Journal of African Law, 61, 3 (2017), 393–418 © SOAS, University of London, 2017.
doi:10.1017/S0021855317000286

The Impact of Judicial Delimitation on Private Rights Existing in Contested Waters: Implications for the Somali-Kenyan Maritime Dispute

Marianthi Pappa*
University of Aberdeen
marianthi.pappa@abdn.ac.uk

Abstract

This article raises concerns about the impact of judicial delimitation on private exploratory rights existing in contested waters. These concerns stem from the tendency of judges to disregard any non-geographic factors during the process of maritime delimitation. This practice allows for the reallocation of the private rights in question and eventually creates tension between public international law and private law. This is discussed in the context of the Somali-Kenyan maritime dispute, which is currently under judicial consideration. The article will demonstrate that, insofar as international judges apply the standard doctrines of delimitation, the prospective judgment may cause the reallocation and, ultimately, the frustration of Kenya's private exploratory contracts in the disputed area. It suggests that a unitization agreement entered after delimitation may reverse this outcome. However, inasmuch as state cooperation lacks the cloak of international custom, the interests of private actors operating in contested waters remain at stake.

Keywords
Maritime delimitation, Kenya, Somalia, exploratory permits, contract frustration

INTRODUCTION

This article investigates the impact of public law judgments on private rights in the context of maritime delimitation. The main purpose of judicial delimitation is the peaceful settlement of interstate maritime disputes. By establishing maritime boundaries, international judges seek to separate the overlapping entitlements of two states in a shared maritime space, on the basis of international law and in an equitable manner.[1] In this light, maritime delimitation rests on the reduction of each state's jurisdiction in the ocean.

* LLB (Aristotle University of Thessaloniki, Greece), LLM (oil and gas law, University of Aberdeen). PhD candidate (international law of the sea, University of Aberdeen).
1 As per arts 74(1) and 83(1) of the UN Convention on the Law of the Sea 1982, signed 10 December 1982 and entered into force 16 November 1994.

https://doi.org/10.1017/S0021855317000286 Published online by Cambridge University Press

This raises questions as to whether a delimitation judgment may also disturb any private exploratory rights that already exist in the disputed area. The author's concerns emerge from the tendency of judges to disregard any non-geographical factors (such as the presence of natural resources or exploratory permits in the disputed area) during the process of maritime delimitation. In essence, this practice allows for the reallocation of the private rights in question and, eventually, creates tension between public international law and private law.

This tension is particularly evident in the Somali-Kenyan boundary dispute, which is currently before the International Court of Justice (ICJ). The presence of private permits granted by Kenya for the exploration of the contested maritime area makes this case worth studying. Hence, it will be interesting to investigate the ICJ's potential stance towards existing private rights.

This article will demonstrate that, insofar as the ICJ aligns with the standard doctrines of maritime delimitation, the prospective judgment may cause the reallocation and, ultimately, the discharge of Kenya's privately-held permits in the disputed area. The key to reversing this outcome is state cooperation; however, as this study observes, this practice is not without difficulties. Through the present analysis, the author challenges the current rules of maritime delimitation and the capacity of international fora to handle complex boundary disputes involving private rights. The author hopes this will encourage future discussion of the legal responses to this problem.

The article is in two parts. The first identifies the clash between public international law and private law in the context of judicial delimitation. After introducing some basic concepts of public international law (ocean enclosure, maritime disputes, delimitation), the article concentrates on the potential impact of international adjudication on private rights that already exist in a disputed area. Against this background, the author sets the research question: will an exploratory permit survive the potential reallocation of the explored area due to maritime delimitation?

The second part answers this question in the context of the Somali-Kenyan case study. After presenting the specifics of the boundary dispute, the article investigates the potential impact of the upcoming delimitation judgment on Kenya's privately-held contractual permits, and the possible ways to secure private rights under the auspices of international law.

THE CLASH BETWEEN PUBLIC INTERNATIONAL LAW AND PRIVATE LAW

From freedom of the seas to ocean enclosure

For centuries, the ocean has been the subject of a battle: the battle between *mare liberum* [freedom of the seas] and *mare clausum* [ocean enclosure - sea under the jurisdiction of one nation]. According to the former doctrine, introduced by Hugo Grotius in 1609, the sea as a whole was too immense to be appropriated by a nation. Despite its wide acceptance among the circles of natural law, the so-called "freedom of the seas" was challenged when John Selden

https://doi.org/10.1017/S0021855317000286 Published online by Cambridge University Press

first supported states' rights to the world's seas and oceans.[2] The idea of state expansion in the ocean was quickly favoured by coastal nations. By the mid-20th century, *mare clausum* had successfully dominated international legal theory.

The prevalence of ocean enclosure in the mid-1900s can be attributed to three main reasons. First, the control of the seas would provide littoral states with access to offshore living and non-living resources. The world's increasing food and energy needs had long ago turned states' interests to the ocean. Yet, it was not until the end of World War II that technological advancements enabled the search for and the utilization of natural resources at great depths.

Secondly, the mid-20th century is intertwined with the independence of many states in Africa, Latin America and Asia. The end of colonization marked the birth of new coastal states seeking economic development and participation in global trade. The key to progress was the declaration of permanent sovereignty over the natural wealth of those states, which encouraged foreign investment onshore and offshore.[3]

Thirdly, the true catalyst for the expansion of states' jurisdiction in the ocean was the development of a suitable legal framework. For centuries, a state's authority could not extend beyond three nautical miles from the shore, subject to the so-called "cannon shot" rule.[4] Yet, with the passage of time, states sought to expand their offshore jurisdiction.[5] In response, the Geneva Convention on the Continental Shelf of 1958 first established coastal states' exploratory rights to the seabed within a distance of 200 nautical miles.[6] However, the expansion of state control in the ocean was completed with the implementation of the UN Convention on the Law of the Sea (UNCLOS) in 1982. Pursuant to this quasi-universal treaty, every littoral state is now entitled to a 12 nautical mile territorial sea, a 200 nautical mile

2 See S Rosenne "Geography in international maritime boundary-making" in H Caminos (ed) *Law of the Sea* (2001, Ashgate Publishing) 225 at 226–27.

3 UN General Assembly res 1803 (XVII) on permanent sovereignty over natural resources, 14 December 1962; UN General Assembly res 3281 (XXIX) Charter on Economic Rights and Duties of States, 12 December 1974.

4 This customary rule has been attributed to the remark of Cornelius van Bynkershoek in 1702, that "territorial sovereignty ends where the power of arms ends". The 3 nm limit remained fixed for the next two centuries. LBrilmayer and N Klein "Land and sea: Two sovereignty regimes in search of a common denominator" (2001, Yale Law School Faculty scholarship paper 2523) 706 at 717; W Walker "Territorial waters: The cannon shot rule" (1945) 22 *British Yearbook of International Law* 210 at 211–13.

5 See of US President Harry Truman's Proclamation with Respect to the Natural Resources of the Subsoil and the Seabed of the Continental Shelf and Proclamation with Respect to Coastal Fisheries in Certain Areas of the High Seas, 28 September 1945; Proclamation of Argentina on the Epicontinental Sea, 5 December 1946; Declaration of the Maritime Zone of Chile, Ecuador and Peru (Santiago Declaration), 18 August 1952.

6 Signed 29 April 1958, and entered into force 10 June 1964, arts 1–2.

https://doi.org/10.1017/S0021855317000286 Published online by Cambridge University Press

exclusive economic zone and a 200 nautical mile continental shelf which, in certain circumstances, can extend up to 350 nautical miles from the coast.[7]

Overlapping entitlements and maritime delimitation

In an ideal world, all littoral states would be able to enjoy the full extent of their legal entitlements in the ocean. Alas, this picture is far from real. Whenever two (opposite or adjacent) states are proximate, their legitimate projections may abut or overlap. To separate their overlapping entitlements, states need to establish an international maritime boundary through the process of delimitation.[8]

The basic function of delimitation is that it helps states define their offshore jurisdiction in a clear-cut way. By definition, boundaries are "lines that mark the limits of an area"[9] or, more correctly in this case, that mark the limits of the jurisdiction of the two states in a shared maritime space. That aside, boundaries serve a series of political, legal and administrative purposes too.[10] These purposes, which Johnston calls "state values", can be classified in two main categories: symbolic values (states' national defence and integrity, exercise of national jurisdiction and sovereignty, good neighbouring); and practical values (states' economic welfare and self-sufficiency through the conduct of economic activities, such as farming, trade, tourism, fishing, exploitation of hydrocarbons and mineral deposits).[11] It must be pointed out, however, that "there is no rule that the … frontiers of a State must be fully delimited".[12] This applies to both land and maritime boundaries.[13]

Delimitation plays a problem-solving role too, for it settles international maritime disputes. Typically, these disputes arise from disagreement between two states regarding their boundary's exact location or the criteria to be applied for the establishment of the boundary.[14] That said, an international dispute is not a vague declaration of opposite assertions over the same area but a "specific and explicitly expressed" disagreement that remains unresolved

7 UNCLOS, arts 3, 57 and 76, respectively.

8 The determination of a boundary line by treaty or otherwise is called delimitation, while the actual laying down of this line and its definition by boundary pillars or other similar means is called demarcation. Sir H McMahon "International boundaries" (1935) 84 *Journal of the Royal Society of Arts* 1 at 4.

