INTERNATIONAL COURT OF JUSTICE

CASE CONCERNING
MARITIME DELIMITATION IN THE INDIAN OCEAN

SOMALIA
v.
KENYA

WRITTEN STATEMENT OF SOMALIA CONCERNING THE PRELIMINARY OBJECTIONS OF KENYA

VOLUME I

5 FEBRUARY 2016

TABLE OF CONTENTS

CHAPTER 1. INTRODUCTION

1.1. The case concerning *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)* was brought before the Court by means of an Application filed by the Federal Republic of Somalia on 28 August 2014. The Application concerns

> "the establishment of the single maritime boundary between Somalia and Kenya in the Indian Ocean delimiting the territorial sea, exclusive economic zone ("EEZ") and continental shelf, including the continental shelf beyond 200 nautical miles ('M')".[1]

1.2. By Order of 18 October 2014, the Court fixed 13 July 2015 and 27 May 2016 as the time limits, respectively, for the Memorial and Counter Memorial of Somalia and Kenya. Somalia filed its Memorial on the scheduled date and requested the Court:

> "1. To determine the complete course of the maritime boundary between Somalia and Kenya in the Indian Ocean, including in the continental shelf beyond 200 M, on the basis of international law.
>
> 2. To determine the maritime boundary between Somalia and Kenya in the Indian Ocean on the basis of the following geographical coordinates … .
>
> 3. To adjudge and declare that Kenya, by its conduct in the disputed area, has violated its international obligations to respect the

[1] *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, Application Instituting Proceedings (28 Aug. 2014), para. 2.

> sovereignty, and sovereign rights and jurisdiction of Somalia, and is responsible under international law to make full reparation to Somalia, including inter alia by making available to Somalia all seismic data acquired in the areas that are determined by the Court to be subject to the sovereignty and/or sovereign rights and jurisdiction of Somalia, and to repair in full all damage that has been suffered by Somalia by the payment of appropriate compensation".[2]

1.3. On 7 October 2015, the Republic of Kenya raised Preliminary Objections to jurisdiction and admissibility. The Order of the Court dated 9 October 2015 fixed 5 February 2016 as the time limit within which Somalia may present a written statement of its observations and submissions in response to Kenya's Preliminary Objections. Somalia files this Written Statement pursuant to that Order.

Section I. Summary of Somalia's Response to Kenya's Preliminary Objections

1.4. By its Preliminary Objections, Kenya seeks to persuade the Court not to engage with any aspect of the merits of Somalia's Application concerning the delimitation of the entirety of the Parties' maritime boundary, including the territorial sea, exclusive economic zone ("EEZ") and continental shelf, both within and beyond 200 nautical miles ("M"). Kenya argues that the Court has no jurisdiction, and invites it to consign the Parties to an open-ended and indefinite process of negotiation—a course that they have already pursued but has failed to yield any prospect of resolving this long-running dispute.

[2] Memorial of Somalia (hereinafter "MS") (13 July 2015), pp. 147-148.

1.5. In challenging the Court's jurisdiction to hear Somalia's Application, Kenya seeks to foreclose any possibility of an independent determination by the Court of the Parties' maritime boundary in accordance with international law. It thereby endeavours to perpetuate a *status quo* that is characterised by Kenya's marked departure from its previous recognition of an equidistant maritime boundary; its expansive and novel claim to a straight boundary along a parallel of latitude; and its extensive unilateral activities throughout the disputed area.

1.6. For reasons explained in Somalia's Memorial, Kenya's position regarding the location of the maritime boundary is legally untenable and its unilateral activities are a violation of Somalia's sovereign rights. It therefore serves Kenya's interests—but not Somalia's—to prevent the merits of Somalia's claims from receiving independent judicial appraisal. This is the true purpose of Kenya's Preliminary Objections.

1.7. Kenya contests the jurisdiction of the Court on the basis of a single short excerpt of a two-page Memorandum of Understanding ("MOU") concerning the delineation of the outer limits of the continental shelf beyond 200 M by the Commission on the Limits of the Continental Shelf ("CLCS" or "Commission").[3] As Somalia will demonstrate, Kenya is seeking to use a document that was intended solely to facilitate the Commission's *delineation* of the continental shelf beyond 200 M—a process that has no connection with or implications for the territorial sea, EEZ or continental shelf up to 200 M—in order to frustrate the *delimitation* of the entire maritime boundary by the Court.

[3] As in its Memorial, Somalia uses the term "delineation" to describe the process under Article 76 of the 1982 UN Convention on the Law of the Sea ("UNCLOS" or "the Convention"), whereby States submit information to the CLCS, which then makes recommendations on the location of the outer-limits of the continental shelf, the point at which national jurisdiction over the continental shelf ends and the jurisdiction of the International Seabed Authority begins.

1.8. There is no textual, contextual or logical foundation for Kenya's argument, which ignores the cardinal distinction between the processes of delimitation and delineation. For the reasons set out in this Written Statement, Kenya's reliance on the MOU in an effort to oust the jurisdiction of the Court is misconceived and entirely without merit. The Preliminary Objections are a transparent attempt to insulate Kenya's unlawful conduct from legal scrutiny. If acceded to, Kenya's argument would deprive the Court of a meaningful role in the resolution not only of this maritime boundary dispute, but of other maritime boundary disputes, including those that might be brought before it under Part XV of the 1982 UN Convention on the Law of the Sea ("UNCLOS" or "the Convention"). There is no obstacle to the Court's ability to hear the merits of Somalia's Application in its entirety, and Somalia invites the Court to firmly so rule.

A. A PRELIMINARY POINT OF AGREEMENT: THE COURT'S JURISDICTION TO DELIMIT BEYOND 200 M IN THE ABSENCE OF RECOMMENDATIONS BY THE CLCS

1.9. Before providing an overview of Somalia's submissions in response to Kenya's objections, it is appropriate to highlight an important point of common ground between the Parties. In Chapter 7 of its Memorial, Somalia set out the basis of the Court's jurisdiction to delimit maritime boundaries beyond 200 M before the CLCS has made recommendations in respect of the delineation of the outer continental shelf of the States concerned.[4] Somalia explained why the Court's jurisdiction is not affected by the absence of the delineation of the outer limits of the coastal States' respective entitlements by the CLCS. Delineation is an entirely separate scientific process that has no bearing or effect on the legal question of delimitation, whether as a matter of process or substance.

[4] MS, paras. 7.3-7.27.

1.10. Kenya's Preliminary Objections do not dispute any aspect of that analysis. Accordingly, there is no doubt—and certainly no difference between the Parties—that as a matter of general principle, the Court is not required to await the final delineation of the outer limits of the continental shelf before delimiting the Parties' maritime boundary beyond 200 M. The Court's competence to undertake that exercise without reference to the status of proceedings before the CLCS is thus a matter of agreement between the Parties. Accordingly, in light of the Parties' common position, Somalia does not address the issue further in this Written Statement. Instead, Somalia's submissions are confined to the single issue that divides the Parties: the interpretation, status and effect of the MOU.

B. THE MEMORANDUM OF UNDERSTANDING AND KENYA'S DECLARATION UNDER ARTICLE 36(2) OF THE STATUTE OF THE COURT

1.11. The entirety of Kenya's objection to the Court's jurisdiction is based on the alleged effect of the bilateral MOU signed by representatives of the Parties in Nairobi on 7 April 2009. The MOU was drawn up by the Government of Norway (which was providing assistance to Somalia and Kenya in connection with their submissions to the CLCS) in order to facilitate the delineation of the outer limits of the continental shelf beyond 200 M by the CLCS. Specifically, the MOU was intended to ensure that the CLCS could issue recommendations concerning the outer limits of the shelf appurtenant to the Parties' coasts—a process that required each Party to consent to the CLCS's review of the other's submission. Contrary to the view Kenya now takes, this was the MOU's exclusive object and purpose.

1.12. The MOU was never ratified in accordance with the requirements of Somalia's Transitional Federal Charter. A short while after the instrument was signed in Nairobi, Somalia's Transitional Federal Parliament voted to reject it. As a consequence, the MOU never entered force in accordance with the Constitution of Somalia.

1.13. Notwithstanding the MOU's questionable status as a binding agreement, Kenya contends that it brings the Parties' maritime boundary dispute within the scope of the first reservation to its Declaration under Article 36(2) of the Statute of the Court, which excludes: "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". It submits that by signing the MOU, the Parties agreed that their entire maritime boundary would be delimited "[o]nly after the CLCS has made its recommendations concerning establishment of the outer limits of the continental shelf" and "[b]y means of a negotiated agreement, not by recourse to the Court".[5]

1.14. Kenya's argument faces a number of formidable hurdles. To succeed in its objection, Kenya has the burden of establishing that the MOU is a valid and binding agreement which:

(1) Contains a clear statement that the Parties must have exclusive recourse to some other method of settling the dispute;

(2) Concerns the entirety of the disputed maritime boundary, including the territorial sea, EEZ and continental shelf, both within and beyond 200 M; and

(3) Provides that recourse to the other method of dispute settlement may only take place *after* the CLCS has made its recommendations on delineation.

1.15. Kenya's submissions do not come close to succeeding on any of these three points.

[5] Preliminary Objections of the Republic of Kenya (hereinafter "KPO") (7 Oct. 2015), para. 3.

1.16. *First*, quite apart from the significant doubt concerning the legal status of the unratified instrument, the text, drafting history and purpose of the MOU do not provide any support for Kenya's claim that it was intended to establish a mechanism for settling the Parties' maritime boundary dispute in whole or in any part. The MOU was concerned exclusively with enabling the delineation of the outer limits of the continental shelf beyond 200 M by the CLCS, as its title makes clear: "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*".[6] This interpretation is reinforced by the text of the MOU, which contains no reference to a particular method of settlement and has no exclusionary language capable of preventing judicial determination of the dispute. This is also confirmed by the preparatory material relating to the drafting of the MOU.

1.17. Kenya has not provided any evidence to the Court to show a different intent in the preparatory material. Not a single word in the material cited by Kenya in its Preliminary Objections suggests that the MOU was concerned with establishing a mechanism (whether exclusive or otherwise) for resolving the disputed maritime boundary. Nor has Somalia been able to locate or identify any material to suggest this was the intention or understanding of the MOU's drafters. Had the Parties intended to confine themselves to reaching a negotiated settlement of their boundary dispute, one would expect to see this clearly

[6] 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 U.N.T.S. 35 (hereinafter "2009 MOU") (7 Apr. 2009) (emphasis added). KPO, Vol. II, Annex 1; MS, Vol. III, Annex 6.

reflected in the contemporaneous correspondence, drafts and diplomatic exchanges. Yet, Kenya has put no documentary evidence into the record to show that the Parties intended to restrict themselves to a particular method of dispute resolution or to exclude the jurisdiction of the Court. In the absence of any such clear or express reference or statement—in the text of the MOU or the material relating to its preparation—Kenya's objection to jurisdiction is untenable and, in Somalia's submission, unarguable.

1.18. The subsequent conduct of the Parties also contradicts Kenya's interpretation. As Somalia will demonstrate, in the years following the MOU Kenya repeatedly described the document as a non-objection agreement. At no point prior to filing its Preliminary Objections did Kenya ever assert that the MOU was an agreement for any other purpose, and it never claimed that it was an agreement to exclude "recourse to some other method or methods of settlement" of the disputed maritime boundary. Somalia has likewise always maintained that the MOU was exclusively concerned with the Parties' CLCS submissions.

1.19. In 2014—at Kenya's invitation—the Parties engaged in detailed and ultimately fruitless negotiations concerning their maritime boundary. During those negotiations it was never suggested that the MOU prescribed a particular means of resolving the dispute. Indeed, Kenya itself even raised the possibility of submitting the dispute to binding international arbitration: a suggestion flatly at odds with the position it now advances before the Court.

1.20. *Second*, and in any event, on its own terms the MOU is plainly limited to matters relating to the outer continental shelf beyond 200 M, and only to matters of delineation. It does not address the continental shelf within 200 M and does not refer (even in passing) to the territorial sea or EEZ. On any view, therefore, the MOU cannot affect the Court's jurisdiction in relation to delimitation of the

territorial sea, EEZ or continental shelf within 200 M. Kenya's attempt to use a document concerning only delineation of the outer continental shelf to bar the Court from addressing delimitation of *any* of the disputed maritime zones is thus fatally flawed.

1.21. *Third*, on Kenya's newly imagined approach, by signing the MOU the Parties intended to enter a binding pact that they would not reach a negotiated settlement in respect of any part of the maritime boundary until *after* the CLCS issued its recommendations on the outer limits of the continental shelf. This is illogical. There is no reason why the Parties would have deliberately agreed that the disputed maritime boundary could *only* be resolved by agreement, while simultaneously agreeing to *exclude* the possibility of agreement until some unknown future date *after* the CLCS completed its delineation recommendations (a process that would inevitably take many years and would have no effect on delimitation).

1.22. Kenya's Preliminary Objections appear to recognise the contradiction inherent in its argument. Kenya's attempt to square the circle in a discreet footnote to its submissions belies the fundamental flaw in its interpretation of the MOU. In that footnote, Kenya asserts that

> "[t]he MOU did not preclude on-going negotiations pending completion of the CLCS review, but provided that the final agreement would only be reached after the CLCS had made its recommendations".[7]

[7] KPO, p. 25, fn. 64.

1.23. There is no logical reason why the Parties would simultaneously have elected to agree that (1) negotiations are the *only* means of settling the boundary dispute; but (2) a negotiated settlement is *excluded* for a potentially indefinite period of time until the CLCS issues recommendations that have no bearing on the dispute subject to negotiation. Kenya's argument treats the MOU both as an agreement to agree *and* as an agreement *not* to agree. That is a patently nonsensical and self-contradictory proposition, and one that is undermined by the negotiations that actually took place. As the evidence before the Court indicates, at no point in those negotiations did Kenya ever indicate that its conduct was premised on the understanding that negotiations could only take place on the basis that they would not reach a conclusion. Kenya's attempt to escape the result of its interpretation highlights the flaw that runs throughout its case.

C. THE CONSEQUENCES OF KENYA'S APPROACH

1.24. Quite apart from the textual and contextual problems with Kenya's reliance on the MOU, the consequences of Kenya's approach also demonstrate that its argument cannot be correct.

1.25. On Kenya's case, the MOU deliberately established bilateral negotiations as the only mechanism for resolving the Parties' disputed maritime boundary. On that basis, any independent judicial determination of the dispute was permanently ruled out, no matter how intractable or unrealistic the Parties' negotiating positions, and regardless of how long they spent unsuccessfully attempting to reach agreement. Either Party could forestall settlement, forever if so desired, simply by adhering to a position the other could not accept.

1.26. As Somalia has explained in its Memorial,[8] there is a fundamental difference of principle between the Parties concerning the location of the maritime boundary in the territorial sea, EEZ and continental shelf (both within and beyond 200 M). Somalia claims an equidistance line following from the three-step process in accordance with the established principles under the Court's jurisprudence and Articles 15, 74 and 83 of UNCLOS, while Kenya advances a novel claim to a boundary along a parallel of latitude. The Parties have already sought to reach a negotiated solution and have had no success. Adjudication by the Court therefore offers the *only* realistic prospect of a clear and binding resolution of the dispute.

1.27. Further, in addition to the consequences in this case, Kenya's submissions would have far-reaching implications for other maritime boundary disputes. Article 74(1) of UNCLOS provides that the delimitation of the EEZ between adjacent or opposite coasts "shall be effected by agreement on the basis of international law". Article 83 contains an identically worded provision in respect of the delimitation of the continental shelf. The fifth operative paragraph of the MOU closely mirrors and is rather obviously drawn from the language of Articles 74 and 83: "The delimitation of maritime boundaries in the areas under dispute … shall be agreed between the two coastal States on the basis of international law".

1.28. If Kenya were correct that this particular language of the MOU is an agreement "to have recourse to some other method or methods of settlement", it would follow that the equivalent language in Article 74 and 83 of UNCLOS (on which that text of the MOU is drawn) would also constitute such an agreement. If so, and on Kenya's approach, the language to be found in those Articles would

[8] MS, paras. 1.17-1.24.

have the effect of automatically depriving the Court of jurisdiction under Article 36(2) of the Statute in respect of *any* dispute concerning the delimitation of the EEZ or continental shelf of a State that is a party to UNCLOS and whose Optional Clause declaration contains a similarly worded reservation.

1.29. As Kenya notes in its Preliminary Objections, the reservation it relies on is "[t]he most frequent reservation" to the acceptance of the Court's compulsory jurisdiction.[9] Of the 34 other States listed in Kenya's Preliminary Objections that have entered the same reservation, 33 have also ratified UNCLOS.[10] It would be remarkable if the mere act of ratifying UNCLOS had the consequence of triggering those States' reservations and thereby ousting the jurisdiction of the Court in respect of any maritime delimitation dispute involving those States. That outcome—which is the logical consequence of Kenya's submission—cannot have been intended by the framers of UNCLOS or its signatories. This provides further confirmation that Kenya's reliance on the MOU is misplaced.

D. THE CONTEXT IN WHICH THE MOU WAS ADOPTED

1.30. Apparently conscious of the evidentiary weaknesses and logical flaws inherent in its argument, Kenya attempts to bolster its Preliminary Objections with a selective and misleading description of the circumstances in which the MOU was drafted, discussed and signed. A proper understanding of the context in which the MOU was produced underscores the conclusion that it was only

---

[9] KPO, para. 142 (citing R. Kolb, *The International Court of Justice* (Hart Publishing, 2013), 464).

[10] Those States are: Australia, Barbados, Belgium, Botswana, Canada, Djibouti, Estonia, the Gambia, Germany, the Republic of Guinea, Honduras, Hungary, India, Ivory Coast, Lesotho, Liberia, Luxembourg, Madagascar, Malawi, Malta, Mauritius, The Netherlands, New Zealand, Nigeria, the Philippines, Poland, Portugal, Senegal, Slovakia, Spain, Sudan, Suriname and the United Kingdom.

concerned with facilitating the delineation of the outer limits of the continental shelf beyond 200 M and was never intended to enshrine a particular method for settling the Parties' maritime boundary dispute. For this reason, Somalia responds in this Written Statement to Kenya's skewed presentation of the facts by providing an accurate account of the relevant factual background.

1.31. In assessing Kenya's argument that the MOU excludes the jurisdiction of the Court in this case, it is appropriate for the Court to have regard to the broader context in which the MOU came to be drafted and agreed in early 2009. Consideration of that context reinforces the implausibility of Kenya's suggestion that the Parties intended to establish a negotiated agreement as the exclusive method of resolving the disputed boundary.

1.32. The MOU was drafted over a very brief period in March 2009. This was a time of considerable flux for Somalia, which was undergoing a delicate transition from almost two decades of civil war, during which the country had effectively ceased functioning as a State. As Somalia has explained in its Memorial,[11] following the armed overthrow of the government in 1991, law and order collapsed and the institutions of government disintegrated. Somalia was plunged into a long period of violence and successive humanitarian disasters, as rival factions battled for control and the country's resources were plundered. For many years there was no effective government in Somalia.

1.33. The grave humanitarian toll of the ongoing conflict, and the increasingly precarious stability of the wider region, ultimately brought about concerted intervention by a range of international bodies acting under the direction of the

[11] *See* MS, paras. 1.11–1.12.

United Nations. With extensive support and guidance from those bodies, the fragile process of re-establishing the framework for a functioning State was begun. As Somalia explains in this Written Statement, that process was very much a work in progress in 2009. A new transitional government had only recently come into office. Years of population displacement and the uncontrolled depletion of Somalia's assets meant that resources and administrative expertise were both in short supply. Terrorism, armed militias and severe poverty all presented existential threats to Somalia's ability to operate as a functioning State. The nascent institutions of the Transitional Federal Government ("TFG") were therefore heavily reliant on outside assistance from the international community in order to carry out the basic tasks of establishing security and protecting Somalia's national interests.

1.34. It was against this background that in early 2009 the U.N. Special Representative of the Secretary General for Somalia ("SRSG") presented to the then newly established TFG drafts of Somalia's preliminary information indicative of the outer limits of its continental shelf beyond 200 M, together with a draft of the MOU, both of which had been prepared with Norway's technical assistance. The documents had been prepared by Norway at the SRSG's initiative, without the TFG's prior knowledge, in order to help Somalia meet the rapidly approaching 13 May 2009 deadline for the filing of preliminary information with the CLCS.

1.35. The TFG was anxious to ensure that Somalia did not suffer further losses of its resources (in this case, those of its continental shelf beyond 200 M) by failing to meet the CLCS deadline. It thus welcomed Norway's assistance. Given its lack of expertise in such matters, the tight time frame and the many other pressing concerns facing the TFG at this time, it naturally deferred to Norway's superior technical expertise and knowledge of CLCS procedure.

1.36. The impending deadline for filing submissions with the CLCS did not have any bearing on the status of the Parties' maritime boundary dispute. Norway's assistance was confined to matters relating to the CLCS. Contrary to the presentation in Kenya's Preliminary Objections, Somalia had virtually no input in negotiating and drafting of the MOU.

1.37. Kenya's suggestion that the Parties intended to restrict themselves to an exclusive method of resolving the disputed maritime boundary is impossible to reconcile with this broader context. At that precarious juncture in its development, Somalia had no interest in binding itself to reach a negotiated settlement, still less a settlement that could not be concluded until after the CLCS made its recommendations on the outer limits of the continental shelf beyond 200 M many years later. On the contrary, Somalia had every reason for keeping all options open, particularly those that would result in a fair, independent and expeditious appraisal of the merits of its claim, and which would not leave it vulnerable to further denudation of its natural resources nor entrench instability in relation to its borders. Having relied heavily on the assistance of the international community, Somalia had no reason to exclude the Court from resolving this issue of immense national importance.

1.38. It follows that Kenya's Preliminary Objections do not merely seek to re-write the MOU, they also seek to re-write the Parties' recent history and to capitalise on Somalia's vulnerability during a delicate transitional moment after years of upheaval.

1.39. After many years of conflict and exploitation, Somalia is proud to be in a position to stand on its own feet, and claim its lawful sovereign rights and jurisdiction in the waters and seabed adjacent to its coast. By making its Application to the Court, Somalia seeks nothing more—and nothing less—than a

fair hearing of the legal merits of the Parties' respective claims concerning their maritime boundary. For the reasons developed in this Written Statement, Kenya's attempt to prevent that from happening is factually and legally without merit.

Section II. Structure of the Written Statement

1.40. Somalia's Written Statement consists of two volumes. Volume I contains the main text. Volume II contains supporting materials.

1.41. The main text of this Written Statement, Volume I, consists of four chapters followed by Somalia's Submissions in response to Kenya's Preliminary Objections.

