INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

MARITIME DELIMITATION IN THE INDIAN OCEAN

(SOMALIA *v.* KENYA)

PRELIMINARY OBJECTIONS

JUDGMENT OF 2 FEBRUARY 2017

2017

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

DÉLIMITATION MARITIME DANS L'OCÉAN INDIEN

(SOMALIE c. KENYA)

EXCEPTIONS PRÉLIMINAIRES

ARRÊT DU 2 FÉVRIER 2017

Official citation:
Maritime Delimitation in the Indian Ocean
(Somalia v. *Kenya), Preliminary Objections, Judgment,*
I.C.J. Reports 2017, p. 3

Mode officiel de citation:
Délimitation maritime dans l'océan Indien
(Somalie c. Kenya), exceptions préliminaires, arrêt,
C.I.J. Recueil 2017, p. 3

ISSN 0074-4441
ISBN 978-92-1-157313-8

Sales number
N° de vente: 1115

2 FEBRUARY 2017

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JUDGMENT

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.

In the case concerning maritime delimitation in the Indian Ocean,

between

the Federal Republic of Somalia,

represented by

H.E. Mr. Abdusalam Hadliyeh Omer, Minister for Foreign Affairs of the Federal Republic of Somalia,

as Agent;

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, Emeritus Professor, 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;

Ms Lea Main-Klingst, Matrix Chambers, London,

as Junior 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, 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 Chairman of the 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;

Ms Kathryn Kalinowski, Foley Hoag LLP, Washington, DC,
Ms Nancy Lopez, Foley Hoag LLP, Washington, DC,

as Assistants,

and

the Republic of Kenya,

represented by

Professor Githu Muigai, E.G.H., S.C., Attorney-General of the Republic of Kenya,

as Agent;

H.E. Ms Rose Makena Muchiri, Ambassador of the Republic of Kenya to the Kingdom of the Netherlands,

as Co-Agent;

Mr. Vaughan Lowe, Q.C., member of the Bar of England and Wales, Emeritus Professor of International Law, University of Oxford, member of the Institut de droit international,
Mr. Payam Akhavan, LL.M. S.J.D. (Harvard), Professor of International Law, McGill University, member of the State Bar of New York and of the Law Society of Upper Canada, member of the Permanent Court of Arbitration,
Mr. Mathias Forteau, Professor at the University of Paris Ouest, Nanterre-La Défense, former member of the International Law Commission,
Mr. Alan Boyle, Professor of International Law at the University of Edinburgh, member of the Bar of England and Wales,
Mr. Karim A. A. Khan, Q.C., member of the Bar of England and Wales,

as Counsel and Advocates;

Ms Amy Sander, member of the Bar of England and Wales,
Ms Philippa Webb, Reader in Public International Law, King's College, London, member of the Bar of England and Wales and of the New York Bar,
Mr. Eirik Bjorge, Junior Research Fellow in Law at the University of Oxford,

as Counsel;

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,
Ms Njeri Wachira, Head, International Law Division, Office of the Attorney-General and Department of Justice,
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,
Ms Pauline Mcharo, Senior Principal State Counsel, Office of the Attorney-General and Department of Justice,
Ms Wanjiku Wakogi, Governance Adviser, Office of the Attorney-General and Department of Justice,
Mr. Samuel Kaumba, State Counsel, Office of the Attorney-General and Department of Justice,
Mr. Hudson Andambi, Ministry of Energy,

as Advisers,

The Court,

composed as above,

after deliberation,

delivers the following Judgment:

1. On 28 August 2014, the Government of the Federal Republic of Somalia (hereinafter "Somalia") filed in the Registry of the Court an Application instituting proceedings against the Republic of Kenya (hereinafter "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 its Application, Somalia seeks to found the jurisdiction of the Court on 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.

2. In accordance with Article 40, paragraph 2, of the Statute of the Court, the Registrar immediately communicated the Application to the Government of Kenya; and, under paragraph 3 of that Article, all other States entitled to appear before the Court were notified of the Application.

3. Since the Court included upon the Bench no judge of Kenyan nationality, Kenya proceeded to exercise its right conferred by Article 31, paragraph 2, of the Statute to choose a judge *ad hoc* to sit in the case; it chose Mr. Gilbert Guillaume.

4. 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.

5. 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.

6. Pursuant to the instructions of the Court under Article 43 of the Rules of Court, the Registrar addressed to States parties to the United Nations Convention on the Law of the Sea the notifications provided for in Article 63, paragraph 1, of the Statute of the Court. In addition, the Registrar addressed to the European Union, which is also party to that Convention, the notification provided for in Article 43, paragraph 2, of the Rules of Court, as adopted on 29 September 2005, and asked that organization whether or not it intended to furnish observations under that provision. In response, the Director-General of the Legal Service of the European Commission indicated that the European Commission, which represents the European Union, did not intend to submit observations in the case.

7. By a communication dated 21 January 2016, the Government of the Republic of Colombia, referring to Article 53, paragraph 1, of the Rules of

Court, asked to be furnished with copies of the pleadings and documents annexed in the case. Having ascertained the views of the Parties in accordance with that same provision, the Court decided, taking into account the objection raised by one Party, that it would not be appropriate to grant that request. By a letter dated 17 March 2016, the Registrar duly communicated that decision to the Government of Colombia and to the Parties.

8. Pursuant to Article 53, paragraph 2, of the Rules of Court, the Court, after ascertaining the views of the Parties, decided that copies of the pleadings and the documents annexed would be made accessible to the public on the opening of the oral proceedings.

9. Public hearings on the preliminary objections raised by Kenya were held from Monday 19 to Friday 23 September 2016, at which the Court heard the oral arguments of:

For Kenya: Mr. Githu Muigai,
Mr. Payam Akhavan,
Mr. Karim A. A. Khan,
Mr. Mathias Forteau,
H.E. Ms Rose Makena Muchiri,
Mr. Alan Boyle,
Mr. Vaughan Lowe.

For Somalia: Ms Mona Al-Sharmani,
Mr. Alain Pellet,
Mr. Paul S. Reichler,
Mr. Philippe Sands.

10. At the hearings, a Member of the Court put questions to the Parties, to which replies were given in writing within the time-limit fixed by the President in accordance with Article 61, paragraph 4, of the Rules of Court. Pursuant to Article 72 of the Rules of Court, each of the Parties submitted comments on the written replies provided by the other.

*

11. In the Application, the following claims were presented by Somalia:

> "The Court is asked to determine, on the basis of international law, the complete course of the single maritime boundary dividing all the maritime areas appertaining to Somalia and to Kenya in the Indian Ocean, including in the continental shelf beyond 200 [nautical miles].
>
> Somalia further requests the Court to determine the precise geographical co-ordinates of the single maritime boundary in the Indian Ocean."

12. In the written proceedings on the merits, the following submissions were presented on behalf of the Government of Somalia in its Memorial:

> "On the basis of the facts and law set forth in this Memorial, Somalia respectfully requests the Court:
>
> 1. To determine the complete course of the maritime boundary between Somalia and Kenya in the Indian Ocean, including in the continental shelf beyond 200 [nautical miles], on the basis of international law.

2. To determine the maritime boundary between Somalia and Kenya in the Indian Ocean on the basis of the following geographical co-ordinates:

Point No.	*Latitude*	*Longitude*
1 (LBT)	1° 39′ 44.07″ S	41° 33′ 34.57″ E
2	1° 40′ 05.92″ S	41° 34′ 05.26″ E
3	1° 41′ 11.45″ S	41° 34′ 06.12″ E
4	1° 43′ 09.34″ S	41° 36′ 33.52″ E
5	1° 43′ 53.72″ S	41° 37′ 48.21″ E
6	1° 44′ 09.28″ S	41° 38′ 13.26″ E
7 (intersection with 12 [nautical-mile] limit)	1° 47′ 54.60″ S	41° 43′ 36.04″ E
8	2° 19′ 01.09″ S	42° 28′ 10.27″ E
9	2° 30′ 56.65″ S	42° 46′ 18.90″ E
10 (intersection with 200 [nautical-mile] limit)	3° 34′ 57.05″ S	44° 18′ 49.83″ E
11 (intersection with 350 [nautical-mile] limit)	5° 00′ 25.71″ S	46° 22′ 33.36″ E

3. To adjudge and declare that Kenya, by its conduct in the disputed area, has violated its international obligations to respect the sovereignty, and sovereign rights and jurisdiction of Somalia, and is responsible under international law to make full reparation to Somalia, including *inter alia* by making available to Somalia all seismic data acquired in areas that are determined by the Court to be subject to the sovereignty and/or sovereign rights and jurisdiction of Somalia, and to repair in full all damage that has been suffered by Somalia by the payment of appropriate compensation.

(All points referenced are referred to WGS-84.)"

13. In the preliminary objections, the following submissions were presented on behalf of the Government of Kenya:

"For the reasons set out above, Kenya respectfully submits, pursuant to Rule 79 (9) of the Rules of Court, that the Court adjudge and declare that:

The case brought by Somalia against Kenya is not within the jurisdiction of the Court and is inadmissible, and is accordingly dismissed."

In the written statement of its observations and submissions on the preliminary objections raised by Kenya, the following submissions were presented on behalf of the Government of Somalia:

"For these reasons, Somalia respectfully requests the Court:

(1) To reject the Preliminary Objections raised by the Republic of Kenya; and
(2) To find that it has jurisdiction to entertain the Application filed by the Federal Republic of Somalia."

14. At the oral proceedings on the preliminary objections, the following submissions were presented by the Parties:

On behalf of the Government of Kenya,

at the hearing of 21 September 2016:

"The Republic of Kenya respectfully requests the Court to adjudge and declare that:

The case brought by Somalia against Kenya is not within the jurisdiction of the Court and is inadmissible, and is accordingly dismissed."

On behalf of the Government of Somalia,

at the hearing of 23 September 2016:

"On the basis of its Written Statement of 5 February 2016, and its oral pleadings, Somalia respectfully requests the Court:

1. To reject the Preliminary Objections raised by the Republic of Kenya; and
2. To find that it has jurisdiction to entertain the Application filed by the Federal Republic of Somalia."

* * *

I. Introduction

15. Somalia and Kenya are adjacent States on the coast of East Africa. Somalia is located in the Horn of Africa. It borders Kenya to the south-west, Ethiopia to the west and Djibouti to the north-west. Somalia's coastline faces the Gulf of Aden to the north and the Indian Ocean to the east. Kenya, for its part, shares a land boundary with Somalia to the north-east, Ethiopia to the north, South Sudan to the north-west, Uganda to the west and Tanzania to the south. Its coastline faces the Indian Ocean.

16. Both States signed the United Nations Convention on the Law of the Sea (hereinafter "UNCLOS" or the "Convention") on 10 December 1982. Kenya and Somalia ratified UNCLOS on 2 March and 24 July 1989, respectively, and the Convention entered into force for the

Parties on 16 November 1994. Under Article 76, paragraph 8, of UNCLOS, a State party to the Convention intending to establish the outer limits of its continental shelf beyond 200 nautical miles shall submit information on such limits to the Commission on the Limits of the Continental Shelf (hereinafter "CLCS" or the "Commission"). The role of the Commission is to make recommendations to coastal States on matters related to the establishment of the outer limits of their continental shelf beyond 200 nautical miles (see paragraph 66 below). Pursuant to Article 4 of Annex II to UNCLOS, a State party intending to establish such limits shall submit the required information to the Commission "as soon as possible but in any case within 10 years of the entry into force of [the] Convention for that State".

In May 2001, bearing in mind the difficulties encountered by some developing States in meeting the requirements of Article 4 of Annex II to the Convention, the eleventh Meeting of States Parties to UNCLOS decided that the ten-year period (referred to in Article 4 of Annex II) would be deemed to have commenced on 13 May 1999 for those States parties to the Convention for which UNCLOS had entered into force before 13 May 1999 (see doc. SPLOS/72). Consequently, the ten-year time-limit for such States to make their respective submissions to the CLCS was due to expire on 13 May 2009. Kenya and Somalia were among those States to which this time-limit applied. In June 2008, at the eighteenth Meeting of States Parties to UNCLOS, it was decided that the ten-year time-limit could be satisfied by the submission to the Secretary-General of the United Nations of preliminary information indicative of the outer limits of the continental shelf beyond 200 nautical miles (see doc. SPLOS/183).

