that have depleted its limited natural resources and, at

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<sup>3</sup> According to the United Nations National Accounts Main Aggregates Database, in 2013 (the most recent year for which statistics are available) Kenya's GDP per capita was US\$ 1,227. Somalia's GDP per capita was US\$ 133. *See* United Nations, Statistics Division, National Accounts Main Aggregates Database, "Per Capita GDP in US Dollars" (Dec. 2014), *available at* <http://unstats.un.org/unsd/snaama/dnllist.asp> (last accessed 26 June 2015). Memorial of the Federal Republic of Somalia ("MS"), Vol. IV, Annex 73.

times, threatened its functioning as a stable State. Its post-independence history has been dominated by instability, poverty and a civil war that led to the collapse of effective central government for two decades. Since 1991, a number of external actors seized upon the absence of effective government to exploit Somalia's territory and resources for their own ends. Terrorism thrived and economic stagnation inflicted a terrible humanitarian toll.

1.12. Since 2012, the Federal Government of Somalia has, with the support of international partners, governed the country under a new national constitution. This places the rule of law, parliamentary democracy and human rights at the heart of the constitutional order. It has a functioning federal government under the leadership of H.E. Hassan Sheikh Mohamud. Governmental and regional institutions that can deliver adequate services to the people are being rebuilt, and life has sprung back in major cities in Somalia including Mogadishu, Hargeissa, Bossaso, Kismayo, Baldayne, Baidoa and many other places throughout the country. Local businesses are thriving; a new generation of educated Somalis is graduating from various educational institutions, and a significant number of the Somali diaspora are returning to their homeland.

1.13. For the first time in its history as an independent country, Somalia is able to make effective use of international dispute mechanisms to protect its rights under international law—including its rights over its territorial and maritime resources—for the benefit of all of its citizens. The present case marks an important moment in Somalia's progress in this respect.

1.14. As one of the world's poorest countries, Somalia's maritime resources are particularly valuable natural assets. As these resources assume increasing importance for Somalia's future development, Kenya's unilateral claim to a maritime boundary that follows a parallel of latitude would deprive Somalia of



some of its most important marine and mineral resources, which Somalia views as keys to its economic development, stability and security.

1.15. Against this background, Somalia has two principal objectives in bringing these proceedings. *First*, it seeks to obtain the definitive delimitation of its maritime boundary in the territorial sea, the EEZ and the continental shelf, including the continental shelf beyond 200 M. *Second*, it asks for a judgment recognizing that Kenya has violated Somalia's territorial integrity and sovereign rights and jurisdiction by awarding commercial oil concessions in Somalia's territorial sea, EEZ and continental shelf.

1.16. The jurisdiction of the Court, in regard to these matters, is plainly established on the basis of Declarations made by the Parties under the optional clause contained in Article 36, paragraph 2, of the Statute of the Court. Somalia's Declaration, made on 11 April 1963, contains nothing that might give rise to any limitation on the jurisdiction of the Court in relation to the matter submitted in the Application.<sup>4</sup> Kenya's Declaration, made on 19 April 1965, contains four

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<sup>4</sup> Somalia's Declaration provides:

"I have the honour to declare on behalf of the Government of the Somali Republic that the Somali Republic accepts as compulsory *ipso facto*, and without special agreement, on condition of reciprocity, the jurisdiction of the International Court of Justice, in conformity with paragraph 2 of Article 36 of the Statute of the Court, until such time as notice may be given to terminate the acceptance, over all legal disputes arising other than disputes in respect of which any other party to the dispute has accepted the compulsory jurisdiction of the International Court of Justice only in relation to or for the purposes of the dispute; or where the acceptance of the Court's compulsory jurisdiction on behalf of any other Party to the dispute was deposited or ratified less than twelve months prior to the filing of the application bringing the dispute before the Court. The Somali Republic also reserves the right at any time by means of a notification addressed to the Secretary-General of the United Nations, and with effect as from the moment of such notification, either, to add to, amend or withdraw any of the foregoing reservations, or any that may hereafter be added".

exceptions, none of which operate to exclude jurisdiction in the present case.<sup>5</sup> The consensual basis for the Court's jurisdiction is plainly established by the existence of convergent Article 36(2) declarations, which "afford a basis for the jurisdiction of the Court".<sup>6</sup> Accordingly, the Court has full jurisdiction to settle the dispute submitted to it by Somalia. There are no grounds for the Court to decline to exercise that jurisdiction.

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(Declarations recognizing the jurisdiction of the Court as compulsory are available at <http://www.icj-cij.org/jurisdiction/?p1=5&p2=1&p3=3&code=SO.>)

<sup>5</sup> Kenya's Declaration provides that:

"it accepts, in conformity with paragraph 2 of Article 36 of the Statute of the International Court of Justice until such time as notice may be given to terminate such acceptance, as compulsory *ipso facto* and without special Agreement, and on the basis and condition of reciprocity, the jurisdiction over all disputes arising after 12th December, 1963, with regard to situations or facts subsequent to that date, other than:

1. Disputes in regard to which the parties to the dispute have agreed or shall agree to have recourse to some other method or methods of settlement;
2. Dispute with the government of any State which, on the date of this Declaration is a Member of the Commonwealth of Nations or may so become subsequently;
3. Disputes with regard to questions which by general rules of International Law fall exclusively within the jurisdiction of Kenya;
4. Disputes concerning any question relating to or arising out of belligerent or military occupation or the discharge of any functions pursuant to any recommendation or decision of an organ of the United Nations, in accordance with which the Government of the Republic of Kenya have accepted obligations.

The Government of the Republic of Kenya reserves the right at any time by means of a notification addressed to the Secretary-General of the United Nations to add to, amend, or withdraw any of the foregoing reservations. Such notifications shall be effective on the date of their receipt by the Secretary-General of the United Nations".

<sup>6</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, para. 110. *See also, e.g., ibid.*, paras. 59-60; *Anglo-Iranian Oil Co. (United Kingdom v. Iran)*, Preliminary Objection, Judgment, I.C.J. Reports 1952, p. 103; *Certain Norwegian Loans (France v. Norway)*, Judgment, I.C.J. Reports 1957, p. 19; *Fisheries Jurisdiction (Spain v. Canada)*, Jurisdiction of the Court, Judgment, I.C.J. Reports 1998, para. 44.

1.17. As regards the merits, a number of fundamental points are in order. *First*, the geography of the Somali and Kenyan coastlines are unremarkable, having a straightforward and stable configuration. As can be seen in **Figure 1.1** (following page 8), the Parties' coasts abutting the area to be delimited are straight and smooth. There are no significant recesses, protuberances or other formations that might affect the delimitation process. Unlike many other disputed maritime boundaries, the Court is not called upon here to consider the effects of any complex or anomalous coastal features, or to modify established principles of maritime delimitation to take account of unstable land formations. The delimitation exercise is straightforward.

1.18. *Second*, the Parties have never concluded any agreement, written or otherwise, concerning the delimitation of their maritime boundary. Both are bound by the Convention and have emphasised their commitment to honouring its provisions, including in relation to the delimitation of their maritime boundaries.

1.19. *Third*, the regularity of the geographic circumstances of the coastline, and the absence of any bilateral agreement departing from the principles to be applied under the Convention make this a case *par excellence* for the application of the equidistance/special circumstances principle (in the territorial sea) and the closely related equidistance/relevant circumstances principle (in the EEZ and continental shelf), in accordance with Articles 15, 74 and 83 of the Convention.

1.20. Equidistance is “the general rule”<sup>7</sup> and “[t]he usual methodology” applicable to maritime delimitation disputes.<sup>8</sup> Accordingly, the Court’s case law establishes that the delimitation exercise must begin with the drawing of a

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<sup>7</sup> *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 2007, para. 281.

<sup>8</sup> *Maritime Dispute (Peru v. Chile)*, Judgment, I.C.J. Reports 2014, para. 184.

provisional equidistance line unless there exist “compelling reasons” to make this “unfeasible”.<sup>9</sup> In the present case there are no reasons—compelling or otherwise—that would make a provisional equidistance line difficult to draw or otherwise unfeasible. To the contrary, the configuration of the relevant coastlines makes the identification of appropriate base points and the construction of an equidistance line quite simple.

1.21. Nor, importantly, are there any special or relevant circumstances that warrant an adjustment to the equidistance line in the interests of achieving an “equitable” result. In the context of the straight and unexceptional Somalia-Kenya coastline, equidistance is the *only* equitable result. Indeed, any departure from equidistance would ignore the foundational principle of maritime delimitation that “the land dominates the sea”,<sup>10</sup> since it would produce an artificial cut-off resulting from an irregular maritime boundary at odds with the regular configuration of the land from which the maritime entitlements derive.

1.22. In contrast to the equidistance line, the parallel boundary Kenya claims lacks any coherent legal basis. Kenya has previously sought to justify the parallel line by reference to a vague appeal to “equitable principles”, claiming that an equidistant boundary would be inequitable in light of the maritime boundary that Kenya negotiated with its southern neighbour, Tanzania, in 1976 and 2009. That argument is entirely without merit.

1.23. Kenya freely negotiated a parallel boundary with Tanzania and voluntarily undertook to be bound by that maritime border. It cannot now invoke what it

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<sup>9</sup> *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, para. 116.

<sup>10</sup> *North Sea Continental Shelf (Federal Republic of Germany/Netherlands)*, Judgment, I.C.J. Reports 1969, para. 96.

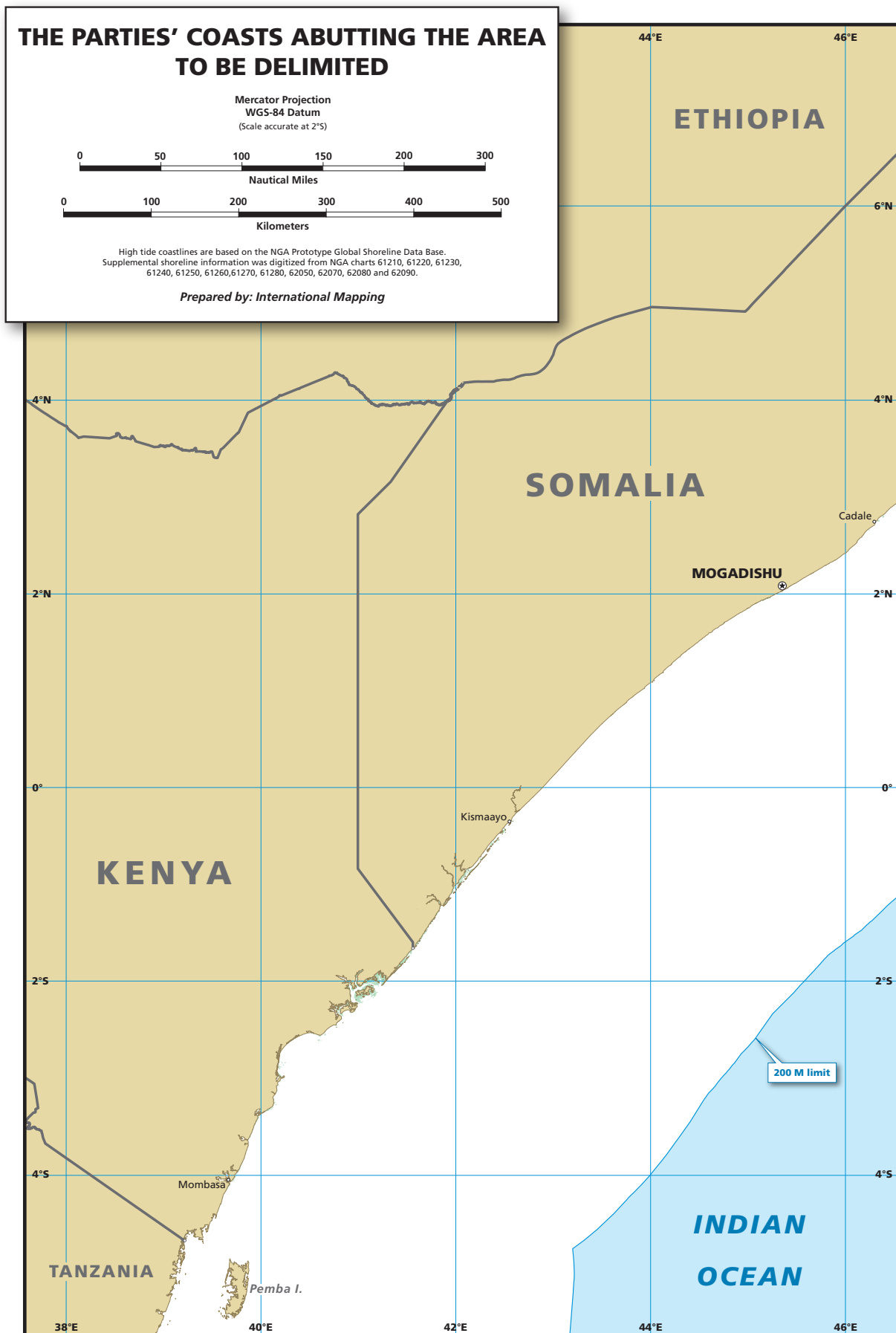


Figure 1.1



perceives as the negative consequences of that agreement in order to seek to diminish Somalia's sovereign rights and jurisdiction. Kenya alone bears responsibility for the consequences of the agreement it entered into with Tanzania. In regards to Somalia, the Kenya-Tanzania agreements are *res inter alios acta* and they cannot be invoked against Somalia to "compensate" Kenya for the consequences of the bargain in made hundreds of miles to the south.

1.24. In any event, it is clear that an unadjusted equidistance line between Somalia and Kenya does not produce an outcome that is disproportionate to the Parties' relevant coasts. In contrast to Kenya's unjustifiable claim, there is nothing inequitable in applying the standard method of delimitation to the wholly unremarkable coastlines of Somalia and Kenya.

## **Section II. Structure of the Memorial**

1.25. Somalia's Memorial consists of four volumes. Volume I contains the main text of the Memorial, along with selected maps and diagrams. Volume II contains a full set of figures and maps. Volumes III and IV contain additional supporting materials.

1.26. The main text of the Memorial, Volume I, consists of eight chapters followed by Somalia's Submissions. After this Introduction, **Chapter 2** describes the geographical, geologic and geomorphological context of this dispute.

1.27. **Chapter 3** addresses the history of the dispute, beginning with the relevant provisions of the Parties' maritime laws, which disclose the contradictory and unpredictable approach taken by Kenya in relation to its maritime boundary with Somalia. As will be seen, both Parties have enacted legislation that is intended to bring their domestic law in line with the Convention

and is consistent with an equidistant maritime boundary. In particular, Kenya's 1972 Territorial Waters Act and 1989 Maritime Zones Act expressly provides for an equidistant delimitation of the territorial sea, while also providing that the EEZ boundary "shall be delimited ... pursuant to an agreement between Kenya and Somalia on the basis of international law".<sup>11</sup>

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

1.29. The chapter then addresses the Parties' respective submissions to the Commission on the Limits of the Continental Shelf ("CLCS") in regard to the extent—but not the delimitation—of the continental shelf beyond 200 M. It concludes by summarising the Parties' unsuccessful efforts to negotiate a maritime boundary agreement, and the sequence of events that ultimately led Somalia to initiate these proceedings.

1.30. **Chapter 4** describes the location of the Parties' land boundary terminus, the starting point of the maritime boundary. The terminal point of the Parties' land boundary was defined with a high degree of precision in a treaty and subsequent agreement between the two colonial powers in 1924 and 1927, respectively. The recognised starting point of the maritime boundary is situated on the low-water line approximately 41 metres southeast of the final permanent

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<sup>11</sup> Republic of Kenya, Chapter 371, *Maritime Zones Act* (25 Aug. 1989), § 4(4). MS, Vol. III, Annex 20.



boundary beacon (Primary Beacon No. 29) at the location known as “Dar Es Salam”.

1.31. **Chapter 5** concerns the delimitation of the territorial sea. It shows that since at least 1972, Kenya’s domestic legislation has expressly recognised that the maritime boundary with Somalia in the territorial sea should follow an equidistance line. The parallel boundary Kenya now claims directly contradicts its own legislation. In these circumstances, there is nothing to displace the presumption under Article 15 of the Convention in favour of an equidistance line within the territorial sea.

1.32. **Chapter 6** concerns the delimitation of the EEZ and the continental shelf within 200 M. It explains the legal and factual basis for Somalia’s claim that the boundary continues along a strict equidistance line with a general bearing of approximately N124.5°E from the outer limit of the territorial sea to the outer edge of the EEZ.

1.33. The chapter begins with a brief review of the applicable law, and then explains why the standard three-step analytical framework known as the “equidistance/relevant circumstances” method is the appropriate approach in this case. It shows how the application of this method compels the conclusion that the equidistance line constitutes an equitable solution that is fully justified in light of the Parties’ conspicuously smooth and unexceptional coasts. Indeed, if equidistance is not appropriate in the circumstances of this case, it is hard to imagine a case in which it would be. In this connection, the chapter also identifies the relevant coasts of the Parties and the relevant area, and explains how appropriate base points have been selected in accordance with established principles for the purpose of constructing the equidistance line.

1.34. **Chapter 7** addresses the delimitation of the continental shelf beyond 200 M. It begins by demonstrating the Court's jurisdiction to delimit the "outer" continental shelf. In this respect, it distinguishes the Court's task in *delimiting* the maritime boundary between Somalia and Kenya from the entirely separate role of the CLCS, which is responsible for *delineating* the precise outer limits of the continental margin. Moreover, both Kenya and Somalia have made full submissions to the CLCS concerning the extent of their respective continental shelves beyond 200 M. There is therefore no legal or practical impediment to the Court's determination of the path of the Parties' maritime boundary while the CLCS is engaged in the task of delineating the full extent of their continental shelves beyond 200 M.

1.35. The legal principles applicable to delimitation of the continental shelf beyond 200 M are the same as those applicable to delimitation within 200 M. Accordingly, the chapter proceeds to explain why, as in the case of the delimitation of the EEZ and the continental shelf within 200 M, there are no relevant circumstances that require a modification of the provisional equidistance line beyond 200 M. Any reduction in Kenya's overall maritime entitlement beyond 200 M could only arise as a result of Kenya's bilateral agreement with Tanzania, by which Kenya voluntarily divested itself of a very large maritime area south of the negotiated parallel boundary. As a matter of law, Somalia cannot be required to compensate Kenya for the consequences of its own past actions.

1.36. Finally, **Chapter 8** concerns Kenya's international responsibility for illegal activities in the disputed maritime area. The chapter begins by explaining how Kenya's unilateral economic exploitation of the disputed maritime area constitutes an unlawful infringement of Somalia's sovereign rights and jurisdiction. It then addresses the remedies to which Somalia is entitled in respect

of these on-going violations. Kenya is obliged to cease all wrongful acts and must deliver to Somalia all the data it has acquired through exploration of areas that pertain to Somalia. Further, to the extent that Kenya is unable to make good the wrongs done to Somalia by restitution, it is under a duty to compensate Somalia for the damage caused by the appropriation of, and interference with, its sovereignty and sovereign rights and jurisdiction over the territorial sea, EEZ and continental shelf.

1.37. The Memorial concludes with Somalia's Submissions.



## **CHAPTER 2. THE GEOGRAPHY, GEOLOGY AND GEOMORPHOLOGY OF SOMALIA AND KENYA**

2.1. This chapter describes the geographical, geological and geomorphological circumstances relevant to the delimitation of the maritime boundary between Somalia and Kenya. **Section I** describes the geographical circumstances that are most pertinent to the delimitation of the maritime boundary within 200 M. **Section II** addresses the geological and geomorphological circumstances that are most pertinent to the delimitation of the maritime boundary in the continental shelf beyond 200 M.

### **Section I. The Geographical Circumstances**

#### **A. THE GEOGRAPHY OF SOMALIA**

2.2. Somalia is located on the East Coast of Africa between latitudes 12°00' N and 1°40' S, and between longitudes 41°00' and 51°25' E. It is the easternmost country on mainland Africa, and the most prominent on the Horn of Africa. Indeed, the country's pointed shape gives the Horn its name. Somalia's location is shown in **Figure 2.1** (following page 16).

2.3. Somalia has a land area of approximately 640,000 km<sup>2</sup> and a population estimated at 10.4 million. It shares land boundaries with Djibouti in the far northwest, Ethiopia in the west and Kenya in the southwest. The only portion of these boundaries that is relevant to these proceedings is the final segment of the land border with Kenya running southeast from approximately the 41°33' E meridian to the land boundary terminus ("LBT") on the Indian Ocean. This

portion of the boundary is described in detail in Chapter 4 concerning the precise location of the LBT.<sup>12</sup>

2.4. Somalia's largest city is its capital, Mogadishu, which has a population of approximately 1.35 million. It is located some 641 km northeast of the LBT with Kenya on the Indian Ocean coast. This location has made it a strategic trade center since the 12th century.<sup>13</sup> While the Mogadishu port has not been as active in recent years, it remains key to Somalia's international trade.

2.5. The other large city on Somalia's southeastern coast is Kismaayo, located approximately 437 km southwest of Mogadishu and 204 km northeast of the LBT. Like Mogadishu, it is the site of an important deep-water port. Today, it is the main point of shipment for Somalia's exports.

2.6. Somalia straddles the Equator near its southern tip. Its climate is mostly arid to semi-arid and, in the north and coastal areas, semi-desert.<sup>14</sup> Most of Somalia receives less than 500 mm of rain a year,<sup>15</sup> with a country annual

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<sup>12</sup> See, *infra*, paras. 4.15-4.24.

<sup>13</sup> U.N. Environment Programme, *The State of the Environment in Somalia: A Desk Study* (Dec. 2005), p. 24. MS, Vol. IV, Annex 88.

<sup>14</sup> *Ibid.*, pp. 38, 40.

<sup>15</sup> A. C. Beier and E. Stephansson, *Environmental and Climate Change Policy Brief: Somalia* (28 Oct. 2012), p. 4. MS, Vol. IV, Annex 92.

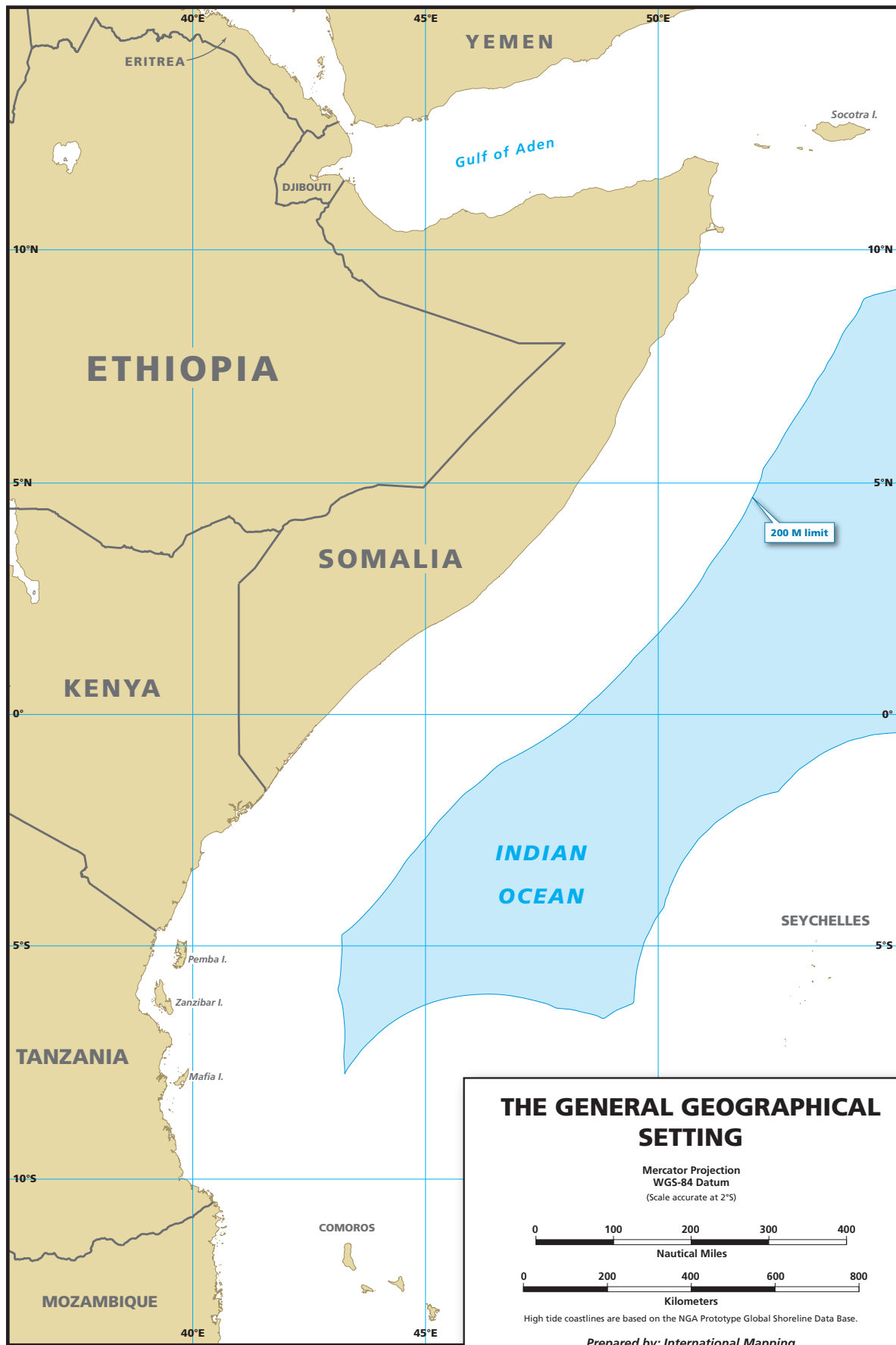


Figure 2.1





average of 250 mm.<sup>16</sup> Its vegetation is mostly dry, deciduous bush and thicket.<sup>17</sup> Only about 1.73% of its land is arable.<sup>18</sup>

2.7. Somalia has a longer coastline than any other country in mainland East Africa. From the boundary with Djibouti in the northwest, Somalia's coast runs generally from west to east along the Gulf of Aden for approximately 1000 km to the Horn of Africa, where it makes an abrupt turn to the southwest and follows the Indian Ocean for another 2000 km to the LBT with Kenya.

2.8. Somalia's Indian Ocean coast can be divided into two parts. The first part of the coast, from the tip of the Horn to the point approximately 92 km northeast of Mogadishu (just south of Cadale),<sup>19</sup> faces generally east-southeast. The second part of the coast runs from the point just described to the LBT with Kenya. This portion of the Somali coast is approximately 733 km in length and faces virtually due southeast.

2.9. Somalia's southeast-facing coast is generally smooth and regular, including the portion running from Mogadishu to the LBT with Kenya. It has sandy beaches punctuated with occasional rocky outcroppings and cliffs. These

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<sup>16</sup> F. Carbone et al., "The Modern Coral Colonization of the Bajuni Barrier Island (Southern Somalia): A Facies Model for Carbonate-Quartzose Sedimentation", *Geologica Romana*, Vol. 35 (1999), p. 114. MS, Vol. IV, Annex 86.

<sup>17</sup> U.N. Environment Programme, *The State of the Environment in Somalia: A Desk Study*, p. 40. MS, Vol. IV, Annex 88.

<sup>18</sup> U.S. Central Intelligence Agency, *The World Factbook: Somalia*, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/so.html> (last visited 3 Apr. 2015), p. 2. MS, Vol. IV, Annex 96.

<sup>19</sup> This point is located at coordinates 2°26'28.9"N - 46°01'26.1"E.

areas of the coast are known in Somali as *Dhulka Deexda*, or the land “without high shrubs or trees”.<sup>20</sup>

2.10. Near the LBT and just southwest of Ras Kaambooni (previously known as “Ras Kiambone” or “Dick’s Head”), there are several islets on the Somali side of the Kenya/Somalia boundary.<sup>21</sup> They are known collectively as the Diua Damasciaca Islands (or in Somali, Lama Shaaqa) and are depicted in **Figure 2.2** (following page 18). They are mostly barren, with sandy, rocky soil and limited shrubbery. Of the four biggest islets, three run in a straight line directly southwest of Ras Kaambooni and parallel to the mainland. The fourth and largest islet is just east of the most southern islet in the string. All lie within 1 M of the Somali coast.

2.11. Marine fisheries have long been important to Somalia’s economy and culture.<sup>22</sup> Coastal communities, including the Baajuun and Reer Maanyo ethnic groups, have traditionally harvested the waters off Somalia’s coast,<sup>23</sup> making a

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<sup>20</sup> U.N. Environment Programme, *The State of the Environment in Somalia: A Desk Study*, p. 14. MS, Vol. IV, Annex 88.

<sup>21</sup> 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), Art. 1. MS, Vol. III, Annex 2. (describing the boundary line in part as running “along that provincial boundary to a point due north of the point on the coast due west of the southernmost of the four islets in the immediate vicinity of Ras Kiambone .... Ras Kiambone (Dick’s Head) and the four islets above mentioned shall fall within the territory to be transferred to Italy”). The 1924 Agreement said there were four islets, but by the time of the 1927 Agreement, the Boundary Commission had corrected this to six islets. 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), Art. 6. MS, Vol. III, Annex 3.

<sup>22</sup> J.R. Vogel, *Fishing for Answers to Piracy in Somalia*, p. 1. MS, Vol. IV, Annex 93.

<sup>23</sup> U.N. Environment Programme, *The State of the Environment in Somalia: A Desk Study*, p. 45. MS, Vol. IV, Annex 88.

# SOMALIA'S RAS KAAMBOONI AND DIUA DAMASCIACA ISLANDS

(DigitalGlobe image from 25 December 2013 viewed in Google Earth)

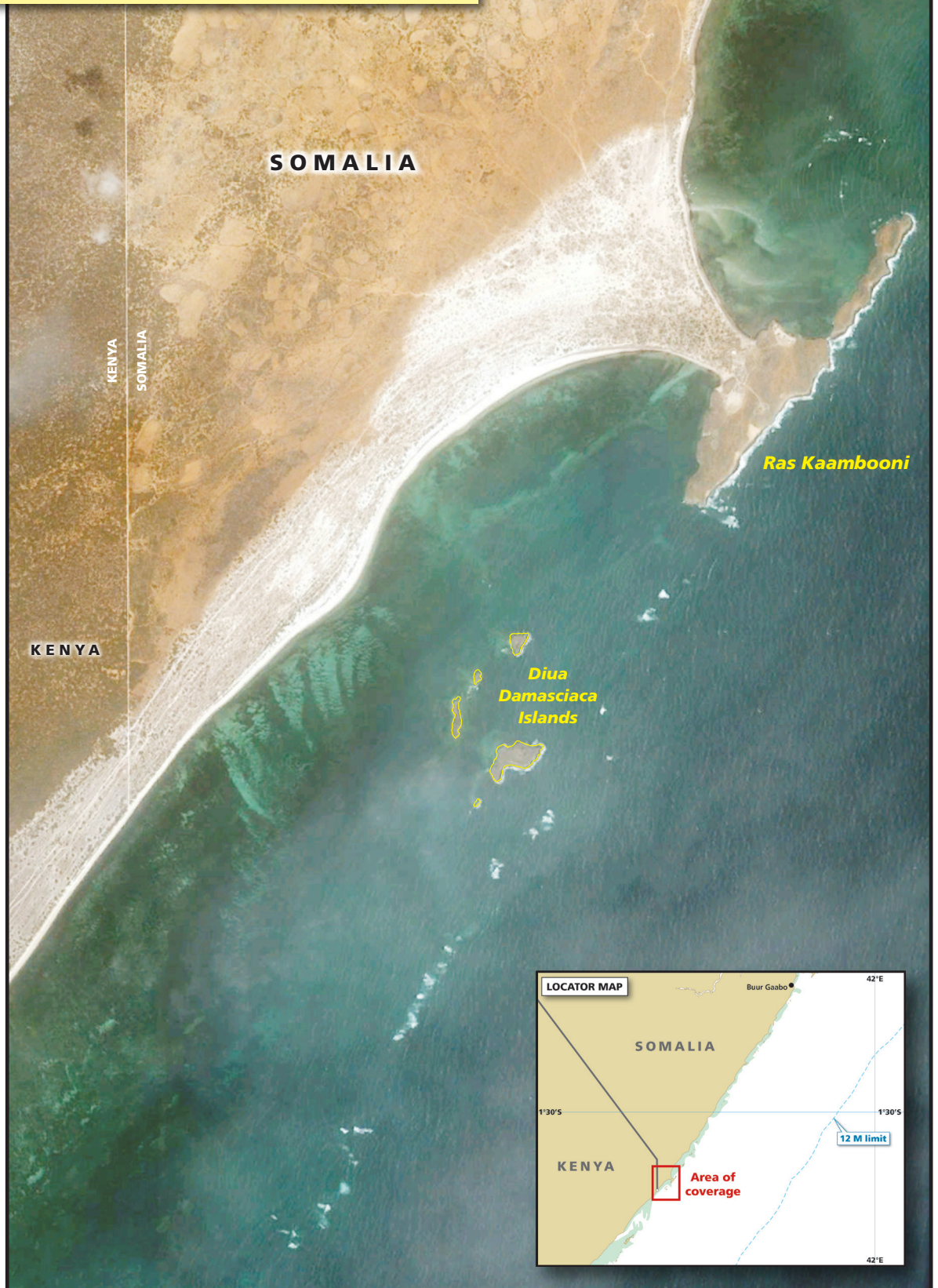


Figure 2.2



livelihood as fishermen and seafarers.<sup>24</sup> The fish and seafood catch in the waters off the southeast-facing mainland includes small pelagic species, tuna, rays, shark, other large fish and lobster. Lobster is an especially important resource for Somalia and has become one of the country's biggest exports.<sup>25</sup> The United Nations Environmental Programme has noted that the Somali Current Marine Ecosystem in the Somali Basin is one of the most important large marine ecosystems in the Indian Ocean, with significant marine fishery resources.<sup>26</sup>

2.12. Indeed, Somalia's waters are rich in valuable, large pelagic species that are in demand around the world, including tuna. Historically, Somalia has sought to take advantage of these natural resources by developing its fisheries sector, especially its small-scale and artisanal fishing cooperatives. Distant Water Fleets from all over the world have been attracted to these resources and have operated in Somalia's EEZ, frequently without licence.<sup>27</sup> The value of the illegal, deep-water fishing hauls off Somalia, in 2005 *alone* (the last year for which data is available), was estimated at US\$ 300 million,<sup>28</sup> which would have equated to over 5% of Somalia's GDP that year.

2.13. These rich fishing resources hold significant potential for Somalia's economy. Recognizing such potential, the UN has identified the fishing sector as

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<sup>24</sup> See Mohamad D. Abdullahi, *CULTURE AND CUSTOMS OF SOMALIA* (2001), p. 11. MS, Vol. IV, Annex 87. Godfrey Mwakikagile, *Kenya: Identity of a Nation* (2007), p. 102. MS, Vol. IV, Annex 89.

<sup>25</sup> U.N. Environment Programme, *The State of the Environment in Somalia: A Desk Study*, p. 46. MS, Vol. IV, Annex 88.

<sup>26</sup> *Ibid.*, p. 45.

<sup>27</sup> Although many foreign or joint venture trawlers operated legally off Somalia's coast between Somalia's independence and 1991, since then (and especially in the last ten years) illegal fishing has been rampant in the area.

<sup>28</sup> L. Persson et al., "Failed State: Reconstruction of Domestic Fisheries Catches in Somalia 1950-2010", *University of British Columbia Working Papers Series*, Working Paper No. 2014-10 (2014), p. 20. MS, Vol. IV, Annex 94.

a key resource for Somalia's economy going forward, as well as a stabilizing influence on the country as a whole.<sup>29</sup>

2.14. Somalia has also recently taken steps to begin exploring its potential for both onshore and offshore petroleum exploration and production. While work was suspended following the start of Somalia's civil war in 1991, the possibilities for such exploration are gaining steam now that the country is on the road to recovery and the security situation has improved. Somalia has recently entered discussions with major international oil companies with the aim of reactivating dormant contracts.

## B. THE GEOGRAPHY OF KENYA

2.15. Kenya is located on the East Coast of Africa to the southwest of Somalia between latitudes 5° 30' N and 4° 41' S, and longitudes 33° 59' E and 41°55' E. In addition to Somalia in the northeast, Kenya shares borders with Ethiopia to the north, South Sudan to the northwest, Uganda to the west and Tanzania to the south.

2.16. Kenya's coast is much shorter than Somalia's, measuring approximately 550 km from the LBT with Somalia in the north to the boundary with Tanzania in the south. Like Somalia's coast south of Mogadishu, it faces generally southeast onto the Indian Ocean. The Kenyan coastline is also unremarkable. With the exception of a small embayment known as Ungama Bay approximately halfway between Somalia and Tanzania (about 180 km southwest of the LBT with Somalia), it is notably regular. (See Figure 2.1 (following page 16).)

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<sup>29</sup> *Ibid.*, p. 21. See also M.G. Hassan and M.H. Tako, "Current status of marine fisheries in Somalia", in ASSESSMENT & MONITORING OF MARINE SYSTEM (S. Lokman et al. eds., 1999), pp. 4-6. MS, Vol. IV, Annex 85 (noting huge disparity between potential and actual fishing hauls, and specifically identifying artisanal fishing as ripe for potential).

2.17. Kenya has a population of approximately 45 million. Its capital, Nairobi, is also its largest city, with a population of some 3.38 million. Kenya's second largest city, Mombasa, which has a population of nearly 1 million, is located on the Indian Ocean coast approximately 430 km southeast of the LBT with Somalia.

2.18. Like Somalia, Kenya straddles the Equator. Its climate varies throughout the country. There are humid, tropical areas along much of the coast, arid and semi-arid ones near Somalia, temperate ones in the lush savannah plains of the interior highlands, and high altitude glaciers in its mountains.

2.19. Unlike Somalia, Kenya is rich in natural resources. Over three quarters of the land is "covered by loam soils, which are particularly well-developed in the semi-arid and desert regions," and are "ideal for agriculture".<sup>30</sup> Kenya's highlands and western plateau are some of the most fertile and agriculturally productive lands on the African continent.<sup>31</sup> Kenya also has abundant wildlife that has significant scientific, touristic and economic value, especially in its highlands.<sup>32</sup>

2.20. The hydrocarbon sector in Kenya is growing. Onshore oil concessions have been licensed since 1950 and offshore drilling has occurred since the 1970s.<sup>33</sup> The recent discovery of oil and gas in Tanzania and Uganda—which

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<sup>30</sup> E.M. Mathu and T.C. Davies, "Geology and the environment in Kenya", *Journal of African Earth Sciences*, Vol. 23, No. 4 (Nov. 1996), p. 516. MS, Vol. IV, Annex 84.

<sup>31</sup> U.S. Central Intelligence Agency, *The World Factbook: Kenya*, available at [https://www.cia.gov/library/publications/the-world-factbook/geos/print/country/countrypdf\\_ke.pdf](https://www.cia.gov/library/publications/the-world-factbook/geos/print/country/countrypdf_ke.pdf) (last accessed 3 Apr. 2015), p. 2. MS, Vol. IV, Annex 97.

<sup>32</sup> *Ibid.*, p. 2.

<sup>33</sup> See African Development Bank, Information Centre for the Extractives Sector (ICES), "Oil & Gas", available at <http://ices.or.ke/sectors/oil-gas/> (last accessed 22 May 2015), p. 1. MS, Vol. IV, Annex 128.

geologists have concluded share geological and geomorphological features with Kenya<sup>34</sup>—has contributed to a new wave of international investment interest in Kenya’s petroleum sector.<sup>35</sup>

2.21. The success rate has been high. Nine of fifteen recent wells have yielded discoveries of oil or gas.<sup>36</sup> For example, in 2012 Tullow Oil and its partners found oil in the Turkana region of northwest Kenya, and have since estimated there are 600 million barrels of discovered recoverable resources in that region.<sup>37</sup> In 2014, other regions were identified to have an estimated 1,196 million barrels.<sup>38</sup> As a result, increased exploration towards exploitation is anticipated.<sup>39</sup>

2.22. The promise of Kenya’s hydrocarbon sector is evidenced by the World Bank’s recent commitment to help Kenya develop its potential. In 2014, the Bank made a US\$ 50 million structured grant to the Kenya Petroleum Technical

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<sup>34</sup> See Luke Patey, *Kenya: An African oil upstart in transition*, Oxford Institute for Energy Studies Paper Series No. WPM 53 (Oct. 2014), p. iii. MS, Vol. IV, Annex 95; see also Lindsay Parson, Expert Review Paper, *Geology and Geomorphology of the East Africa Continental Margin, Indian Ocean* (6 July 2015) (hereinafter “L. Parson Report”), pp. 11-13. MS, Vol. IV, Annex 80.

<sup>35</sup> See Chris Lo, “Offshore Kenya: keeping up the neighbors”, *Offshore Technology Market & Customer Insight* (13 Jan. 2014), p. 2. MS, Vol. IV, Annex 118.

<sup>36</sup> Elayne Wangalwa, “World Bank approves US\$50 million for Kenya’s oil and gas sector”, *CNBC Africa* (12 Feb. 2015), p. 2. MS, Vol. IV, Annex 125.

<sup>37</sup> ICES, “Oil & Gas”, p. 1. MS, Vol. IV, Annex 128; Eduard Gismatullin, “Tullow Finds More Kenyan Oil to Boost East Africa Exports”, *Bloomberg Business* (15 Jan. 2014). MS, Vol. IV, Annex 119; Tullow Oil plc, *Tullow in Kenya* (2013), p. 10. MS, Vol. IV, Annex 110.

<sup>38</sup> ICES, “Oil & Gas”, p. 1. MS, Vol. IV, Annex 128 (estimating the Ngamia, Amosing, Agete, and Twinga wells to have 660 million, 231 million, 163 million, and 142 million barrels, respectively).

<sup>39</sup> Tullow Oil plc, *Kenya exploration and appraisal update* (11 Mar. 2015). MS, Vol. IV, Annex 127.



Assistance Project, which “will promote petroleum activities to contribute to fiscal and foreign exchange revenues” for Kenya.<sup>40</sup>

## **Section II. The Geological and Geomorphological Circumstances**

2.23. The geological processes that led to the formation of the modern Indian Ocean resulted in the creation of several sedimentary basins off the coast of East Africa. These include the Somali Basin, which is the dominant geological feature in the western Indian Ocean off the Somali and Kenyan coasts.

2.24. The Somali Basin is a bean-shaped area covering more than five million km<sup>2</sup>.<sup>41</sup> Its location is depicted in **Figure 2.3** (following page 24). It is bounded by the coasts of Somalia, Kenya and Tanzania to the west; Socotra Island to the north; the flanks of the Carlsberg Ridge to the east; and the Coco-de-Mer Seamounts, Amirante Ridge-trench complex, and Aldabra and Comoros Islands to the east and south.

2.25. As Figure 2.3 reflects, the Somali Basin is subdivided into three sub-basins: the Western Basin immediately east of the southern Somali coast and Kenyan coasts; the Northern Basin to the east of Somalia’s northern coast just below the Horn; and the Eastern Basin. Of the three sub-basins, only the Western Basin is relevant for purposes of this case.

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<sup>40</sup> World Bank, *Press Release: Kenya: New World Bank project will support country efforts to better manage oil and gas developments and revenues to invest in lasting growth and development* (24 July 2014). MS, Vol. IV, Annex 121; *see also* Elayne Wangalwa, “World Bank approves US\$50 million for Kenya’s oil and gas sector”, *CNBC Africa* (12 Feb. 2015), p. 1. MS, Vol. IV, Annex 125.

<sup>41</sup> L. Parson Report, p. 9. MS, Vol. IV, Annex 80.

