



Towards Peaceful Waters: Resolving the Kenya-Somalia Maritime Conflict

Executive Summary

The tragedy of commons is that parties acting in self-interest often seek to exploit a common resource in ways that is detrimental to the collective good and mutual interest of interested parties. In international relations, such self-interested actions often lead to disputes, conflict and even war with catastrophic consequences. While national self-interest is the essence of power politics in international relations, cooperation and collaboration has become an indispensable avenue for regional and international peace, security and development. A current case of the 'crisis of the commons' is the ongoing dispute between Kenya and Somalia over their maritime border. Tensions have been rising between Kenya and Somalia who disagree over the delimitation of the maritime border of an area in the Indian Ocean that both claim.

While the matter is awaiting determination by the International Court of Justice (ICJ) in September 2019, there is a real risk of escalation with serious economic and security implications. This brief proposes a de-escalation and acting in common interest for regional stability. This can be achieved through dialogue and a negotiated (rather than a judicial) settlement in which the border is co-determined by the parties to the dispute in a renewed spirit of Pan Africanism, and the exploitation of the resources contained in the disputed area are made explicit, agreed upon,

and respected. This could take the form of joint development initiatives in the disputed zone in a way that would enhance economic cooperation between the two countries.

Background

The maritime dispute between Kenya and Somalia has been going on for about four decades now. It involves an unsettled dispute over the delimitation of a 100,000 square kilometers territory in the Indian Ocean. Both Kenya and Somalia claim the outer limits of the continental shelf beyond 200 nautical miles. It has emerged, in the past few years, that this area potentially contains high-value hydrocarbons, thus increasing the geo-strategic importance of the area, and the stakes in the dispute.

In 2014, Somalia filed a case against Kenya on the matter at the ICJ. In February 2019, the dispute escalated politically after an alleged auction of oil blocks by Somalia in the disputed territory, at a conference in the United Kingdom. ICJ is expected to deliver its verdict in September 2019.

Disputes between brotherly African nations have typically been resolved through negotiation. This could explain why there are concerns that ICJ may not be the best avenue to resolve disputes between these two neighborly states.

To explore alternative dispute resolution mechanisms available to Kenya and Somalia, the HORN Institute (a think-do tank that focuses on, among other issues, defence and security, and diplomacy and foreign relations), organized

a symposium titled *Maritime Border Challenges in Africa and Implications on Security: An Experts' Symposium* on July 25-26, 2019 in Nairobi, Kenya. The Symposium made the following findings, and recommendations.

Key Symposium Findings

The main findings of the Symposium can be categorized into three broad themes: political, legal, and security.

A. Political

- **Half of the 512 potential maritime boundaries are not delimited nor demarcated.** Coastal borders are strategic maritime assets which are notoriously undetermined, and potentially a source of international conflict. Conflicts of this kind tend to escalate on the basis of questions of sovereignty and rights to resources in the disputed territories.
- **The maritime domain has been traditionally relegated, in favor of the terrestrial domain in development and security thinking in Africa.** The maritime domain has not been as securitized in Africa as land has, hence the evolving consciousness around the economic and security implications of laxities in strategic management and development of the maritime domain.
- **The maritime boundary dispute between Kenya and Somalia is more political than legal.** Border disputes are essentially conflicts replete with core foreign policy issues, and existential dynamics.

These disputes also entail national issues such as sentiments and national identity, accompanied by notions of sovereignty. Thus, these disputes cannot be effectively managed solely through the legal realm.

- **Internal dynamics and politics in Somalia bear considerable influence on the country's maritime dispute with Kenya.** Local general elections necessitate nationalistic positions by the country's political elites in the dispute with Kenya, and specifically, the insistence by Somalia on judicial settlement mechanisms.
- **Foreign influence is palpable in the Somalia-Kenya maritime dispute.** Foreign business actors try to gain drilling concessions in the maritime environment through influencing sovereign governments. However, notions that Somali government officials are puppets for foreign governments should be dealt with cautiously. Instead, focus should on resolving the dispute amicably.
- **Regional mechanisms for maritime boundary dispute settlement are weak.** Although the African Union (AU) established its Border Program in 2007, the AU

has not yet built its institutional, technical, technological, and financial capacities to settle maritime border disputes in the continent. In the absence of these regional dispute resolution mechanisms, African countries resort to alternatives, such as the ICJ.

