Corrigé
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CR 2016/13

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2016

Public sitting

held on Friday 23 September 2016, at 10 a.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 vendredi 23 septembre 2016, à 10 heures, 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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as Co-Agent;

Ms Mona Al-Sharmani, Attorney-at-Law, Senior Legal Adviser to the President of the Federal Republic of Somalia,

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Mr. Alain Pellet, Professor at the University of Paris Ouest, Nanterre-La Défense, former Member and former Chairman of the International Law Commission, member of the Institut de droit international,

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Mr. Nicholas M. Renzler, Attorney-at-Law, Foley Hoag LLP, member of the Bars of the District of Columbia and the State of New York,

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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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Amiral Farah Ahmed Omar, ancien amiral de la marine somalienne et président de l'Institut de recherche sur les affaires maritimes de Mogadiscio,

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Hon. Senator Amos Wako, Chair of the Senate Standing Committee on Legal Affairs and Human Rights,

Hon. Samuel Chepkonga, Chair of the Parliamentary Committee on Justice and Legal Affairs,

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Mr. Michael Guchayo Gikuhi, Director, Kenya International Boundaries Office,

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Mme Philippa Webb, maître de conférences en droit international public au King's College (Londres), membre du barreau d'Angleterre et du barreau de New York,

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Mr. Samuel Kaumba, State Counsel, Office of the Attorney-General and Department of Justice,

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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 de la Somalie. Je voudrais indiquer tout d'abord que, comme c'était déjà le cas mercredi après-midi, M. le juge *ad hoc* Guillaume n'est pas en mesure de siéger aujourd'hui pour des raisons dont il m'a dûment fait part. Je donne à présent la parole à M. le professeur Alain Pellet.

M. PELLET : Et je vous en remercie vivement, Monsieur le président.

LA PORTÉE DU *MOU*

1. Monsieur le président, Mesdames et Messieurs de la Cour, quelle est la question ? Elle est de savoir si vous êtes compétents pour connaître de la requête que la Somalie vous a soumise sur la base des déclarations facultatives qu'ont faites les deux Etats, sachant que celle du Kenya exclut «[l]es différends au sujet desquels les parties en cause auraient convenu ou conviendraient d'avoir recours à un autre mode ou à d'autres modes de règlement». En sont-elles convenues dans le *MoU* ? *That is the question* ![1] (J'aime Racine et Baudelaire, mais je suis large d'esprit, j'aime aussi Shakespeare !) Les longs développements du Kenya sur la sécurité maritime[2], sur le prétendu contrôle qu'il exercerait sur la zone litigieuse[3], sur les propositions d'arrangements provisoires[4], sur la loi somalienne de 1972 sur la mer territoriale[5], n'ont rien à voir avec cette question et n'appellent aucun commentaire de notre part.

2. Pour répondre à notre question, Monsieur le président, toujours le même refrain — que Mathias Forteau s'est enfin résigné à entonner (bien qu'il le chante un peu faux...) : il faut (et il suffit d') interpréter le paragraphe 6 du *MoU* dans son contexte et à la lumière du but et de l'objet de cet instrument considéré dans son ensemble, étant entendu, cela va de soi, que cette interprétation doit donner un effet utile à cette disposition.

3. Des quatre éléments indissociables énumérés dans l'article 31 de la convention de Vienne sur le droit des traités, les deux sur lesquels les Parties s'opposent principalement sont, d'une part,

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[1] William Shakespeare, *Hamlet*, acte III, scène 1.

[2] CR 2016/12, p. 14-15, par. 10 (Akhavan).

[3] CR 2016/12, p. 15, par. 11 (Akhavan).

[4] CR 2016/12, p. 15, par. 11 (Akhavan).

[5] CR 2016/12, p. 18-19, par. 7-8 (Forteau).

le texte du paragraphe 6, et, d'autre part, plus globalement, l'objet et le but du *MoU*. Quelques mots sur ces points de désaccord majeur avant de revenir sur l'interprétation en résultant — puisque aussi bien l'opération d'interprétation doit être intégrée.

4. Le texte d'abord. Et surtout pour insister sur ce qu'il ne dit pas — car nos amis de l'autre côté de la barre lui font dire des choses qui n'y figurent point — c'est comme la langue turque dont on faisait croire au *Bourgeois gentilhomme* de Molière qu'«elle dit beaucoup en peu de paroles»[6]. Mais vous n'êtes pas des bourgeois gentilshommes, Mesdames et Messieurs de la Cour, et le Kenya ne peut vous abuser aussi facilement.

Projection n° 1 : paragraphe 6 du *MoU*

5. Le premier «élément manquant» : l'absence de la moindre référence à la négociation comme mode de règlement du différend et d'ailleurs à quelque mode de règlement que ce soit[7]. Même si vous devez probablement connaître cette disposition à peu près par cœur, je vous suggère de la relire ingénument, en oubliant tout ce qui en a été dit par les Parties. Vous n'y trouverez ni le mot «différend» ; ni le mot «règlement» ; pas davantage le mot «négociations».

Fin de la projection n° 1 — Projection n° 2 : paragraphe 6 du *MoU*/paragraphe 1 de l'article 83 de la CNUDM

Tout ce que vous lisez dans la première partie de cette disposition est, à peu de choses près, ce que vous pouvez lire dans l'article 83, paragraphe 1, (ou 74, paragraphe 1, également) de la convention des Nations Unies sur le droit de la mer. Or personne n'a jamais prétendu que ces dispositions bien connues soient des clauses de règlement des différends. Le paragraphe 6 de notre *MoU* ne l'est pas davantage. Comme dans le reste du texte d'ailleurs, sa rédaction est tellement alignée sur celle de la CNUDM qu'au lieu de mentionner «les Parties» — comme l'eût fait tout accord de règlement des différends «normal», il fait référence aux deux «Etats côtiers» — to the «two coastal States».

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[6] Molière, *Le Bourgeois gentilhomme*, scène XVI.

[7] Voir notamment CR 2016/10, p. 13, par. 3 ; p. 15-16, par. 11-13 (Muigai) ; p. 17-18, par. 8 ; p. 19 (titre) ; p. 19-22, par. 14-22 ; p. 26, par. 39 (Akhavan) ; p. 30, par. 16 (Khan) ; CR 2016/12, p. 10, par. 20 ; p. 12, par. 6 (Akhavan) ; p. 36, par. 32 (Lowe).

6. Du reste, durant la présentation des demandes du Kenya devant la Commission des limites du plateau continental (CLPC) du 3 septembre 2009, Mme Nkoroi, présidente de la Task Force sur la délinéation du plateau continental étendu du Kenya, a déclaré que, conformément au *MoU*, par lequel «the parties undertake not to object to the examination of their respective submissions, … at an appropriate time, a mechanism *will be established* to finalize the maritime boundary negotiations with Somalia»[8]. Le professeur Akhavan (comme le professeur Forteau durant le premier tour[9]) fait grand cas de cette déclaration[10], qui n'est pourtant guère compatible avec sa propre thèse puisque, d'une part, elle confirme que l'objet du *MoU* est bien la non-objection et, d'autre part, elle indique qu'un mécanisme de règlement *sera établi* — «will be established» —, ce qui veut clairement dire qu'il ne l'avait pas été par le *MoU* signé cinq mois plus tôt. Et Mme Nkoroi, qui fait partie de la délégation kényane dans la présente instance, savait de quoi elle parlait : elle avait été étroitement associée à la préparation de cet instrument et était la principale correspondante kényane de l'ambassadeur Longva durant son élaboration[11] et un membre de poids de l'équipe kényane qui a mené les négociations de 2014 avec la Somalie sur la délimitation de la frontière[12].

7. Les formules utilisées par Mme Nkoroi devant la CLPC sont reprises dans la note verbale de la mission permanente du Kenya auprès des Nations Unies au Secrétaire général en date du 24 octobre 2014, qui précise que le *MoU* énonçait des «arrangements provisoires de caractère pratique» conformément aux dispositions de l'article 83, paragraphe 3, de la CNUDM, dont la note reprend également la terminologie[13]. Et, pas plus tard que lundi dernier, Mathias Forteau

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[8] Note Verbale from the Permanent Mission of the Republic of Kenya to the United Nations to H.E. Ban Ki-moon, Secretary-General of the United Nations, No. 586/14 (24 October 2014) (Memorial of Somalia (MS), Vol. III, Annex 50).

[9] CR 2016/10, p. 43, par. 28 (Forteau).

[10] CR 2016/12, p. 13, par. 8 (Akhavan).

[11] Voir E-mail from Mr. Hans Wilhelm Longva to Ms Juster Nkoroi (March 2009) (Preliminary Objections of Kenya (POK), Annex 6) et E-mail exchange between Ms Rina Kristmoen, Professor Abdirahman Ibbi, Mr. Hans Wilhelm Longva, and Ms Juster Nkoroi (10-22 March 2009) (POK, Annex 7) ; E-mail exchange between Mr. Hans Wilhelm Longva, Professor Abdirahman Ibbi and Ms Juster Nkoroi (27 March 2009) (POK, annexe 8).

[12] Dr. Karanja Kibicho, Confidential Note to Ms Juster Nkoroi regarding «Proposal for the Cabinet Secretary MFA and Other Senior Government Official to Visit Mogadishu to Discuss Maritime Boundary Including Lifting of Objection by Somalia on MOU Granting No Objection to Consideration of Kenya's Submission», MFA.INT.8/15A (23 August 2014) (POK, Annex 40).

[13] Note Verbale from the Permanent Mission of the Republic of Kenya to the United Nations to H.E. Ban Ki-moon, Secretary-General of the United Nations, No. 586/14 (24 October 2014) (MS, Vol. III, Annex 50).

proclamait que le *MoU* supposait «nécessairement d'établir, au moment opportun, un mécanisme pour finaliser les négociations»[14]. Un mécanisme de règlement ne peut pas à la fois *avoir été* établi et *devoir l'être* !

8. Il n'est pas possible non plus d'analyser l'avant-dernier paragraphe du *MoU* comme une disposition «procédurale» impliquant de recourir à des négociations[15]. Elle se borne à dire que la délimitation se fera par voie d'accord — comme ***le fait*** le premier paragraphe des articles 74 et 83. Ni par ces dispositions de la CNUDM, ni par le paragraphe 6 du *MoU* «the Parties have agreed to settle the maritime boundary dispute not by adjudication, but by negotiation» as suggested by Professor Lowe[16]. This is [NOT] what they agreed in the MOU[17].

