DISSENTING OPINION OF JUDGE ROBINSON

1. I do not agree with the decision of the majority in paragraph 134 of the Judgment rejecting the first basis advanced by Kenya for its first preliminary objection on the ground that the Memorandum of Understanding (MOU) does not fall within the scope of the reservation to Kenya's optional clause declaration.

2. I also do not agree with the decision of the majority in the same paragraph rejecting the second basis advanced by Kenya for its first preliminary objection on the ground that Part XV of the United Nations Convention on the Law of the Sea (UNCLOS) does not fall within the scope of the reservation to Kenya's optional clause declaration.

3. However, in this opinion I focus on the rejection of the second basis advanced by Kenya for its first preliminary objection since, in my view, it is more problematic because of the very serious implications it has for the interpretation and application of the carefully elaborated provisions of Part XV of UNCLOS.

4. Just about the only finding that I agree with in this Judgment is the majority's rejection in paragraph 120 of Kenya's argument that its reservation "attaches special significance to an agreement to a method of dispute settlement that is *lex specialis* and *lex posterior* in relation to the Parties' optional clause declarations". However, this finding has no consequences for the outcome of this case.

I also make it plain that had paragraph 145, subparagraph 2, been worded differently I would have voted in favour of rejecting Kenya's unclean hands argument in its second preliminary objection.

5. Under Article 36, paragraph 2, of the Court's Statute, both Kenya and Somalia accepted the Court's jurisdiction subject to certain reservations. With regard to the reservation relevant to this case, Kenya accepted the Court's jurisdiction over all disputes other than: "Disputes in regard to which the parties to the dispute have agreed or shall agree to have recourse to some other method or methods of settlement."[1]

6. The essence of Kenya's argument for the second basis of its first preliminary objection is that its reservation excludes from the Court's jurisdiction disputes in relation to which the States parties agree to have recourse to some other method of settlement; as both Kenya and Somalia are States parties to UNCLOS, Part XV is applicable to them; under

[1] United Nations, *Treaty Series (UNTS)*, Vol. 531, p. 114.

Article 287, paragraph 1, of UNCLOS — a provision within Part XV — States parties may make a written declaration selecting one of four means "for the settlement of disputes concerning the interpretation or application of this Convention"[2]; neither State has made such a declaration; therefore, by virtue of Article 287, paragraph 3, they are "deemed to have accepted arbitration in accordance with Annex VII" of UNCLOS. The logic of this argument is that since it is beyond question that all four means identified are methods of settlement for disputes, including the maritime delimitation dispute between the two States, they fall within the terms of the reservation as a method of settlement other than the Court, thereby depriving the Court of jurisdiction. I find this argument persuasive. The majority does not.

7. The majority offers a main and a subsidiary argument for rejecting Kenya's submission on this point. The main argument turns on the interpretation of Article 282 of UNCLOS, which provides:

> "If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed, through a general, regional or bilateral agreement or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in this Part, unless the parties to the dispute otherwise agree."

To exclude the application of Part XV of UNCLOS there must be, according to this article, an agreement, general, regional, bilateral or otherwise, between the States parties to submit the dispute to a procedure that entails a binding decision. There is no such general, regional or bilateral agreement between Kenya and Somalia. The question therefore is whether the phrase "or otherwise" becomes applicable as between those States. The relevant area of enquiry is whether there exists in the relationship between the two States some arrangement which could be said to reflect their agreement to a procedure entailing a binding settlement. Absent such an arrangement reflecting an agreement, Article 282 does not apply and the application of Part XV of UNCLOS is not excluded. It has to be stressed that since the word "agree" in Article 282 also governs the phrase "or otherwise", the enquiry should result in something that, although not a general, regional or bilateral agreement, nonetheless has features that warrant it being considered an agreement.

[2] The four fora listed in Article 287 are the International Tribunal for the Law of the Sea; the International Court of Justice; "an arbitral tribunal constituted in accordance with Annex VII"; and "a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein".

8. It is generally accepted from a reading of the *travaux préparatoires* that the phrase "or otherwise" in that article includes optional clause declarations under Article 36, paragraph 2, of the Court's Statute. Thus, *The United Nations Convention on the Law of the Sea, 1982: A Commentary* (Virginia Commentary) states:

> "Article 282 mentions that an agreement to submit a dispute to a specified procedure may be reached 'otherwise'. The reference was meant to include, in particular, the acceptances of the jurisdiction of the International Court of Justice by declarations made under Article 36, paragraph 2, of the Statute of that Court."[3]

Significantly, the phrase "in particular" in the Virginia Commentary clarifies that instruments other than acceptances of the Court's jurisdiction may constitute an agreement that falls within the scope of Article 282 of UNCLOS.

