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CR 2016/12

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2016

Public sitting

held on Wednesday 21 September 2016, at 4.30 p.m., at the Peace Palace,

President Abraham presiding,

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

Preliminary Objections

VERBATIM RECORD

ANNÉE 2016

Audience publique

tenue le mercredi 21 septembre 2016, à 16 h 30, au Palais de la Paix,

sous la présidence de M. Abraham, président,

***en l'affaire relative à la* Délimitation maritime dans l'océan Indien (Somalie c. Kenya)**

Exceptions préliminaires

COMPTE RENDU

Present:	President	Abraham
	Vice-President	Yusuf
	Judges	Owada
		Tomka
		Bennouna
		Cançado Trindade
		Greenwood
		Xue
		Donoghue
		Gaja
		Sebutinde
		Bhandari
		Robinson
		Crawford
		Gevorgian
	Registrar	Couvreur

Présents : M. Abraham, président
M. Yusuf, vice-président
MM. Owada
Tomka
Bennouna
Cançado Trindade
Greenwood
Mmes Xue
Donoghue
M. Gaja
Mme Sebutinde
MM. Bhandari
Robinson
Crawford
Gevorgian, juges

M. Couvreur, greffier

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Mr. Ahmed Ali Dahir, Attorney-General of the Federal Republic of Somalia,

H.E. Mr. Yusuf Garaad Omar, Ambassador and Permanent Representative of the Federal Republic of Somalia to the United Nations, New York,

Admiral Farah Ahmed Omar, former Admiral of the Somali Navy and the Chairman of Research Institute for Ocean Affairs, Mogadishu,

Mr. Daud Awes, Spokesperson of the President of the Federal Republic of Somalia,

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M. Hudson Andambi, ministère de l'énergie,

comme conseillers.

Le PRESIDENT : Veuillez vous asseoir. L'audience est ouverte. La Cour se réunit aujourd'hui pour entendre le second tour de plaidoiries du Kenya. Je donne tout de suite la parole au professeur Akhavan.

Mr. AKHAVAN:

GENERAL OBSERVATIONS ON SOMALIA'S SUBMISSIONS

1. Mr. President, distinguished Members of the Court. I am pleased to begin Kenya's second round with some general observations on Somalia's first round of oral pleadings. I will be followed by Professor Forteau, who will address the interpretation of the MOU; Professor Boyle, who will address Article 282 of UNCLOS; and Professor Lowe, who will address Kenya's Optional Clause declaration in light of the Court's jurisprudence. The Agent of Kenya will then make the concluding submissions.

2. Mr. President, yesterday, counsel for Somalia completely avoided the simple question that is before the Court: namely, does the penultimate paragraph of the MOU mean something, or does it mean nothing? Professor Pellet spoke at some length about everything except the plain text of the paragraph that is at issue. He disagreed with Kenya's interpretation of that provision, but offered no alternative explanation as to what else that text could possibly mean[1]. The sole purpose of the MOU, he insisted, is "no objection" to CLCS submissions[2]. Why, then, did the Parties insert that paragraph on dispute settlement? The answer is obvious. It does not require a seminar on the law of treaties. The Parties inserted that paragraph because it was part of the agreement expressed in the MOU. Their intention was to give that text practical legal effect.

3. Mr. President, it is said that "you cannot judge a book by its cover"; but Professor Pellet would have you believe that you should judge a treaty by its title! His argument may be summarized as follows: read the title of the MOU and then delete the paragraph that is inconvenient for Somalia's case. That cannot be right.

4. The MOU sets out a coherent three-step method of settlement: first, "no objection" to CLCS submissions; second, CLCS review; and, third, a final agreement covering all maritime

[1]CR 2016/11, p. 16, para. 1 (Pellet).

[2]CR 2016/11, p. 21, para. 13 (Pellet).

areas in dispute. The term "shall agree" after CLCS review is unambiguous. Professor Sands dismissed it as "boiler-plate language" from UNCLOS Articles 74 (1) and 83 (1)[3]. Those provisions stipulate that delimitation of maritime boundaries "shall be effected by agreement"[4]. His only argument was that the MOU has no "exclusionary language" in regard to the Court's jurisdiction[5]. But that point is obviously irrelevant. Kenya's reservation applies to any agreed procedure other than recourse to the Court[6]. Nothing more is required. The Court's jurisprudence gives strict effect to reservations[7]. Professor Sands completely ignored this interpretive rule in the pleadings. Instead, he created his own novel requirement of "deliberate, clear, unambiguous exclusion" in Optional Clause declarations[8]. This new standard defies logic. If the MOU had to specifically exclude recourse to the Court, then Kenya's reservation would become redundant; by this curious logic, unilateral reservations would be subject to the consent of other States. The same logic would then apply to the 34 other States with similar reservations, depriving them of all effect. In fact, Professor Sands quoted the President of the Court, confirming in 2010 that pursuant to such reservations "any other mechanism of dispute settlement as agreed between the parties will prevail over the general jurisdiction of the Court". The point is clear. Nothing more needs to be said.

5. In regard to Part XV procedures, Professor Sands, with characteristic understatement, referred to Kenya's submissions as "manifestly hopeless"[9]. But his only argument was that under Article 282, the Court's jurisdiction takes precedence where there is what he called "matching convergent overlapping Optional Clause declarations"[10]. But this is not the case in the instant

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[3]CR 2016/11, p. 54, para. 13 (Sands).

[4]United Nations Convention on the Law of the Sea (UNCLOS), Art. 74 (1): "The delimitation of the exclusive economic zone between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution"; Art. 83 (1): "The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution."

[5]CR 2016/11, p. 54, para. 13 (Sands).

[6]*Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 240.

[7]*Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, pp. 452–53, para. 44; *Aerial Incident of 10 August 1999 (Pakistan* v. *India), Jurisdiction, Judgment, I.C.J. Reports 2000* pp. 29–31, paras. 36–42; POK, Vol. I, para. 144.

[8]CR 2016/11, p. 52, para. 8 (Sands).

[9]CR 2016/11, p. 66, para. 48 (Sands).

[10]CR 2016/11, p. 61, para. 29 (Sands).

proceedings. Here is the declaration of Somalia and here is the declaration of Kenya. They are not matching. They are not convergent. Article 282 does not apply. Part XV clearly applies; it is the procedural *lex specialis*[11] between the Parties regarding UNCLOS. Nonetheless, the Court need not make a decision of wider application based on Part XV procedures. As a bilateral agreement with an agreed procedure, the MOU is sufficient to exclude jurisdiction in this case.

6. Mr. President, Somalia made some factual assertions that require brief consideration. First, Professor Pellet suggested that the method of settlement in the penultimate paragraph of the MOU has what he called "perverse practical effects" because Somalia's CLCS submission would not be reviewed until 2033[12], that was his calculation. He ignored the fact that there are objections to at least 16 earlier submissions[13]. That is about half of all submissions. He also ignored the fact that the CLCS now meets for between 21 and 26 weeks per year and has significantly expedited its procedures[14]. Kenya's case was scheduled for 2022 but came in the queue in 2014[15]. In any event, maritime delimitation agreements require several years to negotiate, and there is no urgent need for an immediate settlement given the circumstances. In fact, if Somalia was so concerned with expeditious settlement, it would not have objected to Kenya's CLCS submission. Somalia's alarmist theory on prolonged CLCS review scarcely withstands scrutiny.

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[11]See e.g., *Right of Passage over Indian Territory, Merits, Judgment, I.C.J. Reports 1960*, p. 44 ("a particular practice must prevail over any general rules"); *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 240, para. 25 ("falls to be determined by the applicable *lex specialis"*); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 177–178, para. 105; *Beagle Channel Arbitration (Argentina* v *Chile)* (1977) p. 93, 144, para. 39 ("the rule *generalia specialibus non derogant*, on which basis . . . *generalia* would give way to . . .*specialia*"); *Décision du 27 juin 1955* (1955) 12 RIAA p. 88 («il est un principe juridique universel, en matière d'interprétation, qu'en cas de conflit entre un texte général et un texte spécial, c'est le dernier qui doit l'emporter»).

[12]CR 2016/11, p. 30, paras. 29, 30 (Pellet).

