

**III. WHETHER SOMALIA HAS ACQUIESCED TO A MARITIME BOUNDARY
FOLLOWING THE PARALLEL OF LATITUDE**

36. The Court will first ascertain whether there is an agreed maritime boundary between the Parties on the basis of acquiescence by Somalia.

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37. Kenya maintains that Somalia has acquiesced to its claim that the maritime boundary between the Parties follows the parallel of latitude and that there is thus an agreed boundary between them. According to Kenya, acquiescence requires three elements: first, a course of conduct or omission by one State indicative of its view regarding the content of the applicable legal rule; secondly, another State's knowledge (actual or constructive) of such conduct or omission; and, thirdly, a failure by the latter State, when a reaction is called for, to reject or dissociate itself within a reasonable time from the position taken by the first State. Thus, the Respondent's argument is not that a maritime boundary can result from unilateral acts, but that it can be established by consent resulting from the prolonged absence of protest against a claim. Kenya regards acquiescence as a form of consent that can be equated to tacit agreement. In support of its claim, it invokes decisions by international courts and tribunals referring to acquiescence and tacit agreement.

38. Kenya contends that by failing to respond to the Proclamation by the President of the Republic of Kenya of 28 February 1979 (hereinafter the "1979 Proclamation"; see paragraph 54 below), to the Proclamation by the President of the Republic of Kenya of 9 June 2005 (hereinafter the "2005 Proclamation"; see paragraph 61 below) and to Kenya's Submission on the Continental Shelf beyond 200 nautical miles deposited with the CLCS on 6 May 2009 (hereinafter the "2009 Submission to the CLCS"; see paragraph 65 below), Somalia has acquiesced to Kenya's claim that the maritime boundary between the Parties follows the parallel of latitude. In Kenya's view, a reaction is called for where there has been an express, official and public notification, through formal United Nations procedures, of a State's position concerning maritime delimitation and the sovereign rights of adjacent coastal States. It argues that the absence of protest in such circumstances constitutes acquiescence under international law. The Respondent asserts that if Somalia disagreed with Kenya's claim, it should have protested promptly, since circumstances such as the proximity of the States concerned and the giving of formal notice call for a quick and, in some cases, immediate response to a maritime or territorial claim. According to Kenya, Somalia continued to play an active role in international relations during its civil war; it was represented at the United Nations throughout this period and has had an internationally recognized government since 2000. Kenya argues that Somalia was thus in a position to protest against Kenya's claim.

39. Kenya states that the Applicant's failure to react immediately to the 1979 Proclamation or the 2005 Proclamation was particularly significant given that, pursuant to the 1972 Law on the Somali Territorial Sea and Ports, Somalia claimed a territorial sea extending to 200 nautical miles and, therefore, its claim of sovereignty in that area was at stake. In Kenya's view, Somalia's

acquiescence was made clear by its agreement to the principle of equitable delimitation during the negotiations held at the Third United Nations Conference on the Law of the Sea and by its insistence on deleting any reference to equidistance in Articles 74 and 83 of UNCLOS, a position that was shared by other African States. Kenya considers it significant that Somalia initiated a rapprochement with Kenya in 1978 and points out that Somalia did not raise the issue of the 1979 Proclamation during bilateral meetings held between the Parties in 1980 and 1981.

40. Kenya also argues that Somalia's Maritime Law of 1988, which mentions a "straight line" in respect of the territorial sea boundary, refers to the parallel of latitude rather than an equidistance line. In addition, Kenya highlights Somalia's lack of reaction or protest when, in 2007 and 2008, Kenya sent two Notes Verbales in which it stated that it had drawn the boundaries with Somalia "using the parallel of latitude" and requested that Somalia confirm its agreement to such boundaries.

41. Kenya considers that the terms of the "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" (hereinafter the "MOU"), signed by the Parties in 2009, are consistent with Somalia's acquiescence. In Kenya's view, the Court has already found that the MOU does not concern the delimitation of the maritime boundary between the Parties and was intended merely to allow them to make their CLCS submissions before the relevant deadline. It adds that the reference in the MOU to an unsettled maritime boundary "dispute" concerns only the delimitation of the outer continental shelf and simply recognizes that the Parties have not yet negotiated a formal agreement.

42. Kenya contends that a letter sent by the Prime Minister of Somalia to the Secretary-General of the United Nations on 19 August 2009 did not contain a claim to an "equidistant maritime boundary" or a protest against Kenya's maritime boundary claim. It asserts that Somalia's first objection to Kenya's claim was expressed in a letter sent by the Minister for Foreign Affairs and International Cooperation of Somalia to the Secretary-General on 4 February 2014. Kenya argues that its consent to negotiate a formal delimitation agreement does not imply that Somalia has not acquiesced to its claim.

43. Furthermore, Kenya refers to "additional evidence" concerning other conduct of the Parties between 1979 and 2014, which, in its view, "confirms" Somalia's acceptance of the parallel of latitude as the maritime boundary. Kenya asserts that its naval patrols and interceptions, as well as both Parties' conduct concerning fisheries, marine scientific research and offshore oil exploration blocks, have all been consistent with Kenya's claim. The Respondent maintains that its conduct would have called for a reaction from the Applicant, if Somalia had considered that Kenya had encroached on its maritime areas. In this regard, Kenya has submitted a number of maps, reports and other documents issued by various entities. It contends that the maps submitted by Somalia are irrelevant, either because they do not purport to show the official position of the Parties or because they are speculative or of unknown provenance.