9. Other scholarly works reflect the same conclusion:

— P. Gautier states in relation to the phrase "or otherwise" that "[t]his option is generally understood as covering the declarations made by States under Article 36, paragraph 2, of the Statute of the ICJ . . ."[4].

— Y. Tanaka: "There appears to be little doubt that the optional clause under Article 36 (2) of the Statute of the ICJ is 'a procedure that entails a binding decision' set out in Article 282. It would seem to follow that between two States which have accepted the optional clause, the jurisdiction of the ICJ prevails over procedures under Part XV of [UNCLOS] by virtue of Article 28[2]."[5]

— T. Treves, in commenting on Article 282 and optional clause declarations, states that "the consensual aspect — which seems to be the fundamental requirement of Article 36, paragraph 2 — undoubtedly exists, so that it is reasonable to conclude that the parties have agreed 'otherwise'"[6].

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[3] Myron H. Nordquist (Editor-in-Chief), Shabtai Rosenne and Louis B. Sohn (Volume Editors), *United Nations Convention on the Law of the Sea, 1982: A Commentary*, Vol. V, Dordrecht, Boston, London, 1989, pp. 26-27, para. 282.3.

[4] Philippe Gautier, "The Settlement of Disputes", *The IMLI Manual on International Maritime Law, Volume I: The Law of the Sea*, First Edition, 2014, p. 539.

[5] Yoshifumi Tanaka, *The International Law of the Sea* (Cambridge University Press, Second Edition, 2015), pp. 423-424. Cited in CR 2016/11, pp. 63-64, para. 33 (Sands).

[6] Tullio Treves, "Conflicts between the International Tribunal for the Law of the Sea and the International Court of Justice", *New York University Journal of International Law and Politics*, Vol. 31, Issue 4 (Summer 1999), p. 812. Cited in CR 2016/11, p. 64, para. 34 (Sands).

— P. C. Rao: "The agreement referred to in Article 282 UN Convention on the Law of the Sea may be recorded 'otherwise', for example, through separate declarations, such as declarations made under Article 36 (2) ICJ Statute."[7]
— A. E. Boyle: "Thus, two States which have made declarations in similar terms under Article 36 (2) of the ICJ Statute will remain subject to the compulsory jurisdiction of the ICJ even in the LOS Convention cases."[8]

10. Particular care must be taken in examining the *travaux préparatoires* to ascertain exactly what they say about the term "or otherwise" since the Court's understanding of that term is substantially reliant on the preparatory work to clarify its meaning. Quite obviously neither the Virginia Commentary nor any of the five scholarly citations above can reasonably be read as meaning that any and every set of acceptances of the Court's jurisdiction by optional clause declarations with reservations constitutes an agreement that falls within the scope of Article 282. For such a reading would be tantamount to saying that reservations have no impact on optional clause declarations, a conclusion that is clearly contrary to the Court's jurisprudence[9].

11. What the relevant passages relating to the *travaux préparatoires* as well as the scholarly comments do tell us is that at a general level optional clause declarations are included in the reference to "or otherwise" in Article 282, that is, optional clause declarations may, like some other instruments, constitute an agreement that falls within the scope of Article 282. However, whether in light of a particular reservation to an optional clause declaration there is nonetheless an agreement that falls within the scope of Article 282 is a question that has to be answered on the basis of a case-by-case examination of the impact of the reservation on the optional clause declaration.

12. There is nothing in the Virginia Commentary or the scholarly comments to suggest that their references to optional clause declarations were meant to go beyond the substance of the text of Article 36, paragraph 2, of the Court's Statute to include reservations. Article 36, paragraph 2, provides as follows:

> "The States parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special

[7] P. C. Rao, "Law of the Sea, Settlement of Disputes", *Max Planck Encyclopaedia of Public International Law*, para. 11. Cited in CR 2016/11, p. 64, para. 35 (Sands).

[8] A. E. Boyle, "Problems of Compulsory Jurisdiction and the Settlement of Disputes relating to Straddling Fish Stocks", *International Journal of Marine and Coastal Law*, Vol. 14, Issue 1 (1999), p. 7. Cited in CR 2016/11, p. 64, para. 37 (Sands).

