A Commentary on the Dispute Concerning the Maritime Delimitation in the Indian Ocean (Somalia v Kenya)

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On 12 October 2021, the International Court of Justice (ICJ) delivered its long-awaited judgment in the case of *MaritimeDelimitation in the Indian Ocean (Somalia v Kenya)* on the location of the maritime boundary between Somalia and Kenya.

Kenya refused to participate in the oral proceedings on the merits, as discussed here and here. Nonetheless, the Court was satisfied that it had all the necessary information about Kenya's views, including arguments advanced by Kenya in previous phases of the proceedings.

As will be seen, the Court applied its 'standard' delimitation methodology. The three-stage approach to delimiting the exclusive economic zone (EEZ) and continental shelf involved drawing a provisional equidistance line from the chosen base points; adjusting this provisional line for equity in light of the relevant circumstances; and ensuring that the proportionality requirements were met. The final boundary delimitation line between Somalia and Kenya is an adjusted equidistance line, which favours Somalia's position.

This post is divided into two parts. First, it provides a brief background of the case and summarises notable features of the judgment on maritime boundary delimitation (see also the useful thread by Massimo Lando). Second, it analyses issues of general significance which flow from the judgment: the role of non-geographical factors in maritime delimitation; the delimitation of the continental shelf beyond 200 nm; and the Court's treatment of unilateral activities in disputed maritime areas.

The dispute and solution in *Somalia v Kenya*

The first part of this post briefly describes the historical background to the dispute and then describes the maritime boundary delimitation process applied by the ICJ.

a. Historical background

Somalia and Kenya share a land boundary in East Africa which meets the Indian Ocean to the south-east. This maritime area supposedly holds large reserves of hydrocarbons which both States have been eager to exploit. Both Somalia and Kenya are parties to UNCLOS and are, therefore, bound by its provisions.

In 2009, Kenya and Somalia reached a Memorandum of Understanding according to which the two States agreed to delimit their maritime boundary by negotiations. The Somalian Parliament later rejected this agreement. In 2012, Kenya awarded exploration licenses for eight offshore blocks in the Indian Ocean to foreign oil companies, including Italy-based Eni, France-based Total, and US-based Anadarko Petroleum. Somalia protested, contending that Kenya had contravened Somalia's Law No. 37 which defines Somalia's continental shelf and EEZ (for a discussion, see here and here).

The parties adopted fundamentally different approaches to the maritime delimitation. Somalia argued that its maritime boundary should run in the same direction as the south-easterly path of the States' common land boundary. Accordingly, an unadjusted equidistance line throughout all maritime areas would achieve the equitable result required by international law [para 35]. Kenya contended that the parties had already agreed to a maritime boundary as Somalia has acquiesced to a boundary which followed the parallel of latitude. In any event, Kenya claimed that the boundary should take a 45-degree turn at the shoreline and run in a latitudinal line. This would give Kenya access to a much larger share of the disputed maritime area [para 35].

Somalia further requested that the ICJ declare that, by allowing oil and gas activities in the disputed area, including seismic testing and drilling, Kenya had violated Somalia's sovereignty, sovereign rights and jurisdiction and, also, breached UNCLOS and

customary international law [paras 198-200].

