JOINT DECLARATION OF JUDGES GAJA AND CRAWFORD

Jurisdiction — Article 36 (2) of Statute — Paragraph 6 of the MOU not affecting the Court's jurisdiction — Kenya's reservation requires method of settlement that will resolve dispute — Negotiation in good faith may not result in settlement — Paragraph 6 not caught by Kenya's reservation as neither pactum de contrahendo *nor providing for an exclusive method.*

Admissibility — Paragraph 6 of the MOU means that CLCS recommendations must be made before Parties may resort to negotiations — But Parties set aside this time-limit by entering into negotiations without reservation prior to receiving CLCS recommendations — Application thus admissible.

1. We share the views expressed by the majority that the Memorandum of Understanding (MOU) does not provide a "method of settlement" for disputes on maritime boundaries that would trigger Kenya's reservation to its declaration under the optional clause; and further that paragraph 6 of the MOU does not render Somalia's Application inadmissible. However, we differ as to the reasons leading to these conclusions.

2. On the issue of jurisdiction, the question in relation to Kenya's first preliminary objection is whether paragraph 6 of the MOU constitutes an agreement "to have recourse to some other method or methods of settlement" within the meaning of its optional clause declaration. Paragraph 6 provides that the maritime delimitation "shall be agreed between the two coastal States . . . after the Commission has . . . made its recommendations . . . concerning the establishment of the outer limits of the continental shelf beyond 200 nautical miles".

3. Paragraph 6 of the MOU could affect the Court's jurisdiction only if it was caught by Kenya's optional clause reservation. In our opinion, paragraph 6 would be so caught only if it had provided for a method that would resolve the dispute over the maritime boundary. It could have done this by requiring the Parties to agree on delimitation (i.e., if it was a *pactum de contrahendo*) or by providing that negotiation was the *only* method of settlement. It is common ground between the Parties that paragraph 6 does not require them to reach an agreement (see Kenya: CR 2016/12, p. 35, para. 18; and *ibid.*, pp. 25-26, para. 27; Somalia: CR 2016/13, p. 16, para. 11). The question is whether it involved a commitment by each Party not to resolve their dispute in any other way. If

not, the agreement should be read as simply addressing the time for negotiations and it would not establish a method of settlement for the purposes of the reservation.

4. Of course, negotiations can lead to agreement and thereby settle a dispute (cf. Article 33 of the United Nations Charter). But even when there is an obligation to negotiate, negotiations do not constitute, as such, a method of dispute settlement because they may or may not lead to a settlement, depending wholly or partly on the position of one of the States concerned. If States agree to negotiate but leave all their options open as to the outcome of those negotiations, they have not necessarily agreed to a method of *settlement:* it is equally possible that the dispute will not be settled. In the context of a declaration concerned with the compulsory jurisdiction of the Court and with alternatives to it, a reservation as to another method of settlement should be construed as referring to a method that will actually settle the dispute when it is resorted to, not to one that is equally consistent with the dispute remaining unsettled in perpetuity.

5. This conclusion is not affected by the requirement imposed by international law that the negotiations be conducted in good faith. Two parties, each acting in good faith, or not demonstrably in bad faith, can fail to reach agreement. An obligation to negotiate in good faith does not ensure the settlement of the dispute being negotiated.

6. For these reasons we think it is clear that, though they agreed that negotiations would be held, the Parties did not exclude resort to other methods of settlement if those negotiations failed.

7. The Judgment on several occasions states that paragraph 6 did not prevent the Parties from negotiating and even reaching an agreement on their maritime boundary dispute. But that is not the point — the question is whether each Party was free, having regard to paragraph 6, to take unilateral action to trigger dispute settlement before the CLCS had made its recommendations. The answer to that question must be no.

8. That brings us to the issue of admissibility. In our view paragraph 6 of the MOU precludes the admissibility of an application to the Court made before the Parties have received the recommendations of the CLCS on the delineation of their outer continental shelf and have sought to reach an agreement on delimitation. The plain language of the paragraph points to the existence of an obligation to agree on the maritime boundaries "after the Commission has concluded its examination of the separate submissions made by each of the two coastal States and made its recommendations to two coastal States concerning the establishment of the outer limits of the continental shelf beyond 200 nautical miles". In par-

ticular, the use of the word "shall" connotes an obligation to respect that time-limit. Paragraph 6 of the MOU thus imposes a precondition which makes an application to the Court inadmissible until after the CLCS has made its recommendations. The Parties effectively agreed that the dispute would not be ripe for resolution of any kind until after this date.

9. Paragraph 6 of the MOU appears to have a clear justification with regard to the delimitation of the outer continental shelf, in view of the possibility that delineation by the CLCS will affect delimitation. Its rationale is less clear with regard to other areas that are also covered by the same paragraph, which refers to "maritime boundaries in the areas under dispute, *including* the delimitation of the continental shelf beyond 200 nautical miles" (emphasis added). For those other areas it is difficult to identify an interest of one of the Parties in delaying an agreement, let alone a common interest of both Parties in doing so. But the paragraph may have been included in order to allay any fear that the submissions to the CLCS could have some consequences on the delimitation of maritime boundaries generally.

10. Be that as it may, the Parties were certainly free to proceed to an earlier conclusion of an agreement for delimiting some, or all, of their maritime boundaries. This is what the Parties sought to achieve in 2014, when they started negotiations covering all their maritime boundaries on the basis of an invitation by Kenya which was accepted by Somalia. By this conduct the Parties derogated from the time-limit indicated in the MOU. They did so at a time when the recommendations of the CLCS were unlikely to be made before a date in the distant future.

11. Kenya argued that negotiations between States do not necessarily lead to an immediate agreement (CR 2016/10, pp. 22-23) and that therefore no modification of the MOU was involved. However, it seems implicit in the conduct of the Parties as jointly reported (Annexes 31 and 32 to Somalia's Memorial) that they were not intending to wait for up to twenty years before reaching the agreement they were negotiating. There is no indication that the negotiations were intended to be only for a provisional arrangement pending the agreed time-limit (see Somalia's argument at CR 2016/11, p. 16, making a point that was not contested by Kenya). Nor did either of the Parties make any reservation to the effect that the outcome of the negotiations should be consistent with the time-limit stated in the MOU.

12. This leads to the conclusion that while the Parties, by setting a time-limit in the MOU, had implicitly set a condition for the admissibility of an application to the Court, they set aside that time-limit by agreeing

in 2014, without reservation or qualification, to start negotiations in view of seeking an earlier agreement.

(*Signed*) Giorgio GAJA.

(*Signed*) James CRAWFORD.