2.26. The Western Somali Basin is separated from the others by the Central Somali Spur to the north, and the Dhow, VLCC and ARS fracture zones to the east. The Western Basin is at least 125 million years old.<sup>42</sup> Since then, runoff and river flows have carried sediments off the African mainland into the basin, resulting in deep sedimentary layers (up to 7 km of sediment in the central basin<sup>43</sup>). Drill studies have confirmed a striking volume of mainland-transferred sands in the deep water of the basin.<sup>44</sup>

2.27. The transfer of sediment from the Somali mainland, as well as that of Kenya and Tanzania, to the Western Basin continues today.<sup>45</sup> Somalia's two main rivers, the Juba and Shebelle, empty into the basin, bringing with them inland sediments. After crossing the shallow, narrow physical shelf just off Somalia's southern coast,<sup>46</sup> the sediments flow in a generally southeasterly direction, down the very gradual continental slope out to its deepest parts at depths of 4500-4800 m.<sup>47</sup> This sediment transfer is facilitated by the submarine canyons, sediment fan channels, and smaller-scale gully systems that characterize the upper parts of the continental slope.

2.28. In deeper water (below depths of 4000 metres), the Somali Channel emerges as the largest continuous sediment transferring feature, following a slightly sinuous course to beyond 200 M of the coast. Alongside this channel,

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<sup>42</sup> See *ibid.*, pp. 5-6, 8.

<sup>43</sup> *Ibid.*, p. 6.

<sup>44</sup> *Ibid.*, pp. 9-12.

<sup>45</sup> *Ibid.*, pp. 12-13.

<sup>46</sup> South of the Central Somali Spur, the shallow water platform in the Basin is narrow, with an average width of less than 20 M (37 km) out to a depth of 200 m (*i.e.*, the 200 m isobath). L. Parson Report, p. 9. MS, Vol. IV, Annex 80.

<sup>47</sup> *Ibid.*, p. 9.

## THE SOMALI BASIN

(Sea Floor modeling generated from ETOPO data)

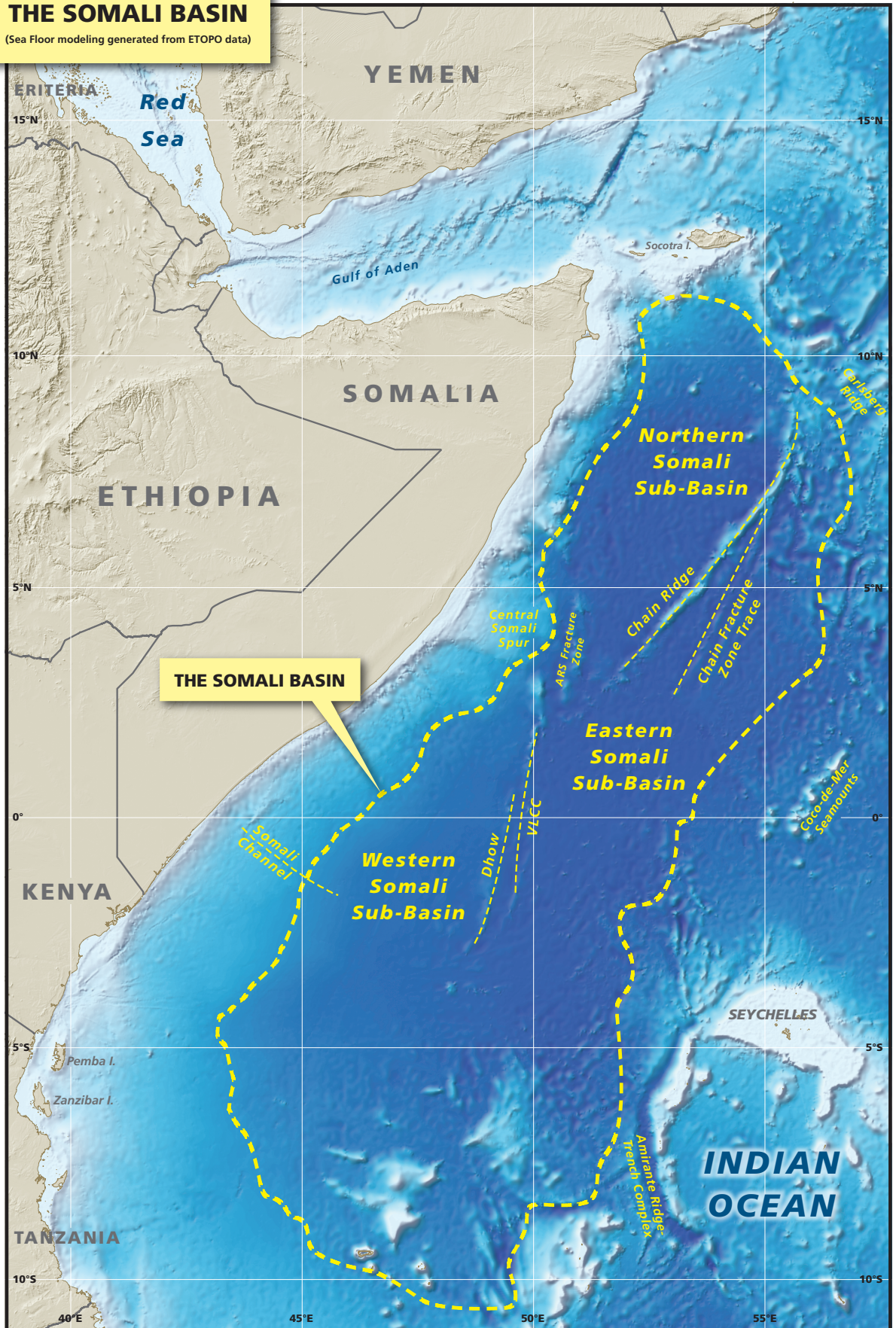


Figure 2.3



intermittent, sediment-laden submarine flows<sup>48</sup> carry mainland sediments across the Western Basin out to the abyssal plain.<sup>49</sup>

2.29. The processes described above characterize the continental margins of both Somalia and Kenya. Indeed, the Somali Basin unites the southern Somali coast with all of Kenya's in a single continuous feature, more than 2000 km in length. Sedimentary materials shed from the continental landmass for the 160 million years of the basin's existence have steadily been deposited across its entire floor, including off the Kenyan coast. The continuity of these sediments from the East African landmass to the shelf and slope, and finally the basin floor, means that the natural prolongation of the Somali and Kenyan coasts extends well beyond 200 M, to the limits of the continental margin as described in Chapters 3 and 7.

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<sup>48</sup> Such flows are also known as "turbidity" currents.

<sup>49</sup> The plain is characterized by its largely flat surface, which is uninterrupted by underwater mountains or other prominent features. L. Parson Report, pp. 9-11. MS, Vol. IV, Annex 80.



## CHAPTER 3. HISTORY OF THE DISPUTE

3.1. This chapter describes the history of the maritime boundary dispute between Somalia and Kenya. **Section I** describes the maritime legislation and claims of Somalia and Kenya. **Section II** discusses their submissions with respect to the continental shelf beyond 200 M. Finally, **Section III** describes the diplomatic negotiations between the Parties and shows that they have fully exchanged views, yet have been unable to resolve their dispute over their maritime boundary.

### Section I. Maritime Zones of the Parties

#### A. SOMALIA

3.2. Somalia signed UNCLOS on 10 December 1982 and ratified it six and a half years later, on 24 July 1989.<sup>50</sup>

3.3. In anticipation of the Convention's ratification, the President of Somalia issued Law No. 5 of 26 January 1989<sup>51</sup> approving the Somali Maritime Law of 1988.<sup>52</sup> The Somali Maritime Law provides that the breadth of Somalia's

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<sup>50</sup> *Note Verbale* from the Permanent Mission of Somali Democratic Republic to the United Nations to the Secretary-General of the United Nations, No. NY/UN-20/490/89 (20 July 1989). MS, Vol. III, Annex 35; *Note Verbale* from the Secretary-General of the United Nations to the Permanent Representative of the Somali Democratic Republic to the United Nations, No. LA 41 TR/221/1 (21-6) (8 Aug. 1989). MS, Vol. III, Annex 36; *Memorandum* from the Secretary-General of the United Nations to Treaty Services of Ministries of Foreign Affairs and of international organizations concerned, No. C.N.187.1989.TREATIES-2 (28 Aug. 1989). MS, Vol. III, Annex 53.

<sup>51</sup> Somali Democratic Republic, Law No. 5, *Somali Maritime Law* (26 Jan. 1989). MS, Vol. III, Annex 11; *see also* Somali Democratic Republic, Presidential Decree No. 14, *Instrument of Ratification* (9 Feb. 1989). MS, Vol. III, Annex 12.

<sup>52</sup> Somali Democratic Republic, Ministry of Fisheries and Sea Transport, *Somali Maritime Law* (1988). MS, Vol. III, Annex 10.

territorial sea is 12 M.<sup>53</sup> It also provides for a 200 M EEZ<sup>54</sup> and a continental shelf that extends throughout the natural prolongation of Somalia's land territory to the outer edge of the continental margin.<sup>55</sup> Finally, Law No. 5 repealed any prior laws inconsistent with the Somali Maritime Law of 1988.<sup>56</sup>

3.4. Shortly thereafter, on 9 February 1989, Somalia enacted Law No. 11, which incorporated UNCLOS into its internal law.<sup>57</sup> On the same day, Presidential Decree No. 14 was promulgated<sup>58</sup> entering Law No. 11 into effect.

3.5. Acting in conformity with Article 7(7) of the Somali Maritime Law of 1988, which provides that Somalia "shall ... draw up detailed charts and lists of geographical coordinates whenever appropriate, showing the outer limits of the Exclusive Economic Zone",<sup>59</sup> the President of Somalia issued a Proclamation

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<sup>53</sup> Article 4(3) provides: "The Territorial Sea of the Somali Democratic Republic shall extend 12 nautical miles into the sea from the baselines. The furthest extent of the country's Territorial Sea limit shall be the baseline extension of 12 nautical miles". *Ibid.*, Art. 4(3).

<sup>54</sup> Article 7(1) provides: "The Exclusive Economic Zone of the Somali Republic which is adjacent to the territorial sea shall extend to 200 nautical miles towards the sea from the baselines from which the breadth of the territorial sea is measured". *Ibid.*, Art. 7(1).

<sup>55</sup> Article 8(1) provides: "The Continental Shelf comprises the seabed and subsoil of the submarine areas that extend beyond the Somali Territorial Sea throughout the natural extension of its land territory to the outer edge of the continental margin". Article 8(5) further provides: "The full jurisdiction of the Democratic Republic of Somalia on the resources within the continental shelf shall extend to its outer limit, 200 nautical miles starting from the baselines from which the breadth territorial sea is measured or, if the continental shelf extends beyond 200 miles, it shall be measured in accordance with Part VI, article 76, 83, and 84 of the United Nations Convention on the Law of Sea". *Ibid.*, Arts. 8(1), 8(5).

<sup>56</sup> Somali Democratic Republic, Law No. 5, *Somali Maritime Law* (26 Jan. 1989), Art. 2. MS, Vol. III, Annex 11 ("The 1959 Maritime Law No. 1 of 21 February 1959 and any other law or any Administrative Law that opposes or [is] not in line with this Law has been repealed").

<sup>57</sup> Somali Democratic Republic, Law No. 11, *Mandate-the Approval of the Third United Nations Maritime Law* (9 Feb. 1989). MS, Vol. III, Annex 13.

<sup>58</sup> Somali Democratic Republic, Presidential Decree No. 14, *Instrument of Ratification* (9 Feb. 1989). MS, Vol. III, Annex 12.

<sup>59</sup> Somali Democratic Republic, Ministry of Fisheries and Sea Transport, *Somali Maritime Law* (1988), Art. 7(7). MS, Vol. III, Annex 10.



claiming a 200 M EEZ measured from a mixture of normal and straight baselines on 30 June 2014.<sup>60</sup> (Somalia uses straight base lines to measure the outer limit of its territorial sea in the area of the Baajuur Islands, a string of fringing islands lying immediately in front of the Somali coast south of Kismaayo. This is reflected in **Figure 3.1** (in Volume II only).) The same day as the Presidential Proclamation, Somalia deposited with the UN Division of Ocean Affairs and the Law of the Sea a list of coordinates for 2,468 points that define the outer limit of its EEZ with precision.<sup>61</sup>

3.6. With respect to the delimitation of Somalia's maritime boundaries with its neighbours, Article 4(6) of the Somali Maritime Law of 1988 provides that in the absence of agreement, "the Somali Democratic Republic shall consider that the border between the Somali Democratic Republic and the Republic of Djibouti and the Republic of Kenya is a straight line toward the sea from the land as indicated on the enclosed charts".<sup>62</sup>

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<sup>60</sup> Federal Republic of Somalia, Office of the President, *Proclamation by the President of the Federal Republic of Somalia* (30 June 2014), para. 1. MS, Vol. III, Annex 14.

<sup>61</sup> Federal Republic of Somalia, *Outer Limit of the Exclusive Economic Zone of Somalia* (30 June 2014). MS, Vol. III, Annex 15. See also United Nations, Division for Ocean Affairs and the Law of the Sea, *Deposit by the Federal Republic of Somalia of a list of geographical coordinates of points, pursuant to article 16, paragraph 2 and article 75, paragraph 2 of the Convention*, U.N. Doc. M.Z.N. 106.2014.LOS (3 July 2014). MS, Vol. III, Annex 68.

<sup>62</sup> Somali Democratic Republic, Ministry of Fisheries and Sea Transport, *Somali Maritime Law* (1988), Art. 4(6). MS, Vol. III, Annex 10. The Somali language does not contain a word precisely equivalent to "equidistance line" in English. The Government of Somalia considers that the phrase "straight line toward the sea" was intended to be equivalent to an equidistance line. Moreover, as a result of its long civil war, many of Somalia's historical records, including sometimes even legislation and related materials, have been lost or destroyed. Somalia has, after diligent investigation, been unable to locate any copies of the "enclosed charts" referenced in the 1988 Maritime Law.

## B. KENYA

3.7. Like Somalia, Kenya signed the Convention on 10 December 1982.<sup>63</sup> It later ratified it on 2 March 1989.<sup>64</sup>

### *1. Maritime Legislation and Claims*

3.8. Ten years before it signed UNCLOS, Kenya enacted its 1972 Territorial Waters Act, in which it claimed a 12 M territorial sea.<sup>65</sup> In 1989, Kenya passed its Maritime Zones Act, which brought Kenya's domestic legislation into conformity with UNCLOS. The 1989 Act established a 12 M territorial sea in addition to a 200 M EEZ.<sup>66</sup> To Somalia's knowledge, Kenya does not have any legislation in force with respect its continental shelf.

3.9. Kenya measures the breadth of its territorial sea and EEZ from straight baselines covering the full length of its coast. Those baselines were first declared in the 1972 Territorial Waters Act,<sup>67</sup> and amended in 2005.<sup>68</sup> In February 1989, Kenya deposited the geographical coordinates defining its baselines with the

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<sup>63</sup> United Nations, Office of Legal Affairs, Division for Ocean Affairs and the Law of the Sea, *Table recapitulating the status of the Convention and of the related Agreements* (10 Oct. 2014), available at [http://www.un.org/depts/los/reference\\_files/status2010.pdf](http://www.un.org/depts/los/reference_files/status2010.pdf). MS, Vol. IV, Annex 72.

<sup>64</sup> *Ibid.* See also Republic of Kenya, Chapter 371, *Maritime Zones Act* (25 Aug. 1989). MS, Vol. III, Annex 20.

<sup>65</sup> Republic of Kenya, *Territorial Waters Act* (16 May 1972, as revised in 1977), Schedule. MS, Vol. III, Annex 17.

<sup>66</sup> Republic of Kenya, *Maritime Zones Act* (25 Aug. 1989), Arts. 3, 4. MS, Vol. III, Annex 20.

<sup>67</sup> The Schedule of the Territorial Waters Act 1972 Act provided for a set of straight baselines. The Kenyan Territorial Waters of 16 May 1972 stated that the area of "the territorial waters of the Republic of Kenya extends on the coastline adjacent to the High Seas to a line twelve International Nautical Miles seawards from the straight baselines, low water lines or low tide elevations ...". Republic of Kenya, *Territorial Waters Act* (16 May 1972, as revised in 1977), Schedule. MS, Vol. III, Annex 17.

<sup>68</sup> Republic of Kenya, *Proclamation by the President of the Republic of Kenya* (9 June 2005). MS, Vol. III, Annex 22.

United Nations.<sup>69</sup> These coordinates were subsequently amended and notified to the United Nations in 2006, with two lists specifying (1) the straight baselines from which the breadth of Kenya's territorial sea would be measured, and (2) the outer limits of Kenya's EEZ.<sup>70</sup> The straight baselines Kenya claims are depicted in **Figure 3.2** (in Volume II only).

3.10. With respect to its maritime boundary with Somalia, Kenya initially took the view that the territorial waters of the two States should be divided by means of an equidistance line. In its 1972 Territorial Waters Act, as revised, Kenya claimed as its boundary with Somalia in the territorial sea "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.<sup>71</sup>

3.11. On 28 February 1979, the President of Kenya, Daniel Toroitich arap Moi, issued a Presidential Proclamation declaring a 200 M EEZ "measured from the appropriate baseline".<sup>72</sup> With respect to the maritime boundary with Somalia, the

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<sup>69</sup> Republic of Kenya, *Approximate Co-ordinates of Baseline Points on Map Sheet SK/74* (28 Feb. 1979). MS, Vol. III, Annex 18.

<sup>70</sup> Republic of Kenya, *Deposit by the Republic of Kenya to the United Nations of lists of geographical coordinates of points, pursuant to article 16, paragraph 2, and article 75, paragraph 2 of the Convention, together with Illustrative map number SK 90 and the Proclamation by the President of the Republic of Kenya of 9 June 2005* (11 Apr. 2006). MS, Vol. III, Annex 22; United Nations, Division for Ocean Affairs and the Law of the Sea, *Deposit by the Republic of Kenya of lists of geographical coordinates of points, pursuant to article 16, paragraph 2, and article 75, paragraph 2, of the Convention*, U.N. Doc. M.Z.N. 58.2006.LOS (25 Apr. 2006). MS, Vol. III, Annex 56; Republic of Kenya, Legal Notice No. 82, *Proclamation by the President of the Republic of Kenya* (9 June 2005), published in *Kenya Gazette Supplement No. 55 (Legislative Supplement No. 34)* (22 July 2005). MS, Vol. III, Annex 21.

<sup>71</sup> Republic of Kenya, *Territorial Waters Act* (16 May 1972, as revised in 1977), para. 2(4). MS, Vol. III, Annex 17 (Paragraph 2(4) of the Act states in full: "On the coastline adjacent to neighbouring States the breadth of 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 of each of the respective States is measured").

<sup>72</sup> Republic of Kenya, *Presidential Proclamation of 28 February 1979* (28 Feb. 1979), para. 1. MS, Vol. III, Annex 19.

1979 Proclamation provides that “the Exclusive Economic Zone of Kenya shall ... (b) in respect of its northern territorial waters boundary with Somali Republic be on eastern latitude South of Diua Damasciaca Island being latitude 1°38’ South”.<sup>73</sup> Somalia cannot explain the evident contradiction between the provisions of Kenya’s 1972 Territorial Waters Act, on the one hand, and the 1979 Presidential Proclamation, on the other.

3.12. Ten years after the 1979 Presidential Proclamation, Kenya’s 1989 Maritime Zones Act reverted to the approach first adopted in the 1972 Territorial Waters Act. It provided that Kenya’s “territorial waters shall extend to every point of which is equidistant from the nearest points on the baselines from which the breadth of territorial waters of each of respective states is measured”.<sup>74</sup>

3.13. With respect to the maritime boundary in the EEZ, the 1989 Maritime Zones Act made no reference to 1°38’ S latitude identified in the 1979 Presidential Proclamation, but rather provided that the “northern boundary of the exclusive economic zone with Somalia shall be delimited by notice in the Gazette by the Minister pursuant to an agreement between Kenya and Somalia on the basis of international law”.<sup>75</sup>

3.14. Seventeen years later, Kenya switched course again and returned to its parallel boundary claim. In a Presidential Proclamation dated 9 June 2005 that made no reference to the 1989 Maritime Zones Act, Kenya took the view that its

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<sup>73</sup> *Ibid.*

<sup>74</sup> Kenya, *Maritime Zones Act* (25 Aug. 1989), para. 3(4). MS, Vol. III, Annex 20. Paragraph 2(4) of the Territorial Waters Act also provided for a territorial sea, stating: “On the coastline adjacent to neighbouring States the breadth of 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 of each of the respective States is measured.” Republic of Kenya, *Territorial Waters Act* (16 May 1972, as revised in 1977), para. 2(4). MS, Vol. III, Annex 17.

<sup>75</sup> Kenya, *Maritime Zones Act* (25 Aug. 1989), para. 4(4). MS, Vol. III, Annex 20.

maritime boundary with Somalia follows a parallel of latitude emanating from the LBT and running due east to the limit of the EEZ.<sup>76</sup> Specifically, the 2005 Proclamation states that the northern limits of Kenya's EEZ would be "on eastern latitude South of Diua Damasciaca Island being latitude 1°39'34" degrees south".<sup>77</sup> (No explanation is provided for the difference between the 1°38' S parallel claimed in 1979 and the 1°39'34" parallel claimed in 2005.)

3.15. **Figure 3.3** (following page 34) shows how Kenya's current claim line compares to an equidistance line.

3.16. On 9 January 2014, Kenya reiterated this boundary claim in a *Note Verbale* to the Secretary-General of the United Nations.<sup>78</sup> The stated purpose of the *Note Verbale* was "to convey general information on Kenya's terrestrial and maritime boundaries".<sup>79</sup> In it, Kenya reiterated the contents of its 2005 Presidential Proclamation and enclosed maps depicting the parallel boundary it

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<sup>76</sup> Republic of Kenya, *Deposit by the Republic of Kenya to the United Nations of lists of geographical coordinates of points, pursuant to article 16, paragraph 2, and article 75, paragraph 2 of the Convention, together with Illustrative map number SK 90 and the Proclamation by the President of the Republic of Kenya of 9 June 2005* (11 Apr. 2006). MS, Vol. III, Annex 22; Republic of Kenya, Legal Notice No. 82, *Proclamation by the President of the Republic of Kenya* (9 June 2005), published in *Kenya Gazette Supplement No. 55 (Legislative Supplement No. 34)* (22 July 2005). MS, Vol. III, Annex 21. The First and Second Schedules, together with the illustrative Map, constitute an adjustment to and are in replacement of the Proclamation made by the President of the Republic of Kenya on 2 February 1979.

<sup>77</sup> Republic of Kenya, *Deposit by the Republic of Kenya to the United Nations of lists of geographical coordinates of points, pursuant to article 16, paragraph 2, and article 75, paragraph 2 of the Convention, together with Illustrative map number SK 90 and the Proclamation by the President of the Republic of Kenya of 9 June 2005* (11 Apr. 2006), para. (1)(b). MS, Vol. III, Annex 22; Republic of Kenya, Legal Notice No. 82, *Proclamation by the President of the Republic of Kenya* (9 June 2005), published in *Kenya Gazette Supplement No. 55 (Legislative Supplement No. 34)* (22 July 2005). MS, Vol. III, Annex 21.

<sup>78</sup> *Note Verbale* from the Permanent Mission of the Republic of Kenya to the United Nations to the Secretary-General of the United Nations, No. 7/14 (9 Jan. 2014). MS, Vol. III, Annex 40.

<sup>79</sup> *Ibid.*, p. 1.

claims in both the territorial sea and EEZ.<sup>80</sup> The *Note* concluded with the assertion that: “Kenya, in accordance with the Convention has exercised and will continue to exercise sovereignty and jurisdiction over the said area”.<sup>81</sup>

3.17. Kenya’s maritime boundary with its neighbour to the south, Tanzania, was first delimited by means of exchange of notes in 1975, which entered into force in 1976.<sup>82</sup> The 1976 agreement provided that, in the area beyond approximately 21 M from the coast, the maritime boundary between the two States would be defined by a parallel of latitude “extending eastwards to a point where it intersects the outermost limits of territorial water boundary or areas of national jurisdiction of two States”.<sup>83</sup>

3.18. On 23 June 2009, Kenya and Tanzania concluded a further agreement on the delimitation of their maritime boundary in the EEZ and continental shelf.<sup>84</sup> The 2009 agreed boundary follows the same parallel of latitude first defined in 1976 and “extends eastward to a point where it intersects the outermost limits of the continental shelf and such other outermost limits of national jurisdiction as may be determined by international law”.<sup>85</sup>

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<sup>80</sup> *Ibid.*

<sup>81</sup> *Ibid.*, p. 2.

<sup>82</sup> Exchange of Notes Constituting an Agreement between the Republic of Kenya and the United Republic of Tanzania on the Territorial Sea Boundary, 1039 U.N.T.S. 148 (17 Dec. 1975 & 9 July 1976), entered into force 9 July 1976. MS, Vol. III, Annex 5.

<sup>83</sup> *Ibid.*, para. 2(d).

<sup>84</sup> Agreement between the United Republic of Tanzania and the Republic of Kenya on the delimitation of the maritime boundary of the exclusive economic zone and the continental shelf, 2603 U.N.T.S. 37 (23 June 2009), entered into force 23 June 2009. MS, Vol. III, Annex 7.

<sup>85</sup> Article 2 of the 2009 Agreement states: “The Parties confirm that the basis of maritime boundary delimitation shall be the parallel of latitude as established in the 1976 Maritime Boundary Agreement. To this extent and in furtherance of the objectives of this Agreement, the Parties agree that the boundary line extends eastwards to a point where it intersects the outermost

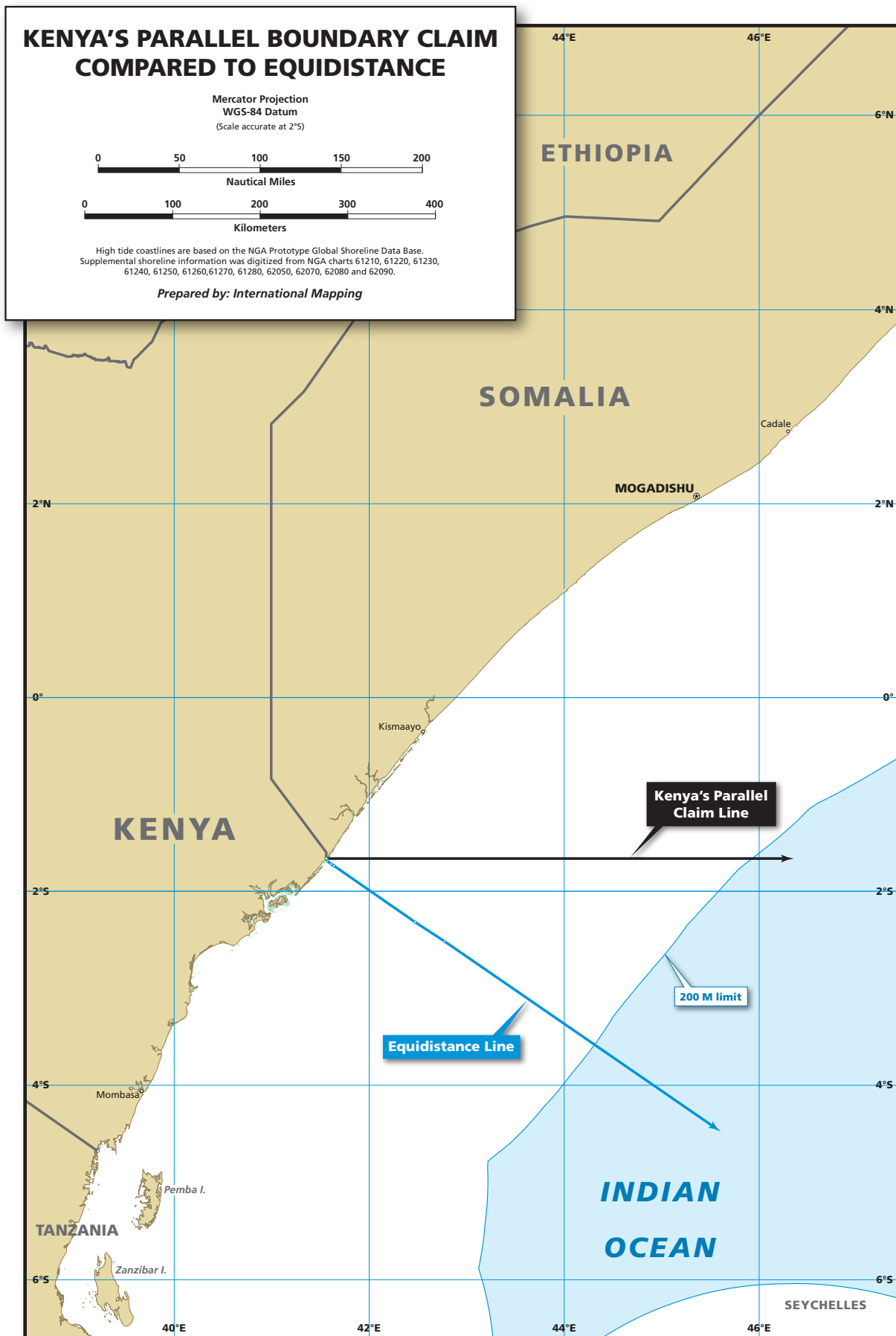


Figure 3.3





3.19. The Kenya-Tanzania maritime boundary is depicted in **Figure 3.4** (in Volume II only).

## 2. *Unilateral Conduct by Kenya*

3.20. According to publicly-available information, Kenya began offering offshore petroleum exploration and exploitation blocks in the 1970s.<sup>86</sup> Until at least 1996, none of these blocks extended beyond the equidistance line with Somalia. Maps produced by oil services companies comprehensively depicting blocks offered by Kenya in 1978,<sup>87</sup> 1979,<sup>88</sup> 1982,<sup>89</sup> 1984,<sup>90</sup> 1985,<sup>91</sup> 1994,<sup>92</sup> 1995<sup>93</sup> and 1996<sup>94</sup> show that Kenya's northernmost offshore blocks respected the equidistance line.

3.21. **Figure 3.5A** (following page 36), for example, is an excerpt from a 1978 map produced by Petroconsultants, S.A. Kenya's block abutting Somalia is

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limits of the continental shelf and such other outermost limits of national jurisdiction as may be determined by international law." *Ibid.*, Art. 2.

<sup>86</sup> National Oil Company of Kenya, "Oil and Gas Exploration History in Kenya", *available at* <http://nationaloil.co.ke/site/3.php?id=1> (last accessed 10 June 2015). MS, Vol. III, Annex 30. *See also* Petroconsultants S.A., *Kenya (Coastal Area): Synopsis 1978 (Including Current Activity)* (Jan. 1979). MS, Vol. II, Annex M1.

<sup>87</sup> Petroconsultants S.A., *Kenya (Coastal Area): Synopsis 1978 (Including Current Activity)* (Jan. 1979). MS, Vol. II, Annex M1.

<sup>88</sup> Petroconsultants S.A., *Kenya (Coastal Area): Synopsis 1979* (Feb. 1980). MS, Vol. II, Annex M2.

<sup>89</sup> Petroconsultants S.A., *Kenya (Coastal Area): Synopsis 1982* (Jan. 1983). MS, Vol. II, Annex M3.

<sup>90</sup> Petroconsultants S.A., *Kenya: Synopsis 1984* (Jan. 1985). MS, Vol. II, Annex M4.

<sup>91</sup> Petroconsultants S.A., *Kenya: Synopsis 1985 (Including Current Activity)* (Apr. 1986). MS, Vol. II, Annex M5.

<sup>92</sup> Petroconsultants S.A., *Kenya: Synopsis 1994* (Jan. 1995). MS, Vol. II, Annex M6.

<sup>93</sup> Petroconsultants S.A., *Kenya: Synopsis 1995* (July 1996). MS, Vol. II, Annex M7.

<sup>94</sup> Petroconsultants S.A., *Kenya: Current Status & Synopsis 1996* (June 1997). MS, Vol. II, Annex M8.

shown extending off-shore along a line running generally southeast. Moreover, the line is shown extending seaward with a dash-double-dot line (— • • —) defined in the map’s legend as “International boundary”. **Figure 3.5B** (following page 36) shows how that line compares to an equidistance line. As the Court can see, the two lines correspond almost precisely.<sup>95</sup> Other maps depicted the boundaries of Kenya’s oil blocks until 1996 confirm that they were limited in the north by the same equidistance line.

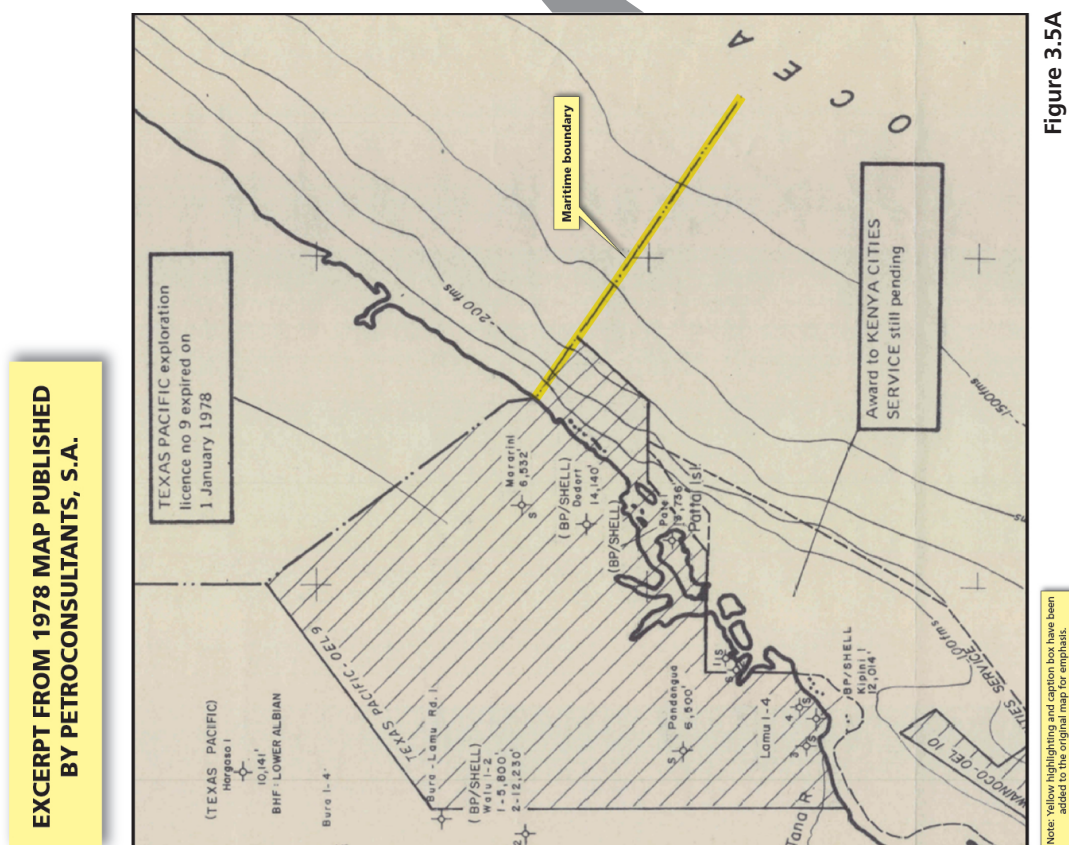
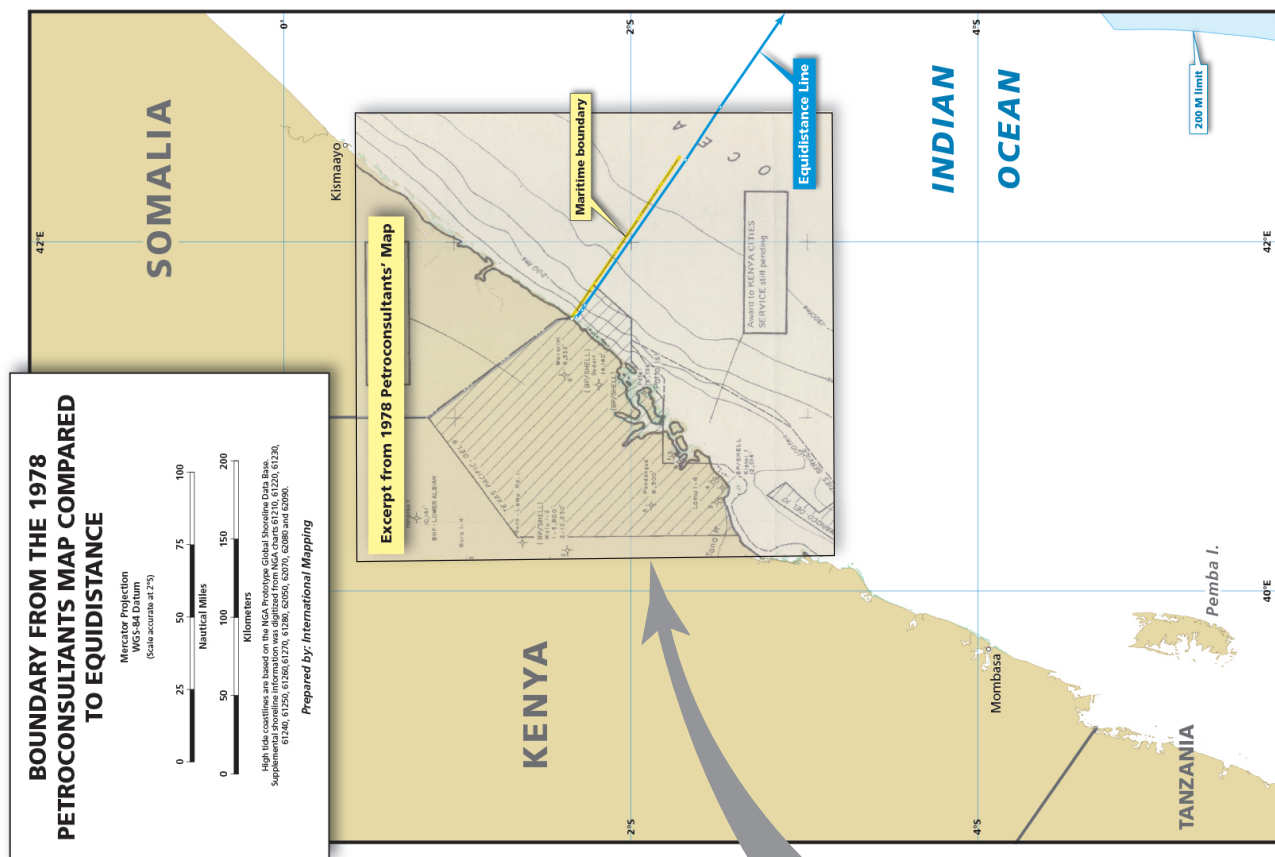
3.22. Starting in or around 2000, Kenya changed tack and began acting on the basis of its unilateral parallel boundary claim to explore for and exploit the resources across the equidistance line in areas south of the parallel.<sup>96</sup> In particular, Kenya has since then offered a number of offshore petroleum blocks for deep-water exploration and drilling, which extend to the parallel boundary it claims.

3.23. Kenya’s current off-shore petroleum blocks are depicted in **Figure 3.7** (following Figures 3.5A & 3.5B). Blocks that lie in whole or in part between the equidistance line and Kenya’s parallel boundary claim include L-5, L-13, L-21, L-22, L-23, L-24 and L-26.

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<sup>95</sup> Somalia has also offered an offshore block the limits of which track the equidistance line: the Jorre Offshore block. IHS Energy Group, *Global Exploration & Production Service: Somalia* (Mar. 2002). MS, Vol. II, Annex M9. The location of the block is depicted in **Figure 3.6** (in Volume II only). In 2001, the French oil company Total S.A. signed a 1-year 2D seismic preliminary exploration contract in this area. African Energy, “SOMALIA - TotalFinaElf to explore offshore”, *Financial Times: Energy Newsletters* (26 Feb. 2001). MS, Vol. IV, Annex 98. In 2007, it subsequently secured it as a technical evaluation area in 2007. Barry Morgan, “Kenyan block still attractive”, *Biyokulule Online* (13 Apr. 2012). MS, Vol. IV, Annex 103.

<sup>96</sup> See National Oil Company of Kenya, “Oil and Gas Exploration History in Kenya”, available at <http://nationaloil.co.ke/site/3.php?id=1> (last accessed 10 June 2015). MS, Vol. III, Annex 30. See also IHS Inc., *Valid Blocks as of 1 January 2000 [Kenya]* (June 2015). MS, Vol. II, Annex M10; IHS Inc., *Valid Blocks as of 1 January 2001 [Kenya]* (June 2015). MS, Vol. II, Annex M11; IHS Inc., EDIN Database, *Kenya: Contracts Block L-05/Block L05* (2015). MS, Vol. IV, Annex 133.

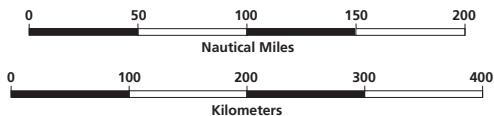


### Figures 3.5A & 3.5B



# KENYA'S OFF-SHORE OIL CONCESSION BLOCKS

Mercator Projection  
WGS-84 Datum  
(Scale accurate at 2°S)



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

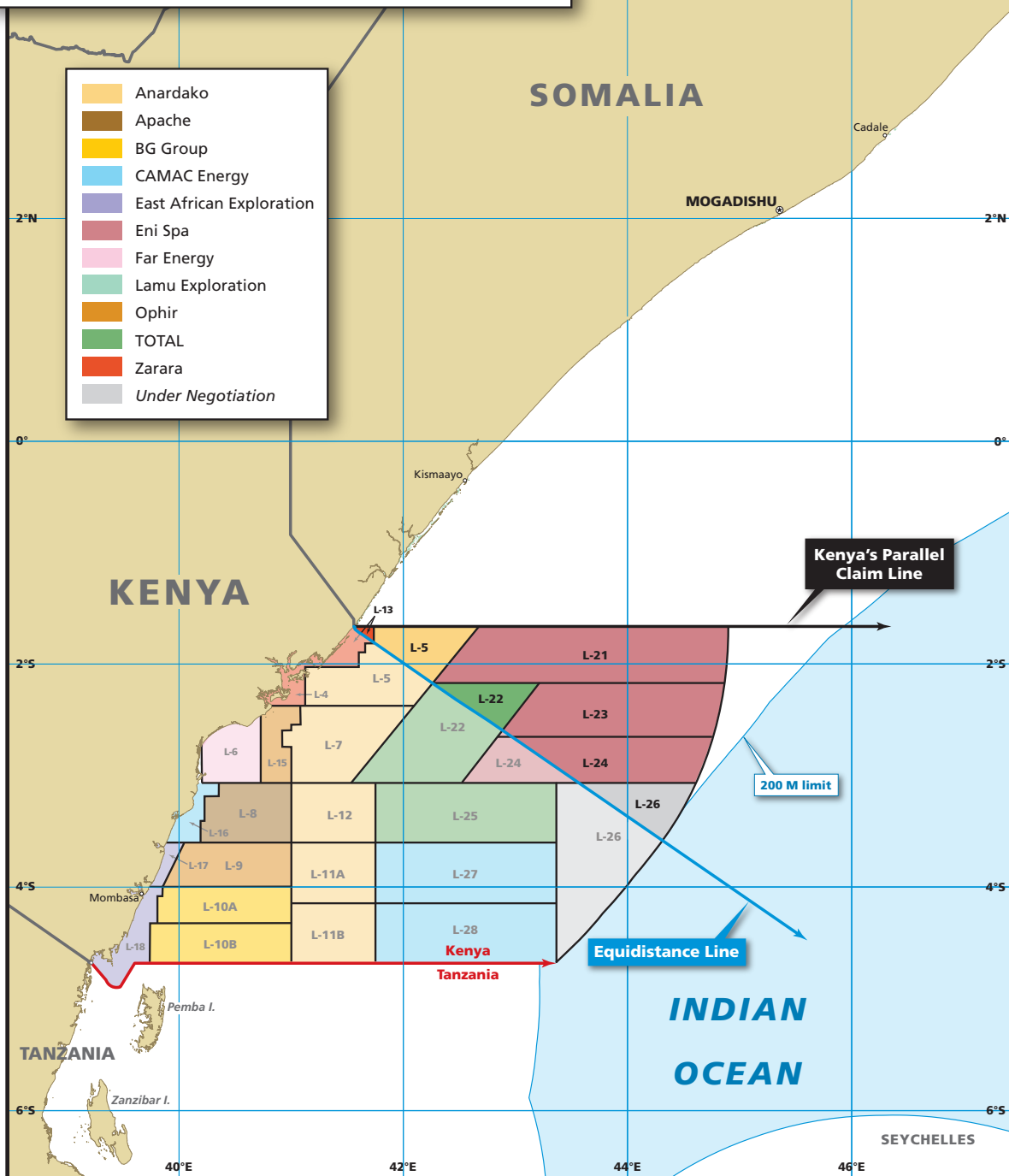


Figure 3.7



3.24. Kenya's activities in the areas on Somalia's side of the equidistance line are discussed in detail in Chapter 8 and form the basis for Somalia's claims discussed in that chapter.