[13]See e.g. the Philippines objecting to the submission of Palau (Note dated 4 Aug. 2009); Argentina objecting to the submission of the United Kingdom in respect of, e.g., the Falklands (Note dated 20 Aug. 2009); Iceland objecting to the submission of Denmark in respect of the Faroe–Rockall Plateau Region (Note dated 5 Apr. 2011); Venezuela objecting to the submission of Guyana (Note dated 9 Mar. 2012); Japan objecting to the submission of China in respect of part of the East China Sea (Note dated 13 Aug. 2013); Japan objecting to the submission of the Republic of Korea (Note dated 28 Aug. 2013); Colombia, Panama, and Costa Rica objecting to the submission of Nicaragua in the south-western part of the Caribbean Sea (Notes dated 23 Sept. 2013 & 5 Feb. 2014); the Democratic Republic of Congo objecting to the submission of Angola (Note dated 11 Apr. 2014); France objecting to the submission of Canada (Note dated 17 Dec. 2014); the USA objecting to the submission of The Bahamas (Note dated 12 Nov. 2014); Canada objecting to the submission of France in respect of St-Pierre-et-Miquelon (Note dated 3 Sept. 2014).

[14]*Decision regarding the Workload of the Commission on the Limits of the Continental Shelf*, 21st meeting, doc. SPLOS/229, 16 June 2011.

[15]Progress of work in the Commission on the Limits of the Continental Shelf (CLCS): Statement by the Chair, 18 Apr. 2016, CLCS/93, at para. 42.

7. Second, Mr. Reichler went to great lengths to present what he characterized as "evidence" of "subsequent conduct" regarding the MOU. You were told that because the Parties discussed maritime delimitation during a preliminary four-month period, this is conclusive proof that there was no prior requirement of CLCS review; and this during a period when Somalia objected to Kenya's CLCS submission. How does one respond to such an argument? It is rather obvious that the Parties are free to conclude a boundary agreement whenever they want, based on mutual consent. But without such mutual consent, the agreed procedure of prior CLCS review under the MOU continues to apply. It is as simple as that.

8. Quite apart from this clutching at straws, the documents that Mr. Reichler invoked in fact confirm Kenya's consistent understanding that the method of settlement under the MOU was negotiation. I will go through these documents briefly and refer to the tab numbers in Somalia's own judges' folder. Kenya's statement to the CLCS in 2009 at tab 9 was produced to argue that the MOU was exclusively limited to "no objection"[16]. In the very next sentence, however, the Kenyan representative, Ms Nkoroi, confirmed that, pursuant to the MOU, "at an appropriate time, a mechanism will be established to finalize the maritime boundary negotiations with Somalia". Another example is Kenya's CLCS submission of 2009 at tab 10. It refers to the MOU and the immediately preceding sentence refers to section 4 (4) of the 1989 Maritime Zones Act of Kenya, providing that "the exclusive economic zone boundary between Kenya and Somalia shall be delimited . . . pursuant to an agreement . . . on the basis of international law"[17]. The Joint Statement of 2013 at tab 11 further indicates that the Parties agreed on "the need to work on a framework of modalities for embarking on maritime demarcation" and, in the next paragraph, refers to "MOUs signed between Kenya and Somalia, and their level of implementation"[18]. Another example is tab 20, whereby Kenya confirms that under the MOU, the Parties "shall agree" on maritime delimitation and reiterates its commitment to a "bilateral agreement," including a willingness to expeditiously resolve Somalia's objection to Kenya's CLCS submission[19]. Despite

[16]Memorial of Somalia (MS), Vol. III, Ann. 61; CR 2016/11, p. 39, para. 21 (Reichler).

[17]MS, Vol. III, Ann. 59; CR 2016/11, p. 39, para. 22 (Reichler).

[18]Preliminary Objections of Kenya (POK), Vol. II, Ann. 31; CR 2016/11, p. 41, para. 27 (Reichler).

[19]MS, Vol. III, Ann. 50; CR 2016/11, p. 49, para. 50 (Reichler).

Somalia's breach of the MOU, Kenya consistently maintained the view that maritime boundary delimitation would be effected by agreement.

9. Mr. President, counsel for Somalia repeatedly used the alleged exhaustion of negotiations as a means of persuading you that without your exercise of jurisdiction, the Parties will never agree on maritime delimitation. Mr. Reichler referred unconvincingly to the MOU method of settlement as "an agreement not to agree"; he referred to it as a "bar either to negotiation or to an expeditious agreement"[20]. Professor Sands referred to "intractable deadlock"[21]. Professor Pellet said that he was "puzzled" at what he called an "impoverished" African nation "slowing things down" by not consenting to adjudication by the Court[22]. For the record, the World Bank considers Kenya a "middle income" country. Leaving that aside, even if we accept Somalia's contention that the procedure under the MOU will not succeed in achieving an agreement after CLCS review, there would be no perpetual limbo, because the Part XV procedures would still apply. There would be a further method of settlement even if the MOU procedure is exhausted, at some point in the not too distant future. Professor Sands' apocalyptic prediction of "dire implications", "radical consequences", "startling outcomes", and other calamities for the Court is an acute episode of rhetorical flourish — but fortunately one that may be cured by a healthy dosage of objective facts[23].

10. In this regard, how should one address the accusation that Kenya is "hostile" to the Court because its case on the merits would "most likely fail" and its intention therefore is "prolonging its own unilateral conduct" — those were the words of Professor Sands[24]. It bears mentioning here that Somalia's pleadings, both written and oral, have completely ignored Kenya's need for maritime enforcement against Al-Shabaab terrorists. Somalia has produced no contrary evidence, and no contrary arguments, that border insecurity is a fundamental threat to Kenya. It is an inconvenient truth for Somalia that hundreds of Kenyan civilians have been massacred by terrorist attacks and that, as Kenya has repeatedly stated, interdiction of Al-Shabaab in the maritime areas in dispute is an existential necessity for Kenya. This is not a maritime dispute between Norway and

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[20]CR 2016/11, p. 48, para. 48; p. 49, para. 51 (Reichler).

[21]CR 2016/11, p. 57, para. 17 (Sands).

[22]CR 2016/11, p. 33, para. 39 (Pellet).

[23]CR 2016/11, p. 56-57, paras. 14 and 16 (Sands).

[24]CR 2016/11, p. 51, para. 4 (Sands).

Sweden. The context is one of serious insecurity, a still fragile situation in Somalia that directly impacts Kenya. Somalia does not deny that the Kenyan navy has patrolled these waters for several years now as part of the African Union Mission in Somalia, endorsed by the United Nations Security Council. Under such complex circumstances, is Kenya to be blamed for wanting a negotiated settlement under the MOU's agreed procedure?

11. Mr. President, one final point merits brief attention. The Deputy Agent referred to Kenya's "misguided attitude" regarding the maritime areas in dispute[25]. She suggested that Kenya's objection is motivated by the fact that it does not have "a serious case on the merits"[26]. Kenya in fact has a strong case on the merits but that has no bearing on jurisdiction. The Court made this clear in *Fisheries Jurisdiction*[27]. The merits also have no bearing on Kenya's motivations for insisting on a negotiated settlement in accordance with the MOU. The point here is only that what Somalia decries as Kenya's unilateral acts must be seen in a proper historical context. Kenya has exercised uncontested jurisdiction in this maritime area since 1979. The Deputy Agent said that "Somalia does not agree"[28]; but there is not a shred of evidence in the Memorial suggesting otherwise, not a single protest for 30 years until the MOU was concluded in 2009. As already stated, the parallel of latitude reflects earlier Anglo–Italian colonial practice in regard to the territorial sea. Under such circumstances, what is reasonable conduct on the part of Kenya? If a State exercises uncontested jurisdiction for 30 years, and a neighbouring State then suddenly asserts a maritime boundary dispute, should all exploratory activities immediately cease? This applies especially to activities of a purely transient nature — and even those activities have been suspended. Kenya has invited Somalia to enter into practical measures of a provisional character as required by Articles 74 (3) and 83 (3) of UNCLOS. Is it fair to fault Kenya in such circumstances, and to accuse it of improper conduct? We would submit that Kenya has behaved in an exemplary fashion. There is simply no basis for the false narrative that Somalia has raised in

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[25]CR 2016/11, p. 11, para. 9 (Al-Sharmani).

[26]CR 2016/11, p. 14, para. 25 (Al-Sharmani).

[27]*Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 452.

[28]CR 2016/11, p. 11, para. 9 (Al-Sharmani).

this proceeding to persuade the Court to exercise jurisdiction in plain disregard of Kenya's reservation.

12. Mr. President, distinguished Members of the Court. That brings to a conclusion my presentation. It has been a great honour to appear before you in this hearing. I would now ask that you invite Professor Forteau to the podium.

Le PRESIDENT : Merci, Monsieur le professeur, je donne la parole à M. le professeur Forteau.