Fin de la projection n° 2 — Projection n° 3 : paragraphe 6 du *MoU*

9. L'élément temporel maintenant, qui tient tellement à cœur à nos contradicteurs[18]. Assurément, le paragraphe 6 inclut un tel élément puisque l'accord sur la délimitation des frontières maritimes dans la zone (ou «les zones») en litige fera l'objet de l'accord envisagé *après* que la CLPC aura fait ses recommandations sur les demandes des deux Etats côtiers. Mais un accord sur quoi ? Sur la délimitation des frontières maritimes dans la zone en litige dans son ensemble, *in full*, «y compris la délimitation du plateau continental au-delà de 200 milles marins». Et pour cause : ceci ne saurait être fait plus tôt puisque ce n'est qu'après l'intervention de la CLPC que l'on pourra finaliser complètement cette délimitation, la finaliser *in full*.

10. Je comprends, Monsieur le président, que Mathias Forteau soit passé pudiquement et rapidement sur ce point embarrassant[19]. Mais je rappelle tout de même que c'est ce que le Kenya lui-même avait reconnu dans ses observations écrites et dans ses plaidoiries de lundi — et ses avocats n'ont pas pu éviter, avant-hier, de le redire — je cite le professeur Akhavan :

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[14] CR 2016/10, p. 43, par. 28 (Forteau).

[15] CR 2016/12, p. 23, par. 25-26 (Forteau) ; p. 31, par. 12 (Lowe).

[16] *Ibid.*

[17] Cf. *ibid.*

[18] Voir CR 2016/12, p. 11, par. 4 (Akhavan) ; p. 22, par. 21 (Forteau) ; p. 32, par. 13, 16 (Lowe).

[19] CR 2016/12, p. 24, par. 28 (Forteau).

> «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 areas in dispute»[20].

Oui, Monsieur le président, c'est *cela* qui devra être conclu après l'intervention de la CLPC : un accord final — *a final agreement* — s'étendant à l'ensemble des zones maritimes respectives des Parties.

11. Il était tout à fait utile de le préciser — et cela dans la perspective même de la procédure en trois temps chère à nos contradicteurs : d'abord les demandes de la CLPC ; ensuite, on n'objecte pas — conformément à l'objet même du *MoU*, ensuite on finalise la délimitation. Et c'est cette opération de finalisation, qui n'apparaît nulle part ailleurs dans ce document, qui rend l'inclusion du paragraphe 6 non seulement utile, mais nécessaire. Sans doute, cette disposition ne fait-elle que rappeler ce qui est expressément prévu dans les articles 74, paragraphe 1, et 83, paragraphe 1, de la convention sur le droit de la mer. Mais, outre que ce ne serait pas la seule disposition du *MoU* qui aurait une fonction «pédagogique» ou descriptive[21], ce rappel était d'autant plus indispensable dans ce cas-ci que la Somalie avait tout intérêt à se prémunir contre tout effet absolu des recommandations de la Commission.

Fin de la projection n° 3 -- Projection n° 4 : paragraphe 6 du *MoU*/paragraphe 8 de l'article 76 de la CNUDM

12. En effet, aux termes du paragraphe 8 de l'article 76 de la CNUDM : «La Commission adresse aux Etats côtiers des recommandations sur les questions concernant la fixation des limites extérieures de leur plateau continental. Les limites fixées par un Etat côtier sur la base de ces recommandations sont définitives et de caractère obligatoire». Or, il était déjà tout à fait clair à l'époque de l'adoption du *MoU* que le Kenya serait en mesure d'obtenir les recommandations de la CLPC bien avant la Somalie. Il était donc de première importance de rappeler que tout acte unilatéral du Kenya fixant les limites de sa marge continentale extérieure ne serait pas opposable à la Somalie et que la frontière commune dans cet espace maritime devait, elle aussi, faire l'objet d'un accord. Cette précaution, prise dans le paragraphe 6, est du reste conforme à l'esprit général du texte dans lequel l'ambassadeur Longva, excellent spécialiste du droit de la mer, s'est montré

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[20] CR 2016/12, p. 10-11, par. 4 (Akhavan) – les italiques sont de nous.

[21] CR 2016/11, p. 22-23, par. 15, p. 24, par. 18 (Pellet).

soucieux de préserver les intérêts de la Somalie — ce qui est particulièrement apparent également dans le paragraphe 4 et au début du paragraphe 5 du *MoU*[22].

Fin de la projection.

13. Comme la chambre de la Cour l'a souligné dans l'affaire du *Golfe du Maine*,

> «87. Le principe de droit international [de la délimitation par voie d'accord] est simple, mais il ne faut pas pour autant en sous-estimer l'importance. Il ne faut pas y voir une pure «vérité allant de soi». Ce principe entend surtout prescrire par implication qu'une délimitation du plateau continental qu'un Etat établirait par voie unilatérale, sans se soucier des vues de l'autre ou des autres Etats concernés par la délimitation, est inopposable à ces derniers en droit international.»[23]

14. C'est cette vérité «n'allant pas forcément de soi» que rappelle le paragraphe 6 du *MoU*. Ce rappel était d'autant plus indispensable ici que l'accent mis sur le fait que la délinéation était sans préjudice de la délimitation pouvait faire douter des relations entre l'une et l'autre de ces opérations. Mais ceci ne concerne que le plateau continental au-delà de 200 milles — et encore, comme le montrent de nombreux précédents[24], ceci n'empêche pas les Etats concernés d'adopter une direction de la frontière même si son point d'aboutissement demeure suspendu à sa conformité avec les recommandations de la CLPC.

15. Monsieur le président, pas plus qu'Anzilotti, le professeur Lowe n'a toujours tort, et nous n'avons aucun mal à le suivre lorsqu'il explique : «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»[25]. Le *MoU* insiste sur le fait que la délimitation et la délinéation sont sans préjudice l'une de l'autre[26] : on peut délimiter, sans que la délinéation ait été effectuée ; on peut délinéer en l'absence de délimitation ; mais la délimitation finale, *in full*, «y compris la délimitation du plateau continental au-delà de 200 milles marins», ne peut, elle, intervenir qu'une fois la délinéation réalisée suite à la procédure devant la CLPC. Tel est le sens évident, ordinaire, *the plain meaning*, du paragraphe 6.

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[22] Voir CR 2016/11, p. 24-25, par. 18-20 (Pellet).

[23] *Délimitation de la frontière maritime dans la région du golfe du Maine (Canada/Etats-Unis d'Amérique), arrêt, C.I.J. Recueil 1984*, p. 292, par. 87.

[24] Voir CR 2016/11, p. 27, par. 25 et note de bas de page n° 43 (Pellet).

[25] CR 2016/12, p. 32, par. 13 (Lowe).

[26] Voir les paragraphes 3, 4 et 5 du *MoU*.

16. Et, bien sûr, cette délimitation finale ne peut venir que «plus tard», à la fin du processus de délinéation. A cet égard, je m'étonne que le professeur Forteau semble avoir découvert avec ravissement dans la nuit de mardi à mercredi que cette fixation complète des limites extérieures du plateau continental au-delà de 200 milles marins ne pourrait intervenir que dans le futur...[27] Au demeurant, le reste de la délimitation est elle aussi couverte par l'expression «future délimitation» : le «futur» par rapport au *MoU* c'est ce qui suit la date de sa signature, le 7 avril 2009. On ne peut pas tirer grand-chose de cette vérité d'évidence.

17. Et j'ai du mal à me passionner pour le pluriel, fût-il double, qui galvanise le professeur Forteau. «Zone(s) maritime(s)» au singulier ou au pluriel... *area* ou *areas*... On utilise décidément sans beaucoup d'états d'âme l'un pour l'autre. Comme je l'ai relevé mardi dernier, le *MoU* lui-même se réfère neuf fois à l'*area under dispute* et seulement deux fois aux *areas* au pluriel[28]. Et les représentants du Kenya n'ont pas manqué à la tradition durant leurs plaidoiries de cette semaine en parlant alternativement et sans aucun critère distinctif d'*area* au singulier ou d'*areas* au pluriel : si on laisse de côté les citations du paragraphe 6, nous avons relevé six singuliers et six pluriels — match nul (je me permets de vous renvoyer au document figurant à l'onglet n° 24 de vos dossiers). Mathias Forteau s'est montré plus attentif à n'utiliser que le pluriel — c'est normal : il lui fallait tenter de sauver son argument — mais l'indifférence insouciante de ses collègues montre que, décidément, pluriel ou singulier c'est «blanc bonnet ou bonnet blanc» ! Et c'est sans doute également ainsi que s'explique le passage du singulier au pluriel dans les différentes versions du projet de mémorandum[29].

18. Monsieur le président, le *MoU* n'est pas un *pactum de non contrahendo*, pas davantage qu'un *pactum de non judicando*. Il n'est pas non plus un *pactum de negociando*. Il est un accord de non-objection — un *pactum de non recusando*. Ceci est attesté :

— par son titre — qui embarrasse si fort nos contradicteurs ;

— par le texte du paragraphe 6 lui-même, qui ne contient pas la moindre allusion à un mode quelconque de règlement des différends, et n'évoque pas les négociations entre les Parties ;

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[27] CR 2016/12, p. 22, par. 21-23 (Forteau). Voir les paragraphes 3, 4 et 5 du *MoU*.

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

[29] Voir CR 2016/12, p. 17, par. 3 (Forteau).

— par le contexte de cette disposition, qui s'inscrit dans une séquence montrant, sans l'ombre d'un doute, qu'il s'agissait dans l'esprit des auteurs du *MoU* non pas de repousser aux calendes grecques la délimitation de la zone en litige, mais d'en permettre la délinéation ; et, à cet égard, la curieuse idée du professeur Lowe selon laquelle un traité pourrait avoir plusieurs objets et buts — qui ne me paraît pas aller de soi — est inopérante ; notre *MoU* n'en n'a qu'un : éviter que la CLPC refuse de délinéer en l'absence de délimitation et sans préjudice de celle-ci — «sans préjudice», c'est-à-dire que la délimitation soit décidée ou non tout en assurant du même coup que la Somalie ne sera pas placée devant le fait accompli d'une délimitation unilatérale ;

— ceci est également confirmé par les travaux préparatoires de cet instrument et par les circonstances de sa conclusion,

— ainsi que par la pratique ultérieurement suivie par les deux Etats, sur lesquels mon ami Paul Reichler va revenir dans un instant.

19. Monsieur le président, le professeur Lowe nous a fait bénéficier d'un brillant exposé sur la liberté souveraine des Etats de choisir le mode de règlement de leurs différends — cet exposé mériterait, je pense, d'être annexé aux actes du séminaire pour le soixante-dixième anniversaire de la Cour ou de celui à venir en l'honneur du vingtième anniversaire du TIDM[30]. Dans cette conférence, l'orateur a évoqué en une jolie formule le «pacte solennel entre les Etats et la Cour» (the «solemn pact between States and the Court»[31]). Le fondement de ce pacte, c'est le respect de la mise en œuvre du principe consensuel. Et le consentement est aussi le fondement de cet autre pacte qui se noue entre les Etats parties au Statut eux-mêmes lorsqu'ils adhèrent à la clause facultative de l'article 36, paragraphe 2 : «les déclarations», avez-vous dit, «bien qu'étant des actes unilatéraux, établissent une série de liens bilatéraux avec les autres Etats qui acceptent la même obligation par rapport à la juridiction obligatoire, en prenant en considération les conditions, réserves et stipulations de durée. Dans l'établissement de ce réseau d'engagements qui constitue le

[30] CR 2016/12, p. 34-37, par. 25-36 (Lowe).