With regard to disputed maritime areas, under Annex I of the CLCS Rules of Procedure, entitled "Submissions in case of a dispute between States with opposite or adjacent coasts or in other cases of unresolved land or maritime disputes", the Commission requires the prior consent of all States concerned before it will consider submissions regarding such areas (see paragraphs 68-69 below). In particular, Article 5 *(a)* of this Annex reads as follows:

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

17. On 7 April 2009, the Kenyan Minister for Foreign Affairs and the Somali Minister for National Planning and International Co-operation signed a "Memorandum of Understanding between the Government of the Republic of Kenya and the Transitional Federal Government of the

Somali Republic to grant to each other no-objection in respect of submissions on the Outer Limits of the Continental Shelf beyond 200 Nautical Miles to the Commission on the Limits of the Continental Shelf" (hereinafter the "MOU"), the text of which is reproduced at paragraph 37 below. On 14 April 2009, Somalia submitted to the Secretary-General of the United Nations preliminary information indicative of the outer limits of the continental shelf beyond 200 nautical miles, enclosing a copy of the MOU. On 6 May 2009, Kenya deposited with the CLCS its submission with respect to the continental shelf beyond 200 nautical miles. On 3 September 2009, at the twenty-fourth session of the CLCS, Kenya made an oral presentation of its submission.

18. The MOU was registered by the Secretariat of the United Nations on 11 June 2009 at Kenya's request. On 19 August 2009, in a letter to the Secretary-General of the United Nations, the Prime Minister of Somalia referred to the MOU and reiterated Somalia's consent to the CLCS considering Kenya's submission. However, as will be explained in further detail below (see paragraph 38), by a letter dated 2 March 2010, the Permanent Representative of Somalia to the United Nations forwarded a letter from the Somali Prime Minister dated 10 October 2009, informing the Secretary-General of the United Nations that the MOU had been rejected by the Transitional Federal Parliament of Somalia, and requesting that it be treated "as non-actionable".

19. On 4 February 2014, the Minister of Foreign Affairs and International Co-operation of Somalia sent two letters to the Secretary-General of the United Nations. In the first letter, Somalia objected to the registration with the Secretariat of the United Nations, nearly five years earlier, of what it termed the "[p]urported MoU". In the second letter, Somalia objected to the consideration by the CLCS of Kenya's submission on the ground that there existed a maritime boundary dispute between itself and Kenya and that the MOU was "void and of no effect".

20. Given Somalia's objection, the CLCS determined, during its thirty-fourth session (held from 27 January to 14 March 2014), that it "was not in a position to proceed with the establishment of a subcommission [to consider Kenya's submission] at that time".

21. The Parties subsequently engaged in negotiations on various questions of maritime delimitation. The Foreign Ministers of Kenya and Somalia held a meeting on 21 March 2014, at which it was agreed that a technical meeting be held among relevant officials. A first bilateral meeting was held in Nairobi on 26 and 27 March 2014. On 28 and 29 July 2014, a second bilateral meeting was held in the same city which was attended by the two Foreign Ministers. The Parties agreed to reconvene on 25 and 26 August 2014 for a third meeting, but that meeting never took place.

22. In view of the partial change in the membership of the CLCS that had occurred since the twenty-fourth session of the Commission in 2009 (at which Kenya had first made an oral presentation of its submission), the Government of Kenya, by means of a Note Verbale dated 7 July 2014, requested that the CLCS allow it the opportunity to make another oral presentation. This presentation was made on 3 September 2014 at the thirty-fifth session of the CLCS. Taking note thereof, the Commission reiterated its decision taken at the thirty-fourth session of the CLCS (see paragraph 20 above) to defer further consideration of the submission.

23. On 21 July 2014, Somalia deposited with the CLCS its submission with respect to the outer limits of the continental shelf beyond 200 nautical miles.

24. On 28 August 2014, Somalia filed in the Registry of the Court an Application instituting proceedings against Kenya.

25. By means of a Note Verbale addressed to the Secretary-General of the United Nations dated 24 October 2014, and with reference to the communications of Somalia of 4 February 2014 (see paragraph 19 above), Kenya protested against "the actions by the Somali Federal Republic" aimed at blocking the CLCS's consideration of Kenya's submission. By a further Note Verbale addressed to the Secretary-General dated 4 May 2015, Kenya, in turn, "object[ed] to the consideration of the Submission by Somalia". However, in a Note Verbale addressed to the Secretary-General dated 30 June 2015, Kenya withdrew its objection to the CLCS's consideration of Somalia's submission.

26. On 7 July 2015, Somalia sent a letter to the Secretary-General of the United Nations in which it withdrew its objection to the CLCS's consideration of Kenya's submission. On 16 July 2015, Somalia submitted an Amended Executive Summary of its submission to the CLCS, which was intended to replace the earlier Summary submitted by Somalia on 21 July 2014.

27. At its thirty-ninth session in New York held from October to December 2015, a CLCS subcommission met to begin consideration of Kenya's submission. In February and March 2016, the subcommission commenced the main scientific and technical examination of the submission. It continued its consideration of the submission in July-August, and October-November 2016, and intends to resume its consideration thereof at the forty-third session in February 2017.

Regarding its submission, Somalia made a presentation thereof on 22 July 2016 during the forty-first session of the CLCS. The CLCS deferred further consideration of Somalia's submission until it was next in line to be considered in the order in which submissions had been received.

*

28. Somalia invokes as the basis for the jurisdiction of the Court in the present case the declarations which Somalia and Kenya have made under

Article 36, paragraph 2, of the Statute of the Court. Somalia deposited its declaration with the Secretary-General of the United Nations on 11 April 1963 while Kenya did so on 19 April 1965. In the view of Somalia, "[n]o condition or reservation to either declaration applies".

29. Kenya, however, raised, pursuant to Article 79 of the Rules of Court, two preliminary objections. One concerns the jurisdiction of the Court, the other the admissibility of the Application.

30. The Court will begin by considering Kenya's objection to the Court's jurisdiction.

II. The First Preliminary Objection: The Jurisdiction of the Court

31. In its first preliminary objection, Kenya asserts that one of the reservations in its declaration accepting the compulsory jurisdiction of the Court applies in this case. Kenya's declaration, in its relevant part, provides that:

> "the Republic of Kenya . . . accepts, in conformity with paragraph 2 of Article 36 of the Statute of the International Court of Justice until such time as notice may be given to terminate such acceptance, 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:
>
> 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." (United Nations, *Treaty Series (UNTS)*, Vol. 531, p. 114.)

32. Kenya argues that its reservation applies for two reasons. First, Kenya contends that in the MOU (see paragraph 17 above) the Parties agreed on a method of settlement of their maritime boundary dispute other than having recourse to the Court, namely by agreement to be concluded by Somalia and Kenya after the CLCS has made its recommendations to them concerning the establishment of the outer limits of the continental shelf beyond 200 nautical miles.

33. Secondly, Kenya argues that Part XV of UNCLOS makes provision for methods of settlement of disputes concerning the interpretation or application of UNCLOS, to which both Kenya and Somalia are States parties. As neither Party has made a declaration regarding the choice of one or more means of dispute settlement pursuant to Article 287, paragraph 1, of UNCLOS, Kenya submits that the Parties are deemed, under paragraph 3 of that Article, to have accepted arbitration in accordance with Annex VII to UNCLOS for the settlement of disputes concerning

the interpretation or application of the Convention. According to Kenya, the relevant provisions of UNCLOS on dispute settlement therefore amount to an agreement "to have recourse to some other method or methods of settlement" within the meaning of Kenya's reservation, which thus applies in the present case.

34. For its part, Somalia argues that the MOU does not establish a method for resolving the delimitation dispute between the Parties and that, consequently, Kenya's reservation does not apply in the present case. Moreover, it disagrees with Kenya's assertion that Part XV of UNCLOS falls within the scope of Kenya's reservation. In Somalia's view, the agreement of the Parties to the jurisdiction of the Court — expressed through declarations under Article 36, paragraph 2, of the Court's Statute — takes priority, under Article 282 of UNCLOS, over the procedures provided for in Section 2 of Part XV.

35. The Court will first consider the MOU and whether that instrument falls within the scope of Kenya's reservation. It will begin by examining the legal status of the MOU under international law. Should it find the MOU valid, the Court will embark on its interpretation and outline what effects, if any, the MOU has in respect of the jurisdiction of the Court in this case. If the Court reaches the conclusion that the MOU does not render Kenya's reservation to its optional clause declaration under Article 36, paragraph 2, of the Court's Statute applicable in the present case, it will then address Kenya's submission that the case falls outside the Court's jurisdiction because of the provisions of Part XV of UNCLOS.

A. The Memorandum of Understanding

1. The legal status of the MOU under international law

36. As noted above (see paragraph 17), on 7 April 2009, the Minister for Foreign Affairs of the Government of Kenya and the Minister for National Planning and International Co-operation of the Transitional Federal Government of Somalia signed a

> "Memorandum of Understanding between the Government of the Republic of Kenya and the Transitional Federal Government of the Somali Republic to grant to each other no-objection in respect of submissions on the Outer Limits of the Continental Shelf beyond 200 Nautical Miles to the Commission on the Limits of the Continental Shelf".

In June 2009, the MOU was submitted by Kenya to the Secretariat of the United Nations for registration and publication pursuant to Article 102 of the Charter of the United Nations. The Secretariat registered it on 11 June 2009, and published it in the United Nations, *Treaty Series* (*UNTS*, Vol. 2599, p. 35).

37. The MOU consists of seven paragraphs, which are unnumbered. In order to facilitate references to the paragraphs, the Court considers it convenient to insert numbering in its analysis. It is also useful to reproduce the text of the MOU *in toto*. It reads as follows:

> "Memorandum of Understanding between the Government of the Republic of Kenya and the Transitional Federal Government of the Somali Republic to grant to each other no-objection in respect of submissions on the Outer Limits of the Continental Shelf beyond 200 Nautical Miles to the Commission on the Limits of the Continental Shelf.
>
> [1] The Government of the Republic of Kenya and the Transitional Federal Government of the Somali Republic, in the spirit of co-operation and mutual understanding have agreed to conclude this Memorandum of Understanding:
>
> [2] The delimitation of the continental shelf between the Republic of Kenya and the Somali Republic (hereinafter collectively referred to as 'the two coastal States') has not yet been settled. This unresolved delimitation issue between the two coastal States is to be considered as a 'maritime dispute'. The claims of the two coastal States cover an overlapping area of the continental shelf which constitutes the 'area under dispute'.
>
> [3] The two coastal States are conscious that the establishment of the outer limits of the continental shelf beyond 200 nautical miles is without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts. While the two coastal States have differing interests regarding the delimitation of the continental shelf in the area under dispute, they have a strong common interest with respect to the establishment of the outer limits of the continental shelf beyond 200 nautical miles, without prejudice to the future delimitation of the continental shelf between them. On this basis the two coastal States are determined to work together to safeguard and promote their common interest with respect to the establishment of the outer limits of the continental shelf beyond 200 nautical miles.
>
> [4] Before 13 May 2009 the Transitional Federal Government of the Somali Republic intends to submit to the Secretary-General of the United Nations preliminary information indicative of the outer limits of the continental shelf beyond 200 nautical miles. This submission may include the area under dispute. It will solely aim at complying with the time period referred to in Article (4) of Annex II to the United Nations Convention on the Law of the Sea (UNCLOS). It shall not prejudice the positions of the two coastal States with respect to the maritime dispute between them and shall be without prejudice to the future delimitation of maritime boundaries in the area under dispute, including the delimitation of the continental shelf beyond

200 nautical miles. On this understanding the Republic of Kenya has no objection to the inclusion of the areas under dispute in the submission by the Somali Republic of preliminary information indicative of the outer limits of the continental shelf beyond 200 nautical miles.

[5] The two coastal States agree that at an appropriate time, in the case of the Republic of Kenya before 13 May 2009, each of them will make separate submissions to the Commission on the Limits of the Continental Shelf (herein referred to as 'the Commission'), that may include the area under dispute, asking the Commission to make recommendations with respect to the outer limits of the continental shelf beyond 200 nautical miles without regard to the delimitation of maritime boundaries between them. The two coastal States hereby give their prior consent to the consideration by the Commission of these submissions in the area under dispute. The submissions made before the Commission and the recommendations approved by the Commission thereon shall not prejudice the positions of the two coastal States with respect to the maritime dispute between them and shall be without prejudice to the future delimitation of maritime boundaries in the area under dispute, including the delimitation of the continental shelf beyond 200 nautical miles.

[6] 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.

[7] This Memorandum of Understanding shall enter into force upon its signature.

IN WITNESS WHEREOF, the undersigned being duly authorized by their respective Governments, have signed this Memorandum of Understanding.

DONE in Nairobi this seventh day of April two thousand and nine, in duplicate, in the English language, both texts being equally authentic."