M. FORTEAU :

L'INTERPRÉTATION DU MÉMORANDUM D'ACCORD DE 2009

1. Merci Monsieur le président. Monsieur le président, Mesdames et Messieurs de la Cour, il m'incombe cet après-midi de revenir sur l'interprétation du mémorandum d'accord de 2009. Rassurez-vous, Monsieur le président, je ne me livrerai pas à une conférence académique sur les règles applicables à l'interprétation des traités. Je me contenterai de les appliquer au cas d'espèce, en les confrontant fidèlement — ce que la Somalie s'est abstenue de faire — aux éléments du dossier. Cela me conduira à revenir successivement, en réponse aux arguments de nos contradicteurs, sur le contexte de conclusion de l'accord (I), sur son champ d'application (II) puis sur les engagements qu'il contient (III) — étant entendu que, contrairement à ce que suggère mon très cher ami le professeur Alain Pellet[29], le «MoU» constitue de manière évidente un traité.

I. Le contexte de conclusion de l'accord

2. Commençons donc par le contexte de conclusion de l'accord, et, plus spécifiquement, par ses travaux préparatoires, entendus au sens propre. Comme c'est souvent le cas pour les accords bilatéraux, par opposition aux traités multilatéraux, les travaux préparatoires de l'accord de 2009 ne sont pas très volumineux[30]. Votre Cour a considéré en 1995 dans l'affaire *Qatar c. Bahrein* que, dans une telle situation, lorsque le matériau est «fragmentaire», «quelles qu'aient pu être les motivations de chacune des Parties, la Cour ne peut que s'en tenir aux termes mêmes d[e l'accord]

[29] CR 2016/11, p. 17-18, par. 6 (Pellet).

[30] Voir les exceptions préliminaires du Kenya (EPK), annexes 6 à 10.

traduisant leur commune intention…»[31]. Cela nous renvoie donc au texte du traité, que j'aborderai dans un instant.

3. Cela étant dit, il existe tout de même deux éléments décisifs dans les travaux préparatoires de l'accord de 2009, éléments dont la Somalie ne tient aucun compte :

— premièrement, l'avant-dernier paragraphe de l'accord qui est consacré à la délimitation figurait déjà dans les versions antérieures du projet d'accord ; en lisant ce paragraphe, les Parties n'ont pas pu se méprendre sur son sens et sa portée, et pourtant aucune d'entre elles n'a exigé son retrait du projet d'accord ; ceci est tout à fait significatif ;

— deuxièmement, dans la deuxième version du projet d'accord, l'avant-dernier paragraphe visait the «*area* under dispute», au singulier[32] ; dans la version finale de l'accord, la décision a été prise de mentionner les «*areas* under dispute». Ce passage du singulier au pluriel a nécessairement une signification juridique.

4. De son côté, M[e] Reichler n'a cité aucun élément des travaux préparatoires qui démentiraient le contenu de l'avant-dernier paragraphe de l'accord. Il s'est contenté de vagues références au soi-disant contexte de conclusion de l'accord, en proposant une lecture déformée de certains documents[33], comme le professeur Akhavan l'a montré il y a un instant. M[e] Reichler s'est bien gardé en revanche,

— d'une part, de répondre aux éléments mentionnés par le Kenya dans son premier tour de plaidoiries qui montrent que les circonstances précises dans lesquelles le «MoU» a été conclu confirment l'interprétation du Kenya[34],

— d'autre part, il s'est également abstenu de faire état des éléments qui attestent que l'accord de 2009 a été conclu, non pas seulement aux fins de la délinéation, mais aussi aux fins de la délimitation. Dans sa note verbale du 17 août 2011, par exemple, la Norvège a dressé un lien explicite entre la délimitation des espaces maritimes entre les Parties et la conclusion de

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[31] *Délimitation maritime et questions territoriales entre Qatar et Bahreïn (Qatar c. Bahreïn), compétence et recevabilité, arrêt, C.I.J. Recueil 1995*, p. 21-22, par. 41.

[32] Voir la lettre du Greffe de la Cour en date du 23 mars 2016, annexant la lettre de la Norvège du 21 mars 2016.

[33] CR 2016/11, p. 34 et suiv., par. 5 et suiv. (Reichler).

[34] Voir CR 2016/10, p. 43-45, par. 30-34 (Forteau).

l'accord de 2009[35]. De même, dans son mémoire, la Somalie a présenté cet accord dans le contexte des «efforts des Parties visant à négocier un accord sur la frontière maritime»[36]. Par ailleurs, M[e] Reichler a de nouveau été incapable de citer le moindre document qui établirait de manière probante que le «MoU» était censé n'avoir aucun lien du tout avec la délimitation.

II. Le champ d'application de l'accord

5. J'en viens, Monsieur le président, au champ d'application de l'accord de 2009. Son avant-dernier paragraphe, on le sait, utilise un double pluriel : il vise «the delimitation of maritime *boundaries* in the *areas* under dispute». Selon Alain Pellet, ce double pluriel n'aurait toutefois aucun effet juridique car le singulier et le pluriel pourraient être utilisés dans un traité «de manière interchangeable»[37]. Voilà, pour un juriste ami de Racine et de Baudelaire[38], une bien curieuse manière d'interpréter le texte d'un traité !

6. De toute évidence et quoi qu'en dise le professeur Sands[39], l'emploi de ce double pluriel a une signification juridique : il entend indiquer que l'engagement pris dans l'avant-dernier paragraphe de l'accord couvre la délimitation de l'ensemble des espaces marins des deux Parties. C'est au demeurant une interprétation qui est confirmée par d'autres éléments.

7. Il se trouve tout d'abord que la revendication somalienne sur le plateau continental a été présentée par la Somalie comme étant indissociable de sa revendication sur la mer territoriale et sur les espaces s'étendant jusqu'à 200 milles marins. La loi somalienne de 1972 sur la mer territoriale fusionne en effet dans un seul et même ensemble, comme s'il s'agissait d'un espace maritime unique, tous les espaces jusqu'à 200 milles marins en considérant qu'ils relèvent tous de sa mer territoriale[40].

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[35] EPK, annexe 4, p. 24-25.

[36] Mémoire de la Somalie (MS), par. 3.36 et suiv.

[37] CR 2016/11, p. 24, par. 18 2) (Pellet).

[38] CR 2016/11, p. 16, par. 2 (Pellet).

[39] CR 2016/11, p. 55, 4) (Sands).

[40] Voir MS, annexe 9.

8. La Somalie s'est bien gardée d'évoquer cette loi de 1972 devant vous, se contentant de suggérer dans son mémoire qu'elle aurait été abrogée en 1988[41]. Mais trois éléments plaident en sens inverse :

— en 2011, la Norvège a cité cette loi de 1972 pour souligner qu'elle devait être mise en conformité avec le droit international, ce qui signifie qu'elle était apparemment encore en vigueur à cette date[42] ;

— dans sa communication préliminaire à la Commission des limites du plateau continental soumise sept jours après la conclusion du «MoU», la Somalie a elle-même cité sa loi de 1972[43] ;

— et lorsqu'en juin 2013, quatre ans après la conclusion du «MoU», la Somalie a refusé d'entrer en négociation avec le Kenya sur la délimitation maritime, la Somalie a fait valoir, en relation explicite avec le «MoU», que «the government's position» en la matière «is» la loi de 1972, laquelle «defines Somali territorial sea as 200 nautical miles and continental shelf»[44].

9. Il est bien connu par ailleurs que, dans le droit international contemporain, les différents espaces maritimes sont «liés entre eux» en ce qui concerne leur délimitation, comme vous l'avez souligné à plusieurs occasions[45]. C'est particulièrement vrai lorsque, comme c'est le cas en l'espèce, une ligne unique de délimitation est revendiquée, laquelle part de la côte des Parties pour s'étendre jusqu'au plateau continental étendu. Dans un tel cas, il est manifeste que les différentes ***p***arties de la délimitation sont interdépendantes et doivent par conséquent être menées ensemble[46]. Dans son exposé écrit, la Somalie a d'ailleurs admis qu'il n'était pas envisageable de dissocier les différentes composantes de la délimitation[47].

10. Dans ces circonstances, il est évident que l'engagement qui figure dans l'avant-dernier paragraphe de l'accord de 2009 couvre, en ce qui concerne les zones objet du différend entre les

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[41] MS, par. 3.3.

[42] EPK, annexe 4, p. 23.

[43] Voir MS, annexe 66, point 3.

[44] EPK, annexe 33.

[45] Voir notamment *Frontière terrestre et maritime entre le Cameroun et le Nigéria (Cameroun c. Nigéria ; Guinée équatoriale (intervenant)), arrêt, C.I.J. Recueil 2002*, p. 441, par. 287.