[31] *Ibid.*, p. 37, par. 35 (Lowe).

système de la clause facultative, le principe de bonne foi joue un rôle essentiel»[32]. Dans notre espèce, les réserves de la Somalie et du Kenya sont sans pertinence puisque le *MoU* ne constitue en aucune manière un accord en vue de recourir à un mode de règlement du différend maritime entre les Parties en dehors de la Cour. Et ce n'est évidemment pas davantage le cas de la partie XV de la CNUDM. Le professeur Sands reviendra tout à l'heure sur cette trouvaille tardive, et un peu dérisoire, de nos amis de l'autre côté de la barre.

20. Dans l'immédiat, Monsieur le président, auriez-vous l'obligeance de donner la parole à M[e] Reichler. Je vous remercie vivement, Mesdames et Messieurs de la Cour, de m'avoir à nouveau subi avec bienveillance.

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

Mr. REICHLER:

THE EVIDENCE

1. Mr. President, Members of the Court, today I will be uncharacteristically brief. It's not because I don't enjoy making long speeches to you. It's just that, after hearing my good friends on the other side on Wednesday, there is not much more that needs to be said about the evidence. The fact is, the Parties are in agreement on almost all of it. There are very few points of disagreement.

2. So my task today will be to call your attention to the evidence that now can be considered undisputed, to identify the factual issues that are still contested, and to offer some observations on those issues. I will follow the same pattern as in the first round. First I will address the evidence regarding the Parties' understanding of the MOU at the time it was executed. Then I will turn to their subsequent conduct.

3. The following facts, which I discussed in the first round, are now either agreed by Kenya, or have not been disputed and can therefore be taken as agreed.

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[32] *Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique), compétence et recevabilité, arrêt, C.I.J. Recueil 1984*, p. 418, par. 60 ; voir aussi *Droit de passage sur territoire indien (Portugal c. Inde), exceptions préliminaires, arrêt, C.I.J. Recueil 1957*, p. 146 ; *Compagnie d'électricité de Sofia et de Bulgarie, arrêt, 1939, C.P.J.I. série A/B n° 77*, p. 81.

i. The MOU was conceived and drafted by Norway[33].

ii. Norway's purpose was to secure the Parties' non-objection to each other's outer continental shelf submission to the CLCS[34].

iii. Norway had no interest in the delimitation of the Parties' maritime boundary, nor in the resolution of their boundary dispute[35]. In Norway's own words in regard to this MOU: "Norway takes no position on these issues other than laying as a premise for its assistance that such issues of maritime delimitation with other States not be prejudiced."[36]

iv. In describing the MOU, Norway referred to it only as a non-objection agreement. It never referred to the MOU as an agreement on dispute resolution[37].

v. In regard to issues of delimitation, Norway's object was, first, to assure that the boundary dispute did not give rise to an objection by either Party to the outer continental shelf submission of the other; and, second, to ensure that neither the MOU nor the Parties' submissions to the CLCS prejudiced their respective positions on the boundary in any way[38].

vi There is not a single reference, in any of the contemporaneous correspondence concerning the MOU, from Norway, from Kenya or from Somalia, to settlement of the maritime

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[33]CR 2016/11, pp. 35-36, paras. 5, 9 (Reichler). See Federal Republic of Somalia, Preliminary Information Indicative of the outer limits of the continental shelf and Description of the status of preparation of making a submission to the Commission on the Limits of the Continental Shelf for Somalia (14 Apr. 2009), p. 4; Memorial of Somalia (MS), Vol. III, Ann. 66.

[34]CR 2016/11, pp. 37-38, paras. 15-16 (Reichler). See Note Verbale from the Permanent Mission of Norway to the United Nations to the Secretariat of the United Nations (17 Aug. 2011); Preliminary Objections of Kenya (POK), Vol. II, Ann. 4.

[35]CR 2016/11, pp. 37-38, paras. 15-16 (Reichler). See Note Verbale from the Permanent Mission of Norway to the United Nations to the Secretariat of the United Nations (17 Aug. 2011); POK, Vol. II, Ann. 4; Prepared Remarks by Amb. Hans Wilhelm Longva at Pan African Conference on Maritime Boundary Delimitation and the Continental Shelf, Accra (9– 10 Nov. 2009); POK, Ann. 25, p. 1

[36]Note Verbale from the Permanent Mission of Norway to the United Nations to the Secretariat of the United Nations (17 Aug. 2011); POK, Vol. II, Ann. 4.

[37]CR 2016/11, pp. 36-39, paras. 10, 12, 14, 16-19 (Reichler); Note Verbale from the Permanent Mission of Norway to the United Nations to the Secretariat of the United Nations (17 Aug. 2011); POK, Vol. II, Ann. 4.

[38]CR 2016/11, p. 36, para. 10 (Reichler); Note Verbale from the Permanent Mission of Norway to the United Nations to the Secretariat of the United Nations (17 Aug. 2011); POK, Vol. II, Ann. 4.

boundary, or to the establishment of a method for resolving that dispute, or to the substance of paragraph 6[39].

vii None of the correspondence between Ambassador Longva of Norway and Kenya makes any reference to dispute settlement or to paragraph 6[40].

viii None of the correspondence between Ambassador Longva and Somalia makes any reference to dispute settlement or to paragraph 6[41].

ix. Kenya referred to the MOU in its internal reporting[42], its presentation to the CLCS[43], and its Executive Summary[44], and in all cases described the MOU solely as a non-objection agreement. It did not describe the MOU as an agreement on dispute settlement. It did not describe paragraph 6 as establishing a means of settlement of the boundary dispute.

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[39]CR 2016/11, p. 36, para. 12 (Reichler). See e-mail from Amb. Hans Wilhelm Longva to Ms Juster Nkoroi (Mar. 2009); POK, Vol. II, Ann. 6; e-mail exchange between Ms Rina Kristmoen, Prof. Abdirahman Ibbi, Amb. Hans Wilhelm Longva, and Ms Juster Nkoroi (10–22 Mar. 2009); POK, Vol. II, Ann. 8; e-mail exchange between Amb. Hans Wilhelm Longva, Prof. Abdirahman Ibbi and Ms Juster Nkoroi (27 Mar. 2009); POK, Vol, II, Ann. 8; e-mail exchange between Ms Edith K. Ngungu and Amb. Hans Wilhelm Longva (30 Mar. 2009), p. 44; POK, Vol. II, Ann.9; e-mail exchange between Ms Edith K. Ngungu and Amb. Hans Wilhelm Longva (30-31 Mar. 2009), p. 47; POK, Vol. II, Ann. 10; e-mail from Amb. Hans Wilhelm Longva to Mr. James Kihwaga (undated), p. 58; POK, Vol. II, Ann. 14; e-mail from Amb. Hans Wilhelm Longva to Hon. Prof. Abdirahman Haji Adan Ibbi (3 Apr. 2009), p. 1; Written Statement of Somalia (WSS), Vol. II, Ann. 20.

[40]CR 2016/11, p. 36, para. 12 (Reichler). See e-mail from Amb. Hans Wilhelm Longva to Ms Juster Nkoroi (Mar. 2009); POK, Vol. II, Ann. 6; e-mail exchange between Ms Rina Kristmoen, Prof. Abdirahman Ibbi, Amb. Hans Wilhelm Longva, and Ms Juster Nkoroi (10–22 Mar. 2009); POK, Vol. II, Ann. 8; e-mail exchange between Amb. Hans Wilhelm Longva, Prof. Abdirahman Ibbi and Ms Juster Nkoroi (27 Mar. 2009); POK, Vol, II, Ann. 8; e-mail exchange between Ms Edith K. Ngungu and Amb. Hans Wilhelm Longva (30 Mar. 2009), p. 44; POK, Vol. II, Ann. 9; e-mail exchange between Ms Edith K. Ngungu and Amb. Hans Wilhelm Longva (30-31 Mar. 2009), p.47; POK, Vol. II, Ann. 10; e-mail from Amb. Hans Wilhelm Longva to Mr. James Kihwaga (undated), p. 58; POK, Vol. II, Ann. 14.

[41]CR 2016/11, p. 36, para. 12 (Reichler). See e-mail from Amb. Hans Wilhelm Longva to Ms Juster Nkoroi (Mar. 2009); POK, Vol. II, Ann. 6; e-mail exchange between Ms Rina Kristmoen, Prof. Abdirahman Ibbi, Amb. Hans Wilhelm Longva, and Ms. Juster Nkoroi (10–22 Mar. 2009); POK, Vol. II, Ann. 8; e-mail exchange between Amb. Hans Wilhelm Longva, Prof. Abdirahman Ibbi and Ms Juster Nkoroi (27 Mar. 2009); POK, Vol, II, Ann. 8; e-mail exchange between Ms Edith K. Ngungu and Amb. Hans Wilhelm Longva (30 Mar. 2009), p. 44; POK, Vol. II, Ann. 9; e-mail exchange between Ms Edith K. Ngungu and Amb. Hans Wilhelm Longva (30-31 Mar. 2009), p.47; POK, Vol. II, Ann. 10; e-mail from Amb. Hans Wilhelm Longva to Mr. James Kihwaga (undated), p. 58; POK, Vol. II, Ann. 14; e-mail from Amb. Hans Wilhelm Longva to Hon. Prof. Abdirahman Haji Adan Ibbi (3 Apr. 2009), p. 1; WSS, Vol. II, Ann. 20.

[42]CR 2016/11, p. 39, para. 20 (Reichler); Message from Jacqueline K. Moseti to the Legal Division, Ministry of Foreign Affairs regarding "Registration of Memorandum of Understanding between GOK and the Transitional Federal Government of the Somali Republic" (20 Aug. 2009) attaching Note Verbale from the United Nations Secretariat (14 Aug. 2009); POK, Vol. II, Ann. 17.

[43]CR 2016/11, p. 39, para. 21 (Reichler); United Nations, Commission on the Limits of the Continental Shelf, Statement by the Chairman of the CLCS on the progress of work of the Commission, United Nations doc. CLCS/64 (1 Oct. 2009), para. 95; MS, Vol. III, Ann. 61.