38. The MOU caused some domestic controversy in Somalia in the months after it was signed. It was debated and rejected by the Transitional Federal Parliament of Somalia on 1 August 2009. In a letter addressed to the Secretary-General of the United Nations dated 10 October 2009, but only forwarded to him under cover of a letter from the Permanent Representative of Somalia to the United Nations dated 2 March 2010, the Prime Minister of the Transitional Federal Government informed the Secretary-General of this rejection, and "request[ed]

the relevant offices of the UN to take note of the situation and treat the MOU as non-actionable". Several years later, in a letter to the Secretary-General of the United Nations dated 4 February 2014, the Somali Minister of Foreign Affairs and International Co-operation maintained that "no [MOU] is in force", highlighting that ratification thereof had been rejected by the Parliament of Somalia. In that letter, he referred to customary international law reflected, in his view, in Article 7 of the 1969 Vienna Convention on the Law of Treaties (hereinafter the "Vienna Convention"), which addresses the circumstances in which a person may, by producing "full powers" or otherwise, enter into a treaty on behalf of a State. He contended that the Minister who had signed the MOU "did not produce appropriate documents demonstrating his powers to represent the Somali Republic for the purpose of agreeing to the text of the MOU", that it was not customary for Somalia to allow that Minister "to enter into binding bilateral arrangements which concern maritime delimitation and the presentation of submissions to the [CLCS] and its consideration of them", and that the Kenyan representatives had been informed at the time of signing that "the MOU would require ratification".

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39. In these proceedings, Somalia does not expressly invoke the alleged invalidity of the MOU as a reason for rejecting the preliminary objection raised by Kenya. It takes the view that it is unnecessary "to determine the legal validity *vel non* of the MOU" on the basis that

> "[e]ven if it were effective *(quod non)*, it does not constitute an agreement on a method for settling the Parties' maritime boundary dispute, let alone one that could preclude this Court from resolving it on the basis of the Parties' matching Optional Clause declarations".

In its written statement on Kenya's preliminary objections Somalia nonetheless highlights that the Transitional Federal Charter of the Somali Republic, applicable between 2004 and 2012, "made the President's authority to sign binding international agreements conditional upon subsequent ratification by Parliament", and that such ratification did not take place. Somalia argues that, while the MOU "does not expressly require ratification", the relevant Minister's "authorization to sign the MOU did not constitute, and could not have constituted, authorization under Somali law for him to dispense with the ratification requirement".

*

40. For its part, Kenya argues that the MOU is an international treaty, duly registered pursuant to Article 102 of the Charter of the United Nations, that is legally binding on the Parties. In respect of Somalia's earlier contentions regarding the absence of authorization on the part of the Minister who signed the MOU, Kenya argues that the Minister had been authorized to sign the MOU by the Prime Minister of Somalia, including in writing by way of "full powers", and points to the fact that the MOU specifies that both Ministers are "duly authorized by their respective Governments". In respect of ratification, Kenya emphasizes that the MOU does not refer to a need for ratification, but instead provides "in categorical terms" for its entry into force "upon its signature". In addition, it contends that there was "nothing in the exchanges leading to adoption of the MOU suggesting that the Parties ever considered a requirement of ratification" and that there is no evidence that its representatives were ever told of such a requirement. Kenya argues that the validity of the MOU was confirmed in Somalia's April 2009 submission of preliminary information to the CLCS. Kenya further contends that the MOU's validity was not questioned in a letter from the Somali Prime Minister to the Secretary-General of the United Nations dated 19 August 2009, shortly after the vote in the Parliament of Somalia, but was challenged only at a later date. It contends that any inconsistency with the internal law of Somalia does not affect the validity of the MOU under international law.

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41. While Somalia has invited the Court to reject Kenya's preliminary objection without considering the status of the MOU under international law, the Court considers that in order to determine whether the MOU has any effect with respect to its jurisdiction, it is appropriate first to address the issue whether the MOU constitutes a treaty in force between the Parties.

*

42. Under the customary international law of treaties, which is applicable in this case since neither Somalia nor Kenya is a party to the Vienna Convention, an international agreement concluded between States in written form and governed by international law constitutes a treaty (see *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 429, para. 263, referring to Article 2, paragraph 1, of the Vienna Convention). The MOU is a written document, in which Somalia and Kenya record their agreement on certain points governed by international law. The inclusion of a provision addressing the entry into force of the MOU is indicative of the instrument's binding character. Kenya consid-

ered the MOU to be a treaty, having requested its registration in accordance with Article 102 of the Charter of the United Nations, and Somalia did not protest that registration until almost five years thereafter (see paragraph 19 above).

43. Somalia no longer appears to contest that the Minister who signed the MOU was authorized to do so as a matter of international law. The Court recalls that, under international law, as codified in Article 7 of the Vienna Convention, by virtue of their functions and without having to produce full powers, Heads of State, Heads of Government and Ministers for Foreign Affairs are considered as representing their State for the purpose of performing all acts relating to the conclusion of a treaty. These State representatives, under international law, may also duly authorize other officials to adopt, on behalf of a State, the text of a treaty or to express the consent of the State to be bound by a treaty. The Court observes that the Prime Minister of the Transitional Federal Government of Somalia signed, on 6 April 2009, full powers by which he "authorized and empowered" the Somali Minister for National Planning and International Co-operation to sign the MOU. The MOU explicitly states that the two Ministers who signed it were "duly authorized by their respective Governments" to do so. The Court is thus satisfied that, as a matter of international law, the Somali Minister properly represented Somalia in signing the MOU on its behalf.

44. It may be added that the Norwegian diplomat who had, as discussed in further detail below (see paragraphs 100-104), been deeply involved in the drafting of the MOU, informed Kenya, in an email sent before the MOU was signed, that "the President of the Somali Republic has now approved the signing of the Memorandum of Understanding".

45. In respect of Somalia's contentions regarding the ratification requirement under Somali law, the Court recalls that, under the law of treaties, both signature and ratification are recognized means by which a State may consent to be bound by a treaty. As the Court has previously outlined:

> "while in international practice a two-step procedure consisting of signature and ratification is frequently provided for in provisions regarding entry into force of a treaty, there are also cases where a treaty enters into force immediately upon signature. Both customary international law and the Vienna Convention on the Law of Treaties leave it completely up to States which procedure they want to follow." (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 429, para. 264.)

The Court notes that the MOU provides, in its final paragraph, that "[t]his Memorandum of Understanding shall enter into force upon its signature" and that it does not contain a ratification requirement. Under customary international law as codified in Article 12, paragraph 1 *(a)*, of the Vienna

Convention, a State's consent to be bound is expressed by signature where the treaty so provides.

46. In his letter of 4 February 2014 to the Secretary-General of the United Nations, the Foreign Minister of Somalia stated that the Kenyan representatives present for the signing of the MOU had been informed orally by the Somali Minister who signed it of the requirement that it be ratified by the Transitional Federal Parliament of Somalia. Kenya denies that such a communication took place and there is no evidence to support Somalia's assertion. Indeed, any such statement by the Minister would have been inconsistent with the express provision of the MOU regarding its entry into force upon signature. The Court also notes that the full powers, dated 6 April 2009, by which the Prime Minister of the Transitional Federal Government of Somalia "authorized and empowered" the Minister to sign the MOU, give no indication that it was Somalia's intention to sign the MOU subject to ratification.

47. In light of the express provision of the MOU that it shall enter into force upon signature, and the terms of the authorization given to the Somali Minister, the Court concludes that this signature expressed Somalia's consent to be bound by the MOU under international law.

48. Regardless of the possibility under international law to conclude a treaty that enters into force upon signature, Somalia has contended that Somali law required ratification of the MOU. A similar question was considered by the Court in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening)*. In its Judgment on the merits, the Court addressed an argument made by Nigeria that a declaration, signed by its Head of State and that of Cameroon, was not valid because it had not been ratified in accordance with Nigerian law (*I.C.J. Reports 2002*, pp. 427-428, para. 258). Having concluded that the relevant agreement had entered into force upon signature under international law (*ibid.*, p. 430, para. 264), the Court went on to consider Article 46 of the Vienna Convention, which provides that:

> "1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.
>
> 2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith."

The Court considered that:

> "The rules concerning the authority to sign treaties for a State are constitutional rules of fundamental importance. However, a limitation of a Head of State's capacity in this respect is not manifest in the sense of Article 46, paragraph 2, unless at least properly publicized. This is particularly so because Heads of State belong to the group of persons who, in accordance with Article 7, paragraph 2, of the Convention '[i]n virtue of their functions and without having to produce full powers' are considered as representing their State." (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 430, para. 265.)

49. In this case, there is no reason to suppose that Kenya was aware that the signature of the Minister may not have been sufficient under Somali law to express, on behalf of Somalia, consent to a binding international agreement. As already noted, the Prime Minister of the Transitional Federal Government of Somalia had, by full powers "authorized and empowered" the Minister, under international law, to sign the MOU. No caveat relating to a need for ratification was mentioned in those full powers, nor in the MOU itself, which on the contrary provided for its entry into force upon signature. As the Court has previously observed, "there is no general legal obligation for States to keep themselves informed of legislative and constitutional developments in other States which are or may become important for the international relations of these States" (*ibid.*, p. 430, para. 266). Moreover, even after the MOU had been rejected by the Somali Parliament, the Prime Minister of Somalia did not question its validity in his letter to the Secretary-General of the United Nations dated 19 August 2009. In this respect, the Court observes that under customary international law, reflected in Article 45 of the Vienna Convention, a State may not invoke a ground for invalidating a treaty on the basis of, *inter alia*, provisions of its internal law regarding competence to conclude treaties if, after having become aware of the facts, it must by reason of its conduct be considered as having acquiesced in the validity of that treaty. Somalia did not begin to express its doubts in this respect until some time later, in March 2010 (see paragraph 38 above). The Court further notes that Somalia has never directly notified Kenya of any alleged defect in its consent to be bound by the MOU.

50. In light of the foregoing, the Court concludes that the MOU is a valid treaty that entered into force upon signature and is binding on the Parties under international law.

2. The interpretation of the MOU

51. The Court will now turn to the interpretation of the MOU, which is reproduced above (see paragraph 37).

52. Kenya argues that, in the sixth paragraph of the MOU, which provides that "[t]he delimitation of maritime boundaries in the areas under dispute . . . shall be agreed between the two coastal States . . . after the Commission has concluded its examination of the separate submissions made by each of the two coastal States and made its recommendations", the Parties agreed on a method of settlement of their maritime boundary dispute. Kenya submits that the agreed method of settlement was an agreement negotiated by the Parties which would only be concluded following receipt of the CLCS's recommendations, and that recourse to the Court is therefore excluded by virtue of Kenya's reservation in its optional clause declaration (see paragraphs 31-32).

53. According to Kenya, the MOU's object and purpose was to agree on such a method for the final settlement of the Parties' maritime boundary. Kenya maintains that the MOU envisages a "two-step sequencing procedure" in which the Parties agreed not to object to the CLCS submission of the other in order to allow the Commission to consider their submissions and to issue its recommendations and that, following CLCS review, the delimitation of the full extent of the Parties' maritime boundary would be settled through an agreement. Kenya emphasizes that undertaking the delineation of the outer limits of the continental shelf beyond 200 nautical miles prior to the delimitation of the maritime boundary between the Parties is "logical" as delimitation first requires the determination of the seaward extent of the Parties' entitlements and the relevant maritime zones. In particular, it submits that review by the CLCS prior to delimitation is important in this case in view of

> "the concavity of the African coastline on the Indian Ocean [which] produces a magnified cut-off effect for Kenya beyond the 200 [nautical-mile] limit. It is, therefore, necessary to determine precisely the entire maritime area to be delimited in order to arrive at an 'equitable solution' in accordance with international law."

54. Kenya contends that the structure of the MOU makes clear that it was intended to address both delineation and delimitation. It argues that, in the MOU, the Parties first recognized the existence of a maritime delimitation dispute between them (para. 2) and then, at the end of the MOU, agreed on the procedure to settle that dispute (para. 6). It emphasizes that, in the paragraphs which are related to delineation (paras. 3, 4 and 5), the Parties referred to the "future delimitation". Kenya maintains that the paragraphs of the MOU are therefore all interdependent, and make clear that delimitation was related to delineation, with the Parties

establishing a temporal link between the two procedures that gave priority to delineation over delimitation. Accordingly, it contends that, while the text of the MOU provides that delineation is without prejudice to delimitation, the latter was, at the procedural level, to be subject to prior delineation. Thus, Kenya argues, the text of the MOU and its object and purpose "are perfectly coherent": the Parties agreed not to block the CLCS from making its recommendations, so that they could then carry out the maritime delimitation on the basis of those recommendations. In other words, according to Kenya, the object and purpose of the MOU was to organize the procedures for both delineation and delimitation. Kenya further argues that, regardless of the MOU's object and purpose, that instrument contains a provision relating to delimitation, namely the sixth paragraph, to which effect must be given, in accordance with the principle of *effet utile*.

