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International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2016

Public sitting

held on Monday 19 September 2016, at 10 a.m., at the Peace Palace,

President Abraham presiding,

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

Preliminary Objections

VERBATIM RECORD

ANNÉE 2016

Audience publique

tenue le lundi 19 septembre 2016, à 10 heures, au Palais de la Paix,

sous la présidence de M. Abraham, président,

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

Exceptions préliminaires

COMPTE RENDU

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

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

M. Couvreur, greffier

The Government of Somalia is represented by:

H.E. Mr. Ali Said Faqi, Ambassador of the Federal Republic of Somalia to the Kingdom of Belgium,

as Co-Agent;

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

as Deputy-Agent;

Mr. Paul S. Reichler, Attorney-at-Law, Foley Hoag LLP, member of the Bars of the United States Supreme Court and the District of Columbia,

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

Mr. Philippe Sands, Q.C., Professor of International Law at University College London, Barrister at Matrix Chambers, London,

as Counsel and Advocates;

Mr. Lawrence H. Martin, Attorney-at-Law, Foley Hoag LLP, member of the Bars of the United States Supreme Court, the District of Columbia and the Commonwealth of Massachusetts,

Ms Alina Miron, Professor of International Law at the University of Angers,

Mr. Edward Craven, Barrister at Matrix Chambers, London,

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

as Counsel;

Mr. Mohamed Omar, Senior Adviser to the President of the Federal Republic of Somalia,

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

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

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

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

Mr. Abubakar Mohamed Abubakar, Director, Maritime Affairs, Ministry of Foreign Affairs,

as Advisers.

Le Gouvernement de la Somalie est représenté par :

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comme agent adjoint ;

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M. Alain Pellet, professeur à l'Université de Paris Ouest, Nanterre-La Défense, ancien membre et ancien président de la Commission du droit international, membre de l'Institut de droit international,

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M. Ahmed Ali Dahir, *Attorney-General* de la République fédérale de Somalie,

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

M. Daud Awes, porte-parole du président de la République fédérale de Somalie,

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Mr. Mathias Forteau, Professor at the University of Paris Ouest, Nanterre-La Défense, Member of the International Law Commission,

Mr. Alan Boyle, Professor of International Law at the University of Edinburgh, member of the English Bar,

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

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

Ms Juster Nkoroi, E.B.S., Head, Kenya International Boundaries Office,

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

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Ms Stella Munyi, Director, Legal Division, Ministry of Foreign Affairs,

Ms Stella Orina, Deputy Director, Ministry of Foreign Affairs,

Mr. Rotiken Kaitikei, Foreign Service Officer, Ministry of Foreign Affairs,

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M. Samuel Chepkonga, président de la commission parlementaire de la justice et des affaires juridiques,

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

Mr. Hudson Andambi, Minstry of Energy,

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Mme Wanjiku Wakogi, conseillère en gouvernance, bureau de l'*Attorney General* et ministère de la justice,

M. Samuel Kaumba, *State Counsel*, bureau de l'*Attorney General* et ministère de la justice,

M. Hudson Andambi, ministère de l'énergie,

comme conseillers.

Le PRESIDENT : L'audience est ouverte.

La Cour se réunit aujourd'hui pour entendre les Parties en leurs plaidoiries sur les exceptions préliminaires soulevées par le Kenya dans l'affaire relative à la *Délimitation maritime dans l'océan Indien (Somalie c. Kenya)*.

La Cour ne comptant sur le siège aucun juge de nationalité kenyane, le Kenya s'est prévalu du droit que lui confère le paragraphe 2 de l'article 31 du Statut de procéder à la désignation d'un juge *ad hoc* en l'affaire : il a désigné M. Gilbert Guillaume.

L'article 20 du Statut dispose que «[t]out membre de la Cour doit, avant d'entrer en fonction, prendre l'engagement solennel d'exercer ses attributions en pleine impartialité et en toute conscience». En vertu du paragraphe 6 de l'article 31 du Statut, cette disposition s'applique également aux juges *ad hoc*. Bien que M. Guillaume ait déjà exercé les fonctions de juge *ad hoc* et qu'il ait fait une déclaration solennelle dans des affaires précédentes, le paragraphe 3 de l'article 8 du Règlement requiert qu'il fasse une nouvelle déclaration en la présente espèce.

Avant de l'inviter à faire sa déclaration solennelle, je dirai d'abord quelques mots de la carrière et des qualifications de M. Guillaume.

M. Gilbert Guillaume, de nationalité française, est licencié en droit et diplômé d'études supérieures d'économie politique et de science économique de l'Université de Paris ; il est aussi diplômé de l'Institut d'études politiques de Paris et ancien élève de l'Ecole nationale d'administration. M. Guillaume est bien connu de la Cour, puisqu'il en a été membre de 1987 à 2005, et président du 6 février 2000 au 5 février 2003.

Avant de devenir membre de la Cour, M. Guillaume avait déjà à son actif une longue et brillante carrière, tant de magistrat que de haut fonctionnaire. Il a ainsi été membre du Conseil d'Etat français et en est maintenant membre honoraire. Il a notamment exercé les fonctions de représentant de la France au comité juridique de l'Organisation de l'aviation civile internationale et assuré la présidence de ce comité de 1971 à 1975. M. Guillaume a par ailleurs été directeur des affaires juridiques au ministère français des affaires étrangères. Il a en outre été agent de la France devant la Cour de justice des communautés européennes et la Cour européenne des droits de l'homme.

M. Guillaume a exercé plusieurs fois les fonctions de juge *ad hoc* à la Cour internationale de Justice. Membre de la Cour permanente d'arbitrage depuis 1980, il a siégé en tant qu'arbitre dans plusieurs affaires. Il est aussi arbitre au centre international pour le règlement des différends relatifs aux investissements, et a assuré à de nombreuses reprises le rôle de président de divers tribunaux arbitraux. Il est membre de l'Institut de France (Académie des sciences morales et politiques), membre de l'Institut de droit international, dont il a été le vice-président, et l'auteur de nombreux ouvrages consacrés à un large éventail d'aspects du droit international. Il a par ailleurs enseigné à l'Académie de droit international de La Haye.

J'invite maintenant M. Guillaume à prendre l'engagement solennel prescrit par l'article 20 du Statut et demande à toutes les personnes présentes à l'audience de bien vouloir se lever.

M. GUILLAUME :

> «Je déclare solennellement que je remplirai mes devoirs et exercerai mes attributions de juge en toute honnêteté et dévouement, en pleine et parfaite impartialité et en toute conscience.»

LE PRESIDENT : Je vous remercie. Veuillez vous asseoir. La Cour prend acte de la déclaration solennelle faite par M. Guillaume et déclare celui-ci dûment installé en qualité de juge *ad hoc* en l'affaire relative à la *Délimitation maritime dans l'océan Indien (Somalie c. Kenya)*.

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I shall now recall the principal procedural steps in the case.

On 28 August 2014, the Federal Republic of Somalia instituted proceedings against the Republic of Kenya concerning a dispute in relation to

> "the establishment of the single maritime boundary between Somalia and Kenya in the Indian Ocean delimiting the territorial sea, exclusive economic zone . . . and continental shelf, including the continental shelf beyond 200 nautical miles".

In order to found the jurisdiction of the Court, Somalia invokes the declarations made, pursuant to Article 36, paragraph 2, of the Statute of the Court, by Somalia on 11 April 1963 and by Kenya on 19 April 1965.

By an Order of 16 October 2014, the President fixed 13 July 2015 as the time-limit for the filing of the Memorial of Somalia and 27 May 2016 for the filing of the Counter-Memorial of Kenya. Somalia filed its Memorial within the time-limit so prescribed.

On 7 October 2015, within the time-limit set by Article 79, paragraph 1, of the Rules of Court, Kenya raised preliminary objections to the jurisdiction of the Court and to the admissibility of the Application. Consequently, by an Order of 9 October 2015, the Court, noting that, by virtue of Article 79, paragraph 5, of the Rules of Court, the proceedings on the merits were suspended, and taking account of Practice Direction V, fixed 5 February 2016 as the time-limit for the presentation by Somalia of a written statement of its observations and submissions on the preliminary objections raised by Kenya. Somalia filed such a statement within the time-limit so prescribed, and the case thus became ready for hearing in respect of the preliminary objections.

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Pursuant to Article 53, paragraph 2, of its Rules, the Court decided, after ascertaining the views of the Parties, that copies of the pleadings and documents annexed would be made accessible to the public on the opening of the oral proceedings. Further, in accordance with the Court's practice, all of these documents will be placed on the Court's website from today.

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I note the presence at the hearings of the Agents, counsel and advocates of the two Parties. In accordance with the arrangements on the organization of the procedure decided by the Court, the hearings will comprise a first and second round of oral argument. The first round of oral argument will open today and close tomorrow, on Tuesday 20 September. Each Party will have one session of three hours. The second round of oral argument will begin on Wednesday 21 September and conclude on Friday 23 September. Each Party will have one session of one-and-a-half hours.

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I now give the floor to The Honourable Mr. Githu Muigai, Agent of the Republic of Kenya. Your Excellency, you have the floor.

Mr. MUIGAI:

1. Mr. President, distinguished Members of the Court. It is my very great honour and privilege to appear before you as Agent for the Republic of Kenya in this hearing of Preliminary Objections. My name is Githu Muigai and I serve as the Attorney-General of Kenya. I am accompanied today by Her Excellency Mrs. Rose Makena Muchiri, Co-Agent and Ambassador of Kenya to the Kingdom of The Netherlands, by Ms Juster Nkoroi, Director of the International Boundaries Office of Kenya, and by other officials and representatives of my Government. We greet you and express our deepest respect and consideration for the Court.

2. I also take this opportunity to greet the Honourable Agent of the Federal Republic of Somalia and other members of the Somali delegation. We extend to you our neighbourly friendship and goodwill.

3. Mr. President, this is the first time that Kenya appears before the International Court of Justice. It is important an occasion for my country. Kenya holds this institution, the principal judicial organ of the United Nations, in the highest regard. Kenya's position that this Court is not competent in the present case is not a retreat from its respect for international law. On the contrary, it is a reflection of Kenya's insistence that agreements must be performed in good faith. As is clear from its Optional Clause Declaration under Article 36 (2) of the Statute, Kenya has not consented to the Court's jurisdiction over disputes in regard to which it has agreed to another method of settlement. In this instance, it is the Memorandum of Understanding ("MOU") of 7 April 2009 that sets out the agreed procedure for settlements of the dispute that Somalia has brought before the Court. Furthermore, Part XV of the 1982 United Nations Convention on the Law of the Sea, which binds Somalia and Kenya alike, is yet another agreed procedure for the settlement of the dispute.

4. Kenya's history is shaped profoundly by the belief that respect for international commitments is the basis for peaceful and friendly relations. Kenya gained independence from colonial rule on 12 December 1963. The day after its independence Kenya became a founding member of the Organization of African Unity, the predecessor to the African Union. Two days later, Kenya became a member of the United Nations. In 1967, it became a founding member of the East African Community.

5. It was in 1965, shortly after its independence, that Kenya made a declaration under Article 36 (2) of the Court's Statute, recognizing its compulsory jurisdiction, subject to reservations.

6. Today, Kenya is a stable multi-ethnic democracy, an increasingly prosperous nation recognized for its leadership role both at the United Nations and the African Union. This includes Kenya's long-standing support for the Government and the people of Somalia. Since the collapse of the Somali State in 1991, Kenya has provided humanitarian relief for almost half a million Somali refugees. Kenya also provided a safe haven in Nairobi for the Somali Transitional Federal Government, from its establishment in 2004 until improved security conditions allowed for its gradual return, in the beginning of 2007. In fact, Kenya played a decisive role in defeating Al-Shabaab forces and capturing Mogadishu. It has made significant contributions to both the civilian and military components of the United Nations mandated African Union Mission in Somalia. Hundreds of Kenyan soldiers have lost their lives defending the Somali Government. They and their families have paid the ultimate price so that our neighbours can live in peace. What is more, hundreds of Kenyan civilians have been the victims of Al-Shabaab terrorist attacks in retaliation for Kenya's support of the Somali Government. Just to give one example, in April 2015, 150 students were killed and 700 held hostage at Garissa University College. The United Nations and the African Union have recognized Kenya's "huge" and "extraordinary" sacrifice[1].

7. Mr. President, distinguished Members of the Court, it is against this background that Somalia's accusation of bad faith against Kenya should be assessed. Somalia would have the Court believe that, during all these years, Kenya has been scheming to take advantage of its neighbour, to steal its sea and oil. Such accusations are absurd, and they are hurtful. They are unfair and disrespectful to a government and people that have sacrificed so much in support of Somalia.

8. Mr. President, it is common ground that Kenya has exercised uncontested jurisdiction in this maritime area since it proclaimed its Exclusive Economic Zone (EEZ) in 1979. In fact, the EEZ boundary was an extension of the territorial sea boundary that reflected prior colonial practice.

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[1]Kenya Preliminary Objections (POK), para. 15.

During the course of this dispute, Kenya has caused no prejudice to Somalia's legal rights. As a matter of fact, Kenya limited itself to transitory exploratory activities, and even those are now suspended. It is not in dispute either that Kenya faces a very real security threat by reason of Al-Shabaab weapons smuggling and infiltration at sea. Nor is it in dispute that Somalia has no maritime enforcement capacity, and will have none in the foreseeable future. Indeed, for the past several years, the Kenyan navy has incurred significant costs in patrolling this maritime area under an African Union mandate, with the endorsement of the United Nations Security Council. It must continue to do so for the foreseeable future.

9. In order to allay any concerns that Somalia may still have, Kenya has, by a diplomatic note dated 25 May 2016, invited Somalia to enter into "provisional arrangements of a practical nature" pending an agreement on the maritime boundary, in accordance with Articles 74 (3) and 83 (3) of the United Nations Convention on the Law of the Sea (UNCLOS). Somalia's response recognizes that Kenya's measures are consistent with "all obligations under the Convention".

10. This maritime boundary delimitation is not as straightforward as Somalia suggests. A full and final settlement will have to contain several important elements that call for a negotiated agreement; that call for recognition of the long-standing *modus vivendi* between the Parties; that call for time, until Somalia achieves greater stability. That is exactly what the MOU provides — a gradual, negotiated settlement. To say that the MOU is irrelevant because two technical-level meetings four months apart in 2014 have exhausted negotiations is in plain contradiction with both Somalia's obligations under the MOU and the obvious reality of the situation.

11. Mr. President, distinguished Members of the Court. There is a Swahili proverb that "the person who helps you in need is truly your friend". Kenya has been a true friend of Somalia throughout its years of need. Kenya remains a friend of Somalia. All that Kenya asserts is that agreements must be performed in good faith; Somalia cannot repudiate its obligations and then portray itself as a victim of Kenya.

12. The MOU sets out the agreed procedure for settling this dispute. It must be followed. And in the very unlikely event that its procedure fails to produce a negotiated settlement, then Part XV procedures under the UNCLOS would then come into operation. That, too, is an agreed procedure other than recourse to the Court. That, too, falls squarely within Kenya's reservations to

the Court's jurisdiction. These are the agreed methods of settlement, and we respectfully submit that the Court declare that Somalia's case falls outside its jurisdiction.