9 See definition in *Oxford Dictionaries*, available at: <http://www.oxforddictionaries.com/definition/english/boundary> (last accessed 27 August 2017).

10 D Johnston *Theory and History of Boundary-Making* (1998, McGill-Queen's University Press) at 42.

11 Id at 12. Also see V Prescott and C Schofield *Political Boundaries of the World* (2004, Martinus Nijhoff) at 216–17.

12 North Sea Continental Shelf cases (*Federal Republic of Germany v Denmark*; *Federal Republic of Germany v Netherlands*) (1969) ICJ Rep 3 at 46.

13 The fact that states are not required to delimit their maritime spaces in order to exercise offshore jurisdiction is also confirmed by their right to explore their shared natural resources, pending delimitation, through a joint development agreement.

14 Johnston *Theory and History*, above at note 10 at 10.

https://doi.org/10.1017/S0021855317000286 Published online by Cambridge University Press

for a reasonable time.[15] Until this difference is crystallized into a specific claim, no actual dispute exists.[16]

International maritime disputes: Means of settlement and underlying challenges

It is not impossible for an unresolved boundary difference to evolve into a violent conflict and threaten international peace and stability.[17] In order to avoid this situation, international law provides several ways for the peaceful settlement of interstate disputes. According to the UN Charter, "[t]he parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice".[18]

The obligation on states to resolve their disputes peacefully also extends to the ocean. More specifically, UNCLOS provides that states settle their maritime disputes mutually and through means of their own choice.[19] As such, no state may unilaterally demarcate a disputed maritime area.[20] In principle, a mutual solution is achieved through bilateral negotiations that lead to an agreement.[21] However, negotiations are not always successful. To protect the situation from a potential stalemate, part XV of UNCLOS provides states with a cluster of means of third-party resolution, including international arbitration and adjudication.[22]

15 J Pan *Toward a New Framework for Peaceful Settlement of China's Territorial and Boundary Disputes* (2009, Martinus Ninjhoff) at 23; J Merrills "The means of dispute settlement" in M Evans (ed) *International Law* (2003, Oxford University Press) 528 at 530.

16 Pan, id at 24.

17 For example, it is supported that the long maritime disputes between Greece and Turkey in the Aegean Sea, China and Japan in the East China Sea or China, the Philippines and Vietnam in the South China Sea threaten global peace and stability. The same applies on land. In Africa, for example, three major wars (Biafra, Eritrea, the Ogaden) and the civil wars in Chad and Sudan have all been caused by territorial disputes. Similarly, in the Middle East, five wars arose from the failure of Jewish and Arab occupants of Palestine to agree on a mutual boundary. See D Downing *An Atlas of Territorial and Border Disputes* (1980, New English Library) at 9.

18 UN Charter, chap VI, art 33.1.

19 UNCLOS, preamble and arts 279–80.

20 "Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regards to other States depends upon international law": Fisheries case (*United Kingdom v Norway*) [1951] ICJ Rep 116 at 132.

21 UNCLOS, art 283.

22 Id, arts 286–87. However, under neither the UN Charter nor general international law are states obliged to exhaust diplomatic negotiations before bringing their maritime dispute to an international court or tribunal: *Cameroon v Nigeria* judgment on preliminary objections, ICJ Rep 1998, 303, para 56.

https://doi.org/10.1017/S0021855317000286 Published online by Cambridge University Press

The majority of boundary disputes are successfully resolved directly by states through treaties, while only 6–7 per cent of them are settled by international bodies.[23] This shows that interstate negotiations are much preferable to adjudication and there are two main reasons for this.

For one thing, diplomacy allows states to keep the dispute under their own control. By choosing this path, states are free to determine not only the place and time of their negotiations but, most importantly, their content. They may agree on any boundary line of their preference and take into account factors (economic, political or historic) that would normally be disregarded by an international body.[24] The second benefit of diplomacy is that it soothes tensions between the disputants. Both sides will join the negotiating table not as competitors but as equal actors. There will be no "winner" or "loser" at the end of their discussions, even if one of them eventually revises its original position in the spirit of compromise. As put by Judge Moore, negotiation is the process "by which governments, in the exercise of their unquestionable powers, conduct their relations one with another and discuss, adjust and settle their differences".[25]

Despite its benefits, however, diplomacy is not always effective. Not all states show the same will to cooperate and compromise. Neither do they wish to spend valuable time on long rounds of negotiation that may eventually be fruitless.[26] In such cases, forcing states to the negotiating table would stoke existing tensions rather than soothe them. States may therefore choose to submit their boundary disputes to international courts or tribunals.[27] Judicial delimitation is the subject matter of this study.

One of the greatest benefits of judicial delimitation is that it provides a "third-party" solution. Upon the submission of a boundary dispute to an international forum, "jurisdiction over the matter shifts to a new body and each side to the dispute is committed in advance to accepting the verdict".[28] As requested by the states, the judges will either indicate the criteria for an

23 I Karaman *Dispute Settlement Under the Law of the Sea Convention* (2012, Martinus Nijhoff) at 184.

24 North Sea Continental Shelf cases, above at note 12 at 93.

25 Dissenting opinion in *The Mavrommatis Palestine Concessions* (1924) PCIJ ser A, no 2 at 62.

26 "The chance of success of diplomatic negotiations is essentially a relative one": id at 13. China and Japan, for example, had 13 unsuccessful rounds of negotiation regarding the delimitation of the East China Sea.

27 A list of disputes submitted to adjudication can be found on the official websites of the ICJ and arbitral tribunals, available at: <http://www.icj-cij.org/en/cases> (last accessed 14 September 2017) and <https://www.itlos.org/en/cases/> (last accessed 27 August 2017) respectively.

28 A Cukwurah *The Settlement of Boundary Disputes in International Law* (1967, Manchester University Press) at 200.

https://doi.org/10.1017/S0021855317000286 Published online by Cambridge University Press

equitable solution[29] or draw the actual boundary line.[30] Hence, by choosing adjudication, states confer on a third party extensive discretionary powers.

This does not necessarily mean that the announced delimitation judgment or arbitral award is always acceptable to both sides. A maritime dispute arises from the inability of two littoral states to enjoy the full extent of their legal entitlements in the ocean due to coastal proximity. To address this situation, international judges are called upon to separate the states' overlapping entitlements over the shared maritime space. To that extent, maritime delimitation requires the reduction of each state's legal entitlement in the ocean.[31]

To reach an equitable result, international judges must strike a delicate balance between the disputants' conflicting entitlements. However, "equity does not necessarily imply equality".[32] The concept of distributive justice is incompatible with maritime delimitation. As held by the ICJ, the purpose of maritime delimitation is not the apportionment or division of the disputed area into converging sectors, but the establishment of maritime boundaries in a maritime space that already appertains to both states.[33]

Things, however, are more complex in practice. It is possible that, pending delimitation, state A granted one or more private exploratory permits in the shared maritime space without its neighbour's consent.[34] This right is not affected by the lack of clear maritime boundaries. Hence, pending delimitation, a littoral state can enjoy the full extent of its entitlement in the ocean, had it not been for the presence of its neighbour.[35] Besides, as highlighted by international jurisprudence, the lack of fixed maritime boundaries should not in itself preclude a state's economic activities in the shared area.[36] However, it is also possible that the delimitation judgment eventually awards all or part of the explored area to state B.[37] In that case, the question arises as to whether the existing private rights will survive.

29 As in the North Sea Continental Shelf cases, above at note 12.

30 As in the application for maritime delimitation in the Caribbean Sea and the Pacific Ocean (*Costa Rica v Nicaragua*), filed at the ICJ on 25 February 2015.

31 P Weil *The Law of Maritime Delimitation: Reflections* (1989, Grotius Publications) at 48.

32 North Sea Continental Shelf cases, above at note 12 at 91.

33 Id at 22.

34 For example: Guyana in the waters also claimed by Suriname; Ukraine in the area of the Black Sea claimed by Romania; Tunisia and Libya, Libya and Malta in the respective maritime disputes in the Mediterranean Sea; China and Japan in the East China Sea; China and Vietnam in the South China Sea; and Greece and Turkey in the Aegean Sea.

35 North Sea Continental Shelf cases, above at note 12 at 57 and 101; Maritime Delimitation in the Area between Greenland and Jan Mayen (*Denmark v Norway*) (1993) ICJ Rep 38 at 59; Weil *The Law of Maritime Delimitation*, above at note 31 at 3.