[46] Voir CR 2016/10, p. 39, par. 19 (Forteau).

[47] EES, par. 3.70 ; voir également MS, vol. III, annexe 51, p. 2.

Parties, la délimitation de l'ensemble de leurs espaces maritimes. C'est ce que vient confirmer, expressément, l'usage du double pluriel.

III. Les engagements souscrits au titre de l'accord

11. J'en viens, Monsieur le président, aux engagements souscrits dans l'accord de 2009. Selon le professeur Pellet, l'interprétation d'un traité suppose «de ne pas détacher les uns des autres les quatre éléments clefs énumérés à l'article 31 [de la convention de Vienne] : texte, objet et but, contexte, et pratique ultérieure»[48]. Le problème est que la Somalie détache elle-même le plus important de ces quatre éléments, à savoir le texte du traité !

12. Pour y parvenir, la Somalie se livre à une manœuvre qui ne trompera pas la Cour. La Somalie commence par postuler que l'accord de 2009 n'aurait qu'un seul et unique but et objet, à savoir la délinéation[49] ; sur la base de ce postulat, elle s'efforce ensuite de dissoudre l'avant-dernier paragraphe de l'accord de 2009, au simple prétexte que celui-ci concerne la délimitation et non la délinéation.

13. Ce pseudo-raisonnement juridique est bien entendu vicié.

14. Sur le plan de ses conséquences tout d'abord, le raisonnement de la Somalie conduit non pas à interpréter, mais à *priver d'effet* une disposition du traité au simple prétexte qu'elle ne rentrerait pas dans l'objet et le but du traité tel**s** que la Somalie les définit, ce que le droit de l'interprétation des traités interdit bien entendu de faire.

15. Sur le plan de la méthode ensuite, il est manifeste que, pour reconstituer l'objet et le but du traité, il ne suffit pas de piocher à son bon plaisir dans le texte du traité, en insistant sur certaines formulations pour mieux en écarter d'autres, de manière sélective, comme l'a fait hier le professeur Alain Pellet. Ce que le droit international commande est de lire l'accord fidèlement et intégralement.

16. Avant de me livrer brièvement à cet exercice, je souhaiterais formuler une remarque préliminaire. Il semble qu'entre son exposé écrit et ses plaidoiries, la Somalie a changé de stratégie interprétative. Dans son exposé écrit, elle défendait la position intenable selon laquelle l'accord

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[48] CR 2016/11, p. 19, par. 8 (Pellet).

[49] CR 2016/11, p. 13, par. 21 (agent adjoint) ; p. 55, 2) (Sands) ; EES, par. 1.7-1.8.

de 2009 n'aurait rien à voir avec la délimitation[50]. Désormais, la position de la Somalie semble plus nuancée : «Assurément», a reconnu le professeur Pellet, l'accord contient une disposition sur la délimitation[51]. De fait, il était difficile de le nier. La conséquence en est que, quelle que soit la définition que la Somalie cherchera à donner à l'objet et au but du traité, elle butera toujours sur le même obstacle : l'avant-dernier paragraphe de l'accord *existe*, et, dès lors que *pacta sunt servanda,* il n'y aucun moyen, et il n'y a aucune raison, de le priver de son effet juridique.

17. La nouvelle thèse de la Somalie serait que le seul effet de l'accord sur la délimitation serait que la délinéation serait «sans préjudice de la délimitation»[52]. Cette nouvelle lecture de l'accord est cependant en contradiction flagrante avec son texte.

18. Pour rappel, l'accord de 2009, qui est reproduit à l'onglet n° 2 de votre dossier, se compose de sept paragraphes.

19. Vous remarquerez tout d'abord que l'accord présente la particularité de commencer et de se terminer par une clause sur la délimitation. Dans le second paragraphe de l'accord, les Parties conviennent de considérer qu'il existe un différend sur la délimitation ; dans le sixième paragraphe, elles établissent la procédure à suivre pour la délimitation, et cela en lien avec la délinéation. C'est un élément important, qui montre que les engagements pris en matière de délinéation sont liés aux questions de délimitation. Par ailleurs, il est évident que c'est parce que les Parties constatent, dans le second paragraphe, qu'il y a un différend sur la délimitation, qu'elles organisent, dans le sixième paragraphe, une procédure pour le règlement de la délimitation. La structure de l'accord confirme ainsi qu'il porte autant sur la délimitation que sur la délinéation.

Projection n° 1 : paragraphe 3 de l'accord de 2009 («The two coastal States…»)

20. Dans le troisième paragraphe de l'accord, les Parties commencent, dans la première phrase, par reprendre la formulation de l'article 76, paragraphe 10, de la convention de Montego Bay, à savoir que la délinéation est sans préjudice de la délimitation. Selon la Somalie,

[50] EES, par. 1.7-1.8.

[51] CR 2016/11, p. 22, par. 13 (Pellet).

[52] CR 2016/11, p. 25, par. 20 *in fine* (Pellet).

l'examen devrait s'arrêter là : tels seraient l'objet et le but exclusifs du «MoU» : de dire, uniquement, que la délinéation est «sans préjudice de la délimitation»[53].

21. Mais il convient bien entendu de lire la suite du texte, qui contient d'importants ajouts et précisions, dont la Somalie ne tient aucun compte. Un peu plus loin dans le même paragraphe, les Parties introduisent un deuxième élément : «the establishment of the outer limits of the continental shelf beyond 200 nautical miles» is «without prejudice to the *future* delimitation of the continental shelf». Cette précision fait écho à la procédure agréée dans l'avant-dernier paragraphe, à savoir que les Parties ont décidé de procéder à une certaine articulation *temporelle* des procédures. Il se déduit par ailleurs de la deuxième phrase du même paragraphe que la priorité, en termes d'intérêt, pour les Parties au moment où elles concluent le «MoU» était la délinéation plutôt que la délimitation. Cet élément explique du même coup l'ordre de priorité retenu dans la procédure qui a été agréée dans l'avant-dernier paragraphe de l'accord.

Projection n° 2 : paragraphe 4 de l'accord de 2009 («Before 13 May 2009…»)

22. Dans le quatrième paragraphe, le même élément est repris, et il y est même précisé : il y est dit dans l'avant-dernière phrase que la «submission» de la Somalie à la Commission des limites sera «without prejudice to the future delimitation of maritime boundaries». De nouveau et cette fois-ci en ce qui concerne la «submission» de la Somalie, on trouve cet élément d'articulation temporelle des étapes du processus de délinéation et de délimitation.

Projection n° 3 : paragraphe 5 de l'accord de 2009 («The two coastal States agree…»)

23. Le paragraphe 5 poursuit ce *crescendo :* il dispose dans sa dernière phrase que non seulement les «submissions» des Parties, mais également «the *recommandations approved* by the Commission … shall be without prejudice to the *future* maritime delimitation of maritime boundaries…». Ce paragraphe signifie nécessairement que la délimitation est conçue comme devant intervenir après l'approbation desdites recommandations.

24. Tout ceci montre que les cinq premiers paragraphes de l'accord préfigurent l'engagement qui est pris dans son avant-dernier paragraphe. Cela montre par là-même que, contrairement à ce

[53] CR 2016/11, p. 22-23, par. 15, premier tiret (Pellet).

qu'affirment nos contradicteurs[54], tous les paragraphes de l'accord sont solidaires les uns des autres et vont dans la même direction : l'objet et le but de l'accord est d'organiser, de manière ordonnée, les procédures de délinéation *et* de délimitation.

Projection n° 4 : paragraphe 6 de l'accord de 2009 («The delimitation…»)

25. A la lumière de ce contexte, le sixième paragraphe de l'accord ne constitue nullement une surprise ; il découle des paragraphes qui précèdent, et il le fait en des termes qui ne méritent aucune interprétation tant leur libellé est clair. Il ne dit pas que la délimitation «should be agreed», ou qu'elle devrait être «settled». Il dit qu'elle «shall be agreed» — et il n'y a aucun différend entre les Parties quant au fait que cela signifie que la méthode choisie pour la délimitation est la négociation.