B. Legal

- **Somalia and Kenya may still withdraw from the judicial process at ICJ.** Article 299 (2) of the United Nations Convention on the Law of the Sea (UNCLOS) provides that “[n]othing in this section [on compulsory procedures entailing binding decisions] impairs the right of the parties to the dispute to agree to some other procedure for the settlement of such dispute or to reach an amicable settlement.”
- **A peaceful mechanism, such as a negotiated settlement, is the most preferred method for resolving the Kenya-Somalia maritime dispute.** Article 279 of the UNCLOS, obligates states parties ...to settle disputes by peaceful means States Parties shall settle any dispute between them concerning the interpretation or application of this Convention by peaceful means in accordance

with Article 2, paragraph 3, of the Charter of the United Nations and, to this end, shall seek a solution by the means indicated in Article 33, paragraph 1, of the Charter.

- **The principles of *effectivités* and equitability can be used at ICJ to defend Kenya's sovereignty over the disputed maritime zone with Somalia.** The principle of *effectivités* or effective occupation and control, is what *Uti Possidetis Juris* is grounded on, and has been long used as a conflict prevention measure. The principle is contemporarily used in dispute settlement and has acquired factual consequence in settling legal cases involving territorial disputes.

On May 23, 2008, the ICJ awarded Pedra Branca or Pulau Batu Puteh and South Ledge to Singapore, and Middle Rocks to Malaysia, having carefully studied the evidence or lack of it, of *effectivités* by the parties. On the other hand, the principle of equitability guides judicial determination of disputes as complicated as the Kenya-Somalia maritime boundary dispute, with

emphasis on fairness or equity, as opposed to positional considerations.

C. Security

- **The maritime domain is the domain of the future for human and national securities.** Global trends reveal patterns of increasing human settlement along coastal areas, more food production hinging on marine life, ecological balance hinging conservation in the maritime domain, and pollution in the seas greatly affecting human security. Similarly, more threats from piracy, terrorism, organized crime, human trafficking and smuggling, and other security threats, are shifting theatre to the seas.
- **Terrorists or militant groups might benefit from the maritime dispute between Kenya and Somalia.** It is possible for terrorists and militant groups such as al Shabab to ride on the nationalistic wave and act as the sole custodians or vanguards for Somalia's sovereignty.

Conclusion

The maritime border dispute between Kenya and Somalia poses a significant risk to the brotherly relations between the two countries, thereby endangering peace and security of both, and of the region.

The International Court of Justice (ICJ) is not the right dispute settlement mechanism to solve this issue due to the finality of its ruling. Additionally, ICJ's ruling shall not be enforced, ultimately forcing both countries to seek a negotiated settlement regardless. To that extent, regional partners and organizations such as the African Union (AU) and the

Intergovernmental Authority on Development (IGAD), need to develop African capacity for dispute settlement, and be instrumental in mediating a dialogue between Kenya and Somalia.

There is too much at stake for both countries to let tensions escalate further. Instead, Kenya and Somalia could create joint development initiatives in the disputed zone, refrain from escalatory actions, reinvigorate Pan-African ideals such as good neighborliness, and resolve the dispute through a negotiated settlement.

Recommendations

- African governments should prioritize maritime security in their development and security thinking, to develop capacity to exploit marine resources, settle maritime boundary disputes and develop maritime security architecture for national and regional security and stability.
- Kenya and Somalia should amicably settle their maritime boundary dispute through alternative settlement mechanisms such as negotiation and mediation, which will promote win-win outcomes, and maintain peaceful bilateral relations.
- Kenya, regional countries, the AU, and IGAD should adequately prevail upon Somalia to withdraw the maritime dispute from ICJ to create room for alternative dispute resolution mechanisms.
- Kenya should escalate its “effective occupation” of the disputed maritime zone, demonstrate this effective occupation or *effectivités* pre-2014. This will establish “facts on the ground” as a countermeasure irrespective of the ICJ ruling.
- Alternatively, Kenya and Somalia should explore joint development initiatives in the disputed zone or enlarging ‘the pie’ to enhance the viability of concession-making and resolution of the dispute through negotiation.
- In the course of the legal dispute, Kenya and Somalia should promote public education, high-level bilateral consensus, and exercise constant engagement, open-mindedness and good leadership for its de-escalatory significance. Ivory Coast and Ghana, faced with a similar dispute, engaged these tools of de-escalation. Relations between Ghana and Ivory Coast remained peaceful and friendly during and after the 2017 decision by the International Tribunal of the Law of the Sea (ITLOS).
- Kenya should emphasize on equity or equitability of judicial decisions, over its maritime dispute with Somalia, as a backstop for its lateral territorial position.