13. Mr. President, Kenya's first round of oral pleadings this morning will commence with an opening speech by Professor Akhavan, who will set forth an outline of Kenya's case. He will be followed by Karim Khan Q.C. who will address the legal validity of the MOU. Following the break, Professor Mathias Forteau will present the terms of the MOU under the law of treaties and explain why it constitutes an agreement on a method of settlement of the maritime dispute. Ambassador Makena Muchiri will then explain why the Parties have not exhausted negotiations. She will be followed by Professor Alan Boyle who will address why, in addition to the MOU, the procedures under the UNCLOS are the applicable method of settlement of the maritime boundary dispute. And, finally, Professor Lowe Q.C. will conclude Kenya's first round of oral pleadings by explaining why both the MOU and UNCLOS procedures fall squarely within Kenya's reservation and thus exclude the Court's jurisdiction.

14. Mr. President, distinguished Members of the Court. That concludes the Agent's remarks. And I would now like you to please call Professor Akhavan to the podium. I thank you.

Le PRESIDENT: Merci, Excellence. Je donne la parole à M. le professeur Akhavan.

Mr. AKHAVAN:

OVERVIEW OF KENYA'S PRELIMINARY OBJECTIONS

I. Introduction

1. Mr. President, distinguished Members of the Court. I am honoured to appear before you today on behalf of Kenya.

2. I will be providing an overview of Kenya's preliminary objections. My colleagues will then elaborate on the specific issues in turn.

3. The only question before the Court is whether the maritime boundary dispute between Kenya and Somalia falls within its jurisdiction. Kenya respectfully submits that it does not.

4. Kenya's optional clause declaration, which you may find at tab 4 of your folders, categorically excludes [slide 1]: "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."[2]

5. This is exactly the kind of reservation the Court had in mind in the *Land and Maritime Boundary* case. It observed that:

> "States remain free to insert into their optional declaration accepting the compulsory jurisdiction of the Court a reservation excluding from the latter those disputes for which the parties involved have agreed or subsequently agree to resort to an alternative method of peaceful settlement."[3]

6. The meaning of Kenya's reservation is absolutely clear. In *Certain Phosphate Lands in Nauru*, the Court interpreted an identical reservation in Australia's optional clause declaration. It held that it applies to any "agreed procedure other than recourse to the Court"[4]. The agreed procedure, however, does not have to specifically exclude the Court. It excludes jurisdiction simply because it falls within the reservation. A distinguished publicist explains, in regard to the United Kingdom's identical reservation, that it is an application of "the relationship between parallel commitments to dispute settlement . . . giving priority to the specific . . . over the general"[5]. Put differently, the reservation covers any procedural *lex specialis* applicable to the dispute.

7. The Court has confirmed that optional clause reservations "should be interpreted in a manner compatible with the effect sought by the reserving State"[6]. The clear effect sought by Kenya is to exclude all disputes with an "agreed procedure other than recourse to the Court". The Court must give strict effect to that intention in determining the scope of its jurisdiction.

8. In regard to the maritime boundary dispute between Kenya and Somalia, there are in fact two agreed procedures. The first is the MOU of 7 April 2009. It states clearly that the Parties shall agree on delimitation by negotiation and that they shall do so *after* review of their respective

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[2]Kenya's Optional Clause Reservation under Art. 36 (2) ICJ Statute, 531 United Nations, *Treaty Series (UNTS)* 113 (1965).

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

[4]*Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 247, para 11; Preliminary Objections of Kenya (POK), para. 145.

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

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

submissions by the Commission on the Limits of the Continental Shelf (CLCS). The second is the UNCLOS Part XV procedures, which make specific provision for delimitation disputes. These two agreed procedures, whether separately or in combination, fall squarely within Kenya's reservation. They both categorically exclude the Court's jurisdiction. The case before you is as simple as that.

II. Legal Validity of the MOU

9. Somalia has pursued a strategy that is best described as "MOU avoidance". It has done everything possible to rid itself of what it apparently considers to be a legal obstacle to its new strategy on maritime delimitation. First, shortly before filing its Application in August 2014, Somalia submitted a letter dated 4 February 2014 to the United Nations Secretary-General. It withdrew its prior consent to Kenya's CLCS submission. It maintained that the "no objection" obligation was not legally binding because the MOU was "null and void". In particular, Somalia alleged that Minister Warsame, who signed the MOU for Somalia, did not have full powers. That allegation was not true. In fact, Somalia has now produced the Minister's letter of authorization in its Written Statement[7]. That false argument has now been abandoned by Somalia.

10. Second, Somalia withdrew its CLCS objection just one week before its Memorial was submitted, and then tried to downplay the legal effect of the MOU in its Memorial. It suggested that its legal validity was uncertain. It set forth all the paragraphs of the MOU, with the notable exception of the final paragraph, which stated that it entered into force upon signature. It also ignored the significance of the registration and publication of the MOU in accordance with Article 102 of the United Nations Charter. Somalia further ignored the fact that its own Prime Minister had specifically confirmed its validity in writing to the United Nations on at least two occasions[8].

11. Third, Somalia still complains in its Written Statement that the MOU required parliamentary ratification under its Transitional Federal Charter. But it does not argue that the MOU is invalid because of an alleged defect under Somalia's internal law.

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[7]Written Statement of Somalia (WSS), para. 2.26 and WSS, Ann. 21.

[8]POK, paras. 58-59; Memorial of Somalia (MS), Ann. 66, p 8; POK, paras. 68-69; and MS, Ann. 37.

12. What is more significant is that the 1 August 2009 parliamentary vote rejecting the MOU in fact makes no mention of the Transitional Federal Charter. Kenya has produced the verbatim record of those deliberations[9]. Somalia does not dispute its authenticity. Whether in fact or in law, this argument has no merit whatsoever.

13. Somalia's conduct has been such that even Norway — which was in fact supporting Somalia with its CLCS submission and establishment of an EEZ — complained to the United Nations that Somalia's actions were "creating doubt as to [its] capability . . . to enter into legally binding international commitments"[10]. Norway expressed its hope that it would be possible to "find a way to affirm the legally binding nature of the MOU"[11].

III. The MOU Method of Settlement

14. Now that Kenya has invoked the MOU before the Court, Somalia appreciates that it cannot credibly challenge its validity. Instead, it has now shifted its "MOU avoidance" strategy by arguing that the penultimate paragraph on the method of settlement is without any legal effect. Somalia's new theory is that irrespective of the MOU's legal validity, that particular paragraph is merely "spare"[12] and descriptive"[13]; that it should simply be ignored by the Court.

15. The text of that paragraph, however, is absolutely clear. It is at tab 5 of your folders. It reads as follows [slide 2]:

> "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."[14]

16. First, the terms refer in the plural to [slide 3] "delimitation of maritime boundaries in the areas under dispute"[15]. Then it specifically clarifies that this is [slide 4] "including the delimitation

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[9]POK, Anns. 23 and 46.

[10]POK, Ann. 4.

[11]POK, Ann. 4.

[12]WSS, para. 3.24.

[13]WSS, para. 3.28.

[14]Memorandum of Understanding Kenya — Somalia, 2599 *UNTS* 35 (2009), p. 38.

[15]*Ibid.*

of the continental shelf beyond 200 nautical miles"[16]. Thus, its scope is clearly not limited to the outer shelf as Somalia claims. It indicates the exact opposite. The MOU was prepared under the supervision of the Norwegian Ambassador Longva, a distinguished international jurist who sadly passed away in 2013. It was drafted precisely and meticulously. It refers to all "areas in dispute".

17. Second, the terms provide that delimitation [slide 5] "shall be agreed between the two coastal States on the basis of international law"[17]. The term is "shall". It is not "should". It is a legal undertaking, a binding obligation, not merely to negotiate in good faith, but to do so with a view to concluding an agreement. In *North Sea Continental Shelf*, which is at tab 6 of your folders, the Court interpreted the less exacting terms "shall be determined by agreement" under Article 6 of the 1958 Convention on the Continental Shelf as follows [slide 6]:

> "[T]he parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement; they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it . . ."[18].

In *Gabčíkovo-Nagymaros*, the Court confirmed that such an obligation requires the parties to "find an agreed solution within the co-operative context of the [applicable] Treaty"[19].

18. Third, the terms of the MOU provide that a delimitation agreement shall be completed [slide 7]:

> "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."[20]

Contrary to what Somalia claims, this does not mean that the parties cannot negotiate prior to CLCS review. That would be absurd. The parties may negotiate prior to the CLCS

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[16]Memorandum of Understanding Kenya — Somalia, 2599 *UNTS* 35 (2009), p. 38.

[17]*Ibid.*.

[18]*North Sea Continental Shelf (Germany* v. *Denmark/Netherlands), Judgment, I.C.J. Reports 1969*, p. 47, para. 85 *(a)*.

[19]*Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 78, para. 142.

[20]Memorandum of Understanding Kenya —Somalia, see *supra* note 14.

recommendations: but they may finalize an agreement only after delineation of the outer limits of the shelf.

19. It is remarkable that Somalia does not produce the text of this paragraph of the MOU until page 75 of its Written Statement[21]. It spends the vast majority of its pleading arguing that the MOU was only concerned with delineation of the outer shelf and nothing else. By Somalia's inverted logic, this exclusive purpose renders the impugned paragraph redundant. The actual text of the MOU somehow evaporates in the intense light of a contrived context. That cannot be right.

20. The Court has made it clear that "interpretation must be based above all upon the text"[22]. In other words, "[i]f the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter"[23]. There is no ambiguity here as to the meaning of "shall be agreed . . . after the Commission has concluded its examination . . . and made its recommendations". That is the end of the matter. No amount of creative lawyering can change its obvious meaning.

21. But let us imagine that there was some ambiguity in the text, that the paragraph was in fact vague and capable of competing interpretations. What would happen then? Would the ambiguity be resolved by depriving the text of legal effect? Surely not. Somalia curiously invokes the *effet utile* principle in an attempt to nullify Kenya's reservation; but it completely disregards that same principle in respect of the MOU. The principle of effectiveness is clear: "[I]f more than one interpretation is possible, the preference should be given to the one which does not have as an effect to wholly or partially deprive a term, sentence or article of any legal meaning and thus of any practical impact."[24] The phrase "shall be agreed" after CLCS review is neither "spare" nor "descriptive". It must be given legal effect; it is a binding obligation.

22. It should be emphasized that Somalia admits that the penultimate paragraph does in fact prescribe a method of settlement. Its only contention is that "negotiations are one among other

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[21]WSS, para. 3.23.

[22]*Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 22, para. 41. Also: *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Jurisdiction and Admissibility, Judgment,* I.*C.J. Reports 1995*, p. 18, para. 33; *Legality of Use of Force* (*Serbia and Montenegro* v. *Belgium*), *Preliminary Objections, Judgment, I.C.J. Reports 2004 (I)*, p. 318, para. 100.

[23]*Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion,* I.C.J. Reports 1950, p. 8. Also: *Arbitral Award of 31 July 1989, Judgment, I.C.J. Reports 1991*, p. 69, para. 48.

[24]R. Kolb, *The Law of Treaties* (2016), Edward Elgar, pp. 154–55.

possible methods" of dispute settlement[25] and that the MOU does not specifically exclude recourse to the Court. But that argument is inapposite. First, if the parties agree to a method of settlement, then they must perform their obligations in good faith. That alone renders Somalia's case inadmissible. Second, even if this paragraph of the MOU does not exclude recourse to the Court, it still falls within Kenya's reservation. All that is required is an "agreed procedure other than recourse to the Court"; there is no additional requirement that it specifically exclude the Court. If the parties had to agree to exclude the Court, then Kenya's reservation would be redundant.

IV. Negotiations have not been exhausted

23. Somalia goes to great lengths to suggest that if the Court does not exercise jurisdiction, the Parties will never be able to conclude an agreement on delimitation. It maintains that they have exhausted negotiations based on just two technical meetings four months apart that were held immediately prior to the filing of Somalia's Application in 2014. Somalia's theory of deadlock does not withstand scrutiny.

24. First, under the MOU, the Parties agreed to conclude a delimitation agreement only after CLCS review. This is a precondition to move to the next stage of the agreed procedure. It is a binding obligation. Somalia claims that this requirement is illogical because it will be a decade before the CLCS considers its submission[26]. But it is not unusual for boundary agreements to be finalized over several years. Furthermore, Somalia's submission is likely to be considered earlier than anticipated. It should be recalled that Kenya's submission was initially scheduled for 2022 but came in the queue for 2014, eight years earlier. Somalia may similarly jump the queue. There are objections to several earlier submissions, and the CLCS is expediting its working procedures. Contrary to Somalia's suggestions, CLCS review is not an insurmountable obstacle. In any case, the Parties were mindful of the time required for CLCS review when they concluded the MOU. Somalia cannot now argue that this condition would deprive the MOU of its effect.

25. Second, the obligation to negotiate in good faith with a view to concluding an agreement is an exacting obligation. It is not satisfied by merely convening two technical meetings four

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[25]WSS, para. 3.72.

[26]WSS, para 3.67.

months apart. Maritime boundary agreements are a time-consuming process. What parties cannot agree on today, they may agree on tomorrow. The circumstances are even more complex in the context of bilateral relations between the parties. Somalia is still in the midst of a fragile post-conflict transition. Kenya has publicly noted its concern that maritime security in the area "continues to pose an existential threat to Kenya and the other countries within the region"[27]. This includes continued maritime enforcement against Al-Shabaab terrorists in the disputed maritime areas where Kenya has exercised prolonged and uncontested jurisdiction.

26. Third, Kenya called for the negotiations in 2014 because of Somalia's breach and repudiation of the MOU. Somalia had objected to Kenya's CLCS submission in February 2014. The Parties held their first meeting in March 2014. Kenya proposed to discuss the MOU. Somalia refused. Kenya wished to discuss the matter again at the second meeting in July 2014. Again, Somalia refused. This was hardly a proper negotiation of the maritime boundary.

27. Fourth, it is apparent that, by 2014, Somalia had already prepared to file its Application before the Court. The proceedings were initiated in August 2014, in the same week that the Parties had scheduled their third meeting. As the Court has emphasized, the Parties cannot merely "go through a formal process of negotiation as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement"[28]. There must be meaningful negotiations, not rigid insistence on a particular method of delimitation, which is exactly what Somalia did. In fact, on 6 June 2013, the Somali Council of Ministers had rejected any "discussions on maritime demarcation or limitations on the continental shelf" with Kenya[29]. It would appear that Somalia was going through the motions just to get before the Court. Against this background, it cannot be said that the Parties have exhausted negotiations.

V. UNCLOS Part XV Procedures

28. Mr. President, even if the Parties had never concluded the MOU, the dispute would still fall outside of the Court's jurisdiction. This case concerns UNCLOS, and the agreed procedure for

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[27]Statement by Kenyan Delegation at the 26th meeting of States Parties to the UNCLOS, New York, 23 June 2016, available at https://www.un.int/kenya/statements_speeches/kenyas-statement-26th-meeting-states-parties-un-convention-law-sea-unclos.

[28]*North Sea Continental Shelf, Judgment*, see *supra*, note 18.

[29]POK, para. 90.

delimitation under UNCLOS is Part XV. Apart from the MOU, Part XV is the applicable procedural *lex specialis* between Kenya and Somalia. It, too, falls squarely within Kenya's reservation.

29. Somalia's only argument is that the Court's jurisdiction applies "in lieu of" Part XV procedures because the "matching" optional clause declarations of Kenya and Somalia constitute an agreement within the meaning of Article 282[30]. This argument is fundamentally flawed. The two declarations are clearly not "matching". Kenya has a reservation concerning agreed procedures other than the Court. Somalia does not. Part XV is clearly an agreed procedure other than the Court. It falls squarely within Kenya's reservation.