26. Le sixième paragraphe de l'accord ne dit pas davantage que la délinéation est sans préjudice de la délimitation — ceci a été déjà dit dans la première phrase du troisième paragraphe et cela n'avait donc pas besoin d'être répété à nouveau dans le sixième paragraphe. Ce sixième paragraphe a un objet différent, déjà présent sous une forme différente dans les paragraphes 3, 4 et 5 : il contient un engagement juridique au terme duquel la délimitation «shall be agreed … after» l'adoption des recommandations de la Commission des limites. Autrement dit, l'accord prévoit, d'une part, que la délinéation est sans préjudice de la délimitation, *d'autre part* et sur le plan *procédural*, que la délimitation est conditionnée à la délinéation préalable. On peut être en désaccord avec cette manière de procéder ; mais en droit, la question n'est pas celle-ci : le fait est que les Parties ont décidé, par le biais d'un accord juridiquement contraignant, de suivre cette procédure.

27. Le professeur Pellet a vainement tenté d'argumenter que cela n'empêcherait pas les Parties de conclure un accord avant les recommandations de la Commission ni même de vous saisir[55]. Il est bien entendu que ce qu'un accord a fait, un autre peut le défaire. Mais à ce jour, aucun accord ne s'est substitué au «MoU» et il convient par conséquent de lui donner effet car il fait droit entre les Parties. Par ailleurs et quoi qu'il en soit, une délimitation par voie d'«accord»

[54] CR 2016/11, p. 23, par. 16 (Pellet).

[55] CR 2016/11, p. 27, par. 24 (Pellet).

n'est certainement pas la même chose qu'une délimitation judiciaire. De ce point de vue, le «MoU» exclut nécessairement votre compétence puisque la procédure agréée est de recourir aux négociations. Au surplus, l'accord à conclure doit intervenir *après* les recommandations de la Commission des limites — c'est ce qui le distingue, par exemple, de la procédure agréée en février 2009 par le Ghana et la Côte d'Ivoire, qui, n'en déplaise à nos contradicteurs[56], n'est donc pas un précédent pertinent dans le cas d'espèce[57]. Cette condition temporelle est une condition juridique, à laquelle il convient également de donner effet.

28. Le professeur Pellet en est finalement venu à soutenir que le seul objet de ce sixième paragraphe serait la finalisation de la délimitation en ce qui concerne uniquement le point extrême de la frontière maritime[58]. Cela constitue, de la part de la Somalie, une révision pure et simple de l'accord de 2009 car celui-ci ne dit absolument rien de tel. Celui-ci ne se limite pas au point extrême de la frontière maritime — ce qu'il aurait pu dire, mais ce qu'il ne dit pas. Son avant-dernier paragraphe dispose expressément que la procédure qu'il organise concerne «the delimitation of maritime boundaries in the areas under dispute, including the delimitation of the continental shelf beyond 200 nautical miles». Selon les termes explicites de l'accord, c'est donc bel et bien l'ensemble de la délimitation maritime qui est couverte par la procédure particulière agréée en 2009 par le Kenya et la Somalie.

29. Ceci, Monsieur le président, Mesdames et Messieurs les juges, conclut ma plaidoirie. Je vous remercie de votre attention, et je vous serais très reconnaissant, Monsieur le président, de bien vouloir appeler maintenant à cette barre le professeur Alan Boyle.

Le PRESIDENT : Merci. Je donne la parole à M. le professeur Boyle. Monsieur le professeur, s'il vous plaît.

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[56] CR 2016/11, p. 35, par. 8 (Reichler).

[57] Voir Submission by the Republic of Ghana to the CLCS. Executive Summary, par. 5.2 (disponible à l'adresse : http://www.un.org/depts/los/clcs_new/submissions_files/submission_gha_26_2009.htm).

[58] CR 2016/11, p. 26-29, par. 23-28 (Pellet).

Mr. BOYLE:

UNCLOS ARTICLE 282 DOES NOT CONFER JURISDICTION ON THE COURT

1. Mr. President, Members of the Court, it is a pleasure to appear before you again, and to respond to my good friend Professor Sands. He has spent far too much time reading my work recently, but I can be brief and I will focus mainly on Article 282.

2. Professor Sands claimed yesterday that Kenya's interpretation of its Optional Clause reservation would "undermine the potential role of the Court" in settling maritime boundary disputes[59]. Mr. President, Kenya is not remotely hostile to the Court, nor is it seeking to undermine its role in maritime boundary disputes. Somalia's argument ignores — and risks destroying — the complex and successful system for settling UNCLOS disputes set out in Part XV of the Convention. It assumes what the States who negotiated that system sought to avoid: making the ICJ the default option for the settlement of UNCLOS disputes. The ICJ is an important part of that system but not in the way that Somalia would have you believe.

3. Part XV creates what has been described, and I didn't invent this term, ***as*** a "cafeteria" of dispute settlement options from which States are free to choose the forum that they consider most appropriate for their particular dispute[60]. The co-chairman of the committee that created this system was a Kenyan diplomat, and I believe that he is responsible for the "cafeteria". Adjudication by the ICJ is only one of the options available under Part XV, and in this context references made yesterday to UN General Assembly resolutions calling for disputes to be referred to the ICJ are plainly out of place. There is a role in international relations for specialized dispute settlement systems, and States adopt those specialised systems for very good reasons. Part XV is an integral and essential part of the Convention and Somalia, like Kenya, was part of the consensus which negotiated that Convention and adopted it in 1982[61].

4. The only truly compulsory procedures under Part XV are those set out in Articles 287 and 298 (1) and in essence, after — but only after — the section 1 procedures and agreed

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[59]CR 2016/11, p. 53, para. 10 (Sands).

[60]Article 287.

[61]UN, *The Law of the Sea: UN Convention on the Law of the Sea* (New York, 1983), 'Introduction', pp. xx–xii; UNCLOS III, Rules of Procedure, UN doc. A/CONF.62/30/Rev.3 (1974), and Final Act, part V, UN doc. A/CONF.62/121 (1982).

time-limits are exhausted, the parties to an UNCLOS maritime boundary dispute have to accept the system for dispute settlement set out in section 2 of Part XV.

5. So the core question under Part XV is whether Kenya has accepted ICJ jurisdiction in the present case. It is not disputed on our side at all that parties to an UNCLOS dispute which have clearly accepted ICJ jurisdiction in matching Optional Clause declarations are covered by Article 282 and that Article will then give that choice priority over ***all*** other procedures in Section 2. That entirely obvious point is made by all of the authors cited by Professor Sands yesterday. But none of those authors — not one, ~~***not***~~ including me — addresses the point at issue in this case: and that point is whether Article 282 applies to an Optional Clause declaration that contains the kind of reservation in favour of other agreed procedures that is found in Kenya's declaration. Let me emphasize that. None of the literature cited by Professor Sands even mentions the point. Perhaps, like me, they thought the answer was so obviously negative that the matter simply required no elaboration. But to give you a flavour, Judge Treves says simply that "[a]ccording to Article 282, the jurisdictional priority given to the Court over the Tribunal on the Law of the Sea, as between states that have accepted the Optional Clause, applies to all cases of compulsory jurisdiction 'provided for' in Part XV of the Convention"[62]. Yes, but that simply begs the question at issue; it certainly does not answer it.

6. Somalia says that only a deliberate and unambiguous exclusion will oust the jurisdiction of the Court when an Article 36 (2) declaration is made. It argues that Kenya could and should have excluded maritime boundary disputes expressly in its reservation[63]. And because Kenya did not do so expressly, Somalia says that the reservation therefore does not cover a maritime boundary dispute, does not apply in this case. And that lack ***of*** specificity ***in*** its view makes the Optional Clause and Article 282 applicable and gives you jurisdiction.

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[62]T. Treves, "Conflicts between the ITLOS and the ICJ", 31 *NYU Journal of Int Law & Pol* (1999) p. 812.

[63]CR 2016/11, p. 54, para. 14 (Sands).

7. But Mr. President and Members of the Court, this argument is not consistent with your own jurisprudence on Article 36 (2)[64]. And where would the argument for greater specificity stop? Suppose Somalia and Kenya had a dispute under a WTO-covered agreement: if Somalia's approach to interpreting Kenya's reservation is correct, then Kenya's Article 36 (2) declaration has conferred compulsory jurisdiction over WTO disputes on the ICJ, even though the WTO has an elaborate and specialized dispute settlement system of its own. Is Somalia really suggesting that the ICJ Optional Clause prevails unless States make far more detailed and specific reservations to their Article 36 (2) reservations? No court has ever taken that view.

8. Consider alternatively a dispute between two States about activities on the deep seabed. Now this should fall within the jurisdiction of the Seabed Disputes Chamber under Part XI of UNCLOS[65]. But will it? On Somalia's argument, Kenya's ICJ jurisdiction would confer compulsory jurisdiction over such a dispute on the ICJ simply because it does not specifically exclude it. That would certainly surprise the parties to UNCLOS.