55. In respect of that paragraph, Kenya appears to accept that it does not impose an obligation on the Parties to reach an agreement regarding delimitation in the relevant areas, but contends that use of the word "shall" indicates "a legal undertaking, a binding obligation, not merely to negotiate in good faith, but to do so with a view to concluding an agreement". Kenya also appears to accept that, in the event that negotiations were to prove unsuccessful, the Parties would be able to have recourse to third party dispute settlement procedures under UNCLOS, but argues that such negotiations have not yet been exhausted.

56. In addition, Kenya contends that the sixth paragraph imposes a "temporal requirement" that an agreement be concluded only after receipt of the CLCS's recommendations. Kenya does not submit that the MOU prevented the Parties from negotiating before the CLCS makes its recommendations. Indeed, in its reply to a question asked by a Member of the Court, Kenya accepted that the sixth paragraph of the MOU "obviously does not prohibit the Parties from concluding one or more interim agreements that are subsequently finalized after the recommendation of the CLCS on the terminus point of the outer continental shelf beyond 200 nautical miles". However, in Kenya's view, even if negotiations prior to receipt of the CLCS's recommendations "resulted in one or more interim agreements on delimitation covering some or all maritime areas in dispute", those negotiations would "still be subject to finalization under the MOU's agreed procedure". Thus, it argues that while under the MOU the Parties may negotiate, and even agree on some parts of the delimitation, they have to wait for the CLCS's recommendations before those negotiations can be finalized.

57. With regard to the scope of the sixth paragraph of the MOU, Kenya contends that the use of the plural of "maritime boundaries" and "areas under dispute", as well as the word "including" indicate that all maritime areas were intended to be covered by that paragraph. In any event, Kenya submits that "[a]ny single line of delimitation is . . . composed of a series of indivisible and interdependent delimitations . . . In these circumstances, the overall maritime delimitation depends on the delimitation of the continental shelf" and thus the MOU affects the maritime delimitation as a whole.

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58. For its part, Somalia contends that the sixth paragraph of the MOU does not establish a method for the settlement of the boundary dispute between the Parties.

59. Somalia argues that the object and purpose of the MOU was to allow the CLCS to examine the submissions of Somalia and Kenya, without prejudice to their respective delimitation claims. It points out that, according to the Rules of Procedure of the CLCS, that body will not make any recommendations based on submissions made by a State regarding the outer limits of the continental shelf if there is an ongoing dispute with another State. However, it may give consideration to submissions involving areas that are in dispute if that other State gives its consent. Somalia contends that the MOU's object and purpose was to provide that requisite mutual consent and that, insofar as the MOU addressed the Parties' delimitation dispute, it was solely to confirm that the agreement on no-objection did not affect, and was without prejudice to, their respective positions. It suggests that it would be "illogical" to require continental shelf delimitation within 200 nautical miles to await delineation beyond 200 nautical miles because the former is not in any way dependent upon the latter. It maintains that the purpose of the MOU's sixth paragraph was therefore not to settle, or provide a means for settling, the Parties' maritime boundary dispute, but was instead to insulate that dispute from the effects of the Parties' understanding on no-objection.

Somalia submits that the title of the MOU makes clear its object and purpose as a no-objection agreement and that the introductory paragraphs, particularly the third paragraph, also reflect this purpose, as do the fourth and fifth paragraphs, which are concerned with enabling delineation. It emphasizes that, in these introductory and operative paragraphs, including by use of the words "without prejudice", the MOU treats delineation and delimitation as two distinct processes, neither one dependent on the other except as regards the endpoint of the maritime boundary beyond 200 nautical miles. It contends that the references to

"future" delimitation in the text refer solely to actions occurring after the date of signature.

60. Somalia argues that the text of the sixth paragraph "does nothing more than reiterate the Parties' standing obligation to attempt to agree on the delimitation of their maritime boundary", pointing to the similarity between that paragraph and Articles 74, paragraph 1, and 83, paragraph 1, of UNCLOS. It compares the use of the passive voice in that paragraph with the more active formulation elsewhere in the text, regarding the sixth paragraph as descriptive rather than prescriptive, and pointing out that other paragraphs, such as the fourth paragraph, contain similarly descriptive language. Consequently, it contends that

> "[f]ar from establishing a binding agreement to negotiate — and only negotiate — their maritime boundary, and then only *after* the CLCS has made its recommendations, [the sixth paragraph] merely acknowledges the Parties' existing obligations under [UNCLOS]" (emphasis in the original).

In any event, Somalia argues that negotiations between the Parties regarding their maritime boundary have been tried and exhausted.

61. In respect of the alleged temporal requirement contained in the sixth paragraph, Somalia refers to the subsequent practice of the Parties, including in undertaking negotiations with respect to their maritime boundary prior to receiving the recommendations of the CLCS, and argues that the MOU cannot be considered as an "agreement not to agree" in the sense that "[i]t would provide for negotiation of the maritime boundary dispute, but only so long as *no agreement was reached*" (emphasis in the original). It considers that the sixth paragraph of the MOU denotes "that the *complete* delimitation of the maritime boundaries between the two States shall be carried out by agreement after the CLCS has made its recommendations" (emphasis in the original). In this respect, it argues that "the MOU in no way prevents the Parties from negotiating an agreement . . . however, it cannot be *finalized* (or 'completed') by fixing its terminus until the Commission's recommendations have been received" (emphasis in the original). It contends that this does not mean that the Parties cannot agree on the direction of the line of delimitation before the CLCS has made its position known, or that the Court must wait for the CLCS's recommendations before proceeding to a delimitation.

62. As to the scope of the sixth paragraph, Somalia contends that "the MOU itself defines the maritime area in dispute strictly in terms of the continental shelf" and makes no reference to the territorial sea or the exclusive economic zone. It considers that the MOU is concerned only

with the continental shelf beyond 200 nautical miles and observes that it contains no reference to the maritime boundary within 200 nautical miles. In respect of the use of plurals in the sixth paragraph, Somalia points out that both the singular "area" and plural "areas" are used interchangeably in the MOU and contends that the word "including" simply reflects the fact that the two States will not be able to determine the endpoint of their common maritime boundary until the CLCS's recommendations have been received. Somalia suggests that the circumstances of conclusion and drafting history of the MOU confirm its interpretation, pointing particularly to statements made by the Norwegian diplomat involved in the drafting of the MOU, as well as Norway itself.

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63. In interpreting the MOU, the Court will apply the rules on interpretation to be found in Articles 31 and 32 of the Vienna Convention, which it has consistently considered to be reflective of customary international law (see, e.g., *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 116, para. 33; *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2009*, p. 237, para. 47, referring to *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, pp. 109-110, para. 160 and *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, pp. 21-22, para. 41; *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 812, para. 23).

64. Article 31, paragraph 1, of the Vienna Convention provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". These elements of interpretation — ordinary meaning, context and object and purpose — are to be considered as a whole. Paragraph 2 of Article 31 sets out what is to be regarded as context. Article 31, paragraph 3, provides that there shall be taken into account, together with the context, any subsequent agreement between the parties regarding the interpretation or application of the treaty, any subsequent practice which establishes such an agreement, and any relevant rules of international law applicable in the relations between the parties.

65. The sixth paragraph of the MOU is at the heart of the first preliminary objection currently under consideration. It is, however, difficult to understand that paragraph without a prior analysis of the text of the MOU as a whole, which provides the context in which any particular paragraph should be interpreted and gives insight into the object and pur-

pose of the MOU. The Court will therefore proceed first of all to such an analysis. It will then turn to an examination of the sixth paragraph.

66. As the MOU makes reference to the role of the CLCS in the process of the delineation of the outer limits of the continental shelf beyond 200 nautical miles, it is useful first to clarify the framework within which the Commission operates. It will be recalled that Article 76, paragraph 8, of UNCLOS provides that:

> "Information on the limits of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured shall be submitted by the coastal State to the Commission on the Limits of the Continental Shelf set up under Annex II on the basis of equitable geographical representation. The Commission shall make recommendations to coastal States on matters related to the establishment of the outer limits of their continental shelf. The limits of the shelf established by a coastal State on the basis of these recommendations shall be final and binding."

The effect of this provision is that, for States parties to UNCLOS, the establishment of "final and binding" outer limits for their continental shelf beyond 200 nautical miles depends on information having been submitted to the CLCS, the CLCS having made recommendations thereon, and the relevant State having established its limits "on the basis of [those] recommendations" (see generally *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 136, paras. 107-108).

67. As the Court has recently observed, "the role of the CLCS relates only to the delineation of the outer limits of the continental shelf, and not delimitation" (*ibid.*, para. 110). The two tasks are distinct (*ibid.*, p. 137, para. 112) and the delimitation of the continental shelf "can be undertaken independently of a recommendation from the CLCS" (*ibid.*, para. 114). In this respect, Article 76, paragraph 10, of UNCLOS provides that "[t]he provisions of this article are without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts". Nonetheless, as the Court has highlighted, "it is possible that the two operations may impact upon one another" and the rules of the CLCS therefore contain provisions that seek "to ensure that its actions do not prejudice matters relating to delimitation" (*ibid.*, para. 113).

68. In this respect, paragraphs 1 and 2 of Rule 46 of the Rules of Procedure of the CLCS, which is entitled "Submissions in case of a dispute between States with opposite or adjacent coasts or in other cases of unresolved land or maritime disputes", provide:

> "1. In case there is a dispute in the delimitation of the continental shelf between opposite or adjacent States or in other cases of unre-

solved land or maritime disputes, submissions may be made and shall be considered in accordance with Annex I to these Rules.

2. The actions of the Commission shall not prejudice matters relating to the delimitation of boundaries between States."

Article 5 of Annex I, referred to therein, provides:

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

(b) The submissions made before the Commission and the recommendations approved by the Commission thereon shall not prejudice the position of States which are parties to a land or maritime dispute."

69. The CLCS has therefore taken the approach that it will not consider a submission made by a State, nor issue recommendations in respect thereof, if there is a maritime delimitation dispute between that State and one or more other States, without the consent of all States concerned. A State will thus be unable to establish the outer limits of its continental shelf if it has a dispute with one or more other States and they have not consented to the consideration of its submission by the CLCS.

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70. The Court now turns to the text of the MOU set out above (see paragraph 37), which it will consider as a whole. The title of the MOU is "to grant to each other no-objection in respect of submissions on the Outer Limits of the Continental Shelf beyond 200 Nautical Miles to the Commission on the Limits of the Continental Shelf". As the Court has previously had occasion to note, a treaty's purpose may be indicated by its title (*Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 118, para. 39; *Certain Norwegian Loans (France* v. *Norway), Judgment, I.C.J. Reports 1957*, p. 24). The MOU's title suggests that its purpose is to allow Somalia and Kenya each to make a submission on the outer limits of the continental shelf to the CLCS without objection from the other, so that the Commission could consider those submissions and make its recommendations, in accordance with Annex I to the CLCS's Rules of Procedure.

71. The first paragraph of the MOU notes the Parties' "spirit of co-operation and mutual understanding", while the second outlines the "maritime dispute" relating to the "delimitation of the continental shelf" between them. The third indicates the Parties' understanding that the establishment of continental shelf outer limits "is without prejudice to the question of delimitation of the continental shelf", and that while they have "differing interests regarding the delimitation", they have a "strong common interest with respect to the establishment of the outer limits".

72. These introductory paragraphs do not contain any commitments but rather outline the circumstances leading to, and reasons for, the conclusion of the MOU. They provide context and are indicative of its purpose. By their terms, they suggest that the two States recognize that they have a "maritime dispute" that is "unresolved" but that they wish to move forward with establishing the outer limits of their continental shelf without prejudice to delimitation, a position that is in line with Article 46, paragraph 2, of the Rules of Procedure of the CLCS and Article 5 *(b)* of Annex I thereto.

73. The MOU's fourth paragraph outlines that Kenya "has no objection to the inclusion of the areas under dispute" in Somalia's preliminary information on the understanding that it shall not prejudice either State's position in respect of the dispute or "future delimitation". The fifth paragraph similarly records that the two States "hereby give their prior consent" to consideration of the submission of the other by the CLCS, even if those submissions include "the area under dispute", on the same understanding that their respective positions on the dispute and "future delimitation" shall not be prejudiced. Again, considered in light of the Rules of Procedure of the CLCS, and particularly Article 5 *(a)* of Annex I, it is apparent that the purpose of these two paragraphs is, without prejudicing the Parties' positions in respect of the dispute or future delimitation, to enable the CLCS to make its recommendations. The Parties' "strong common interest", as identified in the third paragraph, in the establishment of the outer limits of the continental shelf could thus be realized.