44. Somalia notes that Article 15, Article 74 and Article 83 of UNCLOS make clear that delimitation is to be effected by agreement. It recognizes that a maritime boundary may be established by an agreement that is not in written form, but contends that a maritime boundary cannot be established by unilateral acts. In this regard, Somalia maintains that Kenya has not explained how acquiescence differs from tacit agreement. According to Somalia, even if acquiescence could be invoked as a principle of delimitation, Kenya would have to prove a prolonged and consistent course of conduct indicating its own view on the location of the maritime boundary, as well as a very definite course of conduct by Somalia showing its intention clearly and consistently to accept Kenya's claim. Somalia argues that lack of protest against a notification of a claim cannot automatically amount to an acceptance of that claim.

45. Somalia maintains that Kenya's own public statements and positions directly contradict its contention that the Parties have already delimited their maritime boundary along the parallel of latitude. In this regard, Somalia refers to Kenya's 2009 Submission to the CLCS, Kenyan domestic law, Kenya's statements to the United Nations, official Kenyan reports and presentations, the terms of the 2009 MOU, the record of the bilateral negotiations between the Parties and Kenya's pleadings before the Court in support of its preliminary objections. The Applicant adds that other States and international organizations have recognized that the maritime boundary between the Parties remains to be delimited.

46. Somalia further maintains that, in any event, it did not wait until 2014 before protesting against Kenya's claim. It contends that it articulated its claim to an equidistance line in 1974 during the Third United Nations Conference on the Law of the Sea and that this claim was embodied in its Maritime Law of 1988. Somalia asserts that "[t]he Somali language does not contain a word precisely equivalent to 'equidistance line' in English" and that the phrase "a straight line toward the sea from the land" in Article 4, paragraph 6, of the 1988 Law "was intended to be equivalent to an equidistance line". The Applicant also contends that it is unreasonable and unrealistic to expect a State that was ravaged by civil war and had no functioning government to have lodged formal diplomatic protests against a purported claim to a boundary line, stressing that it protested against Kenya's claim "once it resumed having a functioning government after the long civil war". In this regard, it draws attention to the letter sent by its Prime Minister to the Secretary-General of the United Nations on 19 August 2009, which stated, *inter alia*, that the continental shelf between Somalia and Kenya had not yet been delimited. Somalia adds that its opposition to a maritime boundary at the parallel of latitude, as well as its protests against Kenya's award of offshore concessions for maritime areas north of the equidistance line, were reflected in news reports published in 2012 and in a 2013 report of the Monitoring Group on Somalia and Eritrea pursuant to Security Council resolution 2060 (2012).

47. With respect to other conduct of the Parties referred to by Kenya, Somalia argues that "maritime *effectivités*" cannot be invoked in themselves to support the existence of a maritime boundary. In Somalia's view, Kenya's purported displays of authority in the disputed area were in any event sporadic, infrequent and recent, and were undertaken at a time when, on account of civil war, there was no functioning Somali government able to monitor such activities or exercise effective control over them. Somalia considers that the maps, reports and documents adduced by

the Respondent provide no support for the existence of a maritime boundary as claimed by Kenya. It refers to other maps, asserting that they either depict an equidistant maritime boundary or show Kenya's northernmost concession blocks following a course that closely resembles an equidistance line. The Applicant contends that, in any event, even the consistent conduct of two States over a long period of time is not sufficient evidence of an agreement.

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48. The Court recalls that both Kenya and Somalia are parties to UNCLOS. For the delimitation of the territorial sea, Article 15 of the Convention provides for the use of a median line "failing agreement between [the two States] to the contrary", unless "it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a [different] way". The delimitation of the exclusive economic zone and the continental shelf is governed by Article 74, paragraph 1, and Article 83, paragraph 1, of the Convention, respectively. The Court has noted that "[t]he texts of these provisions are identical, the only difference being that Article 74 refers to the exclusive economic zone and Article 83 to the continental shelf" (*Maritime Dispute (Peru v. Chile)*, *Judgment*, *I.C.J. Reports 2014*, p. 65, para. 179). They establish that delimitation "shall be effected by agreement on the basis of international law".

49. The Court reiterates that maritime delimitation between States with opposite or adjacent coasts must be effected by means of an agreement between them, and that, where such an agreement has not been achieved, delimitation should be effected by recourse to a third party possessing the necessary competence (*Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, *Judgment*, *I.C.J. Reports 1984*, p. 299, para. 112 (1)). Maritime delimitation cannot be effected unilaterally by either of the States concerned (*ibid.*; *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, *Judgment*, *I.C.J. Reports 1982*, p. 66, para. 87; *Fisheries (United Kingdom v. Norway)*, *Judgment*, *I.C.J. Reports 1951*, p. 132).

