American Model United Nations
International Court of Justice

Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)

ARGUED: 19 November 2017

DECIDED: 19 November 2017

The Dissenting opinion was signed by and agreed to by Justice Dolan, Justice Kennedy, Justice Caine, Justice Eness, Justice Pederson, and Justice Fuller.

The petitioner and the respondent have demonstrated conclusive evidence that the issues surrounding the maritime border dispute are sufficiently complex and cannot be resolved by negotiations between the two countries, and therefore yield jurisdiction to the ICJ.

The Court was asked to examine the application of the United Nations Convention on the Law of the Sea (UNCLOS) in respect to establishing the maritime border between Somalia and the Republic of Kenya based on the principles outlined in Part II Section II Article 15. We have concluded that the evidence presented by Kenya regarding the claim of historical title over the maritime territory in question is insufficient to justify Kenyan sovereignty over it, and therefore merits a reconsideration of the Kenya-Somalia maritime border based on equitable principles of maritime border delimitation with regard to territorial waters, exclusive economic zone, and continental shelf as per Articles 15, 74, and 83 of the UNCLOS.

The opinion and explanation of reasons of the minority is as follows:

The historical claim argument presented by the delegation of Kenya does not hold when examining the inconsistent and vacillating definitions of the maritime border between Kenya and Somalia historically. The Republic of Kenya argued that the disputed territorial waters have historically been under their jurisdiction. Kenya, however, has changed their maritime boundary with Somalia four times. The first was Ewith the 1972 Territorial Waters Act, which followed the principle of equidistance outlined in Article 15 of the UNCLOS. The second occurred in February 1979 when the President of Kenya then issued a Presidential Proclamation that changed the boundary to a straight line following the latitudinal measure of 1 degree 38'. Kenya changed the boundary for a third time in 1989 with the 1989 Maritime Zones Act which returned the maritime boundary to that which was established by the 1972 Territorial Waters Act. Seventeen years later, Kenya changed the border for the fourth time in a Presidential Proclamation issued on 9 June 2005, which established the contested boundary line in the present case. Additionally, the Somali Maritime Law of 1988 which establishes the maritime boundary with Kenya based on the equidistance principle directly contradicts the historical claims made by Kenya over the disputed maritime territory. Therefore, the historical claim over the territory in question by Kenya is no more legitimate than that of Somalia.

The inconsistency of Kenya's historic claims to the maritime territory in question invalidates the claim that Kenya has historical title over this territory. Furthermore, no evidence was presented by the respondent suggesting the physical presence of sovereign Kenyan citizens or capital in this territory, which further invalidates the historical title argument especially with regard to the idea of adverse acquisition.

In the previous rulings of the ICJ on the Maritime Delimitation in the Black Sea (Romania v. Ukraine) in 2009, Romania laid claim to oil and gas deposits in the Black Sea and prior to 2001 never protested Ukraine's activities in the areas claimed by Romania. The Court ruled that the principle of equidistance should be applied, giving us precedent to rule in favor of Somalia in today's case.

Therefore the minority recommends the following:

First, Ein order to achieve the most equitable solution the International Court of Justice sides with the state of Somalia. The standing law of international delimitation of territorial seas, the exclusive economic zone (EEZ), and the continental shelf is set forth in the United Nations Convention of the Law of the Sea (UNCLOS) through the "Equidistance Principle." The "Equidistance Principle" would be defined as a straight line into the sea from the existing land boundary made of latitudinal and longitudinal points that are proportionately distant from the coastline of each state. The claim by the majority opinion is in consideration of Article 15 of the UNCLOS that states as an exception to the "Equidistance Formula"

> 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 therewithin

The reference here is made to territorial seas, but can be applied broadly to all determinations of delimitation. As explained earlier this claim is made on insufficient grounds and should therefore only be applied in the dispute of delimiting territorial waters. The minority of the Court is persuaded that this does hold merit in the fact that it would be "necessary" to maintain forms of national sovereignty such as state security, regulation of commerce, etc. Therefore for territorial waters should extend straight south 12 nautical miles as currently internationally accepted.

Secondly, that the current boundary is clearly disproportionate. Due to the evidence of equivocation on the positioning of the borders by Kenya the Court cannot say that the equidistance principle doesn't apply because of a historic title belonging to Kenya. Therefore, the border is in violation of CLOS, as the conditions under article 15 to activate a historical argument do not apply. SomaliaOs charge that the border is grossly disproportionate is duly noted. However, Somalia's sovereign rights were not found to be violated as Somalia never asserted a direct claim against Kenyan takings in the disputed areas until the current case. Chapter XV of the CLOS establishes that the ICJ can mediate between parties having disputes, and Kenya acknowledged its willingness to defer to the Court, and therefore made no clear attempt to detract from Somalia's sovereignty. The Court's decision establishes whether or not there is a clear sovereign right to the disputed territory.

Thirdly, the economic development that occurred in the disputed area should rightfully belong to Somalia. Somalia brought the argument that all economic development of the disputed area should be considered illegal, as it was done in violation of CLOS. The minority concurs with this charge. However, as Kenya has demonstrated goodwill throughout argument, it is recommended that Somalia negotiate with Kenya to establish a repayment plan that reimburses the value that Kenya initially invested in the area. Regardless, Somalia has a sole claim in the disputed EEZ and territorial sea and may proceed in whatever manner they see fit.

Finally, we do not recommend deference to the CLCS's decision if it does not support the equidistance principle. The legality of the equidistance principle in this case is clear, and Kenya has no legitimate claim to the disputed territory. Any Somali concession of its rightful sea territory should be disregarded. However, to address the grievances that would arise from a new delimitation of the border, the Court encourages Somalia and Kenya to negotiate potential swaps of maritime territory as both parties see fit. Such collaboration would ameliorate remaining contentions regarding a finalized border, and would be highly endorsed by this Court.

Signed By

Justice Pederson

Justice Dolan

Justice Kennedy

Justice Eness

Justice Fuller

Justice Caine