

The Legal Framework on Oil and Gas Exploration within the Disputed Maritime Zones between Somalia and Kenya

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ABSTRACT

Oil and gas has been a major cause of disputes, conflicts and even wars in several parts of the world. Currently, disputes between Somalia and Kenya on the sovereignty over maritime hydrocarbon resources on the Indian Ocean stands as pending case before the international court of justice since 2014. The study centered on Doctrinal research methodology whereby it is based on primary and secondary sources. The primary source includes United Nations Convention on the law of the sea. Secondary Sources include among others Textbook, Journal and Internet Sources. The study seeks to examine the legal framework governing the law of the sea, which commands the delimitations of exclusive economic Zone and continental shelf before the expansion of offshore production could ensure. The main findings of the study in respect to oil and gas activities within disputed zones is that coastal states are under an international obligation to refrain from undertaking any acts related to drilling of wells, establishment of installations and appropriation of petroleum. It was concluded that, the study gives a brief overview of the oil and gas exploration within the disputed maritime zones between Somalia and Kenya. The study recommends that, the two neighboring states should continue to resolve their maritime disputes in accordance with international law and its legal settlements such as the international court of justice.

Keywords: Somalia, Kenya, Internal Court of Justice, Sovereignty, Maritime Hydrocarbon Resources

Introduction

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. It shares land boundaries with Djibouti in the far northwest, Ethiopia in the west and Kenya in the southwest (Case Concerning Maritime delimitation in the Indian Ocean; Somalia vs. Kenya, 2015). Kenya is bordered by South Sudan to the northwest, Ethiopia to the north, Somalia to the east, Uganda to the west, Tanzania to the south, and the Indian Ocean to the southeast.

Oil and Gas activities within the disputed Ocean zones under the Law of the Sea

The oil and gas industry in Eastern African nations is quite a new sector in contrast with West Africa's Gulf of Guinea where oil was produced from the end of the 1950s onwards. (A. Benjamin et al; 2014) Somalia confirmed commercial petroleum resources since in 2012, but efforts to find oil in Somalia began as far back as the 1948. On the Kenyan side, the exploration of oil and gas begun in the 1950s, it was not until in March 2012 when oil was discovered in the arid northern county of Turkana by a UK firm, the Tullow Oil plc (Mwabu, 2018). The UN Convention on the law of the sea 1982 establishes a legal framework to govern all uses of the oceans. All of the states bordering the Indian Oceans including Somalia and Kenya are contracting parties to UNCLOS. Somalia ratified the UN convention on the law of the sea on 24th July 1989 while Kenya ratified it on 2nd March 1989. The Convention entered into force for Somalia on 16th November 1994, this treaty clarifies the offshore rights and obligations of states.

In a modern technological evolutions and economic conditions continue to favor exploration and extraction of undersea oil and gas in ever deeper sea, disputes over the delineation of maritime boundaries and entitlements to the hydrocarbon resources are grabbing headlines again (S. Harwood, 2012). The dead heat between Somalia and Kenya over the Indian Ocean has shone a spotlight on the issue of maritime boundaries and delineation. The disputed maritime zones are thought to have oil reserves beneath the seabed and the exploration of these reserves remains difficult whilst the political stand-off between Somalia and Kenya remains in place. Both Somalia and Kenya have exclusive sovereign rights over hydrocarbon resources including oil and gas in maritime space such the territorial zone and exclusive economic zone that is adjacent to their coastline. Every coastal nation should adopt and implement national regulations and rules to permit the use of hydrocarbon resources found in their zones. Under the UN convention on the law of the sea, the following maritime spaces are related with regard to the use of oil and gas activities.

Territorial Sea

Additionally, both Conventions and Customary International law permits that every coastal state to extend its territorial sea up to 12 nautical miles measured from the baseline (UNCLOS 1982, article 3). 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 or equidistance line. That rule can only be displaced in limited situations, where there is a contrary agreement, historical title etcetera. The case between Somalia-Kenya's coastlines is wholly unexceptional. It has no protuberance 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 ambit of the general rule reflected in Article 15 of the Convention (*ibid*). Article 15 is recognized to embody an established rule of customary international law (*Qatar vs. Bahrain, 2001*).