50. An agreement establishing a maritime boundary is usually expressed in written form. The Court considers, however, that the "agreement" referred to in Article 15, Article 74, paragraph 1, and Article 83, paragraph 1, of the Convention may take other forms as well. The essential question is whether there is a "shared understanding" between the States concerned regarding their maritime boundaries (see *Maritime Dispute (Peru v. Chile)*, *Judgment*, *I.C.J. Reports 2014*, p. 23, para. 43, and p. 31, para. 69). The Court notes that both Parties recognize that the delimitation of maritime boundaries requires such a shared understanding.

51. The jurisprudence relating to acquiescence and tacit agreement may be of assistance when examining whether there exists an agreement that is not in written form regarding the maritime boundary between two States. In this regard, the Court recalls that "acquiescence is equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent" (*Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, *Judgment*, *I.C.J. Reports 1984*, p. 305, para. 130; see also *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, *Judgment*, *I.C.J. Reports 1992*, p. 577, para. 364). If the circumstances are such that the conduct of the other State calls for

a response, within a reasonable period, the absence of a reaction may amount to acquiescence (*Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, Judgment, I.C.J. Reports 2008, pp. 50-51, para. 121; *Temple of Preah Vihear (Cambodia v. Thailand)*, Merits, Judgment, I.C.J. Reports 1962, p. 23). This is based on the principle “[q]ui tacet consentire videtur si loqui debuisset ac potuisset” (*ibid.*). In determining whether a State’s conduct calls for a response from another State, it is important to consider whether the State has consistently maintained that conduct (*Fisheries (United Kingdom v. Norway)*, Judgment, I.C.J. Reports 1951, pp. 138-139). In evaluating the absence of a reaction, duration may be a significant factor (see e.g. *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, Judgment, I.C.J. Reports 2008, pp. 95-96, paras. 274-276; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, Judgment, I.C.J. Reports 1992, pp. 408-409, para. 80; *Temple of Preah Vihear (Cambodia v. Thailand)*, Merits, Judgment, I.C.J. Reports 1962, p. 32).

52. The Court has set a high threshold for proof that a maritime boundary has been established by acquiescence or tacit agreement. It has emphasized that since “[t]he establishment of a permanent maritime boundary is a matter of grave importance”, “[e]vidence of a tacit legal agreement must be compelling” (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 2007 (II), p. 735, para. 253; see also *Maritime Dispute (Peru v. Chile)*, Judgment, I.C.J. Reports 2014, pp. 38-39, para. 91; *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d’Ivoire)*, Judgment, ITLOS Reports 2017, p. 70, para. 212). Acquiescence “presupposes clear and consistent acceptance” of another State’s position (*Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, Judgment, I.C.J. Reports 1984, p. 309, para. 145). To date, the Court has recognized the existence of a tacit agreement delimiting a maritime boundary in only one case, in which the parties had “acknowledge[d] in a binding international agreement that a maritime boundary already exist[ed]” (*Maritime Dispute (Peru v. Chile)*, Judgment, I.C.J. Reports 2014, p. 38, para. 90). In the present case, the Court will use the criteria it has identified in earlier cases and examine whether there is compelling evidence that Kenya’s claim to a maritime boundary at the parallel of latitude was maintained consistently and, consequently, called for a response from Somalia. It will then consider whether there is compelling evidence that Somalia clearly and consistently accepted the boundary claimed by Kenya.

53. In this respect, the Parties present arguments regarding Kenya’s 1979 Proclamation, 2005 Proclamation, 2009 Submission to the CLCS and their respective domestic laws. They also refer to other conduct of the Parties in the period between 1979 and 2014. The Court will examine these arguments in turn.

54. In the 1979 Proclamation, the President of Kenya declared:

“1. That notwithstanding any rule of law or any practice which may hitherto have been observed in relation to Kenya or the waters beyond or adjacent to the territorial Sea of Kenya, the Exclusive Economic Zone of the Republic of Kenya extend[s] across the sea to a distance of two hundred nautical miles measured from the appropriate base line from where the territorial sea is measured as indicated in the Map annexed to this Proclamation. Without prejudice to the foregoing, the Exclusive Economic Zone of Kenya shall:

- (a) in respect of its southern territorial waters boundary with the United Republic of Tanzania be an eastern latitude north of Pemba island to start at a point obtained by the northern intersection of two arcs one from the Kenya Lighthouse at Mpunguti ya Juu, and the other from Pemba island Lighthouse at Ras Kigomasha.
- (b) in respect of its northern territorial waters boundary with [the] Somali Republic be on eastern latitude South of Diua Damasciaca Island being latitude 1° 38' South.

2. That this Proclamation shall not affect or be in derogation of the vested rights of the Republic of Kenya over the Continental Shelf as defined in the Continental Shelf Act 197[5].

3. All States shall, subject to the applicable laws and regulations of Kenya, enjoy in the Exclusive Economic Zone the freedom of navigation and overflight and of the laying of sub-marine cables and pipelines and other internationally lawful recognized uses of the sea related to navigation and communication.

4. That the scope and regime of the Exclusive Economic Zone shall be as defined in the schedule attached to this Proclamation.”

55. This Proclamation was transmitted by the Secretary-General to the Permanent Missions of the Member States of the United Nations on 19 July 1979.

56. The 1979 Proclamation was concerned with Kenya’s exclusive economic zone. It stated that “the Exclusive Economic Zone of Kenya shall . . . in respect of its northern territorial waters boundary with [Somalia] be on . . . latitude 1° 38' South”.