9. Somalia then talks about a double *renvoi* between the Optional Clause reservation and Article 282, where each instrument allegedly extinguishes the other[66]. Now that might be entertaining. But, as my colleagues have already observed, in its relationship to the ICJ Statute, UNCLOS Part XV has the character of a *lex specialis*. As the International Law Commission noted in its report on the *Fragmentation of International Law* that: "The idea that special enjoys priority over general has a long pedigree in international jurisprudence . . ." ***They*** cite Grotius in offering two reasons for this: they say "A special rule is more to the point . . . than a general one

[64] *Fisheries Jurisdiction Case (Spain* v. *Canada), I.C.J. Reports 1998*, p. 454, para. 49: a declaration including a reservation must be interpreted "in a natural and reasonable way, having due regard to the intention of the State concerned at the time when it accepted the compulsory jurisdiction of the Court", and p. 453, para. 44: conditions or reservations "do not by their terms derogate from a wider acceptance already given. Rather, they operate to define the parameters of the State's acceptance of the compulsory jurisdiction of the Court. There is thus no reason to interpret them restrictively." See also *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 39, para. 88; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 125, para. 131; *Aerial Incident Case (Pakistan* v. *India), I.C.J. Reports 2000*, p.31, para. 42, and POK Vol. I, para. 144.

[65] Article 187 *(a)*.

[66] CR 2016/11, p. 64, para. 43 (Sands).

and it regulates the matter more effectively . . . than general rules. This could also be expressed by saying that special rules are better able to take account of particular circumstances."[67]

10. Grotius, if I may say so, expressed perfectly, almost four centuries ago, the underlying rationale behind Part XV of UNCLOS. It does not extinguish the ICJ Statute, far from it. There is a coherent role for the Court within the architecture of Part XV. But Part XV does create an alternative and more specialized and more diverse dispute settlement system for all the various types of UNCLOS disputes. As such it falls fairly and squarely within the ordinary meaning of the reservation to Kenya's Optional Clause declaration. And that reservation has to be taken at face value, on its own terms: it excludes and was meant to exclude "disputes in regard to which the parties to the dispute have agreed or shall agree to have recourse to some other method or methods of dispute settlement". That reservation in these terms recognizes the significant role of alternative and more specialized dispute settlement systems and procedures[68].

11. If UNCLOS Part XV manifestly provides alternative more specialized methods of dispute settlement**, *w***hy would it fall outside Kenya's Article 36 (2) reservation? There simply is no reason. It cannot be said that the reservation refers only to agreements in existence in 1965, when the declaration was made. Look at the wording: it says "have agreed or shall agree" — so it covers future agreements, such as UNCLOS. It cannot be said that the wording is not apt to cover the whole range of Part XV dispute settlement procedures, and when the declaration refers to "some other procedure or procedures" it plainly means "other than the ICJ". There is no double *renvoi* as Professor Sands put it. The only *renvoi* in Article 282 is to Optional Clause declarations or other agreements that clearly and unambiguously confer jurisdiction on the Court in UNCLOS disputes, ~~*and*~~ which Article 282 was intended to preserve.

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[67]ILC, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, A/CN.4/L.682, 13 April 2006, para 60. See also *Right of Passage over Indian Territory ("Portugal* v. *India) Merits, Judgment, I.C.J. Reports 1960*, p. 44 ("a particular practice must prevail over any general rules"); *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 240, para. 25 ("falls to be determined by the applicable *lex specialis*"); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, pp. 177–178, para. 105; *Beagle Channel Arbitration (Argentina* v. *Chile)* (1977) 52 *International Law Report (ILR)*, p. 144, para. 39 ("the rule *generalia specialibus non derogant*, on which basis . . . *generalia* would give way to . . . *specialia*"); *Décision du 27 juin 1955* (1955) 12, United Nations, *Report of International Arbitral Awards (RIAA)*, p. 388 ("il est un principe juridique universel, en matière d'interpretation, qu'en cas de conflit entre un texte général et un texte spécial, c'est le dernier qui doit l'emporter").

[68]M. Wood, The United Kingdom's Acceptance of the Compulsory Jurisdiction of the International Court' in O.K. Fauchald, H. Jakhelln, and A. Syse (eds.), *Festschrift Carl August Fleischer* (2006), 621, 637; Preliminary Objections of Kenya (POK), para. 143.

12. So that leaves only the previous argument, that Kenya's reservation is simply not specific enough to exclude your jurisdiction. That it does not mention maritime boundaries. But why stop there? Why not argue that it does not mention the outer continental shelf? Or the territorial sea? Or coral reefs? Or scientific whaling? What degree of specificity would satisfy Professor Sands? This is not a serious argument among international lawyers. A general phrase can cover many specificities. It is unnecessary to spell out everything. Nor is it necessary to emulate the Australian declaration, which he quotes.

13. Kenya's position is thus that its Optional Clause declaration, drafted long before UNCLOS was agreed and in very different circumstances, was never intended to cover disputes that fall plainly and squarely within the more specialized cafeteria of procedures established by Part XV, and that its clear and unambiguous wording does not do so now.

14. I might note in conclusion that Australia and Japan have both made Article 36 (2) declarations but they nevertheless did not take the *Southern Bluefin Tuna Case* to the ICJ[69]. This may not necessarily have been a wise choice on Australia's part, but it no doubt reflects the fact that Australia's ICJ declaration contains the same reservation as Kenya's, while Japan's declaration excludes disputes subject to binding arbitration or judicial settlement. Even these two States, which are otherwise among the Court's strongest supporters, recognize that there is a place for specialized dispute settlement régimes. Kenya takes the same view with respect to the adjudication of this dispute by the ICJ.

15. Mr. President, Members of the Court, unless there are any questions, that concludes my part in these proceedings for today and I would now ask you to call on Professor Lowe.

Le PRESIDENT : Merci, Monsieur le professeur. Je donne la parole à M. le professeur Lowe.

Mr. LOWE:

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[69] ***Southern Bluefin Tuna (New Zealand* v. *Japan; Australia* v. *Japan), XXIII RIAA I, 4 August 2000.***

SUMMARY

1. Thank you, Mr. President, Members of the Court. My task is again to summarize and close Kenya's submissions.

2. In the first round, Somalia made two points.

3. One point was that, according to Professor Sands, the effect of UNCLOS Article 282 is to preclude the application of UNCLOS Part XV to this dispute and to permit the Parties' Optional Clause declarations to "trump" Part XV, thus giving the Court jurisdiction over this dispute.

4. The second point was that the MOU is nothing more than an agreement between Kenya and Somalia not to object to each other's CLCS filings. Mr. Reichler told you that it was not understood as an agreement on the means for the settlement of the boundary dispute[70].

5. I shall address each point of those points and close with a response to Somalia's arguments that, as a matter of policy, the Court should find that it has jurisdiction in this case in order to secure future business.

UNCLOS Article 282

6. First, the UNCLOS Article 282 argument. Professor Boyle has addressed the Somali argument that "Part XV of UNCLOS does not and cannot affect the binding agreement established by Kenya's and Somalia's matching Optional Clause declarations"[71].

7. The short answer to it is that the two declarations are *not* matching. In 1965, Kenya excluded disputes in respect of which the Parties already had agreed, or would in future agree, to have recourse to "some other method or methods of settlement" — that is, a method "other than" the ICJ. Somalia did not exclude them. In 1989, when they each ratified UNCLOS, Somalia and Kenya agreed that maritime boundary disputes would be subject to UNCLOS Part XV. Neither State having chosen the ICJ as the forum for dispute settlement under UNCLOS Article 287, the two States have, accordingly, agreed that maritime boundary disputes should go to other Part XV procedures — that is, to methods of settlement "other than" the ICJ. This dispute thus falls inside Somalia's Optional Clause declaration but outside Kenya's. There is nothing complicated about that.

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[70]CR 2016/11, pp. 10-15, paras. 5–25 (Reichler).

[71]CR 2016/11, p. 61, para. 29 (Sands).

8. Of course, if the dispute did fall within *both* States' declarations, UNCLOS Article 282 might preserve the jurisdiction of the ICJ. And that is the point made by the writers quoted by Professor Sands. But the dispute does not fall within both declarations. Kenya has excluded a category of disputes which Somalia has not.

9. Professor Sands tried (in paragraph 42 of his speech) to use Article 282 in order to remove the reservation in Kenya's declaration — to nullify, or "trump" it[72]. He wants to say that Kenya's declaration indeed directs the dispute to the "other agreed method of settlement" in UNCLOS Part XV, but that Article 282 of UNCLOS Part XV then directs it back to the ICJ because of what he says are the "convergent" Optional Clause declarations of Kenya and Somalia.