[44]CR 2016/11, p. 39, para. 22 (Reichler); Republic of Kenya, Submission on the Continental Shelf Submission beyond 200 nautical miles to the Commission on the Limits of the Continental Shelf: Executive Summary (Apr. 2009), para. 7-3; MS, Vol. III, Ann. 59.

x. Somalia, too, understood the MOU as a non-objection agreement, and nothing more[45]. Its only proposed change was to the title[46]. It relied entirely on Norway, and executed the document in the belief that this was necessary in order to be able to submit its outer continental shelf claim to the CLCS[47].

xi. There is no evidence that either Party gave any particular attention to paragraph 6, or held or expressed the view that the MOU was (or could be treated as) an agreement on settlement of the maritime boundary dispute[48].

4. None of this is disputed. I covered all of these points in the first round. Kenya had its chance to respond. They disputed none of it.

5. The only point of dispute concerns what my friend Professor Forteau has called, rather euphemistically, the "*travaux preparatoires*"[49]. He said I paid scant attention to it[50]. That is because it is scant, but it is a fair point and I will address it now.

6. The record includes two drafts of the MOU, and the correspondence about the MOU between Ambassador Longva and Kenya on the one hand[51], and between him and Somalia on the

[45]CR 2016/11, pp. 40-41, para. 25 (Reichler). See e-mail exchange between Ms Rina Kristmoen, Hon. Prof. Abdirahman Haji Adan Ibbi, Amb. Hans Wilhelm Longva and Ms Juster Nkoroi (10–22 Mar. 2009), pp. 1-2; POK, Vol. II, Ann. 7; Network Al-Shahid, Press Release issued by former Somali Minister of National Planning and International Cooperation, Dr. Abdirahman Abdishakur (7 July 2012), p. 2; POK, Vol. II, Ann. 13.

[46]CR 2016/11, p. 22, para. 14 (Pellet); CR 2016/11, p. 37, para. 13 (Reichler); e-mail from Amb. Hans Wilhelm Longva to Mr. James Kihwaga; POK, Vol. II, Ann. 14.

[47]CR 2016/11, pp. 40-41, para. 25 (Reichler); Federal Republic of Somalia, *Preliminary Information Indicative of the outer limits of the continental shelf and Description of the status of preparation of making a submission to the Commission on the Limits of the Continental Shelf for Somalia* ("Somalia, *Preliminary Information to the CLCS*") (14 Apr. 2009), p. 4, MS, Vol. III, Ann. 66; POK, Ann. 13, p. 2 (Somali Minister of Planning and International Cooperation indicating that the Somali Government had "to sign the MOU with Kenya" in order to proceed with its submission); POK, Ann. 7, pp. 1-2 (recording the Somali Deputy Prime Minister expressing his gratitude to Norway with regard to the CLCS submission and expressing his understanding that "we must have the mem[o]random of understanding that [Norway] ha[s] prepared").

[48]CR 2016/11, pp. 40, 48, paras. 23, 35, 47 (Reichler).

[49]CR 2016/12, pp. 16-17, paras. 2-4 (Forteau).

[50]CR 2016/12, p. 17, para. 4 (Forteau).

[51]See e-mail from Amb. Hans Wilhelm Longva to Ms Juster Nkoroi (Mar. 2009); POK, Vol. II, Ann. 6; e-mail exchange between Ms Rina Kristmoen, Prof. Abdirahman Ibbi, Amb. Hans Wilhelm Longva, and Ms Juster Nkoroi (10 - 22 Mar. 2009); POK, Vol. II, Ann. 7; e-mail exchange between Amb. Hans Wilhelm Longva, Prof. Abdirahman Ibbi and Ms Juster Nkoroi (27 Mar. 2009); POK, Vol, II, Ann. 8; e-mail exchange between Ms Edith K. Ngungu and Amb. Hans Wilhelm Longva (30 Mar. 2009), p. 44; POK, Vol. II, Ann. 9; e-mail exchange between Ms Edith K. Ngungu and Amb. Hans Wilhelm Longva (30-31 Mar. 2009), p. 47; POK, Vol. II, Ann. 10; e-mail from Amb. Hans Wilhelm Longva to Mr. James Kihwaga (undated), p. 58; POK, Vol. II, Ann. 14.

other[52]. I covered all of the correspondence in the first round, pointing out that there is nothing in any of it suggesting, explicitly or implicitly, that the MOU was regarded as a dispute settlement agreement, or that it might have such an object and purpose[53]. Kenya has not disputed that.

7. So I will turn to the two drafts of the MOU. The first was transmitted to the Parties in March 2009[54], and the other is the final version of the agreement. Both were sent by Norway. There is no evidence that either Party made any comments on paragraph 6 in either version. In the final version, the word "area," which appeared in the text ten times, was changed to "areas" in just two places, once in paragraph 4 and once in paragraph 6[55]. This is what Professor Lowe was referring to when he attempted to make something out of the fact that the paragraph "was the subject of amendments during the drafting process"[56]. This was the sole change to paragraph 6. There is no evidence that it was made at the request of either Party. There is no evidence as to why it was made, or whether it was considered to be necessary or even substantive.

8. Professor Lowe suggests that "[i]t cannot be claimed that the Parties were ignorant of" paragraph 6[57]. But that is not Somalia's point. We assume each Party read it before they signed it. Our point is that there is no evidence that, and no reason to believe that, the Parties intended or understood it to be a binding agreement on dispute settlement, or anything other than a non-objection agreement in respect of their submissions to the CLCS.

9. That is all there is to the so-called *travaux*. There is nothing else. There is nothing there to support Kenya's current interpretation of the MOU, an interpretation that Kenya expressed for

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[52]See e-mail exchange between Ms Rina Kristmoen, Prof. Abdirahman Ibbi, Amb. Hans Wilhelm Longva, and Ms Juster Nkoroi (10–22 Mar. 2009); POK, Vol. II, Ann. 7; e-mail exchange between Amb. Hans Wilhelm Longva, Prof. Abdirahman Ibbi and Ms Juster Nkoroi (27 Mar. 2009); POK. Vol, II, Ann. 8; e-mail from Amb. Hans Wilhelm Longva to Prof. Abdirahman Ibbi (2 Apr. 2009); POK, Vol. II, Ann. 12; e-mail from Amb. Hans Wilhelm Longva to Hon. Prof. Abdirahman Haji Adan Ibbi (3 Apr. 2009), p. 1; WSS, Vol. II, Ann. 20.

[53]CR 2016/11, p. 36, para. 12 (Reichler).

[54]E-mail from Amb. Hans Wilhelm Longva (27 Mar. 2009), in Letter from Registrar (23 Mar. 2016), annexing Letter from Royal Norwegian Embassy (21 Mar. 2016).

[55]Compare Draft Memorandum of Understanding 2, in Letter from Registrar (23 Mar. 2016), annexing Letter from Royal Norwegian Embassy (21 Mar. 2016), para. 6, with Memorandum of Understanding between the Government of the Republic of Kenya and the Transitional Federal Government of the Somali Republic to Grant to Each Other No-Objection in Respect of Submissions on the Outer Limits of the Continental Shelf beyond 200 Nautical Miles to the Commission on the Limits of the Continental Shelf, 2599 United Nations, *Treaty Series* (*UNTS*) 35 (7 Apr. 2009), para. 6; MS, Vol. III, Ann. 6.

[56]CR 2016/12, p. 32, para. 17 (Lowe).

[57]CR 2016/12, p. 32, para. 17 (Lowe).

the first time only after Somalia commenced these proceedings. Professor Forteau conceded this on Monday[58].

10. I turn to the Parties' conduct. Almost all of that evidence is now undisputed, as well. Here is what is now agreed, or may be considered to be undisputed as a result of Kenya's failure to challenge it.

i. Kenya invited Somalia to engage in negotiations to agree on a maritime boundary in May 2013[59], before the CLCS had ***even*** begun to consider either of their submissions, and before Somalia objected to consideration of Kenya's submission. Kenya at that time did not consider it necessary to await CLCS action before negotiating a boundary agreement. Nor did Kenya initiate negotiations to address Somalia's objection, which was not even made until nine months after Kenya's invitation to negotiate.

ii. Boundary negotiations took place in 2014[60]. They were serious and substantive negotiations at which each side fully presented and defended its views. Detailed technical and legal presentations were made[61]. On Wednesday, Kenya abandoned its contention that the negotiations were about withdrawal of Somalia's objection. It now accepts that these were highly substantive and technical negotiations on the maritime boundary[62].

iii. The delegations to the talks, both in March 2014 and in July 2014, were headed by the Foreign Ministers[63]. Both Ministers were present during the entirety of the talks in July, and expressed their views[64].

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[58]See CR 2016/10, pp. 42, 45, paras. 26, 34 (Forteau).

[59]CR 2016/11, p. 11, para. 27 (Reichler); F. Yusuf H. Adam, Minister of Foreign Affairs & International Cooperation, Federal Republic of Somalia, & A. Mohamed, Cabinet Secretary of Foreign Affairs, Republic of Kenya, *Kenya-Somalia Joint Press Release* (31 May 2013), p. 2; POK, Vol. II, Ann. 31.

[60]See WSS, paras. 2.41-2.74; CR 2016/11, page 11, para. 28 (Reichler); Somalia and Kenya, *Joint Report on Maritime Boundary Meeting, 26-27 Mar. 2014* (1 Apr. 2014). MS, Vol. III, Ann. 31; Government of Somalia and Government of Kenya, *Joint Report on the Kenya-Somalia Maritime Boundary Meeting, 28-29 July 2014* (July 2014). MS, Vol. III, Ann. 32.

[61]See Somalia and Kenya, *Joint Report on Maritime Boundary Meeting, 26-27 Mar. 2014* (1 Apr. 2014). MS, Vol. III, Ann. 31; Government of Somalia and Government of Kenya, *Joint Report on the Kenya-Somalia Maritime Boundary Meeting, 28-29 July 2014* (July 2014). MS, Vol. III, Ann. 32.

[62]CR 2016/12, pages 33-34, paras. 21-23 (Lowe).

[63]See Somalia and Kenya, *Joint Report on Maritime Boundary Meeting*, 26-27 Mar. 2014, p. 1; MS, Vol. III, Ann. 31; Government of Somalia and Government of Kenya, *Joint Report on the Kenya-Somalia Maritime Boundary Meeting*, 28-29 July 2014 (July 2014), para. 1; MS, Vol. III, Ann. 32.