Contiguous Zone

A coastal State is also entitled to a contiguous zone extending up to 24 nm from the baselines from which the territorial sea is measured. In the contiguous zone, a coastal State has the right to enforce violations of its customs, fiscal, immigration and sanitary laws (UNCLOS 1982, article 33).

Oil and Gas Activities in Exclusive Economic Zones and Continental shelf

Exclusive Economic Zone

The Exclusive Economic Zone (EEZ) is one of the most revolutionary features of the Convention, these gives coastal nations to be entitled to an Exclusive Economic Zone (EEZ) extending up to 200nm measured from the coastal baselines over which they also enjoy sovereign rights for the purpose of exploring and exploiting their offshore natural resources, though this zone applies both to non-living, including oil and gas or gravel, nodules or sulphur and living resources, such as fisheries (Article 57, UNCLOS, 1982).

The exclusive economic zones are generously endowment indeed. Approximately 87% of all known and estimated hydrocarbon reserves under the sea fall under some national jurisdiction. As a result, this prompted coastal states to maximize their maritime zones claims, either through EEZ or through extended continental shelf claims. However, in some instances where there are a number of claimants with maritime claims to the same geographic area, it may be difficult for the disputes to be resolved through negotiation, especially if sovereignty over land territory disputes is also involved. The possibility of offshore hydrocarbon deposits being situated in the areas of overlapping claims adds to the complexity of the disputes (Backman et al; 2018).

Continental shelf

Historically, navigation and marine living resources such as fishing were the primary uses of the Oceans. As man progressed, pulled by technology in some instances and pushing that technology at times in order to satisfy his needs, a rich bounty of other resources and uses were found underneath the waves on and under the ocean floor minerals, natural gas, oil, sand and gravel, diamonds and gold (Division for Ocean Affairs and the Law of the Sea, 2012). Under the law of the sea 1982, all coastal States are entitled to a continental shelf area, extending to at least 200

nautical miles (nm) from their coastal baselines, over which they enjoy ‘sovereign rights’ for the purpose of exploring and exploiting their subsea natural resources. These rights exist *ipso facto and ab initio* in the sense that no special legal acts or declarations need to be performed for such rights to be enacted (Yiallourides, 2016). However, 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). 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”.

As mentioned above, the use of Oil and Gas found in this zone are subject to the law of the sea and all other international commitments of the coastal state concerned. Activities that facilitate the actual exercise of a State’s sovereign rights over oil and gas resources in the continental shelf, both in their discovery as well as factual development, are amongst those that can only be conducted by the coastal State (Logchem, 2018).

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.

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 ...” (*Greece vs. Turkey*, 1976).

A line of Contention over Maritime Zones between Somalia and Kenya

Since 2009, Somalia and Kenya contests over where their maritime boundary delimitation in the Indian Ocean lies. The claims overlap contested legal regimes involving the continental shelf, the Exclusive Economic Zone, and extended continental shelf claims beyond 200 nautical miles from the coast. The two neighbors have been locked in a dispute over their maritime boundary, with both claiming a narrow 100,000 kilometers square triangle of sea shelf thought to contain significant deposits of oil and gas. More so, this area is estimated to be bigger than the size of the five African countries such as Comoros, Burundi, Swaziland, Djibouti and Rwanda of which the total geographical area of these countries are 96,598 kilometers. Somalia wants the International Court of Justice to delimit the maritime boundary, and to determine the exact geographical

coordinates as an extension of its southeastern land borders or equidistance method (Somalia Maritime Law, 1988). Kenya, on the other hand, favors the border to run in parallel along the line of latitude on its eastern border (Proclamation by the President of Kenya, 2005).

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 space. A boundary along a line of parallel has no basis in international law including the UN convention on the law of the sea and cannot be justified by reference to any aspect of the history, geography or relevant of their party, all of which support a boundary based on equidistance. Kenya's claim notably appears to be contrary to the position enshrined in its own domestic legislation.