10. And Somalia resolves the endless *renvoi* by asserting that "the jurisdiction established by convergent Optional Clause declarations takes precedence over the dispute resolution procedures contained in Part XV of UNCLOS"[73]. But why does it? Why is the *lex specialis* principle, firmly established in international law, displaced[74]? Why does a dispute over the interpretation or application of UNCLOS Articles on delimitation not fall under the comprehensive provisions of the UNCLOS dispute settlement procedure, to which Kenya and Somalia agreed decades after the making of their ICJ declarations — UNCLOS is not only the *lex specialis*, but also the later of the successive treaties, in terms of Article 30 of the Vienna Convention on the Law of Treaties?

11. Somalia offers no answer — no principles; no precedents; nor even any policy arguments, apart from the threat that Kenya's view may lead to a loss of business for the Court — a point to which I shall return shortly.

12. But in fact, in our submission the Court does not need to decide this point, because the obvious and primary reason why it lacks jurisdiction is that the Parties have agreed to settle the

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[72]CR 2016/11, p. 63, para. 42 (Sands).

[73]CR 2016/11, p. 61, para. 32 (Sands).

[74]*Right of Passage over Indian Territory (Portugal* v. *India), Merits, Judgment, I.C.J. Reports 1960,* p. 44 ("a particular practice must prevail over any general rules"); *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 240, para. 25 ("falls to be determined by the applicable *lex specialis*"); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 177–178, para. 105; *Beagle Channel Arbitration (Argentina* v. *Chile)* (1977) 52 *International Law Review* (I.L.R.), p. 144, para. 39 ("the rule *generalia specialibus non derogant*, on which basis . . . *generalia* would give way to . . . *specialia*"); *Décision du 27 juin 1955* (1955) 12 *Reports of International Arbitral Awards* (RIAA), p. 388 («il est un principe juridique universel, en matière d'interprétation, qu'en cas de conflit entre un texte général et un texte spécial, c'est le dernier qui doit l'emporter»).

maritime boundary dispute not by adjudication, but by negotiation. That is what they agreed in the MOU.

The nature of the MOU

13. And so I turn to Somalia's second main point. In its Memorial, at paragraphs 3.38 to 3.42, Somalia discussed the MOU and set out the text of paragraph 6 — the paragraph that stipulates that the maritime boundaries between Kenya and Somalia shall be *agreed* between the two States *after* the CLCS has made its recommendations on their respective submissions. Somalia made no suggestion that paragraph 6 is superfluous, or alien to the purpose of the MOU, or carries anything other than its plain meaning.

14. In its Memorial, Somalia's objection to the MOU was based on the fact that Somalia "decided against its ratification" and regarded it as "non-actionable", by which Somalia seems to have meant that the existence of the MOU could, as a matter of international law, be ignored.

15. Somalia has now abandoned that position. It now says that the MOU, whose legal effectiveness is apparently conceded, is — in Mr. Reichler's words — "solely . . . an agreement on non-objection to the Parties' respective submissions to the CLCS"[75]. He and Professor Pellet told you that this was "the object and purpose" of the MOU.

16. Neither of them addressed the possibility that the MOU might have more than one object and purpose, as treaties typically do. Neither of them explained why, if the MOU was a simple non-objection agreement, its drafters did not stop at paragraph 5, but went on to include the text of paragraph 6. Neither of them offered a reason for not giving paragraph 6 its natural meaning — that the maritime boundaries between Kenya and Somalia shall be agreed between the two States after the CLCS has made its recommendations. For Somalia, paragraph 6 is the elephant in the room: its inexplicable presence in the MOU a puzzle at which we can only stare, and scratch our heads in uncomprehending wonder.

17. But as Professor Forteau noted, paragraph 6 was included in preliminary drafts of the MOU, and was the subject of amendments during the drafting process. It cannot be claimed that the Parties were ignorant of it, or regarded it as immaterial, or unworthy of their attention. Nor is it

[75]CR 2016/11, p. 40, para. 23 (Reichler).

complicated or obscure. Indeed, the entire MOU is short, simple and clear. There is no reason to suppose that the Parties were ignorant of the obligations to which they were signing up in that provision, or that they could have misunderstood their obligation to settle maritime boundaries, not by reference to the ICJ but by agreement, after the CLCS had made its recommendations.

18. The MOU requires the Parties to seek to agree upon their maritime boundaries. In Kenya's submission, a State cannot terminate a legally binding obligation to negotiate simply by declaring that it regards the negotiations as deadlocked, or further negotiation as futile. Indeed, Somalia wishes to go further and, by having a binding decision of the Court on delimitation, to pre-empt the possibility of a negotiated delimitation in future. Such a self-judging approach would enable States to terminate legal obligations to negotiate at will.

19. Professor Sands said that even if negotiations were required by the MOU, they were exhausted[76]. But that position does not fit with the facts. Somalia says that the bilateral meetings were not "technical" and "preliminary". But the joint report of the first, March 2014, meeting records what was the very first meeting between the teams and the first explanation by each side of its views on delimitation matters, and it refers to it in the first paragraph as a meeting "at the technical level". You will find it in tab 10 of today's judges' folder. The second, July 2014 meeting, the joint report notes that the two national representatives appeared in their capacities as heads of their respective Technical Teams. That is at tab 11.

20. Yes: Ministers were present at the July meeting, in order to build confidence. But think about that. There is no suggestion that in the days between that meeting on 28–29 July 2014 and the filing of Somalia's Application on 28 August, either Minister took the matter back to her Government in order to decide the Government's position — let alone its final position — on the boundary dispute, or that either Government communicated on the matter with the other at the political level. On the contrary, the evidence is quite different.

21. The report of the July meeting records that the Parties would reconvene on 25 and 26 August in Mogadishu "in an attempt to bridge the gaps between the two parties' positions". Kenya's internal note, dated 8 August, at tab 12 of your folders, records that "it was agreed that in

[76]CR 2016/11, pp. 57-59, paras. 16–22 (Sands).

order to move forward the meetings needed to be structured", and that "it was further agreed that the next meeting would be used to develop principles that would guide the negotiations". Evidently, as of 25 August — 72 hours before Somalia filed its Application — the Parties were still operating on the basis that there were bridgeable gaps between them, which they were about to address. Or, at least, Kenya was operating on that basis. Professor Sands and Mr. Reichler both quoted a comment by the Somali Foreign Minister dated 5 August 2014 to the effect that these were "discussions without any possible solution"[77]: but that view of the hopelessness of the position was not communicated to Kenya.

22. Somalia makes much of Kenya's unexplained failure to turn up at the August meeting. Our Co-Agent gave you the reason: specific and serious security concerns leading to a last-minute internal order not to travel to Mogadishu — an order that carries rather more resonance than an order not to travel to The Hague, for example. Should Kenya have explained its absence? Yes. Its failure to do so in the 72 hours prior to the filing of the Application is regrettable, even if the failure to do so afterwards might be accepted as a reflection ***of*** the state of the bilateral relations that Somalia had so abruptly changed. Should Somalia have asked what had happened to the Kenyan delegation? Perhaps. But none of this can alter the fact that there was room for further negotiations and the Parties were preparing to try to bridge the gaps between them.

23. Objectively, there is no evidence that the discussions had reached deadlock. Subjectively, Kenya remained open to discussions on the maritime boundar***ies*** in 2014, and remains open today.

24. In the MOU, Somalia made a legally binding commitment to settle its maritime boundaries with Kenya by agreement. It cannot simply ignore that commitment — as, indeed, it should not have ignored its commitment not to object to Kenya's CLCS submission. Somalia appears to feel free to disregard both commitments in the MOU — to treat them both as "non-actionable" from its point of view.

[77]CR 2016/11, p. 59, para. 22 (Sands); CR 2016/11, p. 47, para. 44 (Reichler).

Dispute settlement architecture

25. Finally, Mr. President, let me address another strand of Somalia's submissions. It sought to reinforce its case by predicting "dire implications"[78] and "radical consequences that surely were not anticipated"[79] if its interpretation of the facts and law is not accepted. It predicts that the Court would be deprived of jurisdiction over many cases.

26. While we do not suppose for one moment that the Court's decision would be influenced by a desire to increase its jurisdiction or its business, that submission does merit a response.

27. The first point is that not all disputes can be put equally effectively and efficiently before each and every procedure for the settlement of disputes. Any particular dispute will be more suited to some dispute settlement procedures than to others.