74. Finally, the sixth paragraph, on which the Parties' arguments focused in particular since Kenya contends that it contains the agreed dispute settlement method regarding the Parties' maritime boundary, provides that delimitation in the disputed areas "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". The sixth paragraph is examined in greater detail below (see paragraphs 79-96). The seventh paragraph, as already noted, provides for the MOU's entry into force upon its signature.

75. The title of the MOU and its first five paragraphs indicate the purpose of ensuring that the CLCS could proceed to consider submissions made by Somalia and Kenya regarding the outer limits of the continental shelf beyond 200 nautical miles, and to issue recommendations thereon, notwithstanding the existence of a maritime dispute between the two States, thus preserving the distinction between the ultimate delimitation of the maritime boundary and the CLCS process leading to delineation.

76. Indeed, Kenya does not deny that one of the purposes of the MOU is to enable delineation to take place, though it suggests that this is a stepping-stone toward achieving the objective of reaching a final maritime delimitation by agreement after receipt of the recommendations of the CLCS.

77. The Court observes that there are various references to maritime delimitation throughout the text of the MOU, in addition to that found in the sixth paragraph. However, none of these references to maritime delimitation elsewhere in the text of the MOU supports Kenya's contention that the MOU serves the purpose of providing a method for settling the dispute relating to the delimitation of the Parties' maritime boundary. The references to maritime delimitation that appear outside of the sixth paragraph fulfil two functions.

The first function of the references to delimitation is to define the delimitation dispute between the Parties in order to establish that the Parties may include the "area under dispute" in their respective submissions to the CLCS and to allow the Commission, irrespective of that dispute, to issue its recommendations. In this respect, the second paragraph of the MOU refers to the "unresolved delimitation issue" between the Parties and defines it as a "maritime dispute", before going on to define the "area under dispute", which is then referred to in the fourth and fifth paragraphs. These references to maritime delimitation do nothing more than further the objective of securing no-objection by either Party to the consideration of the submission of the other Party by the CLCS notwithstanding the delimitation dispute between them.

The second function of the references to delimitation is to make clear that the CLCS process leading to the delineation of the outer limits of the continental shelf is without prejudice to the Parties' dispute regarding maritime delimitation and its resolution. The third paragraph provides that the establishment of outer limits is "without prejudice to the question of delimitation of the continental shelf" and that the Parties' interest in such delineation is "without prejudice to the future delimitation of the continental shelf". In the fourth and fifth paragraphs, Somalia's submission of preliminary information, the two States' submissions to the CLCS and the recommendations of the CLCS are said to be "without prejudice to the future delimitation of maritime boundaries in the area under dispute". The question of delimitation was therefore to be kept separate from the process leading to the delineation of the outer limits of the con-

tinental shelf, suggesting that if the MOU addressed delineation it did not, at least in the first five paragraphs, address delimitation or treat delineation as a step in the process of delimitation.

78. It is true that the MOU refers to "future delimitation" a number of times. This suggests that the process leading to delineation was to be prioritized, in a temporal sense, over delimitation. However, the Parties agree that the MOU of 7 April 2009 was signed in the context of the fast-approaching deadline by which Somalia and Kenya had either to file preliminary information with, or to make their submission to, the CLCS (see paragraph 16 above). In those circumstances, it is unsurprising that commencing the process that would lead to the delineation of the outer limits of the continental shelf would take priority over the resolution of delimitation issues between the Parties and that, at least from the point in time of signing the MOU, any such delimitation would be in the future. While the fifth paragraph of the MOU, in providing, *inter alia*, that the recommendations of the CLCS "shall be without prejudice to the future delimitation", could be construed as implying that delimitation was to occur after the recommendations of the CLCS had been made, the Court is not convinced that the use of the word "future" in this context can be taken, in and of itself, to indicate a temporal restriction on when delimitation was to take place.

79. The sixth paragraph does contain a more explicit reference to delimitation occurring "after" the CLCS has made its recommendations. This may suggest that the Parties contemplated that delimitation would occur after the respective outer limits of their continental shelf had been delineated. However, this does not necessarily mean that they intended to bind themselves to proceed to delimitation only in that way.

80. The question for the Court is whether the Parties, in that sixth paragraph, agreed on a method of settlement of their delimitation dispute other than by way of proceedings before the Court, and agreed to wait for the CLCS's recommendations before any such settlement could be reached.

81. It will be recalled that the sixth paragraph of the MOU provides:

> "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."

82. It is appropriate first to clarify to which maritime zones that paragraph refers. This has implications for the interpretation of the MOU and also for the extent to which Kenya's reservation might be applicable, if at all, in this case.

83. The subject-matter of the sixth paragraph of the MOU relates to "[t]he delimitation of maritime boundaries in the areas under dispute, including the delimitation of the continental shelf beyond 200 nautical miles . . .". The use of the word "including" implies that the Parties intended something more to be encompassed by delimitation in "the areas under dispute" than delimitation in respect of the continental shelf beyond 200 nautical miles. Clarification is provided in the second paragraph of the MOU, which outlines that:

> "The delimitation of the continental shelf between the Republic of Kenya and the Somali Republic (hereinafter collectively referred to as 'the two coastal States') has not yet been settled. This unresolved delimitation issue between the two coastal States is to be considered as a 'maritime dispute'. *The claims of the two coastal States cover an overlapping area of the continental shelf which constitutes the 'area under dispute'*." (Emphasis added.)

84. The Parties have explicitly given a meaning to the term the "area under dispute" as the area in which the claims of the two Parties to the continental shelf overlap, without differentiating between the shelf within and beyond 200 nautical miles. It is true that where the term appears in the sixth paragraph, it is rendered in the plural, "the *areas* under dispute", the plural form having been used only in the final draft of the MOU.

85. However, the Court observes, first, that there is no record explaining this change. Secondly, the singular and plural versions of the term are used interchangeably elsewhere in the text, even in the same paragraph, such as the fourth paragraph, which provides that Somalia's submission of preliminary information "may include the *area* under dispute" and that Kenya has no objection to "the inclusion of the *areas* under dispute" in that submission (emphasis added). This suggests that no differentiation in meaning was intended by the use of the plural form "areas" in the MOU. Thirdly, the text as a whole makes it apparent that the MOU was concerned, in so far as it addressed delimitation, solely with the area of the continental shelf, both within and beyond 200 nautical miles from the two States' respective coasts. Thus, the second paragraph notes that "[t]he *delimitation of the continental shelf* between [them] . . . has not yet been settled" (emphasis added) and defines "[t]his unresolved delimitation issue" as a "maritime dispute", a concept which is referred to in the fourth and fifth paragraphs. Moreover, the third paragraph of the MOU notes

that the establishment of outer limits "is without prejudice to the question of *delimitation of the continental shelf*" (emphasis added) and that the States' interest in "the establishment of [such] outer limits . . . [is] without prejudice to *the future delimitation of the continental shelf*" (emphasis added). In this context, even if the term "area under dispute" had not otherwise been defined, the reference in the sixth paragraph to "[t]he delimitation of maritime boundaries in the areas under dispute" must have been taken to relate to the "maritime dispute" addressed in the second paragraph and referred to elsewhere in the MOU, namely the delimitation of the continental shelf between the two States.

86. The Court thus sees no reason to conclude that a different meaning has to be given to the term "areas under dispute" in the sixth paragraph than to the term "area under dispute" contained in the definition in the second paragraph, namely the areas in which the claims of the two Parties to the continental shelf overlap. The sixth paragraph therefore relates only to delimitation of the continental shelf, "including the delimitation of the continental shelf beyond 200 nautical miles", and not to delimitation of the territorial sea, nor to delimitation of the exclusive economic zone. Accordingly, even if, as Kenya suggests, that paragraph sets out a method of settlement of the Parties' maritime boundary dispute, it would only apply to their continental shelf boundary, and not to the boundaries of other maritime zones.

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87. The Court turns to the question of whether the sixth paragraph, by providing that the delimitation of the continental shelf between the Parties "shall be agreed . . . on the basis of international law after the Commission has concluded its examination of [their] separate submissions . . . and made its recommendations . . .", sets out a method of settlement of the Parties' maritime boundary dispute with respect to that area.

88. As already noted, Kenya argues that the phrase "shall be agreed between the two coastal States on the basis of international law" imposes an obligation to negotiate with a view to reaching agreement, while Somalia argues that it does not impose any obligation but merely acknowledges the Parties' pre-existing obligations under UNCLOS.

89. The Court recalls that, according to the applicable rule of customary international law, the sixth paragraph of the MOU must be interpreted in good faith in accordance with the ordinary meaning given to its terms in their context and in light of the object and purpose of the MOU (see paragraphs 63-64 above). Pursuant to Article 31, paragraph 3 *(c)* of

the Vienna Convention, "[a]ny relevant rules of international law applicable in the relations between the parties" should be taken into account, together with the context. In this case, both Somalia and Kenya are parties to UNCLOS, which is expressly mentioned in the MOU. UNCLOS therefore contains such relevant rules. Moreover, given that the sixth paragraph of the MOU concerns the delimitation of the continental shelf, Article 83 of UNCLOS, entitled "Delimitation of the continental shelf between States with opposite or adjacent coasts", is particularly relevant. That Article provides as follows:

> "1. The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.
>
> 2. If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part XV."

90. There is a similarity in language between Article 83, paragraph 1, of UNCLOS and the sixth paragraph of the MOU. The MOU provides that "delimitation . . . shall be agreed . . . on the basis of international law", while Article 83, paragraph 1, provides that "delimitation . . . shall be effected by agreement on the basis of international law".

By its terms, Article 83, paragraph 1, of UNCLOS sets out the manner in which delimitation of the continental shelf is to be effected by States parties thereto, namely by way of agreement as distinct from unilateral action; it is a provision on the establishment of a maritime boundary between States with opposite or adjacent coasts in respect of the continental shelf, which does not prescribe the method for the settlement of any dispute relating to the delimitation of the continental shelf. This is made clear by paragraph 2 of Article 83, which requires that, if no agreement can be reached within a reasonable time, the States concerned shall resort to the dispute settlement procedures of Part XV, entitled "Settlement of disputes" (which will be discussed in further detail below). The Court notes that Article 83, paragraph 1, of UNCLOS, in providing that delimitation shall be effected by way of agreement, requires that there be negotiations conducted in good faith, but not that they should be successful (see *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 424, para. 244).

91. In line with Article 31, paragraph 3 *(c)*, of the Vienna Convention, and particularly given the similarity in wording between the sixth paragraph of the MOU and Article 83, paragraph 1, of UNCLOS, the Court considers that it is reasonable to read the former in light of the latter. In that context, the reference to delimitation being undertaken by agreement on the basis of international law, which is common to the two provisions, is not prescriptive of the method of dispute settlement to be followed and does not, as indeed Kenya appeared to accept during the oral proceed-

ings, preclude recourse to dispute settlement procedures in case agreement could not be reached.

92. As Kenya emphasizes, the sixth paragraph of the MOU goes beyond the wording of Article 83, paragraph 1, by inclusion of the second part of the clause under consideration, providing that "delimitation . . . shall be agreed . . . *after* the Commission has concluded its examination . . . and made its recommendations . . ." (emphasis added). As already noted (see paragraph 56), Kenya accepts that the text of the sixth paragraph did not preclude it from engaging in negotiations with Somalia on their maritime boundary prior to the CLCS making its recommendations. Indeed, Kenya's own conduct in engaging in two rounds of negotiations in 2014, before Somalia filed its Application instituting proceedings in this case, is consistent with that interpretation. The record before the Court establishes that those negotiations concerned all maritime zones, including the continental shelf, and that the Parties discussed in detail the methodology to be used in the delimitation exercise. Even after Somalia's Application was filed, Kenya, in a Note Verbale to the Secretary-General of the United Nations dated 24 October 2014, stated that "bilateral diplomatic negotiations, at the highest levels possible, are ongoing with a view to resolving [the delimitation of the maritime boundary] expeditiously". As noted above (see paragraph 56), Kenya has also admitted that the Parties could have reached certain agreements in respect of their maritime boundary before the CLCS had made its recommendations. All of the above confirms that Kenya did not consider itself bound to wait for those recommendations before engaging in negotiations on maritime delimitation, or even reaching agreements thereon, and could at least commence the process of delimitation before that of delineation was complete.