1.42. After this introduction, **Chapter 2** provides an account of the relevant facts. The chapter responds to Kenya's selective presentation of the facts in its Preliminary Objections. Section I describes the origins of the MOU. Somalia provides a detailed explanation of the circumstances in which the MOU was drafted and signed in 2009. The contemporaneous evidence unequivocally establishes that the Parties never intended the MOU to create a binding mechanism for resolving the disputed maritime boundary. Section II then describes the Parties' subsequent conduct following the conclusion of the MOU. This reinforces the conclusion that the MOU was intended and understood solely as a non-objection agreement in relation to the Parties' CLCS submissions. Section III concludes with an explanation of the significant doubts regarding the legal status of the MOU. It then describes the conduct by Kenya that caused Somalia to file an objection to the consideration of Kenya's submission by the CLCS, and the reasons why that objection was subsequently withdrawn following Somalia's Application to the Court.

1.43. **Chapter 3** explains why the MOU does not fall within the ambit of Kenya's reservation to its Optional Clause Declaration. Section I begins by addressing the correct interpretation of the MOU. It analyses (1) the object and purpose of the MOU; (2) the text of the instrument; (3) the subsequent practice of the Parties; (4) the wider international legal framework, including UNCLOS; and (5) the circumstances in which it was drafted, discussed and signed. These considerations all point to the same conclusion: that the MOU was concerned exclusively with delineation of the continental shelf beyond 200 M and had nothing to do with establishing a method for resolving any part of the disputed maritime boundary, or any issues of delimitation. After establishing the correct interpretation of the MOU, Section II then explains why the MOU does not fall within the scope of Kenya's reservation to its Optional Clause Declaration.

1.44. Finally, **Chapter 4** explains why, even if the MOU had established a binding agreement concerning the procedure for delimitating the disputed boundary—which Somalia emphatically disputes—it was, in any event, nothing more than an agreement to negotiate (*pactum de negociando*), not an obligation to reach agreement (*pactum de contrahendo*). As will be shown, notwithstanding the difficulties presented by Kenya's conduct, the Parties did in fact engage in detailed negotiations in relation to the disputed maritime boundary, and they did so at Kenya's invitation. However, those negotiations ended in deadlock as a result of Kenya's stubborn adherence to a boundary following a parallel of latitude, its intransigent refusal to consider equidistance or the three-step process established in the Court's jurisprudence, and the failure of its representatives to show up at a scheduled final round of negotiations. In these circumstances, the Parties exhausted any purported obligation to negotiate. Based on the diametrically opposed positions of the Parties, there is no prospect of further negotiations yielding a final agreement. It follows that the MOU cannot deprive the Court of jurisdiction to adjudicate this dispute.

CHAPTER 2. FACTUAL BACKGROUND

2.1. This Chapter presents the facts relating to the origins and signing of the MOU, as well as the conduct of the Parties subsequent to its execution. In setting out these facts, Somalia will address and correct the errors and mischaracterizations set forth in Kenya's Preliminary Objections.

2.2. The Chapter is organised as follows. **Section I** addresses the origins of the MOU; in particular, it addresses the circumstances in which it was proposed, drafted and executed in April 2009. The contemporaneous evidence—including from Norway (which drafted and promoted the idea of the MOU), Kenya and Somalia—shows that the Parties' intent was exclusively to facilitate the consideration of their respective CLCS submissions by committing each not to object to the Commission's consideration of the other's submission. There is no evidence that Norway, Somalia or Kenya ever intended the MOU to do anything else, let alone create a binding agreement on the method for settling the Parties' maritime boundary dispute, as Kenya now claims.

2.3. **Section II** presents the evidence concerning the Parties' subsequent conduct. The evidence shows that at no time following the execution of the MOU did either Party act in a manner consistent with Kenya's newly minted claim that the MOU was intended to constitute an agreed means of settling their boundary dispute. Indeed, the Parties' conduct is entirely inconsistent with Kenya's claim.

2.4. Finally, **Section III** reviews the facts relating to the Parties' differing views on the status of the MOU. Given the circumstances of its adoption and the subsequent conduct of the Parties, Somalia has repeatedly expressed doubts about the legal effect of the MOU. This section presents the relevant facts and shows that even if the MOU were an agreement in force (*quod non*), Somalia is in full

compliance with the only obligation it was intended to impose: that it not object to the Commission's consideration of Kenya's Submission.

Section I. The Origins of the MOU

2.5. Kenya's Preliminary Objections assert that the timing of the April 2009 MOU "was prompted by the 13 May 2009 deadline fixed by the CLCS for the submissions on the outer limits of the continental shelf, *and* the need for an agreed procedure for the full and final delimitation of the maritime boundary".[12] Kenya is correct about the importance of the 13 May 2009 CLCS deadline. It is incorrect, however, about the MOU being prompted by a "need" for "an agreed procedure" for the delimitation of the maritime boundary. There is no evidence before the Court to support that contention, or that the MOU was intended to have anything to do with resolving the Parties' maritime boundary dispute.

2.6. Under Article 4 of Annex II to UNCLOS, coastal States were initially obligated to make submissions to the CLCS on the limits of their continental shelf beyond 200 M within 10 years of UNCLOS entering into force for them. Many coastal States, particularly developing States like Somalia and Kenya, faced challenges in meeting this deadline. Accordingly, the Eleventh Meeting of States Parties to the Convention in 2001 decided that for States for which the Convention had entered into force prior to 13 May 1999 (which included Somalia and Kenya), the 10-year period would be extended to 13 May 2009.[13]

---

[12] KPO, para. 12 (emphasis added).

[13] U.N. Convention on the Law of the Sea, Meeting of States Parties, Eighteenth Meeting, *Decision regarding the workload of the Commission on the Limits of the Continental Shelf and the ability of States, particularly developing States, to fulfill the requirements of article 4 of annex II to the United Nations Convention on the Law of the Sea, as well as the decision contained in*

2.7. By the middle of 2008, it had become evident that many developing nations lacked the requisite technical and financial resources to meet even this extended deadline. On 20 June 2008, the CLCS decided that the filing obligation could be satisfied by the submission of "preliminary information" indicative of the outer limits of the continental shelf beyond 200 M.[14] Full and final submissions could follow thereafter.

2.8. Somalia was among the States that encountered difficulty meeting the extended 13 May 2009 deadline. Its problems were exacerbated by the prevailing domestic situation. As noted in Chapter 1 of this Written Statement and in the Memorial,[15] Somalia entered a long period of civil war following a 1991 armed rebellion against the government. For many years thereafter, there was no effective national governing authority.[16]

SPLOS/72, paragraph (a), U.N. Doc. SPLOS/183 (20 June 2008), p. 2. MS, Vol. III, Annex 58; U.N. Convention on the Law of the Sea, Meeting of States Parties, Eleventh Meeting, *Decision regarding the date of commencement of the ten-year period for making submissions to the Commission on the Limits of the Continental Shelf set out in article 4 of Annex II to the United Nations Convention on the Law of the Sea*, U.N. Doc. SPLOS/72 (29 May 2001), para. (a) (stating: "In the case of a State Party for which the Convention entered into force before 13 May 1999, it is understood that the ten-year time period referred to in article 4 of Annex II to the Convention shall be taken to have commenced on 13 May 1999".). MS, Vol. III, Annex 55.

[14] U.N. Convention on the Law of the Sea, Meeting of States Parties, Eighteenth Meeting, *Decision regarding the workload of the Commission on the Limits of the Continental Shelf and the ability of States, particularly developing States, to fulfill the requirements of article 4 of annex II to the United Nations Convention on the Law of the Sea, as well as the decision contained in SPLOS/72, paragraph (a)*, U.N. Doc. SPLOS/183 (20 June 2008), p. 2. MS, Vol. III, Annex 58 (stating: "It is understood that the time period referred to in article 4 of annex II to the Convention and the decision contained in SPLOS/72, paragraph (a), may be satisfied by submitting to the Secretary General preliminary information indicative of the outer limits of the continental shelf beyond 200 nautical miles and a description of the status of preparation and intended date of making a submission in accordance with the requirements of article 76 of the Convention and with the Rules of Procedure and the Scientific and Technical Guidelines of the Commission on the Limits of the Continental Shelf".); KPO, paras. 26-30.

[15] *See, e.g.*, MS, para. 1.11.

[16] *See, e.g.*, U.N. Environment Programme, *The State of the Environment in Somalia: A Desk Study* (Dec. 2005), p. 13. MS, Vol. IV, Annex 88; U.N. Peacekeeping, "U.N. Operation in

2.9. After a number of failed attempts to establish a stable government, the TFG was set up in 2004, initially for a five-year term. The Transitional Federal Institutions included a Transitional Federal Charter and a Transitional Federal Parliament, the purposes of which were to begin to help reconstitute Somalia as functioning State.[17]

2.10. By early 2007, the domestic situation had stabilised enough that then-TFG President Abdullahi Yusuf Ahmed was able to establish a presence in Mogadishu for the first time since 2004.[18] At approximately the same time, the U.N. Security Council approved the creation of AMISOM, an African Union peacekeeping mission to help promote peace and security in the country, and assist in the reconstruction process.[19] Nevertheless, fighting between forces aligned with the TFG and Al-Shabaab militants continued throughout much of 2007 and 2008.

2.11. It was in this context that a new TFG came to power in early 2009 with the appointment of a President and a cabinet, known as the Council of Ministers.[20] The new President and Council of Ministers were sworn in on 22

Somalia I (UNOSOM I)", *available at* http://www.un.org/en/peacekeeping/missions/past/unosomi.htm (last accessed 11 Jan. 2016). Written Statement of Somalia (hereinafter "WSS") (5 Feb. 2016), Vol. II, Annex 15; U.N. Peacekeeping, "U.N. Operation in Somalia II (UNOSOM II)", *available at* http://www.un.org/en/peacekeeping/missions/past/unosom2.htm (last accessed 11 Jan. 2016). WSS, Vol. II, Annex 16; U.N. Peace Operations, "UNSOM United Nations Assistance Mission in Somalia", *available at* https://unsom.unmissions.org/ (last accessed 11 Jan. 2016). WSS, Vol. II, Annex 18.

[17] A. C. Beier and E. Stephansson, *Environmental and Climate Change Policy Brief: Somalia* (28 Oct. 2012), p. 16. MS, Vol. IV, Annex 92. The Transitional Federal Institutions expired in August 2012; it was at this time that the Federal Government of Somalia was established. *Ibid*.

[18] C. Majtenyi, "Somali President in Capital for Consultations", *VOA* (8 Jan. 2007). WSS, Vol. II, Annex 29.

[19] U.N. Security Council, *Resolution 1744 (2007): Adopted by the Security Council at its 5633rd meeting, on 20 February 2007*, U.N. Doc. S/RES/1744 (21 Feb. 2007). WSS, Vol. II, Annex 8.

[20] *See* U.S. Central Intelligence Agency, *The World Factbook: Somalia*, *available at* https://www.cia.gov/library/publications/the-world-factbook/geos/so.html (last visited 3 Apr. 2015), p. 1. MS, Vol. IV, Annex 96.

February 2009,[21] less than three months before the 13 May 2009 deadline for the submission of preliminary information to the CLCS. That submission was one of the first tasks that demanded the new government's attention.

2.12. When it took office, the new TFG was unaware that the SRSG, Mr. Ahmedou Ould Abdallah, had initiated preparation of Somalia's preliminary information in October 2008 on Somalia's behalf. The SRSG had been assisted in this effort by the Government of Norway.[22] Kenya's Preliminary Objections correctly observe: "Norway came to the assistance of Somalia in preparing its submission to the CLCS. The key figure in this process was a senior Norwegian diplomat and jurist, Mr. Hans Wilhelm Longva, *Ambassadeur en Mission Spéciale* of the Norwegian Ministry of Foreign Affairs".[23] Mr. Harald Brekke, Norway's CLCS member at the time, also provided assistance to Somalia with the submission to the CLCS.[24]

---

[21] 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* (hereinafter "Somalia, *Preliminary Information to the CLCS*") (14 Apr. 2009), p. 4. MS, Vol. III, Annex 66.

[22] *See Note Verbale* from the Permanent Mission of Norway to the United Nations to the Secretariat of the United Nations (17 Aug. 2011), para. 7 (stating: "In October 2008 the SRSG for Somalia, Mr. Ahmedou Ould Abdallah, initiated the preparation on behalf of Somalia of preliminary information indicative of the outer limits of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, in accordance with the decision contained in documents SPLOS/183 from the eighteenth Meeting of States Parties to UNCLOS. In the preparation of this material the SRSG accepted an offer of assistance from the Norwegian Government".). KPO, Vol. II, Annex 4.

[23] KPO, para. 28.

[24] *Note Verbale* from the Permanent Mission of Norway to the Secretariat of the United Nations (17 Aug. 2011), para. 7. KPO, Vol. II, Annex 4. *See also* Somalia, *Preliminary Information to the CLCS* (14 Apr. 2009), p. 5. MS, Vol. III, Annex 66 ("The SRSG and the Transitional Federal Government of the Somali Republic were moreover assisted in the preparation of the present submission by Mr. Harald Brekke, member of the Commission (1997 - present). No advice was provided by any other member of the Commission".); Federal Republic of Somalia, *Continental Shelf Submission of the Federal Republic of Somalia: Executive Summary* (21 July 2014), p. 4.

2.13. Norway's help with Somalia's preliminary information was in keeping with its actions throughout the region. In co-operation with the Economic Community of West African States, it had a similar assistance programme in place for West African countries.[25] Among the other countries that received Norway's assistance was Kenya, which also received advice from Mr. Brekke in the preparation of its CLCS submission.[26]

2.14. The TFG became aware of the SRSG's initiative and Norway's assistance only a little more than two weeks after it had come into office. As recounted in Somalia's Preliminary Information, transmitted to the CLCS on 8 April 2009:

> "The new Transitional Federal Government of the Somali Republic was sworn in on 22 February 2009. At a meeting in Nairobi on 10 March 2009 between the Deputy Prime Minister and Minister of Fisheries and Marine Resources of the Transitional Federal Government of the Somali Republic, Professor Abdirahman Adan Ibrahim Ibbi, the Deputy Special Representative of the Secretary General for Somalia, Mr Charles Petrie, and Ambassador Hans Wilhelm Longva from the Royal Norwegian Ministry of Foreign Affairs, the Transitional Federal Government of the Somali

---

MS, Vol. IV, Annex 70. Mr. Brekke departed the CLCS in 2012. U.N. Commission on the Limits of the Continental Shelf "Membership of the Commission", *available at* http://www.un.org/Depts/los/clcs_new/commission_members_1997_2012.htm (last accessed 11 Jan. 2016). WSS, Vol. II, Annex 18.

[25] Norwegian Ministry of Foreign Affairs, *Press Release: Somalia submits preliminary information indicative of the outer limits of its continental shelf with Norwegian assistance* (17 Apr. 2009), p. 3. KPO, Vol. II, Annex 5.

[26] 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), p. 10. MS, Vol. III, Annex 59.

> Republic was informed about the initiative of the SRSG and of the Norwegian assistance".[27]

2.15. At this same meeting, Norway's Ambassador Longva simultaneously presented the Somalis with a draft of the preliminary information and a draft of the MOU. According to an undated email from Ambassador Longva to Ms. Juster Nkoroi, the Chairperson of Kenya's Task Force on the Delineation of Kenya's Outer Continental Shelf:

> "At the meetings [on 10 March] I presented to the Deputy Prime Minister the draft submission of preliminary information indicative of the outer limits of the continental shelf of Somalia beyond 200 nautical miles which has been prepared at the initiative of the Special Representative of the Secretary General for Somalia, Mr. Ahmedou Ould Abdallah, with the assistance of the Government of Norway. Furthermore, I presented to the Deputy Prime Minister the Draft Memorandum of Understanding which we discussed when we met in Nairobi".[28]

2.16. Kenya's Preliminary Objections are thus incorrect when they assert that "[t]he MOU was proposed by Somalia to Kenya".[29] The proposal originated from Norway, which was then providing technical assistance to both countries. Indeed, the TFG was only made aware of the MOU at the same time it was made aware

---

[27] Somalia, *Preliminary Information to the CLCS* (14 Apr. 2009). MS, Vol. III, Annex 66; *Note Verbale* from H.E. Omar Abdirashid Ali Sharmarke, Prime Minister of the Transitional Federal Government of the Somali Republic, to H.E. Ban Ki-Moon, Secretary General of the United Nations, No. XRW/0065/06/09 (8 Apr. 2009). WSS, Vol. II, Annex 22.

[28] Email from Amb. Hans Wilhelm Longva to Ms. Juster Nkoroi (Mar. 2009). KPO, Vol. II, Annex 6. *See also* Somalia, *Preliminary Information to the CLCS* (14 Apr. 2009), p. 5. MS, Vol. III, Annex 66; Federal Republic of Somalia, *Continental Shelf Submission of the Federal Republic of Somalia: Executive Summary* (21 July 2014). MS, Vol. IV, Annex 70; KPO, para. 26.

[29] KPO, para. 44(a).

that the SRSG had taken the initiative to prepare preliminary information on Somalia's behalf (with Norway's help).

2.17. The drafts of the preliminary information to be submitted to the CLCS and the MOU to be signed with Kenya were presented to Somalia as a package deal, which the TFG understood to be necessary to avoid "los[ing] the continental shelf".[30] According to the transcript of an October 2009 meeting of the Somali Diaspora in London with the then-Prime Minister and Deputy Prime Minister (included as Annex 15 to Kenya's Preliminary Objections), the Prime Minister described the TFG's initial meetings with the SRSG and Ambassador Longva as follows:

> "The issue, the way it begun, on its outset, the man in charge of the UN, Weled Abdallah [the SRSG], accompanied by another man, a maritime expert, paid us a visit. He told us: are you aware that in May 12th [sic] you have a deadline? A deadline of which if we don't ask for its extension, due to this so-called 'continental shelf' that our ocean is likely to be taken over by an organisation by the name: International Sea[bed Authority]".[31]

2.18. Kenya's Preliminary Objections also incorrectly assert that "[t]he draft MOU was accepted, first by Somalia, and then by Kenya".[32] In fact, the

---

[30] Network Al Shahid, *Press Release issued by former Somali Minister of National Planning and International Cooperation, Dr. Abdirahman Abdishakur* (7 July 2012), in which he recounts that "[a]fter the decision by the TFG cabinet and minister [to approve the MOU], I was called by the then Prime Minister Omar Abdirashid who told me to sign the MoU with Kenya adding that there was a deadline to beat (07.04.2009) [sic] which if Somalia misses, it can lose the continental shelf". KPO, Vol. II, Annex 13.

[31] Transcript of a Meeting of the Somali Diaspora in London with Somali Prime Minister Omar Abdirashid Ali Sharmarke and Dr. Abdirahman Adishakur Warsame. KPO, Vol. II, Annex 15.

[32] KPO, para. 34.

contemporaneous evidence shows that Kenya had been made aware of—and then accepted—the proposal for an MOU before the matter had ever been brought to Somalia's attention. Indeed, this was before the TFG had even been made aware of the impending CLCS deadline.

2.19. The undated email from Ambassador Longva to Ms. Nkoroi quoted above at paragraph 2.15 makes this clear. When Ambassador Longva reports to Ms. Nkoroi that he "presented to the Deputy Prime Minister the Draft Memorandum of Understanding *which we discussed when we met in Nairobi*",[33] it is clear that he is referring to an earlier conversation about the MOU between himself and Ms. Nkoroi.

2.20. It is also clear that Somalia had very little input on Norway's draft of the MOU. In fact, the record reflects only a single, purely stylistic change to the title (not even the body) of the document requested by Somalia.[34] The evidence submitted with Kenya's Preliminary Objections reflects a larger number of changes requested by Kenya.[35] Because Somalia was frequently not copied on emails between Ambassador Longva and Ms. Nkoroi and the other members of the Kenyan government with whom he was communicating,[36] it is not in a

---

[33] Email from Amb. Hans Wilhelm Longva to Ms. Juster Nkoroi (Mar. 2009) (emphasis added). KPO, Vol. II, Annex 6; *See also* Somalia, *Preliminary Information to the CLCS* (14 Apr. 2009), p. 5. MS, Vol. III, Annex 66; Federal Republic of Somalia, *Continental Shelf Submission of the Federal Republic of Somalia: Executive Summary* (21 July 2014). MS, Vol. IV, Annex 70; KPO, para. 26.

[34] Email from Amb. Hans Wilhelm Longva to Mr. James Kihwaga KPO, Vol. II, Annex 14.

[35] *See* Email exchange between Ms. Edith K. Ngungu and Amb. Hans Wilhelm Longva (30 Mar. 2009). KPO, Vol. II, Annex 9; Email exchange between Ms. Edith K. Ngungu and Mr. Hans Wilhelm Longva (30–31 Mar. 2009). KPO, Vol. II, Annex 10.

[36] *See, e.g., ibid.*

position to know whether Kenya did or did not also make other changes to the draft.

2.21. Norway's draft, amended to reflect what Kenya characterises as the "purely technical and formalistic" changes requested by the Parties,[37] was signed by Somalia and Kenya in Nairobi on 7 April 2009, less than a month after it had first been presented to the TFG. The Minister for National Planning and International Cooperation, Abdirahman Abdishakur Warsame, signed on behalf of Somalia; the Minister of Foreign Affairs, Moses Wetang'ula, signed on behalf of Kenya.[38] The signed original of the MOU bears only Kenya's coat of arms, not Somalia's.[39] This reflects the fact that it was finalised and prepared for signature at Kenya's Ministry of Foreign Affairs.[40]

2.22. The contemporaneous evidence shows that the MOU was intended solely to facilitate the consideration of the Parties' respective CLCS submissions by granting the mutual consent required, while at the same time making clear that those submissions were without prejudice to the delimitation of the Parties' maritime boundary. The document's title itself reflects this limited goal: "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*

---

[37] KPO, para. 34.

[38] 2009 MOU. KPO, Vol. II, Annex 1; MS, Vol. III, Annex 6.

[39] *See ibid*.

[40] *See* Email from Amb. Hans Wilhelm Longva to Mr. James Kihwaga. KPO, Vol. II, Annex 14 (asking Kenyan representative to make necessary edits); 2009 MOU. KPO, Vol. II, Annex 1; MS, Vol. III, Annex 6 (showing Kenyan government seal on the executed document).