36 Insofar as the state's exploratory activities do not cause permanent change to the seabed (such as drilling). For example, the unilateral conduct of seismic surveys (with the use of ultrasound waves) is permissible. *Guyana/Suriname* arbitral award (PCA 2007) ICGJ at 465–67 and 470; Aegean Continental Shelf case (*Greece v Turkey*) request for the indication of interim measures of protection (1976) ICJ Rep 3 at 30–33.

37 See Maritime Delimitation in the Black Sea (*Romania v Ukraine*) (2009) ICJ Rep 61;

https://doi.org/10.1017/S0021855317000286 Published online by Cambridge University Press

One would expect judges to take this question into serious consideration during delimitation. Over the years, international jurisprudence has sought to make the process of delimitation as objective and predictable as possible.[38] That way, the protagonists of a boundary dispute may "estimate" the outcome of delimitation before initiating the process of adjudication. In this light, international judges have developed a particular approach consisting of three steps: the construction of a provisional equidistance line, made of all points that are equally distant from the states' base points; the correction of this line if required by the circumstances; and a retrospective check of the boundary's proportionality.[39] This approach is systematically followed in international jurisprudence, "unless there are compelling reasons that make it unfeasible" in a particular case.[40]

However, these principles do not axiomatically safeguard private rights that already exist in a disputed area. Pursuant to the "three-step" process, international judges determine whether there are any factors that may affect the course of a boundary. Traditionally, these factors related to coastal geography, such as the concavity or convexity of the states' coastlines and the presence of islands in the disputed area.[41] On the contrary, any non-geographical factors, such as the presence of privately-held concessions (such as for fishing or petroleum operations) in the disputed area, are treated with great scepticism. It must be noted, however, that judges' stance towards private rights was not always that strict.

In the famous *Grisbadarna* case of 1909, the arbitrators of the Permanent Court of Arbitration paid particular attention to the private rights of Swedish fishermen in the disputed waters between Norway and Sweden. As stressed by the hearing panel, "it is a well established principle of the law of nations that the state of things that actually exists and has existed for a long

---

contd
Guyana/Suriname (ibid); Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria (*Cameroon v Nigeria*: *Equatorial Guinea intervening*) ICJ Rep 2002.

38 "Whether it is a land frontier or a boundary line in the continental shelf that is in question, the process is essentially the same, and inevitably involves the same element of stability and performance": Aegean Sea Continental Shelf (*Greece v Turkey*) (1978) (jurisdiction of the court) ICJ Rep 3 at 35–36. Similarly, in 1982, Judge Juménez de Aréchaga highlighted the "need to maintain consistency and uniformity in the legal principles and rules applicable to a series of situations which are characterised by their multiple diversity": Continental Shelf (*Tunisia v Libya*) (1982) ICJ Rep 18, separate opinion at 26.

39 Continental Shelf (*Libyan Arab Jamahiriya v Malta*) (1985) ICJ Rep 13; Maritime Delimitation and Territorial Questions between Qatar and Bahrain (*Qatar* v *Bahrain*) merits (2001) ICJ Rep 40; *Romania v Ukraine*, above at note 37; Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (*Bangladesh/Myanmar*) (2012) ITLOS.

40 *Romania v Ukraine*, id at 116. Such reasons could be the existence of a boundary agreement between the disputants or an historic title.

41 For example, see *Guyana/Suriname*, above at note 36 at 377.

https://doi.org/10.1017/S0021855317000286 Published online by Cambridge University Press

time should be changed as little as possible; this principle is especially applicable in the case of private interests which, once disregarded, cannot be effectively preserved by any manner".[42] It was observed that, if the line proposed by Norway was eventually accepted, private rights would be threatened with reallocation. This in turn would severely disturb the legally acquired interests of the private persons. To prevent this outcome, the award eventually favoured Sweden.

A few decades later, in *Tunisia v Libya*, the ICJ affirmed that the presence of oil wells in the disputed area may affect the process of delimitation.[43] As explained by the judges, this can be the case if the line of existing concessions denotes an explicit or tacit agreement between the states or a *modus vivendi* [acceptable arrangement] on the preferred boundary line.[44] Although the ICJ was not requested to draw the actual boundary (but only to determine the factors that would lead to an equitable result), it respected the line of existing petroleum permits.[45] Consequently, the private rights of the respective operators were protected from reallocation.

Despite these precedents, this position is no longer endorsed in jurisprudence. In a series of subsequent cases, judges have affirmed that a line of oil concessions may indicate states' consensus on a boundary's location. In none of those cases, however, did the courts adjust or shift the provisional boundary line in accordance with existing permits.[46]

This shift in the stance of judges is not entirely without justification. Because of its position in *Tunisia v Libya*, the ICJ was severely criticized for pursuing an activist role.[47] To avoid a similar accusation, judges are now extremely cautious when examining the conduct of states as evidence of boundary agreements.

42 Arbitral Award in the Matter of Delimitation of a Certain Part of the Maritime Boundary between Norway and Sweden (*Norway/Sweden*) (1909) 11 RIAA XI at 6.

43 Above at note 38 at 107.

44 Id at 96.

45 Id at 118 and 133 B4.

46 Case Concerning Delimitation of the Maritime Boundary in Gulf of Maine (*Canada v USA*) (1984) ICJ Rep 246 at 149–54; Delimitation of the Maritime Boundary between Guinea and Guinea Bissau (1985) award at 62–63 and 105; Delimitation of Maritime Areas between Canada and the French Republic (*St Pierre et Miquelon*) (1992) arbitral award at 89–91; arbitration between Newfoundland and Labrador and Nova Scotia, award of arbitral tribunal (2002) at 3.4; *Cameroon v Nigeria*, above at note 37 at 304; arbitration between Barbados and Trinidad and Tobago (2006) award at 361–64; Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (*Nicaragua v Honduras*) (2007) ICJ Rep 659 at 247 and 253–58; *Guyana / Suriname*, above at note 36 at 390; *Romania v Ukraine*, above at note 37 at 198.

47 See dissenting opinions by Judges Gros and Oda. Also see T Cottier *Equitable Principles of Maritime Boundary Delimitation* (2015, Cambridge University Press) at 284.

https://doi.org/10.1017/S0021855317000286 Published online by Cambridge University Press

There are other reasons that support the new stance of judges. It can be argued that disregarding permits during maritime delimitation prevents states from extending claims in the continental shelf through the doctrine of effective occupation.[48] Although this doctrine is widely accepted in territorial delimitation, it does not apply in the ocean. This is because the rights of every coastal state in the continental shelf exist automatically and, as such, do not depend on claim or occupation.[49]

It can be added that the new approach of judges seeks to discourage competitive drilling among disputing states. By authorizing drilling without its neighbour's consent, a state may breach its procedural obligations to cooperate and not prejudice the final delimitation agreement under articles 74(3) and 83(3) of UNCLOS. Besides, the practice of unilateral drilling in undelimited areas may lead to the wasteful exploitation of shared natural resources.[50]

In summary, judges' current practice of disregarding any private rights that exist in the area under delimitation does not lack justification. Be that as it may, this practice is in direct conflict with the general principle of international law that protects legally acquired private rights from potential disturbance. It is regrettable that judges no longer refer to this principle, which has been present in international law since the time of Vattel.[51] Clearly, this omission can have legal and practical implications for non-state actors operating in contested waters. To capture the scale of those implications, this article now refers to the Somali-Kenyan case study.

IMPLICATIONS FOR THE SOMALI-KENYAN CASE STUDY

The boundary dispute

This dispute has its roots in Kenya and Somalia's disagreement on the exact location of their boundary in the western Indian Ocean (figure 1). Based on the principle of equidistance, Somalia contends that the boundary should follow a diagonal, southeast route into the ocean, extending from the states' land border.[52] According to Kenya, however, the maritime boundary should be "a straight line emanating from the states' land boundary terminus and

48 Y Tanaka *International Law of the Sea* (2012, Cambridge University Press) at 211; *Tunisia v Libya*, above at note 38, dissenting opinion of Judge Evensen at 318–19.

49 North Sea Continental Shelf cases, above at note 12 at 19.

50 R Lagoni "Oil and gas deposits across national frontiers" (1979) 73/2 *The American Journal of International Law* 215 at 219.