93. However, Kenya has advanced the argument that negotiations on maritime delimitation could not be finalized and, therefore, that no final agreement could be reached, until after the recommendations of the CLCS had been received.

94. It may be the case that, as the Parties agree, the endpoint of their maritime boundary in the area beyond 200 nautical miles cannot be definitively determined until after the CLCS's recommendations have been received and the outer limits of the continental shelf beyond 200 nautical miles established on the basis of those recommendations. This is consistent with Article 76, paragraph 8, of UNCLOS. A lack of certainty regarding the outer limits of the continental shelf, and thus the precise location of the endpoint of a given boundary in the area beyond 200 nautical miles, does not, however, necessarily prevent either the States concerned or the Court from undertaking the delimitation of the boundary in appropriate circumstances before the CLCS has made its recommendations.

95. The Court does not consider that the sixth paragraph of the MOU can be interpreted as precluding the Parties from reaching an agreement on their maritime boundary, or either of them from resorting to dispute settlement procedures regarding their maritime boundary dispute, before receipt of the CLCS's recommendations.

The Parties could have reached an agreement on their maritime boundary at any time by mutual consent. Moreover, read in light of Article 83, paragraph 1, of UNCLOS (see paragraphs 90 and 91 above), the use of the phrase "shall be agreed" in the sixth paragraph does not mean that the Parties have an obligation to conclude an agreement on a continental shelf boundary; it rather means that the Parties are under an obligation to engage in negotiations in good faith with a view to reaching an agreement. The Parties agree that the sixth paragraph did not prevent them from engaging in such negotiations before receipt of the CLCS's recommendations. There is no temporal restriction contained in the sixth paragraph on fulfilling this obligation to negotiate. The fact that the Parties set an objective as to the time for concluding an agreement does not, given that this paragraph is not prescriptive of a method of settlement to be followed (see paragraphs 90-91), prevent a Party from resorting to dispute settlement procedures prior to receiving the recommendations of the CLCS.

Furthermore, both Somalia and Kenya are parties to UNCLOS, which contains in Part XV comprehensive provisions for dispute resolution, and both States have optional clause declarations in force. The Court does not consider that, in the absence of express language to that effect, the Parties can be taken to have excluded recourse to such procedures until after receipt of the CLCS's recommendations.

96. Finally, the MOU repeatedly indicates that the CLCS process leading to delineation is to be without prejudice to delimitation, treating the two as distinct. This contradicts Kenya's argument that delimitation was, in accordance with the sixth paragraph, to be conditioned on delineation. Nothing suggests that the Parties would have agreed in 2009 that delimitation was dependent on delineation to such an extent that the former had to await the latter.

97. In summary, the Court observes the following in respect of the interpretation of the MOU. First, its object and purpose was to constitute a no-objection agreement, enabling the CLCS to make recommendations notwithstanding the existence of a dispute between the Parties regarding the delimitation of the continental shelf. Secondly, the sixth paragraph relates solely to the continental shelf, and not to the whole maritime boundary between the Parties, which suggests that it did not create a dispute settlement procedure for the determination of that boundary.

Thirdly, the MOU repeatedly makes clear that the process leading to the delineation of the outer limits of the continental shelf beyond 200 nautical miles is to be without prejudice to the delimitation of the maritime boundary between the Parties, implying — consistently with the jurisprudence of this Court — that delimitation could be undertaken independently of a recommendation of the CLCS. Fourthly, the text of the sixth paragraph of the MOU reflects that of Article 83, paragraph 1, of UNCLOS, suggesting that the Parties intended to acknowledge the usual course that delimitation would take under that Article, namely engaging in negotiations with a view to reaching agreement, and not to prescribe a method of dispute settlement. Fifthly, the Parties accept that the sixth paragraph did not prevent them from undertaking such negotiations, or reaching certain agreements, prior to obtaining the recommendations of the CLCS.

98. Given the foregoing, the Court considers that the sixth paragraph of the MOU reflected the expectation of the Parties that, in light of Article 83, paragraph 1, of UNCLOS, they would negotiate their maritime boundary in the area of the continental shelf after receipt of the CLCS's recommendations, keeping the two processes of delimitation and delineation distinct. As between States parties to UNCLOS, such negotiations are the first step in undertaking delimitation of the continental shelf. The Court does not, however, consider that the text of the sixth paragraph, viewed in light of the text of the MOU as a whole, the object and purpose of the MOU, and in its context, could have been intended to establish a method of dispute settlement in relation to the delimitation of the maritime boundary between the Parties. It neither binds the Parties to wait for the outcome of the CLCS process before attempting to reach agreement on their maritime boundary, nor does it impose an obligation on the Parties to settle their maritime boundary dispute through a particular method of settlement.

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99. In line with Article 32 of the Vienna Convention, the Court has examined the *travaux préparatoires*, however limited, and the circumstances in which the MOU was concluded, which it considers confirm the meaning resulting from the above interpretation (see *Maritime Dispute (Peru* v. *Chile), Judgment, I.C.J. Reports 2014*, p. 30, para. 66 and references therein).

100. The Parties signed the MOU in the context of the 13 May 2009 deadline for States to make submissions, or at least to submit preliminary information, to the CLCS regarding the outer limits of their continental shelf. In October 2008, Mr. Ahmedou Ould Abdallah, the then Special Representative of the Secretary-General of the United Nations for Somalia, initiated, in view of the impending deadline, the preparation of pre-

liminary information on behalf of Somalia, which at that time was facing instability and lacked the resources necessary for the preparation thereof. In this task, the Special Representative was assisted by the Kingdom of Norway, and particularly Ambassador Hans Wilhelm Longva, former Legal Adviser of the Norwegian Ministry for Foreign Affairs, and Mr. Harald Brekke, then the Norwegian member of the CLCS.

101. The Transitional Federal Government of Somalia was sworn into office on 22 February 2009. On 10 March 2009, the Transitional Federal Government was informed of the initiative of the Special Representative and the assistance of Norway, and was given a draft of the preliminary information that had been prepared for it. On that occasion, it was also presented with a draft of the MOU that had been prepared by Ambassador Longva. Somalia made a change to the title by adding the words "to each other". It appears that Kenya suggested some changes to the text, but these changes do not appear to have affected the substance of the MOU, in particular its sixth paragraph.

102. The fact that the MOU was prepared by Ambassador Longva in connection with the assistance Norway was providing to Somalia for the preparation of its submission of preliminary information to the CLCS, and that the two documents were presented together as part of the process for ensuring Somalia met the 13 May 2009 deadline, tends to confirm that the MOU was concerned with the CLCS process. It appears from the record that the Parties considered the MOU as a no-objection agreement, necessary in connection with their forthcoming submissions to the CLCS.

103. Furthermore, there is no apparent mention of, or explanation provided for, the inclusion of the sixth paragraph in the text of the MOU. Were that paragraph to have the potentially far-reaching consequences asserted by Kenya, it would in all likelihood have been the subject of some discussion. Yet, in a presentation given in November 2009 at the Pan-African Conference on Maritime Boundary Delimitation and the Continental Shelf, Ambassador Longva discussed the MOU without making any mention of the legal elements allegedly implicit in the sixth paragraph. Indeed, in his presentation, Ambassador Longva

> "stress[ed] from the outset that the establishment of the outer limits of the continental shelf is a different and separate issue from the delimitation of the continental shelf between States with opposite or adjacent coasts. The establishment of the outer limits of the continental shelf is without prejudice to, i.e. it does not affect, matters relating to the delimitation of the continental shelf between States. Consequently it is not necessary to solve issues of maritime delimitation between neighbouring States before embarking on the establishment of the outer limits of the continental shelf."

104. Moreover, in a Note Verbale dated 17 August 2011, the Permanent Mission of Norway to the United Nations provided the Secretariat of the United Nations with its comments in response to the Secretary-General's Report "on the protection of Somali natural resources and waters, and alleged illegal fishing and illegal dumping, including of toxic substances, off the coast of Somalia". In the context of a discussion of "unresolved issues of maritime delimitation", the Note makes reference to the MOU and summarizes aspects thereof. That summary of the MOU mentions its title, the contents of the fifth paragraph, and the provision for its entry into force contained in the seventh paragraph. No mention is made of the sixth paragraph. If it had the significance given to it by Kenya, it is to be expected that this would have been highlighted by the State whose representative had been instrumental in drafting the MOU. Norway said the following in this Note regarding maritime delimitation:

> "The politically most sensitive issues involved may be the unresolved issues of maritime delimitation between Somalia and neighbouring coastal States. Norway takes no position on these issues other than laying as a premise for its assistance that such issues of maritime delimitation with other States not be prejudiced."

105. The Court is of the view that the *travaux préparatoires* and the circumstances in which the MOU was concluded confirm that the MOU was not intended to establish a procedure for the settlement of the maritime boundary dispute between the Parties.

3. Conclusion on whether the reservation contained in Kenya's declaration under Article 36, paragraph 2, is applicable by virtue of the MOU

106. The Court has concluded that the sixth paragraph of the MOU, read in its context and in light of the object and purpose of the MOU, sets out the expectation of the Parties that an agreement would be reached on the delimitation of their continental shelf after receipt of the CLCS's recommendations. It does not, however, prescribe a method of dispute settlement. The MOU does not, therefore, constitute an agreement "to have recourse to some other method or methods of settlement" within the meaning of Kenya's reservation to its Article 36, paragraph 2, declaration, and consequently this case does not, by virtue of the MOU, fall outside the scope of Kenya's consent to the Court's jurisdiction.

B. Part XV of the United Nations Convention on the Law of the Sea

107. According to Kenya, there is a second basis, independent of the MOU, for the Court to conclude that it lacks jurisdiction over Somalia's Application. Kenya again invokes the reservation to its declaration under Article 36, paragraph 2, of the Statute that excludes disputes as to which the parties agree to have recourse to "some other method or methods of settlement", asserting that "Part XV of UNCLOS manifestly provides agreed methods for the settlement of maritime boundary disputes".

108. Kenya points out that Article 287, paragraph 1, of UNCLOS, which is contained in Part XV, provides that States parties may make a written declaration choosing one or more fora for the binding settlement of disputes concerning the interpretation or application of the Convention. Pursuant to Article 287, paragraph 3, States parties that have not made such a declaration are deemed to have accepted arbitration in accordance with Annex VII to UNCLOS. Neither Kenya nor Somalia has made such a declaration. It follows that, in Kenya's view, by operation of the Convention, both Parties are deemed to have accepted arbitration as the method of settling disputes concerning the interpretation or application of the Convention, including maritime boundary disputes, and therefore that the Parties have agreed to "a method of settlement other than recourse to the Court". Accordingly, Kenya submits that its reservation excludes the Court's jurisdiction under Article 36, paragraph 2, of the Statute.

109. In support of this position, Kenya states that its reservation recognizes "the significant role of alternative and more specialized dispute settlement systems and procedures" and that it gives priority to Part XV of UNCLOS as the *lex specialis* and *lex posterior* to the optional clause declarations of the Parties.

110. Kenya also addresses the implications of Article 282 of UNCLOS, a provision in Part XV of the Convention that states:

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

Kenya acknowledges that, pursuant to Article 282, if two States parties to the Convention have made optional clause declarations containing no reservations excluding from the jurisdiction of the Court the dispute submitted to it, those declarations would constitute an agreement to have recourse to a procedure (namely adjudication by this Court) that would apply in lieu of other procedures provided for in Section 2 of Part XV of UNCLOS. However, Kenya maintains that, because Part XV provides agreed methods for the settlement of disputes within the meaning of the reservation to its optional clause declaration, the optional clause declarations of the Parties do not coincide in conferring jurisdiction upon the Court and thus do not constitute an agreement, under Article 282, to submit a dispute concerning the interpretation or application of the Convention to this Court.

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111. Somalia agrees with Kenya that optional clause declarations providing for the jurisdiction of this Court can constitute an agreement to submit a dispute concerning the interpretation or application of the Convention to a procedure entailing a binding decision that applies, pursuant to Article 282, in lieu of any procedure provided for in Section 2 of Part XV of UNCLOS. Somalia points out that Kenya does not dispute that the drafters of UNCLOS "specifically and explicitly intended Optional Clause jurisdiction to have precedence over Part XV" and invokes the *travaux préparatoires* of Article 282, as well as the consistency of scholarly commentary, to support this argument. Thus, in Somalia's view, by making optional clause declarations, the Parties have agreed to the jurisdiction of the Court and this agreement "takes priority over the dispute resolution procedures contained in Article 287 of UNCLOS".