Continental Shelf Beyond 200 Nautical Miles to the Commission of the Limits of the Continental Shelf".[41]

2.23. Annex 25 to Kenya's Preliminary Objections is a copy of Ambassador Longva's prepared remarks at the *Pan African Conference on Maritime Boundary Delimitation and the Continental Shelf* that took place on 9-10 November 2009 (just seven months after the MOU was signed). Ambassador Longva discussed the MOU in some detail. He stated:

> "On 7 April 2009 Kenya and Somalia signed a Memorandum of Understanding where they agree that each of them will make separate submissions to the CLCS, that may include areas under dispute, without regard to the delimitation of maritime boundaries between them, and where *they give their prior consent to the consideration by the CLCS of these submissions in the areas under dispute*. Furthermore, it is stipulated that the submissions made before the CLCS and the recommendations approved by the CLCS thereon shall not prejudice the positions of the two coastal States with respect to the maritime dispute between them and shall be without prejudice to the future delimitation of maritime boundaries in the areas under dispute, including the delimitation of the continental shelf beyond 200 nautical miles".[42]

2.24. There is no indication in Ambassador Longva's statement that Norway intended the MOU to do anything other than facilitate the consideration of the Parties' respective submissions to the CLCS on the outer limits of their

---

[41] 2009 MOU (emphasis added). KPO, Vol. II, Annex 1; MS, Vol. III, Annex 6.

[42] Amb. Hans Wilhelm Longva, *Prepared Remarks at Pan African Conference on Maritime Boundary Delimitation and the Continental Shelf, Accra* (9–10 Nov. 2009) (emphasis added), p. 114. KPO, Vol. II, Annex 25.

continental shelves. There is nothing in the record to suggest that Norway intended to create for the Parties an agreement on the method—let alone the exclusive method—for resolving their maritime boundary dispute. The only goal stated was to give the necessary consent for the Commission's consideration of each of their submissions, while at the same time making clear that this was without prejudice to their different positions on delimitation of the maritime boundary.

2.25. Kenya's Preliminary Objections point to no evidence—and there is none in the record before the Court—that either Somalia or Kenya understood the MOU differently than Norway. There is no suggestion in any of the exchanges leading to the signing of the MOU that anyone involved in the process ever believed that the MOU created an agreed procedure for settling the Parties' maritime boundary dispute.[43]

2.26. In fact, the evidence is to the contrary. Minister Warsame was authorised to sign the MOU on Somalia's behalf by means of a 7 April 2009 letter from the then-Prime Minister.[44] That letter—which itself was drafted by Norway, not

[43] *See generally* Email from Amb. Hans Wilhelm Longva to Ms. Juster Nkoroi (Mar. 2009). KPO, Vol. II, Annex 6; Email exchange between Ms. Rina Kristmoen, Hon. Prof. Abdirahman Haji Adan Ibbi, Amb. Hans Wilhelm Longva, and Ms. Juster Nkoroi (10–22 Mar. 2009). KPO, Vol. II, Annex 7; Email exchange between Amb. Hans Wilhelm Longva, Hon. Prof. Abdirahman Haji Adan Ibbi and Ms. Juster Nkoroi (27 Mar. 2009). KPO, Vol. II, Annex 8; Email exchange between Ms. Edith K. Ngungu and Amb. Hans Wilhelm Longva (30 Mar. 2009). KPO, Vol. II, Annex 9; Email exchange between Ms. Edith K. Ngungu and Mr. Hans Wilhelm Longva (30–31 Mar. 2009). KPO, Vol. II, Annex 10; Email from Amb. Hans Wilhelm Longva to Mr. James Kihwaga. KPO, Vol. II, Annex 14.

[44] *See* Email from Hon. Prof. Abdirahman Haji Adan Ibbi to Hon. Abdirahman Abdishakur Warsame, Minister of Planning and International Cooperation of Somalia (7 Apr. 2009). WSS, Vol. II, Annex 21.

Somalia[45]—states that the Minister had authorization to "[s]ign a memorandum of understanding between the Government of the Republic of Kenya and the Transitional Government of the Somali Republic *to grant no-objection to each other in respect of submission on the outer limits of the Continental Shelf* beyond 200 Nautical Miles to the Commission on the Limits of the Continental Shelf".[46] Minister Warsame's authorization extended no further than that narrow and limited purpose.

2.27. In keeping with the fact that it understood the MOU and its preliminary information to be a package deal, Somalia transmitted its preliminary information indicative of the outer limits of the continental shelf beyond 200 M to the CLCS on 8 April 2009, the day after signing the MOU.[47] Kenya's full submission followed shortly afterwards, on 6 May 2009.[48]

2.28. The Executive Summary to Kenya's submission refers to the MOU in the section captioned "Maritime Delimitations". With respect to the delimitation with Somalia, the Executive Summary states:

---

[45] Email from Amb. Hans Wilhelm Longva to Hon. Prof. Abdirahman Haji Adan Ibbi, Deputy Prime Minister and Minister of Fisheries and Marine Resources of Somalia (3 Apr. 2009). WSS, Vol. II, Annex 20.

[46] *See* Email from Hon. Prof. Abdirahman Haji Adan Ibbi to Hon. Abdirahman Abdishakur Warsame, Minister of Planning and International Cooperation of Somalia (7 Apr. 2009) (emphasis added). WSS, Vol. II, Annex 21. On 7 April, Minister Warsame and Ambassador Longva received a letter of authorization, and the MOU was signed that day. *Id.*; 2009 MOU. KPO, Vol. II, Annex 1; MS, Vol. III, Annex 6.

[47] *Note Verbale* from H.E. Omar Abdirashid Ali Sharmarke, Prime Minister of the Transitional Federal Government of the Somali Republic, to H.E. Ban Ki-Moon, Secretary General of the United Nations, No. XRW/0065/06/09 (8 Apr. 2009). WSS, Vol. II, Annex 22. *See also* Somalia, *Preliminary Information to the CLCS* (14 Apr. 2009). MS, Vol. III, Annex 66.

[48] 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). MS, Vol. III, Annex 59; United Nations, Division for Ocean Affairs and the Law of the Sea, *Receipt of the submission made by the Republic of Kenya to the Commission on the Limits of the Continental Shelf*, U.N. Doc. CLCS.35.2009.LOS (11 May 2009). MS, Vol. III, Annex 60.

> "Section 4(4) of the *Maritime Zones Act, 1989* provides that the exclusive economic zone boundary between Kenya and Somalia shall be delimited by notice in the Gazette by the Minister pursuant to an agreement between Kenya and Somalia on the basis of international law. Subsequently, the two countries have signed a Memorandum of Understanding (MOU) dated 7 April 2009 *granting each other no objection in respect of submissions on the outer limits of the continental shelf* to the Commission on Limits of the Continental Shelf".[49]

2.29. Kenya claims no other effect for the MOU beyond the mutual grant of no-objection. There is no suggestion that Kenya considered the MOU to constitute an agreement on means of dispute settlement.

2.30. As discussed in Chapter 3 of this Written Statement, the plain text of the MOU is consistent with this understanding of the MOU. An analysis of the text confirms that the Parties intended only to consent to the Commission's consideration of each other's submissions on the outer limits of the continental shelf beyond 200 M, *not* to create an agreed method of settling their maritime boundary dispute. Because the interpretation of that text is a question of law, Somalia addresses it in Chapter 3.

Section II. The Parties' Subsequent Conduct

2.31. The evidence of the Parties' subsequent conduct is consistent with the contemporaneous material surrounding the preparation and adoption of the MOU.

---

[49] 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) (emphasis added). MS, Vol. III, Annex 59.

That conduct—including Kenya's own actions—disproves Kenya's argument that the MOU was intended to be anything more than a non-objection agreement.

2.32. Kenya submitted the MOU for registration with the U.N. Secretariat pursuant to Article 102 of the Charter in June 2009, two months after it was signed.[50] Kenya's Preliminary Objections contain an internal memorandum from Ms. Jacqueline Moseti of Kenya's Permanent Mission to the U.N. to the Head of the Legal Division of Kenya's Ministry of Foreign Affairs confirming the MOU's registration. After noting the fact of registration, Ms. Moseti reminded the Head of the Legal Division: "The MOU *is 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*".[51] No other purpose is ascribed to the MOU.

2.33. Kenya made its oral presentation to the CLCS on 3 September 2009.[52] According to the official CLCS records of the session, Ms. Nkoroi (the same Ms. Nkoroi who was involved in the conclusion of the MOU) stated that

> "pending negotiations with the Transitional Federal Government of the Republic of Somalia, provisional arrangements of a practical nature had been entered into, in accordance with article 83, paragraph 3, of the Convention. These arrangements are contained in a memorandum of understanding signed on 7 April 2009, whereby *the*

---

[50] *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 UN Secretariat (14 Aug. 2009), p. 75. KPO, Vol. II, Annex 17.

[51] *Ibid.*, p. 74 (emphasis added).

[52] United Nations, Commission on the Limits of the Continental Shelf, *Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the progress of work of the Commission*, U.N. Doc. CLCS/64 (1 Oct. 2009), para. 93, MS, Vol. III, Annex 61.

> *parties undertake not to object to the examination of their respective submissions*. In this connection, Ms. Nkoroi pointed out that one of the notes verbales from Somalia dated 19 August 2009 was consistent with the memorandum of understanding and confirmed that, at an appropriate time, *a mechanism will be established to finalize the maritime boundary negotiations with Somalia*".[53]

2.34. Here too, there is no suggestion that the MOU was seen by Kenya as anything more than an "undertak[ing] not to object to the examination of the[] respective submissions" of Somalia and Kenya. Moreover, Kenya's statement that "at the appropriate time a mechanism *will be established* to finalize the maritime boundary negotiations" means that it did not then consider that any such mechanism yet existed. This stands in stark contrast with the argument in Kenya's Preliminary Objections that the MOU not only *did* establish such a mechanism, but that it did so to the *preclusion* of all other mechanisms, including recourse to the Court.

2.35. Kenya's new argument also contrasts with its 24 October 2014 *Note Verbale* to the Secretary General of the U.N. protesting Somalia's February 2014 objection to the CLCS's consideration of Kenya's Submission. (The reasons for Somalia's objection are discussed in Section III below.) That *Note* demonstrates that, even as late as two months after Somalia instituted proceedings in this case, Kenya did not regard the MOU as constituting an agreement on a means of settling the Parties' maritime boundary dispute, or precluding dispute settlement before the CLCS had acted. The *Note* states, *inter alia*:

---

[53] *Ibid.* (emphasis added).

> "Kenya confirms that prior to the filing of her Submission to the Commission on 6 April [sic] … Kenya had, in the spirit of understanding and cooperation, negotiated arrangements of a practical nature with the Transitional Federal Government of the Republic of Somalia in accordance with Article 83, paragraph 3, of the Convention. These arrangements were contained in a Memorandum of Understanding (hereinafter MOU) signed on 7th April 2009, *where by both parties, undertook not to object to the examination of their respective submissions*, At the time, Kenya indicated to the Commission that pending further negotiations, *a mechanism will be established to finalise the maritime boundary negotiations with Somalia*".[54]

2.36. Two points emerge from this. *First*, the effect of the MOU was limited to mutual non-objection to the CLCS's consideration of the Parties' respective submissions on the outer limits of the continental shelf. *Second*, and relatedly, no mechanism "to finalise the maritime boundary negotiations with Somalia" had yet been agreed.

2.37. The Parties' initiation and conduct of negotiations on boundary delimitation long before the CLCS acted on either submission constitutes further proof that the MOU was not intended or understood as an agreement on a mechanism for resolving the boundary dispute.

2.38. In its Preliminary Objections, Kenya states:

> "On 31 May 2013, the Kenyan Cabinet Secretary for Foreign Affairs (Hon. Amina Mohamed) and

[54] *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 Oct. 2014), p. 2 (emphasis added). MS, Vol. III, Annex 50.

> the Somali Minister for Foreign Affairs (Hon. Fauzia Yusuf Adam) issued a Joint Statement in which 'the two ministers underlined the need to work on a framework of modalities for embarking on maritime demarcation'".[55]

2.39. If in May 2013 there was a "need to work on a framework for embarking on maritime demarcation", it means that no such framework had yet been agreed—in the MOU or otherwise. Moreover, documents annexed to Kenya's Preliminary Objections show that the 2013 initiative to "embark[] on maritime delimitation" came from Kenya.[56] A contemporaneous newspaper article supplied by Kenya refers, for example, to a "request from Kenya to re-open talks to demarcate maritime boundaries".[57]

2.40. Somalia did not initially consider it opportune to enter into maritime delimitation negotiations. As of May 2013, the new President of what by then had become the Federal Republic of Somalia, H.E. Hassan Sheikh Mohamoud, had been in power for just a few months and was not yet prepared to take the issue up with Kenya. Somalia therefore declined Kenya's first invitation.[58]

2.41. Kenya renewed its initiative early in 2014. As recounted in Somalia's Memorial,[59] the Somali Prime Minister, H.E. Abdiweli Sheikh Ahmed, met the Deputy President of Kenya, H.E. Wilham Ruto, and other senior Kenyan

---

[55] KPO, para. 88.

[56] *See, e.g.*, "Somalia Cabinet rejects appeal for talks on border dispute with Kenya", *Hiiraan* (10 June 2013), p. 1. KPO, Vol. II, Annex 32.

[57] *Ibid*.

[58] *See* KPO, para. 90 (quoting Somali Council of Ministers): "The Federal Government of Somalia does not consider it appropriate to open new discussions on maritime demarcation or limitations on the continental shelf with any parties".

[59] MS, para 3.43.

Officials in Nairobi on 19 February 2014.[60] During the meeting, Kenya's Minister of Foreign Affairs and International Trade reiterated "the willingness of the Government of Kenya to engage the Somali Government in regards to *the existing dispute relating to the delimitation of the maritime boundary* between the two countries".[61] Kenya followed up with a *Note Verbale* dated 7 March 2014 inviting Somalia's Minster of Foreign Affairs to meet with his counterpart in Nairobi.[62]

2.42. This time, Somalia accepted Kenya's invitation by means of a diplomatic note dated 13 March 2014.[63] Somalia confirmed that the time was right to "meet with an official delegation representing the Government of Kenya," and underscored its "commitment to a speedy resolution of the dispute between our sisterly countries regarding the maritime boundary".[64]

2.43. The Parties' Ministers of Foreign Affairs met in Nairobi on 21 March and concluded that a technical meeting between the two States should be held

---

[60] *Letter* from H.E. Dr. Abdirahman Beileh, Minister of Foreign Affairs and International Cooperation of the Federal Republic of Somalia, to H.E. Ms. Amina Mohamed, Minister of Foreign Affairs & International Trade of the Republic of Kenya, No. MOFA/SER/MO/ /2014 (13 Mar. 2014). MS, Vol. III, Annex 43.

[61] *Ibid.* (emphasis added).

[62] *Note Verbale* from the Ministry of Foreign Affairs and International Trade of the Republic of Kenya to the Embassy of the Federal Republic of Somalia in Nairobi, No. MFA. PROT/7/8/1 (7 Mar. 2014). WSS, Vol. II, Annex 23.

[63] *Letter* from H.E. Dr. Abdirahman Beileh, Minister of Foreign Affairs and International Cooperation of the Federal Republic of Somalia, to H.E. Ms. Amina Mohamed, Minister of Foreign Affairs & International Trade of the Republic of Kenya, No. MOFA/SER/MO/ /2014 (13 Mar. 2014). MS, Vol. III, Annex 43.

[64] *Ibid*.

"immediately".[65] A first round of bilateral negotiations was therefore held in Nairobi on 26-27 March 2014.[66] Neither Party considered the MOU an obstacle—whether legal or otherwise—to the conduct of meetings aimed at resolving the dispute.

2.44. Kenya argues in its Preliminary Objections that "the primary purpose of the March 2014 meetings was to secure Somalia's consent to CLCS review, in order to resume and eventually conclude the method of settlement agreed under the MOU".[67] There is no evidence to support that assertion. Indeed, all the evidence is to the contrary.

2.45. As Somalia explained in its Memorial,[68] the Kenyan delegation prepared a draft agenda in advance of the meeting, which contained a line item referring to the MOU.[69] Upon reviewing the draft agenda, the Somali delegation stated its view that the MOU was without effect.[70] It therefore insisted that all references to the MOU be deleted from the agenda.[71] Kenya agreed to the deletion and amended the agenda accordingly. Tellingly, the title of the agreed agenda is

---

[65] Government of Somalia and Government of Kenya, *Joint Report on the Kenya-Somali Maritime Boundary Meeting, 26-27 Mar. 2014* (hereinafter "Somalia and Kenya, *Joint Report on Maritime Boundary Meeting, 26-27 Mar. 2014*") (1 Apr. 2014), p. 1. MS, Vol. III, Annex 31.

[66] *Ibid*.

[67] KPO, para. 99.

[68] MS, para. 3.46.

[69] Federal Republic of Somalia, *Report on the Meeting between The Federal Republic of Somalia and The Republic of Kenya On Maritime Boundary Dispute, Nairobi, Kenya, 26-27 March 2014 (hereinafter* "Somalia, *Report on the Somalia-Kenya Meeting, 26-27 March 2014*") (1 Apr. 2014), p. 1. MS, Vol. III, Annex 24.

[70] Somalia and Kenya, *Joint Report on Maritime Boundary Meeting, 26-27 Mar. 2014* (1 Apr. 2014), pp. 1-2. MS, Vol. III, Annex 31; Somalia, *Report on the Somalia-Kenya Meeting, 26-27 March 2014* (1 Apr. 2014), p. 1. MS, Vol. III, Annex 24.

[71] Somalia, *Report on the Somalia-Kenya Meeting, 26-27 March 2014* (1 Apr. 2014), p. 1. MS, Vol. III, Annex 24.

"Kenya-Somalia *Maritime Boundary Meeting* on Wednesday 26th March, 2014 at 10:00 A.M, Ministry of Foreign Affairs and Trade, 4th Floor Boardroom".[72]

2.46. According to a contemporaneous internal record of the meeting, the Somali team suggested

> "that both delegations should commit themselves to moving forward with beginning negotiations on the existing disputes including the Somali Government's refusal to consent to the consideration by the Commission on the Limitation of Continental Shelf (the "Commission") of the Kenyan submission for an extended continental shelf. The Somali delegation stated that they are willing to discuss all issues relating to maritime delimitation, including the failure to consent to the Commission's review of Kenya's submission, as a comprehensive package with the aim of resolving the existing dispute in a speedy manner.
>
> The Kenyan delegation agreed to proceed on that basis … ".[73]

2.47. The two delegations thus proceeded to engage in an exchange of views over delimitation of their maritime boundary. Somalia, for its part, expressed the view that the boundary should be delimited based on the "principle of equidistance", which was well-established in international law and jurisprudence.[74] It also emphasised that no country could unilaterally establish a

---

[72] Somalia and Kenya, *Joint Report on Maritime Boundary Meeting, 26-27 Mar. 2014* (1 Apr. 2014), pp. 1-2, Annex 2 to the Report (emphasis added). MS, Vol. III, Annex 31.

[73] Somalia, *Report on the Somalia-Kenya Meeting, 26-27 March 2014* (1 Apr. 2014), p. 2. MS, Vol. III, Annex 24.

[74] *Ibid.*; Somalia and Kenya, *Joint Report on Maritime Boundary Meeting, 26-27 Mar. 2014* (1 Apr. 2014), p. 5. MS, Vol. III, Annex 31.

boundary in the absence of an agreement with its neighbouring country, as Kenya had purported to do.[75] Kenya, for its part, rejected equidistance in favour of considerations of "equity and fairness" which, it maintained, yielded the "parallel of latitude" claimed in its 2005 Presidential Proclamation.[76]

2.48. Kenya's current contention that the primary purpose of the March 2014 meeting was "to secure Somalia's consent to CLCS review" is inconsistent with the evidence showing that its purpose in inviting Somalia to talk was, as stated, "to engage the Somali Government *in regards to the existing dispute relating to the delimitation of the maritime boundary* between the two countries".[77]

2.49. Kenya's contention is also undermined by the fact that its own negotiating team came to the meeting with a 13-slide PowerPoint presentation detailing Kenya's arguments in favour of its parallel of latitude claim that it duly presented to the Somali team. A copy of that presentation is included in Annex 31 to Somalia's Memorial. As the Court will appreciate, the slides were highly detailed and included, among other things, a map of the east African coastline depicting what Kenya considers the concavity of the coast giving rise to "special circumstances"; detailed models and calculations of the relevant coasts and

---

[75] Somalia and Kenya, *Joint Report on Maritime Boundary Meeting, 26-27 Mar. 2014* (1 Apr. 2014), p. 5. MS, Vol. III, Annex 31; Somalia, *Report on the Somalia-Kenya Meeting, 26-27 March 2014* (1 Apr. 2014), p. 2. MS, Vol. III, Annex 24.

[76] Somalia, *Report on the Somalia-Kenya Meeting, 26-27 March 2014* (1 Apr. 2014), p. 2. MS, Vol. III, Annex 24; Somalia and Kenya, *Joint Report on Maritime Boundary Meeting, 26-27 Mar. 2014* (1 Apr. 2014), p. 2. MS, Vol. III, Annex 31.

[77] *Letter* from H.E. Dr. Abdirahman Beileh, Minister of Foreign Affairs and International Cooperation of the Federal Republic of Somalia, to H.E. Ms. Amina Mohamed, Minister of Foreign Affairs & International Trade of the Republic of Kenya, No. MOFA/SER/MO/ /2014 (13 Mar. 2014) (emphasis added). MS, Vol. III, Annex 43.

relevant area; and maps depicting what Kenya considered the "gross inequity" that an equidistance-based solution would work on it.[78]

2.50. The details of the Parties' March 2014 negotiations are reflected in a 27 March "Joint Report of the Government of the Republic of Kenya and the Federal Republic of Somali [sic] on the Kenya-Somali *Maritime Boundary Meeting*" duly signed by Ms. Mona Al-Sharmani on behalf of Somalia and Ms. Nkoroi on behalf of Kenya.[79] As in the case of the agreed agenda, the title of the Joint Report is itself indicative of the purpose of the meeting.

2.51. Under the heading "DISCUSSIONS ON THE MARITIME BOUNDARY", four topics are listed in the Joint Report:

> "a) Kenya's departure from the 'equidistance' methodology adopted by the Kenyan Government in the 1972 Territorial Waters Act [as revised in 1977] and the 1989 Maritime Zones Act to the 2005 Presidential Proclamation;
>
> b) Starting point for the determination of the maritime boundary;
>
> c) Baseline and base points;
>
> d) Potential maritime boundary line".[80]

---

[78] Somalia and Kenya, *Joint Report on Maritime Boundary Meeting, 26-27 Mar. 2014* (1 Apr. 2014), Annex 3 to the Report. MS, Vol. III, Annex 31.

[79] *Ibid.*, p. 6 (emphasis added).

[80] *Ibid.*, p. 2.

2.52. The Joint Report contains a detailed record of the Parties' exchanges on each of these subjects. Somalia respectfully refers the Court to Annex 31 of its Memorial for this information.