[9] See for example *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, pp. 452-454, paras. 44 and 47 and *Anglo-Iranian Oil Co. (United Kingdom* v. *Iran), Preliminary Objection, Judgment, I.C.J. Reports 1952*, p. 105. See also paragraphs 13, 14 and 16 of the present opinion.

agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

(a) the interpretation of a treaty;
(b) any question of international law;
(c) the existence of any fact which, if established, would constitute a breach of an international obligation;
(d) the nature or extent of the reparation to be made for the breach of an international obligation."

The language used in Article 282 of UNCLOS, "*[i]f* the States Parties which are parties to a dispute . . . have agreed . . ." (emphasis added), evidences the conditional nature of the provision. Whether the optional clause declarations in this case are to be treated as constituting an agreement between Kenya and Somalia must be determined by an examination of the relevant optional clause declarations and reservation in light of the Court's jurisprudence.

13. Optional clause declarations are neither contracts nor treaties. The Court has explained that once a State has deposited a unilateral declaration, a "consensual bond" is created with each State that has previously, or proceeds subsequently, to do the same[10]. The "compulsory" element of an optional clause declaration flows from this bond or mutuality of commitment. The Court has previously stated, "[i]n fact, the declarations, even though they are unilateral acts, establish a series of bilateral engagements with other States accepting the same obligation of compulsory jurisdiction . . .".[11]

14. In *Certain Norwegian Loans* the Court held that in relation to optional clause declarations "jurisdiction is conferred upon the Court only to the extent to which the Declarations coincide in conferring it"[12].

15. What must therefore be ascertained is whether the optional clause declarations of Kenya and Somalia, along with Kenya's reservation, constitute a "consensual bond", a mutuality of commitment sufficient to be considered an agreement between them that falls within the scope of Article 282 of UNCLOS.

16. The Court's jurisprudence is replete with dicta on the interpretation of optional clause declarations and reservations. The Court held in a case between the United Kingdom and Iran that in construing a declaration, "[i]t must seek the interpretation which is in harmony with a natural

[10] *Right of Passage over Indian Territory (Portugal* v. *India), Preliminary Objections, Judgment, I.C.J. Reports 1957*, p. 146.

[11] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 418, para. 60.

[12] *Certain Norwegian Loans (France* v. *Norway), Judgment, I.C.J. Reports 1957*, p. 23. Cited in present Judgment, para. 115. See also *Anglo-Iranian Oil Co. (United Kingdom* v. *Iran), Preliminary Objection, Judgment, I.C.J. Reports 1952*, p. 103.

and reasonable way of reading the text, having due regard to the intention of the Government of Iran at the time when it accepted the compulsory jurisdiction of the Court"[13]. In *Fisheries Jurisdiction*, the Court held that reservations "should be interpreted in a manner compatible with the effect sought by the reserving State"[14]. In the same case, the Court rejected an interpretation that "[ran] contrary to a clear text"[15]. It also held that "there is no reason to interpret [reservations] restrictively"[16].

17. Kenya's reservation excludes the jurisdiction of the Court in "[d]isputes in regard to which the parties to the dispute have agreed or shall agree to have recourse to some other method or methods of settlement"[17]. Given this lucid and unambiguous text, it would be wholly unreasonable to conclude that the optional clause declarations between Kenya and Somalia constitute an agreement that falls within the scope of Article 282 when Part XV of UNCLOS sets out in Article 287 other methods of settlement. Such a conclusion is plainly not compatible "with the effect sought by the reserving State" — Kenya. It flies in the face of the "natural and reasonable way of reading the text"[18] of the reservation, which is an integral part of Kenya's declaration. The consensual element necessary for an agreement on the basis of the optional clause declarations cannot take root in the environment disturbed by Kenya's reservation.

18. The majority's main argument has two subsets. The first relates to the question of circularity in reasoning. The majority appears to accept Somalia's argument that Kenya's approach to the interpretation of Article 282 leads to circularity in reasoning, because, according to Somalia, Kenya's reservation to its optional clause declaration leads to Part XV of UNCLOS, "which, in turn (by virtue of Article 282) could lead back to the optional clause declaration, with the back and forth continuing indefinitely" (Judgment, para. 113).

19. In my view this argument is unmeritorious. Once Article 282 is reached in the circle, the reasoning ends with the conclusion that the Article does not apply, leaving undisturbed the application of Kenya's reservation. There is no circularity.

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[13] *Anglo-Iranian Oil Co. (United Kingdom* v. *Iran), Preliminary Objection, Judgment, I.C.J. Reports 1952*, p. 104.