30. It is remarkable that Somalia argues in fact that Part XV is incorporated into the MOU. It maintains that the term "shall be agreed" merely "restates the basic principle articulated in Articles 74 (1) and 83 (1) of UNCLOS, according to which the delimitation of maritime boundaries shall be effected by agreement"[31]. Paragraph (2) of those two provisions provides in identical terms that "[i]f no agreement can be reached within a reasonable period of time the States concerned shall resort to the procedures provided for in Part XV". If Somalia's interpretation of the MOU is correct, then Part XV would apply, to the exclusion of the Court's jurisdiction.

31. Nonetheless, Article 280 of Part XV still provides that the parties may agree to settle a dispute "by any peaceful means of their choice". Thus, the MOU applies even under Part XV. In fact, Article 281 (1) clarifies that the procedures 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". Furthermore, Article 281 (2) specifically provides that "[i]f the parties have also agreed on a time-limit, paragraph 1 applies only upon the expiration of that time-limit". In this case, CLCS review is a time-limit. Part XV is not applicable prior to its expiration. Even after CLCS review, the next step under Part XV is to "exchange views regarding its settlement by negotiation or other peaceful means" in accordance with Article 283.

32. Somalia has invoked the optional clause declarations under Article 36 (2) of the Court's Statute as the sole basis for jurisdiction. Neither Kenya nor Somalia has made a declaration under

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[30]WSS, para 3.82.

[31]WSS, para 3.72.

Article 287 (1) *(b)* of Part XV recognizing the Court as the method of settlement. Thus, the UNCLOS procedures are a method of settlement other than recourse to the Court. They exclude the Court's jurisdiction.

VI. Kenya's good faith

33. Mr. President, distinguished Members of the Court. As I have explained, Kenya's Preliminary Objections are based on the straightforward application of its reservation in light of both the MOU and UNCLOS Part XV. The Court needs only to apply basic principles of treaty interpretation to arrive at the conclusion that this dispute falls outside of its jurisdiction.

34. Nonetheless, Kenya will briefly address some of the unfortunate accusations of bad faith that have been made by Somalia. Presumably these are intended to persuade the Court to decide in Somalia's favour in disregard of the applicable law. In particular, Somalia has gone to considerable lengths to suggest that Kenya is a bad neighbour that has suddenly claimed an unjust maritime boundary in 2005, and is now seeking to establish a *fait accompli* so it can immediately exploit offshore oil resources in the disputed areas. This is simply not true. It does not even remotely reflect reality.

35. First, the maritime boundary at the parallel of latitude in the EEZ was established in 1979, and not in 2005 as Somalia suggests. It was in 1979 that Kenya first proclaimed its EEZ and began exercising jurisdiction based on that boundary[32]. The text of the Presidential Proclamation of 28 February 1979 is set out as Annex 19 to Somalia's Memorial. Prior to the MOU in 2009, Somalia never disputed this boundary[33]. In fact, the EEZ boundary was the extension of an uncontested Anglo-Italian territorial sea boundary from the colonial period.

36. Second, Kenya's exploratory activities in the disputed areas have been only of a transitory character. They are well within the range of activities that, as the Court indicated in the *Aegean Sea* case, cause no irreparable prejudice to the rights of other States[34]. In fact, even these transitory activities have been temporarily suspended, and Kenya has invited Somalia to negotiate

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[32]POK, para. 18 citing Somalia's Memorial, Ann. 19.

[33]POK, para. 18.

[34]*Aegean Sea Continental Shelf (Greece* v. *Turkey), Interim Protection, Order of 11 September 1976, I.C.J. Reports 1976*, p. 3; http://www.icj-cij.org/docket/files/62/6219.pdf.

"provisional arrangements of a practical nature" pursuant to Articles 74 (3) and 83 (3) of UNCLOS. As the Agent indicated, Somalia now recognizes that Kenya's conduct is consistent with "all obligations under the Convention". There is no imminent threat to its interests. Oil has yet to be discovered, let alone exploited. Even if it were discovered tomorrow, production would be at least a decade away.

37. In this light, there is no basis for Somalia's alarmist accusations against Kenya — and most certainly no justification for the accusation that it is an unjust nation taking advantage of its neighbour. This is especially unbecoming given the extraordinary sacrifices that Kenya has made in solidarity with the Government and people of Somalia.

VII. Conclusion

38. Mr. President, distinguished Members of the Court. The 2009 MOU opened the way for future cooperation. It was one of the first agreements between Kenya and the new Somali Government. Somalia's breach and repudiation of the MOU, its objection to Kenya's CLCS submission, its unwillingness to negotiate in good faith, its initiation of proceedings before the Court in disregard of the agreed procedure, its false accusations and alarmist tone; these will not resolve the complex issues that must be negotiated between the Parties during Somalia's still-fragile transition. Disregard for international commitments will do nothing to further friendly relations among these two neighbouring African nations.

39. The MOU and Part XV are the agreed procedures for settlement of the maritime dispute between the Parties. They both fall squarely within Kenya's reservation, and thus the dispute is outside of the Court's jurisdiction.

40. Mr. President, distinguished members of the Court. That concludes my presentation. I would now ask that you invite Mr. Karim Khan Q.C. to the podium.

LE PRESIDENT: Merci, Monsieur le professeur. Je donne à présent la parole à M. Karim Khan.

Mr. KHAN:

LEGAL VALIDITY OF THE MEMORANDUM OF UNDERSTANDING

I. Introduction

1. Mr. President, distinguished Members of the Court. It is an honour to appear before you, on behalf of the Republic of Kenya.

2. I will address the legal validity of the Memorandum of Understanding (MOU), and in particular Somalia's attempts to declare the MOU "null and void" in 2014 just a few months before it filed its Application before the Court. Somalia has now abandoned its claim of nullity but seeks instead to deprive the terms of the MOU of any legal effect.

II. The Facts of the Conclusion and Entry into Force of the MOU

3. Mr. President, the MOU was initiated by Somalia, and drafted and reviewed pursuant to the advice of a respected Norwegian diplomat[35]. Prior to its signature, the MOU was approved by the President of Somalia, by the Prime Minister of Somalia and by Somalia's Council of Ministers[36]. The references to the evidence will appear in the footnotes to the transcripts of my speech.

4. The Minister of National Planning and International Cooperation was authorized by the Prime Minister to sign the MOU on behalf of the Somali Government[37]. On 7 April 2009, he and the Kenyan Minister of Foreign Affairs, duly authorized by their respective Governments, signed the MOU at a formal ceremony in Nairobi. The MOU expressly stated that it would enter into force upon its signature[38].

5. The subsequent conduct of the parties was entirely consistent with the validity of the MOU. On 8 April 2009, the day after the signing ceremony, the Somali Prime Minister expressly confirmed its validity — and indeed reproduced the MOU in full and enclosed a copy of the signed

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[35]Preliminary Objections of the Republic of Kenya (hereinafter POK), paras. 32-25, 43.

[36]POK, para. 38.

[37]POK, paras. 38-39.

[38]POK, para. 55. See Somalia's Memorial at Ann. 6.

instrument — in Somalia's submission to the Commission on the Limits of the Continental Shelf ("CLCS")[39].

6. Two months later, on 11 June 2009, in accordance with Article 102 of the United Nations Charter, the MOU was formally registered with the United Nations Secretariat[40]. A Certificate of Registration was issued by the UN Secretariat and the MOU was published in the *United Nations Treaty Series*[41] and the *Law of the Sea Bulletin*[42]. It is evident from the United Nations rules that a treaty cannot be registered unless it is in force[43].

7. The MOU was subsequently confirmed in a letter by the Somali Prime Minister to the United Nations Secretary-General on 19 August 2009, *after* the Somali Parliament's vote on 1 August 2009 to reject the MOU[44]. In that letter, Somalia specifically referred to and reproduced the relevant paragraph of the MOU that it now contends to be without legal effect[45].

8. Mr. President, Somalia included the MOU in Annex 6 to its Memorial with a cover page stating "Entry into force: 7 April 2009, by signature". Somalia chose the following title for the Annex: "MOU . . . entered into force 7 Apr. 2009". In Volume II of Somalia's Memorial, the MOU is included in a section of the annexes entitled "Treaties and agreements". There can be no doubt that Somalia now admits that the MOU is legally binding, and that the provision on the method of dispute settlement is also legally binding.

III. Somalia's Changing Case on MOU Validity

9. Mr. President, I now turn to Somalia's changing case on the validity of the MOU. It is significant that Somalia did not deny that the MOU is a treaty. Kenya agrees: the MOU is indeed a treaty. It is an agreement concluded in writing and governed by international law, and as such, the principle *pacta sunt servanda* applies[46].

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[39]POK, paras. 58-59. Somalia's Memorial, Ann. 66, p 8.

[40]POK, para. 64 and Ann. 17.

[41]Memorial of Somalia (MS), Ann. 6.

[42]POK, Ann. 18.

[43]B. Simma et al., *The Charter of the United Nations: A Commentary*, 3rd ed., 2012, pp. 2098-2099.

[44]POK, para. 68.

[45]POK, para 69 and MS, Ann. 37.

[46]Article 26, Vienna Convention on the Law of Treaties.

10. Prior to these proceedings, in its 4 February 2014 letter to the United Nations Secretary-General, objecting to Kenya's CLCS submission, Somalia claimed that the MOU was "null and void"[47]. It requested, unsuccessfully, the withdrawal of the MOU from the new United Nations Register of treaties. Somalia argued that the Minister who signed the treaty did not have full powers. That contention was false. Somalia now admits that its Minister did in fact have full powers. Indeed, it has now produced the letter of authorization from the Somali Prime Minister in its written pleadings[48]. Somalia's argument on nullity has been rightfully abandoned.

11. Somalia also claimed that the Minister had orally communicated the requirement of ratification to Kenya at the time of signature. There is no record of any such statement. The MOU expressly provides that it shall enter into force upon signature. It is remarkable that Somalia's Memorial reproduced every paragraph of the MOU except that provision. Somalia now admits that the MOU entered into force upon signature[49]. The previous contention that ratification was necessary before the MOU entered into force has been similarly abandoned.

12. Instead, Somalia now asserts that although the MOU did in fact enter into force upon signature, it was contrary to Somali internal law. It claims that the MOU was rejected by a parliamentary vote on 1 August 2009 because it was inconsistent with the Somali Transitional Federal Charter, which it asserts required ratification of all international agreements. That argument is both irrelevant and wrong, both as a matter of fact and law. Internal law is, of course, not a ground for violation of international obligations, as is made clear by Article 27 of the Vienna Convention on the Law of Treaties. Somalia, in fact, does not claim that the MOU is invalid as a result of alleged inconsistency with the Transitional Federal Charter. It does not invoke the narrow exception in Article 46 of the Vienna Convention, the criteria for which would not have been satisfied in any event. Norway referred to Article 46 in its 17 August 2011 letter to the United Nations Secretariat and rejected its application. It stated that "Norway considers both Somalia and Kenya to remain bound by the provisions of the MOU"[50].

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[47]MS, Ann. 42.

[48]Written Statement of Somalia on Kenya's Preliminary Objections (WSS), para. 2.26 and Ann. 21.

[49]WSS, para. 2.81.

[50]POK, paras. 81-2, Ann. 4.

13. As noted by the Tribunal in the *Case Concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau* v. *Senegal)*:

> "[a]s for the practice of international courts and arbitral tribunals, there was *no precedent* of a treaty being declared null and void because one of the contracting States had violated its own internal law in signing it"[51].

14. But what is most significant is that the Somali Parliament never invoked the Transitional Federal Charter in its vote on the MOU. Kenya has produced the verbatim record of the debate in the Somali Parliament[52]. Somalia does not dispute either the authenticity or the accuracy of these records. Nothing whatsoever in that debate refers to the Transitional Federal Charter.

15. Mr. President, it is important to note that those parliamentary deliberations were, in any event, based on deliberate disinformation. This deliberate disinformation was apparently spread by the terrorist group, Al-Shabaab, who claimed that, by concluding the MOU, the Somali Government was "selling the sea" to Kenya[53]. It was, in the words of Somalia's own Minister Warsame, a campaign of "slandering, defaming, and false accusation"[54]. It had nothing to do with procedural requirements or any asserted provision of the Transitional Federal Charter.

16. Somalia has dropped its earlier assertions because the legal validity of the MOU is now a matter before the Court. Somalia realizes that it cannot seriously claim that it is "null and void". Instead, it seeks to obtain the same result by claiming that, even if it were legally valid, its provisions have no legal meaning. It argues that the carefully drafted terms of the MOU are merely "spare" and "descriptive". This is part of a consistent pattern by which Somalia seeks to evade its obligations under the MOU. First, Somalia objected to Kenya's CLCS submission. Now it repudiates the agreement on the method of settlement. In fact, Somalia withdrew its CLCS objection only a week before submitting its Memorial. Now that it has finally complied with its obligations on the first part of the MOU, it attempts to ignore its obligations in the second part. The agreement on "no objection" was the first step towards finalization of a maritime boundary agreement after CLCS review. The two parts are inseparable.

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[51]*Guinea-Bissau* v. *Senegal*, Award, 31 July 1989, 83 *International Law Reports (ILR)* 1, para. 55.

[52]POK, Anns. 23 and 46.

[53]POK, para. 65.

[54]POK, para. 87.

17. Finally, Somalia suggests that it had nothing to do with the drafting of the MOU and it did not know what it was signing. It states that "Somalia had virtually no input in negotiating and drafting of the MOU"[55]. It is not in dispute that Norway prepared the draft on Somalia's behalf, and that it was drafted with precision and expertise by Ambassador Longva, a renowned Norwegian diplomat and jurist who served as the Legal Adviser in the Ministry of Foreign Affairs for 47 years, until his death in 2013. Every letter, every digit, every typographical error, in the MOU was reviewed prior to finalization of the draft. There was nothing random about its terms. Furthermore, it is not in dispute that Somalia benefited from the opinion and approval of an eminent Somali jurist before signing the MOU[56]. Somalia cannot claim now that the MOU was not a proper legally binding agreement.

IV. Conclusion

18. Mr. President, Somalia has gone to great lengths in its strategy of "MOU avoidance". First, it challenged the MOU's validity, arguing that Minister Warsame did not have full powers. Then it argued that there was a requirement of ratification by the Parliament. Those arguments have now been rightfully abandoned, because they are entirely baseless. Now, in these proceedings, Somalia argues that the MOU is legally valid, but that its provisions are devoid of legal meaning. That cannot be right. The MOU is a legally binding agreement on the method of settlement of the maritime boundary dispute between the Parties, and as my colleague Professor Forteau will explain, its provisions must be given full legal effect.

19. Mr. President, Members of the Court, that concludes my submissions. Mr. President, I am in your hands. I would ask that either we adjourn now and that, after the break, Professor Forteau continue the submissions of the Republic of Kenya or, with your leave, he can continue them now.

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[55]WSS, para. 1.36.

[56]POK, paras. 32-25, 43.

Le PRESIDENT : Merci, Monsieur Khan. Je crois que c'est le moment adéquat pour une pause de 10 minutes. L'audience est suspendue.

L'audience est suspendue de 11 h 10 à 11 h 25.

Le PRESIDENT : Veuillez vous asseoir. L'audience est rouverte. La parole est à M. le professeur Forteau.

M. FORTEAU : Je vous remercie, Monsieur le président.

LE MÉMORANDUM D'ACCORD DE 2009 CONSTITUE UN ACCORD PAR LEQUEL LES PARTIES ONT CONVENU D'AVOIR RECOURS À UN MODE DE RÈGLEMENT AUTRE QUE LA COUR INTERNATIONALE DE JUSTICE

I. Introduction

1. Monsieur le président, Mesdames et Messieurs de la Cour, c'est un honneur renouvelé de me présenter à cette barre aujourd'hui. Monsieur le président, comme mon collègue et ami le professeur Akhavan l'a rappelé un peu plus tôt ce matin, le Kenya a exclu de la compétence de la Cour «les différends au sujet desquels les Parties en cause auraient convenu ou conviendraient d'avoir recours à un autre mode ou à d'autres modes de règlement»[57]. Cette formule est particulièrement extensive ; elle vise *tout autre mode de règlement* dont les Parties auraient convenu.