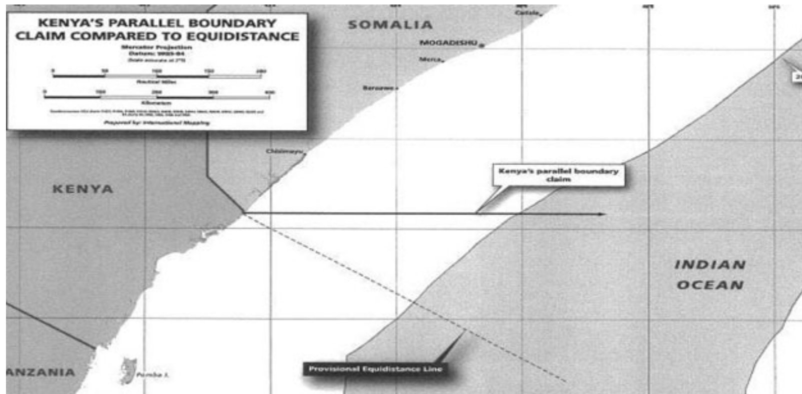
51 E Vattel *The Law of Nations or the Principles of Natural Law, Applied to the Conduct and to the Affairs of Nations and of Sovereigns* (transl of the 1758 ed by C Fenwick, 1916, Carnegie Institution of Washington) book III, chap XIII at 200–01. Also see *Certain Questions Relating to Settles of German Origin in the Territory Ceded by Germany to Poland* (German Settles) (1923) PCIJ (ser B) no 6 at 36; *Case Concerning Certain German Interests in Polish Upper Silesia* (1926) PCIJ (ser A) no 7 at 42.

52 Maritime Delimitation in the Indian Ocean (*Somalia v Kenya*), appln filed by Somalia to the ICJ on 28 August 2014, at 33.

https://doi.org/10.1017/S0021855317000286 Published online by Cambridge University Press

extending due east along the parallel of latitude on which the land boundary terminus sits".[53]

Figure 1. Depicting the parties' boundary claims in the western Indian Ocean. Kenya's claim follows a parallel line, while Somalia's claim follows the (provisional) equidistance line. This map was prepared by International Mapping for the Government of Somalia and is included in Somalia's application to the ICJ.



Despite a series of rounds of negotiation, the boundary difference remained unresolved. In fact, it was severely aggravated in 2012, when Kenya granted a number of permits (production sharing contracts or PSCs)[54] for the exploration of the western Indian Ocean.[55] Somalia challenged the validity of its neighbour's exploratory permits for oil blocks L-21, L-22, L-23 and L-24 (figure 2),

53 Id at 19.

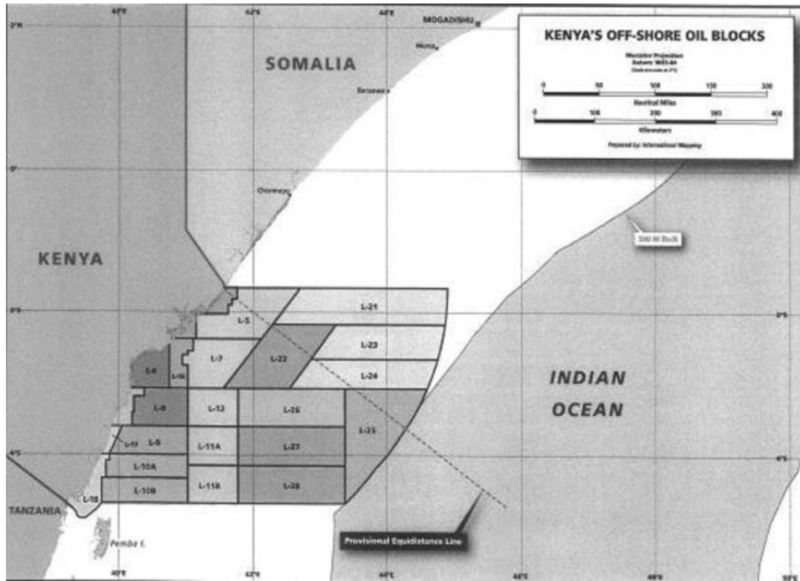
54 According to secs 4.3 and 6.2(1) of the Petroleum (Exploration and Production) Act (cap 308) 1986, Kenya's petroleum operations are conducted through its National Oil Company, by entering into petroleum agreements with international oil companies or in any other appropriate manner. A PSC is a contract under which a private oil company (contractor) is hired by a government (state) in order to render exploratory and financial services in a specific area (oil block). In exchange, the contractor receives a share of any oil production that may result from his work. If no production follows, the contractor receives no compensation at all. Under this regime, the state preserves ownership of its resources and compensates (in a production share) the contractor for undertaking the sole risk of upstream operations. In that sense, a PSC is a service (or work) contract with payment in kind. See B Taverne *Petroleum Industry and Governments* (2nd ed, 2008, Kluwer International Law) at 156; J Easo "Petroleum contracts: Licenses, concessions, production sharing agreements and service contracts" in G Picton-Turbervill *Oil and Gas: a Practical Handbook* (2nd ed, 2014, Globe Law and Business) 7 at 15; A Jennings *Oil and Gas Exploration Contracts* (2nd ed, 2008, Sweet & Maxwell) at 2.

55 Blocks L-21, L-23 and L-24 were awarded for exploration to Eni in 2012, while L-22 was awarded to Total in the same year. Statoil showed interest in L-26 but eventually decided to avoid the area. The Norwegian government commented that "it has always advised Statoil not to apply for concessions in any areas of a potential legal dispute, and when realizing that this was the case with the mentioned L-26 block, Statoil decided not to

https://doi.org/10.1017/S0021855317000286 Published online by Cambridge University Press

as they fall entirely or partly within the disputed area.[56] In August 2014, Somalia requested the ICJ to "determine the complete course of the single maritime boundary, dividing all the maritime areas appertaining to Somalia and Kenya in the Indian Ocean".[57]

Figure 2. Depicting Kenya's offshore oil blocks in relation to the boundary difference. This map was prepared by International Mapping for the Government of Somalia and is included in Somalia's application to the ICJ.



contd
get involved". Anadarko received L-5 in 2010 but, according to subsequent reports, gave up its interest in late 2012 or early 2013, while L-25 remains under negotiation. See Somalia's application to the ICJ at 6 and: "Eni's operations in Africa", available at: <http://www.eni.com/portal/search/search.do?x=0&y=0&keyword=kenya&locale=en_IT&header=search> (last accessed 27 August 2017); "Total steps up exploration activities in Kenya with the award of the offshore L22 license in the Lamu Basin" (press release, 27 June 2012), available at: <http://www.total.com/en/media/news/press-releases/total-steps-exploration-activities-kenya-award-offshore-l22-license-lamu?xtmc=kenya&xtnp=1&xtcr=2> (last accessed 27 August 2017); and Norwegian Ministry of Foreign Affairs "Norway regrets claims by a UN report linking Norwegian development efforts to commercial interests in Somalia" (19 July 2013), available at: <https://www.regjeringen.no/en/aktuelt/development-efforts-somalia/id732864/> (last accessed 27 August 2017).

56 In 2012, Somalia's deputy energy minister, Abdullahi Dool, stated that the "contracts awarded by Kenya for four blocks in deep waters were invalid and the government planned to complain to the United Nations, which oversees maritime border laws": "Somalia challenges Kenya over oil blocks" (6 July 2012) *Reuters*, available at: <http://uk.reuters.com/article/2012/07/06/kenya-somalia-exploration-idUSL6E8I63IM20120706> (last accessed 27 August 2017).

57 Somalia's application to the ICJ at 36.

https://doi.org/10.1017/S0021855317000286 Published online by Cambridge University Press

Possible delimitation scenarios

Both states are anticipating the ICJ's ruling with great concern. The significance of the verdict, however, will be much greater for Kenya. Depending on the judgment, the country's upstream operations in oil blocks L-21, L-22, L-23 and L-24 will either continue or cease permanently.

If the ICJ accepts Kenya's boundary claim, the entire disputed area will remain permanently under Kenya's jurisdiction. As a result, the permits granted for oil blocks L-21, L-22, L-23 and L-24 will continue to authorize the activities of Kenya's investors. However, it is foreseeable that the judgment will favour Somalia (entirely or partly). This is because Somalia's boundary claim is based on the "three-step" delimitation approach that is systematically followed in the jurisprudence. If the ICJ complies with this standard practice, it will draw the boundary line regardless of any non-geographical factors that may exist in the disputed area, including Kenya's privately-held oil permits.

Two possibilities arise from the application of the "three-step" approach. The first is that the final boundary will coincide with Somalia's provisional equidistance line. This would be the case if the ICJ finds no geographical circumstances justifying a departure from equidistance.[58] The second is that the boundary will fall somewhere between the states' extreme claims. This will happen if the ICJ "corrects" the provisional equidistance line due to coastal disproportionality. In either case, however, the area under Kenya's exploration will be affected. In the first instance, the entire disputed area (comprising oil blocks L-21, L-23, more than half of block L-24 and almost half of block L-22) will be awarded to Somalia. In the case of shifted equidistance, the final boundary will cut through one or more of the four disputed oil blocks (figure 3).

As a result, the area under Kenya's exploration will shrink, subject to the final positioning of the boundary. Any oil blocks (or parts thereof) located south of the final line will remain under Kenya's jurisdiction; yet, the country will lose any blocks located north of the final boundary.