2.53. The two delegations continued their negotiations for a full two days but, in the end, could not even agree on the applicable principles of international law.[81] Somalia remained insistent on the methods and principles reflected in UNCLOS and the relevant jurisprudence, which it interpreted to favour an equidistance line, while Kenya remained equally insistent on general considerations of equity, which, in its view, justified a parallel of latitude.[82]

2.54. The Joint Report concludes:

> "The delegations after considering several options and methods including bisector, perpendicular, median and parallel of latitude could not reach a consensus on the potential maritime boundary line acceptable to both countries to be adopted.
>
> Consequently the two delegations resolved to refer the matter to the principals for further guidance".[83]

2.55. There is no suggestion in the Joint Report, or in any other evidence, that either State treated the MOU in the manner that Kenya now claims in its Preliminary Objections. The MOU was not seen to have the effect of precluding negotiations to resolve the maritime boundary dispute until after CLCS

---

[81] Somalia, *Report on the Somalia-Kenya Meeting, 26-27 March 2014* (1 Apr. 2014), p. 2. MS, Vol. III, Annex 24.

[82] *See ibid*.

[83] Somalia and Kenya, *Joint Report on Maritime Boundary Meeting, 26-27 Mar. 2014* (1 Apr. 2014), p. 6 (emphasis added). MS, Vol. III, Annex 31.

recommendations were issued. To the contrary, negotiations proceeded without delay, the Parties fully exchanged their views, and went into a notable degree of detail in doing so before reaching an impasse.

2.56. As discussed in Somalia's Memorial,[84] the Parties subsequently agreed to meet again to continue their negotiations concerning the location of their maritime boundary. A second round of talks was held in Nairobi on 28-29 July 2014.[85] Reflecting the importance the Parties gave to the matter, the Foreign Ministers of both States attended these talks. In its 24 October 2014 *Note Verbale* to the U.N. cited above, Kenya itself characterised these talks as taking place "at the highest levels possible".[86]

2.57. The two delegations presented PowerPoint presentations reflecting their views on the delimitation issue.[87] Somalia gave its presentation on the first day, Kenya on the second.[88] As was the case during their March negotiations, Somalia's position emphasised the law as reflected in the Convention and international jurisprudence, which, in its view, favoured a solution based on equidistance.[89] Kenya continued to insist on the centrality of general

---

[84] MS, para. 3.52.

[85] 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, Annex 32.

[86] *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 Oct. 2014), p. 2. MS, Vol. III, Annex 50.

[87] 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, Annex 32.

[88] *Ibid*.

[89] 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. 1. WSS, Vol. II, Annex 4.

considerations of fairness, and maintained its position that the boundary should follow a parallel of latitude.[90] Once again, the discussions were not seen as being precluded by the MOU in any way.

2.58. The July 2014 talks were "intense" but fruitless.[91] The Parties' positions remained the same as they had been during the first round of negotiations in March. No progress was made in narrowing the differences between them. However, the Parties agreed to reconvene for one more effort "to continue working on these issues in an attempt to bridge the gaps between the two parties' positions".[92]

2.59. At the conclusion of the July negotiations, the Parties produced another Joint Report (the "Second Joint Report").[93] The title of the Second Joint Report echoed the title of the first Joint Report[94] and reflects the purpose of the meeting:

---

[90] *Ibid*., p. 2.

[91] Government of Somalia and Government of Kenya, J*oint Report on the Kenya-Somalia Maritime Boundary Meeting, 28-29 July 2014* (July 2014). MS, Vol. III, Annex 32.

[92] *Ibid. 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, Annex 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, Annex 4.

[93] 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, Annex 32.

[94] *See*, *supra*, para. 2.50.

"Joint Report of the Government of the Republic of Kenya and the Federal Republic of Somalia on the Kenya-Somalia *Maritime Boundary Meeting* …".[95]

2.60. As Somalia detailed in its Memorial,[96] the head of the Somali technical team, Ms. Al-Sharmani, signed the Second Joint Report and transmitted it to Ms. Nkoroi by email on 5 August 2014.[97] Ms. Nkoroi replied on 6 August 2014 confirming that she would sign the Second Joint Report upon her return to the office on 11 August 2014.[98] When that date came and went, Somalia made further inquiries into the status of the report.[99] This time, however, Kenya did not respond; nor did it sign the Second Joint Report. Kenya gave no reason for its failure to sign.

2.61. Kenya's Preliminary Objections contend that at the second round of negotiations

> "Kenya expected finally to discuss the MOU. However, Somalia once again refused to discuss the withdrawal of its objection. Instead, Somalia used the meeting to advance a detailed argument on equidistance as the only possible solution to the maritime boundary dispute. Kenya responded by

---

[95] Government of Somalia and Government of Kenya, *Joint Report on the Kenya-Somalia Maritime Boundary Meeting, 28-29 July 2014* (July 2014) (emphasis added). MS, Vol. III, Annex 32.

[96] MS, para. 3.53-3.54.

[97] Exchange of Emails between Ms. Mona Al-Sharmani, Special Adviser to the President of the Federal Republic of Somalia, and Ms. Juster Nkoroi, Republic of Kenya (6-16 Aug. 2014), p. 4, Email of 5 Aug. 2014. MS, Vol. III, Annex 46.

[98] *Ibid*., p. 2, Email of 6 Aug. 2014.

[99] *Ibid.*, pp. 1-2, Emails of 11, 15, and 16 Aug. 2014.

> presenting its preliminary views in order to establish a framework for further discussions".[100]

2.62. Once again the evidence does not support any of these assertions. The only document Kenya cites is the Second Joint Report, which Kenya invokes for the proposition that Somalia presented its views on the merits of equidistance.[101] That is true, but the Second Joint Report makes it equally clear that Kenya too presented its position on the delimitation issue and rejected Somalia's position.[102]

2.63. There is, moreover, no evidence that these were mere "preliminary views", as Kenya now claims. What the Second Joint Report actually states is: "The Kenyan technical team made a presentation on the 29th July 2014 that reflected the position of the Government of the Republic of Kenya on the maritime boundary between Kenya and Somalia".[103] Given the considerable detail with which Kenya had already addressed the issue at the first round of talks in March, Kenya's assertion that this second presentation (in the presence of its Foreign Minister) was only "preliminary" in nature is not credible.

2.64. The considerable care with which Kenya presented its position is reflected in a contemporaneous Somali record of the second round of negotiations. According to that report:

> "On the morning of 29 July 2014, the Somali and Kenyan delegations met again at the Ministry of

---

[100] KPO, para. 109.

[101] *Ibid.*, para. 109 fn. 135.

[102] 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, Annex 32.

[103] *Ibid.*

Foreign Affairs of Kenya. The meeting was again attended by both Ministers. The Kenyan delegation proceeded to make its presentation as agreed. The Kenyan team argued that the principles of equity and fairness demanded the application of the parallel of latitude methodology in delimiting the maritime boundary between both countries. The Kenyan delegation reviewed certain cases particularly the India/Bangladesh case and the Bangladesh/Myanmar case and noted the importance of identifying the correct relevant coastlines for both countries for purposes of determining the fairness of the delimitation exercise. It stated that in the case between Somalia and Kenya, the relevant coastline for Kenya is its entire coastline and for Somalia the coastline starting from the tip of Horn of Africa and going in the southern direction all the way to the land-boundary terminal between both countries. The Kenyan delegation further argued that due to the concavity of the Kenyan coastline, the parallel of latitude method would result in a more equitable and fair solution.

The Somali and the Kenyan delegation engaged in a heated discussion following the completion of the presentation made by the Kenyan delegation. The Somali delegation requested the Kenyan delegating [sic] to cite one case that a court or a tribunal applied the parallel of latitude as a legally accepted and widely applied principle in international jurisprudence. The Kenyan delegation mentioned bilateral agreements between certain African countries such as Kenya/Tanzania and Tanzania/Mozambique as examples of the applicability of this principle, particularly in Africa. The Somali delegation responded that the existing agreements between Kenya/Tanzania and Tanzania/Mozambique are bilateral agreements that each country voluntarily agreed to. It further stated that no case law exists where a court or a tribunal adopted the parallel of latitude as an internationally

> accepted method in the delimitation of maritime disputes unless the disputing parties voluntarily agree to this method in a separate agreement as in the case of Kenya and Tanzania".[104]

2.65. Kenya's attempt to make it seem as if these negotiations were focused on the MOU is refuted by its own documents. In advance of the second round of negotiations, Kenya sent Somalia a *Note Verbale* dated 24 July 2014 inviting it to the talks in Nairobi.[105] The *Note* states:

> "The Ministry of Foreign Affairs and International Trade of the Republic of Kenya presents its compliments to the Ministry of Foreign Affairs and Investment Promotion of the Federal Government of Somalia and has the honour to refer to *the negotiations between the Government of the Republic of Kenya and the Federal Republic of Somalia on the delimitation of our overlapping maritime boundary.*
>
> The Ministry of Foreign Affairs and International Trade of the Republic of Kenya further informs that Amb. Amina C. Mohamed, Cabinet Secretary, Foreign Affairs and International Trade has the honour to invite H.E. Dr. Abdirahman Dualeh Beileh, Minister of Foreign Affairs of the Federal Republic of Somalia to Nairobi, on **Monday 28th July 2014**, *to discuss the issue on the delimitation*

[104] 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, Annex 4.

[105] *Note Verbale* from the Ministry of Foreign Affairs and International Trade of the Republic of Kenya to the Ministry of Foreign Affairs & Investment Cooperation of the Federal Republic of Somalia, No. MFA/REL/13/21A (24 July 2014) (bold in original, other emphasis added). WSS, Vol. II, Annex 24.

> *of the two countries overlapping maritime boundary*".[106]

2.66. The words could hardly be clearer: on Kenya's own account the purpose of the discussions was precisely "to discuss the issue on the delimitation of the two countries overlapping maritime boundary". The MOU was not even mentioned in Kenya's *Note*.

2.67. In addition, Kenya's 24 October 2014 *Note Verbale* to the U.N. (which, as stated, reported to the U.N. that the maritime boundary talks with Somalia were taking place "at the highest levels possible") still further undermines Kenya's attempt to portray these talks as being focused on the MOU. It states, *inter alia*:

> "Kenya remains committed and continues to pursue more legitimate avenues to have the delimitation of the maritime boundary amicably resolved, most preferably through a bilateral agreement with the Somali Federal Republic and in this regard wishes to inform that notwithstanding the aforementioned actions by Somalia [i.e., its objection to Kenya's submission], bilateral diplomatic negotiations, at the highest levels possible, are ongoing with a view to resolving this matter expeditiously …".[107]

2.68. Again according to Kenya, the goal of the negotiations was "to have the delimitation of the maritime boundary amicably resolved". And by indicating that a bilateral agreement was the "most preferable" avenue for resolving the delimitation, Kenya also made clear that it did not consider a bilateral agreement

---

[106] *Ibid.*

[107] *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 Oct. 2014), p. 2. MS, Vol. II, Annex 50.

the *only* "legitimate avenue" for doing so, or that the MOU stood in the way of any other lawful means for resolving the dispute.

2.69. Indeed, the evidence shows that Kenya itself proposed the idea of referring the dispute to third-party dispute settlement. According to Somalia's contemporaneous internal account of the second round meetings:

> "Minister Beileh [of Somalia] asked Minister Mohamed [of Kenya] as to how long would both countries continue to have their delegations entangled in these heated discussions without any possible solution. Minister Mohamed stated that although both delegations are far apart, she would like both teams to meet again and to attempt one final time to find an amicable solution. *Minister Mohamed further stated that if no agreement could be reached between both countries, both countries might resort to international arbitration*".[108]

2.70. Kenya cannot reconcile its current interpretation of the MOU—as precluding any form of settlement other than by direct negotiation—with its own Foreign Minister's statement that "if no agreement could be reached between both countries, both countries might resort to international arbitration".[109]

---

[108] 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 (emphasis added). WSS, Vol. II, Annex 4.

[109] *Ibid.* There is also nothing in the Second Joint Report, or any other document in the record, to support Kenya's contention that Somalia refused to discuss the withdrawal of its objection to the CLCS's consideration of Kenya's submission. Kenya's own documents prove the opposite. *See* KPO, para. 109. Annex 41 to Kenya's Preliminary Objections is an internal Kenyan document dated 4 August 2014 concerning the proposal to hold a third round of talks in Mogadishu. It states: "Somalia delegation did not discuss the MOU during the first meeting but *we have witnessed a friendlier attitude towards the MOU during the second meeting*". *Confidential Note* from Dr. Karanja Kibicho to the Director General of the National Intelligence Service, "Proposal

2.71. In short, the evidence shows that Kenya did not adopt the position that the delimitation negotiations (or any other lawful means for resolving the dispute) might be untimely in the absence of CLCS recommendations. To the contrary, Kenya's negotiating team pressed ahead with exchanges concerning the substance of the maritime boundary dispute with Somalia, and did so in a process of negotiation with Somalia that represented an effort to resolve that dispute. It is striking that Kenya itself raised the possibility of third-party dispute settlement in the event that the negotiations did not succeed.

2.72. As stated, the Parties agreed to a final round of negotiations in Mogadishu in late August 2014.[110] However, Kenya's delegation never arrived for the scheduled talks, and failed to notify Somalia in advance that it would not attend. Kenya's Preliminary Objections attribute the failure of its team to appear to security concerns.[111] Even if that were true, it was never communicated to Somalia. The Kenyan delegation simply failed to appear on the agreed date.

2.73. There is, moreover, reason to doubt the sincerity of Kenya's professed security concerns. High-level delegations from international bodies and Kenya regularly visited Mogadishu. These included visits by a United Nations Security

---

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 (4 Aug. 2014) (emphasis added). KPO, Vol. II, Annex 41.

[110] *See*, *supra*, para. 2.58.

[111] KPO, para. 110.

Council delegation,[112] Kenya's Minster of Foreign Affairs[113] and the Speaker of its Parliament.[114]

2.74. In any event, if the agreed venue was a problem for Kenya, it might have been expected to say so, or to propose an alternative location. It did neither. Thus, the Somali Foreign Minister wrote to his Kenyan counterpart on 26 August 2014 expressing dismay that the August meetings had not taken place as planned.[115]

2.75. As Somalia explained in its Memorial,[116] it was disappointed by Kenya's unexplained non-appearance at the planned third meeting, and its non-responsiveness to Somalia's efforts to reschedule the meeting, as well as the complete lack of progress during the two rounds of negotiations that the Parties had already held. It was also increasingly troubled by Kenya's continued unilateral actions in the disputed area. In these circumstances, Somalia concluded that further negotiation would be fruitless and decided to initiate these proceedings to seek resolution of its dispute with Kenya in accordance with international law. It did so without violating the MOU, the limited purpose of which did not preclude such judicial recourse.

---

[112] *See* "U.N. Secretary Council makes historic visit to Somalia", *Dhanaanmedia.com* (13 Aug. 2014). WSS, Vol. II, Annex 31 (recording a UN Security Council delegation visited to Mogadishu on 13 August 2014).

[113] "IGAD Foreign Affairs Ministers Arrive in Mogadishu", *AMISOM* (10 Jan. 2015). WSS, Vol. II, Annex 32.

[114] "Speaker of the Somali Parliament receives parliamentary delegation from Kenya", *Radio Muqdisho* (3 Feb. 2015). WSS, Vol. II, Annex 33.

[115] *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, Annex 47.

[116] MS, paras. 3.55-3.56.

2.76. Kenya continued to behave in a manner inconsistent with its recently adopted understanding of the MOU even after Somalia submitted its Application initiating these proceedings. Kenya's October 2014 *Note Verbale* to the U.N. has already been discussed.[117] In addition, on 4 May 2015, Kenya submitted another *Note Verbale* to the U.N. Secretary General, this one objecting to the CLCS's consideration of Somalia's submission.[118] (Somalia made its full submission to the Commission on 21 July 2014.[119]) Kenya's *Note* did *not* state that the MOU created any binding obligations, let alone the specific obligations Kenya now contends, precluding this Court from exercising jurisdiction. The *Note* simply took issue with Somalia's objection to the Commission's consideration of Kenya's submission, and proceeded to lodge Kenya's own objection to the Somali submission.[120]

Section III. The Status of the MOU

2.77. It is a matter of public record that Somalia has repeatedly expressed doubts as to the effectiveness of the MOU, based on the circumstances of its adoption, its rejection by the Somali Parliament and Kenya's continued unilateral actions in the contested area which have steadily increased its *de facto* control over that area.

---

[117] *See*, *supra*, para. 2.35.

[118] *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. 141/15 (4 May 2015). MS, Vol. III, Annex 51.

[119] Federal Republic of Somalia, *Continental Shelf Submission of the Federal Republic of Somalia: Executive Summary* (21 July 2014), MS, Vol. IV, Annex 70.

[120] *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. 141/15 (4 May 2015). MS, Vol. III, Annex 51.

2.78. Also on the public record are Somalia's views that, whether or not the MOU is, or ever was, legally effective, it does not, and was never intended to, establish an exclusive means for settlement of the boundary dispute, let alone one that ousts the clear jurisdiction of this Court. The Court therefore has no need, in Somalia's view, to determine the legal validity *vel non* of the MOU. Even if it were effective (*quod non*), it does not constitute an agreement on a method for settling the Parties' maritime boundary dispute, let alone one that could preclude this Court from resolving it on the basis of the Parties' matching Optional Clause declarations.

2.79. The issue of Somalia's compliance with the MOU is, therefore, beside the point of these proceedings. Nevertheless, Kenya goes on at some length about Somalia's alleged non-compliance with the MOU, perhaps in an effort to make it appear that Somalia has not acted in good faith. This calls for Somalia to set the record straight with regard to its statements and actions pertaining to that instrument.

2.80. *First*, Somalia's Transitional Federal Charter ("TFC")—which was in effect between 2004 and 2012, and drafted in Nairobi with Kenya's assistance[121]—required international agreements to be ratified by Parliament.[122] Article 33(j) of the TFC included "ratification of international agreements and treaties" as a function of Parliament; and Article 44(4)(a) expressly made the

---

[121] *See* A. C. Beier and E. Stephansson, *Environmental and Climate Change Policy Brief: Somalia* (28 Oct. 2012), p. 16. MS, Vol. IV, Annex 92; U.S. Central Intelligence Agency, *The World Factbook: Somalia*, *available at* https://www.cia.gov/library/publications/the-world-factbook/geos/so.html (last accessed 3 Apr. 2015), p. 1. MS, Vol. IV, Annex 96.

[122] *See Letter* from Dr. Abdirahman Beileh, Minister of Foreign Affairs and International Cooperation of the Somali Federal Republic, to H.E. Ban Ki-Moon, Secretary General of the United Nations, No. MOFA/SFR/MO/259/2014 (4 Feb. 2014). MS, Vol. III, Annex 41 (repeating that Somalia had informed Kenya of the ratification requirement at the time of the signing of the MOU).

President's authority to sign binding international agreements conditional upon subsequent ratification by Parliament.[123] Kenya does not appear to dispute this.

2.81. The MOU itself states that it enters into force immediately upon signature, and does not expressly require ratification. However, Minister Warsame's authorization to sign the MOU did not constitute, and could not have constituted, authorization under Somali law for him to dispense with the ratification requirement. The view of the Parliament, and many in the Executive, was that ratification was still required for the MOU to enter into force.

2.82. Accordingly, on 1 August 2009, the Somali Parliament took up the MOU and debated whether or not to ratify it.[124] The debate was intense; some members viewed the MOU as without legal basis.[125] Exercising the powers accorded it under the TFC, the Somali Parliament voted overwhelmingly to reject the MOU.[126]

2.83. By means of a *Note Verbale* dated 10 October 2009, Somalia reported the Parliament's rejection of the MOU to the United Nations. In light of the ratification requirement under domestic law, Somalia asked the U.N. to treat the

---

[123] Transitional Federal Government of Somalia, *The Transitional Federal Charter of the Somali Republic* (Feb. 2004), Article 44(4)(a) ("The President shall have authority to […] sign international treaties on the proposal of the Council of Ministers and upon ratification by Parliament"). WSS, Vol. II, Annex 3.

[124] *See* MS, para. 3.40; *Letter* from H.E. Omar Abdirashid Ali Sharmarke, Prime Minister of the Transitional Federal Government of the Somali Republic, to H.E. Ban Ki-Moon, Secretary General of the United Nations, No. OPM/IC/00./016/11/09 (10 Oct. 2009). MS, Vol. III, Annex 38.

[125] Parliamentary Session of Transitional Federal Parliament of Somalia, *Report and Transcript on Vote on a Motion in connection with the 2009 Memorandum of Understanding* (Aug. 2009), p. 103. KPO, Vol. II, Annex 23.

[126] *Ibid.*

MOU as "non-actionable".[127] The *Note Verbale* was posted to the website of the U.N. Division on Ocean Affairs and the Law of the Sea no later than March 2010.[128] There is no record of any response from Kenya in any forum prior to 2014.[129]

2.84. In any event, Kenya's conduct following execution of the MOU gave Somalia other grounds for questioning the instrument itself, as well as Kenya's intentions. As noted above, the Executive Summary to Kenya's 6 May 2009 CLCS Submission contains a section entitled "Maritime Delimitations".[130] That Section makes no reference to the dispute with Somalia but mentions only the MOU (which it characterises as a non-objection agreement).

2.85. More troubling to Somalia, the Executive Summary expressly claims that Kenya "exercises sovereignty, sovereign rights and jurisdiction" over the maritime areas extending up to the parallel boundary Kenya claimed in the 2005

---

[127] *Letter* from H.E. Omar Abdirashid Ali Sharmarke, Prime Minister of the Transitional Federal Government of the Somali Republic, to H.E. Ban Ki-Moon, Secretary General of the United Nations, No. OPM/IC/00./016/11/09 (10 Oct. 2009), p. 1. MS, Vol. III, Annex 38; *see also Letter* from Dr. Elmi Ahmed Duale, Permanent Representative of the Permanent Mission of the Somali Republic to the United Nations, to H.E. Ban Ki-Moon, Secretary General of the United Nations, No. SOM/MSS/09/10 (2 Mar. 2010), p. 1. MS, Vol. III, Annex 39 ("In this connection H.E. the Prime Minister of Somalia is kindly requesting your Excellency and the relevant offices of the U.N. to take note of the rejection of the (MOU) by the (T.F.G.) Parliament and hence treat the MOU as non-actionable".).

[128] *See Letter* from Dr. Elmi Ahmed Duale, Permanent Representative of the Permanent Mission of the Somali Republic to the United Nations, to H.E. Ban Ki-Moon, Secretary General of the United Nations, No. SOM/MSS/09/10 (2 Mar. 2010). MS, Vol. III, Annex 39.

[129] *See Note Verbale* from the Permanent Mission of Kenya to the United Nations to the U.N. Secretary General (24 Oct. 2014). KPO, Vol. II, Annex 24.

[130] *See*, *supra*, para. 2.28.

Presidential Proclamation described in Somalia's Memorial.[131] It also includes two maps which portray what is labelled as the "maritime boundary" with Somalia shown as running due east along a parallel of latitude from the land boundary terminus.[132] Kenya's Executive Summary therefore suggests that the boundary is settled along the line claimed by Kenya.