2. En ce qui concerne le présent différend, il ne fait aucun doute qu'un tel accord existe aujourd'hui entre les Parties. Le 7 avril 2009, le Kenya et la Somalie ont conclu un mémorandum d'accord qui prévoit le recours à une procédure autre que la Cour internationale de Justice pour la délimitation de leurs frontières maritimes. Les termes de cet accord sont parfaitement clairs à cet égard et ne peuvent prêter à aucune discussion.

II. Le sens du mémorandum d'accord de 2009 est parfaitement clair

3. Vous trouverez une copie de cet accord à l'onglet n° 5 du dossier des juges. Cet accord s'articule en trois parties, qui sont agencées de manière parfaitement cohérente :

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[57] Déclaration du Kenya en vertu du paragraphe 2 de l'article 36, en date du 12 avril 1965, *Recueil des traités des Nations Unies*, vol. 531, p. 113, par. 1.

i) dans le premier paragraphe substantiel de l'accord, les Parties constatent tout d'abord qu'un différend les oppose en ce qui concerne la délimitation du plateau continental ;

ii) dans les trois paragraphes qui suivent, les Parties prennent ensuite des engagements en ce qui concerne la *délinéation*. Les deux Parties s'y engagent à ne pas faire objection à ce que la Commission des limites du plateau continental examine leurs demandes respectives. Dans le dernier de ces trois paragraphes, les Parties précisent notamment que les recommandations qu'adoptera la Commission seront sans préjudice de la délimitation «future» (donc, postérieure auxdites recommandations) de leurs frontières maritimes ;

iii) enfin, dans le cinquième et avant-dernier paragraphe de l'accord, celui qui intéresse directement la présente affaire, les Parties contractent un engagement relatif, non plus à la délinéation, mais cette fois-ci à la *délimitation*. Ce paragraphe dispose que

> «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.»[58]

4. Le sens du mémorandum d'accord de 2009 est par conséquent clair et net :

i) il prévoit, en ce qui concerne «the areas [au pluriel] under dispute», que la délimitation des frontières maritimes (toujours au pluriel) «shall be agreed between the two coastal States». Cela signifie que les Parties se sont engagées à procéder à la délimitation par le biais de négociations, et non en faisant recours à une juridiction internationale ;

ii) l'accord de 2009 précise par ailleurs que cette délimitation devra faire l'objet d'un accord seulement *après* que la Commission des limites du plateau continental aura achevé l'examen des communications de chacun des deux Etats côtiers *et après* qu'elle aura formulé ses recommandations. Les Parties n'ont donc pas entendu procéder, aujourd'hui, à cette délimitation par la voie judiciaire.

5. Dans son exposé écrit, la Somalie a admis que «negotiations are the most natural way for States to settle their maritime boundary disputes»[59] et elle a par ailleurs reconnu que l'accord de

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[58] Exceptions préliminaires du Kenya (EPK), annexe 1 ; mémoire de la Somalie (MS), vol. III, annexe 6.

[59] Exposé écrit de la Somalie (EES), par. 3.72.

2009 constitue un «agreement to negotiate»[60]. Je rappelle par ailleurs que cet accord de négocier est assorti d'une condition temporelle — il faut attendre les recommandations de la Commission avant de finaliser les négociations. Il résulte ainsi tant de l'accord que de l'interprétation qu'en donne la Somalie que la compétence de la Cour, telle que délimitée par la déclaration du Kenya, est exclue en la présente affaire.

6. La Somalie ajoute toutefois que les négociations ne sont pas le seul mode de règlement des différends en droit international[61]. C'est vrai, mais là n'est pas la question. Le fait est qu'en concluant le mémorandum d'accord, le Kenya et la Somalie ont convenu de régler leur différend par la voie de négociations et ont convenu que l'accord sur la délimitation interviendrait seulement après les recommandations de la Commission des limites du plateau continental. Les Parties n'ont nullement convenu en revanche de demander, maintenant, à une juridiction internationale de procéder à cette délimitation à leur place.

7. Reniant le principe *pacta sunt servanda*, la Somalie cherche aujourd'hui à priver l'accord de 2009 de tout effet juridique. Elle déploie à cette fin une double stratégie.

8. La première stratégie consiste à déformer la position du Kenya et à déformer le texte de l'accord. Selon la Somalie, il ne serait pas possible de prétendre que les Parties auraient décidé d'attendre les recommandations de la Commission avant de négocier leurs frontières maritimes, car il se trouve qu'elles auraient déjà entamé des négociations[62]. Ni le mémorandum d'accord ni le Kenya ne disent cependant que les Parties sont empêchées de commencer dès maintenant les négociations. Ce que prévoit, explicitement et clairement, l'accord de 2009, c'est que la délimitation que les Parties doivent négocier devra être agréée après lesdites recommandations — «agréée», et non pas décidée par une cour internationale.

9. La deuxième stratégie déployée par la Somalie pour échapper aux termes clairs du mémorandum d'accord consiste à le réviser sous couvert d'interprétation, faisant fi du principe

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[60] EES, par. 1.44.

[61] EES, par. 3.72.

[62] Voir *ibid.*, par. 3.32-3.33 et 4.15.

selon lequel la Cour ne peut pas réviser les traités[63]. La Somalie affirme ainsi, contre toute raison, que l'avant-dernier paragraphe de l'accord de 2009 ne ferait que répéter les articles 74, par. 1, et 83, par. 1, de la convention sur le droit de la mer et n'aurait donc qu'une portée descriptive d'obligations préexistantes sans être créateur d'obligations nouvelles[64]. Avec tout le respect que je dois à mes contradicteurs, Monsieur le président, c'est là une interprétation parfaitement absurde. Les articles 74 et 83 de la convention sur le droit de la mer énoncent que la délimitation «est effectuée par voie d'accord conformément au droit international afin d'aboutir à une solution équitable». Nulle mention n'y est faite de la Commission des limites. L'accord de 2009 prévoit quant à lui que la délimitation «shall be agreed» par les Parties «after» les recommandations de la Commission des limites. Cette formulation ne laisse pas de doute quant au fait que l'on est bien en présence ici, d'une part, d'un accord créateur d'obligations précises, d'autre part, d'un accord instituant une procédure particulière qui va au-delà de ce que prévoient les articles 74 et 83 de la convention de Montego Bay.

10. Dans ces circonstances, il est plutôt surprenant de lire sous la plume somalienne que l'exception préliminaire du Kenya ne reposerait sur aucune base textuelle[65]. Il se trouve que le texte de l'accord de 2009 est dénué de toute ambiguïté ; il ne dit pas que la délimitation doit ou peut être opérée *aujourd'hui* par *une juridiction internationale* ; l'accord prévoit, de manière à la fois catégorique et précise, que la délimitation doit faire l'objet i) d'un accord ; ii) *après* les recommandations de la Commission des limites. Comme la Somalie l'a reconnu, il s'agit là d'un engagement de négocier, lequel est assorti par ailleurs d'une condition temporelle. Compte tenu de cette formulation claire et précise, la Cour doit s'en tenir au principe énoncé dans l'affaire du *Golfe du Maine* : «le recours à une délimitation par voie arbitrale ou judiciaire n'est en dernière analyse qu'un succédané au règlement direct et amiable entre les parties» ; en conséquence, lorsque les Parties «ont choisi de se réserver pour une éventuelle négociation directe aux fins d'un accord la

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[63] Voir commission du droit international (CDI), *Guide de la pratique sur les réserves aux traités*, A/66/10/Add.1, directive 4.7.1, commentaire, p. 576, par. 6 («La Cour internationale de Justice a également souligné que l'interprétation d'un traité ne peut pas aboutir à sa modification. Comme elle l'a rappelé dans son avis consultatif concernant l'*Interprétation des traités de paix conclus avec la Bulgarie, la Hongrie et la Roumanie* : «La Cour est appelée à interpréter les traités, non à les réviser») ; voir également *ibid.*, directive 1.2, commentaire, p. 76, par. 18.

[64] Voir EES, par. 3.26-3.28 et 3.53.

[65] Voir EES, par. 1.8.

détermination du tracé de la ligne de délimitation», la Cour doit donner effet à cet accord, à défaut de quoi «elle dépasserait sa compétence»[66]. Il ne fait pas de doute dans notre affaire que le Kenya et la Somalie ont choisi en 2009 «de se réserver pour une négociation directe» la délimitation maritime.

11. Pour échapper aux termes clairs de l'accord de 2009, la Somalie avance l'idée que le texte de l'accord ne serait pas déterminant dans la mesure où la règle d'interprétation des traités reflétée à l'article 31 de la convention de Vienne de 1969 formerait une «seule règle, étroitement intégrée» qui fait référence, non seulement au texte, mais aussi au contexte et à l'objet et au but du traité[67]. Le fait toutefois que l'article 31 soit porteur d'une telle règle n'autorise certainement pas la Somalie à invoquer *contre* le texte de l'accord de 2009 son objet, son but ou son contexte et cela n'autorise pas davantage à ne pas tenir compte du texte du traité.

12. Le droit international est clairement fixé au contraire dans le sens, d'une part, que «[l]'interprétation doit être fondée avant tout sur le texte du traité lui-même»[68], d'autre part, que lorsque le texte d'un traité est clair, il n'y a pas lieu de poursuivre plus avant le processus d'interprétation. En 1966, la Commission du droit international a souligné que «les parties sont présumées avoir l'intention qui ressort du sens ordinaire des termes qu'elles utilisent» et elle a rappelé que votre jurisprudence

> «comporte de nombreuses décisions d'où l'on est en droit de conclure que la Cour considère l'interprétation des traités par référence au texte comme une règle établie de droit international. En particulier, rappelait la Commission du droit international, la Cour a maintes fois souligné qu'il n'est pas du rôle de l'interprétation de réviser les traités»[69].

La Cour permanente avait déjà décidé en son temps que, «placée en présence d'un texte dont la clarté ne laisse rien à désirer, elle est tenue de l'appliquer tel qu'il est», ce que votre Cour a

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[66] *Délimitation de la frontière maritime dans la région du golfe du Maine (Canada/Etats-Unis d'Amérique), arrêt, C.I.J. Recueil 1984*, p. 266, par. 22-23.

[67] EES, par. 3.12-3.13, citant le projet d'articles de la CDI de 1966 sur le droit des traités.

[68] *Différend territorial (Jamahiriya arabe libyenne/Tchad), arrêt, C.I.J. Recueil 1994*, p. 22, par. 41 ; *Délimitation maritime et questions territoriales entre Qatar et Bahreïn (Qatar c. Bahreïn), compétence et recevabilité, arrêt, C.I.J. Recueil 1995*, p. 18, par. 33 ; *Ile de Kasikili/Sedudu (Botswana/Namibie), arrêt, C.I.J. Recueil 1999 (II)*, p. 1060, par. 20 ; *Licéité de l'emploi de la force (Serbie-et-Monténégro c. Belgique), exceptions préliminaires, arrêt, C.I.J. Recueil 2004 (I)*, p. 318, par. 100.

[69] Projet d'articles sur le droit des traités, *Annuaire de la CDI*, vol. II, p. 240, par. 11 et 12 du commentaire de l'article 27.

réaffirmé en 1994, notamment[70]. Votre Cour avait déjà confirmé en 1950 que «[s]i les mots pertinents, lorsqu'on leur attribue leur signification naturelle et ordinaire, ont un sens dans leur contexte, l'examen doit s'arrêter là»[71]. Votre Cour a de nouveau réaffirmé en 2007 que, lorsque le sens d'un traité «ressort clairement d[e s]es termes», «il n'est pas nécessaire d[e l']interpréter plus avant»[72].

13. Dans le cas présent, on ne voit pas comment l'accord de 2009 pourrait être interprété comme ayant autorisé votre saisine en 2014 ; les termes de l'accord sont clairs : la délimitation doit faire l'objet d'un accord (et non pas d'un arrêt), après (et non pas avant) que la Commission des limites aura approuvé ses recommandations.

14. De ce point de vue, le principe de l'effet utile commande de tirer les conséquences des engagements pris dans l'accord de 2009. Votre Cour a eu l'occasion de réitérer en 2011 «le principe bien établi d'interprétation des traités selon lequel il faut conférer aux mots un effet utile». Dans l'affaire *Géorgie c. Russie,* vous avez appliqué ce principe à une condition limitant l'applicabilité d'une clause compromissoire, ce qui vous a conduit à vous déclarer incompétents dans l'affaire en cause[73]. La même solution doit prévaloir en l'espèce : l'effet utile qu'il convient de donner au mémorandum d'accord de 2009 et à l'engagement de négocier qu'il contient vous conduira nécessairement à vous déclarer incompétents pour connaître de la requête somalienne de 2014.

15. Nul doute que dans les prochains jours la Somalie, à court d'arguments, accusera le Kenya de faire preuve de fétichisme textuel, et qu'elle tentera de vous convaincre, comme elle s'y est déjà efforcée dans son exposé écrit, que l'intention réelle des Parties ne serait pas celle qui résulte en réalité du texte de l'accord et qu'il conviendrait par conséquent de ne pas tenir compte et

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[70] *Acquisition de la nationalité polonaise, avis consultatif, 1923, C.P.J.I. série B n° 7,* p. 20 ; *Différend territorial (Jamahiriya arabe libyenne/Tchad), arrêt, C.I.J. Recueil 1994*, p. 25, par. 51.

[71] *Compétence de l'Assemblée générale pour l'admission d'un Etat aux Nations Unies, avis consultatif, C.I.J. Recueil 1950,* p. 8 ; rappelé dans *Sentence arbitrale du 31 juillet 1989 (Guinée-Bissau c. Sénégal), arrêt, C.I.J. Recueil 1991*, p. 69, par. 48.

[72] *Différend territorial et maritime (Nicaragua c. Colombie), exceptions préliminaires, arrêt, C.I.J. Recueil 2007 (II),* p. 861, par. 88 (voir également p. 863, par. 97) ; voir également dans le même sens PCA Case No. 2013-19, *The Republic of Philippines* v. *The People's Republic of China*, sentence du 12 juillet 2016, par. 698 («These provisions are unequivocal and require no further interpretation.»)

[73] *Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Géorgie c. Fédération de Russie), exceptions préliminaires, arrêt, C.I.J. Recueil 2011 (I),* p. 125 et suiv., par. 132 et suiv.

même de faire abstraction de ce texte. En droit et pour les raisons que je viens de rappeler, c'est là une position indéfendable, car le texte de l'accord fait droit entre les Parties. Mais *quand bien même* il serait possible de ne pas tenir compte du texte de l'accord, les arguments mis en avant par la Somalie pour discréditer celui-ci sont de toute manière, et pour surplus de droit, privés de tout fondement. Permettez-moi, Monsieur le président, de les examiner maintenant tour à tour en commençant par l'objet et le but du mémorandum d'accord de 2009.

III. L'objet et le but du mémorandum d'accord de 2009

16. Dans son exposé écrit, la Somalie s'efforce de neutraliser l'avant-dernier paragraphe du mémorandum d'accord en estimant tout d'abord qu'il ne serait pas compatible avec l'objet et le but de cet accord. Un tel argument n'est de toute évidence pas conforme aux règles d'interprétation ; on ne peut pas invoquer en effet les prétendus objet et but d'un traité pour *retirer* du traité une disposition qui y figure expressément. C'est pourtant ce que vous demande de faire la Somalie.