112. As to Kenya's characterization of UNCLOS as *lex specialis* and *lex posterior* in relation to the Parties' optional clause declarations, Somalia maintains that

> "[r]atifying a treaty that explicitly gives *priority* to Optional Clause jurisdiction over Part XV procedures cannot logically have the effect of giving priority to Part XV procedures over the Optional Clause" (emphasis in the original).

113. Somalia points out that the relationship between the Parties' optional clause declarations and Part XV of UNCLOS might seem to give rise to circularity, because the reservation to Kenya's optional clause declaration could lead to Part XV, which, in turn (by virtue of Article 282) could lead back to the optional clause declaration, with the back and forth continuing indefinitely. However, Somalia argues that there is no circularity in this case because Article 282 of UNCLOS gives priority to

jurisdiction based on optional clause declarations, noting that "[i]t would turn logic on its head if an instrument that expressly *excludes* cases covered by the Optional Clause could constitute an alternative method of settlement for cases covered by the Optional Clause" (emphasis in the original).

114. As to the possibility of circularity, Kenya responds that there is no *"double renvoi"* in this case. The reservation in Kenya's declaration leads to consideration of Part XV, but the analysis ends there, because Part XV procedures, which are *lex specialis* and *lex posterior*, fall within the reservation to Kenya's declaration. There is therefore no "*renvoi*" from Article 282 back to Kenya's declaration.

* *

115. As the Court has previously stated, "since two unilateral declarations are involved . . . jurisdiction is conferred upon the Court only to the extent to which the Declarations coincide in conferring it" (*Certain Norwegian Loans (France* v. *Norway), Judgment, I.C.J. Reports 1957*, p. 23). Although the declarations of both Parties contain reservations, only one reservation — contained in Kenya's declaration — is at issue here. The Court must therefore look to Kenya's declaration to determine the extent of the jurisdiction conferred upon it by the Parties.

116. To decide whether it has jurisdiction in this case, the Court must evaluate "whether the force of the arguments militating in favour of jurisdiction is preponderant, and . . . 'ascertain whether an intention on the part of the Parties exists to confer jurisdiction upon it'" (*Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 76, para. 16, quoting *Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9*, p. 32; see also *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, pp. 450-451, para. 38).

117. The Court will begin by considering the interpretation of Kenya's declaration and will then turn to the provisions of Part XV, which, according to Kenya, provide the method of settling this dispute to which the Parties have agreed.

118. As the Court has previously stated,

> "[a]ll elements in a declaration under Article 36, paragraph 2, of the Statute which, read together, comprise the acceptance by the declarant State of the Court's jurisdiction, are to be interpreted as a unity, applying the same legal principles of interpretation throughout" (*Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 453, para. 44).

In addition,

> "what is required in the first place for a reservation to a declaration made under Article 36, paragraph 2, of the Statute, is that it should be interpreted in a manner compatible with the effect sought by the reserving State" (*I.C.J. Reports 1998*, p. 455, para. 52).

119. It will be recalled that Kenya's declaration pursuant to Article 36, paragraph 2, of the Court's Statute provides, in relevant part, that it accepts the Court's jurisdiction "over all disputes . . . other than . . . [d]isputes in regard to which the parties to the dispute have agreed or shall agree to have recourse to some other method or methods of settlement". Kenya's declaration therefore reflects an intention that "all disputes" with another State accepting the Court's jurisdiction under Article 36, paragraph 2, of the Statute (other than those addressed by the reservations not relevant to the present case) will be subject to a method of dispute settlement, either in this Court or pursuant to another method to which the parties have agreed. Thus, to give effect to the intent reflected in Kenya's declaration, "interpreted as a unity", the Court may come to the conclusion that it lacks jurisdiction only if it is satisfied that there is an agreement between the Parties to resort to another method of settling the dispute that is the subject-matter of Somalia's Application.

120. Kenya maintains that its reservation attaches special significance to an agreement to a method of dispute settlement that is *lex specialis* and *lex posterior* in relation to the Parties' optional clause declarations. The Court notes, however, that there is nothing in the text of Kenya's reservation that makes a distinction between a highly specific agreement, such as a special agreement in respect of a particular dispute, and a general agreement on the pacific settlement of disputes. Moreover, by using the phrase "have agreed or shall agree", the reservation refers expressly to existing or future agreements between the parties to a dispute. Thus, its plain language is at odds with the suggestion that preference is to be given to agreements concluded subsequent to the date of the Parties' declarations. A determination whether a particular agreement between the Parties falls within Kenya's reservation does not turn on the degree of specificity or the date of that agreement, but must be answered by examining the content of the particular agreement. Accordingly, the Court next examines the relevant provisions of Part XV of UNCLOS.

121. Somalia's Application calls upon the Court to interpret and apply provisions of UNCLOS relevant to maritime delimitation. In general terms, Part XV of UNCLOS sets out methods of settling disputes concerning the interpretation or application of that Convention. However, in order to determine whether, by ratifying the Convention, the Parties have agreed to a method of settling the present dispute other than recourse to the Court, the Court must look more closely at the structure and provisions of Part XV.

122. Part XV, entitled "Settlement of disputes", comprises three sections. Section 1 sets out general provisions regarding the peaceful settlement of disputes. It requires States parties to settle disputes concerning the interpretation or application of the Convention by peaceful means (Art. 279) but expressly provides that they are free to employ "any peaceful means of their own choice" (Art. 280). States parties may agree between themselves to a means of settlement that does not lead to a binding decision of a third party (e.g., conciliation). However, if no settlement has been reached by recourse to such means, either of those States parties may submit the dispute to the court or tribunal having jurisdiction under Section 2 of Part XV, unless their agreement to such means of settlement excludes the procedures entailing a binding decision in Section 2 (Art. 281, para. 1). In addition, Article 282 provides that States parties may agree "through a general, regional or bilateral agreement or otherwise" to submit a dispute to a procedure entailing a binding result. If they do so, that agreed procedure shall apply "in lieu" of the procedures provided for in Part XV.

123. Section 2 of Part XV sets out the provisions regarding compulsory procedures entailing binding decisions. Pursuant to Article 286, those procedures apply when a dispute has not been settled "by recourse to section 1". As to settlement of such disputes, Article 287, entitled "Choice of procedure", allows a State party to choose, by means of a written declaration, one or more of the following bodies (para. 1): the International Tribunal for the Law of the Sea, the International Court of Justice, an arbitral tribunal constituted under Annex VII of the Convention or a special arbitral tribunal constituted under Annex VIII of the Convention. If a State party has not made an express choice, then it is deemed to have accepted arbitration in accordance with Annex VII (Art. 287, para. 3). If the parties to a dispute have not accepted the same procedure, the dispute may be submitted only to arbitration in accordance with Annex VII (Art. 287, para. 5).

124. Article 288, paragraph 1, provides that "[a] court or tribunal referred to in Article 287 shall have jurisdiction over any dispute concerning the interpretation or application of [UNCLOS] which is submitted to it in accordance with this Part". Section 3 of Part XV however sets out limitations on the applicability of Section 2 with respect to certain kinds of disputes (Art. 297). It further permits a State party to declare in writing that it does not accept any one or more of the procedures under Section 2 with respect to certain categories of disputes listed therein (Art. 298).

125. The dispute settlement provisions of Part XV of UNCLOS are an integral part of the Convention, rather than being in the form of an optional protocol. Given that the Convention does not permit reservations (Art. 309), all States parties are subject to Part XV. However, the Convention gives States parties considerable flexibility in the choice of means to settle disputes concerning its interpretation or application. Sec-

tion 1 permits them to agree either to procedures that do not lead to a binding result (Arts. 280 and 281) or to procedures leading to a binding result (Art. 282), and accords priority to such agreed procedures over the procedures of Section 2 of Part XV. The first article in Section 2 of Part XV, entitled "Application of procedures under this section" (Art. 286), provides that the procedures of Section 2 are only available when a dispute has not been settled pursuant to Section 1. Thus, the procedures in Section 2 complement Section 1 in ensuring the integrity of the Convention, by providing a basis for binding dispute settlement (subject to Section 3), but those procedures are residual to the provisions of Section 1. In particular, a procedure that is agreed between States parties and that falls within the scope of Article 282 shall apply "in lieu" of (i.e. instead of) the procedures of Section 2 of Part XV.

126. It is in this context that Article 282 must be interpreted, pursuant to the law on the interpretation of treaties (see paragraphs 63 and 64 above). Article 282 makes no express reference to an agreement to the Court's jurisdiction resulting from optional clause declarations. It provides, however, that an agreement to submit a dispute to a specified procedure that applies in lieu of the procedures provided for in Section 2 of Part XV may not only be contained in a "general, regional or bilateral agreement" but may also be reached "otherwise". The ordinary meaning of Article 282 is broad enough to encompass an agreement to the jurisdiction of this Court that is expressed in optional clause declarations.

127. This interpretation is confirmed by the *travaux préparatoires*. Early in the negotiations of UNCLOS, delegations were aware that "[a] special provision may be needed when parties to a dispute are subject to the jurisdiction of the International Court of Justice as well as Parties to this Convention" (Working paper on the settlement of law of the sea disputes of 27 August 1974, resulting from informal consultations held between representatives of Australia, Belgium, Bolivia, Colombia, El Salvador, Luxembourg, the Netherlands, Singapore and the United States of America, doc. A/CONF.62/L.7). Drafts of the provision that became Article 282 addressed the relationship between procedures specified in UNCLOS and procedures entailing a binding decision accepted by the parties to a dispute not only through a general, regional or special agreement, but also through "some other instrument or instruments" (see, e.g., Informal single negotiating text (Part IV) of 6 May 1976, doc. A/CONF.62/WP.9/Rev.1). It is clear that this formulation encompassed the acceptance of the Court's jurisdiction under Article 36, paragraph 2, of its Statute. In subsequent stages of the negotiations, the expression "or some other instrument or instruments" was replaced with the equivalent expression "or otherwise" (see Report of the Chairman of the Drafting Committee to the plenary of 11 August 1981, doc. A/CONF.

62/L.75/Add.1, and Report to the plenary Conference on the recommendations of the Drafting Committee presented by the Chairman of the Drafting Committee on behalf of the President of the Conference and the Chairman of the First Committee of 30 September 1981, doc. A/CONF. 62/L.82).

128. The phrase "or otherwise" in Article 282 thus encompasses agreement to the jurisdiction of the Court resulting from optional clause declarations. Both Kenya and Somalia recognize this interpretation of Article 282 and agree that if two States have accepted the Court's jurisdiction under the optional clause with respect to a dispute concerning the interpretation or application of UNCLOS, such agreement would apply to the settlement of that dispute in lieu of procedures contained in Section 2 of Part XV. It is equally clear that if a reservation to an optional clause declaration excluded disputes concerning a particular subject (for example, a reservation excluding disputes relating to maritime delimitation), there would be no agreement to the Court's jurisdiction falling within Article 282, so the procedures provided for in Section 2 of Part XV would apply to those disputes, subject to the limitations and exceptions that result from the application of Section 3.

129. In the present case, however, the Court must decide whether Article 282 should be interpreted so that an optional clause declaration containing a reservation such as that of Kenya falls within the scope of that Article, i.e., whether the optional clause declarations of the Parties constitute an "agreement" to submit the dispute to a procedure that entails a binding decision within the meaning of Article 282. As the Court has already observed, the *travaux préparatoires* of UNCLOS make clear that the negotiators gave particular attention to optional clause declarations when drafting Article 282, ensuring, through the use of the phrase "or otherwise", that agreements to the Court's jurisdiction based on optional clause declarations fall within the scope of Article 282. During the period when the Third United Nations Conference on the Law of the Sea was held (1973-1982), more than half of the then-existing optional clause declarations contained a reservation with an effect similar to that of Kenya's reservation, excluding from the jurisdiction of the Court disputes as to which the parties had agreed or would agree on another method of settlement. Despite the prevalence of such reservations and the inclusion of "or otherwise" in the provision for the purpose of taking into account an agreement resulting from optional clause declarations, there is no indication in the *travaux préparatoires* of an intention to exclude from the scope of Article 282 the majority of optional clause declarations, i.e., those containing such reservations. It remains the case today that such reservations are found in more than half of the optional clause declarations in effect.

130. Article 282 should therefore be interpreted so that an agreement to the Court's jurisdiction through optional clause declarations falls within the scope of that Article and applies "in lieu" of procedures provided for in Section 2 of Part XV, even when such declarations contain a reservation to the same effect as that of Kenya. The contrary interpretation would mean that, by ratifying a treaty which gives priority to agreed procedures resulting from optional clause declarations (pursuant to Article 282 of UNCLOS), States would have achieved precisely the opposite outcome, giving priority instead to the procedures contained in Section 2 of Part XV. Consequently, under Article 282, the optional clause declarations of the Parties constitute an agreement, reached "otherwise", to settle in this Court disputes concerning interpretation or application of UNCLOS, and the procedure before this Court shall thus apply "in lieu" of procedures provided for in Section 2 of Part XV.