2.86. Additionally, Kenya had, before the MOU, begun offering a number of off-shore oil blocks that extended north of the equidistance line up to the 1°39'34" parallel it claimed as the boundary in 2005. This unilateral conduct continued after the signing of the MOU. Relevant activities are discussed in Somalia's Memorial.[133] Two examples will suffice for present purposes:

- Kenya's **Block L-22** straddles the equidistance line in areas between approximately 52 and 104 M from the coast.[134] Kenya awarded it to the French oil company Total S.A. in 2012.[135] In 2013, Total carried out a "2D seismic survey and sea core drilling operations" in the area.[136]

- Also in 2012, Kenya awarded **Blocks L-21**, **L-23** and **L-24**—which lie in deeper water entirely (in the case of L-21 and L-23) or predominantly (in the case of L-24) on the Somali side

[131] 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), paras. 1-3. MS, Vol. III, Annex 59.

[132] *Ibid.*, pp. 9 and 15.

[133] MS, paras. 8.19-8.28.

[134] MS, Vol. II, Figure 8.1.

[135] Total S.A., *Press Release: Total Steps Up Exploration Activities in Kenya with the Award of the Offshore L22 License in the Lamu Basin* (27 June 2012). MS, Vol. IV, Annex 105; K. Senelwa, "Kenya ministry signs contracts for oil drilling", *The East African* (7 July 2012). MS, Vol. IV, Annex 108.

[136] Total S.A., *Factbook 2013* (2013), p. 85. MS, Vol. IV, Annex 111.

> of the equidistance line[137]—to the Italian company Eni S.p.A.[138] In 2013-2014, 2D seismic surveys were carried out in all of these blocks by Schlumberger,[139] working pursuant to a non-exclusive exploration licence.[140]

2.87. Confronted with Kenya's persistent and active assertion of its parallel boundary claim despite (1) its recognition of the existence of a dispute, and (2) its obligations under UNCLOS Articles 74(3) and 83(3) not to do anything "to jeopardize or hamper the reaching of [a] final agreement", Somalia responded by objecting to the CLCS's consideration of Kenya's submission.

2.88. Somalia made its objection by means of a 4 February 2014 *Note Verbale* to the U.N. Secretary General: "Based on the exaggerated nature of Kenya's claim, its lack of legal foundation, and its severe prejudice to Somalia both within and beyond 200 M, Somalia formally objects to the consideration of Kenya's submission by the [CLCS]".[141] In Somalia's view, this was the only means at its

---

[137] MS, Vol. II, Figure 8.1.

[138] Eni S.p.A., *Press Release: Eni enters Kenya with the acquisition of three exploration blocks* (2 July 2012). MS, Vol. IV, Annex 106. *See also* IHS Inc., EDIN Database, *Kenya: Contracts Block L21* (2015). MS, Vol. IV, Annex 135; IHS Inc., EDIN Database, *Kenya: Contracts Block L23* (2015). MS, Vol. IV, Annex 136; IHS Inc., EDIN Database, *Kenya: Contracts Block L24* (2015). MS, Vol. IV, Annex 123.

[139] *See* Schlumberger, "Multiclient Latest Projects: Kenya Deepwater 2D 2013 Multiclient Seismic Survey", *available at* http://www.multiclient.slb.com/en/latest-projects/africa/kenya_2d.aspx (last accessed 9 June 2015). MS, Vol. IV, Annex 130; Schlumberger, "Kenya Multiclient Seismic Surveys: 2D offshore data", *available at* http://www.multiclient.slb.com/africa/east-africa/kenya.aspx (last accessed 9 June 2015). MS, Vol. IV, Annex 131; Schlumberger, "Kenya Multiclient Seismic Surveys Map", *available at* http://www.multiclient.slb.com/africa/east-africa/kenya.aspx (last accessed 9 June 2015). MS, Vol. IV, Annex 132.

[140] *See* Hon. Davis Chirchir, Minister of Energy & Petroleum, Republic of Kenya, *Speech: Official Opening of the 5th East Africa, Oil, Gas and Energy Conference* (29 Apr. 2014), p. 2. MS, Vol. III, Annex 28.

[141] *Letter* from Dr. Abdirahman Beileh, Minister of Foreign Affairs and International Cooperation of the Somali Federal Republic, to H.E. Ban Ki-Moon, Secretary General of the United Nations, No. MOFA/SFR/MO/259/2014 (4 Feb. 2014), para. 4. MS, Vol. III, Annex 41. *See also ibid.*,

disposal that might cause Kenya to cease and desist from its unilateral efforts to assume control over the disputed maritime area.

2.89. Somalia also hoped that its March 2014 agreement to Kenya's proposal to commence negotiations on delimitation of the disputed maritime boundary might cause Kenya to consider refraining from further unilateral actions in the disputed area, at least pending the conclusion of negotiations. However, as discussed in Somalia's Memorial,[142] Kenya's conduct in the disputed area continued without interruption. Indeed, it has persisted even since July 2015, when the Memorial (which includes a claim challenging the unlawfulness of Kenya's activities[143]) was filed.

2.90. Thus, for example, in September 2015 the National Oil Corporation of Kenya (a company wholly owned by the Kenyan Government) 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".[144] 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". The document included a map which shows the shallow offshore area to be surveyed extending all the way

---

para. 10 (stating: "The Somali Republic protests the continuing activities of oil companies under licence to Kenya in maritime zones claimed by the Somali Republic, and in dispute between the two States, which are in contravention of Article 74(3), Article 83(3) and Article 300 of UNCLOS. The Somali Republic condemns these activities and urges all parties involved in such activities to immediately cease and desist from them".).

[142] *See* MS, paras. 3.20-3.24, 8.19-8.28.

[143] *See, e.g.*, MS, paras. 8.28, 8.35, p. 148.

[144] 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, Annex 5.

up to the parallel boundary illegally claimed by Kenya.[145] The document added that block L-26 (which covers a large area far offshore on both sides of the equidistance line) might also be included.[146]

2.91. It was only after filing its Application instituting proceedings in this case, and preparing to submit its Memorial to the Court, that Somalia considered it was in a position to safely withdraw its objection to Kenya's submission to the CLCS. On 7 July 2015, it sent a *Note Verbale* to the U.N. Secretary General stating, *inter alia*:

> "In view of Somalia's request to the ICJ to delimit the maritime boundary with Kenya (including in the continental shelf beyond 200 nautical miles), Somalia deems it no longer necessary to maintain its objection to the Commission's consideration of Kenya's submission to the Commission, and hereby extends its consent to the Commission's consideration of the Kenyan submission".[147]

Even assuming that the MOU is in force (*quod non*), Somalia is fully in compliance with the only obligation the instrument purports to impose upon it: not to object to Kenya's submission to the CLCS.

2.92. On the basis of Somalia's July 2015 *Note*, the CLCS proceeded to form a subcommission to consider Kenya's submission on the merits.[148] The

---

[145] *Ibid.*, p. 6.

[146] *Ibid.*, p. 1.

[147] *Letter* from H.E. Abdulsalam H. Omer, Minister of Foreign Affairs and Investment Promotion of the Federal Republic of Somalia, to H.E. Ban Ki-Moon, Secretary General of the United Nations (7 July 2015), p. 2. MS, Vol. III, Annex 52.

[148] U.N. Commission on the Limits of the Continental Shelf, *Progress of work in the Commission on the Limits of the Continental Shelf: Statement by the Chair*, U.N. Doc. CLCS/90 (1 Oct. 2015),

subcommission met to begin consideration of Kenya's submission during the Commission's thirty-ninth session in New York in October and November 2015.[149] Kenya has presented no evidence that it was materially harmed by the brief delay in consideration of its CLCS submission as a consequence of Somalia's February 2014 objection to consideration of that submission.

---

para. 17 (stating that "the Commission took note of a communication received since the thirty-fifth session, namely, the communication from Somalia dated 7 July 2015. In the light of that communication, the Commission determined that it was in a position to proceed with the establishment of a subcommission"). WSS, Vol. II, Annex 14.

[149] *Ibid.*

CHAPTER 3. THE MOU DOES NOT FALL WITHIN THE AMBIT OF KENYA'S RESERVATION

3.1. Both Somalia and Kenya have accepted the Optional Clause and recognise the compulsory jurisdiction of the Court. They made their respective declarations in accordance with Article 36(2) of the Statute soon after their independence.[150] These declarations have remained unchanged ever since, a fact which bears witness to the two States' enduring commitment to the judicial settlement of disputes.[151]

3.2. Both declarations contain reservations excluding the Court's jurisdiction in respect of certain categories of disputes. Contrary to what Kenya argues, however, none of those exclusions is relevant to the present case. According to Kenya's Preliminary Objections: "Kenya and Somalia have expressly agreed on a method of settlement other than the Court for delimitation of their maritime boundary".[152] In Kenya's view, this purported agreement triggers the first reservation to its Article 36(2) declaration, which excludes

> "[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".

---

[150] Somalia made its declaration on 11 April 1963; Kenya made its on 19 April 1965. (Declarations recognising as compulsory the jurisdiction of the International Court of Justice under Article 36, paragraph 2, of the Statute of the Court, are available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=I-4&chapter=1&lang=en).

[151] Kenya's representative to the U.N. General Assembly confirmed his country's commitment to judicial settlement in 2009 when he called for a wider acceptance of the Optional Clause. U.N. General Assembly, Sixty-Fourth Session, Thirtieth Plenary Meeting, *Agenda Item 72: Report of the International Court of Justice*, U.N. Doc. A/64/PV.30 (29 Oct. 2009), p. 15 (Mr. Muita (Kenya). WSS, Vol. II, Annex 10.

[152] KPO, para. 2.

3.3. As Kenya itself notes, reservations that exclude the Court's jurisdiction when the disputing States have agreed to a different method for settling their disputes are present in the Optional Clause declarations of many States.[153] What Kenya fails to mention, however, is that the Court has *never* found that it lacks jurisdiction on the basis of a reservation of this kind. The President of the Court noted in a 2010 speech at the United Nations: "[Forty] States have limited their optional clause declarations by stipulating that any other mechanisms of dispute settlement as agreed between the parties will prevail over the general jurisdiction of the Court. In the few cases where this condition has been at issue, the Court found that it did not exclude recourse to ICJ adjudication".[154]

3.4. Each case must, of course, be assessed in light of its particular circumstances. Nevertheless, the fact that this common reservation has never once been found to exclude the Court's jurisdiction at the very least shows that in order to deprive the Court of its compulsory jurisdiction, an agreement to that effect must be clear and unambiguous. This is all the more so given that, as this Court has held:

> "[A] declaration by which a State recognizes the compulsory jurisdiction … constitute[s] a certain progress towards extending to the world in general the system of compulsory judicial settlement of international disputes".[155]

---

[153] *See* KPO, para. 142.

[154] H. Owada, *Introductory Remarks at the Seminar on the Contentious Jurisdiction of the International Court of Justice* (26 Oct. 2010), p. 7. WSS, Vol. II, Annex 26; *See, e.g., ibid*., fn. 18: *Electricity Company of Sofia and Bulgaria*, Preliminary Objection, Judgment, 1939, P.C.I.J., Series A/B, No. 77, p. 76; *Case concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, Judgment, I.C.J. Reports 1991, paras. 22-24.

[155] *Military and Paramilitary Activities in and against Nicaragua*, Preliminary Objections, Judgment, I.C.J. Reports 1984 (hereinafter "*Nicaragua v. United States of America*"), para. 34.

3.5. An instrument that might deprive matching Optional Clause declarations of their *effet utile* should therefore be interpreted with caution. The Court has explained in a related vein:

> "[T]he clauses of a special agreement by which a dispute is referred to the Court must, if it does not involve doing violence to their terms, be construed in a manner enabling the clauses themselves to have appropriate effects".[156]

3.6. Kenya thus bears the burden of persuading the Court that it and Somalia have entered into a clear and unambiguous agreement to have exclusive recourse to some other method of settling the entirety of their maritime boundary dispute, including in the territorial sea, the EEZ and the continental shelf, both within and beyond 200 M. For Kenya to succeed, at least four cumulative conditions would have to be met: (1) there is a binding agreement between Somalia and Kenya; (2) that provides for a method of settling their maritime boundary dispute; (3) and excludes the jurisdiction of the Court; (4) for the entirety of the dispute Somalia has submitted to the Court.

3.7. Kenya's Preliminary Objections argue that the MOU, signed on 7 April 2009 by Kenya's Minister of Foreign Affairs and Somalia's Minister of National Planning and International Cooperation, meets these conditions. More precisely, Kenya claims that the MOU established a "two-step procedure for dispute settlement, namely that the Parties (a) 'shall agree' on delimitation, and (b) only

---

[156] *Free Zones of Upper Savoy and the District of Gex*, Judgment, 1929, P.C.I.J. Series A- No. 22, p. 13; *Corfu Channel (United Kingdom/Albania)*, Merits, Judgment, I.C.J. Reports (1949), p. 24. *See also Electricity Company of Sofia and Bulgaria*, Preliminary Objection, Judgment, 1939, P.C.I.J. Series A/B, No. 77, p. 76.

after CLCS review".[157] However, Kenya does not even come close to showing that the MOU meets the four criteria stated above.

3.8. As explained in the previous Chapter, the MOU's status as a binding agreement is highly questionable.[158] In any event, quite apart from its legal status, Kenya has wholly misinterpreted the nature and content of the MOU. **Section I** of this Chapter shows that far from establishing a method of settling the Parties' maritime boundary dispute, the MOU deals only with the *delineation* of the outer limits of the continental shelf beyond 200 M. The issue of the delimitation of the maritime boundary is set to the side; the MOU expressly states that the issue of delineation is without prejudice to the Parties' maritime boundary dispute. **Section II** shows that because the MOU is not an agreement on a method of settling the Parties' maritime boundary dispute, Kenya's reservation does not apply in this case.

Section I. The Correct Interpretation of the MOU

3.9. The context in which the MOU was adopted is important to its correct interpretation. When Norway drafted the MOU for the Parties there was—and, indeed, still is—a widespread misperception that proceedings before the CLCS might prejudice the positions of States with respect to the delimitation of their maritime boundaries. Despite express assurances that the work of the Commission is without prejudice to their boundary positions,[159] "States appear

---

[157] KPO, para. 146.

[158] *See*, *supra*, paras. 2.77-2.92.

[159] *See* UNCLOS, Annex II, Art. 9 ("The actions of the Commission shall not prejudice matters relating to delimitation of boundaries between States with opposite or adjacent coasts".). *See also*, *infra*, paras. 3.15-3.17.

wary of depending on this protection to safeguard their interests".[160] The Commission therefore refrains from examining submissions which cover maritime areas that are disputed, unless all States concerned have given their prior consent.[161] This point is important to a proper understanding of the MOU's text in light of its object and purpose, which was to enable both Somalia and Kenya to make their respective submissions to the CLCS concerning the continental shelf beyond 200 M and to receive the Commission's recommendations without prejudicing their positions on the disputed maritime boundary.

3.10. It must also be recalled that a number of developing States, including Somalia, had to prepare their preliminary information under conditions of extreme urgency in order to meet the Commission's 13 May 2009 deadline.[162] Failure to meet that deadline would have meant losing their potential entitlement to a continental shelf beyond 200 M. As Somalia underlined in its April 2009 Preliminary Information: "Somalia is among the developing States that faces particular challenges in fulfilling the requirements of article 4 of Annex II to the

---

[160] C. Lathrop, "Continental Shelf Delimitation Beyond 200 Nautical Miles: Approaches Taken by Coastal States before the Commission on the Limits of the Continental Shelf" in INTERNATIONAL MARITIME BOUNDARIES (D.A. Colson & R.W. Smith eds., 2011), p. 4144. WSS, Vol. II, Annex 28.

[161] *See, infra*, paras. 3.15-3.17.

[162] Annex II, Article 4 of the Convention calls upon coastal States to make submissions "within 10 years of the entry into force of [the] Convention for that State". Recognizing that the Commission did not begin its work until mid-1997 and had not adopted Scientific and Technical Guidelines until 13 May 1999, the States Parties to the Convention decided to push the commencement date for the ten-year period back to 13 May 1999, thus creating a deadline of 13 May 2009 for any State Party for which the Convention had entered into force by 13 May 1999. U.N. Convention on the Law of the Sea, Eleventh Meeting of States Parties, *Decision regarding the date of commencement of the ten-year period for making submissions to the Commission on the Limits of the Continental Shelf set out in article 4 of Annex II to the U.N. Convention on the Law of the Sea*, U.N. Doc. SPLOS/72 (29 May 2001). WSS, Vol. II, Annex 7. Somalia and Kenya (and many other developing States) had to meet this deadline.

Convention due to lack of financial and technical resources and relevant capacity and expertise. Moreover, Somalia continues to experience a number of … constraints relating to the political and security situation in the country, substantially hindering the fulfilment of these requirements".[163] As explained in Chapter 2,[164] and discussed further below, this political context also played an important role in the drafting history of the MOU.

3.11. Assuming (*quod non*) that the MOU were a binding agreement, it would be subject to the "General Rule of Interpretation" embodied in Article 31 of the 1969 Vienna Convention on the Law of Treaties ("VCLT"):

> "1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> > (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
> > (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> 3. There shall be taken into account, together with the context:

---

[163] Somalia, *Preliminary Information to the CLCS* (14 Apr. 2009). MS, Vol. III, Annex 66.

[164] *See*, *supra*, 2.5-2.30.

> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
> (c) any relevant rules of international law applicable in the relations between the parties.
>
> 4. A special meaning shall be given to a term if it is established that the parties so intended".

3.12. In the commentary to its Draft Articles on the Law of Treaties, which formed the basis for the VCLT, the ILC made clear that

> "by heading the article 'General rule of interpretation' in the singular and by underlining the connexion between paragraphs 1 and 2 and again between paragraph 3 and the two previous paragraphs, intended to indicate that the application of the means of interpretation in the article *would be a single combined operation*. All the various elements, as they were present in any given case, would be thrown into the crucible, and their interaction would give the legally relevant interpretation. Thus, article 27 is entitled 'General rule of interpretation' in the singular, not 'General rules' in the plural, because the Commission desired to emphasize that *the process of interpretation is a unity and that the provisions of the article form a single, closely integrated rule*".[165]

[165] U.N. International Law Commission, "Draft Articles on the Law of Treaties" in YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 1966, Vol. II, Part II, pp. 219-220 (emphasis added). WSS, Vol. II, Annex 6. *See also* WTO, Report of the Appellate Body, 21 December 2009, *China - Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, AB-2009-3, para. 268.

3.13. Taken both individually and as "a single combined operation", all the elements referred to in Article 31 of the VCLT yield the same result: the MOU does *not* fall within the ambit of Kenya's reservation. It therefore creates no obstacle to the Court's jurisdiction.

3.14. Given Kenya's newly-espoused view of the object and purpose of the MOU, Somalia will start its analysis by addressing Kenya's errors in this respect; it will next turn to a textual and contextual analysis of the language on which Kenya bases its argument. Somalia will then show that the errors in Kenya's interpretation are further exposed by the subsequent practice of the Parties and by reading the MOU in light of the other rules of international law applicable between the Parties, in particular UNCLOS. Finally, Somalia will examine the drafting history of the MOU for purposes of confirming its proper interpretation.

A. THE OBJECT AND PURPOSE OF THE MOU

3.15. The CLCS's Rules of Procedure expressly provide that the Commission will refrain from making recommendations regarding the outer limits of the continental shelf beyond 200 M when a submission implicates a dispute concerning the delimitation of the continental shelf between opposite or adjacent States. Rule 46(1) provides:

> "In case there is a dispute in the delimitation of the continental shelf between opposite or adjacent States or in other cases of unresolved land or maritime disputes, submissions may be made and shall be considered in accordance with Annex I to these Rules".

3.16. Article 5(a) of Annex I of the Rules provides further:

> "In cases where a land or maritime dispute exists, the Commission shall not consider and qualify a submission made by any of the States concerned in the dispute. However, the Commission may consider one or more submissions in the areas under dispute with prior consent given by all States that are parties to such a dispute".

3.17. Consistent with its Rules, it is the Commission's practice to defer consideration of submissions concerning disputed maritime areas unless and until all interested States give their consent. This is true notwithstanding the fact that Article 9 of Annex II to UNCLOS expressly states that the "actions of the Commission shall not prejudice matters relating to delimitation of boundaries between States with opposite or adjacent coasts".[166]

3.18. The object and purpose of the MOU between Somalia and Kenya was precisely to provide the requisite mutual consent—and no more than that. At the same time, it underscored that neither their consent nor any action by the CLCS would prejudice either State's claim with respect to the delimitation of the maritime boundary, including beyond 200 M.

3.19. This is made abundantly clear by the MOU's title, a key indicator of its purpose:[167] "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*

---

[166] *See also* UNCLOS, Art. 76(10) (stating that "[t]he provisions of this article [concerning the delineation of the outer limits of the continental shelf beyond 20 M] are without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts".).

[167] *See Certain Norwegian Loans (France v. Norway)*, Preliminary Objections, Judgment, I.C.J. Reports 1957 (6 July 1957), p. 24 (using the title of a treaty to determine its purpose).

Outer Limits of the Continental Shelf beyond 200 Nautical Miles to the Commission on the Limits of the Continental Shelf".[168]

3.20. Other elements of the MOU lead equally to the conclusion that its object and purpose was exclusively to permit the CLCS to examine Somalia's and Kenya's submissions, without prejudice to their respective delimitation claims. This is readily demonstrated by applying to the MOU the indicia the ILC and the Court have identified as relevant to determining a treaty's object and purpose, including its introductory paragraphs, its overall structure and the circumstances of its conclusion:[169]

- Although the MOU does not contain a formal preamble, its first paragraph emphasises the "spirit of cooperation and mutual understanding" which animated Somalia and Kenya;

- Paragraph two of the MOU acknowledges the existence of an "unresolved delimitation issue between the two coastal States", and paragraph three underscores that, despite their diverging interests as to delimitation, "the two coastal States are determined to work together to safeguard and promote their common interest *with respect to the establishment of the outer limits of the continental shelf beyond 200 nautical miles*".[170] These statements are significant because the Court has held that articles that appear at the beginning of a treaty "must be

[168] 2009 MOU (emphasis added). KPO, Vol. II, Annex 1; MS, Vol. III Annex 6.

[169] *See* U.N. General Assembly, Sixty-Sixth Session, *Report of the International Law Commission on the work of its sixty-third session (26 April-3 June and 4 July-12 August 2011)*, U.N. Doc. A/66/10/Add.1 (2011), p. 18. WSS, Vol. II, Annex 12 (commentary of guideline 3.1.5.1 of the ILC's Guide to Practice on Reservations to Treaties (*Determination of the object and purpose of the treaty*): "The object and purpose of the treaty is to be determined in good faith, taking account of the terms of the treaty in their context, in particular the title and the preamble of the treaty. Recourse may also be had to the preparatory work of the treaty and the circumstances of its conclusion and, where appropriate, the subsequent practice of the parties".).