17. La Somalie prétend à cet effet et en premier lieu que l'objet et le but de l'accord de 2009 seraient exclusivement relatifs à la délinéation et plus précisément à la non-objection de chaque partie à l'examen par la Commission des limites des demandes de l'autre partie, ce que refléterait l'intitulé du mémorandum d'accord[74]. La Somalie prétend en déduire que l'accord de 2009 aurait donc «nothing to do with the delimitation of any aspect of the Parties' maritime boundary»[75]. Voilà un argument pour le moins surprenant ! Il ne suffit pas d'invoquer en effet l'objet et le but d'un traité pour se débarrasser, comme le fait la Somalie, d'une clause qui figure dans le traité. Par définition, l'objet et le but d'un traité est quelque chose de plus restreint que l'ensemble des dispositions du traité — faute de quoi toute réserve à un traité serait par définition illicite ! En l'espèce, quel que soit l'objet ou le but du traité ou son intitulé, il n'en demeure pas moins que l'accord de 2009 *contient* une disposition consacrée à la délimitation, à laquelle il faut par conséquent donner effet.

18. La Somalie affirme en second lieu que, quand bien même l'accord de 2009 porterait aussi sur la délimitation, il ne concernerait toutefois que le plateau continental au-delà de

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[74] EES, par. 1.7, 1.11 *in fine*, 1.16, 2.5-2.30, 2.91, 3.10, 3.20-3.21, 3.63 et 3.65.

[75] *Ibid.*, par. 3.69.

200 milles marins et que par conséquent, il ne s'appliquerait pas, à tout le moins, aux autres espaces maritimes[76]. Cette affirmation entre de nouveau en collision frontale avec le texte de l'accord qui vise expressément «[t]he delimitation of maritime boundaries [au pluriel] in the areas [de nouveau au pluriel] under dispute, [avant de préciser] including [donc : entre autres, et pas exclusivement] the delimitation of the continental shelf beyond 200 nautical miles». L'accord de 2009 s'applique à ce titre à l'ensemble des espaces maritimes et pas seulement au plateau continental au-delà de 200 milles marins.

19. Je précise d'ailleurs à ce titre que la Somalie sollicite de la Cour le tracé d'une ligne unique de délimitation, couvrant tous les espaces maritimes[77]. Or, en application du principe rappelé dans l'affaire *Qatar c. Bahreïn*, chaque segment d'une ligne unique de délimitation doit être tracé en tenant compte du fait qu'il s'agit de «tracer une limite maritime unique qui soit valable aussi à d'autres fins»[78]. Toute ligne unique de délimitation est constituée de ce fait d'une somme de délimitations indivisibles et interdépendantes, ou, pour reprendre les termes de votre Cour, elle constitue une «délimitation polyvalente»[79]. Dans ces conditions, la délimitation maritime globale dépend de la délimitation du plateau continental. Dès lors, en admettant comme le soutient la Somalie que l'accord de 2009 ne porterait que sur la délimitation du plateau continental *(quod non*), cela ne changerait strictement rien au fait que cet accord produirait tout de même un effet sur l'ensemble de la délimitation maritime.

20. Quoi qu'il en soit, il se trouve que, contrairement à ce qu'affirme la Somalie, l'accord de 2009 ne se limite pas au plateau continental. Il vise explicitement dans le paragraphe consacré à la délimitation les «areas under dispute» et les «maritime boundaries». L'usage de ce double pluriel est dénué de toute ambiguïté, en particulier quand on sait avec quel soin l'accord a été rédigé et approuvé, comme cela a été rappelé un peu plus tôt ce matin[80]. Ce double pluriel signifie

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[76] EES, par. 1.20 ; par. 3.68.

[77] Requête introductive d'instance (RS), par. 2, 36 et 37 ; MS, par. 1.1 ; EES, par. 1.

[78] *Délimitation maritime et questions territoriales entre Qatar et Bahreïn (Qatar c. Bahreïn), fond, arrêt, C.I.J. Recueil 2001*, p. 93, par. 174 ; confirmé par *Différend territorial et maritime entre le Nicaragua et le Honduras dans la mer des Caraïbes (Nicaragua c. Honduras), arrêt, C.I.J. Recueil 2007 (II)*, p. 739-740, par. 265.

[79] *Délimitation de la frontière maritime dans la région du golfe du Maine (Canada/Etats-Unis d'Amérique), arrêt, C.I.J. Recueil 1984*, p. 327, par. 194.

[80] Voir EPK, par. 31 et par. 43, ainsi que les annexes 9 et 10 ; EES, par. 1.34.

que l'ensemble de la délimitation maritime est concernée par l'avant-dernier paragraphe de l'accord de 2009. Certes, on pourrait s'interroger sur les raisons pour lesquelles les Parties ont fait usage de ces expressions générales («areas under dispute», «maritime boundaries») plutôt que d'employer les expressions plus techniques de mer territoriale, zone économique exclusive et plateau continental. On trouvera un élément de réponse dans le fait que, lorsque l'accord de 2009 a été préparé et adopté, les revendications somaliennes étaient affectées d'une grande confusion technique et juridique puisqu'elles semblaient assimiler mer territoriale et zone économique exclusive. Depuis la loi somalienne de 1972 sur la mer territoriale en effet, qui était encore en vigueur en 2009, la Somalie revendiquait une mer territoriale, non pas de 12, mais de 200 milles marins[81] ! Cette revendication ne reposait bien entendu sur aucun fondement juridique, comme la Norvège eut l'occasion de le relever dans une lettre d'août 2011[82].

21. La Somalie affirme en troisième lieu que, si l'on devait admettre que l'accord de 2009 concerne la délimitation, cet accord serait alors «entièrement illogique» car il serait «absurde» de procéder à la délinéation avant la délimitation[83]. De nouveau, ceci n'est pas un argument : on ne peut pas rayer d'un trait de plume une disposition d'un accord au simple prétexte qu'elle serait illogique. Et de toute manière, il n'y a absolument rien d'illogique dans le fait de conditionner la délimitation à la délinéation préalable.

22. Le Kenya prend certes note de l'arrêt rendu par votre Cour le 17 mars dernier. Dans cet arrêt, vous avez jugé, en tout cas au stade des exceptions préliminaires, que «la délimitation du plateau continental au-delà de 200 milles marins peut s'effectuer indépendamment de la recommandation de la Commission»[84]. Certains ne manqueront pas de relever que cette décision semble constituer un revirement de jurisprudence par rapport à votre arrêt de 2007 dans l'affaire *Nicaragua c. Honduras*, arrêt rendu quelques mois avant que le Kenya et la Somalie concluent l'accord de 2009. Dans votre arrêt de 2007, vous aviez jugé que «toute prétention relative à des droits sur le plateau continental au-delà de 200 milles doit être … examinée par la

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[81] Voir EPK, par. 20 et par. 86.

[82] *Ibid.*, annexe 4, p. 23.

[83] EES, par. 3.24-3.25 ; voir aussi *ibid*., par. 1.21-1.23 ; 3.66-3.67 ; 3.70.

[84] *Question de la délimitation du plateau continental entre le Nicaragua et la Colombie au-delà de 200 milles marins de la côte nicaraguayenne (Nicaragua c. Colombie)*, arrêt, 17 mars 2016, par. 114.

Commission des limites du plateau continental constituée en vertu de ce traité»[85]. Quoi qu'il en soit du bien-fondé de votre nouvel arrêt de mars 2016, point sur lequel le Kenya n'estime pas nécessaire de prendre position dans la présente instance, il ne fait aucun doute que votre décision de mars 2016 *n'interdit pas* à des Etats de convenir de commencer par la délinéation avant de passer à la délimitation. De fait, les Etats sont parfaitement libres de retenir cette manière de procéder, ce que plusieurs Etats ont fait, comme cela ressort des annexes produites par la Somalie[86]. La Somalie elle-même d'ailleurs a proposé au Yémen, en 2009, et à la Tanzanie, en 2014, de suivre cette procédure (à savoir délinéer avant de délimiter)[87]. La Somalie est donc mal venue à qualifier aujourd'hui cette procédure d'illogique.

23. Loin d'être illogique, cette procédure est, à dire vrai, plus logique que la solution inverse, comme certains membres de la Cour l'ont relevé en mars dernier[88]. Délimiter suppose en effet de déterminer d'abord les prétentions au titre de chaque partie (c'est-à-dire leur aire d'étendue vers le large), comme le reconnaît la Somalie[89], et la détermination préalable des zones pertinentes aux fins de la délimitation est à son tour indispensable pour pouvoir appliquer ensuite le test de l'absence de disproportion en vue d'arriver à une solution équitable pour l'ensemble des zones en litige[90]. Cela vaut à plus forte raison lorsque c'est une ligne unique de délimitation qui est revendiquée. Il n'est donc pas surprenant que le Kenya et la Somalie aient conclu l'accord de 2009 par lequel ils ont convenu que la délimitation se fera par voie d'accord — après et non pas avant — les recommandations de la Commission des limites. L'accord de 2009, son objet et son but sont à cet égard cohérents de bout en bout : les Parties se sont d'abord donné les moyens d'obtenir les recommandations de la Commission des limites en convenant de ne pas bloquer l'action de la

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[85] *Différend territorial et maritime entre le Nicaragua et le Honduras dans la mer des Caraïbes (Nicaragua c. Honduras), arrêt, C.I.J. Recueil 2007 (II)*, p. 759, par. 319 ; voir également à cet égard B Kunoy, «The Delimitation of an Indicative Area of Overlapping Entitlement to the Outer Continental Shelf», *BYBIL* (2013), vol. 83, p. 61-81.

[86] Voir EES, annexe 28, p. 4152-4153 (décision d'avril 2009 de la France, l'Irlande, l'Espagne et le Royaume-Uni).

[87] Voir MS, vol. III, respectivement annexe 66, d'une part, et annexes 49 et 70, d'autre part.

[88] *Question de la délimitation du plateau continental entre le Nicaragua et la Colombie au-delà de 200 milles marins de la côte nicaraguayenne (Nicaragua c. Colombie),* arrêt, 17 mars 2016, opinion individuelle du juge Owada, par. 23 ; déclaration du juge Gaja ; et déclaration du juge Bhandari (*passim*).

[89] Voir EES, par. 3.10 : «Failure to meet that deadline would have meant losing their potential *entitlement* to a continental shelf beyond 200 M.» ; voir également *ibid.*, annexe 28, en particulier p. 4140 et 4142.

[90] EPK, par. 47. Voir également l'article de B. Kunoy, *op. cit.*

Commission, pour mieux décider ensuite que la délimitation aurait lieu après réception de ces recommandations et sur la base de celles-ci.

IV. La pratique ultérieure des Parties

24. L'analyse de la pratique ultérieure des Parties conduit à la même conclusion. Là encore, les efforts déployés par la Somalie pour supprimer de l'accord de 2009 son avant-dernier paragraphe se révèlent aussi vains qu'artificiels.

25. La Somalie invoque tout d'abord le fait que dans certains documents soumis par les Parties à la Commission des limites, l'avant-dernier paragraphe de l'accord de 2009 n'est pas cité. Il faudrait y voir la preuve que les Parties auraient renoncé à cette partie de l'accord[91]. Dans la mesure cependant où la Commission n'est pas concernée par la délimitation mais seulement par la délinéation, on ne voit pas pourquoi les Parties auraient dû systématiquement se prévaloir devant elle de l'avant-dernier paragraphe de l'accord de 2009. Et au demeurant, il se trouve que le Kenya s'en est bel et bien prévalu devant la Commission[92].

26. Plus fondamentalement, avant que la Cour soit saisie, le Kenya n'avait eu aucune raison d'invoquer à son profit l'avant-dernier paragraphe de l'accord de 2009. Le Kenya estimait en effet, en toute bonne foi, que la Somalie respecterait l'accord qu'elle a conclu. Dans la lettre envoyée par la Somalie au Kenya 48 heures seulement avant la saisine de votre Cour, la Somalie avait d'ailleurs rappelé son accord à la poursuite des négociations sans informer du tout le Kenya de son intention de saisir la Cour dans les quelques heures qui allaient suivre[93]. Ce n'est qu'à partir du moment où la Somalie a violé l'avant-dernier paragraphe de l'accord de 2009 en vous saisissant que le Kenya a dû se prévaloir de la procédure agréée dans cet accord, ce qu'il a fait en soumettant une exception préliminaire.

27. La Somalie affirme ensuite, en s'appuyant à cet effet sur un document interne somalien, qu'en 2014 le Kenya aurait lui-même soulevé la possibilité de soumettre le différend à l'arbitrage[94]. Ces propos prêtés par la Somalie au ministre kényan des affaires étrangères sont cependant,

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[91] EES, par. 2.28-2.29, 3.30-3.31.

[92] Voir EPK, annexes 24 et 44.

[93] Voir MS, vol. III, annexe 47.

[94] EES, par. 2.69.

Monsieur le président, étrangers à la vérité, comme l'établit la déclaration dudit ministre communiquée par le Kenya à la Cour le 27 mai dernier.

28. La Somalie déclare enfin que «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»[95]. On peine à comprendre en quoi cette citation viendrait au soutien de la thèse somalienne. Cette déclaration du Kenya *confirme* au contraire l'avant-dernier paragraphe de l'accord de 2009. L'accord de 2009, encore une fois, n'interdit pas aux Parties de commencer à négocier avant de recevoir les recommandations de la Commission des limites. La procédure qu'il impose est d'attendre ces recommandations avant de trouver un accord sur la délimitation. Cela supposera nécessairement d'établir, au moment opportun, un mécanisme pour *finaliser* les négociations. Tel est le sens évident des propos du Kenya cités par la Somalie.

29. Pour en terminer avec la pratique ultérieure des Parties et l'argument de la Somalie selon lequel les Parties auraient prétendument renoncé à l'avant-dernier paragraphe de l'accord de 2009, je relèverai en tout état de cause que la Somalie néglige de citer plusieurs documents — dont les références figurent en note de bas de page de ma plaidoirie — qui attestent qu'après la conclusion de l'accord de 2009, les deux Parties ont expressément invoqué à plusieurs reprises la procédure agréée dans son avant-dernier paragraphe[96].

V. Le contexte de conclusion du mémorandum d'accord de 2009

30. J'en viens enfin, Monsieur le président, Mesdames et Messieurs de la Cour, au contexte de conclusion de l'accord de 2009, contexte que la Somalie sollicite, à nouveau abusivement, afin d'effacer l'avant-dernier paragraphe de l'accord.

31. Je rappellerai d'abord sur ce point que, selon vos propres termes,

> «il est généralement reconnu que l'examen de[s] circonstances [dans lesquelles un traité est conclu] ne constitue pas autre chose qu'un moyen complémentaire d'interprétation, auquel on a recours seulement lorsque le sens du texte est ambigu ou obscur ou lorsque l'interprétation conduirait manifestement à un résultat

[95] EES, par. 2.33-2.36 ; 3.34-3.47 ; voir aussi par. 2.43 et plus largement 2.37-2.76.

[96] Voir EPK, par. 68-69 ; *ibid*, par. 107 et annexe 24, p. 107 ; MS, vol. III, annexe 50 (dernière page du document) et annexe 61, par. 95, p. 20-21; voir également *ibid.*, annexe 66, par. 6.

manifestement absurde ou déraisonnable»[97], ce qui, encore une fois, n'est pas le cas en l'espèce, tant le texte de l'accord de 2009 est limpide.