## **Section II. The Parties' Claims in the Outer Continental Shelf**

3.25. Somalia and Kenya have both made full submissions to the Commission on the Limits of the Continental Shelf ("CLCS") with respect to the continental shelf beyond 200 M. These submissions are described below.

### **A. SOMALIA**

3.26. As noted, Article 8(1) of Somalia's Maritime Law of 1988 provides that Somalia's continental shelf:

"comprises the seabed and subsoil of the submarine areas that extend beyond the Somali Territorial Sea throughout the natural extension of its land territory to the outer edge of the continental margin".<sup>97</sup>

3.27. Article 8(5) of the law specifically contemplates that Somalia's continental shelf may extend beyond 200 M:

"The full jurisdiction of the Democratic Republic of Somalia on the resources within the continental shelf shall extend to its outer limit, 200 nautical miles starting from the baselines from which the breadth territorial sea is measured or, if the continental shelf extends beyond 200 miles, it shall be measured in accordance with Part VI, article 76,

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<sup>97</sup> Somali Democratic Republic, Ministry of Fisheries and Sea Transport, *Somali Maritime Law* (1988), Art. 8(1). MS, Vol. III, Annex 10.

83, and 84 of the United Nations Convention on the Law of Sea”.<sup>98</sup>

3.28. On 14 April 2009, within the time limits adopted by the State Parties to the Convention,<sup>99</sup> Somalia submitted preliminary information indicative of the outer limits of its continental shelf beyond 200 M.<sup>100</sup> On 21 July 2014, Somalia made its full Submission.<sup>101</sup> In July 2015, Somalia submitted a revised Executive Summary. Technical amendments to the full submission will follow shortly. Somalia expects to make its oral presentation to the CLCS in early 2016.

3.29. On 4 May 2015, Kenya submitted a *Note Verbale* to the Secretary-General of the United Nations informing him of its objection to the CLCS’s consideration of Somalia’s Submission. In particular, the note stated that in light

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<sup>98</sup> *Ibid.*, Art. 8(5).

<sup>99</sup> As supplemented by the decisions of the Eleventh and Eighteenth Meetings of the States Parties to the Convention the established by Article 4 of Annex II. U.N. Convention on the Law of the Sea, Meeting of States Parties, Eleventh Meeting, *Decision regarding the date of commencement of the ten-year period for making submissions to the Commission on the Limits of the Continental Shelf set out in article 4 of Annex II to the United Nations Convention on the Law of the Sea*, U.N. Doc. SPLOS/72 (29 May 2001). MS, Vol. III, Annex 55; U.N. Convention on the Law of the Sea, Meeting of States Parties, Eighteenth Meeting, *Decision regarding the workload of the Commission on the Limits of the Continental Shelf and the ability of States, particularly developing States, to fulfil the requirements of article 4 of annex II to the United Nations Convention on the Law of the Sea, as well as the decision contained in SPLOS/72, paragraph (a)*, U.N. Doc. SPLOS/183 (20 June 2008). MS, Vol. III, Annex 58.

<sup>100</sup> See Federal Republic of Somalia, *Continental Shelf Submission of the Federal Republic of Somalia: Executive Summary* (21 July 2014), pp. 2-3. MS, Vol. IV, Annex 70; Federal Republic of Somalia, *Preliminary Information Indicative of the outer limits of the continental shelf and Description of the status of preparation of making a submission To the Commission on the Limits of the Continental Shelf for Somalia* (14 Apr. 2009). MS, Vol. III, Annex 66; Federal Republic of Somalia, *Appendix 1: Figures*, submitted with *Preliminary Information Indicative of the outer limits of the continental shelf and Description of the status of preparation of making a submission To the Commission on the Limits of the Continental Shelf for Somalia* (14 Apr. 2009). MS, Vol. III, Annex 67.

<sup>101</sup> United Nations, *Receipt of the submission made by the Federal Republic of Somalia to the Commission on the Limits of the Continental Shelf*, U.N. Doc. CLCS.74.2014.LOS (21 July 2014). MS, Vol. III, Annex 69; Federal Republic of Somalia, *Continental Shelf Submission of the Federal Republic of Somalia: Executive Summary* (21 July 2014). MS, Vol. IV, Annex 70.



of the Parties' maritime boundary dispute, "Kenya, in accordance with rule 46 and Annex II of the rules of procedure of the Commission, objects to the consideration of the Submission by Somalia and further urges the Commission not to take any action on it".<sup>102</sup>

## B. KENYA

3.30. On 6 May 2009, Kenya deposited with the CLCS its Submission claiming entitlement to a continental shelf extending up to 350 M throughout the area covered by the Submission.<sup>103</sup>

3.31. Kenya made its oral presentation to the Commission on 3 September 2009.<sup>104</sup> The Commission thereafter indicated that "the submission would be addressed by way of a subcommission to be established ... at a future session ... at the plenary level at the time when the submission is next in line for consideration ...".<sup>105</sup>

3.32. On 4 February 2014, Somalia sent a *Note Verbale* to the Secretary-General of the United Nations presenting its objection to the Commission's

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<sup>102</sup> *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), p. 2. MS, Vol. III, Annex 51.

<sup>103</sup> Republic of Kenya, *Submission on the Continental Shelf Submission beyond 200 nautical miles to the Commission on the Limits of the Continental Shelf: Executive Summary* (Apr. 2009). MS, Vol. III, Annex 59.

<sup>104</sup> United Nations, Commission on the Limits of the Continental Shelf, *Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the progress of work of the Commission*, U.N. Doc. CLCS/64 (1 Oct. 2009), Item 22, Submission made by Kenya, para. 93. MS, Vol. III, Annex 61.

<sup>105</sup> *Ibid.*, Item 22, Submission made by Kenya, para. 97.

consideration of Kenya's Submission.<sup>106</sup> In its *Note Verbale*, Somalia stated that it considered that "there exists a dispute between the Somali Republic and the Republic of Kenya" concerning the delimitation of their maritime boundary.<sup>107</sup> Referring to Kenya's boundary claim, Somalia stated further: "Based on the exaggerated nature of Kenya's claim, its lack of legal foundation, and its severe prejudice to Somalia both within and beyond 200 M, Somalia formally objects to the consideration of Kenya's submission by the [CLCS]".<sup>108</sup>

3.33. Thereafter, at its 34th session held in New York between January and March 2014, the Commission took note of Somalia's *Note Verbale* and decided that "notwithstanding its decision taken at its twenty-fourth session that the submission would be addressed by way of a subcommission to be established at a future session ..., the Commission was not in a position to proceed with the establishment of a subcommission at that time".<sup>109</sup>

3.34. On 7 July 2015, however, Somalia officially withdrew its objection to the Commission's consideration of Kenya's Submission. By means of a letter addressed to the Secretary-General, Somalia stated:

"In view of Somalia's request to the ICJ to delimit the maritime boundary with Kenya (including in the continental shelf beyond 200 nautical miles), Somalia deems it no longer necessary to maintain

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<sup>106</sup> Letter from Dr. Abdirahman Beileh, Minister of Foreign Affairs and International Cooperation of the Somali Federal Republic, to H.E. Ban Ki-Moon, Secretary-General of the United Nations, No. MOFA/SFR/MO/259/2014 (4 Feb. 2014). MS, Vol. III, Annex 41.

<sup>107</sup> *Ibid.*, para. 1.

<sup>108</sup> *Ibid.*, para. 4.

<sup>109</sup> 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/83 (31 Mar. 2014), Item 4, Workload of the Commission, Establishment of new subcommissions, para. 18. MS, Vol. III, Annex 65.

its objection to the Commission's consideration of Kenya's submission to the Commission, and hereby extends its consent to the Commission's consideration of the Kenyan submission".<sup>110</sup>

3.35. At the same time, Somalia underscored that its "consent to the Commission's consideration of Kenya's submission does not affect Somalia's objection to the claims made by Kenya, in particular in regard to Kenya's claim to a purported maritime boundary with Somalia that follows a parallel of latitude".<sup>111</sup>

### **Section III. The Parties' Efforts to Negotiate a Maritime Boundary Agreement**

3.36. Somalia and Kenya not only dispute the location of their maritime boundary, they disagree even on the principles to be used to define the boundary. Diplomatic negotiations, in which Parties' views have been fully exchanged, have failed to resolve their dispute.

3.37. For Somalia, the applicable principles are the ones consistently applied by the Court: (1) construct a provisional equidistance line; (2) determine if there are relevant circumstances that require an adjustment to the line; and (3) determine whether the line produces a grossly disproportionate result. Kenya rejects this approach, insisting that the boundary must follow a parallel of latitude, despite the fact that Somalia has never agreed to such a boundary.

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<sup>110</sup> Letter from H.E. Abdulsalam H. Omer, Minister of Foreign Affairs and Investment Promotion of the Federal Republic of Somalia, to H.E. Ban Ki-Moon, Secretary-General of the United Nations (7 July 2015), p. 2. MS, Vol. III, Annex 52.

<sup>111</sup> *Ibid.*

3.38. Bilateral discussion about these issues were held in 2009, in the context of the Parties' soon-to-be forthcoming Submissions to the CLCS. In April 2009, they entered into a Memorandum of Understanding (the "2009 MOU") concerning those Submissions. The MOU began by observing that 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 coastal States is to be considered as a ‘maritime dispute’. The claims of the two coastal States cover an overlapping area of the continental shelf which constitutes the ‘area under dispute’”.<sup>112</sup>

The MOU stated further that the “two coastal States are conscious that the establishment of the outer limits of the continental shelf beyond 200 nautical miles is without prejudice to the question of the delimitation ...”.<sup>113</sup>

3.39. The MOU also provided: “The two coastal States agree that ... each of them will make separate submissions to the [CLCS] ... with respect to the outer limits of the continental shelf beyond 200 nautical miles without regard to the delimitation of maritime boundaries between them”.<sup>114</sup> It concluded:

“The delimitation of maritime boundaries in the areas under dispute, including the delimitation of the continental shelf beyond 200 nautical miles,

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<sup>112</sup> 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), p. 37. MS, Vol. III, Annex 6.

<sup>113</sup> *Ibid.*

<sup>114</sup> *Ibid.*, p. 38.

shall be agreed between the two coastal States on the basis of international law after the Commission has concluded its examination of the separate submissions made by each of the two coastal States and made its recommendations to two coastal States concerning the establishment of the outer limits of the continental shelf beyond 200 nautical miles”.<sup>115</sup>

3.40. On 10 October 2009, Somalia informed the Secretary-General of United Nations that, on 1 August 2009, the Somali Parliament had voted on the 2009 MOU and had decided against its ratification.<sup>116</sup> In the October 2009 *Note*, Somalia stated:

“I wish to inform your Excellency, that the above mentioned MOU between Somalia and Kenya was considered by the Transitional Federal Parliament of Somalia and the members voted to reject the ratification of that MOU on August 1<sup>st</sup>, 2009.

We would, therefore, request the relevant offices of the U.N. to take note of the situation and treat the MOU as non-actionable”.<sup>117</sup>

3.41. On 2 March 2010 Somalia again wrote to the United Nations requesting it to “take note” of the Somali Parliament’s rejection of the MOU and to treat it as “non-actionable”.<sup>118</sup> On 12 March 2010, the United Nations formally noted Somalia’s position that the 2009 MOU was “non-actionable” on account of it

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<sup>115</sup> *Ibid.*

<sup>116</sup> *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. OPM/IC/00./016/11/09 (10 Oct. 2009). MS, Vol. III, Annex 38.

<sup>117</sup> *Ibid.* (emphasis omitted).

<sup>118</sup> Somalia enclosed its original 10 October 2009 communication to the United Nations. *Letter* from Dr. Elmi Ahmed Duale, Permanent Representative of the Permanent Mission of the Somali Republic to the United Nations, to H.E. Ban Ki-Moon, Secretary-General of the United Nations, No. SOM/MSS/09/10 (2 Mar. 2010). MS, Vol. III, Annex 39.

being denounced by the Somali Parliament.<sup>119</sup> Kenya registered no objection. On 4 February 2014, Somalia wrote to the United Nations, explicitly requesting that the 2009 MOU be removed from the UN registry.<sup>120</sup>

3.42. The MOU, whatever its status, did not purport to resolve the Parties' maritime boundary dispute. To the contrary, in it, the Parties expressly recognized and maintained their conflicting positions on the location of the boundary. Its purpose was to ensure that neither Party objected to the CLCS's consideration of the other's submissions.

3.43. Negotiation in regard to the delimitation of the maritime boundary took place between February and August 2014. On 19 February 2014, the Somali Prime Minister, H.E. Abdiweli Sheikh Ahmed, and the Deputy President of Kenya, H.E. Wilham Ruto, met in Nairobi, Kenya. During the meeting, the Cabinet Secretary of Kenya's Ministry of Foreign Affairs and International Trade "indicated the willingness of the Government of Kenya to engage the Somali Government in regards to the existing dispute relating to the delimitation of the maritime boundary between the two countries".<sup>121</sup> Kenya followed up on this initiative with a letter dated 7 March 2014, in which it requested a meeting to discuss the delimitation of the Parties' maritime boundary.<sup>122</sup>

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<sup>119</sup> See [http://www.un.org/depts/los/clcs\\_new/commission\\_preliminary.htm](http://www.un.org/depts/los/clcs_new/commission_preliminary.htm).

<sup>120</sup> Letter from the Ministry of Foreign Affairs and International Cooperation of Somalia to the Secretary-General of United Nations, No. MOFA/SFR/MO/258/2014 (4 Feb. 2014). MS, Vol. III, Annex 42.

<sup>121</sup> 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.

<sup>122</sup> See *ibid.* (referring to Kenya's Letter Ref. MFA PROT/7/8/1 (7 Mar. 2014) and recognizing its request for a meeting therein).

3.44. Somalia promptly responded to Kenya's invitation by means of a diplomatic note dated 13 March, in which it confirmed its willingness to "meet with an official delegation representing the Government of Kenya" and underscored Somalia's "commitment to a speedy resolution of the dispute between our sisterly countries regarding the maritime boundary".<sup>123</sup>

3.45. The Parties' Ministers of Foreign Affairs met shortly thereafter on 21 March 2014 and concluded that a technical meeting between the two States should be held "immediately".<sup>124</sup>

3.46. As a consequence, bilateral meetings were held in Nairobi on 26 and 27 March 2014.<sup>125</sup> In advance of these meetings, the Kenyan delegation prepared a draft agenda containing a line item referring to the 2009 MOU. Upon reading the agenda, the Somali delegation stated its view that the 2009 MOU was without effect.<sup>126</sup> It therefore insisted that all references to the MOU be deleted from the agenda.<sup>127</sup> Kenya agreed and amended the agenda accordingly. The only substantive line item on the agreed agenda was: "Discussion on: Maritime Boundary".<sup>128</sup>

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<sup>123</sup> *Ibid.*

<sup>124</sup> Government of Somalia and Government of Kenya, *Joint Report on the Kenya-Somali Maritime Boundary Meeting, 26-27 Mar. 2014* (1 Apr. 2014), p. 1. MS, Vol. III, Annex 31.

<sup>125</sup> *Ibid.*

<sup>126</sup> *Ibid.*, pp. 1-2; 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. 1. MS, Vol. III, Annex 24.

<sup>127</sup> 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. 1. MS, Vol. III, Annex 24.

<sup>128</sup> Government of Somalia and Government of Kenya, *Joint Report on the Kenya-Somali Maritime Boundary Meeting, 26-27 Mar. 2014* (1 Apr. 2014), p. 8. MS, Vol. III, Annex 31. See also Federal Republic of Somalia, *Report on the Meeting between The Federal Republic of*

3.47. The two delegations thus proceeded to exchange 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. It also emphasized that no country could unilaterally establish a boundary in the absence of an agreement with its neighbouring country, as Kenya had purported to do.<sup>129</sup>

3.48. For its part, the Kenyan delegation emphasized considerations of “equity and fairness” which, it maintained, would yield the “parallel of latitude” reflected in its 2005 Presidential Proclamation.<sup>130</sup>

3.49. The two delegations continued their negotiations for two days but could not agree even on the applicable principles of international law.<sup>131</sup> Somalia continued to insist on the legal methods and principles as reflected in UNCLOS and the relevant jurisprudence, while Kenya maintained its emphasis on general considerations of fairness.

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*Somalia and The Republic of Kenya On Maritime Boundary Dispute, Nairobi, Kenya, 26-27 March 2014* (1 Apr. 2014). MS, Vol. III, Annex 24.

<sup>129</sup> 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; 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.

<sup>130</sup> “The Somali delegation requested an explanation as to why Kenya had departed from the ‘equidistance’ methodology adopted by the Kenyan Government in the 1972 Territorial Waters Act [as revised in 1977] and the 1989 Maritime Zones Act to the 2005 Presidential Proclamation”. Government of Somalia and Government of Kenya, *Joint Report on the Kenya-Somali Maritime Boundary Meeting, 26-27 Mar. 2014* (1 Apr. 2014), p. 2. 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.

<sup>131</sup> 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.



3.50. Notwithstanding this divergence of views, the delegations did agree on one important item; namely, “to rely on Pillar BP29 as reflected in the 1924 Anglo-Italian Treaty to constitute the starting point solely for the purpose of establishing a maritime boundary ...”.<sup>132</sup>

3.51. The Parties’ March 2014 negotiations are reflected in the 27 March “Joint Report of the Government of the Republic of Kenya and the Federal Republic of Somali [sic] on the Kenya-Somali Maritime Boundary Meeting” duly signed by representatives of both States.<sup>133</sup>

3.52. Somalia proposed that the next round of negotiations take place in either Mogadishu or Djibouti. Kenya proposed instead that they be held in Nairobi.<sup>134</sup> Somalia agreed to this suggestion. The Parties met as scheduled in Nairobi at the end of July 2014.<sup>135</sup> The two delegations exchanged PowerPoint presentations reflecting their views on the delimitation of the maritime boundary.<sup>136</sup> Somalia gave its presentation on the first day, Kenya on the second.<sup>137</sup> As was the case during their March negotiations, Somalia’s position emphasized the law as reflected in the Convention and international jurisprudence, while Kenya continued to insist on the centrality of general considerations of fairness.<sup>138</sup> After “intense” but fruitless discussions, the delegations agreed to adjourn and

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<sup>132</sup> 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.

<sup>133</sup> *Ibid.*, p. 6.

<sup>134</sup> *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.

<sup>135</sup> The Parties did not discuss the issue of the MOU during this round of meetings.

<sup>136</sup> 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.

<sup>137</sup> *Ibid.*

<sup>138</sup> *Ibid.*

reconvene in Mogadishu for a third and final round of discussions on 25 and 26 August 2014.<sup>139</sup>

3.53. The July negotiations resulted in another Joint Report (the “Second Joint Report”).<sup>140</sup> The head of the Somali technical team, Ms. Mona Al-Sharmani, signed the Second Joint Report and transmitted it to her Kenyan counterparts by email on 5 August 2014.<sup>141</sup> On 6 August 2014, Ms. Juster Nkoroi, head of the Kenyan technical team, replied confirming that she would sign the Joint Report upon her return to the office on 11 August 2014.<sup>142</sup> Ms. Nkoroi also noted that she looked forward to the next round of meetings scheduled for 25 and 26 August 2014 in Mogadishu.<sup>143</sup>

3.54. Somalia subsequently made repeated inquiries regarding the status of the Second Joint Report, and sought confirmation that Kenya’s delegation to the next round of negotiations in Mogadishu would arrive as scheduled.<sup>144</sup> Kenya did not respond; it never signed the Second Joint Report, nor did it send its delegation to Mogadishu for the scheduled talks.<sup>145</sup>

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<sup>139</sup> *Ibid.* See *Letter* from H.E. Dr. Abdirahman Beileh, Minister of Foreign Affairs and Investment Promotion of the Federal Republic of Somalia, to H.E. Ms. Amina Mohamed, Minister of Foreign Affairs of the Republic of Kenya, No. 2231 (26 Aug. 2014), p. 1. MS, Vol. III, Annex 47.

<sup>140</sup> 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.

<sup>141</sup> Exchange of Emails between Ms. Mona Al Sharmani, Special Adviser to the President of the Federal Republic of Somalia, and Ms. Juster Nkoroi, Republic of Kenya, regarding signature of the Joint Report on the Kenya-Somalia Maritime Boundary Meeting, 28-29 July 2014 (6-16 Aug. 2014), p. 4, Email of 5 Aug. 2014. MS, Vol. III, Annex 46.

<sup>142</sup> *Ibid.*, p. 2, Email of 6 Aug. 2014.

<sup>143</sup> *Ibid.*, 6 Aug. 2014.

<sup>144</sup> *Ibid.*, 11, 15, and 16 Aug. 2014.

<sup>145</sup> Kenya’s only relevant communication at the time was a letter dated 13 August 2014, which disagreed with Somalia’s 2014 EEZ Proclamation and Somalia’s Full Submission to the CLCS. *Letter* from the Ministry of Foreign Affairs and International Trade to The Ministry of Foreign

3.55. Somalia's Minister of Foreign Affairs wrote his Kenyan counterpart on 26 August 2014.<sup>146</sup> The letter noted that the Somali delegation had been ready to meet with its Kenyan counterpart in Mogadishu, as had been agreed. The Somali Foreign Minister recalled that the Parties had already met twice, and concluded by expressing Somalia's concern that the August meetings did not take place as planned.<sup>147</sup>

3.56. Disappointed by Kenya's non-responsiveness, frustrated by the lack of progress made during the two earlier rounds of negotiations, and increasingly troubled by Kenya's unilateral actions in the disputed area, Somalia concluded that further negotiations would be pointless. It therefore took the decision to initiate these proceedings and seek resolution of its dispute with Kenya in accordance with international law. Its Application to the Court followed on 28 August 2014.

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Affairs and Investment Promotion of the Federal Republic of Somalia (13 Aug. 2014). MS, Vol. III, Annex 45.

<sup>146</sup> *Letter* from H.E. Dr. Abdirahman Beileh, Minister of Foreign Affairs and Investment Promotion of the Federal Republic of Somalia, to Ms. Amina Mohamed, Minister of Foreign Affairs of the Republic of Kenya, No. 2231 (26 Aug. 2014). MS, Vol. III, Annex 47.

<sup>147</sup> *Ibid.*, p. 2.



## **CHAPTER 4. LOCATION OF THE LAND BOUNDARY TERMINUS AND THE STARTING POINT OF THE MARITIME BOUNDARY**

4.1. In this chapter Somalia identifies the location of the land boundary terminus (“LBT”)—from which the delimitation of the maritime boundary begins—at the precise point where the Parties’ land boundary reaches the Indian Ocean.

4.2. The location of the LBT was established in a series of agreements between the Governments of the United Kingdom and Italy that were reached in the early twentieth century, by which the two colonial powers sought to delimit their respective “spheres of influence” in certain parts of East Africa. These agreements culminated in the adoption of a bilateral treaty and the subsequent appointment of a joint commission responsible for demarcating the boundary between the British colony of Kenya and the Italian colony of Jubaland (which was later incorporated within the adjacent Italian colony of Southern Somaliland).<sup>148</sup> The terms of the treaty, and the subsequent boundary demarcation undertaken by the joint commission, defined the location of the border and the LBT with a high degree of precision, by reference to maps and charts then available.<sup>149</sup>

4.3. The boundary between modern Somalia and Kenya initially served to delimit British and Italian spheres of influence in the area between the River

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<sup>148</sup> See, *infra*, paras. 4.4-4.7.

<sup>149</sup> Somalia and Kenya have both acted on the basis that the terminus of the territorial sea boundary is situated at the location described in those instruments. Therefore, solely for the purposes of the delimitation of its maritime boundary with Kenya, Somalia is prepared to proceed on the basis that those instruments correctly record the location of the LBT.

Daua<sup>150</sup> and the Indian Ocean.<sup>151</sup> An 1891 Anglo-Italian treaty first set out a line of demarcation between the two European powers' East African colonial possessions.<sup>152</sup>

4.4. Thirty-three years later, the boundary between what by then had become the territories of Britain's Kenya Colony and Italian Jubaland were modified in the 1924 "Treaty between Italy and the United Kingdom Regulating Certain Questions Concerning the Boundaries of Their Respective Territories in East Africa" (the "1924 Treaty").<sup>153</sup>

4.5. The boundary established by the 1924 Treaty ran from the confluence of the Rivers Ganale and Daua in the north, to the Indian Ocean in the south. Article 1 of the 1924 Treaty defined the final segment of the land boundary in the south by means of a meridian of longitude running to the coast. In particular, it provided:

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<sup>150</sup> Also known as Daua Parma or Dawa. U.S. Department of State, *International Boundary Study No. 134: Kenya-Somalia Boundary*, p. 2. MS, Vol. IV, Annex 82.

<sup>151</sup> *Ibid.*, p. 2.

<sup>152</sup> Protocol between the British and Italian Governments for the Demarcation of their respective Spheres of Influence in Eastern Africa, from the River Juba to the Blue Nile (24th March, 1891), *reprinted in* THE MAP OF AFRICA BY TREATY, Vol. II (E. Hertslet, ed., 1896). MS, Vol. III, Annex 1. Article 1 of the 1891 Agreement provided:

"The line of demarcation in Eastern Africa between the spheres of influence respectively reserved to Great Britain and Italy shall follow from the sea the mid-channel (*thalweg*) of the River Jube [Jubba] up to latitude 6° north, Kismayn [Kismaayo] with its territory on the right bank of the river thus remaining to England".

<sup>153</sup> 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) (hereinafter "Treaty Between Italy and the United Kingdom (15 July 1924)"). MS, Vol. III, Annex 2.

“[T]hence along that provincial boundary to a point due north of the point on the coast due west of the southernmost of the four islets in the immediate vicinity of Ras Kiambone (Dick’s Head); thence due southwards to such point on the coast. Ras Kiambone (Dick’s Head) and the four islets above mentioned shall fall within the territory to be transferred to Italy”.<sup>154</sup>

4.6. The 1924 Treaty included a map, a copy of which is reproduced as **Figure 4.1** (in Volume II only). Article 2 of the 1924 Treaty stated: “In the event of differences between the text and the map, the text will prevail”.

4.7. As well as defining the boundary, the 1924 Treaty established a joint British-Italian Commission (“the Jubaland Commission”) with responsibility for overseeing all matters relating to the practical implementation of the Treaty.<sup>155</sup> The Jubaland Commission subsequently established a subsidiary organ, the Jubaland Boundary Commission, with specific responsibility for delimiting, surveying and demarcating the boundary between Kenya and Jubaland.<sup>156</sup>

4.8. A year after the 1924 Treaty was signed, the United Kingdom and Italy adopted an amended description of the southernmost section of the new colonial boundary. Diplomatic notes were exchanged between the two States on 16 and 26 June 1925. These notes recorded:

“[H]aving regard to the fact that Ras Kiambone (Dick’s Head) and the four small islands, which are in its immediate vicinity, form part of the territory to be transferred to Italy, it is understood that, upon

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<sup>154</sup> Treaty Between Italy and the United Kingdom (15 July 1924), Art. 1. MS, Vol. III, Annex 2.

<sup>155</sup> *Ibid.*, Art. 12.

<sup>156</sup> L.N. King, “The Work of the Jubaland Boundary Commission”, *The Geographical Journal*, Vol. 72, No. 5 (Nov. 1928), p. 418. MS, Vol. IV, Annex 81.

reaching the meridian east of Greenwich which leaves in Italian territory the well of El Beru (or such other meridian east of Greenwich as may be recommended by the Commissioners in accordance with paragraph 3 of Article 1 of the Treaty), the boundary shall follow such meridian southwards to the point of intersection of such meridian with the parallel of South Latitude 0°50'; *thence proceeding in a south-easterly direction to a point situated about six kilometres north of the point of the coast due west of the southernmost of the four islets in the immediate vicinity of Ras Kiambone (Dick's Head); thence due southwards to such point on the coast.* The coast shall be defined as the line of mean sea level ordinary spring tides".<sup>157</sup>

4.9. Between 1925 and 1927 the Jubaland Boundary Commission surveyed and demarcated the entirety of the new boundary. Following the completion of that exercise, the Jubaland Commission memorialized its decisions in an agreement signed by the heads of the British and Italian missions on 17 December 1927 ("the 1927 Agreement").<sup>158</sup> The 1927 Agreement was formally adopted in an agreement between the British and Italian Governments on 22 November 1933.<sup>159</sup>

4.10. The 1927 Agreement consisted of five parts: the main text, together with four appendices that set out: (1) a general and a detailed description of the

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<sup>157</sup> Treaty Between Italy and the United Kingdom (15 July 1924), Note of 16 June 1925 (emphasis added). MS, Vol. III, Annex 2.

<sup>158</sup> Agreement between Italy and the United Kingdom in which are recorded the decisions of the Commission appointed under Article 12 of the Treaty between His Britannic Majesty and His Majesty the King of Italy, signed at London on July 15, 1924, regulating certain questions concerning the boundaries of their respective territories in East Africa (17 Dec. 1927). MS, Vol. III, Annex 3. *See also* Government of the United Kingdom and Government of Italy, *Minutes of the Twenty-First Meeting* (17 Dec. 1927). MS, Vol. III, Annex 33.

<sup>159</sup> Exchange of Notes between His Majesty's Government in the United Kingdom and the Italian Government regarding the Boundary between Kenya and Italian Somaliland (22 Nov. 1933), U.K.T.S. No. 1, Cmd. 4491 (1934). MS, Vol. III, Annex 4.



boundary; (2) a table of geographic coordinates; (3) a map of the demarcated boundary; and (4) a gazetteer to the map giving British and Italian spellings of place names.

4.11. Paragraph 6 of the 1927 Agreement described the location where the land boundary reached the Indian Ocean. It used the southernmost point in a group of small islands close to Ras Chiamboni (the Diua Damasciaca Islands) as a lateral reference point to helping in determining the location of the LBT:

“Article I of the [1924] Treaty states that there are 4 islets in the immediate vicinity of Ras Chiamboni.

The Commission found that there are actually 6 islets.

One these is a prolongation of Ras Chiamboni to the north.

The other 5 form a group about 2 kilometres south-west from the control point of Ras Chiamboni, and are known collectively as Diua Damasciaca.

The most southerly islet of this group is little more than an almost circular rock about 50 metres in diameter.

The Commission having been empowered to do so by the two Governments, *decided that the parallel of latitude tangential to the southern extremity of this latter islet should define the position of the point at which the boundary reaches the coast*”.<sup>160</sup>

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<sup>160</sup> 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

4.12. The 1927 Agreement also recorded a minor modification to the location of the southern longitudinal section of the boundary, which the boundary commissioners agreed to move a distance of 15 metres inland. This was intended to provide a more suitable and stable location for the physical establishment of the final boundary pillar:

“Having been empowered to do so by the two Governments, the Commission decided that the short portion of the boundary defined in the Treaty by a meridian of longitude in the region of *Ras Chiamboni* should be moved so that its southern terminal point should be 15 metres inland from high water mark and on the parallel of latitude mentioned in paragraph 6; the coastal waters being very shallow and high water mark being defined by the crumbling edge of a sand terrace.

This locality is known as Dar es Salam”.<sup>161</sup>

4.13. Pursuant to that minor modification, the “General Description” of the boundary set forth in Appendix I described the final section of the boundary in the following terms:

“[T]hence in a straight line, in a south-easterly direction, towards the highest point of *Ras Chiamboni* until this line is intersected by the meridian of longitude which passes through a point at *Dar Es Salam* 15 metres inland from High Water Mark and due west of the southern extremity of the southernmost of the group of 5 islets known as *Diua Damasciaca*;

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concerning the boundaries of their respective territories in East Africa (17 Dec. 1927), para. 6 (emphasis added). MS, Vol. III, Annex 3.

<sup>161</sup> *Ibid.*, para. 7 (emphasis added).

thence due south along this meridian as far as the point at *Dar Es Salam* defined above”.<sup>162</sup>

4.14. Having reached the point known as Dar Es Salam, the land boundary then continued to the sea “in a south-easterly direction” along “a straight line at right angles to the general trend of coastline at *Dar Es Salam*”.

4.15. According to the “Detailed Description” in Appendix I, the entire length of the land boundary was marked by a path cut through the vegetation and was “indicated in a more permanent manner by primary and secondary beacons at intervals”.<sup>163</sup> There were 29 beacons in total, with Primary Beacon No. 29 (described as a “large cemented masonry” marker) being the furthest south and marking the location of the point 15 metres inland from the high-tide coast at Dar Es Salam, described above.<sup>164</sup> According to the table of geographic coordinates included as Appendix II to the 1927 Agreement, Primary Beacon No. 29 was located at “S. 1 39 51.95” and “E. 41 33 52.18”.<sup>165</sup>

4.16. The only exceptions to the physical demarcation were two “small lengths of a few metres” at the southern and northern ends of the land boundary, which were “indicated by alignment only”. The unmarked section at the southern extremity was described as “a length in the south from Primary Beacon No. 29 to the sea”.<sup>166</sup> As stated, the general description of the boundary in Appendix I

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<sup>162</sup> *Ibid.*, Appendix I: Description of the Boundary between the Colony and Protectorate of Kenya and Italian Somaliland, First Part: General Description.

<sup>163</sup> *Ibid.*, Appendix I, Second Part: Detailed Description.

<sup>164</sup> *Ibid.*, Appendix I, Second Part, § 5.

<sup>165</sup> *Ibid.*, Appendix II: Table of Geographical Coordinates of points fixed on or near the Boundary between the Colony and Protectorate of Kenya and Italian Somaliland by the Anglo-Italian (Jubaland) Boundary Commission, p. 30.

<sup>166</sup> *Ibid.*, Appendix I, Second Part.

defined this segment of the boundary by the line running “in a south-easterly direction” at “right angles to the general trend of coastline at Dar Es Salam”.<sup>167</sup>

4.17. In addition to the textual description, the Boundary Agreement also contained an agreed map showing the location of the new boundary, which recorded the path of the entire land boundary. Because the distances involved are limited to just a few metres, the map does not show the final unmarked section of the land boundary from Dar Es Salam to the sea. An excerpt of the final segment of the boundary as it approaches the sea is included as **Figure 4.2** (following page 58).

4.18. In order to determine the precise location of the Parties’ LBT in modern datum (WGS-84), it is necessary first to pinpoint the location of Primary Beacon No. 29. Although Appendix II to the 1927 Agreement provided specific coordinates for the beacon’s location, these were, due to the technology of the day, derived through astronomical readings and therefore cannot be directly converted to WGS-84.

4.19. Nevertheless, it is possible to determine the precise location of Primary Beacon No. 29 by other means.<sup>168</sup> As stated, pursuant to the 1927 Agreement, the beacon is located due west of the southernmost point of the Diua Damasciaca islands, 15 metres inland from the high water mark. **Figure 4.3** (following Figure 4.2) is a February 2010 satellite image of the islands. As the figure reflects, the southernmost point is located at 1°39’43.30” S - 41°34’35.40” E. (These and all other coordinates that follow are referred to WGS-84.)

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<sup>167</sup> *Ibid.*, Appendix I, First Part.

<sup>168</sup> The security situation in the area at the moment prevents a field visit to confirm the location of the beacon.

(1925-1927)

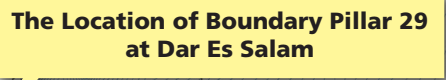


Figure 4.2





## EXPECTED LOCATION OF PRIMARY BEACON No. 29

(DigitalGlobe image from 9 February 2010 viewed in Google Earth)

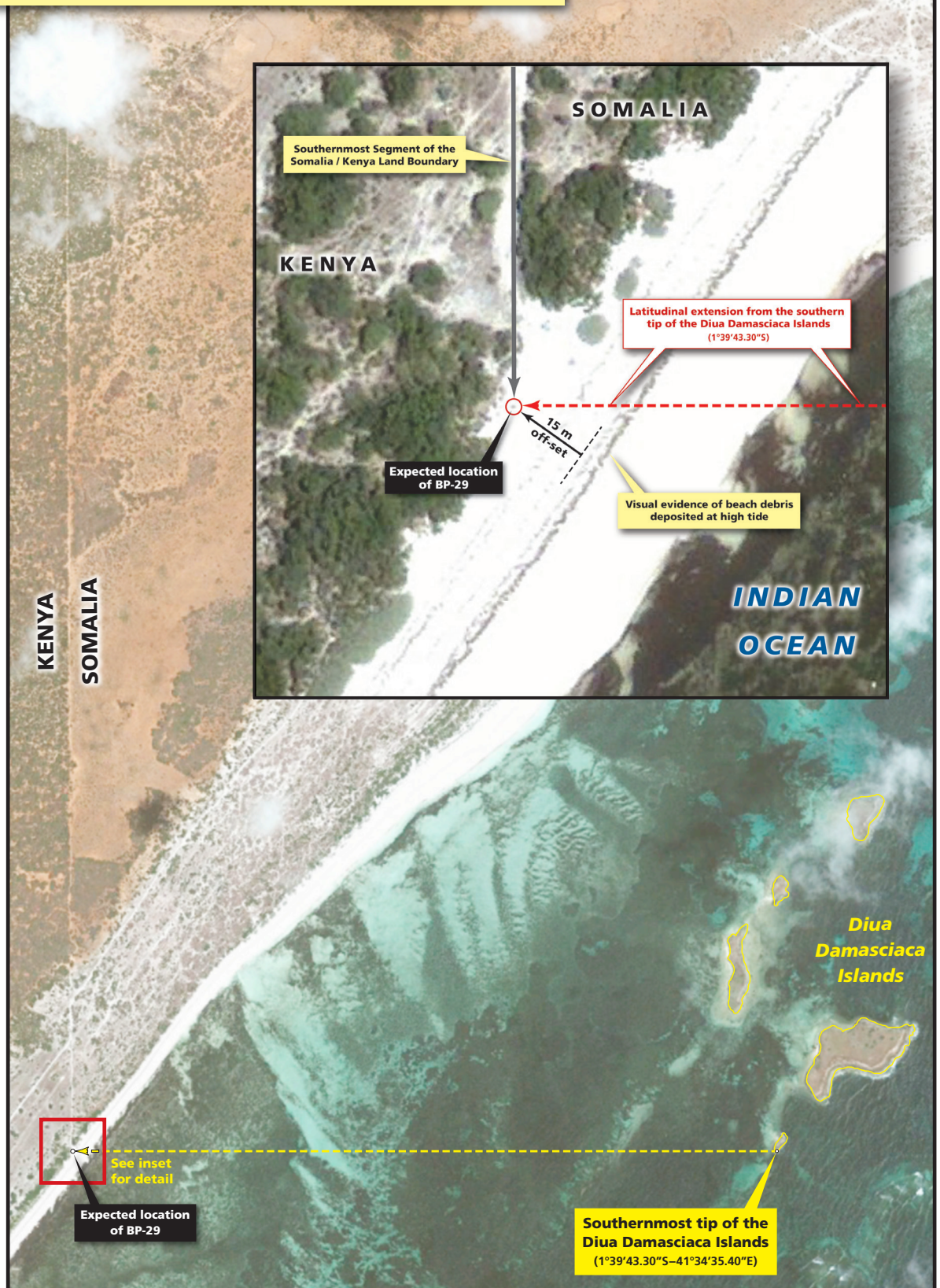


Figure 4.3





4.20. When this line is extended due west, it intersects the narrow longitudinal line that corresponds to the path—the lane cut through the vegetation—that the Jubaland Boundary Commission cleared when it delimited the land boundary in 1926-27 at a point almost exactly 15 metres inland from the high-tide coast. This is the expected location of Primary Beacon No. 29 and is also reflected in Figure 4.3. Indeed, although it is not conclusive, the image appears to confirm the presence of an object at exactly the point one would expect to find Beacon No. 29. The precise coordinates of this point are 1°39'43.30" S - 41°33'33.49" E.

4.21. The beacon is not, however, the LBT as such, as it is still necessary to connect the beacon to the low-water line. As explained above, under the terms of the 1927 Agreement, the land boundary extends from Primary Beacon No. 29 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”.<sup>169</sup>

4.22. In **Figure 4.4** (following page 60), the general direction of the coastline at Dar Es Salam—determined by reference to the 1927 map—is depicted by means of a dashed black line. Drawing a perpendicular to this line from Primary Beacon No. 29 towards the sea yields the solid black line that meets the low-water line some 41 metres distant from the beacon. The coordinates of the point at which this line meets the sea are 1°39'44.07" S - 41°33'34.57" E.

4.23. On the basis of this approach, Somalia submits that the specified coordinates constitute the starting point of the Parties' maritime boundary.

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<sup>169</sup> 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.

4.24. Somalia does not anticipate that Kenya will propose a different starting point for the maritime boundary. As stated in paragraph 3.50 above, in March 2014, the Parties agreed “to rely on Pillar BP29 as reflected in the 1924 Anglo-Italian Treaty to constitute the starting point solely for the purpose of establishing a maritime boundary”.<sup>170</sup>

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<sup>170</sup> 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.

# THE LAND BOUNDARY TERMINUS ON THE PARTIES' LOW-TIDE COAST

(DigitalGlobe image from 9 February 2010 viewed in Google Earth)

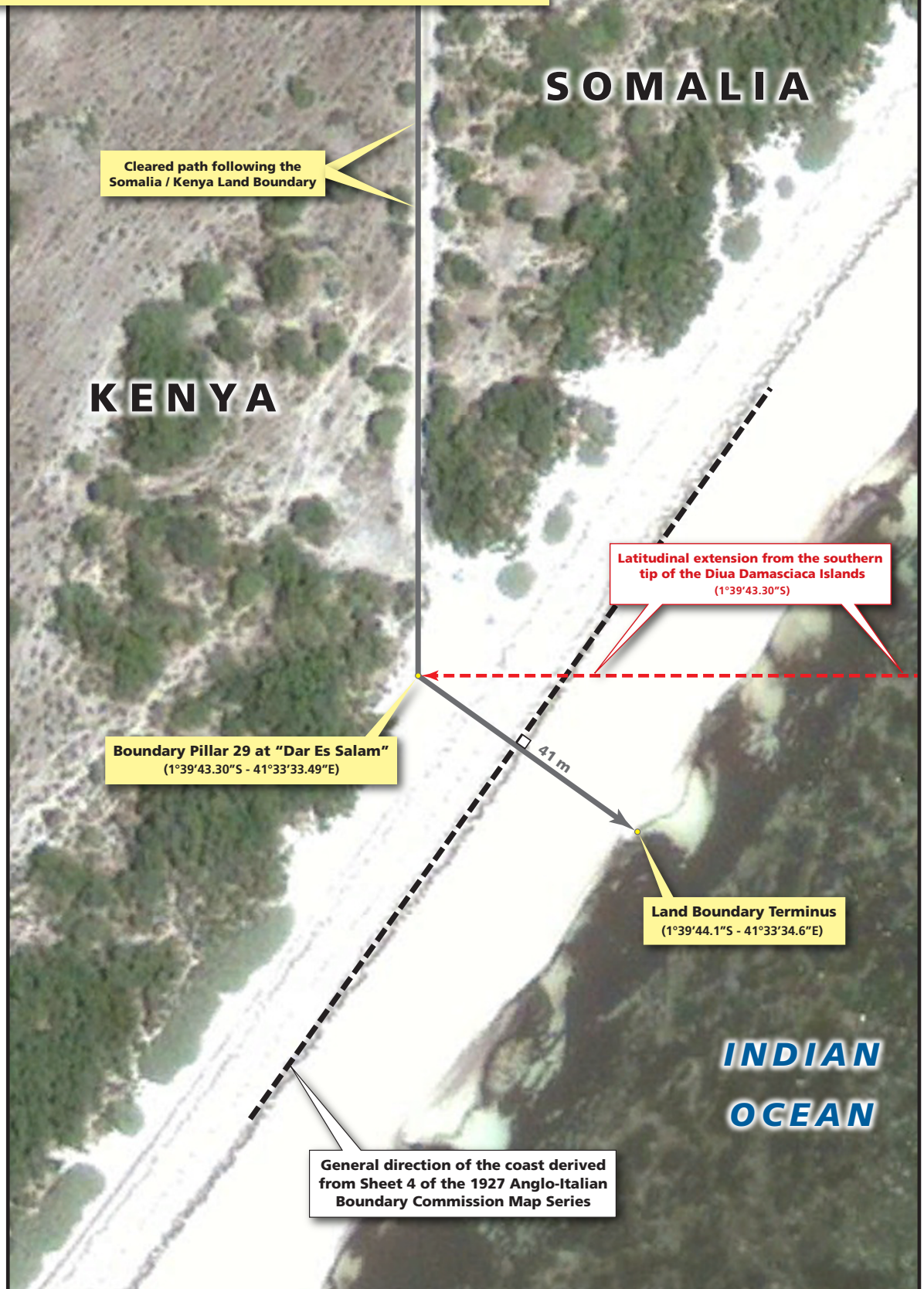


Figure 4.4



## CHAPTER 5. DELIMITATION OF THE TERRITORIAL SEA

5.1. In this chapter, Somalia sets forth its submissions concerning the delimitation of the territorial sea, from the location of the LBT (as described in the previous chapter) to the point at which the territorial sea meets the EEZ and continental shelf 12 M from the coast.