28. A dispute over the adequacy or appropriateness of anti-pollution measures or fishery conservation measures may be better put to a tribunal that is not made up exclusively of lawyers, but contains scientists and technical experts, such as is provided for in UNCLOS Annex VIII. A maritime boundary dispute that involves not only the question of the location of the boundary line but also the question of cross-boundary policing arrangements might be better handled by negotiation than by reference to an international judicial tribunal.

29. That is why UNCLOS, for example, allows States parties to choose among different mechanisms for the handling of different categories of disputes arising under that Convention — what Professor Boyle called the "cafeteria system". You will find the relevant provisions in Articles 279 to 287 and 297 to 299 of UNCLOS, which provide for access to arbitration, special "technical" arbitration, voluntary or compulsory conciliation, the Law of the Sea Tribunal, or this Court, among other procedures.

30. So it is in this Court, where a State may decide in advance that all categories, all disputes in a certain category may be referred to the Court if any party to the dispute so wishes. It can do that by an Optional Clause declaration or by acceding to a compromissory clause in a convention. Or a State can, by making reservations to an Optional Clause declaration and by not signing up to particular treaties, decide that no disputes in a certain category may be submitted to this Court. Or

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[78]CR 2016/11, p. 57, para. 16 (Sands).

[79]CR 2016/11, p. 56, para. 14 (Sands).

it can decide case by case, making no Optional Clause declaration at all. Or it can attach conditions, such as temporal limitations, to its acceptance of the Court's jurisdiction.

31. It is for each State to decide which disputes go where. And we note that over the past century far more maritime boundaries have been settled by negotiation than by adjudication — an indication, no doubt, of what States find the most appropriate and satisfactory way of settling their maritime boundaries. At a time when most of the legal world is seeking to promote non-judicial settlement procedures as an alternative to litigation, Somalia seems to be swimming in the opposite direction.

32. As for Professor Sands's point[80] that the MOU language is "boilerplate", and that if it displaces ICJ jurisdiction the obligation in UNCLOS Articles 74 and 83 to effect maritime delimitation by agreement would equally displace ICJ jurisdiction in all cases, the answer is that it would not. If it becomes apparent that an agreed delimitation is impossible, the parties are free under Articles 74 and 83 to turn to another method of settlement: indeed, UNCLOS Article 283 (2) requires them to consider that possibility. The MOU stipulated a method — agreement — and a time — after the CLCS recommendations — for delimitation. That time has not yet arrived; and negotiations have not been given a fair chance. That is the difference between the MOU and UNCLOS Articles 74 and 83.

33. The second point is that it is for each State to decide on precisely how far it will consent to the jurisdiction of international tribunals. This right is fundamental to the Court's jurisdiction. In the words of the Court's own *Handbook on accepting the jurisdiction of the International Court of Justice*,

> "Given that the nature of the jurisdiction of the Court is strictly consensual, States are free to include reservations in their declarations. . . . They protect the declaring State against undesired involvement in judicial proceedings to the extent specified."[81]

34. The Court has repeatedly reaffirmed that, as it put it in the *Georgia* v *Russia* case, quoting its earlier Judgment in the *Armed Activities* case, "any conditions to which such consent is

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[80]CR 2016/11, p. 54, para. 13 (Sands)

[81]http://www.un.org/en/ga/search/view_doc.asp?symbol=A/68/963&referer=/english/&Lang=E, p. 10.

subject must be regarded as constituting the limits thereon"[82]. And that is why, as you said in the *Fisheries Jurisdiction* case, there is no reason to interpret reservations restrictively[83]. Reservations do not derogate from a wider acceptance of the Court's jurisdiction: they define the parameters of a State's acceptance of the compulsory jurisdiction of the Court, and the Court "must seek the interpretation which is in harmony with a natural and reasonable way of reading the text", having "due regard to the intention of the State concerned at the time when it accepted the compulsory jurisdiction of the Court"[84].

35. There is a solemn pact between States and the Court: the Court respects the limits of the consent of each State to accept the Court's jurisdiction; and within those limits, the State respects the powers of the Court and the State's obligations under the Court's Statute. As Somalia's Deputy-Agent rightly put it, the ICJ "do[es] justice *in accordance with international law*"[85], and the limits of States' consent to its jurisdiction are an integral part of international law.

36. Somalia wishes you to upset this balance, and to assert jurisdiction over a dispute that Kenya has, by agreement with Somalia, in the MOU and in UNCLOS, previously decided should be settled by methods other than a reference to this Court. It shows no disrespect for this institution, the ultimate protector of the Rule of Law in international society, to ask that Somalia be kept to the agreements that it made and that effect be given to the terms of Kenya's declaration of its acceptance of the jurisdiction of this Court.

37. Mr. President, Members of the Court, unless I can assist you further, that concludes my submission on behalf of the Republic of Kenya; and I would ask that you now invite the Honourable Agent for Kenya to the lectern.

Le PRESIDENT : Merci, Monsieur le professeur. Je donne la parole à S. Exc. M. Muigai, l'agent de la République du Kenya. Vous avez la parole.

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[82] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 39, para. 88; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 125, para. 131.

[83] *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 452, para. 44; POK, Vol. I, para. 144.

[84] *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 454, paras. 47, 49.

[85] CR 2016/11, p. 10, para. 2 (Al-Sharmani).

Mr. MUIGAI:

1. Mr. President, distinguished Members of the Court. It is an honour to address you again in these proceedings to make Kenya's concluding submissions.

2. As I indicated in my opening statement on Monday, Kenya holds the Court in the highest regard and is committed to the peaceful settlement of disputes in accordance with international law. In this instance, however, Kenya and Somalia have agreed to other methods of settlement, which brings the dispute within Kenya's reservation to the Court's jurisdiction. Kenya's Preliminary Objections are founded on the performance of international agreements in good faith, and respecting the limits of the State consent to the jurisdiction of the Court.

3. This maritime boundary dispute arises in a delicate political context. Somalia has only recently begun to emerge from a long period of instability caused by civil war, humanitarian disaster and widespread terrorism. In particular, Somalia has no maritime enforcement capacity. Kenya is deeply concerned about maritime security in the region. Al-Shabaab terrorists, who exploit the sea for their operations, are an ongoing threat to Kenya and its neighbours. Kenya has already lost many soldiers fighting Al-Shabaab forces, and we have paid the price in the loss of hundreds of civilians as well. The maritime boundary delimitation between Kenya and Somalia requires sensitive bilateral negotiations that can encompass not just strictly legal issues, but also our very real political and security concerns, as well as practical arrangements to address them. After a volatile transitional period in Somalia, we began these preliminary discussions in 2014 at the technical level, but they were cut short by Somalia's Application to this Court.

4. Kenya does not want deadlock or perpetual uncertainty. We want a permanent solution that will contribute to regional peace and security. We believe that this solution will come from a gradual, flexible, and multifaceted process. Kenya was open to discussions on the maritime boundary in 2014, and we remain ready to continue these negotiations in good faith. We remain confident that goodwill of the Parties will arrive to an agreement over time.

5. Mr. President, Kenya has voluntarily suspended its transitory exploratory activities in the disputed area as an expression of its good faith. In May, we invited Somalia to enter into provisional arrangements pending an agreement on the maritime boundary. We remain open to discussing these arrangements with Somalia. This dispute is a test for a new era in our bilateral

relations and our commitment to bilateral agreements. I remain confident that the Parties will reach an amicable solution consistent with their obligations contained in the MOU of 2009.

Final Submissions

6. Mr. President, Members of the Court, I will now read Kenya's final submissions.

"The Republic of Kenya respectfully requests the Court to adjudge and declare that:

> The case brought by Somalia against Kenya is not within the jurisdiction of the Court and is inadmissible, and is accordingly dismissed."

7. Mr. President, Members of the Court, I sincerely thank the Court for its patience and very careful attention to this case. I thank the Registrar and his staff for the highly professional conduct of these proceedings and the Court's interpreters, transcribers and translators for their excellent work. I unfortunately must return to Kenya tonight for some other urgent State matters. However, Kenya's Co-Agent, Ambassador Rose Makena Muchiri, will be present for the final hearing on Friday. Thank you for your understanding and my sincere apologies to the Court and to the Somali delegation.

8. Mr. President, that concludes Kenya's case and I thank you.

LE PRESIDENT : Merci, Monsieur l'agent. La Cour prend acte des conclusions finales dont vous venez de donner lecture au nom du Kenya. La Somalie présentera son second tour de plaidoiries le vendredi 23 septembre à 10 heures. L'audience est levée.

L'audience est levée à 17 h 55.

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