32. Je soulignerai ensuite, et en tout état de cause, que la Somalie n'a apporté aucun élément au soutien de l'affirmation selon laquelle le contexte de conclusion de l'accord devrait vous conduire à priver de tout effet son avant-dernier paragraphe. La Somalie se contente d'affirmer que si ce paragraphe se voyait donner effet, il retarderait indûment la délimitation maritime qui, selon la Somalie, devrait être fixée de toute urgence[98]. Autrement dit, la Somalie vous demande de ne pas tenir compte du traité conclu en 2009 et de la procédure qu'il prévoit au seul motif qu'il existerait un besoin urgent de délimiter.

33. Cela constitue, une nouvelle fois, un argument dénué de tout fondement en droit : un besoin, quelle qu'en soit l'urgence, ne peut pas priver d'effet un traité en vigueur. Mais l'argument est également privé de tout fondement sur le terrain des faits. L'examen attentif des circonstances de conclusion de l'accord de 2009 montre en effet que lorsque cet accord a été conclu, la délimitation maritime n'était absolument pas une priorité pour la Somalie. Bien au contraire et de son propre aveu, la Somalie n'était pas prête, et n'était pas disposée, en 2009 à entrer en négociations sur la délimitation maritime[99]. Ceci était vrai en 2009 ; ce l'était encore quatre ans plus tard, en juin 2013, date à laquelle la Somalie réitéra qu'elle estimait avoir droit à une mer territoriale de 200 milles marins et annonça officiellement, comme une brutale fin de non-recevoir, qu'elle n'estimait pas «opportun» d'ouvrir avec qui que ce soit des discussions sur la délimitation maritime[100]. La Somalie est-elle bien crédible, dans ces circonstances, à affirmer que lorsqu'elle vous a saisis un an plus tard seulement, en août 2014, il existait désormais une extrême urgence à délimiter par la voie judiciaire ? Si les circonstances de conclusion de l'accord de 2009 révèlent quelque chose, c'est que la Somalie était, de son propre aveu, en 2009 et toujours en 2013, dans un processus fragile de rétablissement des structures étatiques et qu'elle n'était ni en mesure, ni même désireuse de procéder alors à la délimitation maritime.

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[97] *Différend frontalier terrestre, insulaire et maritime (El Salvador/Honduras; Nicaragua (intervenant)), arrêt, C.I.J. Recueil 1992*, p. 584, par. 376.

[98] EES, par. 3.66.

[99] Voir *ibid*, par. 1-32.1-33 ; 2.8-2.11 ; 2.40 ; 3.58-3.59.

[100] Voir EPK, annexes 33, 34, 35 et 36.

34. Ce contexte donne tout son sens à l'accord de 2009. En 2009, les Parties considéraient qu'il n'y avait pas d'urgence à délimiter, tout au contraire. En revanche, le délai était sur le point d'expirer pour la soumission des demandes à la Commission des limites du plateau continental. Cela explique que les Parties se soient entendues pour donner la priorité à la délinéation et pour attendre celle-ci avant de procéder à la délimitation. C'est ce que stipule, clairement, encore une fois, l'avant-dernier paragraphe de l'accord de 2009.

VI. Conclusion

35. En conclusion, Monsieur le président, Mesdames et Messieurs de la Cour, il ne fait aucun doute que vous n'avez pas compétence en la présente affaire. En avril 2009, le Kenya et la Somalie ont conclu un accord dont l'avant-dernier paragraphe stipule, avec clarté, que la délimitation des frontières maritimes dans les zones en litige se fera par voie d'accord après que la Commission des limites du plateau continental aura adressé ses recommandations aux deux Etats. Dans la mesure où un jugement de la Cour n'est pas un accord et dans la mesure où «après» ne veut pas dire «avant», il est manifeste qu'il existe un accord par lequel les Parties ont convenu de recourir à un mode de règlement autre que la Cour internationale de Justice. La conclusion s'impose donc d'elle-même : la Cour n'a pas compétence pour connaître de la requête introductive d'instance déposée par la Somalie en août 2014.

36. Monsieur le président, Mesdames et Messieurs les juges, je vous remercie très vivement de votre attention et je vous serais reconnaissant, Monsieur le président, de bien vouloir donner la parole maintenant à S. Exc. Mme Makena Muchiri. Je vous remercie.

Le PRESIDENT : Merci, M. le professeur. Je donne la parole à S. Exc. Mme l'ambassadeur Makena Muchiri.

Ms MUCHIRI:

NEGOTIATIONS HAVE NOT BEEN EXHAUSTED BETWEEN THE PARTIES

I. Introduction

1. Mr. President, distinguished Members of the Court, it is an honour and privilege to appear before you. I will be addressing Somalia's assertion that negotiations have been exhausted.

2. As Professor Forteau explained, the MOU requires a negotiated agreement on a final maritime delimitation following a Commission on the Limits of the Continental Shelf ("CLCS") review of the Parties' submissions. Negotiation is the agreed procedure; it is a legal obligation. Somalia claims that negotiations are futile. This argument misses the point. For the purpose of the Court's jurisdiction, the sole issue is whether the Parties have agreed to a procedure other than recourse to the Court; but in any case, Somalia's assertion that negotiations have been exhausted is not true. The facts demonstrate that the Parties held only two technical level meetings in 2014; that these were initiated by Kenya to address Somalia's breach of the MOU; and that maritime delimitation was discussed only in the most preliminary way, without any structure or detail. The facts also demonstrate that Somalia did not seriously pursue negotiations, and seemingly went through the motions only so it could get before the Court.

3. Maritime boundary delimitations are complex. Even where the Court has jurisdiction, Parties engage in prolonged negotiations before seeking judicial settlement. It is difficult to say how long negotiations must continue before they can be said to have been exhausted. But among the maritime boundary disputes decided by this Court, the period of prior negotiations has typically been around 20 years[101]. Two preliminary technical meetings just four months apart is clearly not a reasonable period. Under these circumstances, it cannot be said that the Parties have exhausted negotiations, when they have not even started proper discussions.

II. The 2014 technical level meetings

4. Mr. President, allow me to take you through the details of these two meetings.

5. Prior to the negotiations in 2014, the Foreign Ministers of Kenya and Somalia had agreed, in a Joint Statement of 31 May 2013, that meetings should be held to discuss "a framework of modalities for embarking on maritime demarcation" linked to "implementation" of the MOU[102]. Thus, the purpose of discussions at that stage was merely procedural — to structure negotiations

[101] In *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain)*, the Parties negotiated for 26 years 10 months before coming to the ICJ; in *Frontier Dispute (Benin/Niger)*, 41 years; in *Frontier Dispute (Burkina Faso/Niger)*, 36 years.

[102] POK, para. 88.

through a preliminary exchange of views based on the MOU. The primary purpose was *not* to hold substantive negotiations on the maritime boundary.

6. Because this reference to the MOU resulted in heated controversy, on the of 6 June 2013 the Somali Council of Ministers rejected *any* "discussions on maritime demarcation or limitations on the continental shelf" with Kenya[103]. So what prompted the first meeting a few months later?

7. Somalia does not dispute that Kenya initiated the first meeting. The question is why it did so? The answer is clear. It was because of Somalia's letter of 4 February 2014 to the United Nations, repudiating the MOU and objecting to Kenya's CLCS submission. The purpose of the meeting in March 2014, just one month after that letter, was to persuade Somalia to comply with the MOU by withdrawing its objection. The CLCS was scheduled to consider Kenya's submission in September 2014[104]. Compliance with the MOU was an urgent matter for Kenya. Somalia claims there is no evidence that the meeting was for the purposes of discussing the MOU. Should there be any doubt, Kenya has submitted in evidence of an internal contemporaneous letter dated 12 February 2014 from the Head of the Legal and Host Country Affairs Directorate of the Kenyan Ministry for Foreign Affairs addressed to the Cabinet Secretary. That document may be found at tab 11 of the judges' folder. This letter is dated just a week after Somalia's objection. It states that, although the Parties granted each other "no objection" under the MOU, Somalia has "written to the United Nations Secretary-General . . . formally objecting to consideration of Kenya's submission by the Commission". The letter concludes: "It is therefore imperative that diplomatic and bilateral consultations be initiated at the highest level of Government as soon as possible to resolve the situation to ensure that the submissions are considered in 2014 without undue delay". It is clear that Kenya initiated the meeting to discuss the MOU.

8. Mr. President, the Parties agreed on 21 March 2014 that the meetings would only be at the "technical level"[105]. It may be recalled that Somalia had refused to negotiate at all. Thus, this first meeting was in the nature of a confidence-building process. This meeting was held a few days later on 26 and 27 March 2014. Consistent with its primary concern, Kenya proposed an agenda that

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[103]POK, para. 90.

[104]POK, para. 91.

[105]POK, para. 98.

prioritized discussion of the MOU[106]. The record of that first meeting is clear. Somalia refused to even discuss the MOU; it demanded that any mention of the MOU be removed from the agenda[107]. In a spirit of compromise, Kenya agreed to postpone this discussion to a second technical level meeting to be held in June 2014. In other words, Somalia refused to even discuss the primary issue for which Kenya had initiated that meeting.

9. Two significant events occurred between the first and the second technical meetings. First, on 31 March 2014, just days after the first meeting, the CLCS stated that "it was not in a position to proceed with the establishment of a sub-commission at that time"[108]. This was a major setback for Kenya, given the cost and effort it had expended in preparing its submissions. At the June 2014 meeting of the UNCLOS States parties, Kenya's representative had emphasized that "any slight delay in considering a country's submissions results in huge human and material costs used to ensure that the country maintains her ability to defend the submission"[109].

10. Second, on 21 July 2014, Somalia made its own submission to the CLCS at the very session in which it blocked consideration of Kenya's submission. Kenya responded by holding a second meeting to encourage Somalia's compliance with the "no objection" agreement under the MOU.

11. Mr. President, this second meeting took place on 28 and 29 July 2014, just four months after the first meeting. It may be recalled that Somalia requested Kenya's internal contemporaneous record of this meeting, which Kenya has provided[110]. Those two new documents may be found at tab 12 of the judges' folder. They fully support Kenya's case that this meeting was not a proper negotiation of the maritime boundary. The meeting brief dated 8 August 2014 records that Kenya requested time to respond to Somalia's presentation on the maritime boundary.

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[106]POK, Ann. 31.

[107]POK, Anns. 31 and 24.

[108]POK, para. 103.

[109]POK, para. 104.

[110]Joint Report of the Government of the Republic of Kenya and the Federal Republic of Somalia on the Kenya-Somalia Maritime Boundary Meeting held on 28-29 July 2014 at the Ministry of Foreign Affairs and International Trade, Nairobi, Kenya and Brief on a meeting between the Governments of the Republic of Kenya and the Federal Republic of Somalia on the Maritime Boundary held on 28-29 July 2014, Nairobi, Kenya dated 8 August 2014.

It had not come prepared to focus on the merits of the dispute[111]. Both delegations "agreed that in order to move forward, the meetings needed to be structured" with agreed principles to guide negotiations[112]. This plainly contradicts Somalia's contention that negotiations had been exhausted. There was not even a discussion on structure or basic guidelines.

12. The Parties agreed to reconvene for a third technical level meeting to be held less than a month later, on 25 and 26 August 2014. Nothing had changed in the meantime. Kenya remained focused on its CLCS submission that was provisionally scheduled for the 35th session of the CLCS in the very same month. Kenyan internal documents demonstrate that the purpose of the third meeting was "to discuss [a] maritime boundary including lifting of objection by Somalia on MOU granting no objection to consideration of Kenya's submission"[113].

13. Kenya had a clear interest in having this third meeting[114]. It wanted to resolve the MOU issue. But the Kenyan delegation had valid security concerns about attending a meeting in Mogadishu at that time. This is recorded in the meeting brief dated 8 August 2014[115]. The Kenyan national intelligence service made an assessment and advised on 23 August 2014 that "due to the volatile security situation in Mogadishu, it is not advisable for such high powered delegation to visit the country"[116]. It is not difficult to understand why they came to that conclusion[117]. There was a specific risk to the Kenyan delegation because of the extreme anger in Somalia against the MOU, resulting from inflammatory Al-Shabaab rumours that Kenya had conspired to steal Somali waters. The Kenyan delegation genuinely feared that they could be harmed if people in Mogadishu became aware of their presence. Somalia's suggestion that Kenya simply failed to show up is grossly misleading. In fact, it is a pretext. Somalia had already decided to go to the Court.

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[111]Brief on a meeting between the Governments of the Republic of Kenya and the Federal Republic of Somalia on the Maritime Boundary held on 28-29 July 2014, Nairobi, Kenya dated 8 August 2014, p. 2, top of the page.

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

[113]POK, Anns. 40 and 41.

[114]POK, Anns. 40 and 41.

[115]Brief on a meeting between the Governments of the Republic of Kenya and the Federal Republic of Somalia on the Maritime Boundary held on 28-29 July 2014, Nairobi, Kenya dated 8 August 2014, p. 2, bottom of the page (Kenya seeking guidance on the venue for the next meeting).

[116]POK, Ann. 40.

[117]See, e.g., the June 2016 Al-Shabaab car bomb attack on the Ambassador Hotel in Mogadishu where 10 people dead and 50 were wounded: http://www.bbc.com/news/world-africa-36430306.

14. Mr. President, Annex 47 to Somalia's Memorial is a letter from Somalia to Kenya dated 26 August 2014, just two days before its Application was filed. It confirms that both Parties had agreed to an "additional round of discussions". It expresses Somalia's "strong commitment to amicably resolving the pending maritime boundary dispute". It makes no mention that Somalia would come before the Court within 48 hours. That course of conduct might even be described as deception. It is certainly not a commitment to negotiate in good faith.

15. It is reasonable to conclude that Somalia had been preparing for this case well in advance of filing its Application on 28 August 2014. It is reasonable to conclude that it was simply going through the motions of appearing to negotiate, while it refused to discuss the legal validity of the MOU or the withdrawal of its CLCS objection.

16. Mr. President, I must also draw attention to Somalia's assertion that at the second meeting in July 2014, the Kenyan Foreign Minister stated that, "if no agreement could be reached" the Parties "might resort to international arbitration"[118]. Somalia makes much of this alleged statement, as if it constitutes Kenya's consent to arbitration[119].

17. The alleged statement is set out in a report to the file, found in Somalia's Annex 4. It is dated 5 August 2014, just a few days before the filing of the Application. Its co-author is Somalia's Co-Agent in this case. It is curious that an internal note for the file for the Somali Government is drafted in English rather than Somali.

18. What is troubling, however, is that the Kenyan Foreign Minister in fact never made such a statement. Kenya has submitted as new evidence a statement by the Honourable Minister Dr. Amina Mohamed. She states as follows: "I did not ever make the statement that is attributed to me in that Report to the File", which is at tab 13[120]. In regard to this statement, Somalia

[118]Written Statement of Somalia on Kenya's Preliminary Objections (WSS), para. 2.69, Ann. 4.

[119]WSS, para. 1.19. Its Written Statement argues that: "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."

[120]Statement by the Cabinet Secretary Ministry of Foreign Affairs and International Trade on Claims of Resorting to International Arbitration with regard to the Kenya/Somalia Maritime Boundary Dispute, 5 May 2016.

requested Kenya's internal contemporaneous record of that meeting. That record, at tab 12, makes no mention whatsoever of arbitration[121].

III. The potential for meaningful negotiations remains

19. Mr. President, it is against this background, that Somalia claims "deadlock has been reached" and that negotiations "have proven futile"[122]. But the record shows that these were not meaningful negotiations. This Court has clarified that the Parties are "not merely to go through a formal process of negotiation . . . they are under an obligation so to conduct themselves that the negotiations are meaningful"[123].