57. The Court notes that Kenya’s Territorial Waters Act of 1972 had established in its Section 2, subsection 1, that “[e]xcept as provided in subsection (4) of this section the breadth of the territorial waters of the Republic of Kenya shall be twelve nautical miles”. Subsection 4 had stated that “[o]n the coastline adjacent to neighbouring States the breadth of the territorial sea shall extend to a Median Line”. The Territorial Waters Act was revised in 1977, but the text of Section 2, subsection 4, remained the same. The Act remained in force when the 1979 Proclamation was issued. The Court thus observes that Kenya was not consistently claiming a maritime boundary with Somalia at a parallel of latitude in all maritime areas.

58. On 25 August 1989, shortly after ratifying UNCLOS, Kenya adopted the Maritime Zones Act (hereinafter the “1989 Maritime Zones Act”), which is still in force. In respect of the delimitation of the territorial sea, that Act employs similar terms to Kenya’s Territorial Waters Act of 1972. Section 3, subsection 4, of the 1989 Maritime Zones Act provides:

“On the coastline adjacent to neighbouring states, the breadth of the territorial waters shall extend to [a 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.”

As regards the delimitation of the exclusive economic zone, Section 4, subsection 4, of the Act provides that “[t]he northern boundary of the exclusive economic zone with Somalia shall be delimited by notice in the *Gazette* by the Minister pursuant to an agreement between Kenya and Somalia on the basis of international law”.

59. Kenya contends that Section 3, subsection 4, of the 1989 Maritime Zones Act merely reflects the terms of Article 15 of UNCLOS, which, it explains, applies “the median line in the territorial sea as a provisional method ‘failing agreement’ on delimitation”. It considers that the provision is without prejudice to the parallel of latitude boundary adopted in the 1979 Proclamation and maintains that Kenyan legislation neither asserts nor requires territorial sea delimitation based on a median line. Kenya further argues that Section 4, subsection 4, of the 1989 Maritime Zones Act simply recognizes that, notwithstanding the 1979 Proclamation, a formal agreement has not been concluded with Somalia in respect of the boundary of the exclusive economic zone.

60. The Court considers that Kenya’s position is at odds with the text of the 1989 Maritime Zones Act, which refers neither to the 1979 Proclamation nor to a boundary at the parallel of latitude, for either the territorial sea or the exclusive economic zone. In respect of the exclusive economic zone, the text of Section 4, subsection 4, of the 1989 Maritime Zones Act provides that the northern boundary of the exclusive economic zone with Somalia shall be delimited pursuant to “an agreement between Kenya and Somalia”. These words stand in contrast to the text of Section 4, subsection 3, which provides that the southern boundary with Tanzania shall be “on an easterly latitude”, employing similar terms to those found in the 1979 Proclamation. Section 4, subsection 4, thus implies that, unlike the situation of the boundary between Kenya and Tanzania, Kenya considered in 1989 that there was no agreement with Somalia on their maritime boundary. The Act refers instead to an agreement to be concluded and published in the future. It was therefore reasonable for Somalia to understand Kenya’s position to be that an agreement was to be negotiated and concluded at a later date.

61. Kenya’s 2005 Proclamation replaced the 1979 Proclamation, while generally reaffirming its terms. With regard to the exclusive economic zone, the 2005 Proclamation modified the parallel of latitude claimed as the boundary with Somalia. Paragraph 1 of the 2005 Proclamation, in its relevant part, reads as follows:

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

.....

(b) In respect of its northern territorial waters boundary with [the] Somali Republic be on eastern latitude South of Diua Damascia[ca] Island being latitude 1° 39' 34" degrees south.”

The Proclamation included two schedules, which contained co-ordinates defining the “area of the territorial waters” and the “Exclusive Economic Zone” of Kenya. In the first schedule, the northernmost point of the outer limit of Kenya’s territorial sea is on the parallel of latitude. This implied that, for Kenya, the boundary of its territorial sea with Somalia also followed the same parallel of latitude. According to Kenya, the parallel of latitude was adjusted from the one in the 1979 Proclamation for greater accuracy, so that it coincided with the tangent to the southernmost islet of Diua Damasciaca.

62. On 25 April 2006, the Secretary-General notified the Member States of the United Nations and the States parties to UNCLOS that, in accordance with Article 16, paragraph 2, and Article 75, paragraph 2, of the Convention, Kenya had deposited two lists of geographical co-ordinates of points, as contained in the 2005 Proclamation. The 2005 Proclamation was subsequently published in the *Law of the Sea Bulletin* No. 61.

63. Kenya has also drawn the Court’s attention to two Notes Verbales from the Ministry of Foreign Affairs of Kenya to the Ministry of Foreign Affairs of the Transitional Federal Government of Somalia, dated 26 September 2007 and 4 July 2008. In the Note Verbale of 26 September 2007, which concerned the process of delineation of the outer limits of its continental shelf, Kenya claimed that the maritime boundaries between the two countries “have been drawn using the parallel of latitude[], in accordance with Articles 74, 83 of the UNCLOS” and requested Somalia to confirm “that the Transitional Federal Government agrees with the way the maritime boundaries between the two countries are drawn . . . as deposited with the United Nations by the Government of the Republic of Kenya”. The aide-memoire attached to the Note Verbale stated that “the boundaries between our two countries have not been defined”. In the Note Verbale of 4 July 2008, Kenya asked the Government of Somalia “to state its position to the Government of the Republic of Kenya that the Transitional Federal Government of Somalia agrees with the maritime boundaries between the two countries as drawn and deposited with the United Nations by the Government of the Republic of Kenya”.