Each of these oil blocks has been the subject matter of a PSC. The entire contractual relationship, as well as the parties' rights and obligations, are based on this particular area (contract area). The sudden redistribution of this area to Somalia would cause a fundamental change of circumstances that could ultimately affect the contractual relationship between Kenya and its investors.

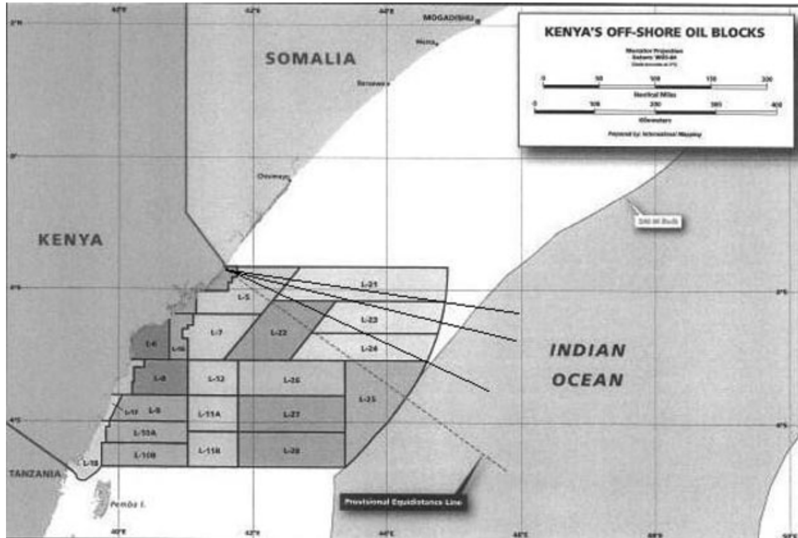
Whether Kenya acted in bad faith in unilaterally granting exploratory permits in the undelimited area or whether it violated its procedural obligation to negotiate with Somalia and seek a cooperative arrangement of a practical nature under articles 74(3) and 83(3) of UNCLOS are certainly important issues, although they lie beyond the scope of this analysis. The main question that this article addresses is whether Kenya's privately-held permits will survive a

58 The states' coasts are neither concave nor convex.

https://doi.org/10.1017/S0021855317000286 Published online by Cambridge University Press

potential redistribution of the contract area due to judicial delimitation. The answer depends on the nature of the instruments in question. The following paragraphs discuss this issue in detail.

Figure 3. If the boundary is drawn anywhere between the parties' boundary claims, it will affect one or more of Kenya's oil blocks. Original map taken from Somalia's application to the ICJ (see comment in figure 2). The extra lines on the map have been added by the author for illustrative purposes only.



THE NATURE OF KENYA'S PSCs

Although entered into between state and non-state actors, the agreements in question are mere private contracts. What is more, these instruments are governed by Kenyan law, which, in essence, is English common law.[59] Consequently, they are subject to the rules and principles of English contract law, such as the norm *pacta sunt servanda* [agreements must be kept].[60] A

59 The signed contracts are not publicly available, hence this article refers to Kenya's Model PSC of 2008: National Oil Corporation of Kenya "Overview of legal framework" (Model PSC), available at: <http://www.nationaloil.co.ke/site/3.php?flag=upstream&id=10> (last accessed 27 August 2017). According to clause 40 of the Model PSC, the contract is governed by the laws of Kenya. According to art 2 of Kenya's Law of Contract cap 23, 1961 "the common law of England relating to contract … shall extend and apply to Kenya".

60 This position was supported in several arbitral awards. See *Texaco Overseas Petroleum Co (Topco) and California Asiatic (Calasiatic) Oil Company v the Government of Libyan Arab Republic* award (1977) 53 ILR 389; *Libyan American Oil Company (Liamco) v the Government of the Libyan Arab Republic* (1977) 62 ILR 141. The opposite opinion is expressed by M Maniruzzaman "State contracts with aliens: The question of unilateral change by the

https://doi.org/10.1017/S0021855317000286 Published online by Cambridge University Press

question that arises is whether the parties to these contracts will remain contractually committed upon the redistribution of the explored area. Put differently, does the fundamental change of circumstances caused by delimitation justify the termination of the affected contracts?

Before 1863, the general rule in English common law was that contracts would remain binding even upon a radical change of circumstances.[61] The reason was that "where there is a positive contract to do a thing, the contractor must perform it or pay damages for not doing so".[62] However, as Sir Hughes Parry put it, "during the last one-hundred years, the courts have been evolving a doctrine to general effect that if there should occur some intervening event or change of circumstances so fundamental on it to strike at the root of the agreement, the contract should be treated as brought to an end forthwith, quite apart from the expressed volition of the parties themselves".[63]

This remark refers to the doctrine of "frustration of the contract" or more precisely "frustration of the adventure or of the commercial or practical purpose of the contract".[64] In particular, a contract is threatened with frustration when: (i) its performance becomes impossible (ii) for a reason that was both unforeseeable by the parties relying on it at the time of entry into the contract and (iii) supervening (not provided for by the language of the contract).[65] The legal consequence of frustration is that it discharges both parties from the duty of future performance. That way, the principle *pacta sunt servanda* is inhibited.

This article now examines whether the redistribution of Kenya's oil blocks due to delimitation could qualify as a frustrating event. For that reason, each of the three elements of frustration is discussed in relation to maritime delimitation.

---

contd
state in contemporary international law" (1992) 9/4 *Journal of International Arbitration* 141 at 141.

61 J Morgan *Great Debates in Contract Law* (2012, Palgrave MacMillan) at 120.

62 *Taylor v Caldwell* [1863] 3 B&S 826 at 833.

63 Sir D Hughes Parry *Sanctity of Contracts in English Law* (1959, Stevens & Sons) at 47.

64 Lord Wright, cited in G Treitel *Frustration and Force Majeure* (2nd ed, 2004, Sweet & Maxwell) at 2-045.

65 *Metropolitan Water Board v Dick, Kerr and Co* [1918] AC 119; *Walton Harvey Ltd v Walker and Homfrays Ltd* [1931] 1 Ch 274. An event caused by the parties' deliberate acts or negligence is not frustrating: Treitel, id at 14-003. As similarly held in Kenya's courts: "a frustrating event must be some outside event or extraneous change of situation … [It] must take place without blame or fault on the side of the party seeking to rely on it": *Samuel Chege Gitau and Another v Joseph Gicheru Muthiora* [2014] eKLR, available at: <http://kenyalaw.org/caselaw/cases/view/105926/> (last accessed 14 September 2017), citing *J Lauritzen AS v Wijsmuller BV* (*The Super Servant Two*) [1990] 1 Lloyd's Rep 1 at 8; *Gimalu Estates Ltd and Four Others v International Finance Corp and Another* [2006] eKLR, available at: <http://kenyalaw.org/caselaw/cases/view/19652> (last accessed 14 September 2017).

https://doi.org/10.1017/S0021855317000286 Published online by Cambridge University Press

Impossible performance

This element is the most crucial. Although, the term "impossible" is quite vague, some useful interpretative guidelines are found in legal theory and jurisprudence. According to case law, "a contractual obligation has become incapable of being performed because the circumstances in which the performance is called for would render it a thing radically different from that which was undertaken by the contract. '*Non haec in foedera veni*'; it was not what I promised to do".[66]

As agreed by scholars and judges, an event that makes performance of a contract "onerous or more expensive" is not frustrating.[67] On the contrary, performance becomes impossible when it is "positively unjust to hold the parties bound" to this contract.[68] This happens, for example, when the subject matter of the contract is physically destroyed. As held in *Taylor v Caldwell*, "in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance … That excuse is by law implied because from the nature of the contract it is apparent that the parties contracted on the basis of the continued existence of the particular person or chattel".[69]

That aside, performance may also be impossible if the subject matter of the contract is seriously damaged (in the case of goods or cargo) or becomes unavailable. The latter can happen when the subject matter is expropriated by a public authority[70] or affected by a court order.[71] The prospective delimitation judgment of the ICJ could be such an order. As already explained, upon its redistribution to Somalia, an oil block would no longer fall under Kenya's jurisdiction. Although the oil block would not be physically destroyed, it would become unavailable for the purpose of performance of the respective PSC.[72] In particular, it would be legally impossible for Kenya to authorize upstream activities in an area that belongs to a foreign jurisdiction. If it did so, it would be acting ultra vires.[73] Similarly, the presence of Kenya's contractors in an area of foreign jurisdiction would result in their legal (civil or

66 Lord Radcliffe in *Davis Contractors LTD v Fareham Urban District Council* [1956] AC 696 at 729.

67 D Yates "Drafting force majeure and related clauses" (1991) 3 *Journal of Contract Law* 186 at 191; Lord Simonds *Halsbury's Laws of England* vol 8 (3rd ed, 1954, Butterworths) at 185. According to McElroy, the same applies for "commercial impossibility": RG McElroy *Impossibility of Performance* (1941, Cambridge University Press) at 194.