20. In fact, it is difficult to think of any maritime delimitation that was resolved in just four months; let alone a complex delimitation that requires sensitive bilateral negotiations on serious political and security concerns.

21. Mr. President, the facts are clear. Somalia refused to discuss the MOU. It refused to withdraw its objection. It insisted upon its equidistance position. It litigated its case. It rushed through a formal process to get before the Court; and it did so during a fragile transitional period when hundreds of Kenyan soldiers and civilians were being killed because of Al-Shabaab terrorist attacks; it did so at a time when Al-Shabaab was infiltrating Kenya from the sea through the same disputed maritime areas, over which Kenya had exercised uncontested jurisdiction for many years. Under these circumstances, it cannot be said that the Parties ever entered into proper negotiations, let alone exhausted them.

22. Mr. President, the art of compromise requires time. It cannot begin and end with the position that "what is mine is mine, and what is yours is negotiable"! When reason prevails, what the Parties cannot agree to today, they may agree to tomorrow. That is especially true given the evolving situation in Somalia.

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[121]Joint Report of the Government of the Republic of Kenya and the Federal Republic of Somalia on the Kenya-Somalia Maritime Boundary Meeting held on 28-29 July 2014 at the Ministry of Foreign Affairs and International Trade, Nairobi, Kenya and Brief on a meeting between the Governments of the Republic of Kenya and the Federal Republic of Somalia on the Maritime Boundary held on 28-29 July 2014, Nairobi, Kenya dated 8 August 2014.

[122]WSS, para. 3.89.

[123]*North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 47, para. 85 *(a)*.

23. Mr. President and Members of the Court, that concludes my presentation. I would now ask that you call Professor Boyle to the podium. Thank you.

Le PRESIDENT : Je vous remercie, Excellence. Je donne la parole à M. le professeur Boyle.

Mr. BOYLE:

UNCLOS PART XV CONSTITUTES AN AGREEMENT ON ANOTHER METHOD OF SETTLEMENT

I. Introduction

1. Mr. President, Members of the Court, it is an honour to appear before you on behalf of the Republic of Kenya. My colleagues have argued that the 2009 Memorandum of Understanding ("MOU") envisages a procedure for settling this dispute that is within the terms of the reservation to Kenya's Article 36 (2) declaration. If you agree, the case will fall outside Kenya's acceptance of the Court's jurisdiction, and what I have to say this morning about Part XV of UNCLOS will be irrelevant.

2. But even if the MOU did not exist, or even if you reject our MOU argument, this Court would still have no jurisdiction over this case, because, as my colleagues have pointed out, Part XV of UNCLOS also comes within the terms of Kenya's Optional Clause reservation. Thus, neither Article 36 (2) of the Statute, nor Article 282 of UNCLOS, provides this Court with a basis for jurisdiction in this case. Because Somalia does rely to some extent on Article 282, I will dispose of it first.

II. Article 282 of UNCLOS does not Confer Jurisdiction on the Court

3. Somalia has brought its case under Article 36 (2) of the Statute, and it is therefore Kenya's Optional Clause declaration, not Part XV of UNCLOS, that determines whether the Court has jurisdiction. Somalia's Written Statement accepts that "Part XV . . . sets out the principles and the *procedures* applicable to dispute settlement under this Convention"[124]. As I will explain in a few moments' time, Part XV is therefore an "agreed procedure" for settling UNCLOS disputes. But

[124]Written Statement of Somalia on Kenya's Preliminary Objections (WSS), para. 3.50.

Somalia goes on to claim that, under Article 282, "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"[125]. That is why I have to deal first with Article 282.

4. But there is a fatal flaw in Somalia's Article 282 argument. There is in fact no "matching" of the declarations made by Kenya and Somalia under Article 36 (2). There is thus no agreement to submit UNCLOS disputes to this Court within the terms of that Article. As you will recall, Kenya's Optional Clause declaration provides that the Court shall *not* have jurisdiction over "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". We would say that Part XV of UNCLOS manifestly provides agreed methods for the settlement of maritime boundary disputes and it is thus necessarily within the terms of the reservation excludes the Court's jurisdiction under the Optional Clause.

5. You will find the text of Article 282 of UNCLOS at tab 15 in your folders. The key point is that if — but only if — the parties "have agreed through a general, regional or bilateral agreement or otherwise" to submit UNCLOS disputes "to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedure provided for [in Part XV], unless the parties to the dispute otherwise agree"[126]. But there is no such agreement in this case — there is no matching Optional Clause declarations, there is no *compromis*, there are no Article 287 declarations opting for the ICJ under UNCLOS Part XV. And without any of these kinds of agreement, Article 282 simply cannot apply to this case. It cannot give you jurisdiction unless there is some agreement.

6. It may be helpful to refer the Court to the only case in which Article 282 has been considered and has conferred jurisdiction on another non-UNCLOS tribunal. That was in the *Mox Plant* case where the European Court of Justice ("ECJ") concluded that as a matter of European Union ("EU") law that court had exclusive jurisdiction over an UNCLOS dispute between two EU member States and it went on to conclude that in accordance with Article 282 of UNCLOS this

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[125]WSS, paras. 3.82-86.

[126]UNCLOS, Art. 282, 1833 *United Nations, Treaty Series* (*UNTS*) 3 (1982).

binding procedure, that is a reference to the ECJ, applied in lieu of Annex VII arbitration[127]. And the parties to the case were thus obliged to terminate the arbitration they had already commenced[128]. But that is nothing like our case. Kenya has not accepted the International Court's compulsory jurisdiction for UNCLOS disputes. Its position is not remotely comparable to that of Ireland and the U.K.

7. At the risk of over-egging the pudding, just suppose that two imaginary States have indeed made identical declarations under Article 36 (2) of the Statute agreeing to submit all disputes concerning interpretation or application of treaties to the ICJ. Would Article 282 apply? Yes. In such a case both parties will have agreed to *a procedure that entails a binding decision*, of course[129]. Article 282 would then ensure that these Optional Clause declarations prevail over any alternative UNCLOS Part XV procedure[130].

8. But Mr. President, Members of the Court, that conclusion requires both Parties to make optional clause declarations in the same terms. And that is the vital point that Somalia ignores. Of course the problem is that Kenya has expressly excluded the Court's jurisdiction from its Article 36 (2) jurisdiction where the dispute falls within other agreed procedure, and that includes the procedures set out in Part XV of UNCLOS or UNCLOS dispute.

9. For that reason, the Optional Clause declarations of the parties in the present case do not and cannot constitute an agreement to submit this dispute to binding settlement within the terms of

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[127]*Commission* v. *Ireland*, E.C.J. Case C-459/03 (30 May 2006), para. 125: "It follows from Article 282 of the Convention that, as it provides for procedures resulting in binding decisions in respect of the resolution of disputes between Member States, the system for the resolution of disputes set out in the EC Treaty must in principle take precedence over that contained in Part XV of the Convention."

[128]The Annex VII arbitrators suspended proceedings until the ECJ had given its decision: see *Mox Plant Case (Ireland* v. *United Kingdom)*, P.C.A, Order No 3: Suspension of Proceedings on Jurisdiction and Merits (24 June 2003); P.C.A, Order No 6: Termination of Proceedings (6 June 2008).

[129]Statute of the I.C.J., Articles 59 and 60. See also: *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility*, *I.C.J. Reports 1984*, p. 392, para. 60, where the Court characterized overlapping optional clause declarations as "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."; *Righs of Passage over Indian territory (Portugal* v. *India), Preliminary Objections, I.C.J. Reports 1957*, p. 146 ("The contractual relation between the Parties and the compulsory jurisdiction of the Court resulting therefrom are established, '*ipso facto* and without special agreement'."); *Land and Maritime Boundary Case (Cameroon* v. *Nigeria), Preliminary Objections, I.C.J. Reports 1998*, p. 275, para. 25 (it establishes a "consensual bond . . ."); *Fisheries Jurisdiction Case (Spain* v. *Canada), I.C.J. Reports 1998*, p.432, para. 46.

[130]See also *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), I.C.J. Reports 2009*, p. 61, paras. 20-22, where a bilateral agreement conferred jurisdiction on the ICJ, although both parties had accepted Annex VII arbitration for the purposes of Part XV of UNCLOS.

Article 282. Whatever Somalia may claim[131], the conditions stated in Article 282 are *not* met in this case.

10. Now Somalia tries to evade this obvious problem by arguing that the Court has never found that it lacks jurisdiction on the basis of a reservation in favour of other methods of dispute settlement[132]. Well that may be so, but the Court has never had to address this question in the context of Part XV of UNCLOS. And as Professor Akhavan has explained, it would be inconsistent with the ordinary meaning of the words used in the Optional Clause reservation and with the intention of the party making the reservation to argue that this Court somehow retains jurisdiction under Article 282, notwithstanding the express and obvious terms of Kenya's reservation[133].

11. Moreover, Somalia's view is not shared by other States parties to UNCLOS. The United Kingdom, the Netherlands, and Honduras have all made the same Optional Clause reservation as Kenya, but they each wanted UNCLOS disputes to be heard by the ICJ. That was their favourite forum. And for that reason each of them thought it necessary to make a declaration under Article 287 of UNCLOS expressly accepting the Court's jurisdiction[134]. Now it is obvious that these States concluded that their Optional Clause declarations, with the reservation, would not prevail over Part XV of UNCLOS, which of course is precisely Kenya's argument, unless they also made the declarations provided for in Article 287. Now I don't need to point out, but I will, that Somalia and Kenya have made no such declarations under Article 287.

12. So to conclude on Article 282, the important question is whether the Optional Clause declarations of *both* Parties provide for the Court to have jurisdiction, otherwise the dispute remains within UNCLOS Part XV procedures. Article 282 cannot reverse an Optional Clause

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[131]WSS, paras. 3.83 and 3.86.

[132]WSS, para. 3.3. But see the Court's contrary view in *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p.240 [POK, para. 145].

[133]*Anglo Iranian Oil Case (United Kingdom* v. *Iran), I.C.J. Reports 1952*, pp. 93, 104; *Aegean Sea Case (Turkey* v. *Greece), I.C.J. Reports 1978*, p. 29, para. 69; *Fisheries Jurisdiction Case (Spain* v. *Canada), I.C.J. Reports 1998*, p. 454, para.48.

[134]United Kingdom Article 36 (2) reservation: (i) any dispute which the United Kingdom has agreed with the other Party or Parties thereto to settle by some other method of peaceful settlement; Netherlands Article 36 (2) reservation: "with the exception of disputes in respect of which the parties, excluding the jurisdiction of the International Court of Justice, may have agreed to have recourse to some other method of pacific settlement."; Honduras Article 36 (2) reservation: "*(a)* Disputes in respect of which the parties have agreed or may agree to resort to other means for the pacific settlement of disputes."

declaration that expressly excludes the Court's jurisdiction in respect of disputes subject to procedures under other treaties, including UNCLOS. Article 282 does not in such cases confer jurisdiction on this Court. Somalia has misread both Kenya's Optional Clause declaration and misapplied Article 282.

III. UNCLOS Part XV constitutes an agreement on a method of settlement for the purposes of Kenya's Article 36 (2) declaration

13. Mr. President, Members of the Court, I can now return to my broader point, that regardless of the MOU, UNCLOS Part XV constitutes another agreement on methods of settlement for the purposes of Kenya's Article 36 (2) declaration. On that basis also, the Court has no jurisdiction over the dispute.

14. Somalia has, of course, initiated a maritime boundary case. Both States are parties to UNCLOS, and that treaty is what this Court would apply in any decision on the merits[135]. Somalia has invoked in its pleadings Articles 15, 74, 76, and 83[136]. It also refers to Articles 2 to 14[137]. The dispute necessarily involves interpretation and application of these provisions of UNCLOS. On this point both Parties agree[138].

15. But if there are no matching Optional Clause declarations, and if Article 282 does not establish your jurisdiction, then it follows that there is an obligation to settle this dispute according to Part XV, as stipulated in UNCLOS Article 286.

16. Somalia's Written Statement addresses this issue in just four pages in Section II (B). It places some reliance on the *Electricity Company of Sofia* case[139] as authority for the following proposition that: "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."[140] But that case is wholly irrelevant to this dispute. It involved Optional

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[135]1982 *UNCLOS*, Article 293.

[136]Memorial of Somalia (MS), paras. 5.9; 5.22; 6.7; 6.10; 7.5; 7.39.

[137]MS, paras. 5.7-5.13.

[138]MS, para. 7.39; *Application Instituting Proceedings* (28 Aug. 2014), para. 33; WSS, para. 3.86. Paragraph 33 of the Application states: "Somalia bases its claim on UNCLOS; specifically Articles 15, 74, and 83, governing the delimitation of the territorial sea, continental shelf and EEZ."

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

[140]WSS, para. 3.81.

Clause declarations that were broader in scope than the compromissory clause contained in a bilateral treaty between the parties. It did *not* involve an Optional Clause declaration expressly restricting the Court's jurisdiction in favour of other agreed procedures. Faced with two bases of general jurisdiction, one under Optional Clause declarations, and one under a bilateral treaty, the Court simply concluded that the narrower basis in the treaty did not by implication exclude the broader acceptance of jurisdiction in the declarations. The two bases of jurisdiction co-existed. But that is *nothing* like this case. Here, unlike Bulgaria, Kenya has specifically excluded from your jurisdiction disputes in respect of which other procedures have been agreed. In those circumstances the only possible basis of compulsory jurisdiction for an UNCLOS dispute involving Kenya is UNCLOS Part XV, not Article 36 (2) of the Court's Statute.

17. Somalia expressly admits that Part XV of UNCLOS provides procedures for the settlement of maritime boundary disputes. It makes the argument that those are not *applicable* procedures only by reference to Article 282[141] — I have already explained why Article 282 is inapplicable. Both States are bound by Part XV. There are therefore agreed procedures other than recourse to the Court, so the exclusion in Kenya's Optional Clause declaration *is* applicable to this dispute. But it may be helpful to the Court if I very briefly summarize those procedures which would be applicable under UNCLOS Part XV.

18. Section 1 of Part XV sets out the general régime for UNCLOS disputes. Article 279 requires the Parties to "seek a solution by the means indicated in Article 33, paragraph 1 of the UN Charter". Those means include negotiation, as envisaged in the MOU.

19. Article 280 reiterates that nothing in Part XV impairs the right of the parties "to agree at any time to settle a dispute . . . by any peaceful means of their own choice". Negotiation, as envisaged in the 2009 MOU, is again one of those means[142].

20. If the parties have agreed on a non-binding procedure, such as negotiation, Article 281 gives that procedure priority over UNCLOS Part XV dispute settlement. On that basis, in our view, even under UNCLOS, the MOU would prevail. Only if there is no settlement within an

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[141]WSS, paras. 3.80-86.

[142]Nordquist, Rosenne and Sohn (eds.), *UNCLOS 1982: A Commentary* (Nijhoff, 1989), Vol. V, p. 20: "Article 280 is intended to make it as clear as possible that the parties to the dispute are complete masters of the procedure to be used to settle it."

agreed time-limit may either party then revert to other procedures listed in section 2 of Part XV. And then finally in section 1, Article 282 gives priority to agreements to refer a dispute to an alternative binding procedure, but, as I have already explained, there is no such agreement in this case.

21. If section 1 procedures do not exhaust the dispute, then section 2 comes into play and it does provide for compulsory binding procedures. Article 286 is imperative. It makes submission of such a dispute to UNCLOS compulsory procedures mandatory: "any dispute . . . *shall* be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section".