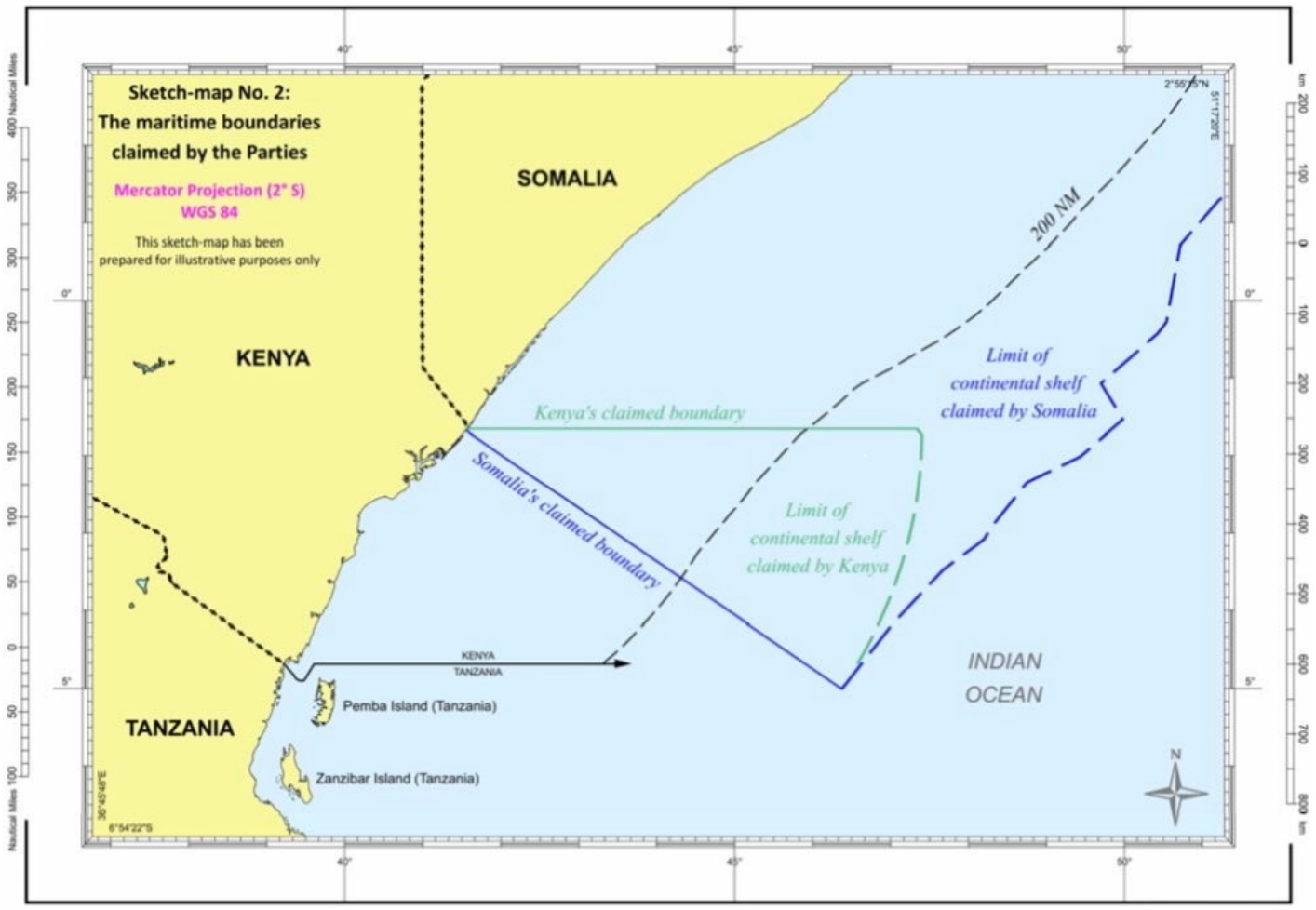

Figure 1: Overlapping Maritime Area

b. The maritime boundary delimitation process

Existence of a tacit boundary

First, the Court addressed Kenya's claim that the States had established, by tacit agreement, the course of their maritime boundaries in the territorial sea, EEZ and continental shelf within 200 nm. Kenya predicated its claim on a) Somalia's alleged acceptance of a maritime boundary at the parallel of latitude through its prolonged absence of protest and b) the parties' consistent practice concerning naval patrols, fisheries, marine scientific research, and oil concessions, according to which both parties limited their maritime activities on their side of the alleged boundary.

The ICJ reiterated that the establishment of a permanent maritime boundary 'is a matter of grave importance' [para 52]. Thus, a high evidentiary threshold is required in order to show that a maritime boundary has been established by acquiescence or tacit agreement. This is consistent with the existing case law. Evidence of a tacit boundary agreement 'must be compelling' (*Nicaragua v Honduras; Ghana/Côte d'Ivoire*) and 'proof of the existence of a maritime boundary requires more than the demonstration of longstanding oil practice or adjoining oil concession limits' (*Ghana/Côte d'Ivoire*).