[14] *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 455, para. 52. Cited in present Judgment, para. 118.

[15] *Ibid.*, p. 464, para. 76.

[16] *Ibid.*, p. 453, para. 44.

[17] See *supra* note 1.

[18] See *supra* note 13.

20. The second subset of the main argument of the majority is set out in paragraph 129 of the Judgment. It makes the point that up to the time the Third United Nations Conference on the Law of the Sea ended in 1982,

> "more than half of the then-existing optional clause declarations contained a reservation with an effect similar to that of Kenya's reservation . . . there is no indication in the *travaux préparatoires* of an intention to exclude from the scope of Article 282 the majority of optional clause declarations, i.e., those containing such reservations. It remains the case today that such reservations are found in more than half of the optional clause declarations in effect." (Judgment, para. 129.)

21. This is a weak argument and it is the only substantial one advanced in the Judgment to support the conclusion that the phrase "or otherwise" was intended to cover optional clause declarations with the Kenyan-type reservation.

22. In 1973, at the start of the Law of the Sea negotiations, of the 46 optional clause declarations 26 (56.5 per cent) had reservations with an effect similar to that of Kenya's (Kenyan-type reservations), a little more than half of the optional clause declarations; in 1982 at the end of the United Nations Conference on the Law of the Sea, of the 47 optional clause declarations 26 (55.3 per cent) had Kenyan-type reservations, a little more than half of the optional clause declarations. In the nine-year period Kenyan-type reservations amounted to somewhere between 54.3 per cent (25 October 1979 — 31 July 1980) and 56.5 per cent (26 November 1973 — 9 January 1974) of optional clause declarations[19]. It is on this slender and wholly unreliable basis that the majority mounts its argument that the phrase "or otherwise" was intended to cover declarations with Kenyan-type reservations.

23. Although the majority's numerical focus is deeply flawed, one cannot help but engage with that approach if only to observe that the majority to which it clings is not a significant one; the majority is not one that reflects 70 per cent, 80 per cent, or 90 per cent of the optional clause declarations in existence at the relevant time; it does not even reflect 60 per cent. It is somewhere between 54.3 per cent and 56.5 per cent, barely a majority.

But let us examine the soundness of the conclusion in paragraph 129. What if the Kenyan-type reservations amounted to less than half of the optional clause declarations, say 49 per cent? The mechanical approach of the majority would seem to require that the *travaux préparatoires* be construed as intending to exclude those reservations from the scope of

[19] *I.C.J. Yearbook 1972-1973*, No. 27, pp. 52-82; *I.C.J. Yearbook 1973-1974*, No. 28, pp. 49-80; *I.C.J. Yearbook 1979-1980*, No. 34, pp. 51-84; and *I.C.J Yearbook 1982-1983*, No. 37, pp. 56-89.

Article 282, with the result that the Court would lack jurisdiction. However, there is no rational basis for this distinction. The *travaux préparatoires* cannot properly be construed as not intending to exclude the Court's jurisdiction in relation to Kenyan-type reservations constituting 54.3 per cent to 56.5 per cent of the optional clause declarations while intending to exclude the Court's jurisdiction when those reservations constitute 49 per cent of the optional clause declarations.

24. The approach of the majority is untenable. Whether the *travaux préparatoires* are to be understood as including or excluding reservations to optional clause declarations does not depend on the number of Kenyan-type reservations made between 1973 and 1982. It is an oversimplification and an error to reduce the issue to one of numbers. What is called for is not a quantitative assessment but a qualitative evaluation of the impact of the reservation on the optional clause declarations and thus, on whether there is an agreement that falls within the scope of Article 282 of UNCLOS.

The signal failure of this Judgment is its refusal to carry out such an evaluation.

25. The Kenyan-type reservation exists in a universe of reservations made between 1973 and 1982. It should not be considered in isolation. Since the majority has a majoritarian fixation it would seem that the reasoning in paragraph 129 would also lead to the conclusion that the *travaux préparatoires* should be construed as evidencing an intention to exclude from the scope of Article 282 optional clause declarations with reservations different from that of Kenya, but which, unlike Kenya's, do not constitute the majority of the universe of declarations in the relevant period. For example, of the many reservations to optional clause declarations that existed in 1973, 21 States had reservations regarding disputes relating to questions which fall exclusively within the domestic jurisdiction of a State and nine States had reservations regarding disputes relating to hostilities, armed conflict and belligerent activities[20]. These are weighty reservations and I note that the former set of reservations constituted 45.7 per cent of the then-existing optional clause declarations — a not insubstantial percentage. Again, the numerical criterion of the majority cannot provide a rational basis for distinguishing between Kenyan-type reservations and the last mentioned reservations.