[170] 2009 MOU (emphasis added). KPO, Vol. II, Annex 1; MS, Vol. III Annex 6.

regarded as fixing an objective, in the light of which the other treaty provisions are to be interpreted and applied".[171]

- In accordance with this clearly stated purpose, the essential terms of the MOU, as reflected in its operative paragraphs, refer only to the Parties' submissions to the CLCS. In those paragraphs, the Parties give their consent to each other's submissions to enable the Commission to consider them and render its recommendations on delineation of the outer limits of the shelf. To that end, paragraph four states that Somalia's forthcoming preliminary information is without prejudice to the delimitation of the boundary and, on that basis, Kenya indicates that it has no objection to the inclusion of the disputed maritime areas in the preliminary information. Paragraph five then states that at the appropriate time both States will make full submissions which will include the areas in dispute. The same paragraph further states: "The two coastal States hereby give their prior consent to the consideration by the Commission of these submissions in the area under dispute", and concludes that "the recommendations approved by the Commission … shall be without prejudice to the future delimitation".

- The same object and purpose is further confirmed by the evidence contemporaneous to the drafting of the MOU that was detailed in Chapter 2.[172] In this respect, it must be stressed that the MOU was prepared in parallel with Somalia's Preliminary Information, which was prepared in light of the rapidly approaching 13 May 2009 CLCS deadline to protect Somalia from losing its potential entitlement in the continental shelf beyond 200 M. Kenya itself admits that "the conclusion of the 2009 MOU was most immediately precipitated by the 13

---

[171] *Case concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment, I.C.J. Reports 1996, para. 28 (determining that Article I of the 1955 Treaty of Amity, Economic Relations, and Consular Rights between the United States of American and Iran "must be regarded as fixing an objective, in the light of which the other Treaty provisions are to be interpreted and applied").

[172] *See*, *supra*, paras. 2.5-2.30.

> May 2009 time limit imposed on both Parties for making their respective submissions to the CLCS".[173]

3.21. These circumstances all undermine Kenya's newly invented argument that the MOU's object and purpose was "to agree on a method for the final settlement of the maritime boundary between Kenya and Somalia".[174] That interpretation does not withstand scrutiny. Indeed, a number of statements in its Preliminary Objections contradict Kenya's current interpretation of the MOU. The Preliminary Objections acknowledge, for example:

> (1) that the rationale behind the MOU was to avoid the waste of time, effort and resources involved in preparing submissions to the CLCS only to have them set aside based on the other Party's objections:
>
> > "It was apparent that an objection by either Party would waste the considerable costs of gathering and analysing data for the submissions and create a situation of perpetual limbo";[175] and
>
> (2) the absence of any relationship between the MOU and the delimitation process:
>
> "The second operative paragraph emphasizes that the MOU is without prejudice to the final delimitation of the maritime boundary".[176]

---

[173] KPO, para. 22.

[174] *Ibid.*, para. 46. *See also ibid.*, paras. 12, 17.

[175] *Ibid.*, para. 46.

[176] *Ibid.*, para. 50.

3.22. Other objective elements point to the same inescapable conclusion: the Parties' only intent was to give mutual consent to the Commission's consideration of their respective submissions.

B. THE TEXT OF THE MOU WITHIN THE RELEVANT CONTEXT

3.23. Kenya bases its entire case on the penultimate paragraph (paragraph six) of the MOU, which reads in full:

> "The delimitation of maritime boundaries in the areas under dispute, including the delimitation of the continental shelf beyond 200 nautical miles, shall be agreed between the two coastal States on the basis of international law 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".

Kenya now claims to interpret this paragraph to mean:

> "The Parties also agreed that following CLCS review, after which the outer limits of the continental shelf could be definitively established, the method of settlement for delimitation of the full extent of the maritime boundary would be a negotiated agreement rather than recourse to any compulsory procedures".[177]

3.24. Kenya thus reads into the spare language of paragraph six two expansive conclusions: (1) that the establishment of the entire maritime boundary, not just the boundary beyond 200 M, is subject to the condition precedent that the CLCS

[177] *Ibid.*, para. 46; *See also íbid*., para. 73 and Kenya's conclusions, paras. 152-153.

has issued recommendations on both Kenya's and Somalia's submissions; and (2) that the full maritime boundary will be established by negotiations—and by negotiations alone—only after those recommendations have been issued. Kenya would thus have the MOU condition the *delimitation* of the entire maritime boundary, within and beyond 200 M, on the prior *delineation* of the outer limits of the continental shelf beyond 200 M. Such an approach would not only be entirely unprecedented but it would also lead to a manifestly absurd result: Somalia and Kenya would have to wait many years until the CLCS issues its recommendations on both of their submissions before they could even attempt to delimit any part of their maritime boundary.

3.25. Kenya's current interpretation of the MOU is also entirely illogical. There is no principled reason why the delimitation of the continental shelf *within* 200 M would be subordinated to the recommendations of the CLCS concerning the delineation of the outer limits of the continental shelf *beyond* 200 M. The former is in no way conditioned on the latter.

3.26. In addition to being illogical, Kenya's argument is incompatible with the plain text of the MOU read on its own and in context. In contrast to the other paragraphs of the MOU, paragraph six does not have any dispositive scope. Its wording is wholly unremarkable and largely echoes the language of Articles 74(1) and 83(1) of the Convention (which provide that the delimitation of maritime boundaries in the EEZ and continental shelf, respectively, "shall be effected by agreement on the basis of international law"). It therefore does nothing more than reiterate the Parties' standing obligation to attempt to agree on the delimitation of their maritime boundary.

3.27. Moreover, the use of the passive voice ("the delimitation of maritime boundaries … shall be agreed on the basis of international law") in paragraph six

contrasts with the more active formulation characteristic of the operative paragraphs. The heart of the MOU is paragraph five pursuant to which Somalia and Kenya consent to each other's submissions. The first sentence of that paragraph states: "*The two coastal States agree* that at an appropriate time" they may make submissions that may include the area in dispute.[178] The second sentence then states: "*The two States hereby give their prior consent* to the consideration by the Commission of these submissions in the area under dispute".[179] The contrast between the affirmative nature with which these obligations are expressed, on the one hand, and the wording of paragraph six, on the other, is plain.

3.28. Paragraph six of the MOU is thus merely descriptive, not prescriptive.[180] Far from establishing a binding agreement to negotiate—and only negotiate—their maritime boundary, and then only *after* the CLCS has made its recommendations, it merely acknowledges the Parties' existing obligations under the Convention.

3.29. Moreover, a single provision cannot be—and must not be—read in isolation from the text as a whole.[181] The overall object and purpose of the

---

[178] 2009 MOU (emphasis added). KPO, Vol. II, Annex 1; MS, Vol. III Annex 6.

[179] *Ibid.*

[180] It is not alone in the respect. Large portions of the MOU contain similarly descriptive statements. Paragraph four, for example, states that Somalia's Preliminary Information "shall not prejudice the positions of the two coastal States with respect to the maritime dispute between them and shall be without prejudice to the future delimitation of maritime boundaries in the area under dispute, including the delimitation of the continental shelf beyond 200 M". *Ibid.* This, of course, would be true regardless of whether or not it was stated in the MOU.

[181] *See, e.g., Case concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment, I.C.J. Reports 1996, para. 27 ("The Court considers that such a general formulation cannot be interpreted in isolation from the object and purpose of the Treaty in which it is inserted"); WTO, Appellate Body, Report, 12 September 2005, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R;

document concerns non-objection. It would be wholly inappropriate to seize on a single clause of the sixth paragraph read in isolation to make the MOU mean what Kenya now attempts to make it mean without clear and convincing evidence of the Parties' intent to achieve that result. Yet, as discussed in Chapter 2,[182] there is no such evidence. Indeed, all the evidence is to the contrary.

3.30. This evidence includes Kenya's 6 May 2009 submission to the CLCS, which was made one month after the MOU was signed.[183] That submission was facilitated by the MOU and it constitutes an "instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty"[184] within the meaning of Article 31 of the VCLT. It is thus part of the context relevant for the interpretation of the MOU.

WT/DS286/AB/R, para. 239 ("[W]e caution against interpreting WTO law in the light of the purported 'object and purpose' of specific provisions, paragraphs or subparagraphs of the WTO agreements, or tariff headings in Schedules, in isolation from the object and purpose of the treaty on the whole. Even if, *arguendo*, one could rely on the specific 'object and purpose' of heading 02.10 of the EC Schedule in isolation, we would share the Panel's view that 'one Member's unilateral object and purpose for the conclusion of a tariff commitment cannot form the basis' for an interpretation of that commitment, because interpretation in the light of Articles 31 and 32 of the *Vienna Convention* must focus on ascertaining the *common* intentions of the parties".).

[182] *See*, *supra*, paras. 2.5-2.30.

[183] This is the date of transmission of the Executive Summary to the UN. *See* United Nations, Division for Ocean Affairs and the Law of the Sea, *Receipt of the submission made by the Republic of Kenya to the Commission on the Limits of the Continental Shelf*, U.N. Doc. CLCS.35.2009.LOS (11 May 2009). MS, Vol. III, Annex 60. The Executive Summary itself has "April 2009" on its cover-page.

[184] Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 332 (23 May, 1969), entered into force 27 Jan. 1980. WSS, Vol. II, Annex 1.

3.31. As discussed in Chapter 2,[185] the Executive Summary to Kenya's May 2009 submission describes the MOU only by its title, indicating that its object is the one described in the title; namely, the mutual grant of non-objection:

> "[T]he two countries have signed a Memorandum of Understanding (MOU) dated 7 April 2009 granting each other no objection in respect of submissions on the outer limits of the continental shelf to the Commission on Limits of the Continental Shelf".[186]

Kenya's Executive Summary says nothing more about the MOU. There is nothing that even suggests that Kenya considered the MOU to establish an agreed method of dispute settlement.

3.32. To succeed on its Preliminary Objections, Kenya must persuade the Court that the MOU is a binding agreement to have exclusive recourse to some other method of settling the Parties' maritime boundary dispute. It also must persuade the Court that this method is negotiations alone and that these negotiations shall be undertaken only after the CLCS has made its recommendations in respect to the submissions of both States. Kenya does not meet any of these challenges.

3.33. Not only does the text of the MOU interpreted in the light of its object and purpose refute Kenya's position, so too does the Parties' subsequent conduct. Indeed, as detailed in Chapter 2,[187] Kenya has not put before the Court *any* evidence prior to the filing of its Preliminary Objections showing that it

---

[185] *See*, *supra*, para. 2.28.

[186] 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, Annex 59.

[187] *See*, *supra*, paras. 2.5-2.76.

considered the MOU to be an instrument whose purpose was to establish a method for settling the Parties' maritime boundary dispute. To the contrary, the evidence it has tendered makes clear that the Parties considered that they could and should conduct delimitation negotiations long before the CLCS issued any recommendations on their submissions.

C. THE SUBSEQUENT PRACTICE OF THE PARTIES

3.34. Article 31(3) of the VCLT provides that the subsequent practice in the application of a treaty is also to be taken into account in interpreting its meaning. In this case, the practice of the Parties, including Kenya, after they signed the MOU confirms that they did not understand it to make the issuance of recommendations by the CLCS a pre-requisite to negotiations to settle their maritime boundary dispute. To the contrary, as described in Chapter 2,[188] they entered into such negotiations without waiting for the CLCS's recommendations, and they did so at Kenya's initiative.

3.35. It must be recalled in this regard that, as soon as the Government of the new Federal Republic of Somalia was firmly in place, Somalia accepted Kenya's invitation to engage in maritime boundary negotiations. The Parties subsequently held two rounds of talks (and scheduled a third) in 2014, all before the CLCS had even considered Somalia's submission or issued recommendations to either State.[189] (In fact, Somalia's full submission to the Commission was made only on 21 July 2014,[190] four months after the first round of negotiations and one week

---

[188] *See*, *supra*, paras. 2.37-2.75.

[189] MS, paras. 3.43-3.56. *See also*, *supra*, paras. 2.41-2.72.

[190] Federal Republic of Somalia, *Continental Shelf Submission of the Federal Republic of Somalia: Executive Summary* (21 July 2014). MS, Vol. IV, Annex 70.

before the second round.) The negotiations were serious and substantive, but they failed.[191]

3.36. This leads to two conclusions: (1) it confirms that neither Party believed the MOU to subordinate delimitation negotiations to the prior recommendations of the CLCS; and (2) to the extent that the MOU would have obliged the Parties to endeavour to solve their dispute by direct negotiations, that obligation (which is an obligation of conduct, not of result) was fulfilled by the negotiations that were held in 2014 but that ultimately proved to have no prospect of success.

3.37. Concerning the first point,[192] it must again be underscored that before lodging its Preliminary Objections, Kenya never took the view that the MOU prevented the Parties from attempting to resolve their delimitation dispute before the CLCS had issued its recommendations. Indeed, a considerable number of documents emanating from Kenya itself clearly show that it shared Somalia's understanding of the MOU as an instrument that did no more than grant mutual non-objection.

3.38. The Executive Summary to Kenya's May 2009 submission to the CLCS already has been discussed above.[193] As recounted in Chapter 2,[194] Kenya's 3 September 2009 oral presentation to the CLCS was to a similar effect. The Head of Kenya's Task Force on the Delineation of the Outer Continental Shelf, Ms. Juster Nkoroi (who was also involved in the discussions leading to the adoption of the MOU), characterised the MOU as an instrument pursuant to which "*the*

---

[191] *See*, *supra*, para. 2.75.

[192] As for the second point, *see* Chapter 4 below.

[193] *See*, *supra*, para. 2.28.

[194] *See*, *supra*, para. 2.33.

parties undertake not to object to the examination of their respective submissions".[195] She did not suggest any other purpose for the MOU. According to the official CLCS records, she also "confirmed that, at an appropriate time, a mechanism will be established to finalize the maritime boundary negotiations with Somalia".[196] In so doing, she made clear that Kenya did not consider the MOU to be an agreement on a method of settling the Parties' delimitation dispute.

3.39. The same points are equally clear in Kenya's 24 October 2014 *Note Verbale* to the Secretary General of the U.N. protesting Somalia's February 2014 objection to the CLCS's consideration of Kenya's Submission.[197] The timing of Kenya's October 2014 *Note Verbale* is particularly significant, as it was submitted two months *after* Somalia filed its Application instituting proceedings in this case. It was thus written not just in the context of an active dispute but in the context of ongoing litigation.

3.40. Kenya's October 2014 *Note* demonstrates that even at that late date it did not regard the MOU as constituting an agreement on a method for settling the Parties' maritime boundary dispute, nor as precluding dispute settlement before the CLCS had acted. The *Note* states, *inter alia*:

> "Kenya confirms that prior to the filing of her Submission to the Commission on 6 April [sic]

---

[195] U.N. Commission on the Limits of the Continental Shelf, *Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the progress of work of the Commission*, U.N. Doc. CLCS/64 (1 Oct. 2009) (emphasis added), para. 95. MS, Vol. II, Annex 61.

[196] *Ibid.*

[197] *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 Oct. 2014). MS, Vol. III, Annex 50.

> 2009 … Kenya had, in the spirit of understanding and cooperation, negotiated arrangements of a practical nature with the Transitional Federal Government of the Republic of Somalia in accordance with Article 83, paragraph 3, of the Convention. These arrangements were contained in a Memorandum of Understanding (hereinafter MOU) signed on 7th April 2009, *whereby both parties, undertook not to object to the examination of their respective submission*. At the time, Kenya indicated to the Commission that pending further negotiations, *a mechanism will be established to finalise the maritime boundary negotiations with Somalia*".[198]

3.41. Here again, the only effect Kenya ascribed to the MOU was mutual non-objection. And by stating that "a mechanism will be established to finalise the maritime boundary negotiations with Somalia", Kenya had also made clear that no such mechanism had yet been agreed. The argument put forward by Kenya in its Preliminary Objection is thus plainly a recent invention, devised well after Somalia had filed its Application initiating these proceedings.

3.42. Notably, Kenya's October 2014 *Note Verbale* also contains the following statement:

> "Kenya remains committed and continues to pursue more legitimate avenues to have the delimitation of the maritime boundary amicably resolved, most preferably through a bilateral agreement with the Somali Federal Republic and in this regard wishes to inform that notwithstanding the aforementioned actions by Somalia [i.e., its objection to Kenya's submission], bilateral diplomatic negotiations, at

[198] *Ibid.*, para. 2 (emphasis added).

> the highest levels possible, are ongoing with a view to resolving this matter expeditiously …".[199]

3.43. In indicating that it considered a bilateral agreement to be the "most preferable" avenue for resolving the delimitation dispute with Somalia, Kenya also clearly indicated that it did not consider such agreement the *only* "legitimate avenue" for doing so. The significance of this last point is underscored by the timing of the *Note*. As stated, it was submitted to the U.N. two months *after* Somalia filed its Application in this case. Yet, even then, Kenya did not (as it does now) take the view that a bilateral agreement was the *exclusive* "legitimate avenue" for resolving the Parties' maritime boundary dispute such that Somalia's earlier recourse to the Court should be deemed invalid. Indeed, as discussed in Chapter 2,[200] it was Kenya itself that first raised the possibility of referring the matter to third-party dispute settlement at the end of the second round of negotiations in July 2014.

3.44. The above leads to two clear conclusions: (1) Kenya may have preferred bilateral negotiations but it did not exclude (which means that, in its view, the MOU does not exclude) other means of settling the dispute; and (2) negotiations were not a remote prospect which could take place only after the CLCS had made its recommendations on the delineation of the outer limits of the shelf. They were, in Kenya's words, "*ongoing*".

3.45. Kenya's conduct proving that it did not consider the MOU to constitute an agreement on a method for settling the Parties' maritime boundary dispute, or precluding dispute settlement before the CLCS had acted, continued even well

---

[199] *Ibid.*, para. 7.

[200] *See*, *supra*, para. 2.69.

beyond October 2014. As stated in Chapter 2,[201] Kenya objected to the Commission's consideration of Somalia's submission by means of a *Note Verbale* to the U.N. Secretary General dated 4 May 2015. After lodging its objection, Kenya's *Note* reiterated that it

> "remains committed and continues to pursue more legitimate avenues to have the delimitation of the maritime boundary amicably resolved, most preferably through bilateral agreement with the Federal Republic of Somalia. The objection to consideration of Somalia's submission, therefore, is without prejudice to such endeavours".[202]

3.46. Here, more than eight months after Somalia filed its Application instituting these proceedings and just five months before submitting its Preliminary Objections, Kenya still did not take the view that a bilateral agreement was the exclusive "legitimate avenue" for resolving the Parties' maritime boundary dispute. To the contrary, by continuing to insist that a bilateral agreement was the "most preferable" method for resolving the dispute, and by failing to invoke the MOU, Kenya clearly proceeded on the basis that the MOU did not make a "bilateral agreement" the exclusive method for doing so. This, of course, is consistent with the fact that Kenya itself had raised the possibility of having recourse to compulsory dispute settlement in the event negotiations failed.[203]

---

[201] *See*, *supra*, para. 2.76.

[202] *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. 141/15 (4 May 2015). MS, Vol. III, Annex 51.

[203] *See*, *supra*, paras. 2.69-2.70.

3.47. The conduct of negotiations on the disputed maritime boundary (at Kenya's request) between March and July 2014, Kenya's oral statements before the CLCS, and its *Notes Verbales* to the U.N. all confirm that:

- The MOU related only to the examination of the Parties' respective submissions to the CLCS; it was meant merely to ensure their mutual consent to those submissions;

- Kenya never conditioned negotiations on the prior adoption of recommendations by the Commission;

- Thus, negotiations on the boundary could be—and were—held in parallel with the examination of the two States' submissions to the CLCS; and

- Finally, as Kenya's own conduct attests, the MOU by no means precluded recourse to the Court to settle their dispute concerning the delimitation of the maritime boundary between the two States.

D. A SYSTEMIC INTERPRETATION OF THE MOU

3.48. According to Article 31(3)(c) of the VCLT: "There shall be taken into account, together with the context … any relevant rules of international law applicable in the relations between the Parties". In the case of the MOU, the "relevant rules of international law" include UNCLOS, to which both Somalia and Kenya are parties. Kenya ratified the Convention on 2 March 1989 and Somalia on 24 July 1989.[204] Interpreting the MOU in the light of UNCLOS is particularly appropriate given that: (1) the text was adopted with a view to facilitating the smooth implementation of the Convention's provisions relating to

[204] U.N. Office of Legal Affairs, Division for Ocean Affairs and the Law of the Sea, *Table recapitulating the status of the Convention and of the related Agreements* (10 Oct. 2014), *available at* http://www.un.org/depts/los/reference_files/status2010.pdf. MS, Vol. IV, Annex 72.

the delineation of the outer limits of the continental shelf beyond 200 M; and (2) the language of the sixth paragraph of the MOU echoes the wording of Articles 74(1) and 83(1) of UNCLOS.

3.49. The Convention's compulsory dispute resolution system provides further support for Somalia's interpretation of the MOU. As Judge P.C. Rao noted in the entry of the *Max Planck Encyclopedia* concerning the settlement of disputes in the law of the sea:

> "More than 100 of [UNCLOS's] articles deal with dispute settlement in a comprehensive manner. The dispute settlement provisions constitute an integral part of the Convention. It establishes both voluntary and compulsory procedures for dispute settlement. The drafters of the UN Convention on the Law of the Sea considered that effective dispute settlement was essential to balance the delicate compromises incorporated in the Convention and to guarantee that it would be interpreted both consistently and equitably".[205]

3.50. Part XV of UNCLOS sets out the principles and the procedures applicable to dispute settlement under the Convention. Two basic principles govern its interpretation. *First*, the Parties to UNCLOS are under an obligation to settle disputes by peaceful means;[206] undue prolongation of disputes is

[205] P. Chandrasekhara Rao, "Law of the Sea, Settlement of Disputes", *Max Planck Encyclopedia of Public International Law* (last updated Mar. 2011). WSS, Vol. II, Annex 27.

[206] UNCLOS, Art. 279.

impermissible.[207] *Second*, the resolution of disputes by means of binding decisions is "the default rule".[208]

3.51. It is true that Article 281 permits States to agree to opt out of procedures entailing a binding decision. That is only true, however, if the agreement excludes any further procedure beyond that agreed by the parties.[209] Moreover, an agreement opting out of procedures entailing a binding decision must contain a clear statement to that effect. As aptly explained in a recent arbitral award, an express exclusion of judicial or arbitral settlement is indispensable:

> "Article 281 requires some *clear statement of exclusion of further procedures*. This is supported by the text and context of Article 281 and by the structure and overall purpose of the Convention. The Tribunal thus shares the views of ITLOS in its provisional measures orders in the *Southern Bluefin Tuna* and *MOX Plant* cases, as well as the separate opinion of Judge Keith in *Southern Bluefin Tuna*

---

[207] Articles 74(2) and 83(2) of UNCLOS specifically provide that "[i]f no agreement can be reached within a reasonable time, the States concerned shall resort to the procedures provided for in Part XV".