The ICJ found that the conduct of the parties did not show that Somalia had clearly and consistently acquiesced to the maritime boundary claimed by Kenya at the parallel of latitude [para 88]. The ICJ noted that bilateral negotiations had taken place between the two States with respect to the appropriate delimitation method and that Somalia and Kenya had both issued statements referring to a delimitation agreement to be negotiated. It concluded, therefore, that there was no tacit agreement on a *'de facto* maritime boundary'.

Delimitation of the maritime boundary

The Court applied its 'standard' delimitation methodology. This evidenced a desire to maintain consistency with the existing case law on maritime boundary delimitation. The Court applied four distinct steps. First, it identified the relevant coasts and baselines and the exact extent of overlapping entitlements. Second, it ascertained whether there was any pre-existing boundary agreement, tacit or explicit, relating to the delimitation of the maritime areas in question. Third, it delimited the territorial sea by applying the median line-special circumstances rule. Fourth, it turned to the delimitation of the exclusive economic zone (EEZ) and continental shelf within and beyond 200 nm.

The delimitation of the territorial sea, the continental shelf and the EEZ in the present case are governed, respectively, by Articles 15, 74 and 83 of UNCLOS. The ICJ highlighted the importance of the pertinent case law on maritime delimitation and ruled that:

[T]he delimitation methodology is based on the geography of the coasts of the two States concerned, and that a median or equidistance line is constructed using base points appropriate to that geography. Since the adoption of the Convention, the Court has gradually developed a maritime delimitation methodology to assist it in carrying out its task. In determining the maritime delimitation line, the Court proceeds in three stages, which it described in the case concerning Maritime Delimitation in the Black Sea (Romania v Ukraine).

The application of the equidistance method is not mandatory under UNCLOS. However, the Court stressed that, absent compelling factors making it inappropriate, it saw no reason to depart from its 'usual' practice [paras 128-131]. The Court, therefore, deployed its standard three-stage approach.

First, a provisional equidistance line was drawn from the most appropriate base points on the coasts of the parties based on methods that are geometrically objective.

Second, the Court considered whether any relevant circumstances called for the adjustment or shifting of the provisional equidistance line to achieve an equitable result. The general geographical situation was of primary importance in determining the equidistance boundary. The Court found that none of the several non-geographical factors advanced by Kenya called for an adjustment. Economic and security factors could not be considered because they related to uncertain and changing factors and, thus, were not 'permanent circumstances' [paras 156-160].

The Court also highlighted that equidistance lines drawn from markedly concave coastlines could lead to inequitable result. Thus, the Court made only one minor adjustment to attenuate the cut-off of Kenya's potential entitlements on account of the concavity of the coastline. The Court took into account the coastline of the two parties but also the concavity of the coastline in the broader geographical area extending from Somalia to Tanzania [paras 164-165, 168]. According to the Court: 'When the mainland coasts of Somalia, Kenya and Tanzania are observed together, as a whole, the coastline is undoubtedly concave' [para 168]. This approach is problematic because it considers a concavity outside the relevant coasts of the parties. It was, therefore, criticised by Judges Abraham, Yusuf and Robinson in their separate opinions. Even though, the resulting adjusted equidistance shifts the final positioning of the boundary to the north, it still allocates the greater part of the disputed area to Somalia [paras 173-174].

For the third and final stage of delimitation, the Court employed an ex-post facto (dis)proportionality test to verify that the adjusted equidistance line did not produce an inequitable result. It considered whether any marked disproportion existed between the ratio of respective coastal lengths and the ratio between the relevant maritime areas allotted to each party [paras 175-177]. The ratio between the maritime zones which pertain to Kenya and Somalia was 1:1.30 in favour of Kenya [para 176]. The Court concluded that the adjusted equidistance line was the single maritime boundary for the territorial sea, EEZ and continental shelf within and beyond 200nm [para 196].