26. It is not reasonable to conclude that the States parties intended the phrase "or otherwise" to include optional clause declarations with such weighty reservations, because they must be taken as knowing that reservations do have an impact on optional clause declarations. It is more reasonable to conclude that the intention was that the phrase "or otherwise" included optional clause declarations that reflect the substance of the text of Article 36, paragraph 2, without more, that is, without reserva-

[20] *I.C.J. Yearbook 1972-1973*, No. 27, pp. 52-82 and *I.C.J. Yearbook 1973-1974*, No. 28, pp. 49-80.

tions. I note that in 1982, there were 16 such optional clause declarations in existence[21].

27. It is as though the majority takes the position that the intention of the States parties to UNCLOS should be ascertained on the basis that they treated reservations as having no legal significance. It is improbable that this could have been their approach.

28. In paragraph 128, the majority instances a situation in which a reservation to an optional clause declaration "excluded disputes concerning a particular subject" such as "disputes relating to maritime delimitation". The majority is, of course, correct in concluding that in such a situation there would be no agreement to the Court's jurisdiction and that the procedures under Part XV of Section 2 would apply. However, it is important to appreciate why that conclusion is correct. It is not correct merely because the language used is express and specific in identifying the subject-matter of the reservation. Rather, it is correct because the effect of the reservation is to prevent the emergence of the "consensual bond"[22], "consensual aspect"[23] or mutuality of commitment, the vital element of optional clause declarations conferring jurisdiction on the Court. The point is that irrespective of how the reservation is worded, the Court must examine its impact on the optional clause declaration and in particular must determine whether, in light of that impact, it can be maintained that the States in question have consented to the jurisdiction of the Court. The Court must carry out this examination even when, as in the case of the example given, the language is specific and apparently crystal clear.

29. According to the Court's jurisprudence, a reservation is an integral part of an optional clause declaration and, as previously noted[24], the Court has pronounced on how reservations are to be interpreted. It is only after interpreting Kenya's reservation that a conclusion could be arrived at as to whether its optional clause declaration, inclusive of its reservation, in conjunction with the optional clause declaration of Somalia, constitute an agreement within the scope of Article 282 of UNCLOS.

30. In my view, as stated earlier[25], the scope of the phrase "or otherwise" is confined to optional clause declarations that reflect the substance of the text of Article 36, paragraph 2, of the Court's Statute. Therefore, if two States have optional clause declarations that are, in substance, confined to the provisions of paragraph 2, those optional clause declarations constitute an agreement that falls within the scope of Article 282 and it is entirely reasonable to understand the *travaux préparatoires* to refer to such optional clause declarations. But it is wrong to understand the refer-

[21] *I.C.J. Yearbook 1982-1983*, No. 37, pp. 56-89.
[22] *Supra* note 10.
[23] *Supra* note 6.
[24] Paragraphs 13, 14 and 16 of the present opinion.
[25] Paragraph 12 of the present opinion.

ences in the *travaux préparatoires* to cover optional clause declarations with reservations when there is not a scintilla of evidence to indicate that the drafters of UNCLOS had given any thought whatsoever to those reservations.

31. In this regard, I find inarguable the point made in the oral proceedings that optional clause declarations only prevail over Part XV of UNCLOS when they are made "in the same terms"[26]. Clearly this conclusion, which calls for substantive rather than literal similarity, excludes optional clause declarations to which one party has attached a Kenyan-type reservation. It is significant that in none of the passages of the five authors cited earlier[27] is there any mention of a reservation to an optional clause declaration. I find persuasive the explanation for that omission offered in oral argument: there was no need to elaborate because it was obvious to the authors that Article 282 would not apply to an optional clause declaration with the Kenyan-type reservation[28].

32. The subsidiary argument advanced by the majority for rejecting Kenya's position is set out in paragraph 132 of the Judgment, where it is held that

> "A finding that the Court has jurisdiction gives effect to the intent reflected in Kenya's declaration, by ensuring that this dispute is subject to a method of dispute settlement. By contrast, because an agreed procedure within the scope of Article 282 takes precedence over the procedures set out in Section 2 of Part XV, there is no certainty that this intention would be fulfilled were this Court to decline jurisdiction (see also Article 286 of UNCLOS)."