[208] *The Republic of Philippines v. The People's Republic of China*, Jurisdiction and Admissibility, Award, 2015, PCA Case Nº 2013-19 (hereinafter "*Philippines v. China*), para. 224 (referring to "the overall design of the Convention as a system whereby compulsory dispute resolution is the default rule …".). *See also* UNCLOS Art. 287 (providing that States may choose among ITLOS, the ICJ or an arbitral tribunal constituted in accordance with Annex VII of the Convention for the settlement of disputes concerning the interpretation or application of UNCLOS (Art. 287(1)). In the event a State does not choose any of the stated means of settling disputes under the Convention, it shall be deemed to have accepted arbitration in accordance with Annex VII (Art. 287(3)).

[209] UNCLOS, Art. 281(1) ("If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed to seek settlement of the dispute by a peaceful means of their own choice, the procedures provided for in this Part apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure".). Art. 282 allows States to opt out of the procedures provided for in Part XV of the Convention, but only if they have agreed to a procedure that "entails a binding decision". Art. 282(1). *See, infra*, paras. 3.82-3.86 for a discussion of the interaction between Articles 282 and 287 in the case of matching Optional Clause declarations.

> that the majority's statement in that matter that 'the absence of an express exclusion of any procedure ... is not decisive' is not in line with the intended meaning of Article 281".[210]

3.52. In this respect it is notable that ITLOS and arbitral tribunals constituted pursuant to Annex VII have consistently rejected objections to their jurisdiction based on arguments concerning the existence of an alternative method of dispute settlement.[211]

3.53. Kenya's recently adopted reading of the MOU pursuant to which it excludes any method of dispute settlement other than negotiations is therefore incompatible with scheme of the Convention, which favours the speedy resolution of disputes, through binding decisions when necessary, and only permits exclusion of judicial or arbitral recourse when the States concerned clearly and unambiguously so agree. The MOU does not meet these conditions. The only reasonable construction of paragraph six of the MOU is that it is a reaffirmation of the obligations of the Parties under UNCLOS, in particular those providing for delimitation by agreement in accordance with international law (Articles 74(1) and 83(1)). That obligation has never been interpreted by States, or by international courts or tribunals, as preventing States from submitting their delimitation disputes to judicial or arbitral settlement. The same can be said for the MOU; it no more constitutes a *pactum de contrahendo* than do Articles 74 and 83 of UNCLOS. Any other interpretation would pave the way to indefinite

---

[210] *Philippines v. China*, Jurisdiction and Admissibility, Award, 2015, PCA Case Nº 2013-19 (internal citations omitted, emphasis added), para. 223.

[211] *Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan), Provisional Measures, Order of 27 August 1999*, ITLOS Reports 2011, paras. 53-55; *MOX Plant Case (Ireland v. United Kingdom), Provisional Measures, Order of 3 December 2001*, ITLOS Reports 2001, paras. 40-53; *see also Philippines v. China*, Jurisdiction and Admissibility, Award, 2015, PCA Case Nº 2013-19.

stalemates in the resolution of disputes and uncertainty in the delimitation of maritime boundaries between States.

E. THE DRAFTING HISTORY OF THE MOU

3.54. Interpreting the MOU in accordance with Article 31 of VCLT does not leave its meaning ambiguous or obscure, nor does it lead to a result which is manifestly absurd or unreasonable. Recourse may therefore be had to its preparatory works and the circumstances of its conclusion as a supplementary means of interpretation only "to confirm the meaning resulting from the application of article 31".[212] In this case, an examination of the preparatory works and the circumstances in which the MOU was concluded does, in fact, confirm the interpretation set out above.

3.55. In the first place, the unique circumstances surrounding the conclusion of the MOU bear reiterating. As shown in Chapter 2,[213] the MOU was concluded with no substantive input from Somalia. The drafters of the MOU were Norway and Kenya—a truly anomalous situation for a bilateral treaty.

3.56. Several reasons explain why Somalia signed it despite these unusual circumstances. Somalia's new Transitional Federal Government ("TFG") was under considerable pressure to submit preliminary information indicative of the outer limits of its continental shelf to the CLCS by 13 May 2009. Failure to do so

---

[212] Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 332 (23 May, 1969), entered into force 27 Jan. 1980, Art. 32 ("Supplementary Means of Interpretation"). WSS, Vol. II, Annex 1. *See also Case Concerning Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, I.C.J. Reports 1994, para. 55; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Judgment, Jurisdiction and Admissibility, I.C.J. Reports 1995, para. 40; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Judgment, I.C.J. Reports 2002, para. 53.

[213] *See*, *supra*, para. 2.16.

would have meant losing Somalia's entitlement to a continental shelf beyond 200 M. The preparation of the preliminary information required time, expertise and funding, all of which Somalia lacked at the critical moment. It was for that reason that, as described in Chapter 2,[214] "in October 2008 the Special Representative of the [UN] Secretary General (SRSG) for Somalia, Mr Ahmedou Ould Abdallah, initiated the preparation of preliminary information indicative of the outer limits of the continental shelf of Somalia beyond 200 nautical miles …. In the preparation of this material the SRSG accepted an offer of assistance from the Government of Norway".[215]

3.57. In the case of Somalia, Norway's involvement went beyond the mere technical assistance it had provided to other States, including Kenya. Norway's help included not just drafting the Preliminary Information but also the MOU and even the letter from Somalia's Prime Minister authorizing the Minister of National Planning and International Cooperation to sign it on Somalia's behalf.[216] By contrast, Kenya's representatives were more actively involved in the drafting of the MOU and proposed several changes to it.[217] The MOU was effectively presented to the TFG as a done deal, part of a package that included the

---

[214] *See*, *supra*, para. 2.12.

[215] Somalia, *Preliminary Information to the CLCS* (14 Apr. 2009), pp. 3-4. MS, Vol. III, Annex 66.

[216] *See*, *supra*, para. 2.26. Norway also drafted the cover letter to Somalia's Preliminary Information submission. *See* Email from Amb. Hans Wilhelm Longva to Hon. Prof. Abdirahman Haji Adan Ibbi, Deputy Prime Minister and Minister of Fisheries and Marine Resources of Somalia (27 Mar. 2009). WSS, Vol. II, Annex 19.

[217] *See, e.g.*, Email exchange between Ms. Edith K. Ngungu and Amb. Hans Wilhelm Longva (30 Mar. 2009). KPO, Vol. II, Annex 9; Email exchange between Ms. Edith K. Ngungu and Mr. Hans Wilhelm Longva (30–31 Mar. 2009). KPO, Vol. II, Annex 10.

preliminary information, without which Somalia would "lose the continental shelf".[218]

3.58. When the draft preliminary information and MOU were presented to it, the new TFG had been in place for less than a month.[219] Somalia's April 2009 Preliminary Information recalls:

> "The new Transitional Federal Government of the Somali Republic was sworn in on 22 February 2009. At a meeting in Nairobi on 10 March 2009 … the Transitional Federal Government of the Somali Republic was informed about the initiative of the SRSG and of the Norwegian assistance".[220]

3.59. Considering the extreme time pressure, the TFG could hardly have opposed the initiative or requested more time to consider it. Thus, the Minister of National Planning and International Cooperation, Professor Ibbi—the person from the TFG with whom Ambassador Longva exchanged e-mails—limited himself to expressing his gratitude to Norway:

> "Dear Ambassador, I am very pleased to see you again what I would like to inform you is that The Council of Minister of [S]omalia have approved the Re-Submission of the preliminary information

---

[218] *See* Network Al Shahid, *Press Release issued by former Somali Minister of National Planning and International Cooperation, Dr. Abdirahman Abdishakur* (7 July 2012). KPO, Vol. II, Annex 13; Email from Amb. Hans Wilhelm Longva to Ms. Juster Nkoroi (Mar. 2009). KPO, Vol. II, Annex 6; Email exchange between Ms. Rina Kristmoen, Hon. Prof. Abdirahman Haji Adan Ibbi, Amb. Hans Wilhelm Longva, and Ms. Juster Nkoroi (10–22 Mar. 2009). KPO, Vol. II, Annex 7; Email exchange between Amb. Hans Wilhelm Longva, Hon. Prof. Abdirahman Haji Adan Ibbi and Ms. Juster Nkoroi (27 Mar. 2009). KPO, Vol. II, Annex 8; Email from Amb. Hans Wilhelm Longva to Hon. Prof. Abdirahman Haji Adan Ibbi (2 Apr. 2009). KPO, Vol. II, Annex 12.

[219] *See*, *supra*, paras. 2.14-2.15.

[220] Somalia, *Preliminary Information to the CLCS* (14 Apr. 2009), p. 4. MS, Vol. III, Annex 66.

> indicative of the outer limits of the continental shelf beyond 200 nautical miles, which we suppose [sic] to submit to the Secretary General of the United Nations before 13 May 2009.
>
> As we have agreed yes I am ready to meet with you again but My Prime [M]inister would like to invite you and H.E Rina to come to Mogadishu one day trip that you will also see our Prime Minister who would li[k]e to thank you and your Government for their unreserved endeavours towards this issue. The Cabinet became ve[r]y happy to know that The Norw[e]gian Government has done all the work that we supposed [sic] to do without any interest than wanting only to help the newly born Somali Government and as well wants to see Somalia to stand again its fee[t].
>
> Third Po[i]nt, if you remember The parag[]raph that you asked me to mention what to be written we agreed to let you know these points:-
>
> 1- Yem[e]n and Kenya we must have the mem[o]randum of understanding that you have prepared.
> 2. mentioning that the Council of Minister have approved with many thanks to the Norwegian Government and SRSG whom have been doing.
> 3. Somalia wants to submit its submission before any[]one else.
> and so on".[221]

There is no mention of the maritime boundary or any "agreed" procedure for resolving the Parties' dispute. The entire focus is on the submission to the CLCS.

[221] Email exchange between Ms. Rina Kristmoen, Hon. Prof. Abdirahman Haji Adan Ibbi, Amb. Hans Wilhelm Longva, and Ms. Juster Nkoroi (10–22 Mar. 2009), p. 34. KPO, Vol. II, Annex 7.

3.60. The e-mail exchanges submitted with Kenya's Preliminary Objections are to the same effect. *None* of them presents the MOU as anything other than a mutual commitment not to object to each other's CLCS submission. *None* of the persons involved in its drafting stated, or even hinted, that the MOU had anything to do with establishing a method for resolving the Parties' maritime delimitation dispute. Still less is there anything to suggest that the MOU was intended to establish a very peculiar two-step procedure for settling that dispute, pursuant to which negotiations were both exclusive and dependent upon the CLCS's prior issuance of recommendations.

3.61. Considering Ambassador Longva's critical role in drafting the MOU, it is useful to examine the views he expressed, both contemporaneously[222] and in subsequent declarations. They confirm beyond any doubt that the purpose of the document was not to condition the delimitation of the maritime boundary between Somalia and Kenya on the prior adoption of recommendations by the CLCS. The sole purpose of the instrument was, as its title attests, the mutual grant of no objection so the Commission could proceed to exam their respective submissions notwithstanding their unresolved delimitation dispute.

3.62. Ambassador Longva's presentation concerning the MOU at the November 2009 *Pan African Conference on Maritime Boundary Delimitation and the Continental Shelf* was discussed in Chapter 2 and is conclusive on this point. As

[222] *See, e.g.*, Email exchange between Amb. Hans Wilhelm Longva, Hon. Prof. Abdirahman Haji Adan Ibbi and Ms. Juster Nkoroi (27 Mar. 2009). KPO, Vol. II, Annex 8; Email exchange between Ms. Edith K. Ngungu and Amb. Hans Wilhelm Longva (30 Mar. 2009). KPO, Vol. II, Annex 9; or Email from Amb. Hans Wilhelm Longva to Mr. James Kihwaga. KPO, Vol. II, Annex 14. In all these exchanges Ambassador Longva stresses the need to include clarifications concerning the "beyond 200 nautical miles purpose" of the MOU.

recounted there,[223] Ambassador Longva characterised the MOU strictly as a non-objection agreement. He stated:

> "On 7 April 2009 Kenya and Somalia signed a Memorandum of Understanding where they agree that each of them will make separate submissions to the CLCS, that may include areas under dispute, without regard to the delimitation of maritime boundaries between them, and where they give their prior consent to the consideration by the CLCS of these submissions in the areas under dispute".[224]

He said nothing about any agreement on dispute settlement, whether generally or in relation to the area beyond 200 M. Nowhere in his summary does he hint that the MOU is an agreement on the means of settlement of the boundary dispute, or that the Commission's delineation of the outer limits in the area beyond 200 M is a pre-condition for negotiations on the delimitation of the boundary.

3.63. Also enlightening is the more general explanation concerning the purpose and utility of such non-objection agreements Ambassador Longva gave during the same presentation:

> "Both the joint submission made by Mauritius and the Seychelles, and the Memorandum of Understanding signed by Kenya and Somalia, as well as the understandings reached at the subregional meetings of West African coastal States in Accra and Praia represent important breakthroughs in the handling of unresolved issues

---

[223] *See*, *supra*, paras. 2.23-2.24.

[224] Amb. Hans Wilhelm Longva, *Prepared Remarks at Pan African Conference on Maritime Boundary Delimitation and the Continental Shelf, Accra* (9–10 Nov. 2009), p. 114. KPO, Vol. II, Annex 25.

> of maritime delimitation between neighbouring States in the context of the establishment of the outer limits of the continental shelf beyond 200 nautical miles. … The regional or sub-regional approach and cooperation chosen by most of the West African coastal States with respect to the establishment of the outer limits of the continental shelf beyond 200 nautical miles should also provide an example to other coastal States both in Africa and elsewhere. We have already seen that *unresolved issues of maritime delimitation and the possibility of overlap between the areas beyond 200 nautical miles claimed by neighbouring States*, provide strong arguments in favour of a regional or sub-regional approach and cooperation".[225]

3.64. Norway subsequently reconfirmed this interpretation of the MOU in a 2011 *Note Verbale* from its Permanent Mission to U.N. to the U.N. Secretariat, in which the MOU is discussed in some detail. The *Note* closely parallels Ambassador Longva's comments on the object and purpose of the document:

> "With the good offices of Norway, and after consultations between the two sides, on 7 April 2009 Somalia and Kenya signed in Nairobi a 'Memorandum of Understanding between the Government of Kenya and the Transitional Federal Government of the Somali Republic granting 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'. In the Memorandum of Understanding (MoU) the Parties agree that at an appropriate time each of them will make separate submissions to the Commission on the Limits of the Continental Shelf (CLCS) that may include areas under dispute between the two countries, without

[225] *Ibid.* (emphasis added).

> prejudice to the delimitation of maritime boundaries between them. *In this MoU the two coastal States grant their prior consent to the consideration by the CLCS of these submissions in the areas under dispute*. Furthermore it is stipulated that the submissions made before the CLCS and the recommendations approved by the CLCS thereon shall not prejudice the positions of the two coastal States with respect to the maritime dispute between them and shall be without prejudice to the future delimitation of maritime boundaries in the areas under dispute, including the delimitation of the continental shelf beyond 200 nautical miles".[226]

3.65. The conclusions to be drawn from the above are obvious. On the basis that the general rule of interpretation enunciated in Article 31 (and, secondarily, Article 32) of the VCLT is applicable, the 2009 MOU between Somalia and Kenya:

> (1) Creates a neat distinction between the *delimitation* of the Parties' maritime boundary and the *delineation* of the outer limits of the continental shelf beyond 200 M, and applies only to the latter;
>
> (2) Does not establish, or even imply, any prohibition of negotiations between the two States pending the establishment of the outer limits of the continental shelf beyond 200 M; and
>
> (3) Does not establish negotiations as the exclusive method of settling the maritime boundary dispute between them.

3.66. To require the Parties to wait for the CLCS's recommendations before engaging in efforts to resolve the boundary dispute would only cause considerable and pointless delay. In addition to being inconsistent with

---

[226] *Note Verbale* from the Permanent Mission of Norway to the United Nations to the Secretariat of the United Nations (17 Aug. 2011) (emphasis added), p. 25. KPO, Vol. II, Annex 4.

UNCLOS, it is also flatly incompatible with the general policy of the African Union.[227] In April 2014, at a time when the negotiations with Somalia were on-going, Kenya's President himself stated before Parliament that, as a member of the African Union, Kenya was under an obligation to delimit its boundaries in a timely manner.[228]

3.67. While it is conceivable that the CLCS could issue recommendations concerning Kenya's submission in late 2016 or during 2017, many more years will be needed before the Commission will be able to consider Somalia's submission (which, as stated, was submitted in July 2014). Indeed, Somalia's submission is fourth to last in the queue for consideration by the CLCS, and the Commission's backlog is already considerable. According to Kenya's untenable interpretation of the MOU, the Parties (and the Court) could not address any aspect of their maritime delimitation dispute for at least a decade. The MOU

---

[227] Memorandum of Understanding between the Members of the African Union on Security, Stability, Development and Cooperation in Durban, South Africa (July 2002), *reprinted in* AFRICA, FROM BARRIERS TO BRIDGES: COLLECTION OF OFFICIAL TEXTS ON AFRICAN BORDERS FROM 1963 TO 2012 (2013), p. 53. WSS, Vol. II, Annex 2 (Point 10 of the Memorandum is thus drafted: "African borders: In conformity with the Cairo Summit Decision on borders, conclude [sic] by 2012, with the assistance of the UN cartographic unit where required, the delineation and demarcation of borders between African states, where it has not been done, to strengthen peaceful inter-state relations. The outcome of such exercises should be deposited with the African Union and the United Nations. Prior to 2012 when the process should be completed, there should be bi-annual review of the state of implementation".). *See also* African Union Border Programme, *Third Declaration on the African Union Border Programme Adopted by the Third Conference of African Ministers in Charge of Border Issues, Niamey, Niger, AUBP/EXP-MIN/7* (17 May 2012), *reprinted in* AFRICA, FROM BARRIERS TO BRIDGES: COLLECTION OF OFFICIAL TEXTS ON AFRICAN BORDERS FROM 1963 TO 2012 (2013). WSS, Vol. II, Annex 13. *See also* African Union Border Programme, *Declaration on the African Union Border Programme and its Implementation Modalities as Adopted by the Conference of African Ministers in Charge of Border Issues held in Addis Ababa, Ethiopia* (7 June 2007). WSS, Vol. II, Annex 9. *See also* African Union, Second Conference of African Ministers in Charge of Border Issues, Preparatory Meeting of Governmental Experts, Addis Ababa, Ethiopia, *AUBP/EXP-MIN/2 Concept Note* (22-25 Mar. 2010). WSS, Vol. II, Annex 11.

[228] E. Mutai, "Kenya, Somalia border row targeted in Sh5.6bn mapping plan", *Business Daily* (20 Apr. 2014). WSS, Vol. II, Annex 30.

cannot and should not be interpreted to frustrate any prospect of resolving the Parties' delimitation dispute in a timely manner, or via judicial determination.

3.68. Further, in the alternative and as a strictly subsidiary argument, Somalia notes that under any view of the MOU, Kenya's Preliminary Objections are entirely irrelevant concerning the delimitation of any maritime area other than the continental shelf:

- The title of the MOU refers only to the "Continental Shelf beyond 200 nautical miles", showing that it has no application to any other zone;

- The second paragraph defines the "maritime dispute" as concerning "[t]he delimitation of *the continental shelf* between the Republic of Kenya and the Somali Republic";[229]

- The same paragraph also states that "the claims of the two coastal States cover an overlapping area of *the continental shelf* which constitutes the 'area under dispute'";[230]

- The sixth paragraph (the provision on which Kenya would rely) applies only to "[t]he delimitation maritime boundaries in the *areas under dispute*";[231] and

- The expressions "territorial sea" and "exclusive economic zone" are entirely absent from the MOU.

3.69. That said, Somalia wishes to make absolutely clear that it does not consider that the MOU applies even to the Parties' dispute concerning the delimitation of the continental shelf, whether within or beyond 200 M. As shown,

---

[229] 2009 MOU (emphasis added). KPO, Annex 1; MS Annex 6.

[230] *Ibid.* (emphasis added).

[231] *Ibid.* (emphasis added).

the MOU's object and purpose is limited to the mutual grant of non-objection in relation to their respective CLCS submissions. Its scope is therefore limited to the *delineation* of the continental shelf beyond 200 M; it has nothing to do with the *delimitation* of any aspect of the Parties' maritime boundary. To the extent that the MOU addressed the delimitation dispute, it was solely to confirm that the no objection agreement had no effect on, and was without prejudice to, the Parties' positions on delimitation. The MOU was not, even remotely, an attempt to resolve that dispute; rather, it did no more than confirm the separateness of that dispute from the agreement on submissions to the CLCS.

3.70. The fact that the Somali and Kenyan submissions are pending before the Commission[232] does not prevent the Court from exercising its jurisdiction to delimit the maritime boundary between the Parties in its entirety, including in the continental shelf beyond 200 M. Indeed, it would not be in line with the principle of sound administration of justice to expect States to return to the Court (or any other judicial or arbitral organ) years later to settle the remaining part of their maritime boundary dispute.[233] As made clear by the *chapeau* of Article 38 of its Statute, the Court's "function is to decide in accordance with international law such disputes as are submitted to it". It would not be consistent with this mandate if the Court were, without good reason, to allow a significant part of a dispute to

---

[232] *See*, *supra*, paras. 2.92, 3.67.

[233] As President Basdevant recalled, "to ensure a good administration of justice, it is necessary not to delay the settlement of this dispute". *Asylum (Colombia/Peru)*, Extension of Time-Limits, Order, I.C.J. Reports 1949, p. 267. *See also The Panevezys-Saldutiskis Railway Case*, Preliminary Objections, Order, 1938, P.C.I.J. Series A/B, No. 67, pp. 55-56; *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (New Application: 1962)*, Preliminary Objections, Judgment, I.C.J. Reports 1964, p. 42; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Counter-Claims, Order, I.C.J. Reports 1997, para. 30. *See also Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Preliminary Objections, Judgment, I.C.J. Reports 2008, para. 85.

lie unresolved for many years, and remain a source of tension and instability in the relations between the two Parties.

Section II. The Absence of Any Agreed Exclusive Method of Settlement within the Meaning of Kenya's Optional Declaration

3.71. It follows from the above that the MOU does not fall within the scope of the first reservation to Kenya's Optional Clause declaration. Nor is Part XV of the UNCLOS an obstacle to the Court's Jurisdiction, as Kenya obliquely seems to suggest.