5.2. The general rule, reflected in Article 15 of UNCLOS, provides that the territorial sea between two adjacent coastal States is to be delimited according to a median (equidistance) line. That rule can only be displaced in limited situations, where there is a contrary agreement, historic title or where other “special circumstances” pertain. As described in Chapter 2, the Somalia-Kenya coastline is wholly unremarkable. It has no protuberances or concavities, or any other special features that would render an equidistance line inappropriate. Nor is there an agreement or historic title to the contrary. This case therefore falls squarely within the general rule reflected in Article 15.

5.3. Notwithstanding the geographic and legal considerations, Kenya claims as the boundary in the territorial sea a parallel of latitude. Its claim is wholly unjustifiable, having no basis in international law. It is also fundamentally unfair and unprincipled. Even more remarkably, the boundary line in the territorial sea now claimed by Kenya is contrary to a position expressly enshrined in its own domestic law for over three decades.

5.4. This Chapter is divided into two sections. **Section I** describes the methodology for delimiting the territorial sea beginning at the LBT. It is divided into four parts. Part A addresses the 1982 Convention. Part B discusses the appropriate baselines, applying the pertinent principles of international law to the straight and relatively featureless Somalia-Kenya coastline. Part C explains the

selection of appropriate base points for construction of the equidistance line and the construction of the line itself. Part D explains why there are no “special circumstances” that might operate to displace equidistance. Finally, **Section II** explains why Kenya’s claim to a parallel of latitude as a boundary is legally and factually unsustainable.

5.5. As set forth in Chapter 4, the LBT is in the vicinity of the location known as Dar Es Salaam on the low-water line at coordinates 1°39’44.07” S - 41°33’34.57” E. From that point, the maritime boundary in the territorial sea follows an equidistance line for 12 M to the point where the territorial sea meets the EEZ and continental shelf, at coordinates of 1°47’54.60” S and 41°43’36.04” E.

## **Section II. The Law Governing the Delimitation of the Territorial Sea**

### **A. THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA**

5.6. The law relating to the territorial sea is well established. Following the 1958 Convention on the Territorial Sea and the Contiguous Zone,<sup>171</sup> in 1982 UNCLOS consolidated the existing principles of international law and established a comprehensive regime governing the law of the sea within a unified legal instrument. Somalia and Kenya both ratified UNCLOS in 1989.<sup>172</sup>

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<sup>171</sup> Kenya acceded to the Convention on the Territorial Sea and the Contiguous Zone on 20 June 1969. Somalia was not a party to the Convention. *See* United Nations Treaty Collection, *Status of the Convention on the Territorial Sea and the Contiguous Zone, Declarations and Reservations*, available at <https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXI/XXI-1.en.pdf>. MS, Vol. III, Annex 8.

<sup>172</sup> Somali Democratic Republic, Law No. 5, *Somali Maritime Law* (26 Jan. 1989). MS, Vol. III, Annex 11; Somali Democratic Republic, Presidential Decree No. 14, *Instrument of Ratification* (9 Feb. 1989). MS, Vol. III, Annex 12; Somali Democratic Republic, Law No. 11, *Mandate-the Approval of the Third United Nations Maritime Law* (9 Feb. 1989). MS, Vol. III, Annex 13.

5.7. Article 2 of UNCLOS enshrines the principle—already contained in Article 1 of the 1958 Convention on the Territorial Sea and the Contiguous Zone—that every coastal State has sovereignty over its territorial sea.<sup>173</sup> Part II of UNCLOS, which includes Article 2, contains detailed rules regarding the limits of the territorial sea. As the Court has stated, the specificity of those provisions reflects the fact that, in view of the sovereign status of territorial waters: “The methods governing territorial sea delimitations have needed to be, and are, more clearly articulated in international law than those used for other, more functional maritime areas”.<sup>174</sup>

5.8. Article 3 of UNCLOS recognises the right of every State to establish the breadth of its territorial sea up to a limit not exceeding 12 M. The limit must be “measured from baselines determined in accordance with this Convention”.<sup>175</sup> For these purposes, the outer limit of the territorial sea is a line “every point of which is at a distance from the nearest point of the baseline equal to the breadth of the territorial sea”.<sup>176</sup>

5.9. Article 15 regulates the delimitation of the territorial sea between States with opposite or adjacent coasts.<sup>177</sup> It provides:

“Where the coasts of two States are opposite or adjacent to each other, neither of the two States is

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<sup>173</sup> “The sovereignty of a coastal State extends, beyond its land territory and internal waters ... to an adjacent belt of sea, described as the territorial sea”.

<sup>174</sup> *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Merits, Judgment, I.C.J. Reports 2007 (hereinafter “*Nicaragua v. Honduras*”), para. 269.

<sup>175</sup> UNCLOS, Art. 3.

<sup>176</sup> *Ibid.*, Art. 4.

<sup>177</sup> The terms of Article 15 are “virtually identical” save for “minor editorial changes” to the text of Article 12(1) of the 1958 Territorial Sea Convention. *Nicaragua v. Honduras*, para 280.

entitled, failing agreement between them to the contrary, to extend its territorial sea beyond *the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured*. The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith”.<sup>178</sup>

5.10. Article 15 is also recognised to embody an established rule of customary international law.<sup>179</sup> According to the Annex VII tribunal in *Guyana v. Suriname*, Article 15 “places primacy on the median line as the delimitation line between the territorial seas” of adjacent States.<sup>180</sup> In this regard, it is now well established that “a presumption of equidistance exists in the case of the territorial sea”.<sup>181</sup>

5.11. Three steps are to be followed in constructing an equidistance line: (a) first, the location of the baselines is established; (b) second, specific base points on those baselines are identified, to enable an equidistance line to be calculated; and (d) third, an equidistance line is then plotted. These three steps will now be applied.

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<sup>178</sup> UNCLOS, Art. 15 (emphasis added).

<sup>179</sup> The ICJ has stated that Article 15 “is to be regarded as having a customary character.” *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Merits, Judgment, I.C.J. Reports 2001 (hereinafter “*Qatar v. Bahrain*”), para. 176.

<sup>180</sup> *Guyana v. Suriname*, Award, UNCLOS Annex VII Tribunal (17 Sept. 2007), para. 296.

<sup>181</sup> BROWNIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW (James Crawford ed., 8th ed. 2012), p. 283. MS, Vol. IV, Annex 91.



## B. BASELINES

5.12. Article 3 of UNCLOS provides that the width of a State’s territorial sea is to be “measured from baselines determined in accordance with” the Convention.<sup>182</sup> Article 5 then establishes the general principle that:

“Except where otherwise provided in this Convention, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognised by the coastal state”.<sup>183</sup>

5.13. Articles 6 to 13 contain specific provisions that may displace the normal rule under Article 5 in respect of certain distinctive coastal features, such as fringing islands,<sup>184</sup> internal waters<sup>185</sup> and low-tide elevations.<sup>186</sup> According to Article 14, a State may determine baselines by any of the methods provided for in those Articles, having regard to the relevant conditions. The Court has noted, however, that the use of straight baselines is as an “exception” that “may only be applied if a number of conditions are met” and which must therefore be applied “restrictively”.<sup>187</sup>

5.14. Since the coasts of Somalia and Kenya in the vicinity of the LBT—which control the location of the equidistance line between Somalia and Kenya—are not exceptional in any way, Somalia uses normal baselines for measuring the breadth

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<sup>182</sup> UNCLOS, Art. 3.

<sup>183</sup> *Ibid.*, Art. 5.

<sup>184</sup> *Ibid.*, Art. 7.

<sup>185</sup> *Ibid.*, Art. 8.

<sup>186</sup> *Ibid.*, Art. 13.

<sup>187</sup> *Qatar v. Bahrain*, para. 212.

of the territorial sea.<sup>188</sup> Kenya, in contrast, has claimed the straight baselines discussed in Chapter 3 and reflected in Figure 3.2 (in Volume II). In Somalia's view, Kenya's use of straight baselines is manifestly inconsistent with UNCLOS. There is no legal basis for employing straight baselines in respect of the portion of the Kenyan coast abutting the LBT or any other.

5.15. In any event, the Court has held that:

“the issue of determining the baseline for the purpose of measuring the breadth of the continental shelf and the exclusive economic zone and the issue of identifying base points for drawing an equidistance/median line for the purpose of delimiting the continental shelf and the exclusive economic zone between adjacent/opposite States are two different issues”.<sup>189</sup>

5.16. The same reasoning applies *mutatis mutandis* to the delimitation of the territorial sea. Indeed, Somalia is aware of no case in which a delimitation in the territorial sea (or beyond) has been drawn by reference to a State's declared straight baselines. It is therefore appropriate to use the normal baselines (*i.e.*, the low-water lines) of Somalia and Kenya for the purpose of constructing the equidistance line between them.

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<sup>188</sup> The 1972 Law on the Somali Territorial Sea and Ports provided that the coastal low water line would serve as the normal baseline for measuring the breadth of the territorial sea. Somali Democratic Republic, Law No. 37, *Law on the Somali Territorial Sea and Ports* (10 Sept. 1972), Art. 2(1). MS, Vol. III, Annex 9. The Somali Maritime Law of 1988 similarly uses the coastal low waterline as “the normal baseline”. Somali Democratic Republic, Ministry of Fisheries and Sea Transport, *Somali Maritime Law* (1988), Art. 4(1). MS, Vol. III, Annex 10.

<sup>189</sup> *Maritime Delimitation in the Black Sea (Romania v Ukraine)*, Judgment, I.C.J. Reports 2009 (hereinafter “*Black Sea Case*”), para. 137.

### C. BASE POINTS AND THE CONSTRUCTION OF THE EQUIDISTANCE LINE

5.17. In the *Black Sea* case, the Court explained that the equidistance line is “to be constructed from the most appropriate points on the coasts of the two States concerned, with particular attention being paid to those protuberant coastal points situated nearest to the area to [be] delimited”.<sup>190</sup> In this regard, the appropriate points are those “which mark a significant change in the direction of the coast, in such a way that the geometrical figure formed by the line connecting all these points reflects the general direction of the coastlines”.<sup>191</sup>

5.18. On the basis of the approach set forth in the Convention, Somalia has made use of the most commonly employed software, known as “CARIS-LOTS”, based on NGA Nautical Chart 61220 to identify the following base points on the Parties’ respective coasts.

5.19. Three base points on the Somali side of the LBT influence the location of the equidistance line within 12 M. Base points S1 and S2 are located on the Diua Damasciaca Islands, located at 1°39’43.30” S - 41°34’35.40” E and 1°39’35.90” S - 41°34’45.29” E respectively. Base point S3 is a low-tide elevation located at 1°39’14.99” S - 41°35’15.68” E.

5.20. The appropriate base points on the Kenyan side of the LBT were identified by reference to the same criteria: they are situated on the most seaward points on the charted low-tide coast. Two base points on the Kenyan side of the boundary control the equidistance line within the territorial sea. Base point K1 is located at 1°42’00.06” S - 41°32’47.38” E; base point K2 is located at 1°43’04.77” S - 41°32’37.18” E.

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<sup>190</sup> *Ibid.*, para. 117.

<sup>191</sup> *Ibid.*, para. 127.

5.21. The location of each of these base points is reflected in **Figure 5.1** (following page 68). Using these base points yields the equidistance line in the territorial sea that is also depicted in Figure 5.1.<sup>192</sup>

#### D. ABSENCE OF SPECIAL CIRCUMSTANCES

5.22. Exceptionally, Article 15 of UNCLOS allows for a departure from equidistance where “special circumstances” are shown to exist. The jurisprudence makes clear that special circumstances only exist where, as a result of one or more particularly anomalous geographic features of the coastlines, equidistance would produce an arbitrary, unreasonable or unworkable boundary in the territorial sea.

5.23. No such “special circumstances” exist in the present case. In contrast to cases such as *Nicaragua v. Honduras* and *Qatar v. Bahrain*, the Somalia-Kenya coastline in the vicinity of the LBT is notable for its smooth and regular configuration, as well as its stability. There are no geographic or geologic features in the present case that justify a departure from equidistance in the territorial sea.

5.24. The absence of special circumstances is confirmed by Kenya’s domestic legislation, which has for several decades defined its territorial sea boundary with

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<sup>192</sup> The turning points of the equidistance line in the territorial sea are listed in the table below:

Turning Point	Coordinates
T1	1°40'05.92" S - 41°34'05.26" E
T2	1°41'11.45" S - 41°34'06.12" E
T3	1°43'09.34" S - 41°36'33.52" E
T4	1°43'53.72" S - 41°37'48.21" E
T5	1°44'09.28" S - 41°38'13.26" E

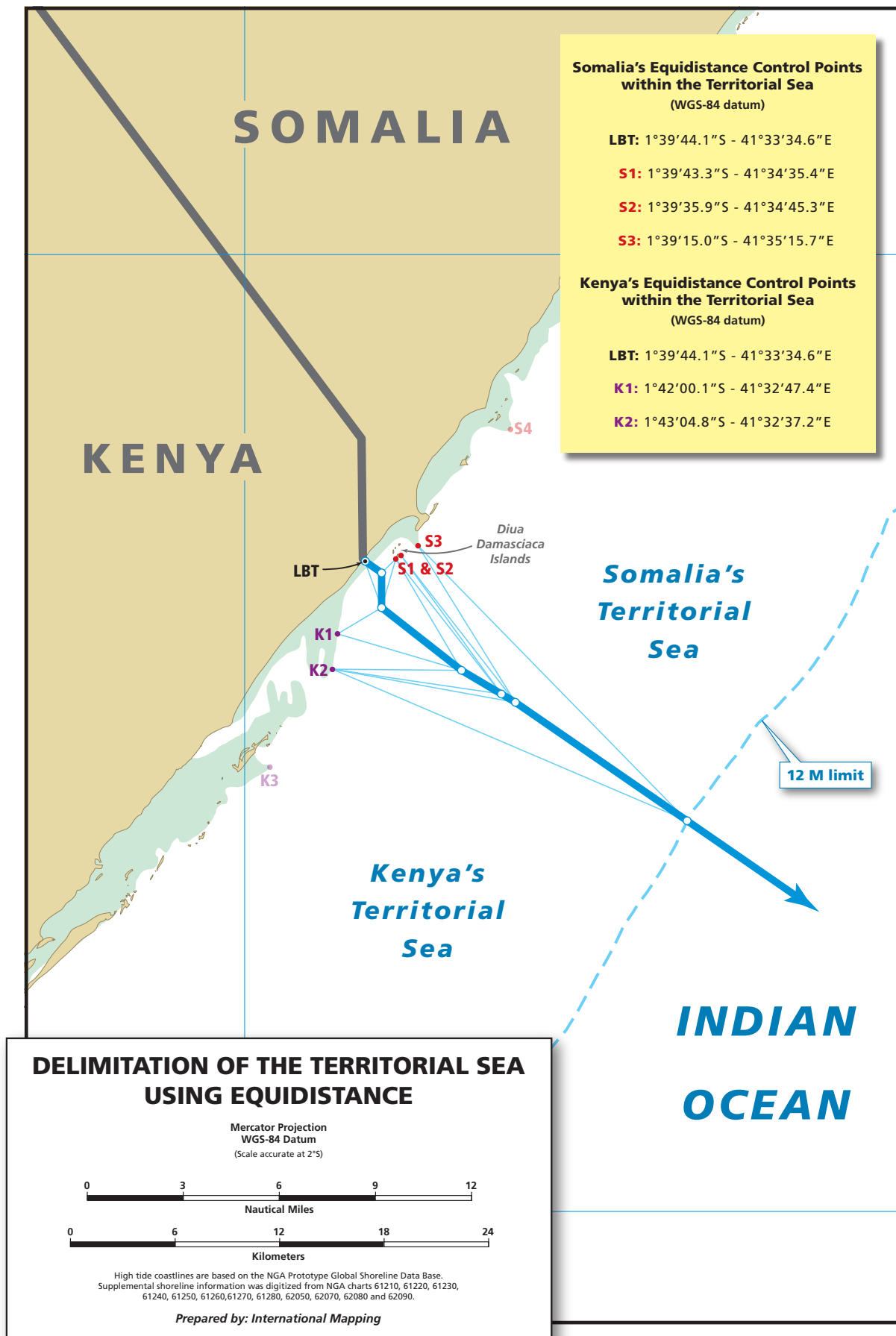


Figure 5.1



Somalia by express reference to equidistance. Kenya's Territorial Waters Act of 1972 described itself as "An Act of Parliament to make provision for the delimitation of the territorial waters of Kenya, and for purposes incidental thereto".<sup>193</sup> The Act provided that the width of Kenya's territorial sea "shall be measured in the manner set out in the Schedule to this Act calculated in accordance with the provisions of the Convention on the Territorial Sea and the Contiguous Zone".<sup>194</sup> Section 2(4) of the Act stated:

"On the coastline adjacent to neighbouring States the breadth of 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 of each of the respective States is measured".<sup>195</sup>

5.25. Seventeen years later, the Kenyan legislature enacted the Maritime Zones Act of 1989. The 1989 Act reiterated the territorial sea provisions in the 1972 Act in materially identical terms. The 1989 Act states that it was intended, *inter alia*, to "consolidate the law relating to the territorial waters ... of Kenya".<sup>196</sup> It makes reference to the territorial sea provisions of UNCLOS and expressly adopts an "equidistant" territorial sea boundary. Section 3 provides:

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<sup>193</sup> Republic of Kenya, Law No. 2 of 1972, *Territorial Waters Act* (16 May 1972). MS, Vol. III, Annex 16.

<sup>194</sup> *Ibid.*, § 2(2).

<sup>195</sup> *Ibid.*, § 2(4) (emphasis added).

<sup>196</sup> The long title describes the Act as: "An Act of Parliament to consolidate the law relating to the territorial waters and the continental shelf of Kenya; to provide for the establishment and delimitation of the exclusive economic zone of Kenya; to provide for the exploration and exploitation and conservation and management of the resources of the maritime zones; and for connected purposes". Republic of Kenya, Chapter 371, *Maritime Zones Act* (25 Aug. 1989), Title. MS, Vol. III, Annex 20.

“(1) Except as provided in subsection (4), the breadth of the territorial waters of Kenya shall be twelve nautical miles.

(2) The breadth of the territorial waters shall be measured in the manner set out in the First Schedule calculated in accordance with the provisions of the United Nations Convention on the Law of the Sea done at Montego Bay on 10<sup>th</sup> December, 1982. ...

(4) 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”.<sup>197</sup>

5.26. As far as Somalia has been able to determine, Kenya’s Maritime Zones Act of 1989 is still in force. Kenya’s Interpretation and General Provisions Act (Cap 2.) defines the expression “the territorial waters” as “any part of the open sea within twelve nautical miles of the coast of Kenya measured in accordance with the provisions of the Maritime Zones Act”.<sup>198</sup> This definition of Kenya’s territorial sea applies for the purposes of “every other written law, and in all public documents enacted, made or issued before or after the commencement of this Act”.<sup>199</sup>

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<sup>197</sup> *Ibid.*, § 3.

<sup>198</sup> Republic of Kenya, Laws of Kenya, Chapter 2, *The Interpretation and General Provisions Act* (1983, revised ed. 2008), § 3. MS, Vol. III, Annex 23.

<sup>199</sup> *Ibid.*, § 3(1).



### Section III. Kenya's Claim to a Parallel of Latitude Boundary

5.27. For the reasons described above, the present case is a paradigmatic example of one in which the boundary in the territorial sea should be determined by reference to equidistance. There is nothing in the geography of either Party's coastline that warrants a departure from the general principle. Nor is there any basis in the Parties' pre-independence history or post-independence practice to displace the presumption of an equidistance boundary in the territorial sea.

5.28. In 2005, the President of Kenya issued a Proclamation ("the 2005 Proclamation"), taking forward a position adopted in a similarly worded Proclamation in 1979. The 2005 Proclamation did not expressly address the location of the territorial sea boundary. It did, however, purport to fix the northern boundary of Kenya's EEZ by reference to the putative northern boundary of Kenya's territorial waters, along a parallel:

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

b. In respect of its northern territorial waters boundary with Somali Republic be on eastern latitude South of Diua Damascian Island [sic] being latitude 1°39'34" degrees south".<sup>200</sup>

5.29. The parallel boundary claimed by Kenya has no historical or legal basis. The colonial powers did not agree on a maritime boundary following a parallel, and the governments of Somalia and Kenya reached no such agreement following independence. As explained above, from at least 1972 Kenya's legislation

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<sup>200</sup> Republic of Kenya, Legal Notice No. 82, *Proclamation by the President of the Republic of Kenya* (9 June 2005), published in *Kenya Gazette Supplement No. 55 (Legislative Supplement No. 34)* (22 July 2005), Art. 1. MS, Vol. III, Annex 21.

expressly recognised an equidistance boundary in the territorial sea, and the Kenyan legislature expressly reaffirmed the existence of an “equidistant” boundary in 1989. It is therefore unclear on what legal basis Kenya claims that the boundary follows the parallel of latitude that transects the LBT.

5.30. Beyond the inconsistency with its own law and international law, Kenya’s approach is arbitrary and would lead to impractical and unworkable consequences. *First*, as shown in **Figure 5.2** (following page 72), based on the coordinates specified in the 2005 Proclamation,<sup>201</sup> the parallel of latitude claimed by Kenya would bisect the largest of the Diua Damasciaca Islands and would leave the southernmost island exclusively in Kenya’s territorial waters. Yet, the Diua Damasciaca islands have always been recognised as being within the territory of Somalia. The 1924 Treaty—and the 1927 Agreement—expressly stated that the Diua Damasciaca islands were part of Italian territory—a position supported by Kenya’s 1972 Territorial Waters Act and its 1989 Maritime Zones Act.<sup>202</sup> There has never been any question concerning sovereignty over those islands. It is therefore unclear on what basis Kenya purports to claim the parallel boundary set out in the 2005 Proclamation.

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<sup>201</sup> The Presidential Proclamation states that the boundary of Kenya’s territorial waters shall be “on eastern latitude South of Diua Damascian Island being latitude 1°39’34” degrees south”. *Ibid.*, para. 1(b). The First Schedule contains the coordinates for the straight baseline used for determining the extent of Kenya’s territorial waters for the purposes of the Proclamation. The first coordinate listed in that Schedule is 1°39’34.25344”S - 41°34’44.19626”E, which describes a location on land in the middle of the largest of the Diua Damasciaca islands. *Ibid.*

<sup>202</sup> The final part of the General Description in the Appendix to the 1927 Agreement, for example, stated: “thence, in a south-easterly direction, to the limit of territorial waters in a straight line at right angles to the general trend of the coastline at Dar Es Salam, *leaving the islets of Diua Damasciaca in Italian territory*”. Exchange of Notes between His Majesty’s Government in the United Kingdom and the Italian Government regarding the Boundary between Kenya and Italian Somaliland (22 Nov. 1933), U.K.T.S. No. 1, Cmd. 4491 (1934), Appendix I, First Part “General Description” (emphasis added). MS, Vol. III, Annex 4.

# THE PARALLEL RESULTING FROM THE COORDINATES SPECIFIED IN KENYA'S 2005 PRESIDENTIAL PROCLAMATION

(DigitalGlobe image taken on 9 February 2010 viewed in Google Earth)

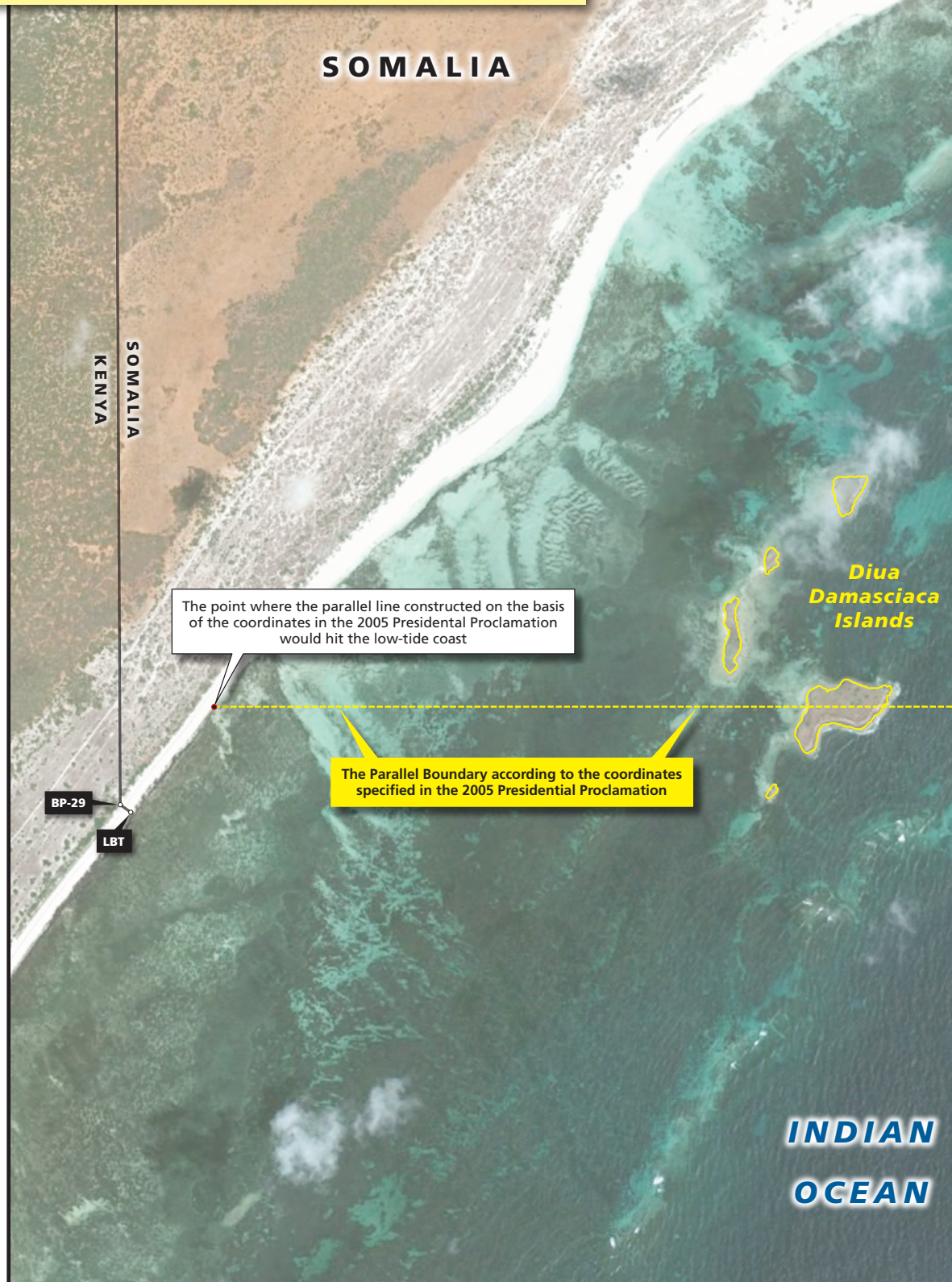


Figure 5.2



5.31. In any event, because the LBT is almost exactly opposite the southernmost point of the Diua Damasciaca islands, a maritime boundary following the parallel of latitude passing through the LBT, would leave the islands literally within metres of Kenya's territorial sea. In other words, the approach that Kenya proposes would effectively deprive the Diua Damasciaca islands of large parts of a territorial sea to which they are entitled under UNCLOS and general international law. **Figure 5.3** (following page 74) shows the location of that line. Such a result cannot be reconciled with the 1982 Convention, or the jurisprudence of the Court or other international courts or tribunals.

5.32. In short, there is no basis in law, geography or history for a territorial sea boundary along a parallel of latitude. It follows that the Court's task in delimiting the territorial sea boundary is straightforward: the maritime boundary in the territorial sea falls to be determined by a straightforward application of the equidistance method, as described above.

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5.33. Accordingly, the territorial sea boundary between Somalia and Kenya is to be delimited as depicted in Figure 5.1 (following page 68). The end point of that line is located at 1°47'54.60" S and 41°43'36.04" E. This point also constitutes the starting point for the Parties' continental shelf boundary within 200 miles and the EEZ. That boundary is addressed in Chapter 6.





# KENYA'S PARALLEL BOUNDARY CLAIM LINE EXTENDING EAST FROM THE LAND BOUNDARY TERMINUS

(DigitalGlobe image from 9 February 2010 viewed in Google Earth)

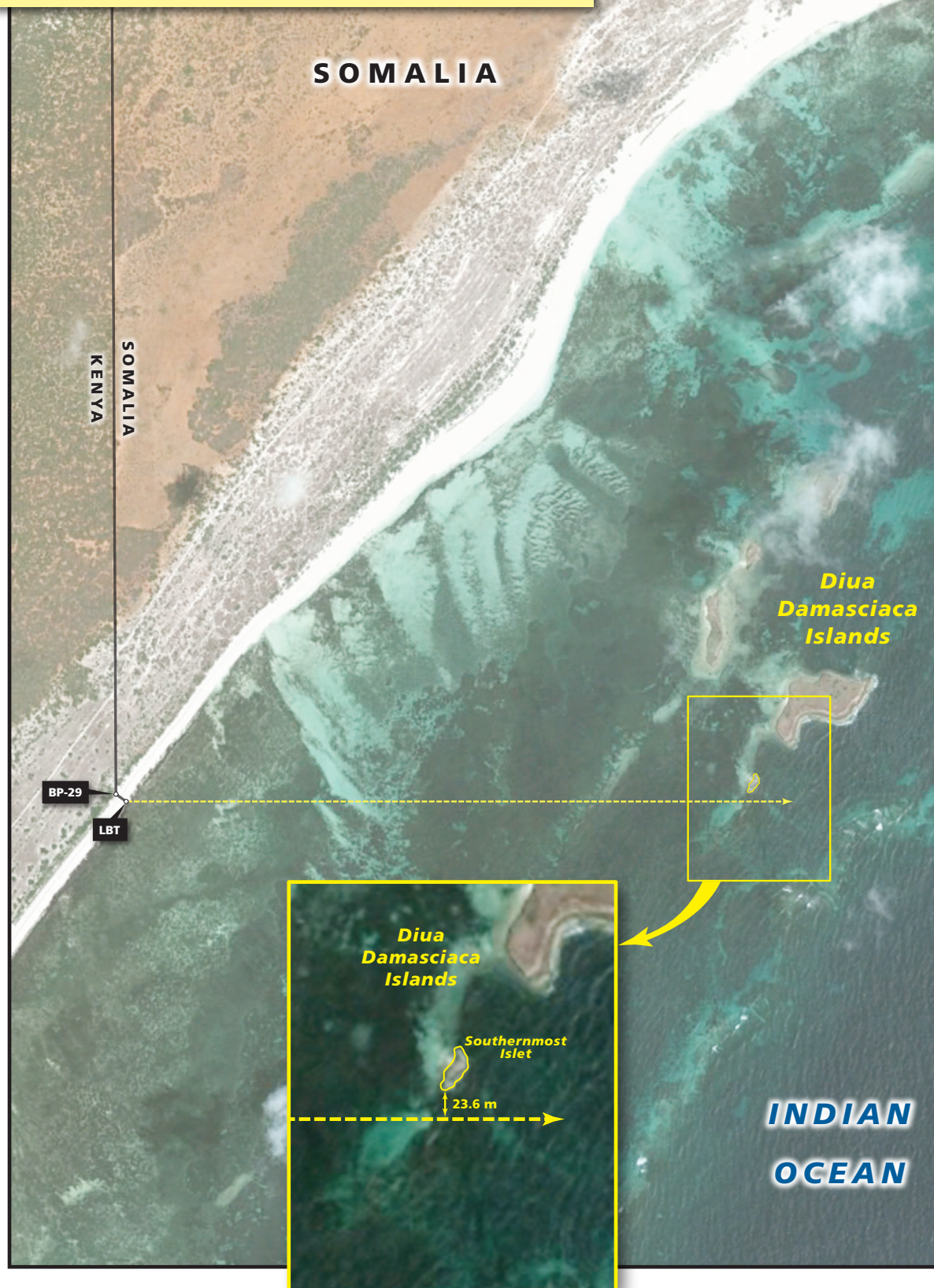


Figure 5.3





## CHAPTER 6. DELIMITATION OF THE EEZ AND CONTINENTAL SHELF WITHIN 200 M

6.1. This chapter sets forth Somalia's case concerning the delimitation of the EEZ and continental shelf up to 200 M. Chapter 7 addresses the delimitation of the continental shelf beyond 200 M.

6.2. Somalia submits that the EEZ and continental shelf within 200 M should be delimited by means of an equidistance line, which follows a general bearing of approximately N124.5°E. This line, shown in **Figure 6.1** (following page 76), begins at the outer limit of the territorial sea boundary described in Chapter 5 and extends up to the 200 M limit. The end point of the equidistance line should serve as both the outer limit of the EEZ and the starting point for the delimitation of the outer continental shelf, as discussed in Chapter 7.

6.3. **Section I** of this Chapter reviews the applicable law, including the international jurisprudence that is most pertinent to this case. **Section II** identifies the relevant coasts of the Parties, as well as the relevant area for purposes of establishing the geographical context in which the delimitation is to take place. Finally, **Section III** addresses the delimitation of boundary between Somalia and Kenya in the EEZ and continental shelf within 200 M. Somalia will show that the application of the now-standard three-step method to the circumstances of this case leads to the conclusion that an equidistance line constitutes the equitable solution that the law requires.

## **Section I. The Applicable Law**

### **A. THE REGIMES OF THE EEZ AND CONTINENTAL SHELF**

6.4. The regimes of the EEZ and continental shelf are governed by Part V (comprising Articles 55 through 75) and Part VI (comprising Articles 76 through 85) of the Convention, respectively.

6.5. Article 55 of the Convention defines the EEZ as:

“an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention”.<sup>203</sup>

6.6. Article 57 provides that the EEZ “shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is

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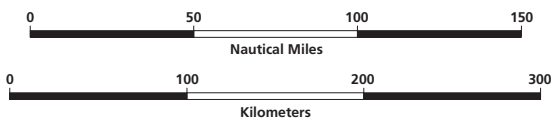
<sup>203</sup> UNCLOS, Art. 55. Article 56(1) states the rights, jurisdiction and duties of the coastal State in the EEZ. It provides:

1. In the [EEZ], the coastal State has:

- (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources ... of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone ...;
- (b) jurisdiction as provided for in the relevant provisions of this Convention with regard to: (i) the establishment and use of artificial islands, installations, and structures; (ii) marine scientific research; (iii) the protection and preservation of the marine environment;
- (c) other rights and duties provided for in this Convention.

# THE EQUIDISTANCE LINE

Mercator Projection  
WGS-84 Datum  
(Scale accurate at 2°S)



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



Figure 6.1



measured”.<sup>204</sup> Unlike a coastal State’s rights in the continental shelf, an EEZ must be affirmatively claimed.<sup>205</sup>

6.7. Article 76(1) of the UNCLOS defines the continental shelf as:

“[t]he seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance”.<sup>206</sup>

6.8. Coastal States are thus entitled to a continental shelf extending either (1) to a distance of 200 M from their baselines, or (2) to the outer edge of the continental margin when that margin extends beyond 200 M. The requirements for establishing entitlement to a continental shelf beyond 200 M are stated in Article 76(4) and are subject to the constraints provided in Article 76(5). As discussed further in Chapter 7, the application of these rules to both Somalia and

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<sup>204</sup> *Ibid.*, Art. 57. In accordance with the Convention, on 30 June 2014 the President of Somalia issued a Proclamation claiming an EEZ extending to 200 M from normal baselines, and Somalia deposited a list of coordinates defining the outer limit of its EEZ with the United Nations Division of Ocean Affairs and the Law of the Sea. See Federal Republic of Somalia, Office of the President, *Proclamation by the President of the Federal Republic of Somalia* (30 June 2014). MS, Vol. III, Annex 14; United Nations, Division for Ocean Affairs and the Law of the Sea, *Deposit by the Federal Republic of Somalia of a list of geographical coordinates of points, pursuant to article 16, paragraph 2 and article 75, paragraph 2 of the Convention*, U.N. Doc. M.Z.N. 106.2014.LOS (3 July 2014). MS, Vol. III, Annex 68.

<sup>205</sup> Compare UNCLOS, Art. 77(3) (providing that continental shelf rights need not be expressly proclaimed), with UNCLOS Arts. 56 & 57 (not waiving any proclamation requirement).

<sup>206</sup> UNCLOS, Art. 76(1).

Kenya entitles both to claim a continental shelf extending to as much as 350 M from their coasts in the maritime areas relevant to these proceedings.<sup>207</sup>

6.9. A coastal State's rights in the continental shelf "do not depend on occupation, effective or notional, or on any express proclamation".<sup>208</sup> Rather, they exist *ipso facto* and *ab initio*.<sup>209</sup>

6.10. Articles 74(1) and 83(1) govern the delimitation of the EEZ and continental shelf, respectively. As the International Tribunal for the Law of the Sea ("ITLOS") has observed, the two articles are "identical in their content" and differ only in that they are applied to different maritime areas.<sup>210</sup> They provide that the respective delimitations "between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution".<sup>211</sup>

## B. INTERNATIONAL JUDICIAL AND ARBITRAL PRACTICE

6.11. Having set "an equitable solution" as the standard for the delimitation of the continental shelf and EEZ, the Convention "is silent as to the method to be

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<sup>207</sup> See, *infra*, paras. 7.28-7.32.

<sup>208</sup> UNCLOS, Art. 77(3).

<sup>209</sup> *North Sea Continental Shelf (Federal Republic of Germany/Netherlands)*, Judgment, I.C.J. Reports 1969 (hereinafter "*North Sea Cases*"), para. 19.

<sup>210</sup> *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. 182.

<sup>211</sup> *Ibid.*, para. 182.

followed to achieve it”.<sup>212</sup> “To endow this standard with specific content” was “left to States themselves, or to the courts”.<sup>213</sup>

6.12. Implementing this standard in judicial practice, the Court has identified—and other tribunals have consistently followed—the three-step analytical framework known as the “equidistance/relevant circumstances method”.<sup>214</sup> This now-conventional approach is very similar to the “equidistance/special circumstances” rule applicable in the territorial sea.<sup>215</sup> It is designed to minimize the subjectivity that characterized some of the early delimitation cases, while also achieving a “high degree of transparency”.<sup>216</sup>

6.13. The three-step methodology was neatly summarized by the Court in the *Black Sea* case:

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<sup>212</sup> *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Merits, Judgment, I.C.J. Reports 1985 (hereinafter “*Libya/Malta*”), para. 28.

<sup>213</sup> *Ibid.*, para. 28.

<sup>214</sup> See, e.g., *Bangladesh/Myanmar*, para. 238.

<sup>215</sup> See, e.g., *supra*, paras. 5.2, 5.22; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Merits, Judgment, I.C.J. Reports 2001 (hereinafter “*Qatar v. Bahrain*”), para. 231; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Merits, Judgment, I.C.J. Reports 2002, para. 288 (The applicable criteria, principles and rules of delimitation “are expressed in the so-called equitable principles/relevant circumstances method. This method, which is very similar to the equidistance/special circumstances method applicable in delimitation of the territorial sea, involves first drawing an equidistance line, then considering whether there are factors calling for the adjustment or shifting of that line in order to achieve an ‘equitable result’”).

<sup>216</sup> *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India (Bangladesh v. India)*, Award, UNCLOS Annex VII Tribunal (7 July 2014) (hereinafter “*Bangladesh v. India*”), para. 344 (“[T]he Tribunal is of the view that, by separating the first and second stages in the application of the equidistance/relevant circumstances method, a high degree of transparency can be achieved”). See also *Barbados/Trinidad and Tobago*, Award, UNCLOS Annex VII Tribunal (11 Apr. 2006) (hereinafter “*Barbados/Trinidad and Tobago*”), para. 307 (referring to the equidistance/relevant circumstances method, stating: “The Tribunal is therefore satisfied that the delimitation method discussed ensures both the need for certainty and the consideration of such circumstances that might be relevant for an equitable solution”).

“First, the Court will establish 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. So far as delimitation between adjacent coasts is concerned, an equidistance line will be drawn unless there are compelling reasons that make this unfeasible in the particular case. ...

[T]he Court will at the next, second stage consider whether there are factors calling for the adjustment or shifting of the provisional equidistance line in order to achieve an equitable result. ...

Finally, and at the third stage, the Court will verify that the line (a provisional equidistance line which may or may not have been adjusted by taking into account the relevant circumstances) does not, as it stands, lead to an inequitable result by reason of any marked disproportion between the ratio of the respective coastal lengths and the ratio between the relevant maritime area of each State by reference to the delimitation line”.<sup>217</sup>

6.14. In the section that follows, Somalia will show that application of this three-step method leads to the conclusion that the provisional equidistance line is not only the proper starting point for the delimitation between Somalia and Kenya, but also the appropriate end point. It constitutes the equitable solution the law requires. There are no relevant circumstances warranting an adjustment in Kenya’s favour; nor does the equidistance line produce a result that is disproportionate, let alone so grossly disproportionate as to render the result inequitable.

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<sup>217</sup> *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009 (hereinafter “*Black Sea Case*”), paras. 116-122.



6.15. Indeed, given the entirely unremarkable nature of the relevant geography, it is difficult to imagine a case in which equidistance more obviously yields an equitable solution.

## **Section II. The Identification of the Relevant Coasts and Relevant Area**

6.16. Before applying the three-step method to the circumstances of this case, it is appropriate to begin with an examination of the geographical setting within which this delimitation will be affected. This involves an analysis of two related concepts: (a) the relevant coasts of the Parties and (b) the relevant area.

### **B. THE RELEVANT COASTS**

6.17. The concept of the “relevant coast” derives from the principle that “the land dominates the sea”.<sup>218</sup> A State acquires maritime entitlement through the projection of its coasts into the sea.<sup>219</sup> The Court observed in *Tunisia/Libya* that “the coast of the territory of the State is the decisive factor for title to submarine areas adjacent to it”.<sup>220</sup>

6.18. The Court explained in the *Black Sea* case:

“The role of relevant coasts can have two different though closely related legal aspects in relation to

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<sup>218</sup> *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Merits, Judgment, I.C.J. Reports 2012 (hereinafter “*Nicaragua v. Colombia*”), para. 140 (“It is well established that ‘[t]he title of a State to the continental shelf and to the exclusive economic zone is based on the principle that the land dominates the sea through the projection of the coasts or the coastal fronts’” (citing *Black Sea Case*, para. 77).).