In 1973 during the United Nations Convention on the Law of the Sea, Kenya and seven other countries rejected the equidistance approach in favor of the equitable principle, which seeks to achieve fairness in situations where the strict rule of law would be too severe or unkind. With a relatively smaller coastline, it is obvious why Kenya prefers the fairness principle. Somalia on the other hand has the second longest coastline in Africa of 3,300 kilometers, after Madagascar's 4,828 kilometers (ORWA, 2019).

Kenya unilaterally conducted to offer offshore petroleum exploration and exploitation blocks in the 1970. 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 right from 1978 up to 1996 shows that Kenya's northernmost offshore blocks respected the equidistance line. In 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 (National Oil Company of Kenyan, 2000).

Kenyan Oil and Gas 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. Thus Kenya exploited both the living and the non-living resources of the maritime disputed zones (Maritime Delimitation in the Indian Ocean).

Nonetheless, under Paragraph 3 of articles 74 and 83 of the United Nations Convention on the Law of the Sea 1982, attempts to regulate areas of overlapping EEZs and continental shelves. This commonly phrased provision, laying down two different obligations- one to cooperate and the other to prevent certain conduct from commencing significantly influence the possibility for claimants to unilaterally conduct activities concerning oil and gas resources in disputed maritime areas (Logchem, 2018).

Kenya Oil and Gas Awards

The maritime boundary disputes between Somalia and Kenya have typically occurred after the discovery of seabed resources, especially oil and gas. Interest in Kenya and later on Somalia for oil and gas exploration has seen a sharp increase in recent years. The hydrocarbons have become a main source of dispute and latent conflicts between African nations as neighboring states seek to lay claim to the continent's natural resources (Khalfaoui et al; 2019).

Kenya awarded a number of petroleum exploration blocks to oil companies located in the maritime disputed zone. Oil and gas exploration in block L-13 lies closest to shore on both sides of the equidistance line covering 2, 019.9 kilometers square, were awarded to SOHI Gas-Dodori Ltd in 2008, while blocks L-21; L-23 and L-24 lies entirely on the Somalia side of provisional equidistance line were awarded to the Italian company Eni S.P.A in 2012 (Hill, 2016).

Block L-5; which also straddle the equidistance line, were first offered in July 2000, and originally included both onshore and offshore areas. Star Petroleum International signed a surface exploration contract in October 2000. In April 2001, Dana Petroleum became the operator, and carried out 2D and 3D seismic studies. In May 2003 Woodside Petroleum took over, acquiring seismic data in this area. In 2006, Woodside drilled the first deep-water well off Kenya, the Pomboo-1, on Somalia's side of the equidistance line (*Somalia vs. Kenya 2014*).

Block L-22, which straddle the equidistance line in areas between approximately 52 and 104 M from the coast, were awarded to Total S.A in 2012. Block L-26 also lies on both sides of the equidistance line in far off-shore areas. Earlier negotiations over this block with Norway's Statoil collapsed when the company withdrew because the block was located in the disputed area.

Several times, the Federal Republic of Somalia protested the unlawful Kenya's unilateral activities in the disputed area. To the extent that the Attorney General of Somalia himself shown his concern over the gross violation of Somalia's sovereignty and territorial integrity by writing a complaint to the CEO of one of the mining oil companies by the name of Total Oil Company.

International Arbitration over Oil and Gas Activities

Under the existing circumstances, given that Somalia and Kenya have both made full submissions to the Commission on the Limits of the Continental shelf with respect to the continental shelf beyond 200M as well as their EEZ' presidential proclamation, though the two neighboring coastal states disputes over the location of their maritime boundary with a potentially lucrative, triangular stretch of 100,000 kilometers square of offshore territory believe to contain large oil and Gas deposits.

The diplomatic negotiations, in which parties' views have been fully exchanged but all in vein to resolve their disputes, this paved the way, Somalia to file a suit against Kenya at the International Court of Justice in 2014, seeking to resolve a long-running dispute over oil and gas reserves in the

Indian Ocean. The court represents one way of solving border conflicts in maritime areas if bilateral or regional attempts fail.