[64]M. Al-Sharmani and M. Omar, representatives of the Ministry of Foreign Affairs of the Federal Republic of Somalia, *Report to the File of the Meeting between the Federal Republic of Somalia and the Republic of Kenya On Maritime Boundary Dispute, Nairobi, Kenya, 28-29 July 2014* (5 Aug. 2014); WSS, Vol. II, Ann. 4.

iv. No agreement was reached. No progress toward an agreement was made. The Parties disagreed sharply, even over the appropriate method for the delimitation[65]. Kenya insisted that the boundary follow a parallel of latitude[66]. Somalia insisted that it follow an equidistance line, consistent with ICJ jurisprudence[67]. There was no narrowing of positions, or indication of flexibility by either Party on this matter of principle[68]. The discussions were heated.

v. At the conclusion of the July negotiations, the Foreign Minister of Somalia suggested that it was pointless to continue such heated discussions where the Parties were so far apart, and there were no signs that an agreement would be possible. The Kenyan Foreign Minister agreed that they were far apart, but proposed that there be one more meeting to "attempt one final time to find an amicable solution"[69].

vi. Somalia's Foreign Minister agreed to that request, and a third and final meeting was scheduled for 25-26 August in Mogadishu[70].

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[65]Somalia and Kenya, *Joint Report on Maritime Boundary Meeting*, 26-27 Mar. 2014, p. 6; MS, Vol. III, Ann. 31.

[66]Somalia and Kenya, *Joint Report on Maritime Boundary Meeting*, 26-27 Mar. 2014, p. 5; MS, Vol. III, Ann. 31; Memorandum from S. Mokaya-Orina, Head/Legal & Host Country Affairs Directorate, to Cabinet Secretary, Ministry of Foreign Affairs & International Trade, Republic of Kenya (8 Aug. 2014), p. 2.

[67]Somalia and Kenya, *Joint Report on Maritime Boundary Meeting*, 26-27 Mar. 2014, p. 6; MS, Vol. III, Ann. 31; Memorandum from S. Mokaya-Orina, Head/Legal & Host Country Affairs Directorate, to Cabinet Secretary, Ministry of Foreign Affairs & International Trade, Republic of Kenya (8 Aug. 2014), p. 1.

[68]See Somalia and Kenya, *Joint Report on Maritime Boundary Meeting*, 26-27 Mar. 2014, p. 6; MS, Vol. III, Ann. 31; Memorandum from S. Mokaya-Orina, Head/Legal & Host Country Affairs Directorate, to Cabinet Secretary, Ministry of Foreign Affairs & International Trade, Republic of Kenya (8 Aug. 2014); Government of Somalia and Government of Kenya, *Joint Report on the Kenya-Somalia Maritime Boundary Meeting*, 28-29 July 2014 (July 2014); MS, Vol. III, Ann. 32.

[69]M. Al-Sharmani and M. Omar, representatives of the Ministry of Foreign Affairs of the Federal Republic of Somalia, *Report to the File of the Meeting between the Federal Republic of Somalia and the Republic of Kenya On Maritime Boundary Dispute, Nairobi, Kenya, 28-29 July 2014* (5 Aug. 2014), p. 2; WSS, Vol. II, Ann. 4.

[70]See Letter from H.E. Dr. Abdirahman Beileh, Minister of Foreign Affairs and Investment Promotion of the Federal Republic of Somalia, to H.E. Ms Amina Mohamed, Minister of Foreign Affairs of the Republic of Kenya, No. 2231 (26 Aug. 2014), p. 1; MS, Vol. III, Ann. 47. See also M. Al-Sharmani and M. Omar, Representatives of the Ministry of Foreign Affairs of the Federal Republic of Somalia, *Report to the File of the Meeting between the Federal Republic of Somalia and the Republic of Kenya On Maritime Boundary Dispute, Nairobi, Kenya, 28-29 July 2014* (5 Aug. 2014), pp. 3-4; WSS, Vol. II, Ann. 4.

vii. The Kenyan delegation failed to show up for the meeting. No advance notice was given. No subsequent explanation was provided[71]. Kenya's non-appearance took Somalia completely by surprise. Somalia urgently communicated with Kenya to find out what happened. Kenya never responded[72].

11. All of these facts are now agreed, or at least undisputed. It remains for me to address a few points raised for the first time on Wednesday by my friend Professor Lowe.

12. Professor Lowe concedes that the Foreign Ministers were present during the negotiations — he has no choice since this is recorded in the Joint Reports — but he attempts to minimize this by suggesting that this was merely "in order to build confidence"[73]. There is no evidence to support this statement, which is pure unsubstantiated assertion on his part, and no evidence is cited in his speech. The Reports show that the Ministers headed the delegations to both talks, and were full and active participants in the July talks[74].

13. Professor Lowe further attempts to dismiss the Foreign Ministers' role in the negotiations by suggesting that there is no evidence that "either Minister took the matter back to her Government in order to decide the Government's position . . . or that either Government communicated on the matter with the other at the political level"[75]. With respect, my good friend could not have been serious. In the first place, the Foreign Ministers *are* the political level. Their communication with one another, as at the July negotiations, *is* communication between the two governments at the political level. Second, it can safely be presumed that, in the matter of negotiating a maritime boundary agreement, the Foreign Ministers reported, or took the matter

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[71]See Letter from H.E. Dr. Abdirahman Beileh, Minister of Foreign Affairs and Investment Promotion of the Federal Republic of Somalia, to H.E. Ms Amina Mohamed, Minister of Foreign Affairs of the Republic of Kenya, No. 2231 (26 Aug. 2014); MS, Vol. III, Ann. 47.

[72]CR 2016/11, p. 45, para. 45 (Reichler); Letter from H.E. Dr. Abdirahman Beileh, Minister of Foreign Affairs and Investment Promotion of the Federal Republic of Somalia, to H.E. Ms Amina Mohamed, Minister of Foreign Affairs of the Republic of Kenya, No. 2231 (26 Aug. 2014), p. 1; MS, Vol. III, Ann. 47; M. Al-Sharmani and M. Omar, representatives of the Ministry of Foreign Affairs of the Federal Republic of Somalia, *Report to the File of the Meeting between the Federal Republic of Somalia and the Republic of Kenya On Maritime Boundary Dispute, Nairobi, Kenya, 28-29 July 2014* (5 Aug. 2014), pp. 3-4; WSS, Vol. II, Ann. 4.

[73]CR 2016/12, page 33, para. 20 (Lowe).

[74]See Government of Somalia and Government of Kenya, *Joint Report on the Kenya-Somali Maritime Boundary Meeting, 26-27 Mar. 2014* (1 Apr. 2014), p. 1; MS, Vol. III, Ann. 31; and M. Al-Sharmani and M. Omar, representatives of the Ministry of Foreign Affairs of the Federal Republic of Somalia, *Report to the File of the Meeting between the Federal Republic of Somalia and the Republic of Kenya On Maritime Boundary Dispute, Nairobi, Kenya, 28-29 July 2014* (5 Aug. 2014), pp. 3-4; WSS, Vol. II, Ann. 4.

[75]CR 2016/12, p. 33, para. 20 (Lowe).

back to, the highest governmental authorities. That is their duty. And they had ample opportunity to consult and receive instructions, before the March 2014 talks, between March and July of 2014, and during the month that elapsed between the July talks and those that were scheduled for late August. Is Professor Lowe seriously suggesting that the distinguished Foreign Ministers of Somalis and Kenya were off on a frolic of their own? There is certainly no evidence before you for that.

14. Professor's Lowe's final assertion is that Somalia did not wait long enough before coming to the Court; that gaps between the two Parties' positions were still somehow "bridgeable", and that if Somalia considered that a negotiated solution was impossible, its "view of the hopelessness of the position was not communicated to Kenya"[76].

15. Kenya has offered no explanation as to why it believes the differences were "bridgeable". Professor Lowe cites only to Kenya's internal report on the July negotiations[77]. At the time of that report, which is dated 8 August 2014, the Parties were anticipating, and preparing for a final round of meetings later that month, which had been requested by Kenya's Foreign Minister. In that context, the report spoke of an agreed need for the meetings to be structured, and to develop guiding principles for them. It is not disputed that Kenya wanted to make one more try at reaching an agreement. That is why Somalia agreed to the request and the August meetings were scheduled. Kenya's report in preparation for those meetings is consistent with this.

16. More significant is what Professor Lowe did *not* say. He made no mention of Somalia's internal report[78], or of the Somali Foreign Minister's letter of 26 August[79] to his Kenyan counterpart, which was to the same effect. Professor Lowe made no effort to dispute *that* evidence. Nor did Kenya's Foreign Minister in the declaration she submitted earlier this year challenge that evidence.

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[76]CR 2016/12, p. 34, para. 21 (Lowe).

[77]CR 2016/12, p. 33, para. 21 (Lowe).

[78]M. Al-Sharmani and M. Omar, representatives of the Ministry of Foreign Affairs of the Federal Republic of Somalia, *Report to the File of the Meeting between the Federal Republic of Somalia and the Republic of Kenya On Maritime Boundary Dispute, Nairobi, Kenya, 28-29 July 2014* (5 Aug. 2014), pp. 3-4; WSS, Vol. II, Ann. 4.

[79]Letter from H.E. Dr. Abdirahman Beileh, Minister of Foreign Affairs and Investment Promotion of the Federal Republic of Somalia, to Ms Amina Mohamed, Minister of Foreign Affairs of the Republic of Kenya, No. 2231 (26 Aug 2014); MS, Vol. III, Ann. 47.

17. As a result, it is undisputed that the Parties recognized, and acknowledged to one another, at the conclusion of the July negotiations, that they were very far apart, and that there was little hope of reaching a solution. And it is undisputed that the August talks were scheduled, at the request of Kenya's Foreign Minister, in her recorded words, as a "final" attempt to find an amicable solution[80]. The Court is aware of this report, which we provided at tab 18 of your folders on Tuesday. I will not impose another reading of it on you, but you know where to find it. Professor Lowe is simply wrong in asserting that Somalia did not communicate to Kenya its sense of "hopelessness" in regard to the negotiations[81]. To the contrary, the Somali Foreign Minister clearly expressed this to his Kenyan counterpart at the conclusion of the July negotiations, which is what prompted Kenya's Foreign Minister to request the one final meeting to attempt to find an amicable solution[82].

18. Professor Lowe calls it "regrettable" that the Kenyan delegation failed to show up for that meeting, and then it failed to explain its absence[83]. That is putting it mildly. In the circumstances, with the Parties as far apart as they were, with each of them fastened tightly to its own position on widely divergent delimitation methodologies, and with Kenya failing to appear for what was considered to be the final attempt to reach an agreement, and failing to give advance notice or subsequent explanation for its non-appearance, it was entirely reasonable for Somalia to conclude that there would be no further negotiations, and that they would be pointless in any event. Professor Sands will have more to say on this point.

19. My point is that Kenya's conduct, especially its engagement in serious and substantive negotiations to reach a boundary agreement, is inconsistent with its current interpretation of paragraph 6 of the MOU as a binding agreement on dispute settlement. Even in the course of these hearings, Kenya's interpretation has changed, and changed again. There have been a number of notable tactical retreats.