<sup>219</sup> *North Sea Cases*, para. 96 (“[T]he land is the legal source of the power which a State may exercise over territorial extensions to seaward”); *Black Sea Case*, paras. 77, 99; *Nicaragua v. Colombia*, para. 140.

<sup>220</sup> *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Merits, Judgment, I.C.J. Reports 1982, para 73.

the delimitation of the continental shelf and the exclusive economic zone. First, it is necessary to identify the relevant coasts in order to determine what constitutes in the specific context of a case the overlapping claims to these zones. Second, the relevant coasts need to be ascertained in order to check, in the third and final stage of the delimitation process, whether any disproportionality exists in the ratios of the coastal length of each State and the maritime areas falling either side of the delimitation line”.<sup>221</sup>

6.19. A State’s relevant coast is not necessarily co-extensive with its entire coastline. In order to be considered “relevant” for delimitation purposes, a coast “must generate projections which overlap with projections from the coast of the other Party”.<sup>222</sup> This is because “the task of delimitation consists in resolving the overlapping claims by drawing a line of separation of the maritime areas concerned”.<sup>223</sup>

6.20. As a result, portions of a coast that do not generate entitlements that overlap with those of the other State are not considered relevant. The Court explained in *Tunisia/Libya* that

“it is not the whole of the coast of each Party which can be taken into account; the submarine extension of any part of the coast of one Party which, because of its geographic situation, cannot overlap with the extension of the coast of the other, is to be excluded from further consideration ...”.<sup>224</sup>

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<sup>221</sup> *Black Sea Case*, para. 78.

<sup>222</sup> *Nicaragua v. Colombia*, para. 150; *Black Sea Case*, para. 99.

<sup>223</sup> *Nicaragua v. Colombia*, para. 141; *Black Sea Case*, para. 77.

<sup>224</sup> *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Merits, Judgment, I.C.J. Reports 1982, para. 75; *Nicaragua v. Colombia*, para. 150.

6.21. The Court's Judgment in *Romania v. Ukraine* provides a useful illustration of this principle. The Court determined that Ukraine's coast along the U-shaped Karkinit's'ka Gulf was not relevant for purposes of the delimitation with Romania because the "coasts of this gulf face each other and their submarine extension cannot overlap with the extensions of Romania's coast. The coasts of Karkinit's'ka Gulf do not project in the area to be delimited".<sup>225</sup> This is reflected in **Figure 6.2**, a reproduction of Sketch-Map 4 from the Court's 2009 Judgment (in Volume II only). The portions of Ukraine's coast fronting on to Karkinit's'ka Gulf were therefore excluded from the calculation of Ukraine's relevant coastal length.

6.22. Similarly, in *Nicaragua v. Colombia*, the Court treated as relevant the entirety of Nicaragua's east-facing mainland coast, except only for the small segment around Punta Perlas that faced southwards, away from the delimitation area (which lay to the east of Nicaragua's coast).<sup>226</sup> This is shown in **Figure 6.3**, a reproduction of Sketch-Map 6 from the Court's 2012 Judgment (in Volume II only).

6.23. To date, two cases have addressed the delimitation of the continental shelf beyond 200 M: *Bangladesh/Myanmar* and *Bangladesh v. India*. In both cases, the disputing States were considered to have only a single relevant coast; there was not one coast relevant to the delimitation within 200 M and another coast relevant to the delimitation beyond 200 M.

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<sup>225</sup> *Black Sea Case*, para. 100 (emphasis added). See also *Nicaragua v. Colombia*, para. 145 (The Court determined as irrelevant a short segment of Nicaragua's coastline near Punta de Perlas that did not make any overlapping projections.).

<sup>226</sup> *Nicaragua v. Colombia*, para. 145.

6.24. This approach is consistent with the principle that “there is in law only a single ‘continental shelf’ rather than an inner continental shelf and a separate extended or outer continental shelf”.<sup>227</sup> ITLOS underscored the point in its Judgment in *Bangladesh/Myanmar*:

“Article 76 of the Convention embodies the concept of a single continental shelf. In accordance with article 77, paragraphs 1 and 2, of the Convention, the coastal State exercises exclusive sovereign rights over the continental shelf in its entirety without any distinction being made between the shelf within 200 nm and the shelf beyond that limit. Article 83 of the Convention, concerning the delimitation of the continental shelf between States with opposite or adjacent coasts, likewise does not make any such distinction”.<sup>228</sup>

6.25. Moreover, in both Bangladesh cases, the relevant coasts included the lengths of coast that faced onto *all* areas of overlapping entitlements, including the overlap beyond 200 M. Thus, the relevant coasts of Myanmar and India extended to points fully 550 and 645 km distant (measured point-to-point) from their land boundary termini with Bangladesh.<sup>229</sup>

6.26. **Figures 6.4 and 6.5** (in Volume II only) are reproductions of the sketch-maps of the relevant coasts of the parties drawn from the ITLOS Judgment in *Bangladesh/Myanmar* and the Award of the Annex VII tribunal in *Bangladesh v. India*, respectively.

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<sup>227</sup> *Barbados/Trinidad and Tobago*, para. 213.

<sup>228</sup> *Bangladesh/Myanmar*, para. 361.

<sup>229</sup> Bangladesh’s entire coast was deemed relevant in both cases. *Bangladesh/Myanmar*, para. 201; *Bangladesh v. India*, para. 280.

## *1. Somalia*

6.27. Applying the above principles to the circumstances of this case suggests that Somalia's relevant coast extends from the LBT with Kenya in the south to the area just south of Cadale, some 92 km north of Mogadishu. The entirety of this portion of the Somali coast projects directly onto the area of overlapping entitlements, including the areas beyond 200 M where Somalia's and Kenya's submissions to the CLCS overlap. North of this point, Somalia's coast arcs gradually away from the area of overlapping entitlements and is therefore no longer relevant to the delimitation with Kenya. Somalia's relevant coast is depicted in **Figure 6.6** (following page 86). So defined, Somalia's relevant coast is 733 km long.

## *2. Kenya*

6.28. These same principles lead to the conclusion that, except only to the extent certain portions of its coast face away from the area of overlapping potential entitlements, all of Kenya's coast is relevant in these proceedings. Those exceptions are:

- The northeastern extremities of Ungama Bay in the central portion of Kenya's coast, which, much like Punta Perlas in *Nicaragua v. Colombia*, faces due south and thus away from the delimitation area; and
- The final section of Kenya's coast as it approaches Tanzania, which faces south towards Tanzania's Pemba Island, rather than the area of overlap with Somalia.

6.29. Taking account of these exceptions, Kenya's relevant coast measures 466 km. This is depicted in **Figure 6.7** (following Figure 6.6).

6.30. The ratio of coastal lengths is thus 733:466, or **1.57:1**, in favour of Somalia.

### C. THE RELEVANT AREA

6.31. As in the case of the relevant coasts, only a portion of the total maritime area appertaining to the Parties is relevant for delimitation purposes. In *Nicaragua v. Colombia*, the Court stated: “Depending on the configuration of the relevant coasts in the general geographical context, the relevant area may include certain maritime spaces and exclude others which are not germane to the case in hand”.<sup>230</sup>

6.32. The “relevant area” is limited to the maritime area where the projections of the Parties’ relevant coasts overlap. This is distinct from the areas where the Parties *claims* overlap. The Court explained in *Jan Mayen*:

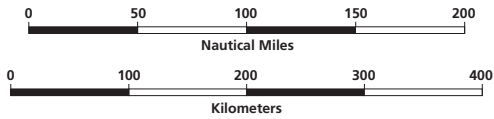
“The ‘area of overlapping claims’ ... between the two lines representing the Parties’ claims, is of obvious relevance to any case involving opposed boundary claims. But maritime claims have the particular feature that there is an area of overlapping entitlements, in the sense of overlap between the areas which each State would have been able to claim had it not been for the presence of the other State; this was the basis of the principle of non-encroachment enunciated in the *North Sea Continental Shelf* cases. It is clear that in this case a true perspective on the relationship of the opposing claims and the opposing entitlements is to be gained by considering both the area of overlapping

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<sup>230</sup> *Nicaragua v. Colombia*, para. 157.

# SOMALIA'S RELEVANT COAST

Mercator Projection  
WGS-84 Datum  
(Scale accurate at 2°S)



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



Figure 6.6





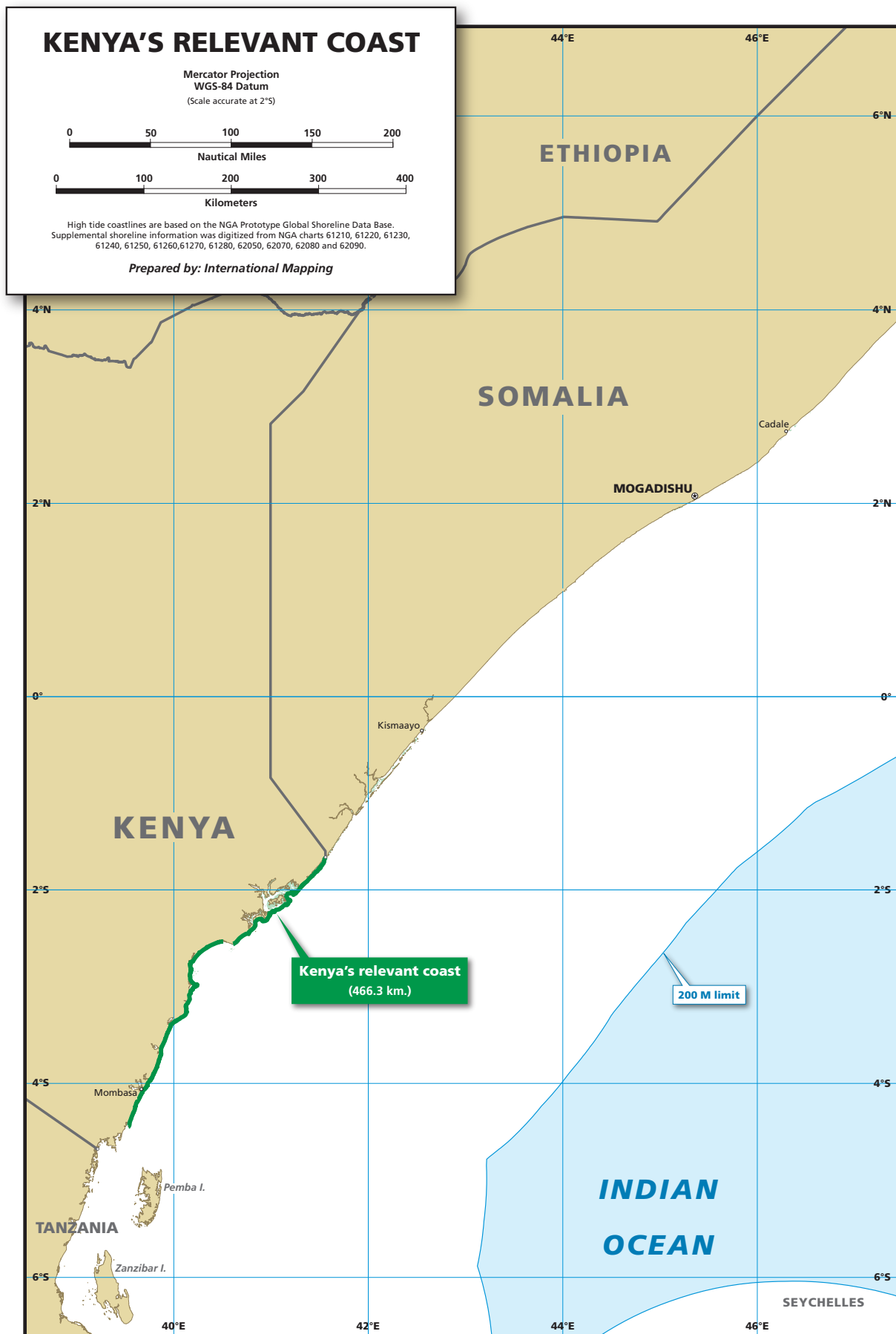


Figure 6.7



claims and the area of overlapping potential entitlement”.<sup>231</sup>

6.33. The Court put the point more succinctly in its 2012 Judgment in *Nicaragua v. Colombia*, in which it stated: “The relevant area comprises that part of the maritime space in which the potential entitlements of the parties overlap”.<sup>232</sup>

6.34. The calculation of the relevant area does not, however, “purport to be precise but is only approximate and ‘[t]he object of delimitation is to achieve a delimitation that is equitable, not an equal apportionment of maritime areas’”.<sup>233</sup>

6.35. As noted, there have been two decided cases that, like this one, involved the delimitation of the continental shelf beyond 200 M: *Bangladesh/Myanmar* and *Bangladesh v. India*. In both cases, ITLOS (in *Bangladesh/Myanmar*) and the Annex VII arbitral tribunal (in *Bangladesh v. India*) identified a single relevant area that included maritime areas both within and beyond 200 M. For analytical purposes, however, Somalia considers that the Court may find it convenient to proceed with the examination of the relevant area in two steps: first, in the area within 200 M; and second, in the totality of the areas at issue, including those beyond 200 M.

6.36. Within 200 M, the areas where “the maritime space in which the potential entitlements of the parties overlap”<sup>234</sup> is easily identified. “[H]ad it not been for

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<sup>231</sup> *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, Judgment, I.C.J. Reports 1993, para. 59 (internal citations omitted).

<sup>232</sup> *Nicaragua v. Colombia*, para. 159.

<sup>233</sup> *Ibid.*, para. 158 (quoting *Black Sea Case*, para. 110).

<sup>234</sup> *Ibid.*, para. 159.

the presence of the other State”,<sup>235</sup> each Party would be entitled to *all* of the maritime space within 200 M of their coasts. These areas can be ascertained by drawing 200 M envelopes of arcs from the relevant coasts of both States. Where the arcs intersect constitutes the area of overlapping potential entitlements. This area is shown in **Figure 6.8** (following page 88). It measures 213,863 km<sup>2</sup>. (Areas south of the Kenya-Tanzania agreed boundary, where the interests of a third State are implicated, have been excluded from this area.)

6.37. Adding to this area the maritime space beyond 200 M “in which the potential entitlements of the parties overlap” is also a straight-forward process. Beyond 200 M, the area of overlapping potential entitlements consists of those areas beyond 200 M that each State would have been able to claim but for the presence of the other. Together with the area of overlapping entitlements within 200 M, those areas are depicted in **Figure 6.9** (following Figure 6.8).<sup>236</sup>

6.38. Somalia considers that this area constitutes the totality of the relevant area in the circumstances of this case. It measures 319,542 km<sup>2</sup>.

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<sup>235</sup> *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, Judgment, I.C.J. Reports 1993, para. 59.

<sup>236</sup> The area so depicted includes areas claimed by Kenya as continental shelf beyond 200 M that are within 200 M of Somalia. Insofar as these are claimed by Kenya as “outer” continental shelf, Somalia has included them in its depiction of the area of overlapping potential entitlements.

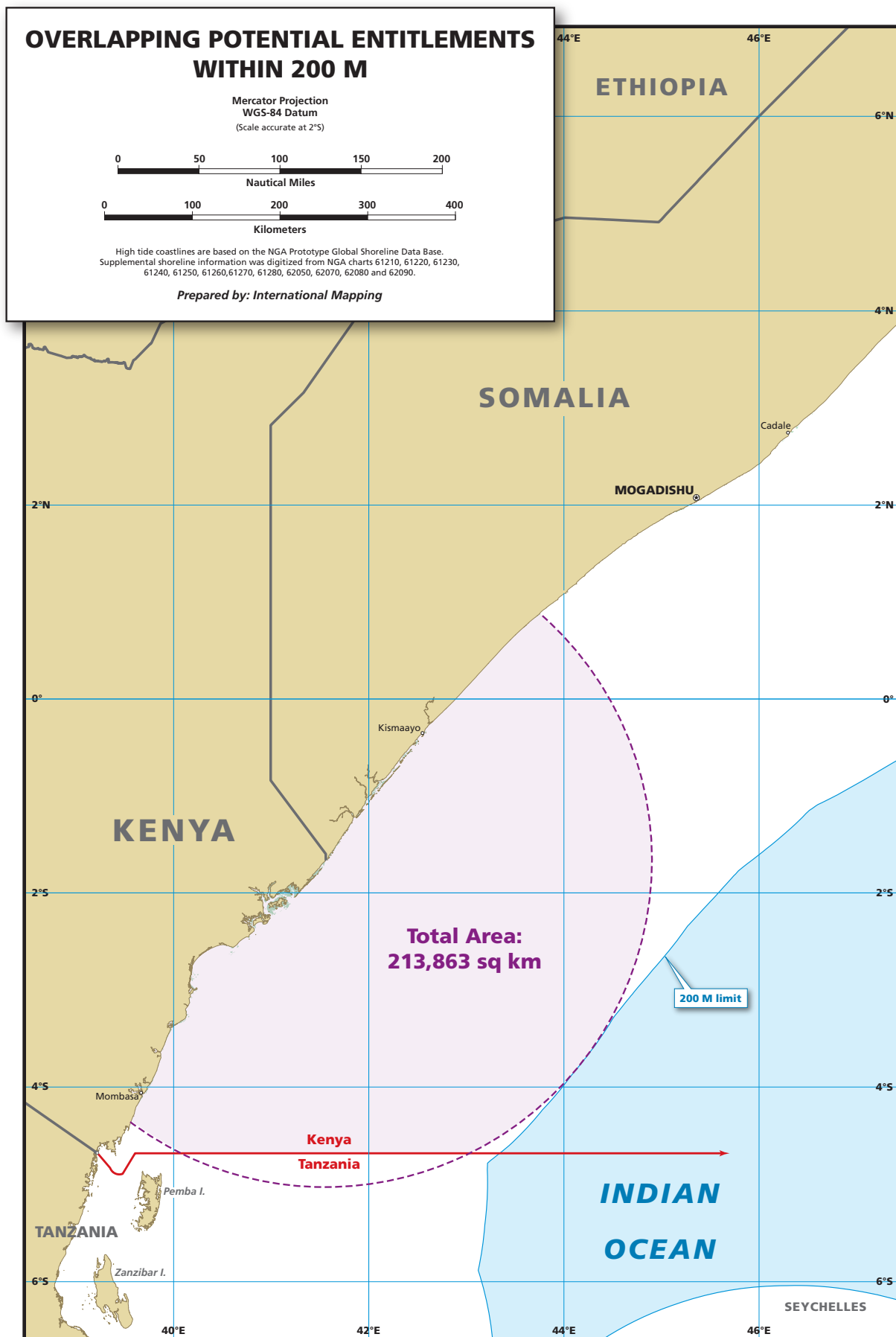


Figure 6.8



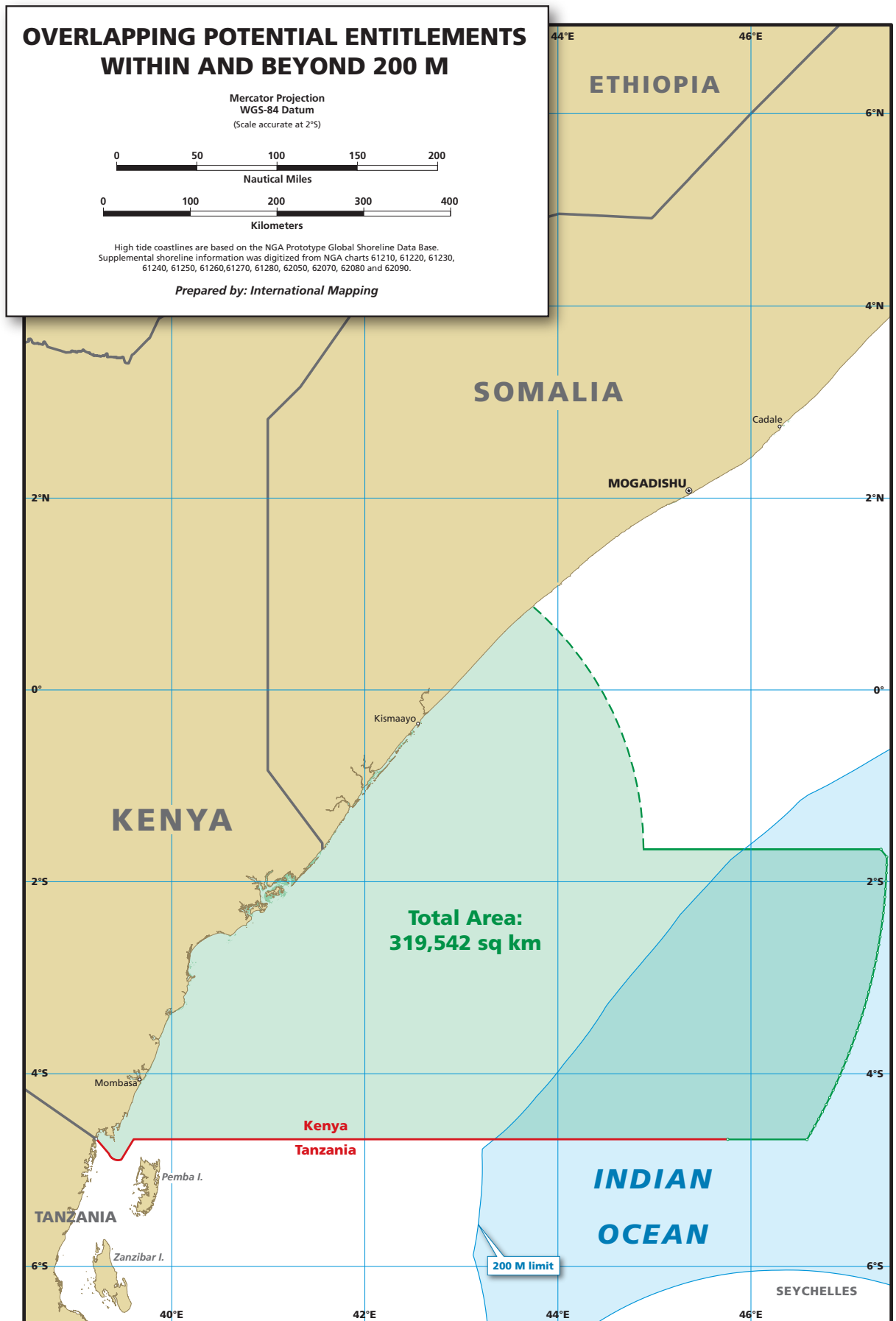


Figure 6.9





### **Section III. The Delimitation of the Maritime Boundary between Somalia and Kenya**

#### **A. THE APPLICATION OF THE THREE-STEP METHOD**

##### *1. The Provisional Equidistance Line*

6.39. The first step in the three step method is, of course, the drawing of a provisional equidistance line. The Court explained in the *Black Sea* case that the provisional equidistance line should generally be constructed using “the most appropriate base points on the coasts of the Parties”.<sup>237</sup> As previously noted in Chapter 5, the Court stated that the “most appropriate [base] points” are those “which mark a significant change in the direction of the coast, in such a way that the geometrical figure formed by the line connecting all these points reflects the general direction of the coastlines”.<sup>238</sup>

6.40. As discussed in Chapter 2 concerning the geographical circumstances, the coasts of Somalia and Kenya are most remarkable for the fact that they are so unremarkable.<sup>239</sup> From the northern end of Somalia’s relevant coast approximately 92 km north of Mogadishu to the southern extreme of Kenya’s relevant coast abutting Tanzania, the coasts of the Parties are generally smooth and unexceptional. They also run virtually due southwest. There is therefore no question of selecting base points for the drawing of the provisional equidistance line that “mark a significant change in the direction of the coast”.

6.41. To the contrary, in the circumstances of this case, the appropriate base points literally choose themselves. This is done using appropriate software based

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<sup>237</sup> *Black Sea Case*, paras. 116-117; *Nicaragua v. Colombia*, para. 191.

<sup>238</sup> *Black Sea Case*, para. 127.

<sup>239</sup> *See, supra*, paras. 2.9, 2.16.

on relevant nautical charts. The software automatically selects those points that generate the equidistance line (i.e., the line every point of which is equidistant from the nearest points on the Parties' baselines). As stated in Chapter 5, Somalia has used CARIS LOTS, based on NGA Nautical Chart 61220. The result is the base points reflected in **Figure 6.10** (following page 90). The coordinates of the base points that control the equidistance line between 12 and 200 M are indicated in the table below.

<b>SOMALIA</b>	
<b>Base Point</b>	<b>Coordinates</b>
S3	1°39'14.99" S - 41°35'15.68" E
S4	1°35'37.21" S - 41°38'01.00" E

<b>KENYA</b>	
<b>Base Point</b>	<b>Coordinates</b>
K2	1°43'04.77" S - 41°32'37.18" E
K3	1°46'10.97" S - 41°30'45.14" E

6.42. These base points yield the provisional equidistance line depicted above in Figure 6.1 (following page 76) drawn out to the 200 M limit.

6.43. The Court will observe that the provisional equidistance line is notably straight throughout its length. Beyond the fifth turning point, approximately 6 M from the coast, it follows a virtually constant bearing of some N124.5°E all the way to the 200 M limit. This is because the coasts of the Parties are so regular.

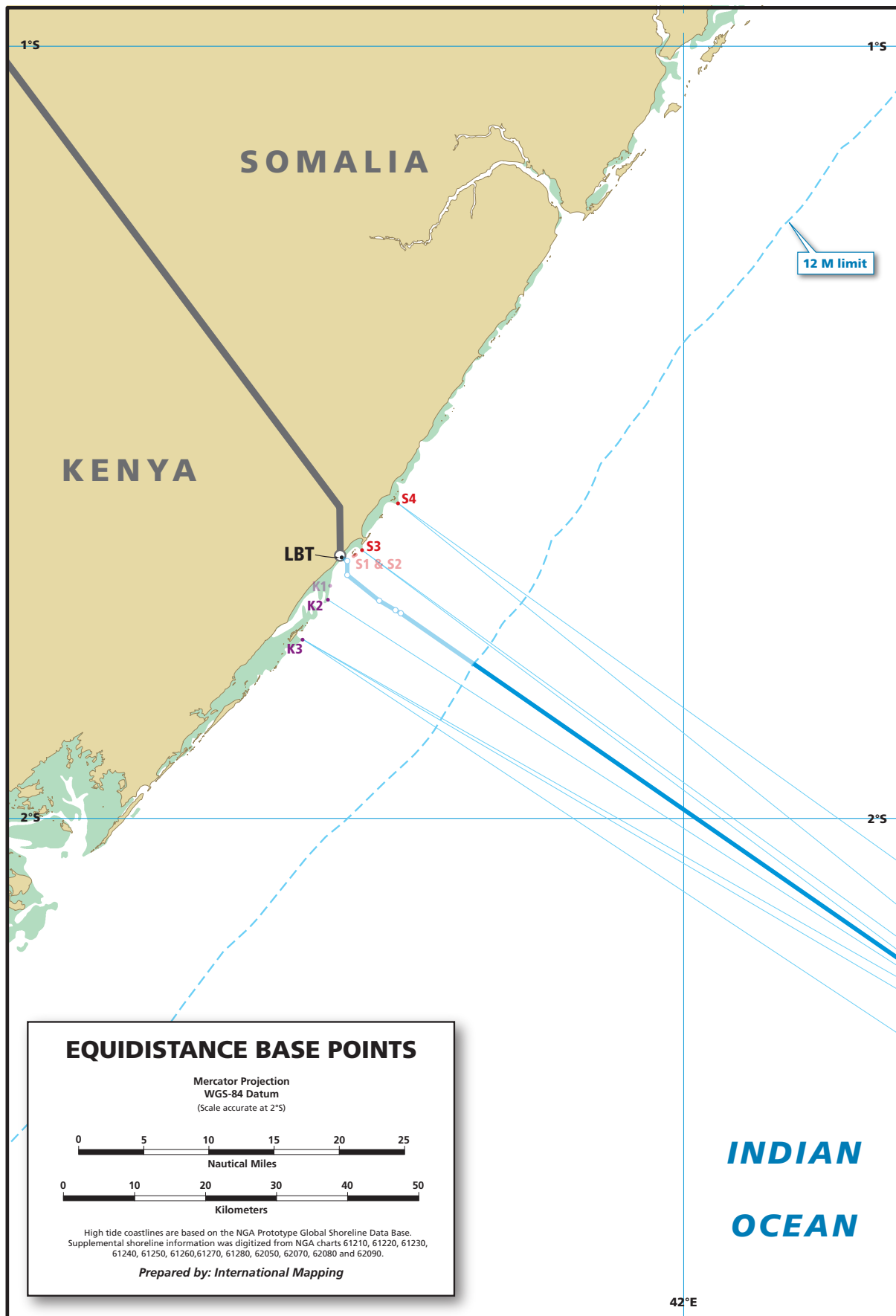


Figure 6.10



Due to the lack of any “significant change in the direction of the coast”,<sup>240</sup> the base points controlling the equidistance line throughout its length are located in relatively close proximity to the Parties’ LBT at Dar Es Salam. On the Somali side, there are two base points that control the line in the area between 12 and 200 M, the furthest of which is 11 km from the LBT. On the Kenyan side, there are also two base points that control the line in this area, the most southerly of which is 13 km from the LBT. These base points produce a line that is conspicuously straight.

6.44. Due to the comparative straightness of the line, there are only two turning points in the equidistance line in the area between 12 and 200 M.<sup>241</sup> The line intersects the 200 M limit at the point located at 3°34’57.05” S - 44°18’49.83” E.

## 2. *Relevant Circumstances*

6.45. The second step of the 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”.<sup>242</sup>

6.46. It is now well-established that the relevant circumstances that may justify the adjustment of the equidistance line in order to reach an equitable result are essentially of a geographic nature.<sup>243</sup> Rarely, security concerns<sup>244</sup> or, even more

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<sup>240</sup> *Black Sea Case*, para. 127.

<sup>241</sup> The two turning points are located at 2°19’01.09” S - 42°28’10.27” E and 2°30’56.65” S - 42°46’18.90” E.

<sup>242</sup> *Black Sea Case*, para. 120.

<sup>243</sup> For examples, *see, infra*, para. 6.47.

<sup>244</sup> *Libya/Malta*, para. 51; *Black Sea Case*, para. 204.

exceptionally, circumstances related to access to resources,<sup>245</sup> may justify the adjustment of the equidistance line. By contrast, circumstances created by the conduct of the parties do not constitute relevant circumstances for the purposes of maritime delimitation.<sup>246</sup> *A fortiori*, legal commitments undertaken by one party in boundary agreements with third States not involved in the delimitation *sub judice* do not amount to relevant circumstances that might justify the adjustment of the equidistance line. Any other approach would undermine the fundamental principle of *res inter alios acta*.

6.47. The geographic circumstances international courts and tribunals have recognized as potentially relevant for the purposes of adjusting the provisional equidistance line are: the cut-off effect appreciated within the general geographical context;<sup>247</sup> the cut-off effect due to the concavity of the coast;<sup>248</sup> and the presence of islands in the relevant area.<sup>249</sup>

6.48. None of these circumstances is present in this case. Nor are there any other unusual or anomalous geographical circumstances that could arguably be regarded as relevant. To the contrary, the coasts of the Parties are comparatively straight and unremarkable. Nothing renders the provisional equidistance line here

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<sup>245</sup> See *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, Judgment, I.C.J. Reports 1984, para. 236; *Black Sea Case*, para. 198; *Nicaragua v. Colombia*, para. 223; *Barbados/Trinidad and Tobago*, para. 241.

<sup>246</sup> *Black Sea Case*, paras. 189-197; *Nicaragua v. Colombia*, para. 220.

<sup>247</sup> See, e.g., *Nicaragua v. Colombia*, paras. 212-215.

<sup>248</sup> *North Sea Cases*, para. 89; *Black Sea Case*, paras. 199-201; *Nicaragua v. Colombia*, para. 244; *Maritime Dispute (Peru v. Chile)*, Judgment, I.C.J. Reports 2014, para. 181; *Bangladesh/Myanmar*, paras. 291-293, 325; *Delimitation of Maritime Boundary between Guinea and Guinea-Bissau*, Award (14 Feb. 1985), reprinted in R.I.A.A., Vol. XIX, at p. 149, para. 102; *Bangladesh v. India*, paras. 403-404, 413-417.

<sup>249</sup> *Libya/Malta*, para. 64; *Qatar v. Bahrain*, para. 219; *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Merits, Judgment, I.C.J. Reports 2007, paras. 302 *et seq.*; *Black Sea Case*, para. 185; *Bangladesh/Myanmar*, paras. 316-319.

“extraordinary, unnatural or unreasonable”,<sup>250</sup> as would be required to justify an adjustment to the provisional equidistance line.

6.49. In this respect, Somalia observes that while any delimitation line by definition entails some curtailment of the parties’ potential entitlements, the goal of the delimitation process is to ensure that such curtailment is shared in a reasonable and balanced manner. In the *Black Sea* case, for example, the Court noted that the lines advocated by each of the parties inequitably cut off the maritime entitlements of the other. It stated:

“The Court observes that the delimitation lines proposed by the Parties, in particular their first segments, each significantly curtail the entitlement of the other Party to the continental shelf and the exclusive economic zone. The Romanian line obstructs the entitlement of Ukraine generated by its coast adjacent to that of Romania, the entitlement further strengthened by the northern coast of Ukraine. At the same time, the Ukrainian line restricts the entitlement of Romania generated by its coast, in particular its first sector between the Sulina dyke and the Sacalin Peninsula”.<sup>251</sup>

6.50. In contrast, the provisional equidistance line drawn by the Court—and ultimately adopted as the maritime boundary—avoids such a drawback as it allows the adjacent coasts of the Parties to produce their effects, in terms of maritime entitlements, in a reasonable and mutually balanced way”.<sup>252</sup>

6.51. The provisional equidistance line in this case has precisely the same effect. As between Somalia and Kenya, the coasts of the Parties produce their

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<sup>250</sup> See *North Sea Cases*, para. 24.

<sup>251</sup> *Black Sea Case*, para. 201.

<sup>252</sup> *Ibid.*, para. 201.

effects, in terms of maritime entitlements, in a reasonable and mutually balanced fashion. Neither Party is disproportionately cut-off from its entitlements by that time.<sup>253</sup>

6.52. This is shown in **Figure 6.11** (following page 94), which depicts the coastal projections of the two States by means of arrows emanating from their coasts. The arrows have been drawn perpendicular to the general direction of the Parties' relevant coasts (determined by the line that connects the end points of the relevant coasts on either side). As the Court can see, the coasts of both Kenya and Somalia produce their effects in a mutually balanced fashion. Neither side is cut-off, if at all, to a greater extent than the other.

6.53. Kenya may claim that the agreement it concluded with Tanzania<sup>254</sup> results in a cut-off of its coastal projections. That agreement, however, is *res inter alios acta* to Somalia. Moreover, the effect of it is only to deprive Kenya of some of its entitlements beyond 200 M. The irrelevance of the Kenya-Tanzania agreement to the present proceedings will be discussed in Chapter 7. For the purposes of this Chapter, it suffices to note that there is no reason to make any adjustment to the provisional equidistance line.

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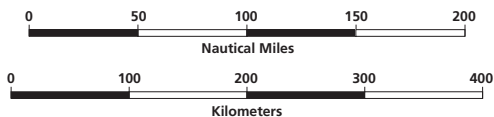
<sup>253</sup> In its Application, Somalia set forth its view that there were no relevant circumstances to warrant any adjustment to the provisional equidistance line in favour of Kenya. It further submitted that if an any adjustment to the provisional equidistance line were warranted, it should be in favour of Somalia. Having now had the benefit of a more complete assessment of the facts, including the practise of both Parties, and the law that is to be applied, Somalia has revisited that earlier view. It has concluded, for the reasons set forth in this Memorial, that there are no relevant circumstances to warrant any adjustment to the provisional equidistance line in favour of either Party.

<sup>254</sup> See, e.g., *supra*, paras. 1.22-1.23.



# THE EQUIDISTANCE LINE PRODUCES ITS EFFECTS IN A REASONABLE, MUTUALLY BALANCED FASHION

Mercator Projection  
WGS-84 Datum  
(Scale accurate at 2°S)



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

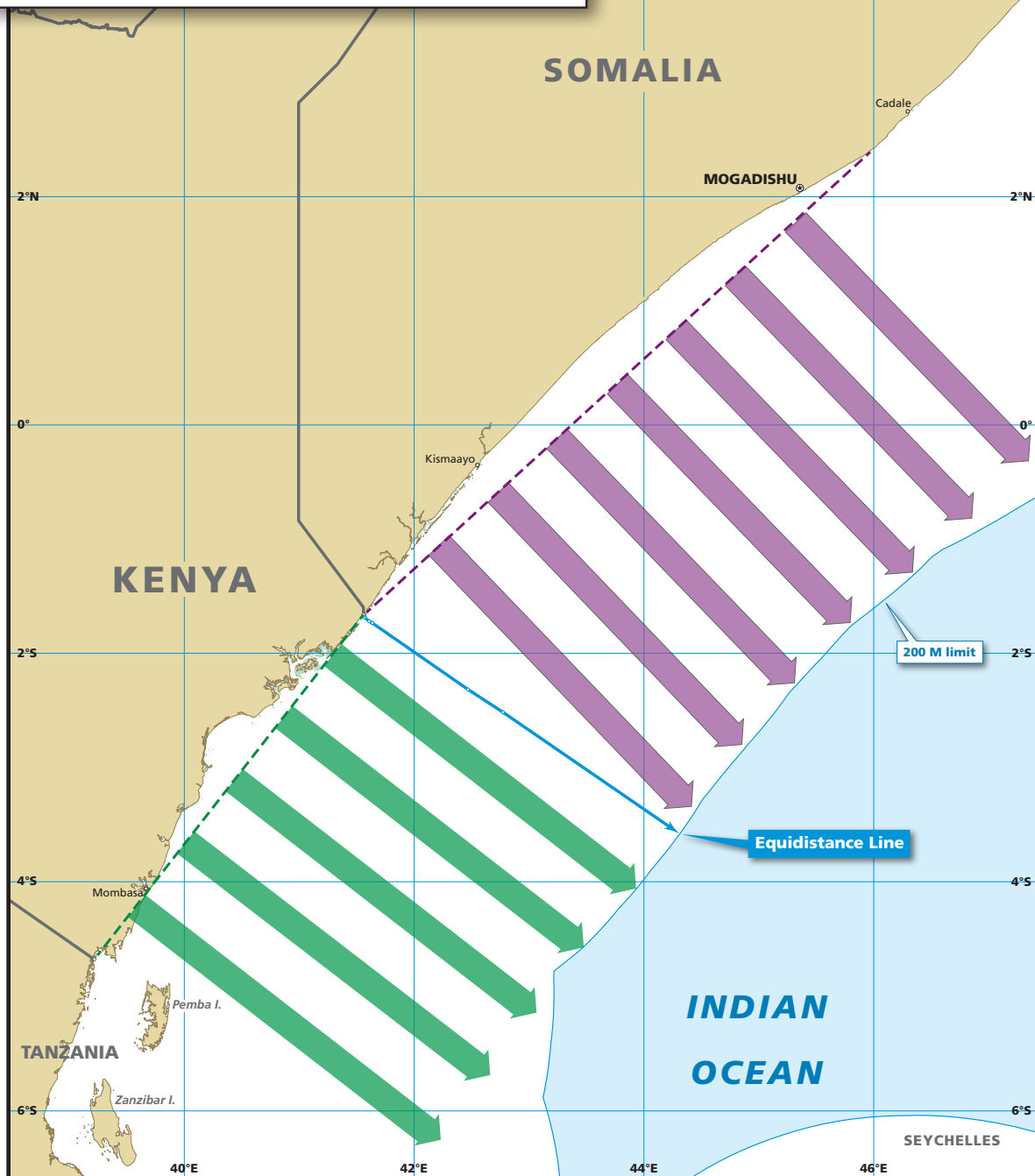


Figure 6.11



### 3. *The Non-Disproportionality Test*

6.54. In the third and final step, the Court considers whether the delimitation line developed by 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”.<sup>255</sup>

6.55. The purpose of this exercise is *not* to ensure a proportionate result but rather to provide a final check against a disproportion so gross as to render the proposed delimitation inequitable.<sup>256</sup> It “remains in each case a matter for the Court’s appreciation, which it will exercise by reference to the overall geography of the area”.<sup>257</sup>

6.56. Dividing the area of overlapping entitlements within 200 M by means of the provisional equidistance line results in an allocation of 103,627 km<sup>2</sup> (48.5%) to Somalia and 110,236 km<sup>2</sup> (51.5%) to Kenya; a ratio of **0.94:1** *in favour of Kenya*. This is depicted in **Figure 6.12** (following page 96). Given that Somalia’s relevant coast is longer than that of Kenya by a ratio of 1.57:1, the provisional equidistance line favours Kenya in the sense that it receives substantially more maritime space than it would in the case of a strictly proportionate delimitation.

6.57. In contrast, the results using Kenya’s claim line to divide the area of overlapping entitlements within 200 M are conspicuously unbalanced. Adopting Kenya’s parallel boundary claim would result in allocating fully 152,203 km<sup>2</sup> (71%) of the area to Kenya and just 61,600 km<sup>2</sup> (29%) to Somalia (*see Figure 6.13* (following Figure 6.12)). The ratio would be **0.41:1** in favour of Kenya.

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<sup>255</sup> *Black Sea Case*, para. 210.

<sup>256</sup> *See North Sea*, para. 210; *see also, supra*, para. 6.13.

<sup>257</sup> *Black Sea Case*, para. 213.

Given the 1.57:1 disparity in relevant coastal length, the manifest inequity of such a result, especially in comparison with an equidistance line, is evident.

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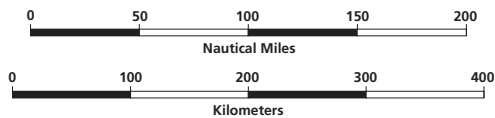
6.58. For the foregoing reasons, Somalia respectfully submits that the maritime boundary between Somalia and Kenya in the EEZ and continental shelf within 200 M should be defined by an equidistance line. Such a line produces the equitable solution the law requires; there are no reasons warranting any adjustment to it. Given the entirely unremarkable nature of the prevailing geography, if equidistance is not the appropriate solution in this case, it is difficult to imagine a case in which it would be.

6.59. Accordingly, the maritime boundary between 12 M and 200 M from the LBT follows the following course:

- from the limits of the territorial sea at the point located at 1°47'54.60" S - 41°43'36.04" E along a geodesic line to the point located at 2°19'01.09" S - 42°28'10.27" E;
- thence along a geodesic line to the point located at 2°30'56.65" S - 42°46'18.90" E;
- thence along a geodesic line to the 200 M limit located at 3°34'57.05" S - 44°18'49.83" E.