64. The Court observes that the Notes Verbales did not characterize the maritime boundary claimed by Kenya as an agreed boundary, but rather invited Somalia to confirm its agreement. It has not been shown that Somalia provided such confirmation.

65. In its 2009 Submission to the CLCS, Kenya states that the maritime space over which it exercises sovereignty, sovereign rights and jurisdiction was determined on the basis of the provisions of UNCLOS, “as implemented by the following legislation and proclamations: the *Territorial Waters Act, 1972*; the *Maritime Zones Act, 1989, Cap. 371*; and, the *Presidential Proclamation* of 9 June 2005 . . . in respect of Kenya’s territorial sea and exclusive economic zone”. It also states that “the outer edge of the continental margin appurtenant to Kenya’s land territory extends beyond 200 [nautical miles] measured from the territorial sea baseline”. The lists of co-ordinates and the maps included by Kenya in its submission show a single maritime boundary with Somalia at a parallel of latitude, extending beyond 200 nautical miles to the claimed outer limit of its continental shelf.

66. The Court notes that Kenya's 2009 Submission to the CLCS was made for the purpose of delineating the outer limits of its continental shelf, which is a process distinct from the delimitation of the continental shelf (*Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, *I.C.J. Reports 2012 (II)*, p. 668, para. 125). In this regard, Kenya's submission indicates that "Kenya has overlapping maritime claims with the adjacent coastal States of Somalia to the north and with the United Republic of Tanzania to the south" and mentions that Kenya and Somalia had signed the 2009 MOU agreeing that they would not object to each other's submissions to the CLCS. The MOU provides that

"[t]he submissions made before the Commission and the recommendations approved by the Commission thereon shall not prejudice the positions of the two coastal States with respect to the maritime dispute between them and shall be without prejudice to the future delimitation of maritime boundaries in the area under dispute".

67. As previously noted by the Court in the 2017 Judgment, the terms of the MOU suggest "that the two States recognize that they have a 'maritime dispute' that is 'unresolved'" (*I.C.J. Reports 2017*, p. 32, para. 72) and identify the "area under dispute" as that "in which the claims of the two Parties to the continental shelf overlap, without differentiating between the shelf within and beyond 200 nautical miles" (*ibid.*, p. 35, para. 84). They also suggest that "the Parties intended to acknowledge the usual course that delimitation would take . . . namely engaging in negotiations with a view to reaching agreement" (*ibid.*, p. 40, para. 97). In this connection, the MOU provides that "[t]he delimitation of maritime boundaries in the areas under dispute . . . shall be agreed between the two coastal States on the basis of international law".

68. The Court observes that Kenya's 2009 Submission to the CLCS also alludes to the lack of agreement between the Parties on the maritime boundary in the exclusive economic zone. In respect of the boundary with Tanzania, the submission explains that "[a]n agreement is in place between Kenya and Tanzania concerning the delimitation of maritime boundaries". However, in respect of the boundary with Somalia, the submission states that the exclusive economic zone boundary "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", thus employing the same terms as Section 4, subsection 4, of the 1989 Maritime Zones Act. The submission also notes the existence of an "unsettled boundary line between Kenya and Somalia". From these terms, it was reasonable for Somalia to maintain its understanding that an agreement had yet to be negotiated and concluded.

69. On 26 and 27 March 2014, at the request of the Kenyan Government, the Parties met in Nairobi to engage in negotiations on maritime delimitation. The mere fact that these negotiations took place suggests that the Parties recognized the need to delimit the maritime boundary between them (see *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, Judgment, *ITLOS Reports 2017*, p. 73, paras. 221-222, and p. 78, para. 243). This is confirmed by the Parties' joint report on the negotiations, which states that they considered "several options and methods including bisector, perpendicular, median and parallel of latitude", but that they "could not reach a consensus on the potential maritime boundary line acceptable to both countries to be adopted". Nowhere does the report imply that there already was an agreed maritime boundary between the Parties.

70. Finally, the Court observes that Kenya's recognition that no agreement on the maritime boundary with Somalia has been reached was also reflected in its two Notes Verbales to the Secretary-General from the Permanent Mission of Kenya to the United Nations, dated 24 October 2014 and 4 May 2015, and in its statements made to the Court during the preliminary objections phase of the case.

71. In light of the foregoing, the Court concludes that Kenya has not consistently maintained its claim that the parallel of latitude constitutes the single maritime boundary with Somalia. Kenya's claim was contradicted by its Territorial Waters Act of 1972, which remained in force in 1979, its 1989 Maritime Zones Act and its 2009 Submission to the CLCS. Under these circumstances, it was reasonable for Somalia to understand that its maritime boundary with Kenya in the territorial sea, in the exclusive economic zone and on the continental shelf would be established by an agreement to be negotiated and concluded in the future. The Court thus concludes that there is no compelling evidence that Kenya's claim and related conduct were consistently maintained and, consequently, called for a response from Somalia.