68 Lord Denning MR in *Ocean Tramp Tankers Corp v V/O Sovfracht (The Eugenia)* [1964] 2 QB 226 at 239.

69 Above at note 62 at 829.

70 *BP Exploration Co (Libya) Ltd v Hunt* [1983] 2 AC 352.

71 *Peckham v Industrial Securities Co* 113 A 799 (1929).

72 Treitel *Frustration*, above at note 64 at 4-001.

73 Hence, the redistribution of the contract area could be considered as a case of "supervening illegality", which also causes frustration. See E McKendrick *Contract Law* (5th ed, 2012, Oxford University Press) at 723.

https://doi.org/10.1017/S0021855317000286 Published online by Cambridge University Press

criminal) liability towards Somalia. It is, therefore, accepted that maritime delimitation can render the performance of a PSC impossible.

Unforeseeable event

The next step is to examine whether this situation is unforeseeable. According to Treitel, an event is foreseeable and will prevent frustration of the contract only when it is one that "any person of ordinary intelligence would regard as likely to occur".[74] One could argue that the redistribution of Kenya's oil blocks is clearly foreseeable, as the boundary difference was known to Kenya and its contractors when the PSCs were signed in 2012. This position can, however, be rejected for the following reasons.

First, although the Somali-Kenyan boundary difference was known in 2012, Kenya and its contractors could not predict that the case would go to court. International law does not oblige states to resolve their boundary differences. In fact, maritime delimitation is not mandatory at all. Nonetheless, if states wish to proceed with delimitation, they may do so through an agreement.[75] If no delimitation agreement can be reached, then the case is brought to an international body.[76] However, in order to be settled judicially, a boundary situation must be an actual dispute.[77] It was explained earlier that an international dispute is not a mere difference of opinion but a "specific and explicitly expressed disagreement" that remains unresolved for a reasonable time.[78] Based on the facts of the case, the Somali-Kenyan boundary difference evolved into a dispute when Kenya's exploratory permits were granted. As stated by Abdullahi Haji, Somalia's minister of foreign affairs in 2012, "[t]he issue between Somalia and Kenya is not a dispute; it is a territorial argument that came after oil and gas companies became interested in the region. If the argument continues unresolved, it will change into a dispute that may result at last in souring the deep relation between our two countries and (cause a) war at last".[79]

The diplomatic negotiations that took place until 2014 and the memorandum of understanding signed between Kenya and Somalia in 2009[80] also

74 G Treitel *The Law of Contract* (10th ed, 1999, Sweet & Maxwell) at 841.

75 UNCLOS, arts 15, 74.1 and 83.1.

76 Id, arts 74.2 and 83.2.

77 Aegean Continental Shelf case, above at note 36 at 27–31.

78 Pan *Toward a New Framework*, above at note 15; Merrills "The means of dispute settlement", above at note 15.

79 K Gilblom "Kenya, Somalia border row threatens oil exploration" (20 April 2012) *Reuters*, available at: <http://www.reuters.com/article/2012/04/20/us-kenya-exploration-idUSBRE83J0M120120420> (last accessed 27 August 2017).

80 "MoU signed between the Government of the Republic of Kenya and the Transitional Federal Government (TFG) of the Somali Republic granting to each other no-objection in respect of submissions on the outer limits of the continental shelf beyond 200 nm to the Commission on the Limits of the Continental Shelf", available at: <http://www.innercitypress.com/los2somalia.pdf> (last accessed 27 August 2017). It was also added that delimitation of the shared area would be agreed between the states on the basis

https://doi.org/10.1017/S0021855317000286 Published online by Cambridge University Press

suggest that the parties' intention was to settle their boundary difference through an agreement. Besides, one cannot overlook that the outbreak of civil war in 1991 and the consequent socio-political instability rendered Somalia a "failed state". It was not until 2012 that the country obtained a permanent central government and entered an era of institutional reconstruction. It can, therefore, be presumed that Kenya could not predict or expect that fragile Somalia would eventually bring the case to the ICJ. Rather, it is likely that Kenya granted the oil concessions in some sort of good faith, expecting that the boundary line (and the future of the existing permits) would be freely decided between the two parties.

Secondly, even if Somalia's plans to seek judicial assistance were already known in 2012, the outcome of judicial delimitation would still be uncertain. No safe predictions can be made until the ICJ's judgment is announced. In fact, it is even possible that the entire explored area will remain under Kenya's jurisdiction after delimitation.

Thirdly, one could argue that a diligent investor (oil company) should have foreseen the risk, the very moment they showed interest in an undelimited area. This would inhibit the investor from invoking frustration.[81] According to legal theory, however, the mere fact that a particular event "was or ought to have been foreseen … does not (necessarily) prevent it from becoming a frustrating event; the question … is whether the new situation thus created is within or outside the scope of the contract".[82] Hence, depending on the circumstances, an event that makes contractual performance impossible can still cause frustration, even if it could or should have been foreseen by one of the parties. After all, no English courts have ever excluded frustration just because the event in question "was or should have been foreseen".[83]

contd
of international law after receiving the commission's recommendations. According to the UN however, the MoU was eventually rejected by the Parliament of the TFG and is therefore treated as "non-actionable". See UN Records, Legislation and Treaties "Kenya", available at: <http://www.un.org/depts/los/LEGISLATIONANDTREATIES/STATEFILES/KEN.htm> (last accessed 14 September 2017), stating: "By a note verbale dated 2 March 2010, the Permanent Mission of the Somali Republic to the United Nations informed the Secretariat that the MOU had been rejected by the Parliament of the Transitional Federal Government of Somalia, and 'is to be hence treated as non-actionable'." Also see UN Division for Ocean Affairs and Law of the Sea "Preliminary information indicative of the outer limits of the continental shelf beyond 200 nautical miles", available at: <http://www.un.org/Depts/los/clcs_new/commission_preliminary.htm#%282%29_> (last accessed 27 August 2017).

81 See *Walton v Walker*, above at note 65 at 282.

82 *Nile Co for the Export of Agricultural Crops v H and JM Bennet (Commodities) Ltd* [1963] 1 Lloyd's Rep 555 at 582; Treitel *Frustration*, above at note 64 at 13-001.

83 Treitel, id at 13-008.

https://doi.org/10.1017/S0021855317000286 Published online by Cambridge University Press

Supervening event

The existence of this element depends on whether Kenya's PSCs refer explicitly to any changes in the contract area due to maritime delimitation. A clause that would normally refer to this event would be the force majeure clause. Although the concept of force majeure originates from civil law,[84] it is widely employed in common law when frustration is difficult to establish.[85] Its purpose is to excuse non-performance upon the occurrence of an unforeseeable and unavoidable event.[86] As a risk allocation tool, the force majeure clause is freely negotiated between the contractual parties. In most contracts, however, it consists of two limbs: one listing specific events (acts of God, wars, natural disasters) and a general one referring to "any event beyond the control of the parties". That way (unlike with frustration), contractual parties are prepared for certain risks "beforehand, in an agreed, rather than an imposed, manner".[87]

Under Kenya's Model PSC, the force majeure clause includes:

> "1. Acts of God, unavoidable accidents, acts of war or conditions attributable to or arising out of war (declared or undeclared), laws, rules, regulations, and orders by any government or governmental agency, strikes, lockouts, or other labour or political disturbances, insurrections, riots, and other civil disturbances, hostile acts of hostile forces constituting direct and serious threat to life and property, and all other matters or events of a like or comparable nature beyond the control of the Party concerned, other than rig availability.
>
> 2. In this clause, 'Force Majeure' means an occurrence beyond the reasonable control of the Minister or the Government or the contractor which prevents any of them from performing their obligation under this contract."[88]

This clause makes no reference to a boundary dispute (existing or future) or a prospective delimitation judgment. Still, one might consider delimitation to be an event "of a like or comparable nature [to those described in para 1 of the clause] beyond the control of the Party concerned". That could be based on the fact that the impact of delimitation is unforeseeable.

84 Art 1148 of the French Civil Code reads, "there is no place for any damages when, as a result of *force majeure* or *cas fortuit*, the debtor has been prevented from conveying or doing that to which he was obliged or has done what was forbidden to him". W Swadling "The judicial construction of force majeure clauses" in E McKendrick (ed) *Force Majeure and Frustration of Contract* (2nd ed, 1995, Lloyd's of London Press Ltd) 1 at 6.

85 Although force majeure can be a contractual clause, it has been held that it is a general principal of law applicable even when the contract is silent on that point: *Mobil Oil Iran Inc v Government of the Islamic Republic of Iran*, Iran-US CTR award no 311-74/76/81/150-3 (1987) 39; *Phillips Petroleum Co Iran v Islamic Republic of Iran*, Iran-US CTR award no 425-39-2 (1989) 108.