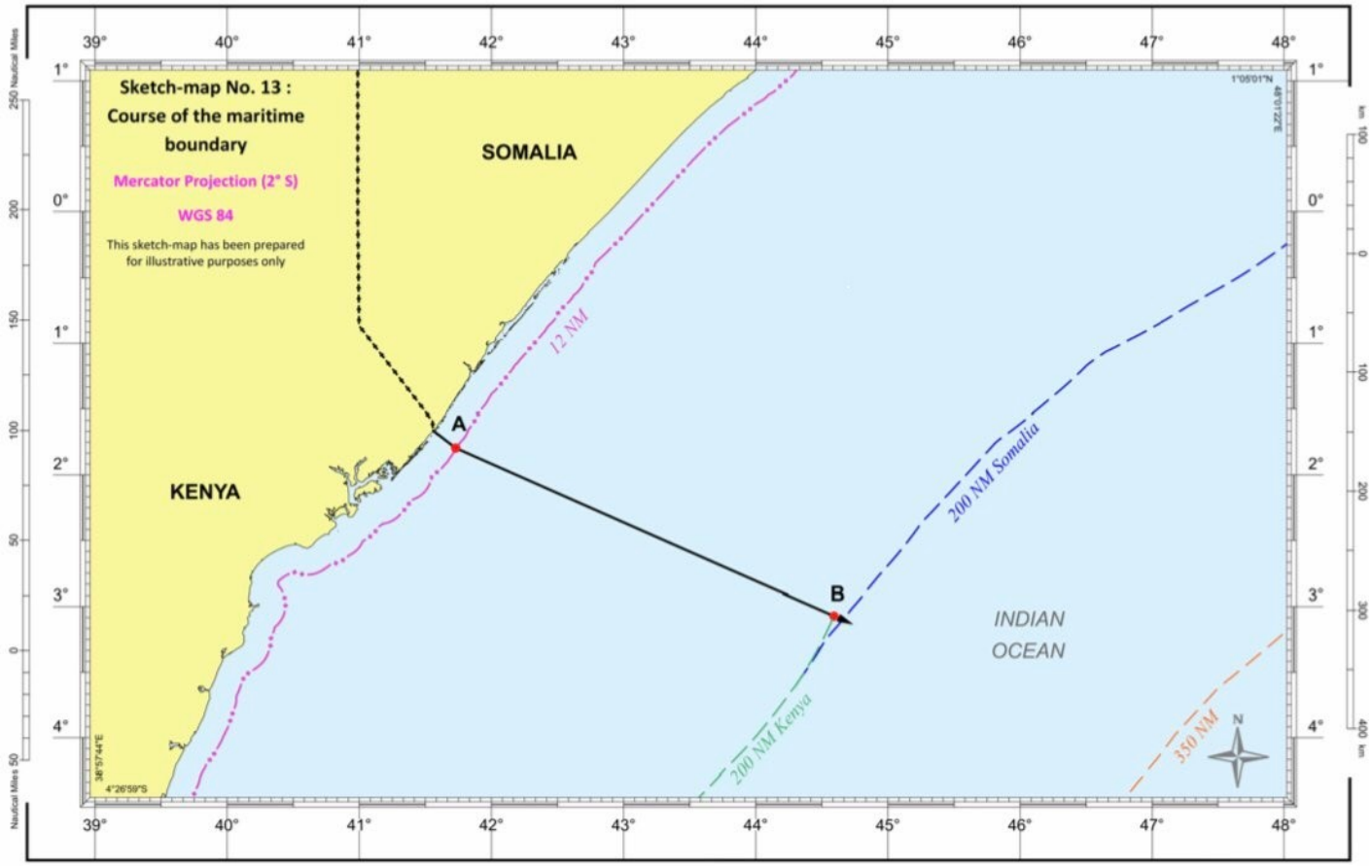

Figure 2: Course of the Maritime Boundary

The implications of the decision

The second part of this post comments on three of the key issues raised by the judgment: the role of non-geographical factors in maritime delimitation; the delimitation of the continental shelf beyond 200 nm; and the Court's treatment of unilateral activities in disputed maritime areas.

a. The role of non-geographical factors in maritime boundary delimitation

For decades, the impact of non-geographical factors on maritime delimitation has been debated by States and scholars. Economic considerations lie at the heart of the continental shelf and EEZ concepts. Yet, such factors have not played, at least explicitly, a significant role in the delimitation of these zones. As will be seen, the ICJ did not decide that non-geographical factors should be considered but did not rule that such factors would never be relevant.