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72. The Court recalls that Kenya's claim of acquiescence is based on Somalia's alleged acceptance of a maritime boundary at the parallel of latitude, in particular through its prolonged absence of protest. The Court will address this argument of Kenya, bearing in mind the conclusion drawn above (see paragraph 71).

73. Kenya has emphasized that it issued the 1979 Proclamation while the Parties were actively participating in the negotiations held at the Third United Nations Conference on the Law of the Sea and that Somalia's lack of reaction should be assessed in light of the positions it took in that context. Discussions during the Conference on the question of the delimitation of maritime areas resulted in the adoption of Article 15, Article 74, paragraph 1, and Article 83, paragraph 1, of UNCLOS. The Court notes that the latter two provisions reflect the view held by both Kenya and Somalia during the negotiations that the delimitation of the exclusive economic zone and the continental shelf between States with adjacent or opposite coasts should be effected by agreement "in order to achieve an equitable solution". These provisions, however, do not set forth a specific method of delimitation and it cannot be inferred from the Parties' positions during the Conference that Somalia rejected equidistance as a possible method of achieving an equitable solution.

74. In the years immediately following Kenya's 1979 Proclamation, the Parties engaged in discussions on a variety of issues regarding their bilateral relations, such as trade and exploitation of marine resources. However, there is no indication that Somalia accepted Kenya's claim to a boundary along a parallel of latitude during that period. In this regard, Kenya has submitted minutes of a meeting held between the Vice-Presidents of the two States on 6 May 1980, but these minutes make no mention of any discussion of the Parties' maritime boundaries or the 1979 Proclamation. The same is true of other evidence submitted by Kenya in relation to meetings held between the Parties in 1981.

75. Until 1989, Somalia did not claim an exclusive economic zone or define its continental shelf. Article 1, paragraph 1, of the 1972 Law on the Somali Territorial Sea and Ports defined Somalia's territorial sea as extending to 200 nautical miles, without including any provision pertaining to its delimitation. Shortly before ratifying UNCLOS, Somalia adopted the Maritime Law of 1988, approved by Law No. 5 on 26 January 1989. Article 7 of the Maritime Law provides that Somalia's exclusive economic zone shall extend to 200 nautical miles, and Article 8 defines its continental shelf both within and beyond 200 nautical miles. The Maritime Law does not refer to the delimitation of either of these areas. Article 4 defines Somalia's territorial sea as extending to 12 nautical miles and addresses the issue of its delimitation with Kenya, providing in the relevant part of paragraph 6:

“If there is no multilateral treaty, 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.”

76. Somalia has not produced the charts mentioned in the provision, explaining that they may have been lost or destroyed during the civil war. It maintains that “the phrase ‘straight line toward the sea’ was intended to be equivalent to an equidistance line”. Kenya contends that, although the meaning of this phrase is unclear, taking Somalia's contemporary practice into account, it should be interpreted as a reference to the parallel of latitude.

77. The Court notes that Article 4, paragraph 6, of the Maritime Law also refers to the delimitation of maritime areas in relation to the Republic of Yemen, employing the phrase “a median line”. The phrase “a straight line toward the sea from the land” is not clear and, without the charts mentioned, its meaning cannot be determined. Kenya submits a number of documents, including the Mining Code of the Somali Democratic Republic of 1984 and several maps, which, in its view, support its interpretation of this phrase. The text of the Mining Code, adopted prior to the Maritime Law of 1988, does not serve to clarify the meaning given by the latter to the phrase “a straight line toward the sea from the land”. Article 58 of the Mining Code concerns only the establishment of concession blocks in Somali territory. The Mining Code did not itself regulate Somalia's maritime boundaries. Similarly, the maps submitted by Kenya depict only oil concession blocks. As the Court will further explain below (see paragraphs 86 and 87), such blocks, in and of themselves, cannot be taken to indicate the existence of a maritime boundary.

78. Somalia did not react immediately to the 2005 Proclamation. However, its view was made clear on several occasions in 2009. As noted above (see paragraph 67), the MOU concluded that year between the Parties refers to an unsettled maritime dispute. Somalia's 2009 submission of preliminary information to the CLCS reproduces the text of the MOU and indicates that “[u]nresolved questions remain in relation to [the] bilateral delimitation of the continental shelf with neighbouring States”. In addition, in a letter dated 19 August 2009 and addressed to the Secretary-General of the United Nations, the Prime Minister of Somalia maintained that “[t]he delimitation of the continental shelf . . . has not yet been settled”, further stating that

“[i]t 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”.

Furthermore, as noted by the Court in the 2017 Judgment, in 2014 Somalia “objected to the consideration by the CLCS of Kenya’s submission on the ground that there existed a maritime boundary dispute between itself and Kenya” (*I.C.J. Reports 2017*, p. 14, para. 19). Somalia withdrew its objection in 2015, noting that the dispute had been submitted to the Court.

79. Finally, the Court cannot ignore the context of the civil war that afflicted Somalia, depriving it of a fully operational government and administration between 1991 and 2005. These circumstances were public and notorious (see e.g. Security Council, *Report of the Secretary-General on the protection of Somali natural resources and waters*, UN doc. S/2011/661, 25 October 2011, para. 22), and they were also recognized by Kenya in the previous phase of the proceedings. This context needs to be taken into account in evaluating the extent to which Somalia was in a position to react to Kenya’s claim during this period.