22. The court or tribunal having jurisdiction will be one of the four listed in Article 287. It is open to the parties to make a declaration choosing one or other. But if the parties have made no such declaration under Article 287, or if their declarations do not match, then the key point set out in Article 287 (3) is that "both Parties *are deemed to have accepted arbitration* in accordance with Annex VII to the Convention"[143].

23. Mr. President, Members of the Court, Part XV of UNCLOS clearly sets out a comprehensive dispute settlement régime that covers the present dispute. It clearly falls within the reservation to Kenya's Optional Clause declaration. It does not confer jurisdiction on the Court in the present case.

24. Before concluding, I will deal very briefly with a number of Somalia's claims concerning the MOU where it says that Kenya's reading of the MOU is "incompatible with . . . the Convention"[144].

25. First, Somalia says that binding resolution of disputes is the "default rule" under section 2 of Part XV[145], but for all the reasons I have just set out, it is completely clear that Part XV cannot be a basis for the Court's jurisdiction in this case. Section 2 of Part XV would give this Court compulsory jurisdiction only if both Parties to the dispute had made Article 287 declarations designating the ICJ as the forum under that Article. They have not done so.

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[143]*South China Sea Arbitration: Award on Jurisdiction and Admissibility (Philippines* v. *China)*, P.C.A. 2016, para. 109; 1982 UNCLOS, Article 287 (3).

[144]WSS, paras. 3.48 and 3.53.

[145]WSS, para. 3.50.

26. Somalia then claims that UNCLOS "favours the speedy resolution of disputes, through binding decisions, and only permits exclusion of judicial recourse when the States concerned clearly and unambiguously so agree"[146]. But, it then accepts that Article 281 allows the parties to opt out of binding procedures[147], but it argues that the penultimate paragraph of the MOU does not exclude binding settlement. It is, they say, merely "a reaffirmation of . . . Articles 74 (1) and 83 (1)"[148].

27. But this is to stand Article 281 on its head. The MOU does not need to exclude resort to binding compulsory settlement in order to give priority to an agreement to negotiate a boundary. The express terms of Article 281 are sufficient in themselves for that purpose.

28. Third, Article 281 (2) of UNCLOS provides that "[i]f the parties have also agreed on a time-limit", Part XV binding procedures apply "only upon the expiration of that time-limit". Well, Mr. President, as has already been explained, we have not passed the time-limit which requires the CLCS to review and make recommendations.

29. Finally, there is the point that Ambassador Makena has made in relation to those further negotiations, whether under Articles 74 or 83, or 283, further negotiations envisaged by all of those Articles simply have not taken place as yet[149].

30. So, invoking Part XV to reinterpret the MOU gets Somalia nowhere. On the contrary, it tells us that this Court lacks jurisdiction. The fundamental point is quite simple. An agreement to settle a boundary by negotiation after the CLCS has made its recommendations is plainly not an agreement to refer a dispute to this court for immediate binding settlement. Frankly, nothing more need be said.

31. Mr. President, let me conclude. The Parties are in agreement that Part XV procedures are a method of dispute settlement under UNCLOS. As such, they necessarily fall within Kenya's

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[146]WSS, para. 3.53.

[147]WSS, para. 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. Moreover, an agreement opting out of procedures entailing a binding decision must contain a clear statement to that effect."

[148]WSS, para. 3.53.

[149]UNCLOS, Articles 74 (2) and 83 (2); *South China Sea Arbitration: Award on Jurisdiction and Admissibility (Philippines* v. *China)* P.C.A. 2016, paras. 344-352; *North Sea Continental Shelf, (Federal Republic of Germany* v. *Denmark/Netherlands), Judgment, I.C.J. Reports 1969*, pp. 46-48, paras. 83-87; *Fisheries Jurisdiction (United Kingdom* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, pp. 31-32, paras. 73-75.

Optional Clause reservation. Somalia's only argument to the contrary is their "matching" declarations under Article 36 (2). But there are in fact no "matching" declarations for all the reasons we have set out. In those circumstances, there is no compulsory jurisdiction for Article 282 to affirm. Somalia's attempt to reinterpret the MOU does not help. Even if we disregard the MOU entirely, however, the fundamental point of my speech to you this morning has been that UNCLOS Part XV provides — of itself — a clear and compelling reason for upholding Kenya's Optional Clause reservation by dismissing this case.

32. Mr. President, I would now ask you to invite Professor Lowe to the podium.

Le PRESIDENT : Merci. Je donne à présent la parole au professeur Lowe. Monsieur le professeur, étant donné que les représentants du Kenya n'ont pu commencer à s'exprimer ce matin que quelques minutes après le début de la présente audience, vous pourrez si vous le souhaitez et si vous en avez besoin, déborder un peu au-delà de 13 heures. Vous devriez être à même de terminer votre présentation autour de 13 h 05, n'est-ce pas ?

Mr. LOWE :

KENYA'S ARTICLE 36 (2) RESERVATION

I. Introduction

1. Thank you very much, Mr. President. I think it will be perfectly adequate to do that. I should say that it is a privilege to appear before you and the Members of the Court and an honour to have been entrusted with this part of the presentation of Kenya's pleadings. I shall, however, for the benefit of the translators drop one or two of the less necessary paragraphs of my speech as I go through. My task is to close Kenya's submissions and summarize the reasons why Somalia's Application falls squarely within Kenya's reservation to its declaration accepting the jurisdiction of the Court, so that there is no mutual consent to the jurisdiction of the Court and the case must be dismissed.

2. As the Court observed in the *Spain* v. *Canada Fisheries Jurisdiction* case: States make reservations for a variety of reasons, and they are entitled to rely upon them and to have the Court apply them irrespective of arguments over the merits of the case[150].

3. The Court said in the *Fisheries Jurisdiction* case that it is for each State, in formulating its declaration, to decide upon the limits that it places upon its acceptance of the jurisdiction of the Court. It said "[t]his jurisdiction only exists within the limits within which it has been accepted", and

> "[c]onditions or reservations . . . do not by their terms derogate from a wider acceptance already given. Rather, they operate to define the parameters of the State's acceptance of the compulsory jurisdiction of the Court. There is thus no reason to interpret them restrictively."[151]

II. Kenya's declaration under Article 36 (2) of the Court's Statute

4. Well, Kenya's declaration under Article 36 (2) was made on 19 April 1965, a quarter of a century before Kenya became bound by UNCLOS and by the 2009 MOU. [Slide 1]. The material part of the declaration reads as follows:

> "[t]he Government of the Republic of Kenya . . . accepts . . . as compulsory ipso facto and without special Agreement, and on the basis and condition of reciprocity, the jurisdiction over all disputes arising after 12th December, 1963, with regard to situations or facts subsequent to that date, other than:
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> 1. 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; . . ."[152]

5. Well, Kenya's reservation puts no limits on the methods to which the disputing Parties may agree to have recourse, and is in that respect strikingly wider in its scope than the example of a declaration set out in paragraph 29 of the Court's *Handbook* on jurisdiction[153]. One might say, in the terms of Article 33 of the United Nations Charter, that the reservation excludes from the Court's jurisdiction disputes in regard to which the parties to the dispute have agreed or shall agree

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[150]*Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 455-456, paras. 54-56.

[151]*Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 453, para. 44.

[152]Kenya's Optional Clause Reservation under Art. 36 (2) of the ICJ Statute, 531 *United Nations, Treaty Series (UNTS)* 113 (1965)

[153]ICJ, *Handbook on accepting the jurisdiction of the International Court of Justice: model clauses and templates*, p. 12/39.

to have recourse to negotiation, or enquiry, or mediation, or conciliation, or arbitration, or judicial settlement in a court other than the ICJ, or by resort to regional agencies or arrangements, or by any other peaceful means of their own choice.

6. Well, the plain meaning of Kenya's reservation is that if Kenya and Somalia have agreed to have recourse to some other method or methods of settling the dispute over their maritime boundaries, that agreement engages the reservation, and this Court, with respect, does not have jurisdiction to settle that dispute.

7. Kenya says that there are *two* such agreements binding Kenya and Somalia.

III. The Memorandum of Understanding (MOU) of 7 April 2009

8. The first is the MOU of 7 April 2009. Professor Forteau and Mr. Khan took you through that instrument. It is a written text, registered with the United Nations as a treaty. It was not made subject to ratification or any other formalities. It entered into force immediately upon signature. It has not been terminated in accordance with the Law of Treaties. It was and is legally binding. And Somalia's retrospective attempts to cancel its effect have no legal basis.

9. Somalia has retreated from its argument that the MOU has no legal force and the disagreement now appears to be over the question whether it is an agreement "to have recourse to some other method or methods" of settling the dispute over their maritime boundaries, within the meaning of Kenya's reservation.

10. Well, the term "method or methods" bears its ordinary meaning. Dictionary definitions of the term "method" in English refer to a procedure or process for achieving something, a way of approaching or going about some particular task. That is not controversial. The term "method" is used in the context of international law interchangeably with the terms "mode" or "means" or "procedure" for settling a dispute. And you will see that, for example, in the *Handbook on the Peaceful Settlement of Disputes Between States*, prepared by the United Nations in 1992[154].

11. And the "method" prescribed by the MOU is, as a first step, the reference to the United Nations Commission on the Limits of the Continental Shelf — the "CLCS" — followed by the making of recommendations by the CLCS on the outer limits of the continental shelf area to be

[154] http://www.un.org/law/books/HandbookOnPSD.pdf. See, e.g., paras 135, 140-143, for examples of the interchangeable use of these terms.

delimited between the two States, and then followed by negotiation between the two States leading to an *agreed* maritime boundary. [Slide 2].

> "[D]elimitation of maritime boundaries in the areas under dispute . . . *shall be agreed* between the two 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 . . ."[155]

The statement leaves no room for uncertainty as to its meaning.

12. That is not to say that there can be no discussions relating to maritime boundaries before the CLCS issues its decision. Indeed, there have been such discussions. But the agreed procedure is that the actual negotiation of the agreed boundary must come *after* the CLCS has made its recommendations in respect of the claims made by Kenya and by Somalia.

13. And you will notice that emphatic temporal aspect — the duty to wait until *after* the CLCS recommendation before finalizing the agreed boundary — as an integral part of the agreed procedure.

14. Well, Somalia accepts in its Written Statement that the negotiation of a boundary is a "method" of dispute settlement. It says, in paragraph 3.72, that "[n]egotiations are one among other possible methods"[156].

15. Somalia's argument is that it is not the *exclusive* method of dispute settlement. But Professor Akhavan explained that what is important for Kenya's reservation is not that Kenya and Somalia agreed to an *exclusive* method of dispute settlement but that they agreed to "*some* other method or methods" — a method or methods other than recourse to this Court.

16. Professor Akhavan also dealt with the argument that this only leaves *some* of the maritime boundaries beyond the Court's jurisdiction. He explained that the MOU was drawn up on behalf of Somalia, in the context of Kenyan concerns about security and law enforcement along the maritime boundary in the territorial sea and in the contiguous zone as well as in the continental shelf and EEZ. The concern was with *all* maritime zones, from the seashore out as far as the outer limits of continental shelf jurisdiction. And that is the concern that the MOU addressed. It refers to "areas" in dispute in the plural, and to maritime "boundaries", in the plural.

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[155]Memorandum of Understanding Kenya–Somalia (MOU), 2599 *UNTS* 35 (2009), p. 38.

[156]Written Statement of Somalia on Kenya's Preliminary Objections (WSS), 5 Feb. 2016, para. 3.72.

17. What more can be said? The MOU is an agreement on a method of settlement for the settlement of the dispute over the delimitation of maritime boundaries between Kenya and Somalia. CLCS makes its recommendation. Then Kenya and Somalia finalize their negotiations over boundaries, and that agreed method falls squarely within the terms of Kenya's reservation, and Somalia's Application is therefore outside the jurisdiction of the Court. Kenya has not accepted the Court's jurisdiction over this dispute and, with respect, submits that the Court cannot decide this dispute.

IV. UNCLOS Part XV

18. The second agreement between Kenya and Somalia is the United Nations Convention on the Law of the Sea.

19. Even if the MOU did not exist, Somalia and Kenya are both bound by UNCLOS. Professor Boyle explained the relevant UNCLOS provisions. Disputes concerning maritime boundaries are subject to the mandatory dispute settlement procedures of UNCLOS Part XV, in accordance with UNCLOS Articles 279 and 286. This dispute is accordingly one "in regard to which the parties to the dispute have agreed … to have recourse to some other method or methods of settlement" — the UNCLOS Part XV methods — to use the words of Kenya's reservation again.

20. UNCLOS Article 280 says that States Parties may agree on means for settling disputes; and Article 281 says that if they have agreed on methods of dispute settlement then UNCLOS Part XV applies only if the agreed methods do not produce a settlement and the agreement does not exclude any further procedure.

21. Article 282 of UNCLOS says that if the parties to a dispute agree upon a procedure entailing a binding decision, that procedure applies in lieu of UNCLOS Part XV, and Somalia suggests that the Parties have somehow "agreed" to refer cases to the ICJ: but as Professor Boyle explained Somalia and Kenya have *not* "agreed": they do *not* have "convergent Optional Clause declarations"[157].

22. So the logic is inescapable. The MOU either is such an agreement on the settlement of the dispute between the Parties, or it is not. If, as Kenya says, it is such an agreement, then it must

[157]WSS, 5 Feb. 2016, para. 3.75.

be followed; and *the MOU* puts the dispute outside the Court's jurisdiction because of Kenya's reservation, consistently with UNCLOS Articles 280 and 281.

23. If, on the other hand, the MOU is *not* an agreement within the terms of UNCLOS Articles 280 and 281, then the MOU can be no impediment to the application of UNCLOS Part XV. The UNCLOS Part XV procedures, agreed and binding between Kenya and Somalia, would accordingly be applicable to this dispute, and *UNCLOS* would put the dispute outside this Court's jurisdiction because of the terms of Kenya's reservation to its ICJ declaration.

Professor Boyle explained that UNCLOS Article 286 is mandatory. It says that any unresolved dispute concerning the interpretation or application of the Convention *shall* be submitted to "the court or tribunal having jurisdiction under [section 2 of UNCLOS Part XV]".

24. Kenya and Somalia could have given jurisdiction to the ICJ for this purpose, making it the "relevant court", if both of them had made a declaration to that effect under UNCLOS Article 287. But both Kenya and Somalia have chosen *not* to give this Court jurisdiction over such disputes under UNCLOS Part XV, but to allow such disputes to go to other fora.

25. They have agreed to have recourse to a method of settlement other than recourse to this Court because UNCLOS Part XV falls squarely within the terms of Kenya's reservation to the Court's jurisdiction.

V. Conclusion

26. So, in conclusion, the result is either, as Kenya says, the jurisdiction of this Court is excluded by the procedure agreed in the MOU or, if for some reason that were not the case, the jurisdiction of the Court would be excluded by the procedure agreed in UNCLOS Part XV. Mr. President, Members of the Court, the need for this hearing has arisen only because Somalia, in its Application, ignored the terms of the agreements that it had made for the settlement of maritime boundary disputes with Kenya. But Somalia has no right to ignore those terms. Kenya may, and does, rely upon the terms of its declaration accepting the Court's jurisdiction, and Kenya will follow the procedure that has been agreed for the settlement of this dispute; and that procedure is one that Somalia has already agreed will operate outside the doors of this Court.

27. Mr. President, unless there is anything else with which I can assist the Court, that brings my submission and Kenya's submissions in this first round to a close.

Le PRESIDENT : Je vous remercie, Monsieur le professeur. Voilà en effet qui met un terme au premier tour de plaidoiries du Kenya. La Cour se réunira de nouveau demain mardi à 10 heures pour entendre la Somalie en son premier tour de plaidoiries.

L'audience est levée à 13 h 5.

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