# DIVISION OF OVERLAPPING POTENTIAL ENTITLEMENTS WITHIN 200 M USING EQUIDISTANCE

Mercator Projection  
WGS-84 Datum  
(Scale accurate at 2°S)



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

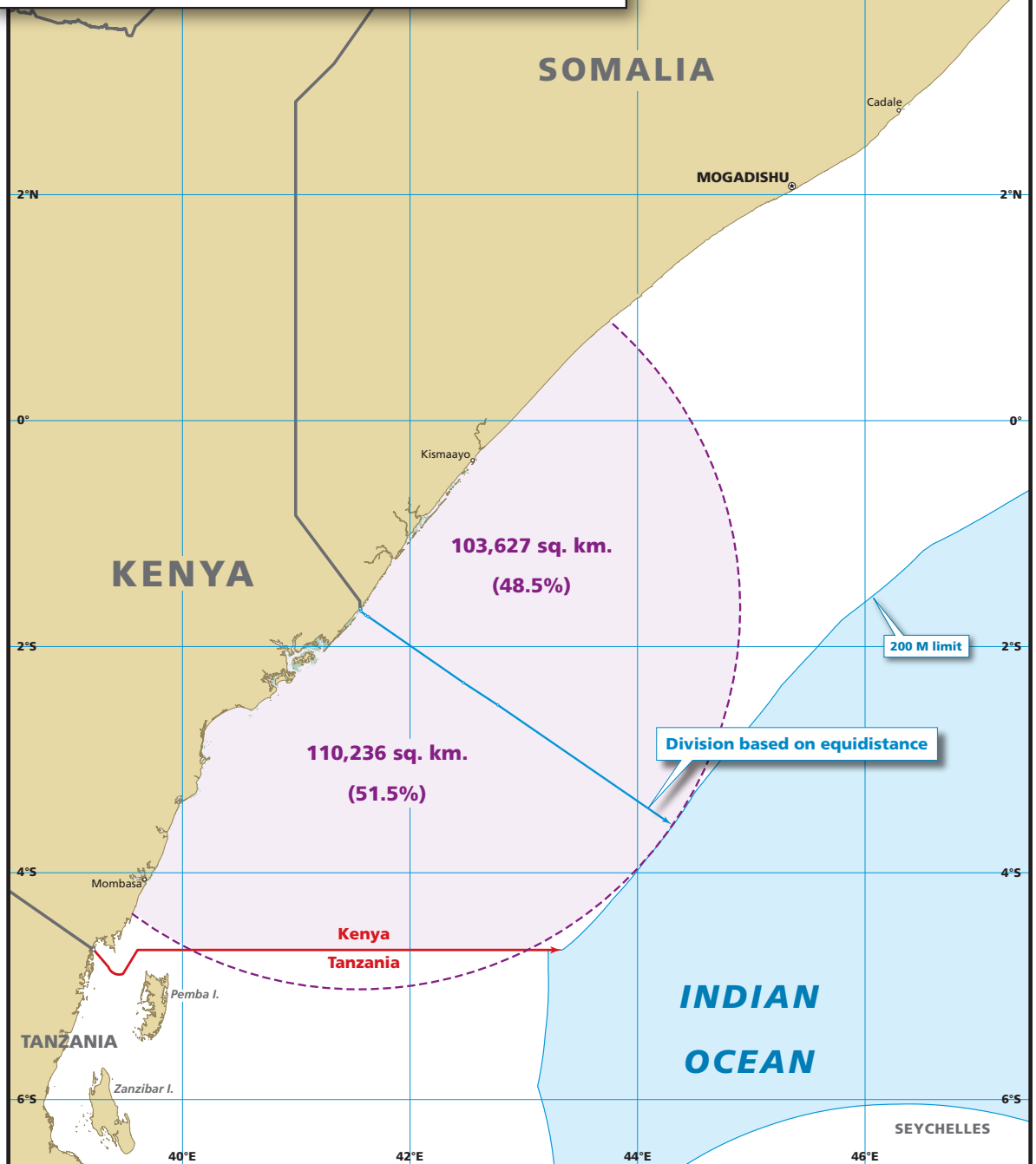
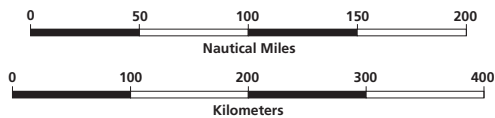


Figure 6.12



# DIVISION OF OVERLAPPING POTENTIAL ENTITLEMENTS WITHIN 200 M USING KENYA'S PARALLEL CLAIM

Mercator Projection  
WGS-84 Datum  
(Scale accurate at 2°S)



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

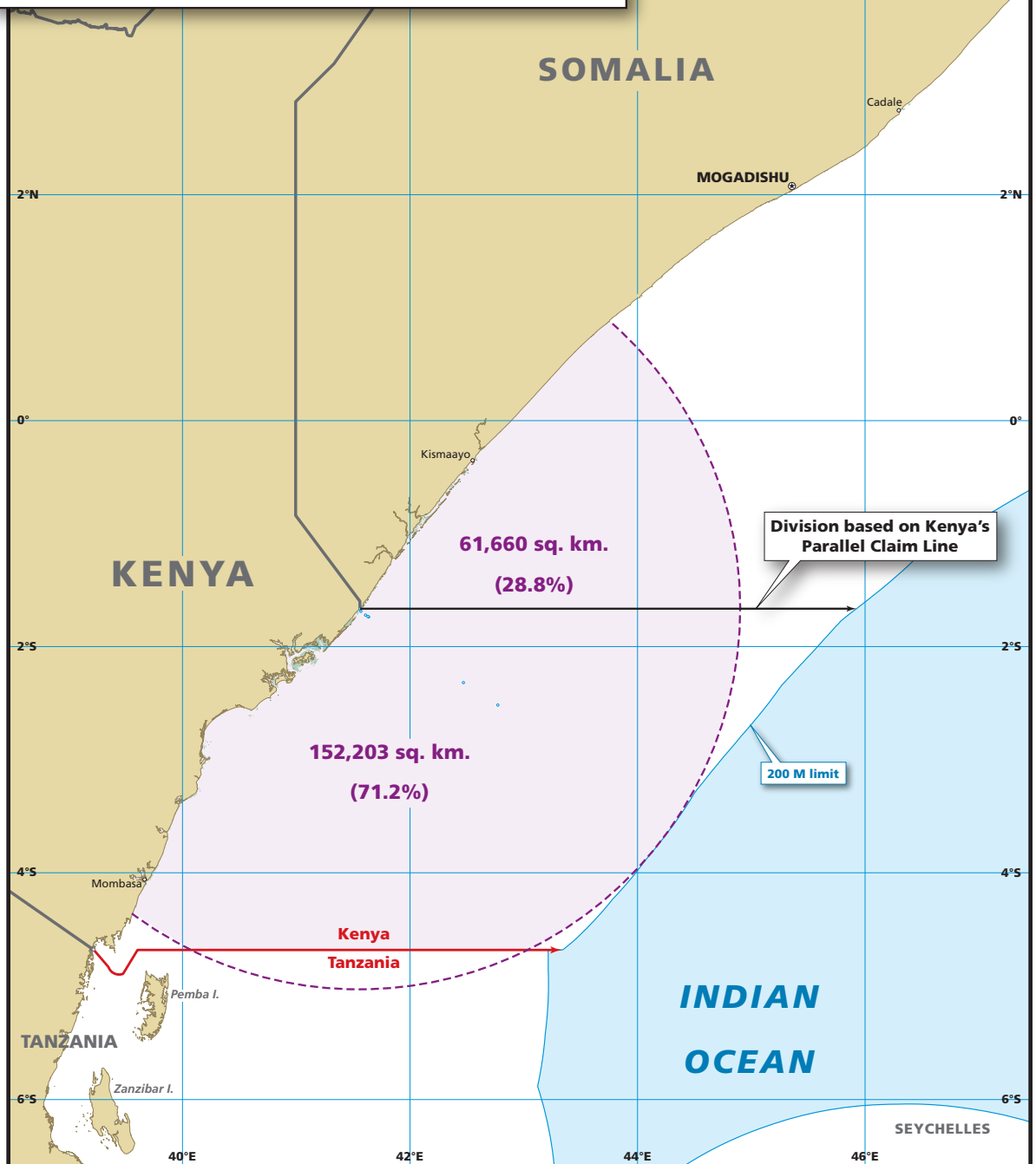


Figure 6.13





## CHAPTER 7. DELIMITATION OF THE CONTINENTAL SHELF BEYOND 200 M

7.1. Article 76, paragraphs 1 to 3, of UNCLOS provide for the establishment of the continental shelf of a coastal State beyond 200 M on the basis of the natural prolongation of its landmass into the adjacent seabed. Paragraphs 4 to 7 of the same Article define the manner in which, and set limits on the extent to which, States may establish such an entitlement beyond 200 M. Article 76, paragraph 8, requires States to submit information to the CLCS, which will then make recommendations on the delineation of the outer limits of the continental shelf,<sup>258</sup> *i.e.* where national jurisdiction over the continental shelf ends and that of the International Seabed Authority begins.<sup>259</sup> It is on the basis of these recommendations that a State may establish the legal outer limits of its continental shelf beyond 200 M.

7.2. **Section I** of this Chapter addresses the Court's jurisdiction to delimit the continental shelf between the Parties beyond 200 M, and shows that the Court's jurisdiction in this respect is not affected by the absence of the delineation of the outer limits of their respective entitlements by the CLCS. **Section II** describes the CLCS Submissions of Somalia and Kenya, respectively. **Section III** discusses the rules and principles applicable to the delimitation of the continental shelf beyond 200 M, and demonstrates that their application in this case results in the extension of the equidistance line to the outer limit of the Parties' continental margins.

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<sup>258</sup> For the sake of clarity, the present Chapter uses the word "delineation" to name this operation (*see* UNCLOS, Art. 76, paras. 4(a)(i), 7; *ibid.*, Annex II: Commission on the Limits of the Continental Shelf), and "delimitation" when the determination of the lateral boundary between States is concerned.

<sup>259</sup> Article 1 of the UNCLOS defines the "Area", which is the zone of jurisdiction of the International Seabed Authority, as "the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction".

Finally, **Section IV** shows that the extension of the equidistance line avoids encroaching on any maritime areas claimed by a third State (here, Tanzania).

**Section I. The Jurisdiction of the Court to Delimit the Continental Shelf Beyond 200 M**

7.3. The admissibility of Somalia's claims for delimitation of the continental shelf beyond 200 M cannot be challenged on the grounds that the CLCS has not yet made its recommendations concerning either Somalia's or Kenya's Submissions. The CLCS's mandate covers *delineation* of the outer limits of the continental shelf, whereas the Court is asked to determine a line of *delimitation* between two adjacent States (here Somalia and Kenya). These are two distinct exercises, neither of which is dependent on the other.

A. THE RESPECTIVE ROLES OF THE COURT AND THE CLCS WITH REGARD TO THE CONTINENTAL SHELF BEYOND 200 M

7.4. The CLCS has no power to delimit the continental shelf, or even to make recommendations on submissions regarding the outer limits where there is a dispute between opposite or adjacent States concerning their continental shelf boundaries. Article 76, paragraph 10, of the UNCLOS specifically provides that:

“The provisions of this article are without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts”.

7.5. Article 9 of Annex II of the UNCLOS similarly provides that:

“The actions of the Commission shall not prejudice matters relating to delimitation of boundaries between States with opposite or adjacent coasts”.

7.6. The CLCS has implemented this requirement in Rule 46 of its Rules of Procedure:

*“Submissions in case of a dispute between States with opposite or adjacent coasts or in other cases of unresolved land or maritime disputes*

1. In case there is a dispute in the delimitation of the continental shelf between opposite or adjacent States or in other cases of unresolved land or maritime disputes, submissions may be made and shall be considered in accordance with Annex I to these Rules”.<sup>260</sup>

7.7. Section 5 of Annex I of the Rules further provides that:

“In cases where a land or maritime dispute exists, the Commission shall not consider and qualify a submission made by any of the States concerned in the dispute. However, the Commission may consider one or more submissions in the areas under dispute with prior consent given by all States that are parties to such a dispute”.<sup>261</sup>

Thus, it has been the Commission’s constant practice, consistent with its Rules of Procedure,<sup>262</sup> to defer the consideration of submissions concerning areas in dispute, if one of the States concerned opposes this consideration.<sup>263</sup>

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<sup>260</sup> United Nations, Commission on the Limits of the Continental Shelf, *Rules of Procedure of the Commission on the Limits of the Continental Shelf*, U.N. Doc. CLCS/40/Rev.1 (17 Apr. 2008), Rule 46 (emphasis added). MS, Vol. III, Annex 57.

<sup>261</sup> *Ibid.*, Annex I, § 5(a).

<sup>262</sup> *See supra* para. 7.6.

<sup>263</sup> *See, e.g.*, 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/76 (5 Sept. 2012), para. 57. MS, Vol. III, Annex 63 (“The Commission then continued its

7.8. The distinction between delimitation and delineation is now well-established in the case law. In the *Bay of Bengal (Bangladesh/Myanmar)* case, ITLOS observed that:

“the exercise of its jurisdiction in the present case cannot be seen as an encroachment on the functions of the Commission, inasmuch as the settlement, through negotiations, of disputes between States regarding delimitation of the continental shelf beyond 200 nm is not seen as precluding examination by the Commission of the submissions made to it or hindering it from issuing appropriate recommendations.

For the foregoing reasons, the Tribunal concludes that, in order to fulfil its responsibilities under Part XV, Section 2, of the Convention in the present case, it has an obligation to adjudicate the dispute and to delimit the continental shelf between the Parties beyond 200 nm. Such delimitation is without prejudice to the establishment of the outer limits of the continental shelf in accordance with article 76, paragraph 8, of the Convention”.<sup>264</sup>

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meeting in private. It recalled that at its twenty-fourth session, it had taken note of the following *notes verbales*: from Argentina, dated 21 April 2009; from the United Kingdom, dated 6 August 2009; from the United States of America, dated 19 August 2009; and from the Russian Federation, dated 24 August 2009. It took also note of the communications received after the first presentation by Argentina, namely, the *notes verbales* from: India, dated 31 August 2009; the Netherlands, dated 30 September 2009; Japan, dated 19 November 2009; and Argentina, dated 8 August 2012. Taking into consideration those *notes verbales* and the two presentations made by the delegation, the Commission reiterated its instructions to the Subcommission, in accordance with the rules of procedure, *not to consider and qualify those parts of the submission that are subject to dispute and not to consider and qualify the part of the submission that relates to the continental shelf appurtenant to Antarctica*” (emphasis added).).

<sup>264</sup> *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*”), paras. 393-394.

7.9. The Arbitral Tribunal in the *Bay of Bengal (Bangladesh v. India)* case likewise confirmed that it had jurisdiction to delimit the continental shelf beyond 200 M, even though the CLCS had not yet made its recommendations:

“The Tribunal notes that in the present case, the outer limits of the continental shelf have not yet been established in accordance with article 76 and Annex II to the Convention, concerning the Commission on the Limits of the Continental Shelf (the ‘CLCS’). However, recalling the reasoning of the International Tribunal for the Law of the Sea in *Bangladesh/Myanmar* (*Judgment of 14 March 2012*, paragraphs 369-394), the Tribunal sees no grounds why it should refrain from exercising its jurisdiction to decide on the lateral delimitation of the continental shelf beyond 200 nm before its outer limits have been established. ...

There is a clear distinction in the Convention between the delimitation of the continental shelf under article 83 of the Convention and the delineation of its outer limits under article 76 (*Bangladesh/Myanmar*), *Judgment of 14 March 2012*, paragraph 376; *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, *Judgment of 19 November 2012*, *Judgment*, I.C.J. Reports 2012, p. 624 at p. 669, paragraph 129). Whilst the function of settling disputes with respect to the delimitation of maritime boundaries between adjacent or opposite States is entrusted to the dispute settlement procedures under Part XV of the Convention, the CLCS plays an indispensable role in the delineation of the continental shelf beyond 200 nm. On the one hand, the recommendations of the CLCS ‘shall not prejudice matters relating to delimitation of boundaries’, (Convention, Annex III, art. 9), and on the other hand, the decision of an international court or tribunal delimiting the lateral boundary of the continental shelf beyond 200 nm is without prejudice to the delineation of the outer limits of

that shelf. In short, the mandates of these bodies complement one another”.<sup>265</sup>

7.10. The Arbitral Tribunal in *Barbados v. Trinidad and Tobago*, emphasised that it was under an obligation to settle the entire dispute submitted to it. This included the Parties’ claims in the continental shelf beyond 200 M:

“There was some difference between the Parties as to the scope of the matters which constituted the dispute with which the Tribunal was required to deal, particularly as regards what the Parties referred to as ‘the extended continental shelf’, by which they meant that part of the continental shelf lying beyond 200 nm. Trinidad and Tobago submitted that that matter was part of the dispute submitted to the Tribunal, while Barbados submitted that it was excluded by the terms of its written notification instituting the arbitration, particularly its description of the dispute and the statement of the relief sought. The Tribunal considers that the dispute to be dealt with by the Tribunal includes the outer continental shelf, since (i) it either forms part of, or is sufficiently closely related to, the dispute submitted by Barbados, (ii) the record of the negotiations shows that it was part of the subject-matter on the table during those negotiations, and (iii) in any event there is in law only a single ‘continental shelf’ rather than an inner continental shelf and a separate extended or outer continental shelf”.<sup>266</sup>

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<sup>265</sup> *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India (Bangladesh v. India)*, Award, UNCLOS Annex VII Tribunal (7 July 2014) (hereinafter “*Bangladesh v. India*”), paras. 76, 80.

<sup>266</sup> *Barbados/Trinidad and Tobago*, Award, UNCLOS Annex VII Tribunal (11 Apr. 2006) (hereinafter “*Barbados/Trinidad and Tobago*”), para. 213.

7.11. This Court, too, has recognised the distinction between delineation, a task with which the CLCS is entrusted, and delimitation, which falls within its own competence:

“The Court emphasizes that both parties in the *Bay of Bengal* case were States parties to UNCLOS and had made full submissions to the Commission ... and that the Tribunal’s ruling on the delimitation of the continental shelf in accordance with Article 83 of UNCLOS does not preclude any recommendation by the Commission as to the outer limits of the continental shelf in accordance with Article 76, paragraph 8, of the Convention. ITLOS further noted that a ‘clear distinction’ exists under UNCLOS between the delimitation of continental shelf and the delineation of its outer limits”.<sup>267</sup>

7.12. It is true that in *Nicaragua v. Columbia* the Court decided not to exercise jurisdiction over Nicaragua’s claim concerning the continental shelf beyond 200 M. This was not, however, because it considered that the delineation by the CLCS had any kind of priority over delimitation, but rather because the Court considered that, in the absence of a full submission to the CLCS, Nicaragua had not proven that it had an entitlement to a continental shelf beyond 200 M. The Court stated:

“The Court observes that Nicaragua submitted to the Commission only ‘Preliminary Information’ which, by its own admission, falls short of meeting the requirements for information on the limits of the continental shelf beyond 200 nautical miles which ‘shall be submitted by the coastal State to the Commission’ in accordance with paragraph 8 of Article 76 of UNCLOS (see paragraph 120 above).

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<sup>267</sup> *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Merits, Judgment, I.C.J. Reports 2012 (hereinafter “*Nicaragua v. Colombia*”), para. 125.

Nicaragua provided the Court with the annexes to this ‘Preliminary Information’ and in the course of the hearings it stated that the ‘Preliminary Information’ in its entirety was available on the Commission’s website and provided the necessary reference. ...

However, since Nicaragua, in the present proceedings, has not established that it has a continental margin that extends far enough to overlap with Colombia’s 200-nautical-mile entitlement to the continental shelf, measured from Colombia’s mainland coast, the Court is not in a position to delimit the continental shelf boundary between Nicaragua and Colombia, as requested by Nicaragua, even using the general formulation proposed by it”.<sup>268</sup>

7.13. Since the time of the Court’s Judgment in 2012, Nicaragua has made a full submission to the CLCS in conformity with Article 76(8), and introduced a new case before the Court concerning “the delimitation of the boundaries between, on the one hand, the continental shelf of Nicaragua beyond the 200-nautical-mile limit from the baselines from which the breadth of the territorial sea of Nicaragua is measured, and on the other hand, the continental shelf of Colombia”.<sup>269</sup>

7.14. It follows from the above that the CLCS’s mandate over the submissions made by Somalia and Kenya, which lay claim to overlapping areas of continental shelf beyond 200 M, is without prejudice to the *delimitation* of their respective

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<sup>268</sup> *Nicaragua v. Colombia*, paras. 127, 129.

<sup>269</sup> *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, Application Instituting Proceedings (16 Sept. 2013), para. 2.



maritime areas and is of no consequence to the Court's jurisdiction to determine the Parties' maritime boundary in the area beyond 200 M.

7.15. Somalia took this position as early as 2009 in a letter from the Prime Minister of Somalia to the Secretary-General of the United Nations:

“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 point where the land 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 the 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’ for the purposes of rule 5 (a) of Annex I to the Rules of Procedure of the Commission. The Kenyan and Somali claims cover an overlapping area which for the same purposes constitutes ‘the areas under dispute’. *Accordingly, any action of the Commission shall, in accordance with UNCLOS, Annex II, article 9, not prejudice matters relating to the delimitation of the continental shelf between the Republic of Kenya and the Somali Republic*”.<sup>270</sup>

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<sup>270</sup> 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), p. 1 (emphasis added). MS, Vol. III, Annex 37.

7.16. Kenya has also recognised “that the actions of the Commission are without prejudice to the delimitation of the outer limits of the Continental shelf”.<sup>271</sup>

B. THE COURT’S EXERCISE OF JURISDICTION IN THIS CASE DOES NOT PREVENT THE CLCS FROM EXAMINING THE TWO PARTIES’ SUBMISSIONS

7.17. Accordingly, the Court’s jurisdiction to delimit the continental shelf beyond 200 M cannot logically be made dependent on the prior action of the CLCS.

7.18. As shown, if delimitation is not agreed between the two States (or is not determined by a judicial organ), the CLCS will not examine and make recommendations on the submissions of any of the States party to a dispute, in the absence of express consent from the interested States. As ITLOS noted in the *Bangladesh/Myanmar* case:

“[T]he consequence of these decisions [of postponement of examination] by the CLCS is such that, if the Tribunal were to decline to delimit the continental shelf beyond 200 nm, the outer limits of the continental shelf of each of the Parties would remain unresolved, unless the Parties were able to reach an agreement. In light of the many previous rounds of unsuccessful negotiations between them, the Tribunal does not see that such an agreement is likely. Accordingly, far from enabling action by the CLCS, inaction by this Tribunal would in practice leave the Parties in a position in which they would likely be unable to benefit fully from their rights over the continental shelf. The Tribunal does not

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<sup>271</sup> *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), p. 2. MS, Vol. III, Annex 50.

consider that such an outcome would be consistent with the object and purpose of the Convention”.<sup>272</sup>

7.19. Until recently, although both Somalia and Kenya had made full submissions to the CLCS (on 21 July 2014<sup>273</sup> and 6 May 2009, respectively<sup>274</sup>), their examination by the Commission was deferred as a result of Somalia’s express objection.

7.20. Following the rejection by its Parliament of the MOU signed on 7 April 2009 by Somalia’s Minister for National Planning and International Cooperation and Kenya’s Minister for Foreign Affairs, Somalia objected to the Commission’s consideration of Kenya’s submission.<sup>275</sup> Somalia’s objection was prompted by Kenya’s reliance, in its submission to the CLCS, on its entirely indefensible claim to a boundary with Somalia following the parallel of latitude.<sup>276</sup>

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<sup>272</sup> *Bangladesh v. India*, para. 82.

<sup>273</sup> See Federal Republic of Somalia, *Continental Shelf Submission of the Federal Republic of Somalia: Executive Summary* (21 July 2014). MS, Vol. IV, Annex 70; United Nations, *Receipt of the submission made by the Federal Republic of Somalia to the Commission on the Limits of the Continental Shelf*, U.N. Doc. CLCS.74.2014.LOS (21 July 2014). MS, Vol. III, Annex 69.

<sup>274</sup> See United Nations, Commission on the Limits of the Continental Shelf, *Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the progress of work of the Commission*, U.N. Doc. CLCS/64 (1 Oct. 2009), paras. 93-97. MS, Vol. III, Annex 61.

<sup>275</sup> See, *supra*, paras. 3.32-3.33.

<sup>276</sup> See Republic of Kenya, *Submission on the Continental Shelf Submission beyond 200 nautical miles to the Commission on the Limits of the Continental Shelf: Executive Summary* (Apr. 2009), p. 9, KEN-ES-DOC-Map 1: Map depicting the outer limit of the extended continental shelf of Kenya (reproduced as Figure 7.2 below). MS, Vol. III, Annex 59.

7.21. Somalia first informed the United Nations of its objection by letter dated 10 October 2009,<sup>277</sup> and reiterated this objection by means of a subsequent letter dated 2 September 2014:

“In connection therewith, the Somali Government wishes to recall to your Excellency’s attention the communication made by the Ministry of Foreign Affairs and International Cooperation of the Federal Republic of Somalia, REF No: MOFA/SFR/MO/258/2014, dated 4 February 2014<sup>[278]</sup> ... in which the Somali Government stated, among other things, that there is a maritime dispute between Somalia and Kenya and that pursuant to paragraph 5(a) of Annex I of the Rules it has not given its consent (and does not hereby give its consent) to the consideration by the Commission of the submissions made (or to be made) or presented (or to be presented) by the Government of Kenya”.<sup>279</sup>

Kenya nevertheless urged the “Commission [to] consider the submission by Kenya as soon as is practical”.<sup>280</sup>

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<sup>277</sup> *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. OPM/IC/00./016/11/09 (10 Oct. 2009). MS, Vol. III, Annex 38.

<sup>278</sup> *Letter* from Dr. Abdirahman Beileh, Minister of Foreign Affairs and International Cooperation of the Somali Federal Republic, to H.E. Ban Ki-Moon, Secretary-General of the United Nations, No. MOFA/SFR/MO/259/2014 (4 Feb. 2014). MS, Vol. III, Annex 41.

<sup>279</sup> *Letter* from the Permanent Mission of the Somali Republic to the United Nations to H.E. Ban Ki-Moon, Secretary-General of the United Nations, No. SOM/MSS/253/14 (2 Sept. 2014), p. 1. MS, Vol. III, Annex 48.

<sup>280</sup> *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), p. 2. MS, Vol. III, Annex 50.

7.22. Having been informed of the legal positions of the two Parties, the CLCS deferred its examination Kenya's submission until such time as the delimitation dispute was settled or Somalia's opposition withdrawn:

“Recalling the decision taken at its thirty-fourth session (see CLCS/83, para. 18), and taking note of the presentation made by Kenya on 3 September 2014, the Commission, *in keeping with its practice, reiterated its decision to defer further consideration of the submission and the communications from Kenya and Somalia*”.<sup>281</sup>

7.23. After initiating the present proceedings, and having decided to entrust the Court with the delimitation of the Parties' maritime boundary, including in the area beyond 200 M, Somalia subsequently decided that its objection to the CLCS's consideration of Kenya's submission was no longer necessary. It trusts that its maritime rights will be fully protected by the Court which will determine the maritime boundary between the Parties with binding force. Accordingly, as a sign of good will and cooperation, on 1 July 2015, Somalia officially withdrew its opposition to the Commission's consideration of Kenya's submission.

7.24. In particular, Somalia's Minister of Foreign Affairs and Investment Promotion informed the Secretary-General of the United Nations:

“In view of Somalia's request to the ICJ to delimit the maritime boundary with Kenya (including in the continental shelf beyond 200 nautical miles), Somalia deems it no longer necessary to maintain its objection to the Commission's consideration of Kenya's submission to the Commission, and hereby

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<sup>281</sup> 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. 64 (emphasis added). MS, Vol. IV, Annex 71.

extends its consent to the Commission's consideration of the Kenyan submission".<sup>282</sup>

7.25. In the meantime, on 4 May 2015, Kenya notified the CLCS that it objected to the Commission's consideration of Somalia's submission in regard to the area beyond 200 M, based on the Parties' dispute over the maritime boundary in this area. As of now, Kenya's objection is the only impediment to the Commission's consideration of either Party's submission. Somalia hopes that Kenya will follow its example and withdraw its objection to CLCS action, so that the delineation of the outer limits of the continental margin can go forward in parallel with the delimitation of the maritime boundary by the Court.

7.26. However, even if there were no longer any impediment to the Commission's consideration of either Party's submission, it is now estimated that, due to its backlog, the Commission will not be in a position to make recommendations on the outer limits of Kenya's continental shelf before the end of 2016, at the earliest; and those on Somalia's submission will be made much later.

7.27. In any case, the Commission's consideration of the Parties' submissions would not interfere with the Court's jurisdiction to delimit the continental shelf beyond 200 M for the reasons explained above. The two organs have fundamentally different mandates. Moreover, it would not be in line with the principle of sound administration of justice to expect States to return to the Court (or another judicial or arbitral organ) years later to settle the remaining part of

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<sup>282</sup> *Letter* from H.E. Abdulsalam H. Omer, Minister of Foreign Affairs and Investment Promotion of the Federal Republic of Somalia, to H.E. Ban Ki-Moon, Secretary-General of the United Nations (7 July 2015), p. 2. MS, Vol. III, Annex 52.

their continental shelf boundary.<sup>283</sup> As made clear by the *chapeau* of Article 38 of its Statute, the Court’s “function is to decide in accordance with international law such disputes as are submitted to it”. It would not be consistent with this mandate if the Court were, without good reason, to allow a significant part of a dispute to lay unresolved for many years, and remain a source of tension and instability in the relations between the two Parties.

## **Section II. The Respective Claims of Somalia and Kenya Beyond 200 M**

7.28. In *Nicaragua v. Honduras* and *Nicaragua v. Colombia*, the Court considered that “any claim of continental shelf rights beyond 200 miles [by a State party to UNCLOS] must be in accordance with Article 76 of UNCLOS and reviewed by the Commission on the Limits of the Continental Shelf established thereunder”.<sup>284</sup> As described in Chapter 3, and reiterated below, both Somalia and Kenya have fulfilled their obligations under Article 76.

7.29. On 14 April 2009, Somalia submitted preliminary information to the CLCS on the limits of its continental shelf beyond 200 M. On 21 July 2014, it made its full submission, including a detailed description of the scientific and technical data, maps, technical procedures and scientific methodologies that were

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<sup>283</sup> As President Basdevant recalled, “to ensure a good administration of justice, it is necessary not to delay the settlement of this dispute”. *Asylum (Colombia/Peru)*, Extension of Time-Limits, Order, I.C.J. Reports 1949, p. 267. See also, e.g., *The Panevezys-Saldutiskis Railway Case*, Preliminary Objections, Order, 1938, P.C.I.J. Series A/B, No. 67, pp. 55-56; *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (New Application: 1962)*, Preliminary Objections, Judgment, I.C.J. Reports 1964, p. 42; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Counter-Claims, Order, I.C.J. Reports 1997, para. 30; *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Preliminary Objections, Judgment, I.C.J. Reports 2008, para. 85.

<sup>284</sup> *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Merits, Judgment, I.C.J. Reports 2007, para. 319, quoted in *Nicaragua v. Colombia*, para. 126.

applied in the establishment of the outer limits of the continental shelf of Somalia where those limits extend beyond 200 M.<sup>285</sup> In July 2015, a revised Executive Summary was deposited with the U.N., and technical amendments to the full submission (which have no material impact on the location of the outer limit in areas abutting Kenya) will be transmitted in due course.

7.30. On the basis of this data, Somalia's claim to a continental shelf beyond 200 M covers a total area of some 471,103 km<sup>2</sup>. The proposed outer limit of its continental shelf, depicted in **Figure 7.1** (following page 112), is defined by 510 fixed points established in accordance with Article 76.

7.31. On 6 May 2009, Kenya submitted to the CLCS information on the limits of its continental shelf beyond 200 M.<sup>286</sup> Kenya claims a total area of continental shelf beyond 200 M measuring more than 100,000 km<sup>2</sup>.<sup>287</sup> The outer limit of Kenya's claim for an outer continental shelf, as depicted in its submission to the CLCS, is illustrated in **Figure 7.2** (following Figure 7.1).

7.32. The area in which the respective claims of Somalia and Kenya beyond 200 M overlap measures some 85,223 km<sup>2</sup>. This is illustrated in **Figure 7.3** (following Figure 7.2).

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<sup>285</sup> See Federal Republic of Somalia, *Continental Shelf Submission of the Federal Republic of Somalia: Executive Summary* (21 July 2014). MS, Vol. IV, Annex 70.

<sup>286</sup> United Nations, Division for Ocean Affairs and the Law of the Sea, *Receipt of the submission made by the Republic of Kenya to the Commission on the Limits of the Continental Shelf*, U.N. Doc. CLCS.35.2009.LOS (11 May 2009). MS, Vol. III, Annex 60; Republic of Kenya, *Submission on the Continental Shelf Submission beyond 200 nautical miles to the Commission on the Limits of the Continental Shelf: Executive Summary* (Apr. 2009). MS, Vol. III, Annex 59.

<sup>287</sup> 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. 8-3. MS, Vol. III, Annex 59.



# THE LIMIT OF SOMALIA'S CONTINENTAL SHELF AS SUBMITTED TO THE CLCS (JULY 2015)

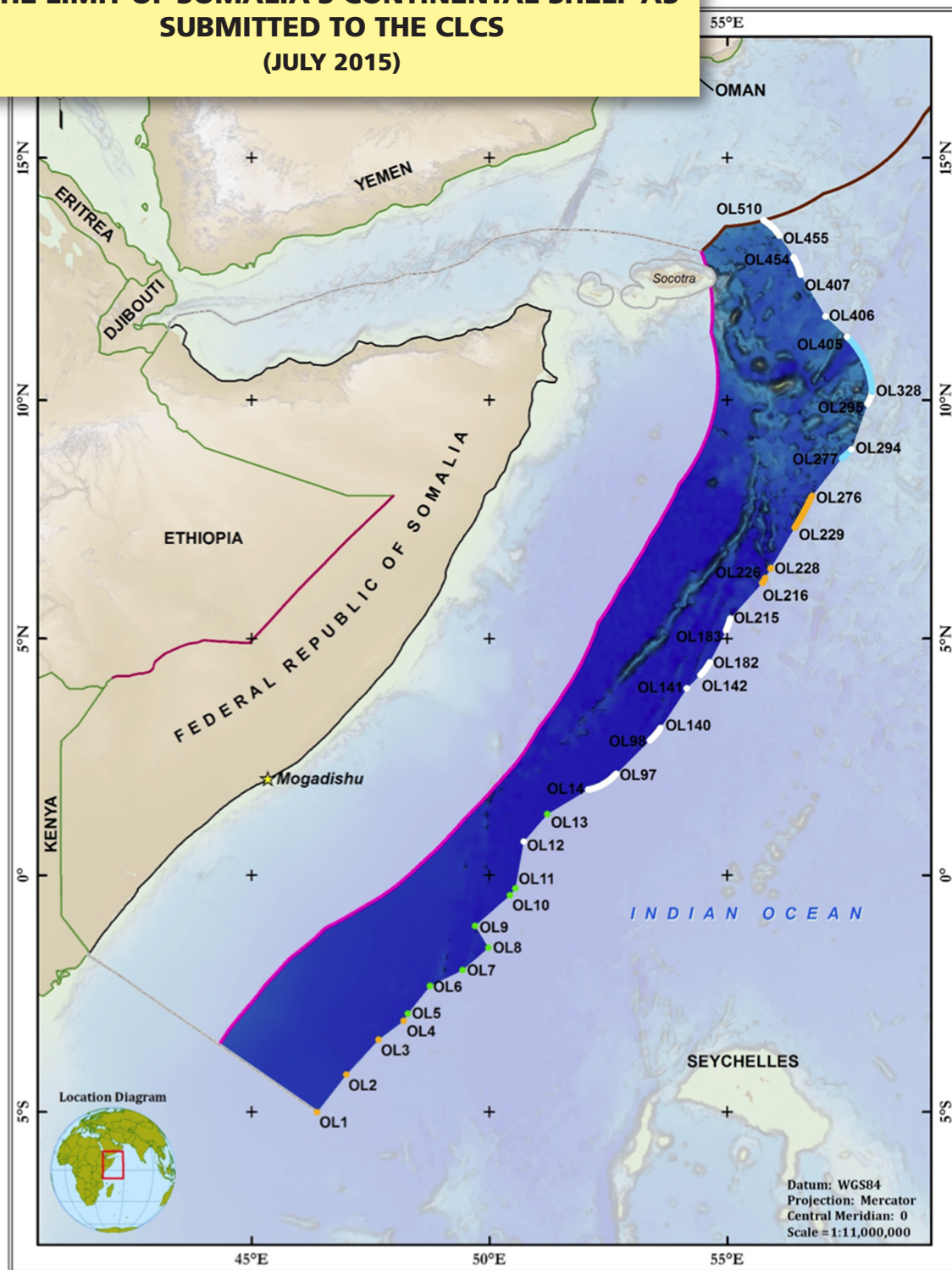


Figure 7.1







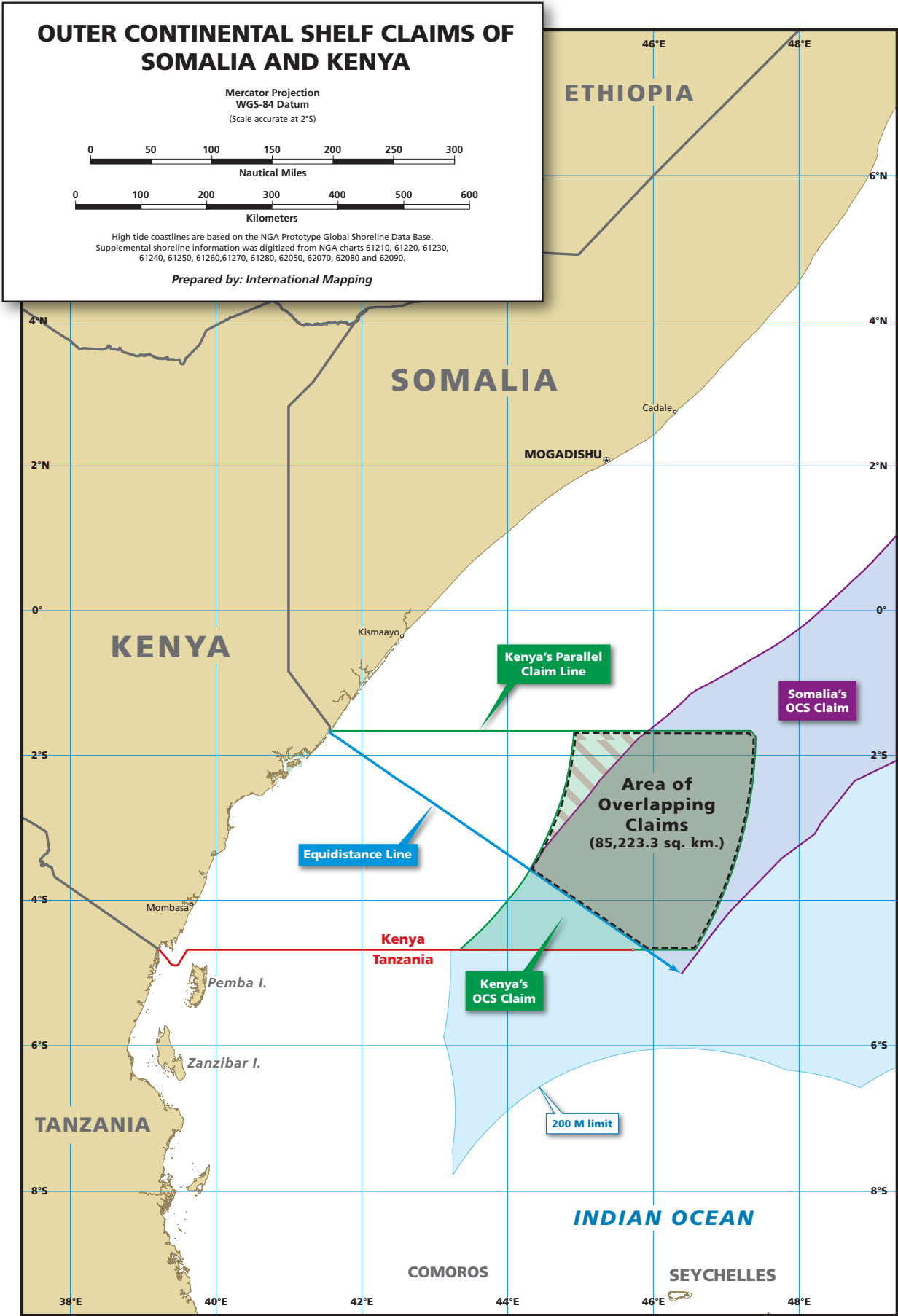


Figure 7.3



7.33. As shown in **Figure 7.4** (following page 114) the overlapping claims include a maritime area situated within 200 M of Somalia's coasts that is claimed by Kenya as continental shelf beyond 200 M. In this "Grey Area", Somalia claims continental shelf and EEZ rights, whereas Kenya only claims continental shelf rights. The "Grey Area" encompasses some 8,875.5 km<sup>2</sup>.

7.34. Somalia accepts that Kenya has an entitlement to a continental shelf extending beyond 200 M, at least *prima facie* and subject, of course, to the CLCS's recommendations on the precise location of the outer limits. The documentation submitted by Somalia to the CLCS also underscores that there is an entitlement on its side, as well. It is because Kenya's and Somalia's submitted continental shelf areas overlap that a decision by the Court on the lateral delimitation of their continental shelves beyond 200 M is necessary.

7.35. The Parties' entitlements to a continental shelf beyond 200 M is not in dispute between them. The Court is therefore not called upon, in principle, to make a definitive ruling on the existence and extent of the respective entitlements of Somalia and Kenya.<sup>288</sup>

7.36. Should the Court consider that it is nevertheless necessary for it to assess Somalia's and Kenya's entitlements to a continental shelf beyond 200 M, it can make a *prima facie* evaluation based on the two Parties' submissions to the CLCS. In *Bangladesh/Myanmar*, ITLOS was satisfied with the information contained in the Parties' submissions to the CLCS:

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<sup>288</sup> As the arbitral tribunal in the *Bay of Bengal* arbitration underlined: "The Tribunal notes the Parties' agreement that both States have entitlements beyond 200 nm, and both have made submissions to the CLCS. The Parties also agree that their entitlements beyond 200 nm are determined by application of article 76, paragraph 4, of the Convention, and that neither may claim a superior entitlement based on geological or geomorphological factors in the overlapping area". *Bangladesh v. India*, para. 457.

“The scientific data and analyses presented in this case, which have not been contested, do not establish that Myanmar’s continental shelf is limited to 200 nm under article 76 of the Convention, and instead indicate the opposite”.<sup>289</sup>

7.37. As the Court itself noted in *Nicaragua v. Colombia*, in that case, ITLOS:

“underlined that, in view of the fact that a thick layer of sedimentary rocks covers practically the entire floor of the Bay of Bengal, the Bay presents a unique situation and that this fact had been acknowledged in the course of negotiations at the Third United Nations Conference on the Law of the Sea”.<sup>290</sup>

7.38. If the Court deems it appropriate, it may also appoint an independent expert to weigh the merits of Somalia’s and Kenya’s submissions, thus enabling the Court to have informed expert guidance on these technical issues. It is important to reiterate, however, that the Court is *not* being asked to determine the precise location of the outer limits of the continental shelf (this is the task of delineation that is assigned to the CLCS).

### **Section III. Delimitation of the Continental Shelf Beyond 200 M**

#### **A. APPLICABLE LAW**

7.39. Whereas Article 76 of UNCLOS provides the geomorphologic and geologic definition of the continental shelf, and thus specifies the conditions for an entitlement to the outer continental shelf, Article 83, paragraph 1, provides the

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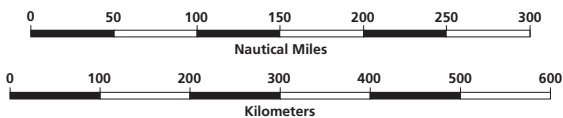
<sup>289</sup> *Bangladesh/Myanmar*, para. 448.

<sup>290</sup> *Nicaragua v. Colombia*, para. 125.