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[80]See M. Al-Sharmani and M. Omar, Representatives of the Ministry of Foreign Affairs of the Federal Republic of Somalia, Report to the File of the Meeting between the Federal Republic of Somalia and the Republic of Kenya On Maritime Boundary Dispute, Nairobi, Kenya, 28-29 July 2014 (5 Aug. 2014), p. 2; WSS, Vol. II, Ann. 4.

[81]CR 2016/12, p. 34, para. 21 (Lowe).

[82]M. Al-Sharmani and M. Omar, Representatives of the Ministry of Foreign Affairs of the Federal Republic of Somalia, *Report to the File of the Meeting between the Federal Republic of Somalia and the Republic of Kenya On Maritime Boundary Dispute, Nairobi, Kenya, 28-29 July 2014* (5 Aug. 2014), p. 2; WSS, Vol. II, Annex 4.

[83]CR 2016/12, p. 34, para. 22 (Lowe).

20. Kenya began by taking the position that paragraph 6 required the Parties to negotiate an agreement to the boundary dispute only after the CLCS had issued its recommendations on both of their submissions[84]. But they soon found this interpretation impossible to reconcile with the evidence that they themselves proposed boundary negotiations in 2013, and that they engaged in them in 2014 notwithstanding the fact that the CLCS had not even begun to consider either Party's submission, let alone issued recommendations.

21. The first retreat was signalled by my friend Professor Akhavan on Monday. The new interpretation that day was that paragraph 6 merely prevents the Parties from reaching a boundary agreement before the CLCS issues its recommendations, but it does not prevent them from negotiating before then. In other words, they can negotiate for ten or 20 years, or for whatever time it takes for the CLCS to act, as long as they do not reach an agreement. Professor Akhavan even called it "absurd" to suggest, as Kenya had in fact previously suggested, that paragraph 6 prevented the Parties from negotiating before the CLCS completed its process[85].

22. That was Monday's interpretation. After we chided them on interpreting paragraph 6 as an "agreement not to agree"[86], they came up with a second new interpretation on Wednesday. Again it fell to Professor Akhavan to present it. That new interpretation was that "the Parties are free to conclude a boundary agreement whenever they want, based on mutual consent"[87].

23. This might have been intended as another tactical retreat, but I think it is more like raising a white flag. It is a concession that completely undermines Professor Forteau's courageous, if ill-founded, argument that "[t]he temporal condition [of paragraph 6] is a legal condition, which must equally be given effect"[88]. Professor Forteau himself has not retreated from this position. Ignoring Kenya's own conduct, and its changing arguments, he has gamely clung to the position that delimitation can *only* come about *after* the CLCS has completed its process. He is now the lone defender of that fortress — the last of the Mohicans. Not even his own colleagues are willing to stand beside him.

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[84]CR 2016/10, p. 63, para. 12 (Lowe).

[85]CR 2016/10, p. 20, para. 18 (Akhavan).

[86]CR 2016/11, p. 48, para. 48 (Reichler).

[87]CR 2016/12, p. 13, para. 7 (Akhavan).

[88]CR 2016/12, p. 24, para. 27 (Forteau).

24. More importantly, nor does the evidence support him. It shows that, prior to this case, Kenya did not consider paragraph 6 of the MOU to be a binding agreement on dispute settlement. Kenya did not consider itself bound to await delineation by the CLCS before embarking with Somalia on delimitation of the maritime boundary. In 2014 Kenya and Somalia attempted to delimit the boundary through bilateral negotiations. The attempt failed. Surely the MOU does not, and was never intended to, deny recourse to judicial settlement in such circumstances, or to delay it for ten or 20 years or for however long it takes the CLCS to issue recommendations that are in any event entirely without prejudice to boundary delimitation.

25. Mr. President, there is no evidence that this is what the Parties intended or understood the MOU to require. The evidence all points in the opposite direction, and decisively so.

26. Mr. President, Members of the Court, I thank you once again for your kind courtesy and patient attention, and I ask you to call Professor Sands to the podium.

Le PRESIDENT : Merci, je donne la parole à présent au professeur Philippe Sands.

Mr. SANDS:

NEITHER THE MOU NOR PART XV OF UNCLOS FALLS WITHIN KENYA'S OPTIONAL CLAUSE RESERVATION

I. Introduction

1. Monsieur le Président, Members of the Court, I will be relatively brief in responding to two remaining points that might be on your minds. Given Kenya's silence as to its written argument that Somalia's Application is inadmissible, we assume that claim is now dropped and I will say no more about it. As to all else, we maintain the position as set out in our written pleadings and in our first round on Tuesday.

II. Even if the MOU had created an obligation to negotiate, Somalia amply fulfilled that obligation

2. Somalia's primary case is that the MOU does not constitute an agreement that the Parties would delimit the entire maritime boundary exclusively by negotiations and we believe that our submission on that point is compelling, and that it disposes of Kenya's objection. If you find that we are wrong about that, and conclude *contra textum* that the MOU did somehow impose some sort

of obligation to negotiate, then we say that the evidence clearly establishes that Somalia amply fulfilled any such obligation.

3. In the first round, I referred you to several Judgments of this Court that address the meaning of the word "negotiation"[89]. As we listened to counsel for Kenya, we were struck — as you must have been also — that, although Kenya takes issue with Somalia's assessment of the facts, it does not challenge the applicable legal standards or principles that we identified. And that much at least is common ground between the Parties. In particular, Kenya did not dispute this Court's description of negotiation as "a genuine attempt . . . to engage in discussions with the other disputing party, with a view to resolving the dispute"[90].

4. Did Somalia engage in such a "genuine attempt" with Kenya before it instituted these proceedings? It seems very difficult to see how you could possibly conclude that Somalia did not. As Mr. Reichler has shown, the evidence unambiguously establishes that Somalia engaged in discussions with Kenya, that it made a serious and sincere attempt to determine whether an amicable solution of the boundary dispute was possible. You will have noted that Kenya has abandoned its first round claim that the discussions between the Parties in 2014 somehow did not constitute "negotiations". Equally, Kenya does not claim that the negotiations were a charade, or that Somalia did not engage in the negotiations in good faith and with a genuine desire to reach a settlement.

5. What Kenya does say is that the negotiations should have gone on. And on. And on. And on. And on. In fact, they say they should continue for years and even for decades, until after the CLCS has made its final recommendation. Yet the evidence before you establishes that the negotiations had reached a point at which it was reasonable for Somalia to conclude that they were unlikely to bear fruit. As this Court confirmed in *Cameroon* v. *Nigeria*: "Neither in the Charter nor otherwise in international law is any general rule to be found to the effect that the exhaustion of diplomatic negotiations constitutes a precondition for a matter to be referred to the Court."[91]

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[89]CR 2016/11, pp. 57-58, paras 18-20 (Sands).

[90]*Application of the Convention on the Elimination Of All Forms Of Discrimination (Georgia* v. *Russian Federation), I.C.J. Reports 2011 (I)*, pp.132-133, paras. 157-159.

[91]*Land and Maritime Dispute between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 303, para. 56.

6. Under UNCLOS, we say, the standard is not more onerous, as a unanimous Annex VII Arbitral Tribunal made clear in *Barbados* v. *Trinidad and Tobago*, where it said that the fact that "a further round of negotiations had been fixed" did not preclude Barbados from "reasonably taking the view that negotiations to delimit the Parties' common maritime boundaries had already lasted long enough . . . and that it was now appropriate to move to the initiation of the procedures of Part XV". That Tribunal confirmed that the obligation to resort to Part XV procedures applied once negotiations had been conducted for "a reasonable period of time", and that *either party* was free to make a determination that such time had been reached[92].

7. In that case, the negotiations lasted but three years. And, as you will recall, the *North Sea Continental Shelf* cases the three parties agreed that there was no point in proceeding with negotiations after just six months of tripartite talks[93]. And in *Mauritius* v. *United Kingdom*, another Annex VII Tribunal ruled — unanimously again — not in a case relating to delimitation that: "States themselves are in the best position to determine where substantive negotiations can productively be continued."[94]

8. Somalia was entitled to conclude that negotiations could not productively be continued. It has met the standard under general international law; it has met the standard under UNCLOS; and it has met the standard in the MOU — assuming it to impose an obligation to negotiate at all, which we say it does not.

9. The failure of the negotiations is hardly surprising. The Parties' starting positions could scarcely be further apart. Somalia considers that established principles of international law call for an equitable delimitation. Kenya used to agree with that position, but then, in 2005, it abruptly changed its view in favour of a new parallel, unsupported, line on the basis of alleged State practice and "inequity". By the time the Parties began to negotiate in early 2014, Kenya had stuck intractably to that position for almost a decade, and of course Kenya had been — and continued to be — engaged in various unilateral activities in the waters claimed by Somalia. That was the

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[92] *Barbados* v. *Trinidad and Tobago*, Decision of 11 April 2006, United Nations, *Reports of International Arbitral Awards (RIAA)*, Vol. XVII, pp. 147-251, para. 199.

[93] *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 3, para. 9.

[94] *Mauritius* v. *United Kingdom*, Award, PCA Case No. 2011-13, para. 379.

reality of the situation. By insisting that the boundary followed a parallel of latitude for its entire course, Kenya was stubbornly adhering to a method of delimitation that has never been adopted by this Court or by any other tribunal, and it was doing so to justify claims to a disputed area in which it had been unilaterally exploring for oil for many years, under licensing agreements with major international oil companies that it had no intention of cancelling. No surprise then that the Parties were unable to agree on the applicable principles, let alone their practical application. In light of the vast gulf between the Parties, there was no realistic prospect of a negotiated settlement or even of further productive negotiations within the foreseeable future, as at August 2014.

10. As Mr. Reichler pointed out, the negotiations ended because Kenya failed to appear for what the Parties agreed would be the final attempt to bridge the gap that separated them. Kenya does not dispute that the Parties agreed to meet one final time, or that it failed to appear for the final meeting, or that it failed to offer any advance warning of its non-appearance or any subsequent explanation for that non-appearance. In the circumstances, any responsible State — any reasonable State in Somalia's position — was entitled to conclude that the prospects of an amicable solution were non-existent.

11. In short, assuming it had any obligation to negotiate under the MOU, which we say it did not, Somalia satisfied that obligation.

III. Part XV of UNCLOS

12. So I turn to Kenya's arguments concerning Part XV of UNCLOS. It is striking that an argument that occupied all of one measly sentence in Kenya's 70 page written pleadings now represents half of Kenya's entire case at these oral hearings. The Court may indeed consider that this reflects the loss of faith on the part of Kenya in its primary case.

13. The question for the Court is simple. Does Part XV of UNCLOS constitute an agreement between Kenya and Somalia "to have recourse to some other method or methods of settlement" within the meaning of Kenya's Article 36 (2) declaration such as to oust the jurisdiction of this Court? We say the answer is clearly "No".

