Extractives Hub

“Somalia *vs*. Kenya Offshore Boundary Dispute Policy Brief”

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1. BRIEF FACTUAL BACKROUND

Somalia brought a legal action against Kenya before the International Court of Justice (ICJ) in 2014 after the latter had failed to attend a third round of ongoing delimitation talks. As the map pictured above shows, Somalia maintains that its sea border extends to the frontier line of its land border, in a southeasterly direction. Its claim is based on on the equidistance principle embodied in United Nations Convention on the Law of the Sea (UNCLOS). Kenya, however, claims the border follows along the parallel line of latitude directly east of its shared land terminus with Somalia. The two States mutually exclusive claims thus substantially overlap on an area of the continental shelf, the Exclusive Economic Zone (EEZ), and the prolongation of the continental shelf beyond 200 nautical miles from the coast. As such there is a substantial offshore area of overlapping claims that could be the subject of fruitful and mutually advantageous *International Joint Development* by the two States instead of litigation, with its likely protracted and uncertain outcome.

2. INTERNATIONAL JOINT DEVELOPMENT

(1) Rationale for Joint Development

An area is ripe for international Joint Development when it is known, or is reasonably expected, to be hydrocarbon endowed but it is situated in a “gray area” of overlapping international territorial claims, predominantly offshore, by adjacent or opposing States. This is not as easy as International Unitization, where boundaries have already been agreed and delineated by treaty. Rather, it only becomes relevant where no such boundary delimitation agreement(s) have been reached. But it is not an uncommon solution, due to difficulties States often encounter in the settlement of their historic and conflicting territorial claims. To avoid political instability and interminable delay in the exploration for and development of any potential hydrocarbon resources, a regime created under a Joint Development Agreement (JDA) can allow for peaceful exploration and development until the boundaries are later defined by agreement. Joint Development is, in fact, a procedure under which boundary disputes are temporarily set aside – without prejudice to the validity of conflicting State claims – and the interested States agree instead, jointly to explore, exploit and evenly share any hydrocarbons found in the Joint Development Zone (JDZ) that is established under the JDA. Perhaps the offshore area in dispute between Somalia and Kenya could be ripe for a Joint Development solution, subject to numerous *caveats* below? If it were to be accomplished, it would create an ambient and stable development atmosphere of political cooperation rather than the perpetuation of an ongoing dispute.

(2) Essential Elements of a Joint Development Regime

How, then, would such a JDZ be created? The best way to proceed is to follow established State practice which, despite some differences in details, has followed common patterns in the legal format for Joint Development of international common hydrocarbon resources situated in disputed offshore areas. Significantly, State practice has uniformly accepted the concept of Joint Development as an applicable and convenient regime and, thus, neither the concept nor its component aspects have ever needed to be tested or disputed in a contentious legal action.

Traditionally, a Joint Development format would include all of the following features[1]:

[1] “Classic Joint Development”, as defined in “The Joint Development of International Petroleum Resources in Undefined and Disputed Areas”, Ibrahim F.I. Shihata and William T. Onorato, 15 ICSID Rev.-FILJ 299 (1996)

i. a JDA treaty or convention between or amongst the interested States which identifies the area to be subject to Joint Development, the legal basis of the accord to proceed, and the agreed proportions of resource sharing;
ii. the establishment under such treaty or convention of an international joint commission (IJC) of equal representation amongst the contracting States, with a supervisory mandate over the venture and certain administrative and consultative powers;
iii. the granting or retroactive confirmation of exploration, exploitation and development rights to selected licensees or concessionaires (rights-holders), normally by the participating States but, possibly (and indeed, preferably) directly by the IJC; and
iv. the selection by the rights-holders, subject to approval by the IJC, of a single operator to conduct petroleum operations on their behalf.