# OVERLAP BETWEEN SOMALIA'S EEZ AND KENYA'S CLAIM BEYOND 200 M

Mercator Projection  
WGS-84 Datum  
(Scale accurate at 2°S)



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

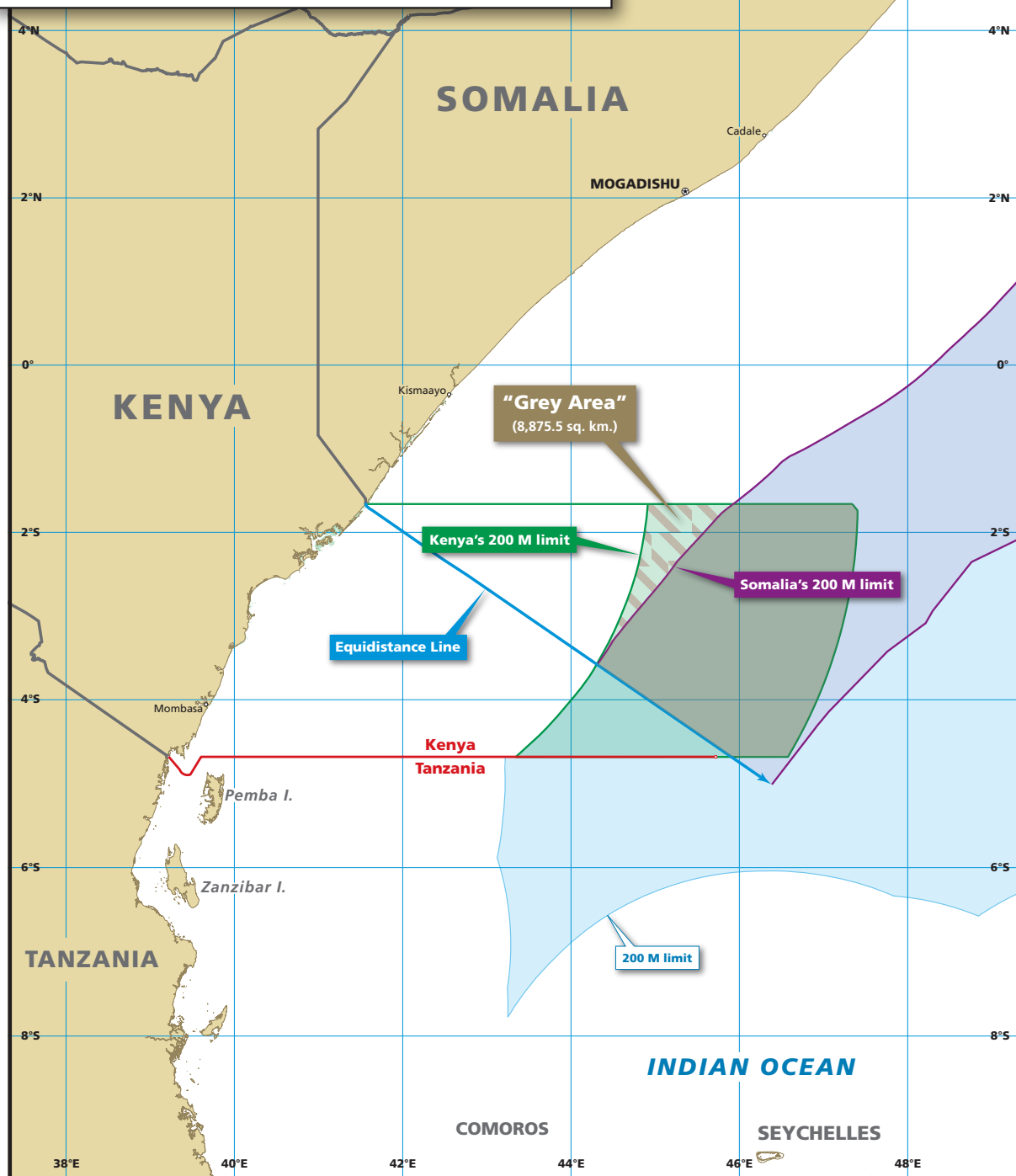


Figure 7.4



principles for delimitation. These principles apply equally to the delimitation of the continental shelf within as well as beyond 200 M.

7.40. As the Arbitral Tribunal underscored in *Bangladesh v. India*, the existence of a single continental shelf implies uniform application of legal principles, within and beyond 200 M:

“The Tribunal emphasizes that article 76 of the Convention embodies the concept of a single continental shelf. This is confirmed by article 77, paragraphs 1 and 2 of the Convention, according to which a coastal State exercises exclusive sovereign rights over the continental shelf in its entirety. No distinction is made in these provisions between the continental shelf within 200 nm and the shelf beyond that limit. Article 83 of the Convention, concerning the delimitation of the continental shelf between States with opposite or adjacent coasts, likewise makes no such distinction. This view is in line with the observation of the tribunal in *Barbados/Trinidad and Tobago* that ‘there is in law only a single ‘continental shelf’ rather than an inner continental shelf and a separate extended or outer continental shelf’ (*Award of 11 April 2006*, RIAA, Vol. XXVII, p. 147, at pp. 208-209, paragraph 213)”.<sup>291</sup>

7.41. The “equidistance/relevant circumstances” method therefore applies equally in respect to the continental shelf beyond 200 M as it does within 200 M. This is the approach ITLOS adopted in *Bangladesh/Myanmar*:

“The Tribunal notes that article 83 of the Convention addresses the delimitation of the continental shelf between States with opposite or adjacent coasts without any limitation as to area. It

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<sup>291</sup> *Bangladesh v. India*, para. 77.

contains no reference to the limits set forth in article 76, paragraph 1, of the Convention. Article 83 applies equally to the delimitation of the continental shelf both within and beyond 200 nm.

In the view of the Tribunal, the delimitation method to be employed in the present case for the continental shelf beyond 200 nautical miles should not differ from that within 200 nm. Accordingly, the equidistance/relevant circumstances method continues to apply for the delimitation of the continental shelf beyond 200 nm. This method is rooted in the recognition that sovereignty over the land territory is the basis for the sovereign rights and jurisdiction of the coastal State with respect to both the exclusive economic zone and the continental shelf”.<sup>292</sup>

7.42. The Arbitral Tribunal in *Bangladesh v. India* followed the same approach:

“The Parties and the Tribunal agree that there is a single continental shelf. The Tribunal considers that the appropriate method for delimiting the continental shelf remains the same, irrespective of whether the area to be delimited lies within or beyond 200 nm. Having adopted the equidistance/relevant circumstances method for the delimitation of the continental shelf within 200 nm, the Tribunal will use the same method to delimit the continental shelf beyond 200 nm”.<sup>293</sup>

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<sup>292</sup> *Bangladesh/Myanmar*, paras. 454-455.

<sup>293</sup> *Bangladesh v. India*, para. 458.

## B. APPLICATION OF THE LEGAL PRINCIPLES TO THE PRESENT CASE

### 1. *Construction of the Equidistance Line*

7.43. The equidistance line between Somalia and Kenya in the area beyond 200 M is constructed by extending the equidistance line established for delimiting the territorial sea, the EEZ and the continental shelf up to 200 M. The point at which the equidistance line intersects the 350 M limit is located at 5°00'25.7'' S - 46°22'33.4'' E (see **Figure 7.5** in Volume II only)).

### 2. *The Absence of Relevant Circumstances*

7.44. As demonstrated in Chapter 6, there are no relevant circumstances, geographic or otherwise, which warrant any adjustment to the equidistance line. To the contrary, the equidistance line allows the coasts of the Parties to produce their effects, in terms of maritime entitlements, in a reasonable and mutually balanced way. Neither Somalia nor Kenya is prevented “from extending its maritime boundary as far seaward as international law permits”.<sup>294</sup> Kenya’s coastline generates substantial entitlements within and beyond 200 M. To the extent that Kenya’s entitlements may appear reduced beyond 200 M, this is a result of its delimitation agreement with Tanzania. This, however, is not a relevant circumstance opposable to Somalia.

7.45. By contrast, the parallel boundary Kenya claims grossly cuts off Somalia’s entitlements up to and beyond 200 M. Indeed, although it generates limited entitlements to a continental shelf beyond 200 M, most of Somalia’s relevant coast is unjustifiably deprived of this effect by Kenya’s claim line. This can be seen in **Figure 7.6** (following page 118).

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<sup>294</sup> *Bangladesh v. India*, para. 417.

7.46. As the Arbitral Tribunal in the *Bay of Bengal* case underscored:

“Adjusting the equidistance line would not improve the situation if it were merely to transfer the cut-off from one Party to the other”.<sup>295</sup>

7.47. Kenya’s proposed delimitation line is not based on any pre-established legal criteria, and would produce a fundamentally inequitable result, since an “equitable solution requires that each State enjoy reasonable entitlements in the areas into which its coasts project”.<sup>296</sup> It is apparent that the boundary claimed by Kenya cuts off Somalia from its obvious entitlements within as well as beyond 200 M.

7.48. In the present case, Kenya’s coastal projections are prevented from producing their full effects beyond 200 M only because of the delimitation line it accepted when it concluded its agreement of 23 June 2009 with Tanzania.<sup>297</sup> This can be seen in **Figure 7.7** (following Figure 7.6). Kenya cannot, however, invoke the consequences of a treaty it voluntarily entered into to support its claim against Somalia; the 2009 treaty cannot be opposed to Somalia so as to deprive it of its maritime entitlements.

7.49. The jurisprudence establishes that agreements concluded with a third State by one of the Parties to a delimitation dispute cannot be invoked as a relevant circumstance against the other Party. The Court explained in *Nicaragua v. Colombia*:

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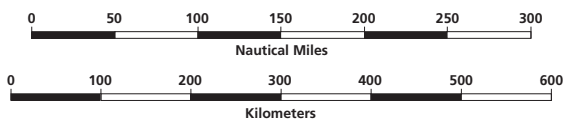
<sup>295</sup> *Ibid.*, para. 419.

<sup>296</sup> *Nicaragua v. Colombia*, para. 216.

<sup>297</sup> Agreement between the United Republic of Tanzania and the Republic of Kenya on the delimitation of the maritime boundary of the exclusive economic zone and the continental shelf, 2603 U.N.T.S. 37 (23 June 2009), entered into force 23 June 2009. MS, Vol. III, Annex 7.

# SOMALIA'S COASTAL PROJECTION IS CUT-OFF BY KENYA'S PROPOSAL

Mercator Projection  
WGS-84 Datum  
(Scale accurate at 2°S)



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

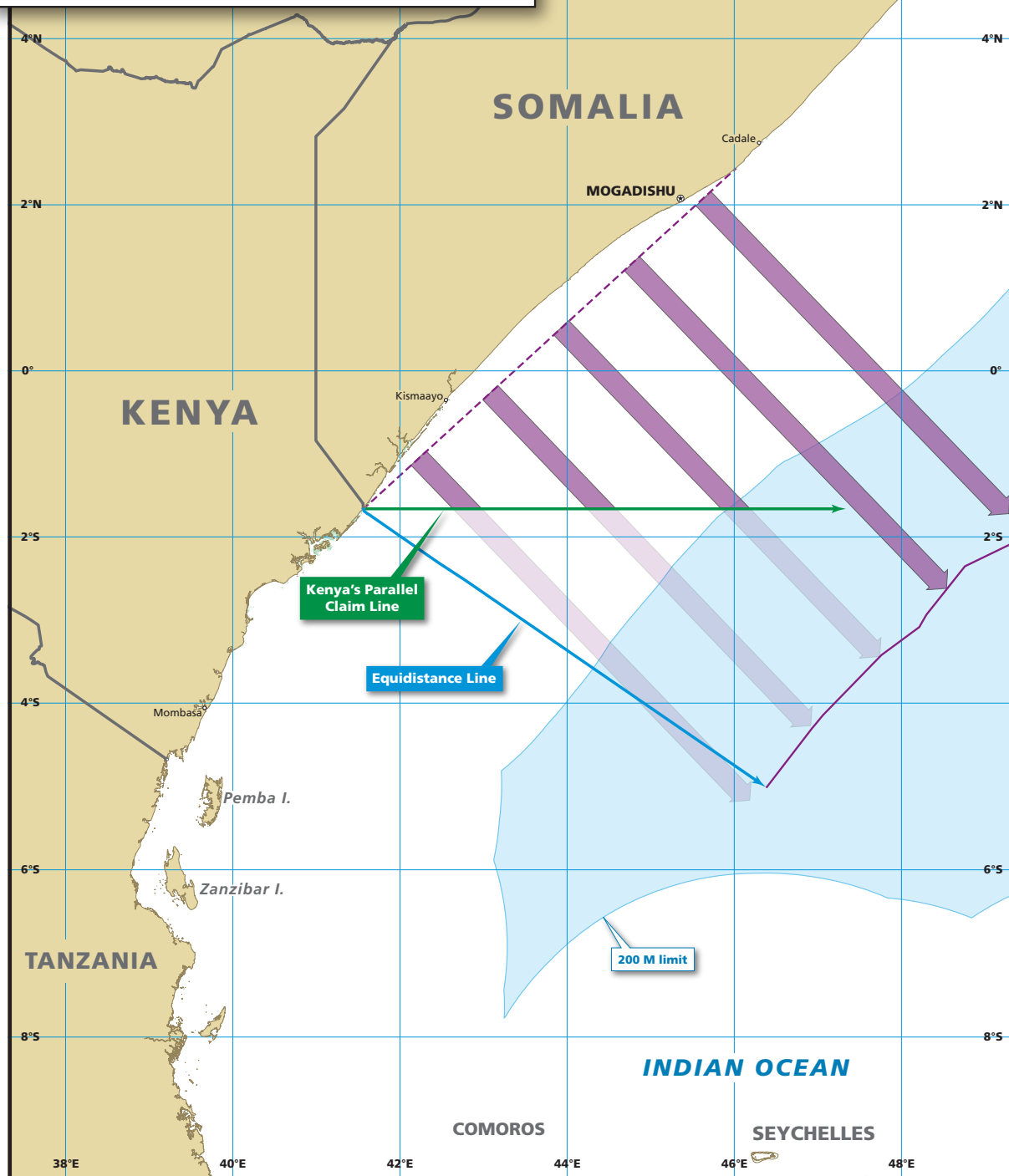


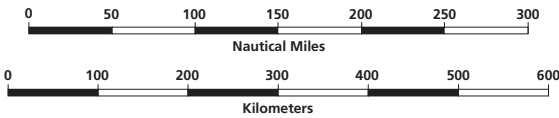
Figure 7.6





# ANY CUT-OFF KENYA SUFFERS IS A RESULT OF ITS AGREEMENT WITH TANZANIA

Mercator Projection  
WGS-84 Datum  
(Scale accurate at 2°S)



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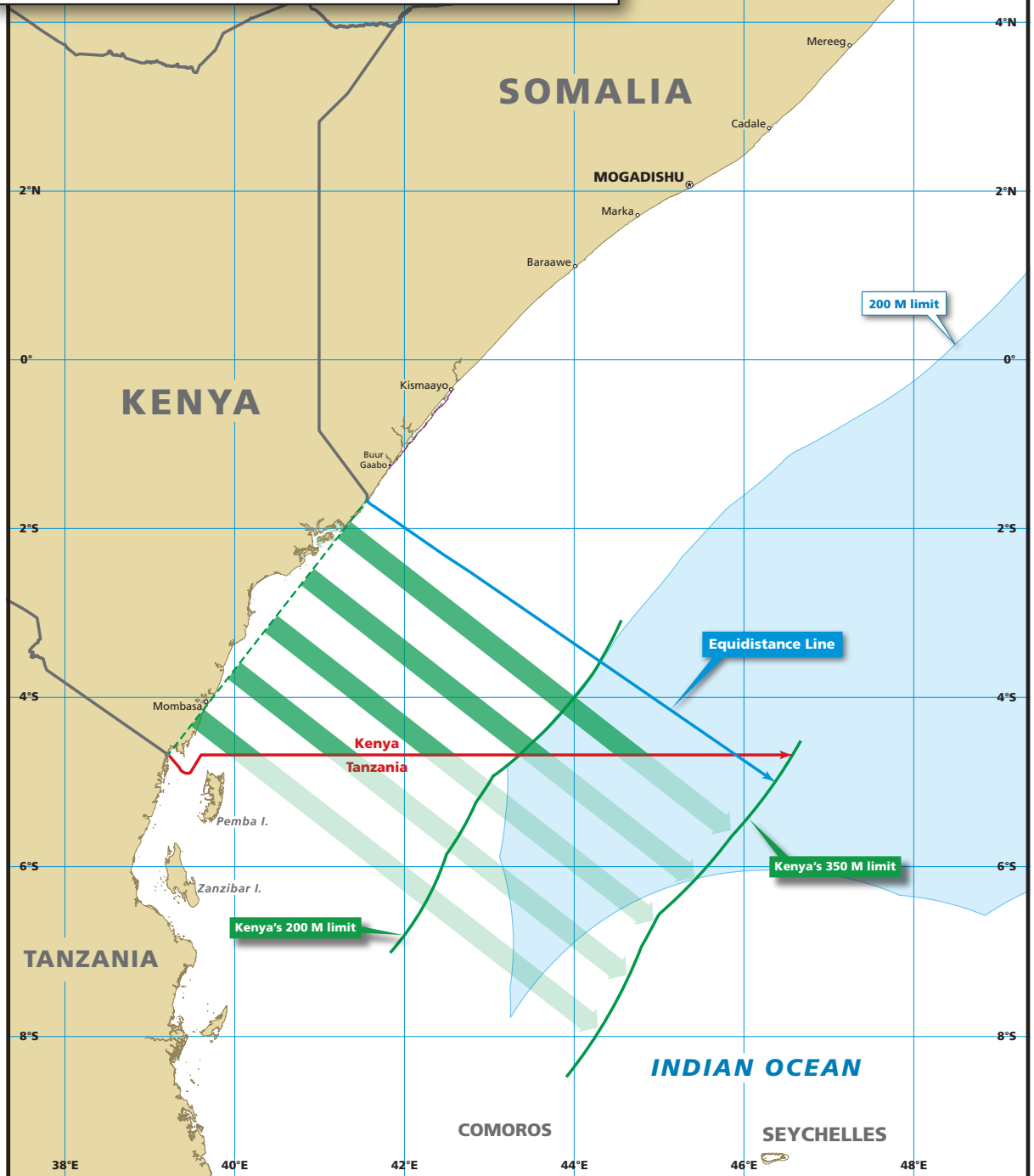


Figure 7.7



“It is a fundamental principle of international law that a treaty between two States cannot, by itself, affect the rights of a third State. As the Arbitral Tribunal in the *Island of Palmas* case put it, ‘it is evident that whatever may be the right construction of a treaty, it cannot be interpreted as disposing of the rights of independent third Powers’ (*Reports of International Arbitral Awards (RIAA)*, Vol. II, p. 842). In accordance with that principle, the treaties which Colombia has concluded with Jamaica and Panama and the treaty which it has signed with Costa Rica cannot confer upon Colombia rights against Nicaragua and, in particular, cannot entitle it, vis-à-vis Nicaragua, to a greater share of the area in which its maritime entitlements overlap with those of Nicaragua than it would otherwise receive”.<sup>298</sup>

7.50. In similar fashion, the Arbitral Tribunal established to resolve the maritime delimitation dispute between Barbados and Trinidad and Tobago reaffirmed that a State that concluded a delimitation treaty with a third Party cannot seek compensation for a disadvantageous treaty from a third State:

“The Tribunal is not concerned with the political considerations that might have led the Parties to conclude the 1990 Trinidad-Venezuela Agreement, and certainly 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. ... The treaty is quite evidently *res inter alios acta* in respect of Barbados and every other country”.<sup>299</sup>

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<sup>298</sup> *Nicaragua v. Colombia*, para. 227. See also *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, Judgment, I.C.J. Reports 1993, para. 86.

<sup>299</sup> *Barbados/Trinidad and Tobago*, para. 346. See also *Bangladesh v. India*, para. 411.

7.51. Considering the fundamental principle of *res inter alios acta*, Kenya cannot place any reliance upon its agreements with Tanzania to buttress its case against Somalia.<sup>300</sup> It is to be noted that the 1975-1976 Agreement delimited the territorial waters between Kenya and Tanzania,<sup>301</sup> whereas the 2009 Agreement established a single maritime boundary between the continental shelves of the two States, it being understood that this line of delimitation would extend up to the outer limits of the continental shelf, which were not expressly specified:

“The boundary line of the Exclusive Economic Zone and the Continental Shelf between the Parties is hereby delimited along the parallel of latitude from Point T-C eastwards to a point that it intersects the outermost limits of the Continental Shelf”.<sup>302</sup>

7.52. Both Tanzania<sup>303</sup> and Kenya<sup>304</sup> interpret the 2009 Agreement as delimiting the continental shelf boundary between them within as well as beyond

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<sup>300</sup> See Exchange of Notes Constituting an Agreement between the Republic of Kenya and the United Republic of Tanzania on the Territorial Sea Boundary, 1039 U.N.T.S. 148 (17 Dec. 1975 & 9 July 1976), entered into force 9 July 1976. MS, Vol. III, Annex 5; Agreement between the United Republic of Tanzania and the Republic of Kenya on the delimitation of the maritime boundary of the exclusive economic zone and the continental shelf, 2603 U.N.T.S. 37 (23 June 2009), entered into force 23 June 2009. MS, Vol. III, Annex 7.

<sup>301</sup> Article 1 of the 2009 Agreement recalls: “1.1 The Parties reaffirm the Agreement that entered into force on 9th July, 1976 between them which determines the Maritime Boundary up to 12 nautical miles (the Territorial Waters)”. (Agreement between the United Republic of Tanzania and the Republic of Kenya on the delimitation of the maritime boundary of the exclusive economic zone and the continental shelf, 2603 U.N.T.S. 37 (23 June 2009), entered into force 23 June 2009, Art. 1.1. MS, Vol. III, Annex 7.) It must however be stressed that the end point of the delimitation established by the 1975-1976 Agreement was not defined therein.

<sup>302</sup> *Ibid.*, Art. 3.

<sup>303</sup> Tanzania’s position, as expressed in its submission to the CLCS, is that: “Through the Exchange of Notes, the two countries agreed to a single line delimiting the Territorial Sea and Exclusive Economic Zone (EEZ) boundary between the two countries. In addition, the two countries have an agreement signed on 23<sup>rd</sup> June 2009, to extend the maritime boundary from the 1976 agreement to the outermost limits of national jurisdiction as may be determined by international law”. United Republic of Tanzania, *Partial Submission on the Continental Shelf beyond 200 Nautical Miles to the Commission on the Limits of the Continental Shelf Pursuant to*

200 M. The 2009 Agreement thus extended the previously agreed boundary into the area beyond 200 M without a change in direction. Article 2 of the 2009 Agreement provides:

“The Parties confirm that the basis of maritime boundary delimitation shall be the parallel of latitude as established in the 1976 Maritime Boundary Agreement. To this extent and in furtherance of the objectives of this limits of the continental shelf and such other outermost limits of national jurisdiction as may be determined by international law.”

7.53. Through this Agreement, 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. This can be readily appreciated in **Figure 7.8** (following page 122).

7.54. Kenya cannot plausibly claim ignorance about the effects on its potential entitlements of its parallel boundary agreement with Tanzania. An analysis of the original 1976 Kenya-Tanzania Agreement, published in a 1981 maritime brief by the United States Department of State, clearly shows that the seaward extension of the agreed boundary with Tanzania would result in the enclosure of Kenya's

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*Part VI of and Annex II to the United Nations Convention on the Law of the Sea 1982: Executive Summary* (18 Jan. 2012), para. 5.2. MS, Vol. III, Annex 62.

<sup>304</sup> Kenya's position is that: “Through the Exchange of Notes, the two countries have agreed to a single line delimiting the territorial sea and exclusive economic zone boundary between the two countries. In addition the two countries have agreed to a maritime boundary extending from the 1976 agreement to the continental shelf”. 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. 7-2. MS, Vol. III, Annex 59.

maritime space within a triangle formed by the agreed line and the equidistance line with Somalia.<sup>305</sup> Nevertheless, for reasons only Kenya knows, it expressly agreed to exactly this result in 2009.

### 3. *Absence of Disproportion*

7.55. According to the Court's now well established methodology, also uniformly followed by ITLOS<sup>306</sup> and arbitral tribunals<sup>307</sup>:

“In the third and final stage, the Court conducts a disproportionality test in which it assesses whether the effect of the line, as adjusted or shifted, is that the Parties' respective shares of the relevant area are markedly disproportionate to their respective relevant coasts”.<sup>308</sup>

7.56. The non-disproportionality test is to be applied taking into account the share of the Parties' entitlements, *not* the share of their respective claimed areas. Consequently, the area relevant of the disproportionality test “encompasses all of the areas, within and beyond 200 nm in which the seaward projections of the Parties' relevant coasts overlap”.<sup>309</sup> As previously noted,<sup>310</sup> the relevant area, within and beyond 200 M, encompasses approximately 319,542 km<sup>2</sup>.

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<sup>305</sup> See United States, Department of State, Bureau of Intelligence and Research, *Limits in the Seas*, No. 92, *Maritime Boundary: Kenya-Tanzania* (23 June 1981). MS, Vol. IV, Annex 83.

<sup>306</sup> *Bangladesh/Myanmar*, paras. 497-499.

<sup>307</sup> *Barbados/Trinidad and Tobago*, paras. 376-379; *Guyana v. Suriname*, Award, UNCLOS Annex VII Tribunal (17 Sept. 2007), para. 392; *Bangladesh v. India*, paras. 494-497.

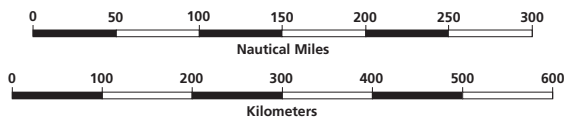
<sup>308</sup> *Nicaragua v. Colombia*, para. 193, quoting *Denmark v. Norway*, I.C.J. Reports 1993, para. 64 and *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, para. 122. See also, *supra*, paras. 6.13-6.15, 6.54-6.57.

<sup>309</sup> *Bangladesh v. India*, para. 490.

<sup>310</sup> See *supra*, para. 6.38; see also, *supra*, paras. 6.31-6.38.

# EQUIDISTANCE WOULD HAVE PROVIDED KENYA A MUCH LARGER AREA OF THE CONTINENTAL SHELF BEYOND 200 M

Mercator Projection  
WGS-84 Datum  
(Scale accurate at 2°S)



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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

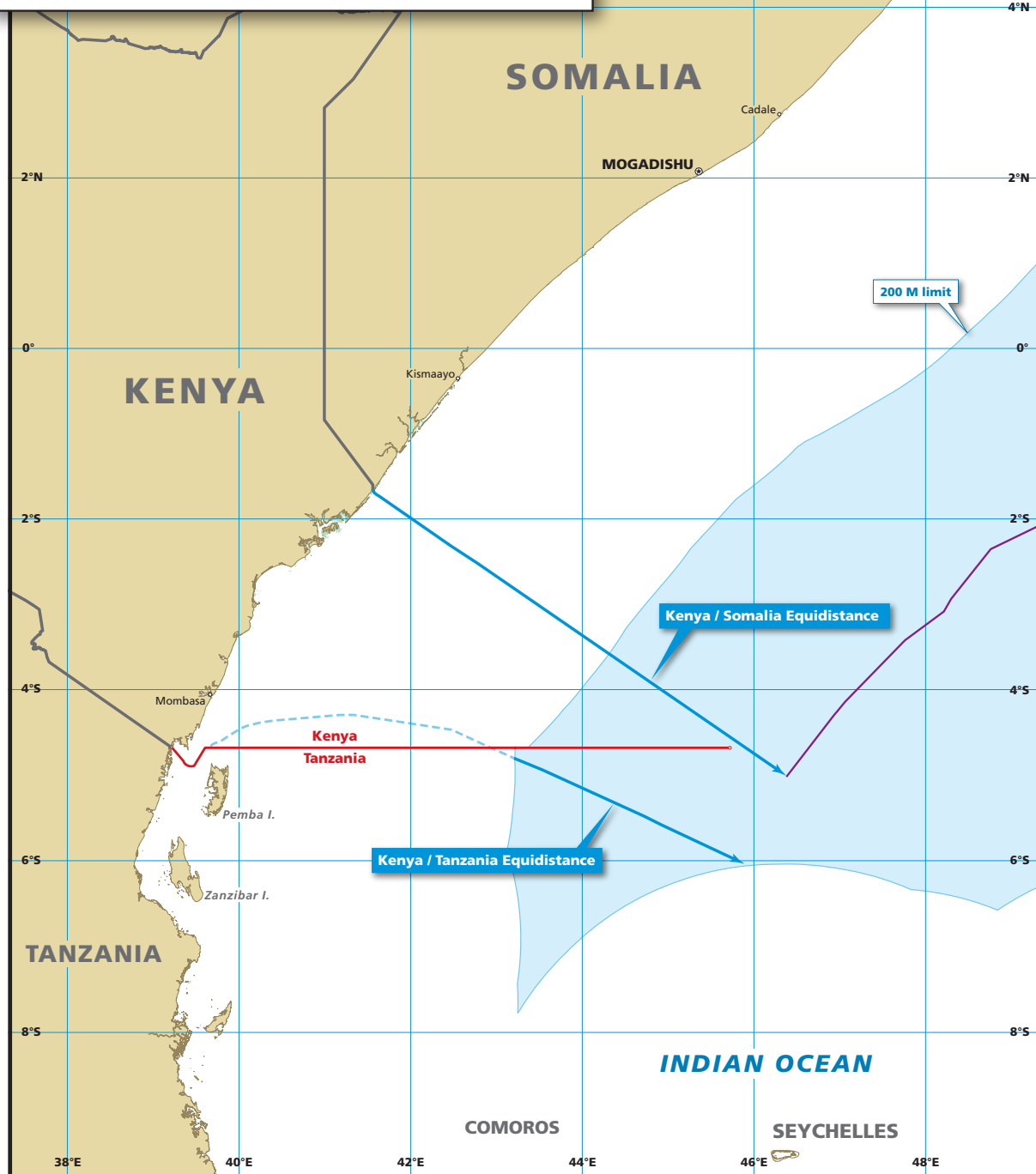


Figure 7.8





7.57. With regard to the continental shelf beyond 200 M, the non-disproportionality test applies by reference to the entire relevant area, and not separately for the areas within and beyond 200 M. This was the method applied both by the ITLOS in the *Bangladesh/Myanmar* case and by the Arbitral Tribunal in *Bangladesh v. India*:

“As set out above, the length of the relevant coast of Bangladesh is 418.6 kilometres. The length of the relevant coast of India is 803.7 kilometres. The ratio between the lengths of the relevant coasts of the parties is thus 1: 1.92.

As set out above, the relevant area comprises 406,833 square kilometres. Having adjusted the provisional equidistance line, the Tribunal’s delimitation lines allocates approximately 106,613 square kilometres of the relevant area to Bangladesh and approximately 300,220 square kilometres of the relevant area to India. The ratio of the allocated areas is approximately 1: 2.81.

The Tribunal finds that this ratio does not produce any significant disproportion in the allocation of maritime areas to the Parties that would require alteration of the adjusted equidistance line to ensure an equitable solution”.<sup>311</sup>

7.58. In the present case, the ratio between the lengths of the relevant coasts of the parties is of 733 km for Somalia against 466 for Kenya, that is 1.57:1, in favour of Somalia.<sup>312</sup> As reflected in **Figure 7.9** (following page 124), a boundary between Somalia and Kenya following equidistance, taking into account the delimitation line resulting from Kenya’s agreement with Tanzania,

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<sup>311</sup> *Bangladesh v. India*, paras. 495-497. See also *Bangladesh/Myanmar*, paras. 495-499.

<sup>312</sup> See, *supra*, paras. 6.27-6.30.

would leave Kenya with 41% of the relevant area (including some 16,700 km<sup>2</sup> beyond 200 M), and Somalia with 59%. That is a ratio of 1.44:1 in favour of Somalia. There is no disproportionality, gross or otherwise.

7.59. In contrast, Kenya's proposed boundary line would have an excessively disproportionate effect, since it would result in an apportionment of 81% of the area to Kenya, leaving Somalia with only 19% of the area, that is some approximately 1:4 in favour of Kenya (*see* **Figure 7.10** (following Figure 7.9)).

#### **Section IV. No Encroachment on Tanzania's Entitlements Beyond 200 M**

7.60. In its initial Submission to the CLCS, Somalia had considered that:

“Based on the current submission and the information published on the Commission's website regarding the Executive Summary of the submission made by the Federal Republic of Somalia, there is a potential overlap between the Somali and the Tanzanian claims as regards the areas of the continental shelf beyond 200 nautical miles”.<sup>313</sup>

7.61. However, after more thorough assessment, it is apparent that a strict equidistance line between Somalia and Kenya avoids any encroachment upon Tanzania's entitlements. The Executive Summary to Somalia's Submission to the CLCS has been amended accordingly and the revised full submission will be submitted in due course. As can be seen from **Figure 7.11** (following Figure 7.10), the equidistance line does not encroach upon Tanzania's entitlements beyond 200 M as they are reflected in Tanzania's submissions to the CLCS.

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<sup>313</sup> Federal Republic of Somalia, *Continental Shelf Submission of the Federal Republic of Somalia: Executive Summary* (21 July 2014), p. 9. MS, Vol. IV, Annex 70.

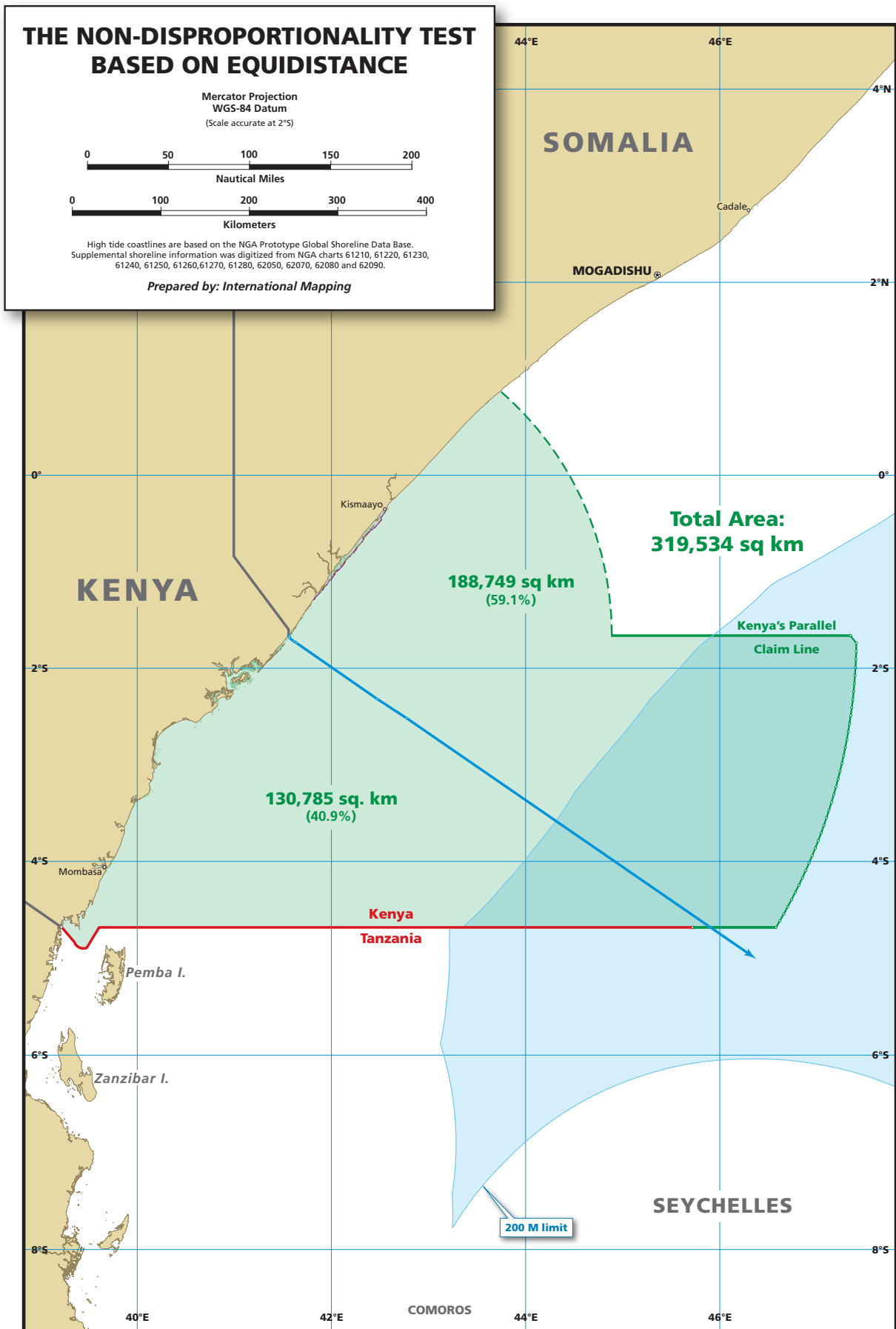


Figure 7.9



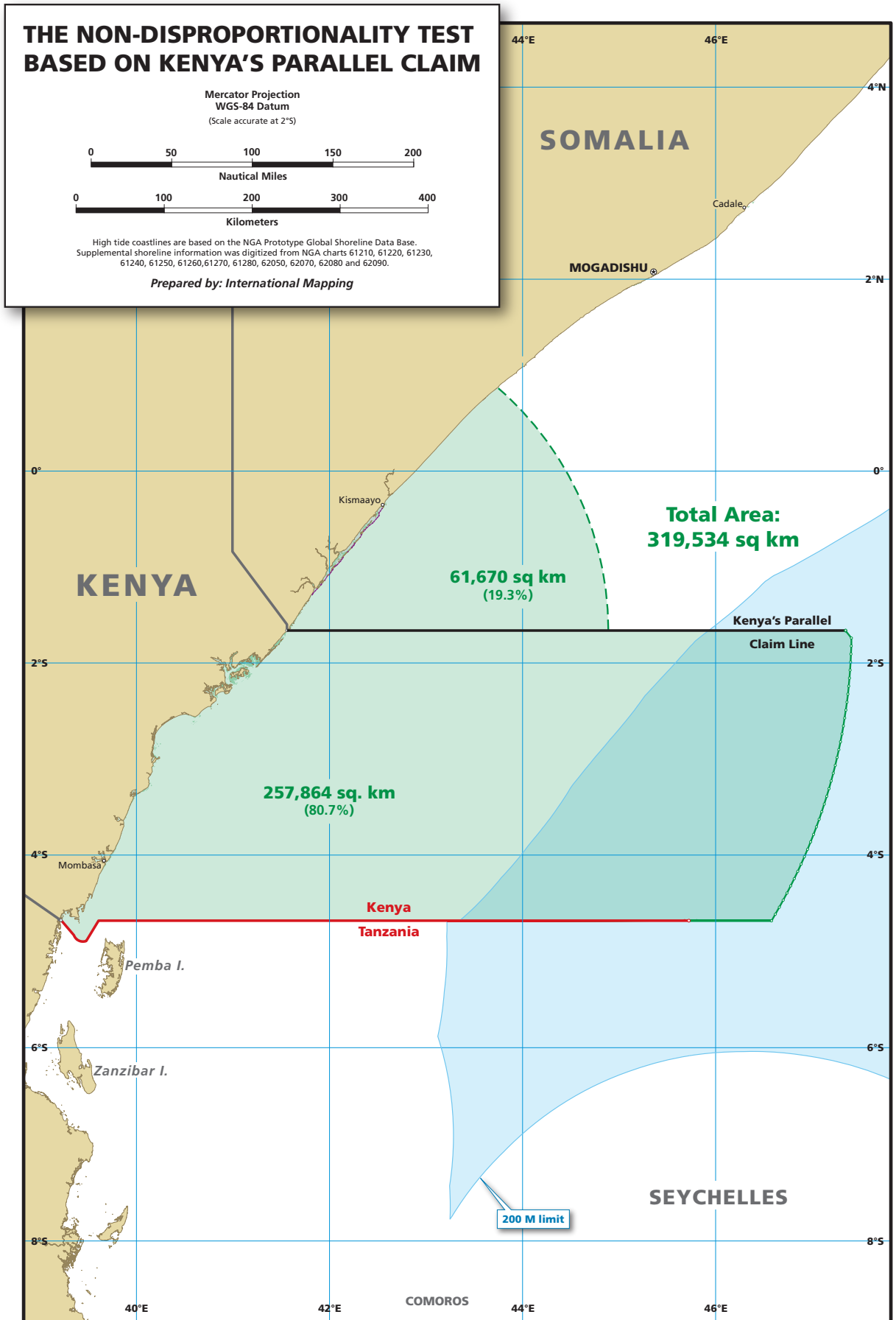
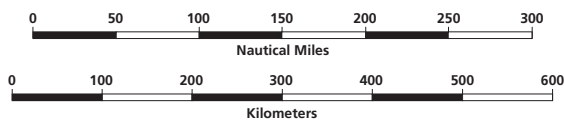


Figure 7.10



# EQUIDISTANCE BEYOND 200 M AVOIDS ANY OVERLAP WITH TANZANIA'S POTENTIAL ENTITLEMENTS

Mercator Projection  
WGS-84 Datum  
(Scale accurate at 2°S)



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Prepared by: International Mapping

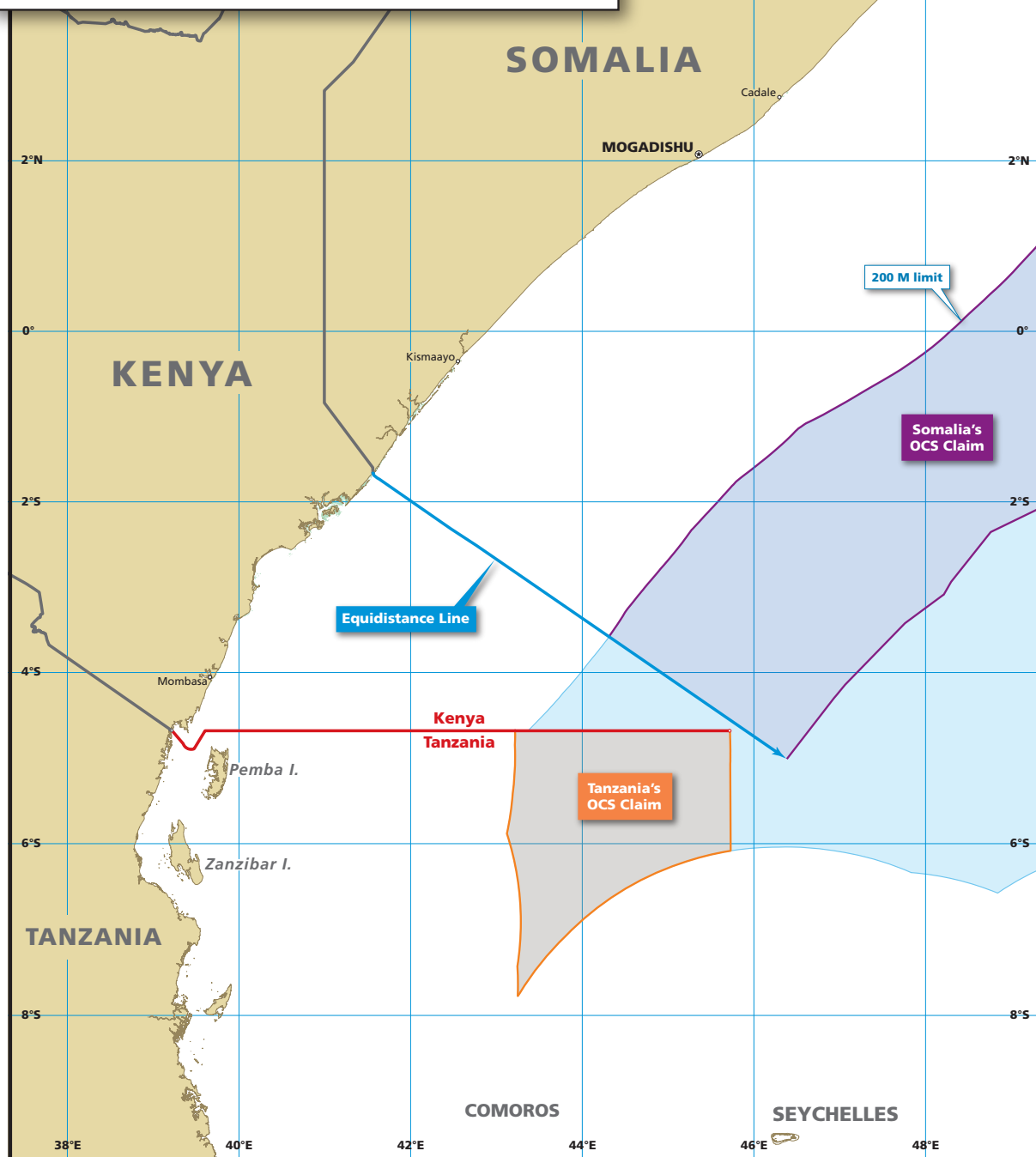


Figure 7.11





7.62. In any event, in the event there were an area of overlapping claims beyond 200 M, both Somalia and Tanzania have confirmed that they are ready to engage in consultations.<sup>314</sup>

7.63. Significantly, the Court is not invited to make any decision on any delimitation that would affect Tanzania's claim. Indeed,

“as Article 59 of the Statute of the Court makes clear, it is axiomatic that a judgment of the Court is not binding on any State other than the parties to the case. Moreover, the Court has always taken care not to draw a boundary line which extends into areas where the rights of third States may be affected. The Judgment by which the Court delimits the boundary addresses only Nicaragua's rights [in the present case: Somalia's rights] as against Colombia [in the present case Kenya] and vice versa and is, therefore, without prejudice to any claim of a third State or any claim which either Party may have against a third State”.<sup>315</sup>

7.64. The 2009 Agreement between Tanzania and Kenya does, however, have the effect of creating an area south of the Kenya-Tanzania agreed boundary, which is not claimed by either Kenya or Tanzania, but which is situated within 350 M of Somalia and is claimed by it (*see Figure 7.12* (in Volume II only)). Since Kenya renounced any claim in this area as a result of its Agreement with

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<sup>314</sup> *Note Verbale* from the Permanent Mission of the United Republic of Tanzania to the United Nations to the Commission on the Limits of the Continental Shelf, No. TZNY/P.60/2 (17 Oct. 2014). MS, Vol. III, Annex 49.