80. For the foregoing reasons, the Court considers that the conduct of Somalia between 1979 and 2014 in relation to its maritime boundary with Kenya, as examined above, in particular its alleged absence of protest against Kenya’s claim, does not establish Somalia’s clear and consistent acceptance of a maritime boundary at the parallel of latitude.

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81. Kenya also argues that other conduct of the Parties between 1979 and 2014 confirms Somalia’s acceptance of a maritime boundary at the parallel of latitude. Kenya refers, in particular, to the Parties’ practice concerning naval patrols, fisheries, marine scientific research and oil concessions (see paragraph 43 above). The Court will now consider this argument of Kenya.

82. The Court recalls that, in the context of a maritime delimitation dispute, as for territorial disputes, the date on which the dispute crystallized is of significance. Acts occurring after such date are in principle irrelevant to the determination of a maritime boundary and cannot be taken into consideration, “having been carried out by a State which, already having claims to assert in a legal dispute, could have taken those actions strictly with the aim of buttressing those claims” (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, *I.C.J. Reports 2007 (II)*, pp. 697-698, para. 117; see also *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, Judgment, *I.C.J. Reports 2008*, pp. 27-28, para. 32; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Judgment, *I.C.J. Reports 2002*, p. 682, para. 135).

83. Kenya argues that there was no dispute between the Parties until 2014. However, when it submitted its Preliminary Objections in 2015, it stated that “[i]t was only in 2009 that Somalia first disputed Kenya’s 1979 EEZ maritime boundary”. Somalia, for its part, argues that the Parties have been engaged in a maritime boundary dispute since the 1970s. The Court recalls that the MOU concluded by the Parties in 2009 and Kenya’s 2009 Submission to the CLCS indicate that a maritime dispute existed between them as of 2009 (see paragraphs 66-68 above). Somalia has not provided the Court with sufficient evidence to conclude that the dispute emerged before 2009. Accordingly, the Court considers that the Parties’ activities after 2009 cannot be taken into consideration for the purpose of determining the maritime boundary.

84. In light of the foregoing, the Court will examine the conduct of the Parties referred to by Kenya. The Court begins by considering the evidence of naval patrols. Maps depicting and logs recording Kenya’s naval patrols and interceptions in the territorial sea show that some law enforcement activities were conducted by Kenya north of the equidistance line claimed by Somalia. Occasionally, however, they were also conducted north of the parallel of latitude that it claims as the maritime boundary. Kenya’s naval patrols and interceptions were thus not necessarily consistent with its maritime boundary claim. Moreover, one of the maps submitted by Kenya is marked “secret” and the remaining evidence does not establish that Somalia had knowledge of these activities.

85. The evidence on fisheries and marine scientific research activities also does not support Kenya’s claim. Kenya submitted a fishing licence it had granted to a French vessel on 20 June 2011 for the period between July 2011 and June 2012, which included co-ordinates for fishing areas north of the equidistance line. There is no evidence, however, that Somalia had knowledge of these activities, which, in any event, took place after 2009. Kenya also submitted a report issued by the Ministry of Fisheries and Marine Transport of Somalia for the period 1987/1988, which referred to the positions studied in a survey conducted by the Intergovernmental Oceanographic Commission (hereinafter the “IOC”) of UNESCO. However, this report includes no indication of any maritime boundary. Similarly, a map published by the Ministry of Fisheries of Somalia and reproduced in a 1987 report of the United Nations Environment Programme does not depict the boundary of Somalia’s southernmost fishery region or its maritime boundary with Kenya. It therefore cannot be concluded from this map that Somalia considered the maritime boundary to be established at the parallel of latitude. Other documents submitted by Kenya as evidence — including a map produced by the IOC, an offshore trawling survey of Kenya conducted by the Food and Agriculture Organization of the United Nations and the United Nations Development Programme, and a technical paper reflecting the results of a survey programme conducted in co-operation with Norwegian agencies — were not produced by the Parties and thus cannot be taken to reflect their official positions.

86. As regards oil concessions, the Parties have referred to a number of maps produced by third parties, as well as by Kenyan and Somali institutions. Kenya has also referred to the terms of Somalia’s Mining Code (see paragraph 77 above) and Petroleum Law. The Court notes that the Parties have established offshore oil concession blocks employing different lines since the 1970s. However, the Parties have referred only to limited practice that took place before 2009, such as

a series of contracts concluded since 2000 in relation to the oil concession block identified by Kenya as Block L-5 and the drilling of the first exploratory well slightly north of the equidistance line claimed by Somalia, between December 2006 and January 2007. For the most part, the Parties have referred to practice after 2009, which, for the reasons previously explained (see paragraphs 82 and 83 above), is irrelevant to the determination of the maritime boundary.