86 Swadling "The judicial construction", above at note 84 at 8.

87 Id at 5.

88 Model PSC, clause 38.

https://doi.org/10.1017/S0021855317000286 Published online by Cambridge University Press

This study, however, finds that the event of delimitation is not of "a like or comparable nature" to those described in the force majeure clause. A closer look at these events shows that they do not affect the very existence of the contract. What they really do is to freeze (suspend, hinder or delay) the performance of the affected party's contractual obligations. This situation is temporary, as it lasts until the cessation of the particular event. In that sense, force majeure does not exclude liability for a breach of contract; it simply ensures "that non-performance is no breach because no performance was due in the circumstances which have occurred".[89] Such circumstances arise from a physical catastrophe, a strike, a civil riot and the like. This is why a force majeure clause usually provides an extension of time to the promisor.[90] During that period, the contract is dormant but still exists. It is left to the parties' discretion to agree to cancel the contract if its performance remains impossible beyond a certain time.[91] However, this is not the case with delimitation, the impact of which is immediate and irreversible. As already seen, once the contract area of a PSC "changes hands", it becomes legally unavailable. No court has the power to enforce that contract.[92] Hence, the impact of delimitation on a contract is much closer to frustration than to force majeure.[93]

For these reasons, this study contends that maritime delimitation can qualify as a frustrating event. As a result, and unless the ICJ departs from the fixed doctrines of maritime delimitation, the affected permits will be automatically discharged, even if their subject matter (oil blocks) is partly redistributed to Somalia.[94] The reason is that, in English common law, there is "no such concept as partial or temporary frustration".[95] A contract is either frustrated (in total) or it remains in force.

Further implications of contract frustration

As put by Lord Bingham, frustration will "kill the contract and discharge the parties from further liability under it".[96] Consequently, Kenya's contractors may have to abandon[97] any areas that are no longer under Kenya's jurisdiction, without further liability. Yet, there is another important issue to be

89 Swadling "The judicial construction", above at note 84 at 18.
90 Id at 9; Model PSC, clause 38.6.
91 Model PSC, clause 38.5.
92 McKendrick *Contract Law*, above at note 73 at 44.
93 However, even if maritime delimitation was explicitly referred to in the force majeure clause, that would not exclude the doctrine of frustration. See McKendrick, id at 34. The opposite was expressed by Mocatta J in *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA* [1977] 1 Lloyd's Rep 133 at 163.
94 Of course Kenya may redesign its reduced oil blocks and sign new PSCs with the same or different investors.
95 Treitel *Frustration*, above at note 64 at 5-008.
96 *The Super Servant Two*, above at note 65 at 8.
97 Unless they obtain a permit from Somalia after delimitation.

https://doi.org/10.1017/S0021855317000286 Published online by Cambridge University Press

addressed. Since "the remedy in a frustrated contract is to place the parties (to the extent possible) back to the positions that they were prior to the contract",[98] the question of the contractors' refund arises.

One of the main features of a PSC is the contractor's commitment to a large capital investment, before conducting any exploratory or development activities. This usually includes: a signature bonus, a monetary security or parent company guarantee, and a series of surface fees payable in advance of certain periods.[99] If production follows, the contractor first recovers his investment costs by receiving reimbursement from the produced oil (known as cost oil) and then earns a share from the remaining production (known as profit oil). If no oil is discovered, the contractor is not reimbursed at all. In the oil industry, this financial risk is acceptable. However, the risk that may arise from the discharge of a PSC before its completion is different. A situation where the contractor loses any pre-payments (signature bonus or surface fees) due to the contract's sudden termination would be inequitable.[100] In order to avoid this, the contractor must submit a restitutionary claim.

According to the general (common law) rule of restitution, a claimant can only recover his money if the consideration for his payment has totally failed (total failure of consideration).[101] This requires that no part of the condition pursuant to which the claimant made a payment to the defendant has been satisfied. Courts, however, have gradually developed a different theory for the case of frustration. Their original position was that the money paid under a contract that became frustrated was irrecoverable.[102] This was later reversed in the famous *Fibrosa* case, which held that money paid before frustration was recoverable, but only if the consideration for the payment had wholly failed.[103] Yet, a strict application of this rule would cause inequitable results in the case of frustrated contracts involving pre-payments.

This problem was eventually tackled by the Law Reform (Frustrated Contracts) Act 1943. This act (also applicable in Kenya)[104] applies to any

98 *Paul Kipsang Kosgei and Two Others v Thomas Kprono Magut and Another* [2014] eKLR, available at: <http://kenyalaw.org/caselaw/cases/view/100597/> (last accessed 14 September 2017).

99 Model PSC, clauses 4.6 and 5.

100 R Halson *Contract Law* (2001, Pearson Education) at 427. One might argue that Kenya's investors are entitled to "equitable relief" on the basis of "proprietary estoppel". In English common law, this is triggered when a person is given a clear assurance (such as an oral promise) that they will acquire a right over property and they suffer detriment as a result of their reliance on this assurance. See *Taylor Fashions and Old & Campbell v Liverpool Victoria Trustees* [1982] QB 133. However, this is not the case here, as the parties have signed a contract (the PSC).

101 R Goff and G Jones *The Law of Restitution* (7th ed, 2008, Sweet & Maxwell Ltd) at 19-002.

102 *Blakeley v Muller & Co* [1903] 2 KB 760n; *Chandler v Webster* [1904] QKB 493.

103 *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 at 48; *Whincup v Hughes* (1870–71) LR 6 CP 78 at 84.

104 A Hussain *General Principles and Commercial Law of Kenya* (1993, East African Publishers) at 8; schedule of Kenya's Law of Contract cap 23, 1961.

https://doi.org/10.1017/S0021855317000286 Published online by Cambridge University Press

contract that has become impossible to be performed or been otherwise frustrated. According to section 1(2), all sums to be paid pursuant to the contract before the frustrating event are no longer payable, while any sums already paid are recoverable. In practice, this means that a total failure of consideration is no longer required in frustrated contracts.[105] Thus, restitution can be sought even when the contract is frustrated after partial performance. The act adds that any valuable benefit (other than money) obtained before the time of discharge is also recoverable, where that is considered just.[106]

Pursuant to section 1(2) of the act, Kenya's contractors would not only be discharged from future payments, but they could also seek a refund for *any* payments (signature bonus, fees or guarantee) made before frustration. This refund would cover what was paid under the frustrated contract but nothing more, so there would be no damages for breach of contract or loss of profits.[107]

It is also possible that Kenya's contractors have conducted a series of seismic surveys and geological reports since 2012.[108] Irrespective of their results (a major oil discovery or a dry well), these services have been performed for Kenya's benefit. Whether the contractors seek compensation for such non-monetary contributions is answered by section 1(3) of the act and the famous case of *BP Exploration Co (Libya) Ltd v Hunt (No 2)*.[109] In this case, Mr Hunt (who owned an oil concession in Libya) assigned the exploration and production of oil to BP. The company would provide all necessary finance until oil was found, while any profits would be shared between the parties. Oil was eventually found, but the concession was expropriated in 1971 by Muammar Gaddafi's regime. BP (which had already paid half of its contributions) argued that the contract was frustrated, adding that Mr Hunt obtained a valuable benefit from the contractual performance before the expropriation. Therefore, the company claimed a "just sum" of money under the Frustrated Contracts Act 1943. The act provides neither a definition of "benefit" nor a method for its calculation. Hence, the court had to deal with these issues. As Goff J put it,

> "Money has the peculiar character of a universal medium of exchange. By its receipt, the recipient is inevitably benefited; and … the loss suffered by the plaintiff is generally equal to the defendant's gain, so that no difficulty arises concerning the amount to be repaid. The same cannot be said of other benefits, such as goods or services … From that very nature of things, therefore, the problem of restitution in respect of such benefits is more complex than in cases where the benefit takes the form of a money payment."[110]

---

105 A Burrows *The Law of Restitution* (2nd ed, 2002, Butterworths) at 362; Law Reform (Frustrated Contracts) Act 1943, sec 1(1).

106 Id, sec 1(3).

107 *Ranfer Company Ltd v Commissioner of Customs & Excise and Another* [2003] eKLR, available at: <http://kenyalaw.org/caselaw/cases/view/4049/> (last accessed 14 September 2017).

108 Model PSC, clauses 14(2) and 15.

109 [1979] 1 WLR 783.

110 Id at 799.

https://doi.org/10.1017/S0021855317000286 Published online by Cambridge University Press

The court first identified the defendant's benefit, which in that case was the end product of the company's services.[111] It then estimated the value of this benefit pursuant to the circumstances.[112] On that basis, Goff J determined the "just sum", being the sum that would lead to "the prevention of the unjust enrichment of the defendant at the plaintiff's expense".[113] This amount consisted of the expenditure made by the claimant plus payments in cash and oil, while deducting the oil BP received in reimbursement. In this light, Goff J accepted that the contract was frustrated and awarded BP $35.4 m, pursuant to section 1(3) of the act. The defendant's argument that BP had contracted to take the risk of expropriation was rejected.