<sup>315</sup> *Nicaragua v. Colombia*, para. 228.

Tanzania, this cannot be considered as part of the relevant area for the present dispute.<sup>316</sup>

\*

7.65. Consequently, the delimitation between Somalia and Kenya beyond 200 M follows the equidistance line as described in Chapter 6 above, up to a point which will be established following the recommendations of the CLCS.

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<sup>316</sup> See *Nicaragua v. Colombia*, para. 163 (“The Court recalls that the relevant area cannot extend beyond the area in which the entitlements of both Parties overlap. Accordingly, if either Party has no entitlement in a particular area, whether because of an agreement it has concluded with a third State or because that area lies beyond a judicially determined boundary between that Party and a third State, that area cannot be treated as part of the relevant area for present purposes”).

## **CHAPTER 8. KENYA'S RESPONSIBILITY FOR ILLEGAL ACTIVITIES IN THE DISPUTED AREA**

8.1. As Somalia underscored in its Application, “Kenya has acted unilaterally ... to exploit both the living and the non-living resources”<sup>317</sup> of the disputed area. It has awarded several exploration blocks, and undertaken or authorised various companies to undertake exploration studies. In doing so, Kenya violated Somalia’s sovereignty and sovereign rights and jurisdiction, as well as the principles enshrined in UNCLOS. For these reasons, Kenya has engaged its international responsibility.

8.2. In **Section I** of this Chapter, Somalia will show that its claim relating to Kenya’s responsibility is admissible in the present proceedings. **Section II** demonstrates that Kenya has breached and continues to breach its international obligations. Lastly, **Section III** establishes that cessation and compensation are the appropriate forms of reparation in this case.

### **Section I. The Admissibility of Somalia’s Claim Concerning Kenya’s Responsibility for Unlawful Conduct**

8.3. This Court and international arbitral tribunals have entertained claims of responsibility made in the context of territorial or maritime delimitation disputes. Thus, in the *Temple of Preah Vihear* case, the Court considered that the claims concerning the withdrawal of armed forces and restitution of cultural objects potentially removed from the Temple or the Temple area were consequential on the claim of sovereignty:

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<sup>317</sup> *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, Application Instituting Proceedings (28 Aug. 2014), para. 25.

“In the presence of the claims submitted to the Court by Cambodia and Thailand, respectively, concerning the sovereignty over Preah Vihear thus in dispute between these two States, the Court finds in favour of Cambodia in accordance with her third Submission. It also finds in favour of Cambodia as regards the fourth Submission concerning the withdrawal of the detachments of armed forces.

As regards the fifth Submission of Cambodia concerning restitution, the Court considers that the request made in it does not represent any extension of Cambodia’s original claim (in which case it would have been irreceivable at the stage at which it was first advanced). Rather is it, like the fourth Submission, implicit in, and consequential on, the claim of sovereignty itself’.<sup>318</sup>

8.4. In the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria*, the Court, referring to the *Temple* case, addressed Cameroon’s claims relating to Nigeria’s responsibility for acts committed in areas where Cameroon was recognized to be the territorial sovereign.<sup>319</sup> In the same vein, in the *Territorial and Maritime Dispute (Nicaragua v. Colombia)* case, the ICJ considered Nicaragua’s request “that the Court adjudge and declare that ‘Colombia is not acting in accordance with her obligations under international law by stopping and otherwise hindering Nicaragua from accessing and disposing of her natural resources to the east of the 82<sup>nd</sup> meridian’”,<sup>320</sup> as unfounded.<sup>321</sup> In both of these latter cases, the Court thus considered the claims relating to responsibility admissible, even if it ultimately dismissed them on the merits.

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<sup>318</sup> *Temple of Preah Vihear (Cambodia v. Thailand)*, Merits, I.C.J. Reports 1962, p. 36.

<sup>319</sup> *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Merits, Judgment, I.C.J. Reports 2002, paras. 312-324.

<sup>320</sup> *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Merits, Judgment, I.C.J. Reports 2012 (hereinafter “*Nicaragua v. Colombia*”), para. 248.

<sup>321</sup> *Ibid.*, para. 250.

8.5. Likewise, in the *Guyana v. Suriname* arbitration, the Tribunal

“[did] not accept Suriname’s argument that in a maritime delimitation case, an incident engaging State responsibility in a disputed area renders a claim for reparations for the violation of an obligation provided for by the Convention and international law inadmissible”.<sup>322</sup>

8.6. More recently, in its Order dated 25 April 2015 the Special Chamber of ITLOS in the case relating to the *Dispute concerning delimitation of the maritime boundary between Ghana and Côte d’Ivoire in the Atlantic Ocean* unanimously prescribed the following provisional measures:

“(a) Ghana shall take all necessary steps to ensure that no new drilling either by Ghana or under its control takes place in the disputed area ...;

(b) Ghana shall take all necessary steps to prevent information resulting from past, ongoing or future exploration activities conducted by Ghana, or with its authorization, in the disputed area that is not already in the public domain from being used in any way whatsoever to the detriment of Côte d’Ivoire;

(c) Ghana shall carry out strict and continuous monitoring of all activities undertaken by Ghana or with its authorization in the disputed area with a view to ensuring the prevention of serious harm to the marine environment”.<sup>323</sup>

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<sup>322</sup> *Guyana v. Suriname*, Award, UNCLOS Annex VII Tribunal (17 Sept. 2007) (hereinafter “*Guyana v. Suriname*”), paras. 423.

<sup>323</sup> *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d’Ivoire in the Atlantic Ocean (Ghana/Côte d’Ivoire)*, Provisional Measures, Order of 25 April 2015, ITLOS (hereinafter “*Ghana/Côte d’Ivoire*”), para. 108(1).

In so doing, the Special Chamber recognized that Ghana's acts and omissions formed part of the subject-matter of the maritime delimitation dispute the parties had submitted to it.

8.7. Similarly, in the present case, the Court has jurisdiction to decide on the rights of Somalia and Kenya in the area in dispute and to draw the consequences stemming from their violation.

## **Section II. Kenya's Violation of Somalia's Sovereignty and Sovereign Rights Triggers Its International Responsibility**

### **A. THE PRINCIPLE OF EXCLUSIVITY OF RIGHTS IN MARITIME ZONES**

8.8. It is a fundamental principle of international law that

“Sovereignty in the relations between States ... is the right to exercise therein, to the exclusion of any other State, the functions of a State. The development of the national organisation of States during the last few centuries and, as a corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations”.<sup>324</sup>

8.9. As the Court stated in *Nicaragua v. Colombia*: “In accordance with long-established principles of customary international law, a coastal State possesses sovereignty over the sea bed and water column in its territorial sea .... By

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<sup>324</sup> *Island of Palmas Case (Netherlands/USA)*, Award (4 Apr. 1928), R.I.A.A., Vol. II, at p. 838.

contrast, coastal States enjoy specific rights, rather than sovereignty, with respect to the continental shelf and exclusive economic zone”.<sup>325</sup>

8.10. Even if there is a distinction between the authority a coastal State exercises in the territorial sea on, the one hand, and in the EEZ and continental shelf, on the other hand, it nonetheless remains true that, in both cases:

“Sovereign rights at sea entail exclusiveness as to the exploration and exploitation of resources, thereby preventing other States from exercising such activities. ... In the same way, whenever a State engages in activities relating to the resources of another State or in other activities that fall under the latter’s exclusive rights or jurisdiction in the latter’s maritime zones, it is in breach of its exclusive rights. This necessarily entails the former’s international responsibility and a duty to provide full reparation for the injury caused”.<sup>326</sup>

8.11. Being an automatic corollary of sovereignty or of sovereign rights that a State inherently enjoys under international law, the principle of exclusivity logically applies to the maritime areas which are disputed by two or more States. The settlement of such a dispute, by way of conventional or judicial delimitation of the areas pertaining to each Party, does not establish the authority of the concerned State in the maritime areas recognized as belonging to it. As the Court underlined in the *North Sea Continental Shelf* case, delimitation “is a process which involves establishing the boundaries of an area already, in principle,

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<sup>325</sup> *Nicaragua v. Colombia*, para. 177. See *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Merits, Judgment, I.C.J. Reports 2001, para. 174.

<sup>326</sup> E. Milano and I. Papanicolopulu, “State Responsibility in Disputed Areas on Land and at Sea”, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV)*, Vol. 71 (2011), p. 588. MS, Vol. IV, Annex 90.

appertaining to the coastal State and not the determination *de novo* of such an area”.<sup>327</sup>

8.12. For these reasons, economic activities conducted in a disputed maritime area call for reparation when they constitute a violation of the exclusive rights of the State whose jurisdiction over the maritime areas is recognized following delimitation. These activities include the exploration of these maritime areas in order to obtain information on the existence of exploitable living and non-living resources, and *a fortiori* their economic exploitation.

8.13. The Court acknowledged just this point in its Order on provisional measures in the *Aegean Sea Continental Shelf* case, where Turkey’s unilateral seismic surveys were considered by Greece to infringe upon its sovereign rights:

“Whereas seismic exploration of the natural resources of the continental shelf without the consent of the coastal state might, no doubt, raise a question of infringement of the latter’s exclusive right of exploration; whereas, accordingly, in the event that the Court should uphold Greece’s claims on the merits, Turkey’s activity in seismic exploration might then be considered as such an infringement and invoked as a possible cause of prejudice to the exclusive rights of Greece in areas then found to appertain to Greece ...”.<sup>328</sup>

8.14. While it is true that the circumstances of that particular situation did not “suffice to justify recourse to its exceptional power under Article 41 of the Statute

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<sup>327</sup> *North Sea Continental Shelf (Federal Republic of Germany/Netherlands)*, Judgment, I.C.J. Reports 1969, para. 18. See also, e.g., *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, Judgment, I.C.J. Reports 1993, para. 64.

<sup>328</sup> *Aegean Sea Continental Shelf (Greece v. Turkey)*, Request for the Indication of Interim Measures of Protection, Order, I.C.J. Reports 1976 (hereinafter “*Greece v. Turkey*”), para. 31.



to indicate interim measures of protection”,<sup>329</sup> the Court nonetheless considered that “the alleged breach by Turkey of the exclusivity of the right claimed by Greece to acquire information concerning the natural resources of areas of continental shelf, if it were established, is one that might be capable of reparation by appropriate means”.<sup>330</sup>

8.15. This line of thinking was recently confirmed by the ITLOS Special Chamber in its Order on provisional measures in the *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d’Ivoire in the Atlantic Ocean*. In this respect, it must be noted that there, as here, the Chamber was called upon to apply UNCLOS:

“*Considering* that the Special Chamber considers that the rights of the coastal State over its continental shelf include all rights necessary for and connected with the exploration and exploitation of the natural resources of the continental shelf and that the exclusive right to access to information about the resources of the continental shelf is plausibly among those rights;

*Considering* that the acquisition and use of information about the resources of the disputed area would create a risk of irreversible prejudice to the rights of Côte d’Ivoire should the Special Chamber, in its decision on the merits, find that Côte d’Ivoire has rights in all or any part of the disputed area”.<sup>331</sup>

8.16. This holds true *a fortiori* if the resources of the area recognized as belonging to the other party are exploited. The Special Chamber explained in its

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<sup>329</sup> *Ibid.*, para. 32.

<sup>330</sup> *Ibid.*, para. 33.

<sup>331</sup> *Ghana/Côte d’Ivoire*, paras. 94-95.

Order of 25 April 2015 that “the sovereign rights include all rights necessary for or connected with the exploration of the continental shelf and the exploitation of its natural resources”; they “comprise rights of sovereignty over the territorial sea and its subsoil (article 2, paragraph 2, of the Convention) and sovereign rights of exploration and exploitation of the natural resources of the continental shelf (articles 56, paragraph 1, and 77, paragraph 1, of the Convention)”.<sup>332</sup> This applies equally to the living resources of the waters of the territorial sea and of the EEZ (Articles 2, paragraph 1 and 56, paragraph 1, 61 and 62 of the UNCLOS).

8.17. Moreover, as the Special Chamber also noted in its April 2015 Order, drilling activities “result in significant and permanent modification of the physical character of the area in dispute” which may cause (and, indeed, unavoidably cause) irreparable prejudice which “cannot be fully compensated by financial reparations”.<sup>333</sup>

8.18. This Court itself has stated that activities causing alterations to the subsoil, or the appropriation or use of the resources cause prejudice to the sovereign rights of the coastal State:

“whereas no complaint has been made that this form of seismic exploration involves any risk of physical damage to the seabed or subsoil or to their natural resources; whereas the continued seismic exploration activities undertaken by Turkey are all of the transitory character just described, and do not involve the establishment of installations on or above the seabed of the continental shelf; and whereas no suggestion has been made that Turkey has embarked upon any operations involving the actual appropriation or other use of the natural

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<sup>332</sup> *Ibid.*, para. 61.

<sup>333</sup> *Ibid.*, para. 89. *See also ibid.*, para. 90.

resources of the areas of the continental shelf which are in dispute ...”.<sup>334</sup>

B. KENYA’S UNILATERAL ACTIVITIES IN THE DISPUTED AREA ARE UNLAWFUL

8.19. As discussed in Chapter 3, several exploration blocks awarded by Kenya to oil companies are situated in the disputed area (*see Figure 8.1* (following page 136)).

8.20. **Block L-13** lies closest to shore on both sides of the equidistance line. According to publicly available information, it was awarded to SOHI Gas-Dodori Ltd in 2008.<sup>335</sup> In 2011, Zarara Oil & Gas Limited, a subsidiary of Midway Resources International (“MRI”), replaced SOHI Gas-Dodori Ltd. as the operator.<sup>336</sup> The contract was renewed at the end of 2012.<sup>337</sup> It appears that, in 2013, the company “completed the acquisition, processing and interpretation of 6,262 line kms of gravity-magnetic data across the original area of its operated Blocks L4 and L13[...] which will be followed-up by an additional seismic survey programme to be executed by MRI over the next 24 months”.<sup>338</sup> On 20 September

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<sup>334</sup> *Greece v. Turkey*, para. 30. *See also Guyana v. Suriname*, paras. 465-470.

<sup>335</sup> IHS Inc., EDIN Database, *Kenya: Contracts Block L-13* (2015). MS, Vol. IV, Annex 134.

<sup>336</sup> Its consortium partners were Swiss Oil Company and the National Oil Corporation of Kenya. Deloitte, “Kenya”, in *THE DELOITTE GUIDE TO OIL AND GAS IN EAST AFRICA: UNIQUELY STRUCTURED* (2014), p. 11. MS, Vol. IV, Annex 116. *See also* Midway Resources International, *Media Release: Midway Resources International (“MRI”) completes gravity-magnetic seismic data acquisition programs on Blocks L13 and L4, Kenya* (19 July 2013). MS, Vol. IV, Annex 114; Republic of Kenya, Ministry of Energy and Petroleum, *Draft National Energy And Petroleum Policy* (20 Jan. 2015), Table 2-2. MS, Vol. III, Annex 29.

<sup>337</sup> IHS Inc., EDIN Database, *Kenya: Contracts Block L-13* (2015). MS, Vol. IV, Annex 134.

<sup>338</sup> Midway Resources International, *Media Release: Midway Resources International (“MRI”) completes gravity-magnetic seismic data acquisition programs on Blocks L13 and L4, Kenya* (19 July 2013), p. 2. MS, Vol. IV, Annex 114.

2014, the Attorney-General of Somalia wrote MRI to protest its “gross violations of Somalia’s sovereignty and territorial integrity”.<sup>339</sup>

8.21. **Block L-5**, which also straddles the equidistance line, was first offered in July 2000, and originally included both onshore and offshore areas.<sup>340</sup> Star Petroleum International signed a surface exploration contract in October 2000.<sup>341</sup> In April 2001, Dana Petroleum became the operator,<sup>342</sup> and carried out 2D and 3D seismic studies.<sup>343</sup> In May 2003 Woodside Petroleum took over, acquiring seismic data in this area.<sup>344</sup> In 2006, Woodside drilled the first deep-water well off Kenya, the Pomboo-1, on Somalia’s side of the equidistance line.<sup>345</sup> (The well turned up dry.<sup>346</sup>) Woodside’s contract expired on 11 July 2008.<sup>347</sup>

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<sup>339</sup> Letter from H.E. Ahmed Ali Dahir, Attorney-General of the Federal Republic of Somalia, to Mr. Peter Worthington, Chief Executive Officer of Midway Resources International, No. 02/124/XIG/2014 (20 Sept. 2014), p. 2. MS, Vol. IV, Annex 77.

<sup>340</sup> IHS Inc., EDIN Database, *Kenya: Contracts Block L-05/Block L05* (2015). MS, Vol. II, Annex M10.

<sup>341</sup> *Ibid.*

<sup>342</sup> *Ibid.*

<sup>343</sup> Dana Petroleum plc, *Annual Report & Accounts 2002* (2003), p. 6. MS, Vol. IV, Annex 99.

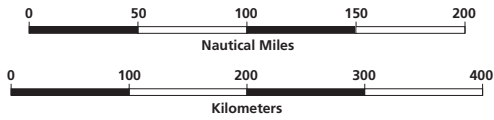
<sup>344</sup> IHS Inc., EDIN Database, *Kenya: Contracts Block L-05/Block L05* (2015). MS, Vol. IV, Annex 133. See also Nina Rach, “Kenya forges ahead”, *oedigital.com* (1 July 2013). MS, Vol. IV, Annex 113; Thomas Pearmain, “Woodside Spuds Offshore Well; Kenya’s Oil Future to Be Determined in 2007”, *Global Insight* (5 Dec. 2006). MS, Vol. IV, Annex 100. Woodside initially led a consortium of independent exploration companies and was the operator for Block L-5, having a 30% stake. The remaining interests were held by Dana Petroleum (30%), Repsol (20%), and Global Petroleum (20%). Thomas Pearmain, “Woodside Well in Kenya a Duster”, *Global Insight* (23 Jan. 2007). MS, Vol. IV, Annex 100.

<sup>345</sup> See Chris Lo, “Offshore Kenya: keeping up the neighbors”, *Offshore Technology Market & Customer Insight* (13 Jan. 2014), p. 1. MS, Vol. IV, Annex 118; Nina Rach, “Kenya forges ahead”, *oedigital.com* (1 July 2013). MS, Vol. IV, Annex 113. This well was 2193 m (7195 feet) deep. Nina Rach, “Kenya forges ahead”, *oedigital.com* (1 July 2013), p. 2. MS, Vol. IV, Annex 113.

<sup>346</sup> Republic of Kenya, National Assembly, *Official Report* (24 Apr. 2007), p. 858. MS, Vol. III, Annex 26; Republic of Kenya, National Assembly, *Official Report* (8 Aug. 2007), p. 3057. MS, Vol. III, Annex 27.

# KENYA'S OFF-SHORE OIL CONCESSION BLOCKS

Mercator Projection  
WGS-84 Datum  
(Scale accurate at 2°S)



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

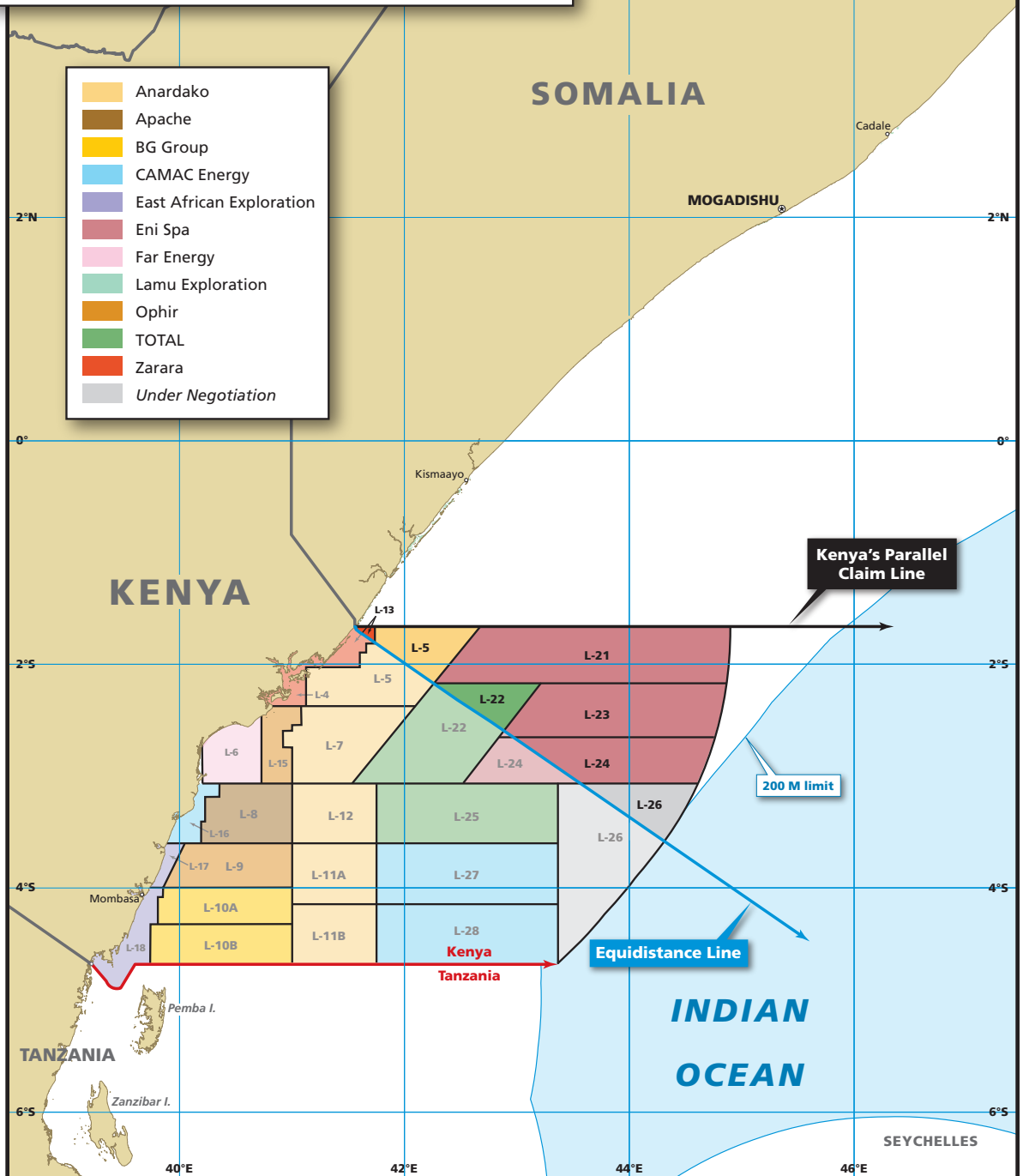


Figure 8.1



8.22. In April 2009, Kenya offered a redrawn L-5 for surface exploration and drilling. In June 2009, Anadarko Kenya Corporation, a subsidiary of U.S.-based Anadarko Petroleum Corporation, was awarded the contract.<sup>348</sup> Total S.A. of France later gained a 20% stake in the block.<sup>349</sup> The company announced that exploratory drilling was scheduled in 2015, in its offshore blocks awarded by Kenya, although the publicly available information does not indicate where exactly this drilling will take place.<sup>350</sup>

8.23. **Block L-22**, which straddles the equidistance line in areas between approximately 52 and 104 M from the coast, was awarded to Total S.A. in 2012.<sup>351</sup> In 2013, Total carried out a “2D seismic survey and sea core drilling operations”,<sup>352</sup> followed by additional “seabed core drilling operations” and a “3D seismic survey” in 2014.<sup>353</sup> On 20 September 2014, the Attorney-General of

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<sup>347</sup> IHS Inc., EDIN Database, *Kenya: Contracts Block L-05/Block L05* (2015). MS, Vol. IV, Annex 133.

<sup>348</sup> *Ibid.*; Nina Rach, “Kenya forges ahead”, *oedigital.com* (1 July 2013). MS, Vol. IV, Annex 113. Its consortium partners were the French company Total, and Government-Kenya, PTTEP. Deloitte, “Kenya”, in *THE DELOITTE GUIDE TO OIL AND GAS IN EAST AFRICA: UNIQUELY STRUCTURED* (2014), p. 10. MS, Vol. IV, Annex 116; Anadarko Petroleum Corporation, *Second-Quarter 2013 Operations Report* (29 July 2013), p. 13. MS, Vol. IV, Annex 115.

<sup>349</sup> 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.

<sup>350</sup> “Anadarko to Drill Play-Opening Deepwater Well in Kenya”, *Oil & News Kenya* (15 Mar. 2015). MS, Vol. IV, Annex 126.

<sup>351</sup> Total S.A., *Press Release: Total Steps Up Exploration Activities in Kenya with the Award of the Offshore L22 License in the Lamu Basin* (27 June 2012). MS, Vol. IV, Annex 102; Kennedy Senelwa, “Kenya ministry signs contracts for oil drilling”, *The East African* (7 July 2012). MS, Vol. IV, Annex 108.

<sup>352</sup> Total S.A., *Factbook 2013* (2013), p. 85. MS, Vol. IV, Annex 111.

<sup>353</sup> Total S.A., *Factbook 2014* (2014), p. 81. MS, Vol. IV, Annex 117.

Somalia protested Total's "gross violations of Somalia's sovereignty and territorial integrity".<sup>354</sup>

8.24. **Blocks L-21, L-23 and L-24**<sup>355</sup>—which lie in deeper water entirely (in the case of L-21 and L-23) or predominantly (in the case of L-24) on the Somali side of the equidistance line—were awarded to the Italian company Eni S.p.A. in 2012.<sup>356</sup> On 24 April 2014, the Somali Ministry of Foreign Affairs sent a letter to Eni S.p.A. informing it that these blocks "l[ay] within the maritime zones of Somalia" and "condemn[ing]" its activities.<sup>357</sup>

8.25. **Block L-26** also lies on both sides of the equidistance line in far offshore areas. Earlier negotiations over this block with Norway's Statoil collapsed when the company withdrew because the block was located in the disputed area.<sup>358</sup>

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<sup>354</sup> Letter from H.E. Ahmed Ali Dahir, Attorney-General of the Federal Republic of Somalia, to Mr. Christophe de Margerie, Chief Executive Officer of Total S.A., No. 03/125/XIG/2014 (20 Sept. 2014), p. 2. MS, Vol. IV, Annex 78.

<sup>355</sup> Insofar as Somalia can tell, Block L-25 seems to be outside the disputed area. However, Kenyan public records as to the location of that block are inconsistent: one document depicts it as situated within the disputed area, *see* National Oil Company of Kenya, *Kenya Exploration Blocks (2006)*, available at <http://www.nationaloil.co.ke/image/blockstatus.jpg>. MS, Vol. III, Annex 25, whereas another depicts it as outside of that area, *see* Republic of Kenya, Ministry of Energy and Petroleum, *Draft National Energy And Petroleum Policy* (20 Jan. 2015), Figure 2-1. MS, Vol. III, Annex 29.

<sup>356</sup> Eni S.p.A., *Press Release: Eni enters Kenya with the acquisition of three exploration blocks* (2 July 2012). MS, Vol. IV, Annex 106. *See also* IHS Inc., EDIN Database, *Kenya: Contracts Block L21* (2015). MS, Vol. IV, Annex 135; IHS Inc., EDIN Database, *Kenya: Contracts Block L23* (2015). MS, Vol. IV, Annex 136; IHS Inc., EDIN Database, *Kenya: Contracts Block L24* (2015). MS, Vol. IV, Annex 123.

<sup>357</sup> Letter from Dr. Abdirahman D. Beileh, Ministry of Foreign Affairs & Investment Promotion of the Federal Republic of Somalia, to Mr. Paolo Scaroni, Chief Executive Officer of Eni S.p.A., No. MOFA/MO/1043/2014 (24 Apr. 2014), p. 1. MS, Vol. IV, Annex 74.

<sup>358</sup> *See* Kingdom of Norway, Ministry of Foreign Affairs, "Norway regrets claims by a UN report linking Norwegian development efforts to commercial interests in Somalia" (25 July 2013). MS, Vol. III, Annex 34. *See* Rawlings Otini, "Kenya expels oil giant Statoil from exploration plan", *Business Daily Africa* (5 Nov. 2012). MS, Vol. IV, Annex 109. *See also* 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. 28. MS, Vol. III, Annex 64.



Kenya then awarded Lamu Oil and Gas Limited, a joint venture between the Jordanian oil company Edgo and Qatar First Investment Bank, an exploration licence in July 2012.<sup>359</sup> The licence was, however, relinquished in January 2013 due to “the technical difficulties of drilling in [the block’s] very deep water”.<sup>360</sup> Thus, Block L-26 appears currently to be unlicensed.<sup>361</sup>

8.26. The Kenyan government also authorised companies which are not operators to undertake additional seismic activities in the disputed area. In 2008, seismic data were acquired by PGS in association with the National Oil Corporation of Kenya, which included data relating to Block L-22.<sup>362</sup> In 2013-2014, 2D seismic surveys were carried out in blocks L-21, L-22, L-23, L-24 and L-26. These studies were carried out by Schlumberger,<sup>363</sup> which was granted a non-exclusive exploration licence.<sup>364</sup> The Kenyan Government intends to use the information thus acquired in order to fortify its position in the next licensing

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<sup>359</sup> IHS Inc., EDIN Database, *Kenya: Contracts Block L26* (2015). MS, Vol. IV, Annex 124; Kelly Gilblom, “Middle Eastern oil explorer gives up licence in Kenya”, *Reuters* (28 Jan. 2013). MS, Vol. IV, Annex 112.

<sup>360</sup> Kelly Gilblom, “Middle Eastern oil explorer gives up licence in Kenya”, *Reuters* (28 Jan. 2013). MS, Vol. IV, Annex 112; IHS Inc., EDIN Database, *Kenya: Contracts Block L26* (2015). MS, Vol. IV, Annex 124.

<sup>361</sup> See Nina Rach, “Kenyan explorers look deeper offshore”, *oedigital.com* (1 July 2014), p. 3. MS, Vol. IV, Annex 120. See also Republic of Kenya, Ministry of Energy and Petroleum, *Draft National Energy And Petroleum Policy* (20 Jan. 2015), Table 2-2. MS, Vol. III, Annex 29.

<sup>362</sup> See Petroleum Geo-Services, “Kenya-Lamu Basin PGS MultiClient2D”, available at [http://www.pgs.com/pageFolders/241891/kenya\\_lamu\\_mc2d\\_a3ds\\_0412\\_std.pdf](http://www.pgs.com/pageFolders/241891/kenya_lamu_mc2d_a3ds_0412_std.pdf) (last accessed 8 June 2015). MS, Vol. IV, Annex 129.

<sup>363</sup> See Schlumberger, “Multiclient Latest Projects: Kenya Deepwater 2D 2013 Multiclient Seismic Survey”, available at [http://www.multiclient.slb.com/en/latest-projects/africa/kenya\\_2d.aspx](http://www.multiclient.slb.com/en/latest-projects/africa/kenya_2d.aspx) (last accessed 9 June 2015). MS, Vol. IV, Annex 130; Schlumberger, “Kenya Multiclient Seismic Surveys: 2D offshore data”, available at <http://www.multiclient.slb.com/africa/east-africa/kenya.aspx> (last accessed 9 June 2015). MS, Vol. IV, Annex 131; Schlumberger, “Kenya Multiclient Seismic Surveys Map”, available at <http://www.multiclient.slb.com/africa/east-africa/kenya.aspx> (last accessed 9 June 2015). MS, Vol. IV, Annex 132.

<sup>364</sup> See Hon. Davis Chirchir, Minister of Energy & Petroleum, Republic of Kenya, *Speech: Official Opening of the 5th East Africa, Oil, Gas and Energy Conference* (29 Apr. 2014), p. 2. MS, Vol. III, Annex 28.

negotiations.<sup>365</sup> Moreover, it appears that, “[o]n the offshore L22 license, seabed core drilling operations were carried out in early 2014 and a 3D seismic survey was carried out”.<sup>366</sup>

8.27. Thus, the Kenyan government itself has undertaken, or authorised private companies to undertake, extensive seismic research in the disputed area, acquiring information as to the nature, extent and economic viability of the potential resources in the area. For its part, Somalia has protested against this illegal exploration in maritime areas it claims as its own.<sup>367</sup> It has also ordered the companies involved to cease their activities,<sup>368</sup> though several have refused to do so.<sup>369</sup>

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<sup>365</sup> See John Gachiri, “National Oil, American firm finish survey of Lamu oil blocks”, *Business Daily* (2 Dec. 2014). MS, Vol. IV, Annex 122.

<sup>366</sup> Total S.A., *Factbook 2014* (2014), p. 81. MS, Vol. IV, Annex 117.

<sup>367</sup> See Kelly Gilblom, “Kenya, Somalia border row threatens oil exploration”, *Reuters* (20 Apr. 2012). MS, Vol. IV, Annex 104; and Kelly Gilblom, “Somalia challenges Kenya over oil blocks”, *Reuters* (6 July 2012). MS, Vol. IV, Annex 107.

<sup>368</sup> See *Letter* from Dr. Abdirahman D. Beileh, Ministry of Foreign Affairs & Investment Promotion of the Federal Republic of Somalia, to Mr. Paolo Scaroni, Chief Executive Officer of Eni S.p.A., No. MOFA/MO/1043/2014 (24 Apr. 2014). MS, Vol. IV, Annex 74; *Letter* from H.E. Ahmed Ali Dahir, Attorney-General of the Federal Republic of Somalia, to Mr. Claudio Descalzi, Chief Executive Officer of Eni S.p.A., No. 01/115/XIG/2014 (16 Sept. 2014). MS, Vol. IV, Annex 76; *Letter* from H.E. Ahmed Ali Dahir, Attorney-General of the Federal Republic of Somalia, to Mr. Peter Worthington, Chief Executive Officer of Midway Resources International, No. 02/124/XIG/2014 (20 Sept. 2014). MS, Vol. IV, Annex 77; *Letter* from H.E. Ahmed Ali Dahir, Attorney-General of the Federal Republic of Somalia, to Mr. Christophe de Margerie, Chief Executive Officer of Total S.A., No. 03/125/XIG/2014 (20 Sept. 2014). MS, Vol. IV, Annex 78.

<sup>369</sup> See *Letter* from Mr. Massimo Mantovani, Senior Executive Vice President, General Counsel Legal Affairs Department, Eni S.p.A., to H.E. Abdirahman D. Beileh, Minister of Foreign Affairs of the Federal Republic of Somalia, No. Prot. Dialag 10 (9 June 2014). MS, Vol. IV, Annex 75; *Letter* from Mr. Claudio Descalzi, Chief Executive Officer of Eni S.p.A., to H.E. Abdirahman D. Beileh, Minister of Foreign Affairs of the Federal Republic of Somalia, and H.E. Ahmed Ali Dahir, Attorney-General of the Federal Republic of Somalia, No. 85 (3 Oct. 2014). MS, Vol. IV, Annex 79.

8.28. Kenya's unilateral activities "no doubt, raise a question of infringement of [Somalia's] exclusive right of exploration"<sup>370</sup> and engage Kenya's international responsibility. The envisaged drilling in view of the exploitation of the resources of the continental shelf and, possibly, of the territorial sea, would *a fortiori* entail Kenya's responsibility.

### **Section III. Consequences of Kenya's Responsibility**

8.29. The obligation of cessation<sup>371</sup> of the wrongful act is the first of the consequences triggered by Kenya's violation of Somalia's exclusive rights of exploration. The acquisition and retention of data is a continuing violation of an international obligation. In cases where the wrongful act consists of the acquiring and continuing possession and analysis of confidential data, as well as its transmission to third parties (like the oil companies interested in the exploitation of maritime areas), *restitutio in integrum* is not possible. As the Court said in its provisional measures Order of 3 March 2014 in the *Certain Documents and Data* case between Timor-Leste and Australia,

"Any breach of confidentiality may not be capable  
of remedy or reparation as it might not be possible

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<sup>370</sup> *Greece v. Turkey*, para. 31. See also *supra* paras. 8.8-8.15.

<sup>371</sup> See Article 30 of the ILC's *Articles on Responsibility of States for Internationally Wrongful Acts*:

"Cessation and non-repetition

The State responsible for the internationally wrongful act is under an obligation:

(a) to cease that act, if it is continuing;

(b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require".

International Law Commission, *Commentary on the Draft Articles on Responsibility of States for Internationally Wrongful Acts*, in *Report of the International Law Commission on the work of its fifty-third session (23 April-1 June and 2 July-10 August 2001)*, in YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, Vol. II, Part 2 (2001), p. 88. MS, Vol. III, Annex 54.

to revert to the *status quo ante* following disclosure of the confidential information”.<sup>372</sup>

8.30. It is therefore not sufficient for Kenya to cease collection of seismic data, after the Court has delivered its judgment on delimitation. Kenya must also be ordered to deliver to Somalia all the data it has acquired in relation to portions of the disputed area that are finally recognized as pertaining to Somalia. Kenya must also be ordered not to further disseminate the data thus acquired and to take all necessary measures in order to prevent the companies that undertook the surveys from disseminating this data. If, during the present proceedings, Somalia has reason to believe that Kenya is acting contrary to this duty, it reserves its right to request provisional measures indicating that Kenya must refrain from such activities.

8.31. In the same vein, it must be recalled that as indicated in Article 29 of the ILC Articles on the Responsibility of States for Internationally Wrongful Acts (*Continued duty of performance*):

“The legal consequences of an internationally wrongful act under this part do not affect the continued duty of the responsible State to perform the obligation breached”.

This is true in the present case, and indeed Kenya cannot take shelter behind the fact that the Court has not yet decided on the maritime boundary between the Parties to continue to breach its duty not to create a *fait accompli* in the disputed area.

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<sup>372</sup> *Questions relating to the seizure and detention of Certain Documents and Data (Timor-Leste v. Australia)*, Request for the Indication of Provisional Measures, Order of 3 March 2014, I.C.J., para. 42. See also *Ghana/Côte d’Ivoire*, paras. 47, 92.

8.32. This also applies during the duration of the present proceedings: Kenya continues to develop its strategy of exploration in the area, to grant concessions, to undertake seismic studies and even to conduct drilling operations,<sup>373</sup> despite being well aware of Somalia's claim. In so doing, it not only breaches Somalia's sovereign rights, but it also aggravates the dispute that has been submitted to the Court for decision.

8.33. It also goes without saying that in the event Kenya's activities affect Somalia's rights in a permanent manner, the former "is under an obligation to make full reparation for the injury caused by the internationally wrongful act".<sup>374</sup> In the present case, restitution—which "is the first of the forms of reparation available to a State injured by an internationally wrongful act"<sup>375</sup>—is hardly practicable. The Special Chamber of ITLOS recently underscored:

*"Considering that, whatever its nature, any compensation awarded would never be able to restore the status quo ante in respect of the seabed and subsoil; ...*

*Considering that the acquisition and use of information about the resources of the disputed area would create a risk of irreversible prejudice to the rights of Côte d'Ivoire should the Special Chamber, in its decision on the merits, find that Côte d'Ivoire has rights in all or any part of the disputed area;*

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<sup>373</sup> See, *supra*, paras. 8.19-8.28.

<sup>374</sup> ILC, *Commentary on the Draft Articles on Responsibility of States for Internationally Wrongful Acts*, in YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, Vol. II, Part 2 (2001), Art. 31(1). MS, Vol. III, Annex 54. See also *Case Concerning the Factory at Chorzów, Merits, Judgment, 1928, P.C.I.J. Series A, No. 17*, p. 47; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010, para. 273.

<sup>375</sup> ILC, *Commentary on the Draft Articles on Responsibility of States for Internationally Wrongful Acts*, in YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, Vol. II, Part 2 (2001), Art. 35 Commentary, para. 1. MS, Vol. III, Annex 54.

*Considering* therefore that the exploration and exploitation activities, as planned by Ghana, may cause irreparable prejudice to the sovereign and exclusive rights invoked by Côte d'Ivoire in the continental shelf and superjacent waters of the disputed area ...".<sup>376</sup>

8.34. As a result, "insofar as" the damage caused by Kenya's internationally wrongful acts cannot be "made good by restitution", it is "under an obligation to compensate for the damage".<sup>377</sup> Compensation would, of course, be the only means of reparation if Kenya extracts, or authorizes extraction of, oil within this area before the end of the present proceedings.<sup>378</sup> The same would hold true in case Kenya continues to encourage or authorize fisheries in the maritime area under Somalia's jurisdiction.

8.35. Accordingly, Somalia requests the Court to adjudge and declare that Kenya, by its conduct, has engaged its international responsibility and that compensation is due to Somalia for the damage thus caused. Somalia reserves the right subsequently to claim compensation for elements of unjust enrichment

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<sup>376</sup> *Ghana/Côte d'Ivoire*, paras. 90, 95-96.

<sup>377</sup> ILC, *Commentary on the Draft Articles on Responsibility of States for Internationally Wrongful Acts*, in YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, Vol. II, Part 2 (2001), Art. 36(1). MS, Vol. III, Annex 54. See also *Case Concerning the Factory at Chorzów, Merits, Judgment, 1928, P.C.I.J. Series A, No. 17*, pp. 47-48; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, para. 152; *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Compensation owed by the Democratic Republic of the Congo to the Republic of Guinea, Judgment, I.C.J. Reports 2012, para. 13; *The M/V "Saiga" (No. 2) Case (Saint Vincent and the Grenadines v. Guinea)*, Judgment of 1 July 1999, ITLOS Reports 1999, para. 170.

<sup>378</sup> See *Ghana/Côte d'Ivoire*, para. 88; *Guyana v. Suriname*, paras. 465-470.

consequent upon Kenya's unlawful conduct in Somalia's sovereign maritime areas and for the financial damages it has suffered.<sup>379</sup>

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<sup>379</sup> *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, paras. 151-154; *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, I.C.J. Reports 2010, paras. 160-164.





## SUBMISSIONS

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

1. 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.
2. 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

3. To adjudge and declare that Kenya, by its conduct in the disputed area, has violated its international obligations to respect the sovereignty, and sovereign rights and jurisdiction of Somalia, and is responsible under international law to make full reparation to Somalia, including inter alia by making available to Somalia all seismic 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)

13 July 2015



H.E. Abdusalam H. Omer

Minister of Foreign Affairs and Investment Promotion

Agent of the Federal Republic of Somalia



### Certification

I certify that the annexes are true copies of the documents referred to and that the translations provided are accurate.



H.E. Abdusalam H. Omer

Minister of Foreign Affairs and Investment Promotion

Agent of the Federal Republic of Somalia



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