There are numerous variants to the above-mentioned core components of Joint Development, but they all are intended to obtain the same ultimate result: avoidance of political instability and interminable delay in the exploration for and development of any potential hydrocarbon resources in the JDZ. In some cases the IJC is merely an intergovernmental consultative body, leaving the real policy decisions still to be made by the energy ministries of the participating States.[2] In other cases, the IJC is fully empowered to offer acreage, negotiate agreements, grant licenses and supervise the JDZ.[3] Yet another variant is where participating States delegate operational and supervisory authority to their respective national oil companies (NOCs) to carry out day-to-day operations and supervision in the zone.[4] The norm is to apply the domestic laws of the each of the contracting States to the JDZ, but if they have substantially different fiscal and contractual regimes, then they must agree on one applicable system that blends or draws from the best elements of their respective systems.[5] And, indeed, there are even examples where the contracting States have created a detailed and comprehensive, interlocking legislative, contractual and fiscal regime to govern all aspects of operations in the JDZ.[6]

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[2] As, for example, was done in both the Japan-South Korea and Saudi Arabia-Kuwait JDAs.
[3] This was the case for both the Thai-Malaysian and Saudi Arabia-Sudan JDAs.
[4] This was the method by which the Malaysia-Vietnam JDA was implemented.
[5] Thailand and Malaysia had different internal licensing and contractual systems (Concession; Production Sharing) but agreed to use a PSA for all operations licensed under their JDA.
[6] The most prominent such arrangement was found in the original Australia-Indonesia JDA for development of the resources of the Timor Gap offshore area.

While equal sharing of the recovered petroleum resources is the norm, there have been rarer cases where unequal sharing of revenues and resources have been agreed, motivated primarily by disproportionate wealth and development capabilities between friendly, neighboring States – one granting a favor to the other by taking a lesser share.[7] But in the end, the motivating factor is always to assure that exploration and development goes forward in the disputed area in a peaceful, uninterrupted fashion, free of political risk, where otherwise it would have been indefinitely postponed by ongoing disputes and disagreements.

Particularly relevant to the Somalia-Kenya offshore boundary dispute is the principle mentioned above that if/when Joint Development is agreed to, it is then carried out *without prejudice* to each claimant State's original jurisdictional claim. Negotiations on the issue of final boundary delimitation may be postponed for the duration of the JDA. They may also, by mutual agreement, be reopened at any time during its duration and finally settled without necessarily interrupting Joint Development.[8] As Joint Development progresses and the hydrocarbon endowment – or lack thereof – becomes known to the participating States, the question of ultimate delimitation often becomes easier to settle in the new environment of cooperation that prevails between the States or it simply becomes moot. In any event, neither the conclusion of a JDA nor any activities taking place as a consequence thereof affects the obligation of the claimant States to continue to negotiate in good faith in order to reach an equitable delimitation solution for the disputed area by mutual agreement, on the basis of prevailing international law on the matter. Thus an agreement on a JDZ between Somalia and Kenya would provide an immediate developmental solution and eliminate the need for them to continue with expensive and unnecessary international litigation before the ICJ.

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[7] Both Saudi Arabia and Australia have agreed to take less than 50% shares of JDA resources in such agreements reached with less economically developed neighbors.

[8] As occurred in the cases of the Saudi Arabia-Kuwait, Saudi Arabia-Sudan and Iceland-Norway JDAs.

3. CONCLUSIONS

As we have seen, carrying out Joint Development in the absence of a previously agreed partition of a hydrocarbon resource-rich area between/amongst claimant States is both feasible and mutually advantageous. Since actual development can only proceed in a politically settled and stable environment, by-passing entrenched or inflexible State positions on the location of international offshore boundaries and creating, instead, a mutually agreed, commonly held JDZ is a proven and intelligent solution. Whether such an arrangement is temporary or permanent in duration, its basic concept allows current exploration for and development of the potential petroleum resources to the benefit of the claimant States, *without prejudice* to their claims of ultimate sovereignty. Experience shows that the success of such a form of international cooperation is itself conducive to the future settlement of conflicting territorial claims and to the broader cooperation amongst the States involved. JDAs creating JDZs have been successfully adopted in numerous offshore areas worldwide, providing an ambient political and stable development atmosphere of political and economic cooperation.