Somali also quickly engaged the ICJ as recourse to negotiation, fearing that Kenya would make new reservation by altering it *Optional Clause Acceptance* under article 36(2) of the court's statute to exclude the Court's Jurisdiction over maritime boundary disputes. As expected, Kenya confirmed those suspicions on January 24 2017 when it lodged a new reservation opting out of the compulsory dispute settlement procedure concerning maritime delimitations (S. Mohammed, 2019). Somalia and Kenya both have accepted a compulsory *ipso facto*, on the basis of reciprocity, the jurisdiction of the court in 1963 and 1965 respectively.

The jurisdiction of the Court under Article 36, paragraph 2, of its Statute is underscored by Article 282 of UNCLOS, which provides: "If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed, through a general, regional or bilateral agreement or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in this Part [XV of UNCLOS], unless the parties to the dispute otherwise agree".

However, previous verdicts have in most cases used a maritime boundary delimitation principle which, in this case favors Somalia. The ICJ, ITLOS and Arbitral Tribunals all used the equidistance principle which defines boundaries as the midpoint between two states. Example, on March 29, 1994, Cameroon took its dispute with Nigeria concerning the question of sovereignty over the Bakassi Peninsula, and requesting the Court to determine the course of the maritime frontier between the two States (Orwa, 2019).

In its judgment of October 10, 2002, the Court determined that sovereignty over the Bakassi Peninsula lay with Cameroon by using the equidistance principle. The ruling involved first drawing a median line, then considering whether factors are calling for the adjustment or shifting of that line to achieve an equitable result (Orwa, 2019). Other ICJ judgment on maritime boundary delimitation include disputes between Tunisia vs. Libya (1982), Canada vs. United States (1984), Malta vs. Libya (1985), Denmark vs. Norway (1993), Qatar vs. Bahrain (2001), Nicaragua vs. Honduras (2007), Romania vs. Ukraine (2009) and Chile vs. Peru (2014). Fisheries Jurisdiction (Spain v. Canada) 2001, Territorial and Maritime Dispute (Nicaragua v. Colombia), 2012.

Currently, there are some pending cases before the ICJ include among others; (Bolivia v. Chile, 2013), Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia 2013), Maritime delimitation in the Caribbean Sea and the Pacific Ocean (Costarica v. Nicaragua February 2014) and Maritime delimitation in the Indian Ocean (Somalia v. Kenya 2014). The first and only decision by the ITLOS on maritime delimitation was related to a dispute between Bangladesh and Myanmar in the Bay of Bengal, this case began on 14 December 2009 and ended 14th March 2012.

Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean, this case also began on 3 December 2014 and ended 23 September 2017. Decisions by **Arbitral Tribunals** on maritime boundary delimitation include dispute between Eritrea vs. Yemen (1999), Barbados vs. Trinidad & Tobago (2006), Guyana vs. Suriname (2007), Bangladesh vs. India (2014) and Slovenia vs. Croatia (2017).

Under the United Nations Convention on the Law of the Sea 1982 establishes an international legal and institutional framework that governs all the dividing world's oceans. Although there is no rule or provisions that explicitly addresses on how to resolve sovereignty disputes over off-shore features. However much, it does contain provisions on the nature and extent of the maritime claims that can be made from land territory and offshore features.

Conclusion

The federal Republic of Somalia and Kenya have been engaged in a disputed over the extent of their exclusive economic zone, ostensibly sparked by oil and gas exploration within the area. Somalia objects Kenya to drill in a disputed maritime space. However, Securing rights over valuable marine resources, both living and non-living, such as fisheries and deposits of seabed hydrocarbons is one on the key drivers for maritime dispute between the two states. Kenya awards 7 new offshore exploration blocks to an international oil companies are at the heart of the maritime dispute between Somalia and Kenya. Currently, the case between Somalia and Kenya are still pending adjudication before the International Court of Justice. The court will addresses among others the Land Boundary Terminus, Single Maritime Boundary and state responsibility for illegal oil and gas activities in the disputed areas.

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