14. It is helpful, we suggest, to take this in stages. The Parties agree that you only get to the Part XV/Article 282 argument if you find that the MOU does *not* impose "some other method or

methods of settlement" or, if it does, that it has been fulfilled[95]. We say that, since the MOU argument fails on either alternative, you will have to deal with the Article 282 point. To resolve this, we suggest you ask yourselves a number of questions.

15. First, is UNCLOS an agreement binding on Kenya and Somalia? The answer is "yes", of course.

16. Second, is it an agreement to have recourse to *some other method* of settlement — in other words a method of settlement *other* than determination by the Court under the Optional Clause? The answer to that is "No", and the reason is simple. By signing up to UNCLOS, Kenya and Somalia agreed to be bound by the full package of rights and obligations contained in Part XV, and that package included Article 282. Professor Akhavan stated rather boldly that "Article 282 does not apply"[96] — "Article 282 does not apply" — but why? He offered no explanation. He castigates us, as he put it, for deleting paragraph 6 of the MOU, because he says we find it inconvenient. Professor Pellet has answered that point, but he sees no difficulty in deleting Article 282 entirely from the Convention.

17. Yet the purpose of Article 282 is to include certain categories of disputes from the settlement procedures in Part XV, and you heard Professor Boyle confirm that it is, and I use his words, "not disputed" that Article 282 gives the choice of ICJ jurisdiction "clearly accepted" a "priority over all other procedures in Section 2 of Part XV"[97]. That is confirmed by the academic and other commentary I cited in the first round[98]. And Kenya agrees that the drafters of UNCLOS specifically and explicitly intended Optional Clause jurisdiction to have precedence over Part XV[99]. Not in dispute.

18. But Kenya says that such priority does not apply when a State has entered a reservation of the kind that it and 34 other States have made. Kenya's logic appears to be this: the Article 36 (2) reservation operates as a *renvoi* to UNCLOS, but it says there is no *renvoi* back

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[95]CR 2016/12, pp. 11-12, paras. 4-5 (Akhavan); CR 2016/12, pp. 25-26, para. 4 (Boyle); CR 2016/12, p. 30, para. 7; pp. 33-34, paras. 19-24 (Lowe).

[96]CR 2016/12, p. 12, para. 5 (Akhavan).

[97]CR 2016/12, p. 26, para. 5 (Boyle).

[98]CR 2016/11, pp. 61-62, paras. 33-37 (Sands).

[99]CR 2016/10, p. 54, para. 7 (Sands).

because . . . Article 282 does not apply! But Article 282 does apply, and its effect is to send the matter back to the Optional Clause and to the ICJ. On Kenya's approach, the *renvoi* is continuous, it is indeed an endless game of ping pong between two players, one called 36 (2), the other called 282.

19. To put it another way, a State which is a party to UNCLOS and the Optional Clause might be said to be bound by two parallel régimes of dispute settlement. Is Part XV to take priority over the Optional Clause, or is the Optional Clause to take priority over Part XV? As Kenya accepts, in those moments of lucidity where it recognizes Article 282 to be applicable, that provision does indeed establish a default prioritization: the Optional Clause trumps Part XV. Can an Optional Clause reservation that excludes disputes which the parties have agreed to as an alternative settlement procedure reverse that default rule? That is the question for you. Plainly it cannot. Ratifying a treaty that explicitly gives *priority* to Optional Clause jurisdiction over Part XV procedures cannot logically have the effect of giving priority to Part XV procedures over the Optional Clause. Such an outcome would be "absurd", to take the word used in Article 32 *(b)* of the 1969 Vienna Convention.

20. Of course, the point about circularity is not a new one, as many in this room are aware. Professor Boyle referred yesterday to the *Southern Bluefin Tuna* case[100], and will no doubt be aware that counsel in that case made the point in hearings that the interplay between Article 36 (2) of the Optional Clause and Article 282 means that "the reservations excluding from the jurisdiction of the ICJ disputes in regard to which the Parties have agreed to some other means of settlement *leads us into a circular argument*"[101]. Now, counsel in that case noted that the applicant States in that case — Australia and New Zealand — did not explain why in the circumstances of that case, and I quote the words of counsel, "it is the ICJ, rather than the UNCLOS Tribunal, which should lose its jurisdiction"[102].

21. We say the circularity is broken, and the *renvoi* does not lead to an endless loop. This is because the effect of Article 282 is to make clear that Part XV of UNCLOS is not in these

[100]CR 2016,12, p. 29, para. 14 (Boyle).

[101]*Southern Bluefin Tuna Case* (*Australia and New Zealand* v. *Japan*) ICSID, Volume III, Wednesday 10 May 2000, p. 53.

[102]*Ibid*., p. 54.

circumstances to be treated as an agreement on "some other method or methods of settlement". The agreement constituted by Part XV is one that deliberately carves out — and gives explicit and intended priority to — ICJ adjudication under the Optional Clause. It would turn logic on its head if an instrument that expressly *excludes* cases covered by the Optional Clause could constitute an alternative method of settlement for cases covered by the Optional Clause.

22. Article 282 sends you back to the Great Hall and to the International Court of Justice, precisely because in cases covered by the Optional Clause there is no agreement to have recourse to Part XV dispute settlement. If Article 282 did not exist, then arguably perhaps Kenya would have such an argument for an agreement. But the problem for Kenya — the fatal flaw in its argument and in its logic — is that Article 282 exists and it applies.

23. Kenya is plainly conscious of the difficulty of its argument, so it has made a further leap into the dark; it invokes the *lex specialis* principle to break the endless loop, a sort of legal *Groundhog Day*. That is not, however, a persuasive point. In making it, Professor Lowe cited various authorities, and we have examined each of them with very great care: not one of them supports the proposition for which he argues, namely that one procedure for judicial or arbitral settlement will trump another because it is to be found in a treaty that is more particular and less general. He cited to *Passage over Indian Territory*, for example, but in that case the Court was concerned with "practice" on matters of substance, ruling that, "a particular practice must prevail over any general rules"[103]. And he cited to the *Nuclear Weapons* Advisory Opinion, yet that, too, directs to matters of substance, not procedure, in determining that the test of what is an arbitrary deprivation of life will be determined by "the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities"[104]. He cited to no authority to support the proposition that one rule on dispute settlement procedure will trump another simply because it forms part of a more specialized rule or régime.

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[103] *Right of Passage over Indian Territory (Portugal* v. *India), Merits, Judgment, I.C.J. Reports 1960*, p. 44.

[104] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 240, para. 25; emphasis added.

24. Indeed, we are not aware of any such authority. A similar argument did not find favour with this Court in *Nicaragua* v. *Colombia*[105]. The Court rejected an attempt by Colombia to invoke the *lex specialis* principle in order to persuade the Court that it lacked jurisdiction under the Optional Clause, holding that "the provisions of the Pact of Bogotá and the declarations made under the Optional Clause represent two distinct bases of the Court's jurisdiction which are not mutually exclusive". As a result, "the scope of its jurisdiction could be wider under the optional clause" than under the regional treaty[106]. But there was no question of one extinguishing the other.

25. As to the applicable law, we of course agree with the proposition that the 1982 Law of the Sea Convention is more *specialis* than general international law. But the problem for Kenya is that it includes Article 282. Professor Akhavan and his colleagues may like to wish away that provision, they offer no basis to do so. Proclaiming *"lex specialis, lex specialis*, *lex specialis"* loudly and repeatedly cannot make Article 282 simply disappear.

26. One might address the matter in a different way, by posing the question thus — the function of counsel is to assist judges in dealing with difficult questions: is it really imaginable that the drafters of UNCLOS intended dispute settlement under Part XV to extinguish the Court's jurisdiction over law of the sea matters in respect of all those States that have entered a reservation to Article 36 (2) of the kind made by Kenya? That is the question. There is nothing in the record of UNCLOS to suggest that. Indeed, the evidence and commentary points decisively in the other direction. Yet, that is the consequence of the argument that Kenya seeks to impose upon you.

27. In addition to the materials I cited on Tuesday, the Virginia Commentary on UNCLOS stresses that Part XV settlement procedures are subsidiary to any other agreed procedure: "Article 282 reflects the prevailing view that parties would normally prefer to have the dispute settled in accordance with a procedure previously agreed upon by them"[107]. The *IMLI Manual on International Maritime Law* explains that Article 282 establishes "an order of priority among the different mechanisms which may exist for the settlement of disputes", but one in which "the system

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[105]*Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II)*, p. 832.

[106]*Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II)*, p. 873, paras. 136-137.

[107]M. H. Nordquist, S. Nandan & S. Rosenne (eds.), *United Nations Convention on the Law of the Sea: A Commentary*, Vol. 5, 1989, pp. 25-26.

instituted by UNCLOS plays a residual role vis-à-vis other mechanisms"[108]. Part XV procedures are subsidiary, secondary, residual. This is hardly the stuff of overriding *lex specialis* that Kenya would have you digest and apply in its effort to make this Court write Article 282 out of UNCLOS.

28. In short, Kenya is inviting you to disregard your jurisprudence on the interpretation of Optional Clause declarations and reservations, and it offers no case law and no commentary in support of its approach. Nor has it been able to show why the consequences for this Court's role on matters of the law of the sea, as I explained on Tuesday, would not come to pass. We invite you, Monsieur le Président, to maintain your consistent jurisprudence; we invite you to give effect to the intention of the drafters of UNCLOS, both elements point decisively to the jurisdiction of this Court.

29. In summary, this case does not fall within the ambit of Kenya's reservation. Neither the MOU nor UNCLOS constitute an agreement to have recourse to some other method of settlement. This Court has jurisdiction to hear Somalia's Application and there are no grounds for you not to exercise that jurisdiction.

30. Mr. President, Members of the Court, that concludes my response. Once again I thank you and your colleagues for your attention, and invite you to call to the Bar the Deputy-Agent of Somalia.

Le PRESIDENT : Merci, Monsieur le professeur. Je donne maintenant la parole à Mme Al-Sharmani, agent adjoint de la Somalie. Madame, vous avez la parole.

Ms AL-SHARMANI:

CONCLUDING REMARKS

1. Mr. President, distinguished Members of the Court, my task today is to conclude Somalia's presentations at these hearings.

2. As you heard, Mr. President, Kenya continues to insist that the 2009 MOU constitutes an agreed method — and an exclusive one at that — for the settlement of the maritime boundary

[108] Attard, Fitzmaurice and Guitierrez (eds.), *The IMLI Manual on International Maritime Law, Volume 1: The Law of the Sea*, First Edition, 2014, p. 539.

dispute between our countries. Our counsel has explained the reasons why that argument is unsustainable as a matter of fact and law.

3. From Somalia's perspective, there is an even larger level at which the argument simply makes no sense. On Wednesday, the Honourable Agent of Kenya said that the "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."[109] That may be true. But, in our view, it only underscores why the MOU could not possibly bear the weight that Kenya that seeks to place on it.