Based on this, Kenya's contractors have a prima facie[114] right to seek a refund for any contributions (monetary or otherwise) made before frustration. In order to support their claims, the contractors must prove that Kenya obtained a benefit before the time of discharge. As explained above, any monetary pre-payments would constitute a benefit. In the case of non-monetary contributions however, the benefit must be identified and valued by a judge or an arbitrator.[115]

Notwithstanding this right, Kenya's contractors would permanently lose their permits due to delimitation. This in itself is detrimental as, in order to remain in the area, the companies would have to obtain new permits from Somalia.[116] If they fail to do so, these investors will have wasted a considerable number of years working on the "wrong side". Furthermore, this may ultimately deter oil companies from operating in contested waters in the future.

111 Id at 802.

112 Id at 802–03.

113 Id at 805.

114 Subject to the exceptions in sec 1(5) of the act.

115 Clause 41 of the Model PSC reads: "Any question or dispute arising out of or in relation to or in connection with this contract shall, as far as possible, be settled amicably. Where no settlement is reached within 30 days from the date of the dispute … the dispute shall be referred to arbitration in accordance with the UNCITRAL arbitration rules adopted by the United Nations Commission on International Trade Law."

116 In 2012, the East African Energy Forum warned Kenya's investors (Eni, Total, Statoil and Anadarko) about the "risk of being shut out of future Somali energy concessions", along with what it described as "legal action" that might be taken against Kenya and the oil companies. See "International oil companies illegally exploiting Somali hydrocarbons?" (23 August 2012) *OilPrice.com*, available at: <http://oilprice.com/Latest-Energy-News/World-News/International-Oil-Companies-Illegally-Exploiting-Somali-Hydrocarbons.html> (last accessed 27 August 2017). In September 2013, however, the president of Federal Republic of Somalia met Eni's CEO in "an atmosphere of cordiality" to discuss "Eni's interest in evaluating the exploration potential of hydrocarbons present in Somalia"; see "Somalia's president and Eni's Paolo Scaroni discuss energy" *MarineLink*, available at: <https://www.marinelink.com/news/maritime/eni-exploration> (last accessed 14 September 2017).

https://doi.org/10.1017/S0021855317000286 Published online by Cambridge University Press

A REVERSIBLE SITUATION?

Arguably, this situation would have been avoided if the dispute had not been brought to international adjudication in the first place. For instance, the states could have entered into a delimitation treaty bearing a "grandfather" clause in order to preserve the existing private rights in the shared area.[117] However, the states' failure to agree on the exact location of the boundary has made the conclusion of such a treaty unfeasible.

Alternatively, Kenya and Somalia could seek a provisional arrangement in the form of a joint development agreement.[118] Such an agreement would allow states to develop in common the natural resources of the shared maritime area, while shelving the boundary dispute and complying with their procedural obligation to cooperate under articles 74(3) and 83(3) of UNCLOS. The beneficiaries of this arrangement would not only be the two states but also the private oil companies already operating in the disputed area. Notwithstanding its merits, a joint development agreement is not easy to conclude. As with all agreements, it is the product of good faith, strong political will and mutual consent.[119] It can be argued that Kenya's economic and industrial superiority, and the fact that Somalia (formerly a "failed state") still lacks strong domestic institutions, may have debilitated the two states' relations and ultimately hindered the reaching of such an arrangement.

The ICJ will eventually resolve the boundary dispute. Still, can the foreseeable frustration of Kenya's permits be reversed, even if the existing concessions may not affect the course of the final boundary? This study shows that reversal is possible. The ICJ can encourage the conclusion of an interstate unitization agreement, should the final boundary cut through any of Kenya's oil blocks. In that case, the delimitation judgment will terminate the long boundary dispute, with the subsequent unitization agreement allowing for the development of a potential transboundary reserve by the existing operators on behalf of both states. The outcome of this process would be: the successful settlement of the long boundary dispute by a third party; the common development of natural resources by Kenya and Somalia; and the preservation of existing private interests in the area.

State cooperation post delimitation for the development of transboundary reserves has successfully occurred before in practice,[120] and has also been

117 As in art 6 of the delimitation treaty between Equatorial Guinea and Nigeria, 23 September 2000.

118 For example, see joint development agreements entered into between Kuwait and Saudi Arabia on 7 July 1965, and Japan and the Republic of Korea on 30 January 1974.

119 For discussion of the merits and challenges of joint development, see C Schofield "No panacea? Challenges in the application of provisional arrangements of a practical nature" in M Nordquist and J Norton Moore (eds) *Center for Oceans Law and Policy, Vol 16: Maritime Border Diplomacy* (2012, Martinus Nijhoff) 151.

120 For example, the British-Norwegian Agreement relating to the Exploitation of the Frigg

https://doi.org/10.1017/S0021855317000286 Published online by Cambridge University Press

encouraged by judges in previous delimitation cases.[121] It must be noted, however, that cooperation with a view to unitization rests solely on the states' will and does not yet have the effect of a customary rule.[122] Nor is it entirely absolved of practical difficulties.[123] A unitization agreement requires long negotiations or even the modification of each side's resource claims. One would expect that the presence of a clear maritime boundary (post delimitation) would facilitate interstate negotiations. However, how easy would it be for Kenya and Somalia to return anew to the negotiating table in order to conclude a unitization agreement? The pressure to reach such an agreement could imperil the states' relations or even jeopardize the implementation of the ICJ's delimitation judgment. Apparently, attempts for state cooperation can either bring wonderful results or become a new source of controversy.

CONCLUSIONS

The peaceful coexistence of states falls squarely within the contours of public international law. Yet, when it comes to maritime delimitation, public international law does not stand alone: insofar as there are privately held rights in the disputed area, the establishment of international boundaries is also a matter of private law.

Alas, the main approaches of delimitation followed in modern jurisprudence do not appear to be in line with this statement. As this article has explained, the tendency of judges to disregard exploratory permits during the process of maritime delimitation opens the way to the reallocation and, eventually, the termination of any affected acquired rights in the disputed area. If anything, this creates tension between public international law and private law.

This tension underlies the Somali-Kenyan boundary dispute, which is currently before the ICJ. It has been demonstrated that, insofar as the prospective

---

contd
Field Reservoir, 10 May 1976; Framework Agreement between the United Kingdom and Norway, 4 April 2005.

121 North Sea Continental Shelf cases, above at note 12 at 97–101; *Eritrea / Yemen*, award of the arbitral tribunal, second stage (1999) at 84–86; *Tunisia v Libya*, above at note 38, Judge Evensen's dissenting opinion at 321–23; *Guinea / Guinea-Bissau*, above at note 46 at 121–23.

122 For instance, the tribunal in *Eritrea / Yemen* did not refer to states' general obligation to cooperate post delimitation. Rather, it focused on the behaviour of the particular disputants. According to some scholars however, the tribunal's position on common exploration of transboundary resources may eventually suggest the introduction of a custom. See Cottier *Equitable Principles*, above at note 47 at 367; and M Reisman "Eritrea-Yemen arbitration (award, phase II: Maritime delimitation)" (2000) 94 *American Journal of International Law* 721 at 735.

123 For discussion of the merits and challenges of unitization, see I Townsend-Gault "Zones of cooperation in the oceans: Legal rationales and imperatives" in Nordquist and Norton Moore *Maritime Border Diplomacy*, above at note 119, 110 at 110–33.

https://doi.org/10.1017/S0021855317000286 Published online by Cambridge University Press

ruling follows the doctrines of maritime delimitation, it may act as a frustrating event causing the discharge of Kenya's privately held contracts in the disputed area. The key to avoiding this situation is state cooperation through the conduct of a unitization agreement. However, inasmuch as state cooperation lacks the cloak of international custom, the future of private interests in disputed areas remains uncertain.

The fact that existing private rights may suddenly vanish upon the judicial settlement of the dispute raises serious concerns as to the efficacy of the current rules of maritime delimitation. In the bigger picture, it challenges the stance of the international law of the sea towards long-existing international principles, such as the doctrine of acquired rights. Hence, although international adjudication can resolve an interstate dispute in a final and peaceful manner, it may ultimately disturb the private rights that already exist in the disputed area.

It is hoped that this study has informed the ongoing discussion about the legal problems that may emerge during judicial delimitation. Apart from balancing the conflicting interests of states, delimitation should also be concerned with protecting existing private rights in disputed waters. The systematic promotion by judges of state cooperation both pending and post delimitation could be an encouraging first step towards that goal.

https://doi.org/10.1017/S0021855317000286 Published online by Cambridge University Press