33. The Court has also cited the Permanent Court of International Justice's (PCIJ) Judgment in *Factory at Chorzów* in which that Court held that

> "the Court, when it has to define its jurisdiction in relation to that of another tribunal cannot allow its own competency to give way unless confronted with a clause which it considers sufficiently clear to prevent the possibility of a negative conflict of jurisdiction involving the danger of a denial of justice"[29].

34. The Court has to be careful that it does not employ reasoning that defeats one of the main goals of the UNCLOS States parties in constructing the dispute settlement system in Part XV. The States parties did not wish to give any particular prominence to the International Court of Jus-

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[26] CR 2016/10, Kenya (Boyle), p. 56, para. 8.
[27] Paragraph 9 of the present opinion.
[28] CR 2016/12, Kenya (Boyle), p. 28, para. 5.
[29] *Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9*, p. 30 (Claim for Indemnity).

tice in the dispute settlement system. In fact, a proposal by Switzerland and the Netherlands to place the ICJ at the head of the list of fora in Article 287 "did not find sufficient support . . . and was withdrawn"[30]. The UNCLOS States parties did not wish the ICJ to be the only dispute settlement mechanism nor did they wish it to be the default mechanism. Hence, Article 287 of UNCLOS sets out a menu of options, including the ICJ, and the default mechanism is arbitration under an Annex VII Tribunal set up pursuant to Part XV of UNCLOS.

35. It is of course correct as a statement of law that an agreed procedure within the scope of Article 282 prevails over the procedures of Part XV of UNCLOS. But that does not necessarily mean that, should the Court decline jurisdiction, an Annex VII Tribunal would not find that it has jurisdiction. The Tribunal's decision will depend on whether it finds that in the circumstances of this case there is an agreed procedure that falls within the scope of Article 282. It will only decline jurisdiction if it finds that there is such a procedure. In my submission, it is most probable that, by reason of the unambiguous wording of Kenya's reservation and the existence of alternative fora in Article 287 of UNCLOS, an Annex VII Tribunal would find that it has jurisdiction. In any event, the Court should not indulge in speculation. The Court's function is to determine whether on the basis of the law and facts the Annex VII Tribunal or the Court itself has jurisdiction. Speculation that the Tribunal will not accept jurisdiction is not a sufficient reason for the Court to conclude that it has jurisdiction; neither is it a sufficient reason for the Court to determine that the Annex VII Tribunal does not have jurisdiction. It is simply not a proper consideration.

36. Paragraph 132 of the Judgment may be viewed by some as merely a self-serving finding favouring the jurisdiction of the Court. The Court's Judgment has, in effect, turned Article 287, paragraph 3, of UNCLOS on its head by treating the ICJ as the default mechanism, when that provision assigns that role to the Annex VII Tribunal.

37. In the circumstances of this case the dictum of the PCIJ set out in paragraph 33 of this opinion is inapplicable since the provisions of Part XV, in particular Article 287, are sufficiently clear "to prevent the possibility of a negative conflict of jurisdiction involving the danger of a denial of justice". As we have seen, Kenya and Somalia will, by virtue of Article 287, paragraph 3, have access to arbitration under Annex VII. Thus, there is no possibility of a "denial of justice" on the basis that, should the Court find that it has no jurisdiction, the two States would be left without a dispute settlement mechanism.

38. In conclusion, the analysis in this opinion shows that, by reason of Kenya's reservation, the optional clause declarations of the Parties do not

[30] Doc. SD/1 (1978, mimeo.) (Netherlands and Switzerland). Reproduced in Vol. XII, Platzöder, p. 234. Cited in Virginia Commentary, *supra* note 3, p. 44, para. 287.6.

constitute an agreed procedure under Article 282 of UNCLOS; Kenya's purposeful reservation becomes applicable with the result that, within the meaning of *Certain Norwegian Loans*[31], there is no coincidence between the optional clause declarations of Kenya and Somalia in conferring jurisdiction on the Court; Article 282 does not provide a basis for the Court's jurisdiction; in terms of Kenya's reservation, the procedures set out in Article 287 constitute methods of settlement other than the Court; since neither Kenya nor Somalia has selected a procedure under Article 287, paragraph 1, by virtue of Article 287, paragraph 3, they are deemed to accept Annex VII arbitration as a method of settlement.

39. In light of the foregoing, I would have ruled in favour of Kenya's submission that the reservation it made to its optional clause declaration under Article 36, paragraph 2, of the Court's Statute excludes the Court's jurisdiction in this case.

(Signed) Patrick ROBINSON.

[31] See *supra* note 12.