4. When the MOU was signed in 2009, it was an even more delicate moment in Somalia's rebirth. At that precarious juncture, the Transitional Federal Government had only recently assumed office. Somalia could have had no interest in binding itself to reach a negotiated settlement, and forever precluding itself from seeking judicial recourse. Nor could it have had an interest in committing to reach a negotiated settlement only after the CLCS issued its recommendations many, many years hence.

5. Why would Somalia have an interest in entrenching uncertainty and instability in relation to its borders for long years, perhaps decades, to come? Having relied heavily on the assistance of the international community, Somalia could have had no reason to prevent itself from seeking this Court's assistance in resolving an issue of such great national importance. On the contrary, Somalia had every reason for keeping all of its options open, particularly those that would result in a fair, independent and expeditious appraisal of the merits of its maritime claims.

6. Mr. President, Members of the Court, in its arguments before you, Kenya also continues to insist that we somehow rushed to the Court in a circumstance where there was no urgency[110]. In that connection, it is quick to tell you that it voluntarily suspended its unilateral activities in the disputed area. Somalia, it says, should have no fears[111]. Well, this is news to Somalia. We had never previously been informed that that was the case.

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[109]CR 2016/12, p. 38, para. 3 (Muigai).

[110]CR 2016/12, pp. 33-34, paras. 21-22 (Boyle).

[111]CR 2016/12, p. 15, para. 11 (Akhavan); p. 38, para. 5 (Muigai).

7. In considering Kenya's change in behaviour, I would respectfully remind the Court that less than a month before Kenya filed its Preliminary Objections in October 2015, it was soliciting tenders for seismic surveys to be carried out in the disputed area, with a view to issuing licences in 2017.

8. In particular, in September 2015 the National Oil Corporation of Kenya published an "Expression of Interest for Provision of a 3D multi-client broadband seismic offshore survey in the Shallow waters of the Lamu offshore basin". The tender document officially announced that the company and Kenya's Ministry of Energy and Petroleum were preparing for "an open licensing round tentatively scheduled for the year 2017", and that "[a] formal announcement on the date from the Ministry of Energy and Petroleum is expected soon"[112]. The document included a map which shows the shallow offshore area to be surveyed extending all the way up to the parallel boundary that is claimed by Kenya, contrary to international law[113].

9. And just the year before, in 2014, before we filed our Application, 2D seismic surveys authorized by Kenya were carried out in a number of blocks that encompass the disputed area[114], and one of its licensees even conducted sea-core drilling operations in one of the disputed blocks[115].

10. It was exactly this pattern of behaviour that was of such concern to Somalia since 2014, and ever since, and has heightened our sense of urgency to secure a fair and objective determination of what is ours.

11. Mr. President, Members of the Court, Kenya also returned again to its contention that it has exercised undisputed sovereignty in the area in dispute since 1979[116]. This is an issue that is of no relevance to the jurisdictional issue before you. It goes to the merits. But it helps explain why the negotiations between both countries failed. Kenya was unwilling to budge from its long-standing position that the boundary had to follow the parallel of latitude. Only that boundary

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[112]National Oil Corporation of Kenya, "Expression of Interest for Provision of a 3D Multi-Client Broadband Seismic Offshore Survey in the Shallow Waters of the Lamu Offshore Basin," NOCK/PRC/03 (1057) (25 Sept. 2015); WSS, Vol. II, Ann. 5.

[113]National Oil Corporation of Kenya, "Expression of Interest for Provision of a 3D Multi-Client Broadband Seismic Offshore Survey in the Shallow Waters of the Lamu Offshore Basin," NOCK/PRC/03 (1057) (25 Sept. 2015) p. 1; WSS, Vol. II, Ann. 5.

[114]MS, para. 8.26,

[115]MS, para. 8.23.

[116]CR 2016/12, p. 15, para. 11 (Akhavan).

would justify its activities in the maritime areas it regarded as most promising for economic development. This is a position that no Somali government could ever accept.

12. Ironically, Kenya may have unwittingly contradicted its own argument on Wednesday afternoon. In his opening remarks, Professor Akhavan said 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"[117]. So, accepting Kenya's word as true — which Somalia denies — as no AMISOM forces had in the past or is currently patrolling the Somali seas, it appears that Kenya now claims to have patrolled the waters in dispute, not in the exercise of its own sovereignty but as a member of a broader African Union mission "*in Somalia*".

13. In any event, it is exactly this situation of confusion and conflicting claims that makes the early resolution of the maritime boundary dispute between our two countries necessary and urgent.

14. As I said on Tuesday, we place great value on our deep and close ties with Kenya. We also recognize the significant contributions that they and others have made to the rebuilding effort of Somalia. That said, Kenya's security concerns are shared by Somalia and, indeed, the entire world. Somali soldiers too are paying the ultimate price defending their own country, sometimes doing it with their own bare hands. We have all made sacrifices and we will continue to do so until Somalia and the whole region are secure.

15. Kenya's sacrifices, like those of other countries including Uganda, Djibouti, Burundi and many others, do not constitute a reason to deny Somalia the rights to which international law entitles it. Kenya cannot, as it seems to suggest, expect compensation in the form of maritime areas that would otherwise appertain to Somalia. Kenya's political arguments have no bearing on the legal task before this Court.

16. Mr. President, Members of the Court, our maritime boundary dispute with our Kenyan brothers and sisters is just one element of the overall relationship with our Kenyan friends. But it is real. It is also intractable, which is why we had to come to this Court.

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[117]CR 2016/12, p. 15, para. 10 (Akhavan); emphasis added.

17. Mr. Reichler reviewed the history of negotiations on Tuesday and again this morning[118]. After successive rounds of talks, we were at loggerheads. Further negotiations showed every sign of being pointless. We saw no reasonable prospect of success. It was as if we were speaking different languages. It was even worse than a conversation between civil law and common law lawyers!

18. We could not even get past basic questions of methodology. They wanted a parallel of latitude, and refused to budge. We insisted on equidistance, in accordance with the Court's jurisprudence. They rejected it out of hand.

19. Nevertheless, Somalia agreed to one final round of talks at Kenya's insistence. Both Parties understood that this was to be a final attempt to reach an amicable solution. Kenya has not disputed this. To our great surprise, they did not show up. Nor did they tell us why they did not show up. They have not disputed this either. Now they claim that they had security concerns. Yet, they fail to mention to this Court that we had offered to hold the last round of talks in Djibouti if they had so desired[119]. They never responded to that offer either.

20. In a circumstance where we perceived an acute threat to our rights, where Kenya was unilaterally exercising control over our maritime areas and resources, and where the Court could be stripped of its jurisdiction literally any day by a modification of Kenya's Optional Clause declaration, it was not only reasonable for Somalia to come before this Court, it was fully justified in doing so.

21. In your wise hands, this thorn in the side of our otherwise strong relations can be removed in good time, we can move forward together in an era of greater peace and stability, with both sides secure in the knowledge of its rights and able to finally utilize its resources for the benefit of its own people.

22. Mr. President, distinguished Members of the Court, I will end as I began on Tuesday: with an expression of thanks. I wish to echo the remarks of the Honourable Agent of Kenya on Wednesday when he thanked the able Registrar and the personnel of the Registry for their diligent

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[118]CR 2016/11, pp. 41-49, paras. 27-51 (Reichler)***; CR 2016/13, pp. 23-27, paras. 10-19 (Reichler).***

[119]Letter from H.E. Dr. Abdirahman Beileh, Minister of Foreign Affairs and Investment Promotion of the Federal Republic of Somalia, to H.E. Ms. Amina Mohamed, Minister of Foreign Affairs of the Republic of Kenya, No. 2231 (26 Aug. 2014), p. 2; MS, Vol. III, Ann. 47.

assistance that has made these hearings run so smoothly. We also wish to thank the Court's interpreters for their typically exceptional work, as well as the others members of the Court's staff.

23. Finally, Mr. President, we wish to thank you and all the Members of the Court for your very courteous attention throughout these hearings. Somalia confidently entrusts the matter of Kenya's Preliminary Objections to your wise judgment.

24. I will now read Somalia's Submissions:

> "On the basis of its Written Statement of 5 February 2016, and its oral pleadings, Somalia respectfully requests the Court:
>
> 1. To reject the Preliminary Objections raised by the Republic of Kenya; and
>
> 2. To find that it has jurisdiction to entertain the Application filed by the Federal Republic of Somalia."

25. Mr. President, distinguished Members of the Court, thank you for your time and good morning.

Le PRESIDENT : Je vous remercie, Madame.

La Cour prend acte des conclusions finales dont vous venez de donner lecture au nom de la Somalie, comme elle l'a fait mercredi dernier pour les conclusions finales présentées par le Kenya.

Un juge a des questions à poser aux Parties, questions auxquelles les Parties sont priées de répondre par écrit. Je vais à présent donner la parole à cet effet à M. le juge Crawford.

Judge CRAWFORD: Thank you, Sir.

During 2014, the Parties conducted negotiations over maritime delimitation. They did so without making any express reservation as to the timeliness of such negotiations in terms of the penultimate paragraph of the Memorandum of Understanding.

At the time, the recommendations of the Commission on the Limits of the Continental Shelf in relation to the submissions of Kenya and Somalia were years away.

I have two questions:

(1) Which maritime zones (territorial sea, EEZ, continental shelf within or beyond 200 miles) did those negotiations cover?

(2) In the circumstances, could such delimitation negotiations, conducted in good faith, be understood as waiving any rights either party may have had to a prior recommendation of the Commission?

Thank you, Mr. President.

Le PRESIDENT : Je vous remercie, Monsieur le juge Crawford. Le texte des questions sera communiqué aux Parties, sous forme écrite, dès que possible. Les Parties sont invitées à soumettre leurs réponses écrites le mercredi 28 septembre à 13 heures au plus tard. Toutes observations qu'une Partie pourrait souhaiter présenter sur les réponses de l'autre devront être communiquées le vendredi 30 à 13 heures au plus tard.

Ceci nous amène au terme des audiences consacrées aux exceptions préliminaires présentées par le Kenya en la présente affaire. Je tiens à remercier les agents, conseils et avocats des deux Parties pour leurs interventions. Conformément à la pratique, je prierai les agents de rester à la disposition de la Cour pour tous renseignements complémentaires dont elle pourrait avoir besoin.

Sous cette réserve, je déclare close la procédure orale en l'affaire relative à la *Délimitation maritime dans l'océan Indien (Somalie c. Kenya)*. La Cour va maintenant se retirer pour délibérer. Les agents des Parties seront avisés en temps utile de la date à laquelle la Cour rendra son arrêt. La Cour n'étant saisie d'aucune autre question aujourd'hui, l'audience est levée.

L'audience est levée à 11 h 35.

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