87. The Court notes Kenya's argument that the conduct of the Parties, including with respect to oil concessions, reflects the existence of a *de facto* maritime boundary. Even assuming that the limited evidence of practice before 2009 could be taken to suggest that a *de facto* line along the parallel of latitude may have been used by the Parties for the location of oil concession blocks, at least for some time, the Court observes that this may have been "simply the manifestation of the caution exercised by the Parties in granting their concessions" (*Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Judgment, I.C.J. Reports 2002, p. 664, para. 79). The Court also recalls that a *de facto* line "might in certain circumstances correspond to the existence of an agreed legal boundary or might be more in the nature of a provisional line or of a line for a specific, limited purpose, such as sharing a scarce resource" (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 2007 (II), p. 735, para. 253). The Court considers that "proof of the existence of a maritime boundary requires more than the demonstration of longstanding oil practice or adjoining oil concession limits" (*Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, Judgment, ITLOS Reports 2017, p. 71, para. 215).

88. For the reasons set out above, the Court considers that other conduct of the Parties between 1979 and 2014 does not confirm that Somalia has clearly and consistently accepted a maritime boundary at the parallel of latitude.

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89. In conclusion, the Court finds that there is no compelling evidence that Somalia has acquiesced to the maritime boundary claimed by Kenya and that, consequently, there is no agreed maritime boundary between the Parties at the parallel of latitude. Kenya's claim in this respect must therefore be rejected.

IV. MARITIME DELIMITATION

90. In view of the conclusion just reached, the Court will now turn to the delimitation of the maritime areas appertaining to Somalia and Kenya.

91. In its Application, Somalia requested the Court to determine, on the basis of international law, the complete course of the single maritime boundary dividing all the maritime areas appertaining to Somalia and to Kenya in the Indian Ocean, including the continental shelf beyond 200 nautical miles (see paragraph 25 above).

A. Applicable law

92. Both Somalia and Kenya are parties to UNCLOS (see paragraph 33 above). The provisions of the Convention must therefore be applied by the Court in determining the course of the maritime boundary between the two States.

B. Starting-point of the maritime boundary

93. Although the Parties initially proffered divergent views on the appropriate approach to defining the starting-point of the maritime boundary, those views evolved in the course of the proceedings and are now by and large concordant.

94. According to Somalia, the construction of the maritime boundary line begins with the identification of the land boundary terminus, which it locates at 1° 39' 44.07" S and 41° 33' 34.57" E. To locate the land boundary terminus, Somalia first explains that the terminal point of the Parties' land boundary was defined with a high degree of precision in the 1927/1933 treaty arrangement between the two colonial Powers, the United Kingdom and Italy. Somalia contends that, consistent with the terms of the 1927 Agreement, the final permanent boundary beacon, known as Primary Beacon No. 29, or "PB 29", at the location known as "Dar Es Salam", must be connected to the low-water line by means of a straight line, perpendicular to the coast. It submits that the point at which this perpendicular line intersects the low-water line is the proper starting-point of the maritime boundary. Somalia situates this point on the low-water line approximately 41 metres south-east of PB 29. Somalia further contends that its approach to defining the starting-point of the maritime boundary is in conformity with Article 5 of UNCLOS, which states that the normal baseline for measuring the breadth of the territorial sea is the "low-water line".

95. In its Counter-Memorial and Rejoinder, Kenya made reference to PB 29 itself as being the appropriate starting-point for the delimitation of the maritime boundary. It argued against a starting-point located on the low-water line. The Court, however, notes that subsequently, in Appendix 2, where Kenya discussed how a provisional equidistance line ought to be constructed, it stated that such a line "begins from [a land boundary terminus] on the low-water line extending south-east from PB29". Taking these views into account, the Court can conclude that the Parties agree on the method for identifying the starting-point of the maritime boundary.

96. As to the exact location of PB 29, Somalia first argued that its co-ordinates are 1° 39' 43.3" S and 41° 33' 33.49" E. In its Counter-Memorial, Kenya replied that the precise co-ordinates of PB 29 are slightly different, at 1° 39' 43.2" S and 41° 33' 33.19" E. However, in the oral proceedings, Somalia indicated that it would be prepared to accept the co-ordinates proposed by Kenya for PB 29 for the purposes of identifying the starting-point of the maritime boundary in the Indian Ocean.

97. As to the exact location of the land boundary terminus, the Parties have put forward co-ordinates that are approximately the same. The co-ordinates for the land boundary terminus identified by Kenya by employing British Admiralty Chart 3362 — namely 1° 39' 44.0" S and 41° 33' 34.4" E — differ only slightly from the co-ordinates identified by Somalia using the United States National Geospatial Agency (US NGA) Nautical Chart 61220 (see paragraph 94 above). During the oral proceedings, Somalia stated that it would “be content with the outcome” regardless of which chart the Court chose to employ.

98. Taking into account the views of the Parties, the Court considers that the starting-point of the maritime boundary is to be determined by connecting PB 29 to a point on the low-water line by a straight line that runs in a south-easterly direction and that is perpendicular to “the general trend of the coastline at Dar Es Salam” in accordance with the terms of the 1927/1933 treaty arrangement. On the basis of British Admiralty Chart 3362, the Court determines that the co-ordinates for the starting-point of the maritime boundary are 1° 39' 44.0" S and 41° 33' 34.4" E¹ (see sketch-map No. 3 below).

¹ All the co-ordinates given by the Court are by reference to WGS 84 as geodetic datum. All delimitation lines described by the Court are geodetic lines and all azimuths provided are geodetic azimuths based on WGS 84.