A. THE MOU DOES NOT FALL WITHIN THE SCOPE OF KENYA'S RESERVATION

3.72. The language of the MOU providing that the "delimitation of maritime boundaries in the areas under dispute, including the delimitation of the continental shelf beyond 200 M, shall be agreed between the two coastal States" merely restates the basic principle articulated in Articles 74(3) and 83(3) of UNCLOS, according to which the delimitation of maritime boundaries shall be effected by agreement. Even if negotiations are the most natural way for States to settle their maritime boundary disputes, that does not mean they are the *only* way. Negotiations are one among other possible methods. The MOU does not render them exclusive.

3.73. As shown above,[234] correctly interpreted, the MOU does not set out an agreed method for settling the Parties' maritime boundary dispute, or any part of it. The object and purpose of the MOU is neither the delimitation of Somalia's and Kenya's respective maritime areas nor the establishment of a procedure for

[234] *See* Section I above.

that purpose. Despite Kenya's extraordinary claim to the contrary, there is nothing in the MOU to suggest that the Parties undertook a binding commitment to settle their dispute through negotiations, and then only after the CLCS had made its recommendations. The MOU therefore does not constitute an "agreement" for that purpose within the meaning of Kenya's reservation.

3.74. There is, moreover, nothing in the MOU to support Kenya's assertion that negotiations would be exclusive and prevent the Court from exercising its jurisdiction over this dispute. For Kenya's objection to succeed, it would have to demonstrate that the Parties intended the MOU to displace the effect of their Optional Clause declarations under Article 36(2) of the Court's Statute for the entirety of the dispute Somalia has submitted. Kenya cannot do so.

3.75. It is well established that the system of convergent Optional Clause declarations creates a series of binding obligations based on reciprocity. The Court has underscored the contractual nature of the relationship that results from such matching declarations:

> "The Court considers that, by the deposit of its Declaration of Acceptance with the Secretary General, the accepting State becomes a Party to the system of the Optional Clause in relation to the other declarant States, with al1 the rights and obligations deriving from Article 36. The contractual relation between the Parties and the compulsory jurisdiction of the Court resulting therefrom are established, 'ipso facto and without special agreement' by the fact of the making of the Declaration. … A State accepting the jurisdiction of the Court must expect that an Application may be filed against it before the Court by a new declarant State on the same day on which that State deposits with the Secretary General its Declaration of Acceptance. For it is on that very day that the

> consensual bond, which is the basis of the Optional Clause, comes into being between the States concerned".[235]

3.76. The Court also highlighted the bilateral nature of the engagements resulting from convergent Optional Clause declarations in its judgment in the *Military and Paramilitary Activities* case:

> "In 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, in which the conditions, reservations and time-limit clauses are taken into consideration".[236]

3.77. Given the bilateral nature of the commitments assumed under Article 36(2) of the Statute, the legal effects stemming from them can only be nullified by a clear and unambiguous exclusion of the Court's jurisdiction. There is no such exclusion in the MOU.

3.78. In the present case, it is apparent that at no point did Kenya seek to exclude—or actually exclude—the right of recourse to the ICJ (or any other judicial or arbitral mechanism) for the delimitation of the maritime boundary with Somalia:

- There is no express exclusion to that effect in Kenya's Optional Clause declaration;

---

[235] *Case Concerning Right of Passage over Indian Territory*, Preliminary Objections, Judgement, I.C.J. Reports 1957, p. 146 (emphasis added). *See also Electricity Company of Sofia and Bulgaria*, Preliminary Objection, Judgment, 1939, P.C.I.J. Series A/B, No. 77, p. 81.

[236] *Nicaragua v. United States of America*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, para. 60.

- During two rounds of negotiations with Somalia, no such exclusion was ever claimed;

- The MOU itself makes no mention of "negotiations" in regard to the maritime boundary within 200 M, and certainly makes no reference to them as exclusive of other peaceful means of dispute settlement; and

- Prior to the filing of its Preliminary Objections on 7 October 2015, Kenya never expressed the view that the MOU constituted an agreement to settle the maritime boundary dispute by negotiation only, to the exclusion of all other means of peaceful dispute settlement. Nor did Kenya assert that such negotiations could only be held after the CLCS had issued its recommendations to both States. To the contrary, it was Kenya that invited Somalia to join in negotiations to resolve the boundary dispute in 2013 and 2014. As a result of Kenya's initiative, the Parties engaged in detailed substantive negotiations during two rounds of talks in 2014.

B. PART XV OF UNCLOS POSES NO OBSTACLE TO THE COURT'S JURISDICTION

3.79. In a terse, subsidiary argument, Kenya's Preliminary Objections also claim that

> "quite apart from the 2009 MOU, the UNCLOS Part XV methods of settlement would also trigger Kenya's reservation and exclude the Court's jurisdiction".[237]

3.80. Kenya does not elaborate on this point. Presumably, it means to suggest that UNCLOS itself constitutes another agreement to have recourse to some other

[237] KPO, para. 147.

method of dispute settlement within the meaning of the first reservation to its Optional Clause declaration. Kenya is mistaken about this too.

3.81. Part XV of the Convention has no effect on the prior agreement between Somalia and Kenya to confer jurisdiction on this Court resulting from their matching Optional Clause declarations. In an analogous context, the Permanent Court of International Justice stressed:

> "[T]he multiplicity of agreements concluded accepting the compulsory jurisdiction is evidence that the contracting Parties intended to open up new ways of access to the Court rather than to close old ways or to allow them to cancel each other out with the ultimate result that no jurisdiction would remain. In concluding the Treaty of conciliation, arbitration and judicial settlement, the object of Belgium and Bulgaria was to institute a very complete system of mutual obligations with a view to the pacific settlement of any disputes which might arise between them. There is, however, no justification for holding that in so doing they intended to weaken the obligations which they had previously entered into with a similar purpose, and especially where such obligations were more extensive than those ensuing from the Treaty".[238]

3.82. In fact, the agreement to submit disputes to the Court that results from the Parties' matching declarations under Article 36(2) of the Statute has priority over the procedures established in Part XV of UNCLOS. Article 282 of the Convention provides:

---

[238] *Electricity Company of Sofia and Bulgaria*, Preliminary Objection, Judgment, 1939, P.C.I.J. Series A/B, No. 77, p. 76.

> "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".[239]

3.83. The conditions stated in Article 282 are met in this case. The agreement between Somalia and Kenya to submit their dispute to this Court that results from their convergent Optional Clause declarations constitutes an agreement under UNCLOS "to a procedure that entails a binding decision" within the meaning of Article 282. This form of agreement is covered by the words "or otherwise" in Article 282. As noted in an authoritative commentary:

> "Article 282 mentions that an agreement to submit a dispute to a specified procedure may be reached 'otherwise.' This 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".[240]

3.84. The first condition established by Article 282 of the UNCLOS—namely that the Parties have agreed to submit their dispute to a procedure that entails a binding decision—is therefore met.

---

[239] UNCLOS, Art. 282 (emphasis added).

[240] M. H. Nordquist, S. Nandan, & S. Rosenne (eds.), UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982, A COMMENTARY, VOL. V (1989), pp. 26-27. WSS, Vol. II, Annex 25. *See also ibid.*, p. 26, fn. 7 ("Earlier drafts also contained a reference to the possibility of the acceptance of a procedure through 'some other instrument or instruments.' This phrase was changed to 'otherwise' on recommendation of the Drafting Committee". (citing A/CONF.62/L.75/Add.l and A/CONF.62/L.82)); *Southern Bluefin Tuna (New Zealand-Japan, Australia-Japan), Decision of 4 August 2000*, RIAA, Vol. XXIII, p. 27 (summarizing an argument made by Japan).

3.85. The second condition is that the jurisdictional body chosen by the Parties (here the ICJ) must have the power to interpret and apply UNCLOS in order to resolve the dispute submitted to it. This condition is implicit in the use of the phrase "a dispute concerning the interpretation or application of this Convention" in Article 282.[241]

3.86. In the present case, the Court undoubtedly has jurisdiction to interpret and apply UNCLOS. Both Parties have ratified it and Somalia has explicitly requested the Court to decide its claims on this basis.[242] Therefore, not only is the Court's jurisdiction established on the basis of Article 36(2) of the Statute, it also has priority over the procedures established in Article 287 of UNCLOS. The UNCLOS Part XV procedures are therefore no obstacle to the Court's jurisdiction, as Kenya wrongly claims.

*

3.87. Kenya's and Somalia's adherence to the system of Optional Clause declarations provided by Article 36(2) of the Statute for over 50 years bears witness to their commitment to "the object and purpose of the Statute [which] is to enable the Court to fulfil the functions provided for therein, and, in particular, the basic function of judicial settlement of international disputes by binding decisions in accordance with Article 59 of the Statute".[243]

---

[241] *See also MOX Plant Case (Ireland v. United Kingdom), Provisional Measures, Order of 3 December 2001*, ITLOS Reports 2001, paras. 38, 48-52.

[242] *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya),* Application Instituting Proceedings (28 Aug. 2014), para. 33.

[243] *LaGrand (Germany v. United States),* Judgment, I.C.J. Reports 2001, para. 102.

3.88. Whether by virtue of the combined effect of the Optional Clause declarations and the MOU, or by virtue of UNCLOS, negotiations and judicial settlement are considered as alternative methods to reach a solution to the dispute on maritime delimitation, neither of which is preclusive of the other:

> "The Court's judgment will thus substitute for the non-existent agreement between the Parties on the delimitation of the continental shelf and the exclusive economic zones and shall resolve all such matters which have not been settled by the Parties".[244]

3.89. Consequently, the MOU cannot be interpreted as making negotiations the only permissible method of dispute settlement, to the exclusion of third-party settlement. And even in the exceedingly unlikely event the Court agrees with Kenya's newly adopted interpretation of the MOU, it still cannot depart from its constant jurisprudence, which makes clear that negotiations are not to continue indefinitely. If deadlock has been reached, the Parties can seize the Court. In the present case, Somalia and Kenya have—at Kenya's invitation—made such efforts and, as discussed in the next Chapter, they have proven futile.

[244] *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, para. 29.

CHAPTER 4. IN ANY CASE, THE PARTIES HAVE FULFILLED THEIR PURPORTED OBLIGATION TO NEGOTIATE

4.1. The first reservation included with Kenya's Optional Clause declaration concerns "[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". As shown in the previous Chapter, the MOU does not constitute such an agreement.

4.2. It is therefore only in the alternative that Somalia will show that even if (*quod non*) the MOU fell within the ambit of Kenya's reservation and implicitly made negotiations a required method of settlement, there would still be no bar to the Court's jurisdiction. In that case, the obligation would be only a *pactum de negociando* not a *pactum de contrahendo*; that is, it would not be an obligation to actually conclude an agreement:

> "[E]vidence of such an attempt to negotiate – or of the conduct of negotiations – does not require the reaching of an actual agreement between the disputing parties. In this regard, in its Advisory Opinion on *Railway Traffic between Lithuania and Poland*, the Permanent Court of International Justice characterized the obligation to negotiate as an obligation 'not only to enter into negotiations, but also to pursue them as far as possible, with a view to concluding agreements [even if] an obligation to negotiate does not imply an obligation to reach agreement ...'".[245]

[245] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, I.C.J. Reports 2011, para. 158 (quoting *Railway Traffic between Lithuania and Poland*, Advisory Opinion, 1931, P.C.I.J., Series A/B, No. 42, p. 116). *See also North Sea Continental Shelf (Federal Republic of Germany/Netherlands)*, Judgment, I.C.J. Reports *1969*, para. 87; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea*

4.3. Therefore:

> "Negotiations do not of necessity always presuppose a more or less lengthy series of notes and despatches; it may suffice that a discussion should have been commenced, and this discussion may have been very short; this will be the case if a dead lock is reached, or if finally a point is reached at which one of the Parties definitely declares himself unable, or refuses, to give way, and there can therefore be no doubt that *the dispute cannot be settled by diplomatic negotiation*".[246]

In the view of the Court,

> "[i]t is sufficient if, at the date on which a new procedure is commenced, the initial procedure has come to a standstill in such circumstances that there appears to be no prospect of its being continued or resumed".[247]

Section I. Unfeasibility of Successful Negotiations

4.4. As discussed, Somalia and Kenya entered into negotiations without considering themselves bound to wait for the CLCS's recommendations. Negotiations took place between March and July 2014 but proved fruitless.[248] Despite "intense" and sometimes "heated" exchanges, the Parties made no progress in narrowing the sizable gap between them. Somalia's position remained

---

intervening), Judgment, I.C.J. Reports 2002, p. 424, par. 244; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010 (I), p. 68, para. 150.

[246] *The Mavrommatis Palestine Concessions (Greece/United Kingdom)*, Jurisdiction, Judgment, 1994, P.C.I.J. Series A, No. 2, p. 13 (emphasis added). *See also Border and Transborder Armed Actions (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 1988, para. 80.

[247] *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 1988, para. 80.

[248] *See*, *supra*, paras. 2.41-2.75.

constant in emphasizing equidistance and the three-step method established in the Court's jurisprudence, while Kenya remained equally committed to a generalised conception of equity that, in its view, dictated the parallel of latitude it claimed as the boundary by Presidential Proclamation in 2005.[249]

4.5. The lack of progress caused the Somali Foreign Minister to ask in frustration at the end of the second round of talks "how long would both countries continue to have their delegations entangled in these heated discussions without any possible solution".[250] The Parties had, in short, reached a deadlock. Nevertheless, a last chance was to be given at achieving a negotiated settlement at talks scheduled in Mogadishu in August 2014.[251] On the agreed date, the Kenyan delegation simply did not appear. No advance notification was provided and no explanation was given.[252]

4.6. As discussed in Chapter 2,[253] even as the negotiations were ongoing—and, indeed, even now—Kenya has persisted in its unilateral activities in the disputed area. Kenya thus seeks to have the best of all worlds: it (1) has refused even to consider modifying its position with respect to its parallel boundary claim in negotiations with Somalia; (2) persists in its unilateral activities in the disputed area that are plainly designed to exert *de facto* control over it; and (3) now seeks simultaneously to preclude Somalia from seeking judicial settlement of the

---

[249] *See*, *supra*, paras. 2.53, 2.57.

[250] 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.

[251] *See*, *supra*, para. 2.72.

[252] *See*, *supra*, para. 2.72-2.74.

[253] *See*, *supra*, para. 2.86.

dispute. These actions are part and parcel of the same transparent strategy: to impose upon Somalia a boundary following a parallel of latitude by unilateral action, by foreclosing any possibility of a negotiated settlement (except on Kenya's terms) or a judicially-determined one.

4.7. It is customary for international courts to defer to a State's appreciation that negotiations have reached a deadlock. Indeed, "the States concerned ... are in the best position to judge as to political reasons which may prevent the settlement of a given dispute by diplomatic negotiation".[254] In light of Kenya's intransigent attitude during the bilateral exchanges,[255] its extensive unilateral activities in the disputed area,[256] its lack of explanation for its failure to appear during the scheduled third round of negotiations,[257] Somalia was clearly correct in concluding that negotiations had reached a deadlock and that it was pointless to continue trying. Indeed, Kenya's attitude was (and is) incompatible with the principle of *bona fide* negotiations. Somalia has therefore more than fulfilled any *pactum de negociando* the MOU may have created.

4.8. The recently adopted interpretation of the MOU Kenya now offers in its Preliminary Objections is just another tactic for delaying the settlement of the dispute while continuing to exert its control over the disputed area. Somalia does not share this conception of the peaceful settlement of disputes. Recourse to the Court is justified on several grounds:

---

[254] *Philippines v. China*, Jurisdiction and Admissibility, Award, 2015, PCA Case Nº 2013-19, para. 350 (quoting *Mavrommatis Palestine Concessions*, Jurisdiction, Judgment, 1924, P.C.I.J. Series A, No. 2, p 15).

[255] *See*, *supra*, paras. 2.72-2.75.

[256] *See*, *supra*, para. 2.86. *See also* MS, paras. 8.19-8.28.

[257] *See*, *supra*, paras. 2.72-2.75.

- The Court has jurisdiction to resolve the dispute;

- Its solution will be a fair, binding and final decision based on international law;

- It will solve the *whole* dispute through a binding decision, reached within a reasonable time; and

- An international judicial decision is more likely to be respected by government and civil society in both countries.

Section II. Kenya's Artificial Objection Based on the Doctrine of "Unclean Hands"

4.9. In these circumstances, Somalia is fully justified to have seized the Court. It remains only to address what appears to be Kenya's second preliminary objection, based on the uncertain doctrine of "unclean hands".[258] According to Kenya, Somalia's Application should be deemed inadmissible because:

> "First, [Somalia] has consented, then objected, then consented again (immediately before filing its Memorial), to Kenya's CLCS submission, causing significant costs and delay. Second, it has disregarded the requirement of CLCS review prior to delimitation that was specifically stipulated in the MOU. Third, it has attempted to circumvent its obligation to negotiate an agreement on delimitation after CLCS review, by opting unilaterally to bring the dispute before the Court".[259]

[258] KPO, paras. 148-150.

[259] *Ibid.*, para. 149.

4.10. These spurious allegations are irrelevant to the Court's jurisdiction. All of them relate to matters that go to the *delineation* of the outer limits of the continental shelf beyond 200 M, not to the *delimitation* of the maritime boundary up to and beyond 200 M. More to the point, this is not a case in which Somalia seeks to enforce an agreement that it is alleged to have breached. Somalia does not invoke the MOU as a basis for the Court's jurisdiction. It argues merely that the MOU, even if it is enforceable (*quod non*), does not bar the Court's jurisdiction resulting from the Parties' convergent Optional Clause declarations.

4.11. Finally, Kenya's allegations are unfounded in fact. The CLCS is currently reviewing Kenya's submission,[260] and the alleged "costs and delay" are highly exaggerated. The CLCS proceeded to form a subcommission to consider Kenya's submission only a year after the initially planned date. This hardly a "significant" delay, particularly given that Kenya cannot lawfully begin to exploit the shelf beyond 200 M until the boundary with Somalia has been settled.

4.12. In that sense, the interests of both Parties, including Kenya, are furthered by the submission of this dispute to the Court. There is no question that, given the CLCS's lengthy backlog, combined with the large number of States ahead of Somalia in the queue, the boundary will be determined much sooner by the Court than by any negotiations, even if fruitful, that might take place after the CLCS eventually makes its recommendations to both States.

4.13. Moreover, it must be recalled that the unclean hands doctrine has never been recognised in inter-State proceedings. On the contrary, the Court has always

[260] *See*, *supra*, para. 2.92.

rejected it, whether expressly or implicitly, in every case when it has been raised.[261]

4.14. In any event, whatever the status of the doctrine in inter-state relations, it is clearly not a bar to the admissibility of an Application. The Court held in the *Avena* case:

> "Even if it were shown … that Mexico's practice as regards the application of Article 36 was not beyond reproach, this would not constitute a ground of objection to the admissibility of Mexico's claim".[262]

The same conclusion applies with respect to Kenya's objection to the admissibility of Somalia's Application: the objection is itself inadmissible.

*

4.15. It follows from the above that even if (*quod non*) the MOU could be interpreted as providing for negotiations as an exclusive means of settlement of the dispute over the delimitation of the continental shelf between Somalia and Kenya, it would have been superseded by the subsequent conduct of the Parties who had engaged in detailed negotiations (at Kenya's invitation) over the

---

[261] *See Nicaragua v. United States of America*, Merits, Judgment, I.C.J. Reports 1986, p. 134, para. 268; Judgment, 25 September 1997, *Gabčikovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, para. 133; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, I.C.J. Reports 2002, para. 35; *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, I.C.J. Reports 2003, paras. 28-30; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, para. 63.

[262] *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, I.C.J. Reports 2004, para. 47.

maritime boundary and had reached a deadlock long before the CLCS could make its recommendations.

SUBMISSIONS

For these reasons, 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.

5 February 2016

H.E. Abdusalam H. Omer

Minister of Foreign Affairs and Investment Promotion

Agent of the Federal Republic of Somalia

Certification

I certify that the annexes are true copies of the documents referred to and that the translations provided are accurate.

H.E. Abdusalam H. Omer

Minister of Foreign Affairs and Investment Promotion

Agent of the Federal Republic of Somalia

VOLUME II

EXHIBITS

TREATIES & AGREEMENTS

Annex 1 — Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 332 (23 May, 1969), entered into force 27 Jan. 1980

Annex 2 — Memorandum of Understanding between the Members of the African Union on Security, Stability, Development and Cooperation in Durban, South Africa (July 2002), *reprinted in* Africa, From Barriers to Bridges: Collection of Official Texts on African Borders from 1963 to 2012 (2013)

SOMALI GOVERNMENT DOCUMENTS

Annex 3 — Transitional Federal Government of Somalia, *The Transitional Federal Charter of the Somali Republic* (Feb. 2004)

Annex 4 — 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)

KENYAN GOVERNMENT DOCUMENTS

Annex 5 — 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)

UNITED NATIONS AND OTHER INTERNATIONAL ORGANISATION DOCUMENTS

Annex 13 African Union Border Programme, *Third Declaration on the African Union Border Programme Adopted by the Third Conference of African Ministers in Charge of Border Issues, Niamey, Niger, AUBP/EXP-MIN/7* (17 May 2012), *reprinted in* Africa, From Barriers to Bridges: Collection of Official Texts on African Borders from 1963 to 2012 (2013)

Annex 14 U.N. Commission on the Limits of the Continental Shelf, *Progress of work in the Commission on the Limits of the Continental Shelf: Statement by the Chair*, U.N. Doc. CLCS/90 (1 Oct. 2015)

Annex 15 U.N. Peacekeeping, "U.N. Operation in Somalia I (UNOSOM I)", *available at* http://www.un.org/en/peacekeeping/missions/past/unosomi.htm (last accessed 11 Jan. 2016)

Annex 16 U.N. Peacekeeping, "U.N. Operation in Somalia II (UNOSOM II)", *available at* http://www.un.org/en/peacekeeping/missions/past/unosom2.htm (last accessed 11 Jan. 2016)

Annex 17 U.N. Peace Operations, "UNSOM United Nations Assistance Mission in Somalia", *available at* https://unsom.unmissions.org/ (last accessed 11 Jan. 2016)

Annex 18 U.N. Commission on the Limits of the Continental Shelf "Membership of the Commission", *available at* http://www.un.org/Depts/los/clcs_new/commission_members_1997_2012.htm (last accessed 11 Jan. 2016)

DIPLOMATIC AND OTHER GOVERNMENT CORRESPONDENCE

Annex 19 Email from Amb. Hans Wilhelm Longva to Hon. Prof. Abdirahman Haji Adan Ibbi, Deputy Prime Minister and Minister of Fisheries and Marine Resources of Somalia (27 Mar. 2009)

ACADEMIC ARTICLES, BOOKS, AND SPEECHES

NEWSPAPER & MEDIA REPORTS