Kenya invoked a range of non-geographical factors to support its claims. First, Kenya argued that naval patrols, fisheries, and marine scientific research activities, as well as oil concessions, evinced a particular conduct of the parties demonstrating the existence of a *de facto* maritime boundary. The Court did not find that the invoked conduct sufficed to establish a maritime boundary [paras 84-88]. Second, Kenya also asserted that security interests and the fact that the parties' conduct evidenced a de facto maritime boundary should be considered as relevant circumstances dictating the adjustment of the provisional equidistance line. Kenya drew on the Gulf of Maine case and alluded to the 'devastating repercussions' that an unadjusted equidistance line would have on local fishermen [paras 151-153]. In other words, Kenya invoked non-geographical factors to either evade the plotting of a maritime boundary by the Court at the outset or, if its first approach proved unsuccessful, affect the delimitation process later.

When discussing the three-stage approach, the Court stated that 'relevant circumstances' are factors which are 'mostly geographical in nature', but that there is 'no closed list of relevant circumstances' [para 124]. This leaves open the possibility of considering non-geographical factors as relevant circumstances at the second stage of the delimitation process. This was also echoed by Judge Xue in her declaration where she regretted the exclusive use of geographical factors at the second stage of

delimitation [paras 13-14]. Be that as it may, the Court declined to accept that the invoked non-geographical factors impacted the maritime boundary [paras 158-160].

b. Delimitation of the continental shelf beyond 200 nm

The ICJ upheld its own jurisdiction to delimit the continental shelf beyond 200 nm, notwithstanding the absence of recommendations from the Commission on the Limits of the Continental Shelf (CLCS) to either Somalia or Kenya. The final location of the seaward endpoint beyond the 200 nautical mile limit remains to be established according to the CLCS's recommendations. The Court considered that 'the lack of delineation of the outer limit of the continental shelf is not, in and of itself, an impediment to its delimitation between two States with adjacent coasts' [para 189].

In Bangladesh/Myanmar, ITLOS also upheld its jurisdiction over outer continental shelf-designations and delimited the maritime boundary despite the lack of CLCS' recommendations. ITLOS did so 'in view of uncontested scientific evidence regarding the unique nature of the Bay of Bengal and information [regarding the existence of] of a continuous and substantial layer of sedimentary rocks extending from Myanmar's coast to the area beyond 200 nm' [para 446]. No such evidence existed in Somalia v Kenya.

In 2016 Nicaragua v Colombia, the ICJ had found that it did have jurisdiction to determine a boundary beyond 200 nm between the parties as Nicaragua had submitted scientific data to the CLCS, even though the CLCS had not yet issued any recommendations. Seven judges had dissented, arguing that 'information submitted to the CLCS pursuant to Article 76(8) of UNCLOS will not necessarily be regarded as sufficient to establish the existence of an extended continental shelf' [Joint Dissenting Opinion of Vice-President Yusuf, Judges Cançado Trindade, Xue, Gaja, Bhandari, Robinson and Judge ad hoc Brower]. The judges thus considered that CLCS' recommendations were a prerequisite to validate a claim over the continental shelf beyond 200 nm. Indeed, it is difficult to see why the mere fact of making a full submission to the CLCS should make any difference. The submission does not mean that the submitting State has an entitlement to an extended continental shelf or where its outer limit lies. In Somalia v Kenya, President Donoghue expressed her concern on this point in her separate opinion [paras 4, 8] and Judge Robinson acutely criticised the Court's choice to proceed with delimitation beyond 200 nm in his individual opinion [paras 9-21].

c. Unilateral activities in disputed maritime areas

Another key question for adjudication related to Kenya's continuing seismic testing and oil drilling activities in the disputed maritime area while the dispute was pending resolution. Somalia made a dual argument regarding Kenya's unilateral activities. First, Somalia argued that Kenya's unilateral activities violated Somalia's sovereign rights. Second, Somalia alleged that Kenya's unilateral activities breached Articles 74(3) and 83(3) of UNCLOS which provide that parties must make every effort not to jeopardise or hamper arrival at a delimitation agreement. Thus, Somalia correctly disentangled the possible infringement of sovereign rights where Kenya's operations would fall within Somalia's maritime zones following delimitation from the breach of Articles 74(3) and 83(3) of UNCLOS.

This was the third case, following the Guyana v Suriname Annex VII Arbitration in 2007 (see here and here) and the *Ghana/Cote d'Ivoire* case by the Special Chamber of ITLOS in 2017 (see here and here), in which an international decision-making body ascertained the meaning and scope of Articles 74(3) and 83(3) of UNCLOS within the context of unilateral oil and gas activities in disputed maritime areas. Notably, *Somalia v Kenya* was the first time the ICJ was called upon to construe and apply these provisions.

On the first argument regarding the alleged violation of Somalia's sovereignty/sovereign rights, the ICJ followed the findings of ITLOS in the *Ghana/Côte d'Ivoire* case. The ICJ held that activities conducted by a State in an undelimited area to which another State has also laid claims do not violate the latter's sovereign rights, even if the area is later allocated to that State [para 203]. Put differently, the Court endorsed the view that delimitation has a constitutive function: it is an act generating sovereign rights for States. This view is regrettable since it turns on its head the fundamental axiom according to which States enjoy inherent rights (*ipso facto and ab initio*) over the continental shelf (for a criticism see also here and here).

Additionally, the Court found that there was no evidence that Kenya's claims over the area had not been made in good faith [para 204]. Thus, Kenya's maritime activities did not violate Somalia's sovereignty/sovereign rights. The principle of good faith is admittedly vague. Hence, it is regrettable that the Court did not provide guidance on its application to this dispute. Besides, it is hard to perceive how delineating offshore blocks covering the entirety of the disputed area (some of which were located way beyond the provisional equidistance line) and performing unilateral hydrocarbon activities in parts of the area did not constitute signs of bad faith.

On the second argument regarding the putative violation of Articles 74(3) and 83(3) of UNCLOS, the Court, in line with previous

jurisprudence, did not consider that activities of a 'transitory character' (i.e. granting of oil concessions, performance of seismic surveys) sufficed to jeopardize or hamper the reaching of a final agreement [para 207]. Harking back to *Guyana v Suriname*, the Court stressed that drilling activities causing permanent physical change in the marine environment could jeopardize or hamper the reaching of a final agreement [para 208]. However, the Court deemed the available evidence insufficient to demonstrate that Kenya carried out drilling operations that could have led to permanent physical change in the disputed area after the dispute was crystallised in 2009 and, thus, did not find any violation [paras 83, 209]. The Court, nonetheless, appears to have endorsed the position that unilateral drilling in disputed maritime areas causing permanent harm entails infringement of the obligations in Articles 74(3) and 83(3) of UNCLOS.

The Court did not further discuss Articles 74(3) and 83(3). The lax treatment of Articles 74(3) and 83(3) of UNCLOS may very well exacerbate tension in disputed areas. As Judge Paik put it in his separate opinion in *Ghana/Côte d'Ivoire*, tolerating serious unilateral activities in disputed areas 'would certainly send a wrong signal to States pondering over their next move in a disputed maritime area elsewhere' (on a critical view, see here, here and here). Future jurisprudence should be more decisive in terms of unilateral activities in disputed areas.

Conclusion

The ICJ's judgment in *Somalia v Kenya* completes the maritime boundary between Somalia and Kenya. The judgment illustrates a desire to contribute to the development of consistent delimitation jurisprudence by, first, confirming that the 'equidistance/relevant circumstances method' is now standard in a maritime delimitation process and, second, underscoring the primacy of criteria associated with coastal geography, such as concavity, coastal length, etc., while ignoring factors related to unilateral activities in the relevant maritime area.

However, the way in which the Court dealt with several matters raises concerns over the coherence and stability of its jurisprudence. The Court considered a concavity outside the relevant coasts; delimited the continental shelf beyond 200 nm absent recommendations by the CLCS; and embraced the view that delimitation is constitutive of sovereign rights. These points depart from the Court's *jurisprudence constante* and generate additional ambiguity. Furthermore, the Court did not shed light on the content of Articles 74(3) and 83(3) of UNCLOS. Of course, importantly, another maritime boundary delimitation has been effected by the Court through the application of the three-stage approach. Nevertheless, the coherent interpretation and application of the pertinent international rules remains of utmost importance for the entrenchment of a stable legal order.

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