131. As previously noted, Kenya's acceptance of the Court's jurisdiction extends to "all disputes" (leaving aside reservations not relevant here), except those for which the Parties have agreed to resort to a method of settlement other than recourse to the Court. In the present case, Part XV of UNCLOS does not provide for such other method of dispute settlement (see paragraph 130). Accordingly, this dispute does not, by virtue of Part XV of UNCLOS, fall outside the scope of Kenya's optional clause declaration.

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

> "the Court, when it has to define its jurisdiction in relation to that of another tribunal, cannot allow its own competency to give way unless confronted with a clause which it considers sufficiently clear to prevent the possibility of a negative conflict of jurisdiction involving the danger of a denial of justice" (*Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9*, p. 30).

133. Taking into account all of these considerations, the Court concludes that "the force of the arguments militating in favour of jurisdiction is preponderant" (see paragraph 116 above), and that this case does not, by virtue of Part XV, fall outside the scope of the Parties' consent to the Court's jurisdiction.

C. Conclusion

134. In light of the Court's conclusion that neither the MOU nor Part XV of UNCLOS falls within the scope of the reservation to Kenya's optional clause declaration, the Court finds that Kenya's preliminary objection to the jurisdiction of the Court must be rejected.

III. The Second Preliminary Objection: The Admissibility of Somalia's Application

135. The Court will now consider Kenya's preliminary objection to the admissibility of Somalia's Application.

136. In support of its contention that the Application is inadmissible, Kenya makes two arguments.

137. First, Kenya claims that the Application is inadmissible because the Parties had agreed in the MOU to negotiate delimitation of the disputed boundary, and to do so only after completion of CLCS review of the Parties' submissions.

138. The Court has previously rejected Kenya's contention that the MOU contained an agreement to settle the Parties' maritime boundary dispute by negotiation and only after the completion of CLCS review of the Parties' submissions (see paragraphs 98 and 106 above). Thus, having rejected the premise on which this ground of inadmissibility is based, the Court must also reject this aspect of Kenya's second preliminary objection.

139. Secondly, Kenya states that the Application is inadmissible because Somalia breached the MOU by objecting to CLCS consideration of Kenya's submission, only to consent again immediately before filing its Memorial. According to Kenya, the withdrawal of consent was a breach of Somalia's obligations under the MOU that gave rise to significant costs and delays. Kenya also contends that a State "seeking relief before the Court must come with clean hands" and that Somalia has not done so. Consequently, it argues, Somalia's Application is inadmissible.

140. Somalia responds to this contention by claiming that "even if [it] were in breach of the MOU — which it is not — this would not preclude Somalia from invoking its entirely separate rights under Article 36 (2) of the Statute". Somalia adds that it has withdrawn its objection to CLCS consideration of Kenya's submission, which "is now before the CLCS, without any real delay". In addition, Somalia maintains that the "'unclean hands' doctrine" has never been recognized by the Court and that "the Court's case law confirms that accusations of bad faith of the type levelled against Somalia cannot bar the admissibility of an Application".

141. The Court recalls that, in a letter to the Secretary-General of the United Nations dated 10 October 2009, forwarded to him under cover of a letter dated 2 March 2010, Somalia requested that the MOU be treated "as non-actionable" (see paragraph 18 above). Somalia objected to consideration by the CLCS of Kenya's submission by letter dated 4 February 2014. It withdrew this objection by letter of 7 July 2015 (see paragraphs 19 and 26 above).

142. The Court observes that the fact that an applicant may have breached a treaty at issue in the case does not *per se* affect the admissibility of its application. Moreover, the Court notes that Somalia is neither relying on the MOU as an instrument conferring jurisdiction on the Court nor as a source of substantive law governing the merits of this case.

Thus, Somalia's objection to CLCS consideration of Kenya's submission does not render the Application inadmissible.

143. In the circumstances of this case, there is no need for the Court to address the more general question whether there are situations in which the conduct of an applicant would be of such a character as to render its application inadmissible.

144. In light of the foregoing, the Court finds that the preliminary objection to the admissibility of Somalia's Application must be rejected.

* * *

145. For these reasons,

THE COURT,

(1) *(a)* By thirteen votes to three,

Rejects the first preliminary objection raised by the Republic of Kenya in so far as it is based on the Memorandum of Understanding of 7 April 2009;

IN FAVOUR: *President* Abraham; *Vice-President* Yusuf; *Judges* Owada, Tomka, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari, Crawford, Gevorgian;

AGAINST: *Judges* Bennouna, Robinson; *Judge* ad hoc Guillaume;

(b) By fifteen votes to one,

Rejects the first preliminary objection raised by the Republic of Kenya in so far as it is based on Part XV of the United Nations Convention on the Law of the Sea;

IN FAVOUR: *President* Abraham; *Vice-President* Yusuf; *Judges* Owada, Tomka, Bennouna, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari, Crawford, Gevorgian; *Judge* ad hoc Guillaume;

AGAINST: *Judge* Robinson;

(2) By fifteen votes to one,

Rejects the second preliminary objection raised by the Republic of Kenya;

IN FAVOUR: *President* Abraham; *Vice-President* Yusuf; *Judges* Owada, Tomka, Bennouna, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari, Crawford, Gevorgian; *Judge* ad hoc Guillaume;

AGAINST: *Judge* Robinson;

(3) By thirteen votes to three,

Finds that it has jurisdiction to entertain the Application filed by the Federal Republic of Somalia on 28 August 2014 and that the Application is admissible.

IN FAVOUR: *President* Abraham; *Vice-President* Yusuf; *Judges* Owada, Tomka, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari, Crawford, Gevorgian;

AGAINST: *Judges* Bennouna, Robinson; *Judge* ad hoc Guillaume.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this second day of February, two thousand and seventeen, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Federal Republic of Somalia and the Government of the Republic of Kenya, respectively.

(Signed) Ronny ABRAHAM,
President.

(Signed) Philippe COUVREUR,
Registrar.

Vice-President YUSUF appends a declaration to the Judgment of the Court; Judge BENNOUNA appends a dissenting opinion to the Judgment of the Court; Judges GAJA and CRAWFORD append a joint declaration to the Judgment of the Court; Judge ROBINSON appends a dissenting opinion to the Judgment of the Court; Judge *ad hoc* GUILLAUME appends a dissenting opinion to the Judgment of the Court.

(Initialled) R.A.
(Initialled) Ph.C.

DECLARATION OF VICE-PRESIDENT YUSUF

Agree with the Court's decision and reasons — Somalia and Kenya neither negotiated nor drafted the Memorandum of Understanding in dispute — Such direct negotiation would have facilitated interpretation — States must actively participate in the creation of the obligations they take on.

1. I agree with the Judgment of the Court on the preliminary objections raised by Kenya and the reasoning that led to the final decisions. Nevertheless, the circumstances in which the present dispute on the jurisdiction of the Court have arisen require me to make some observations regarding the signature by Kenya and Somalia of the Memorandum of Understanding ("MOU"), which is mainly at the origin of the preliminary objections by Kenya and which has been the focus of submissions from both Parties.

2. The MOU at issue in this case was, as a matter of fact, drafted by Ambassador Hans Wilhelm Longva of Norway in the context of technical assistance provided by Norway to African coastal States, which enabled them to make submissions or submit preliminary information to the Commission on the Limits of the Continental Shelf ("CLCS") within the time-limits prescribed by the States parties to the United Nations Convention on the Law of the Sea ("UNCLOS"). As Norway noted, such assistance was provided in response to calls made by the United Nations General Assembly at its Sixty-Third and Sixty-Fourth Sessions (A/RES/63/111 and A/RES/64/71), and by States parties to UNCLOS at their eighteenth meeting (SPLOS/183). Norway's assistance not only extended to Somalia and Kenya, but also to a number of other States in West Africa.

3. Such technical assistance was both timely and beneficial to African coastal States in view of the impending deadline for States to make submissions or at least to submit preliminary information to the CLCS regarding the outer limits of their continental shelf. Full submissions or even the provision of preliminary information to the CLCS are technically complex undertakings which require the involvement of individuals with the appropriate expertise in geology, geophysics, or hydrography. Many African States lack the requisite technical expertise and thus Norway's assistance was of the utmost importance given the time-limit for the submission of preliminary information to the CLCS.

4. A distinction must, however, be made between the technical work required in connection with the submission or the provision of preliminary information to the CLCS regarding the outer limits of the continental shelf, for which Norway offered its assistance following the United Nations General Assembly resolution, and the negotiation and drafting of a bilateral MOU between Kenya and Somalia to signify their no-objection to each other's submissions in view of the unresolved issues of maritime delimitation between the two neighbouring States.

5. The latter was a purely legal and policy matter which should have been handled directly between the two neighbouring African States, negotiated between them to their mutual satisfaction, and drafted by their legal experts in accordance with clear understandings on the granting of no-objection to each other with regard to their respective submissions as well as the manner in which the separate issues of delimitation would be dealt with by their respective Governments. This does not seem, however, to have been the case.

6. As noted in the Judgment of the Court:

> "On 10 March 2009, the Transitional Federal Government [of Somalia] was informed of the initiative of the Special Representative and the assistance of Norway, and was given a draft of the preliminary information that had been prepared for it. On that occasion, it was also presented with a draft of the MOU that had been prepared by Ambassador Longva. Somalia made a change to the title by adding the words 'to each other'. It appears that Kenya suggested some changes to the text, but these changes do not appear to have affected the substance of the MOU, in particular its sixth paragraph." (Para. 101.)

7. In light of the above described circumstances regarding the conclusion and signature by Kenya and Somalia of a bilateral agreement, which they had neither drafted nor negotiated between themselves, but which was proposed to them by a third party, it is surprising that they are in a dispute relating to the interpretation of the specific provisions of that agreement based on their alleged objectives and intentions at the time of signing. Each of them attributes now certain legal implications to the provisions of that agreement when there are hardly any *travaux préparatoires* showing their actual contribution to its conception (Judgment, para. 99).

8. Following their independence in the 1960s, African States objected to succession to bilateral agreements to which they had not contributed, and in the negotiation of which they had not participated, and called for the application of the clean-slate doctrine, particularly as reformulated in what is commonly known as the Nyerere doctrine of State succession. Of

course, the MOU between Kenya and Somalia cannot be assimilated to the bilateral treaties concluded between the colonial powers and third States, the succession to which African States objected upon their independence; nor should the noble intentions of Norway, which came forward to assist them, be the subject of misunderstanding by virtue of a dispute which is neither of its own making nor could it have been predicted.

9. Yet, it is perplexing, to say the least, that more than 50 years after independence, Kenya and Somalia are in dispute regarding the interpretation of a bilateral agreement, which they signed, but which was neither negotiated between them nor drafted by them. Indeed, the present dispute revolves around the legal implications of a bilateral agreement drafted by a third party and concluded by the two neighbouring States with hardly any input from their respective Governments.

10. International law today is not the same as that of the early twentieth century nor even that which prevailed at the time of independence of African States in the 1960s. Its effects pervade the daily lives of peoples throughout the world: their economic transactions, their development, their social interactions, and their cultural exchanges are all impacted by international law. As the scope of international law has increased, so too has the importance of ensuring that each State actively participates in the creation of international legal instruments and rules which affect its peoples and resources, and understands the obligations that it takes on.

11. No Government can afford today to put its signature to a bilateral legal instrument which it has neither carefully negotiated nor to which it has hardly contributed. This applies especially to African Governments, which, due to their painful historical experience with international legal agreements concluded with foreign powers (e.g., protectorate, unequal and capitulation treaties), should pay particular attention to the contents of such agreements. To this end, they need to develop and use their own expertise to negotiate, draft, and advise on the rules and obligations of international law to which they wish to subscribe.

(Signed) Abdulqawi A. YUSUF.

DISSENTING OPINION OF JUDGE BENNOUNA

[Original English Text]

Optional clause declaration — Reservation for disputes subject to another method of settlement — Interpretation of paragraph 6 of the MOU — Article 31 of the Vienna Convention on the Law of Treaties — Reversal of order of the general rule of interpretation — Ordinary meaning of the terms as starting point — Erroneous analogy with Article 83 of UNCLOS — Existence of a procedure for the settlement of the maritime dispute in paragraph 6.

To my regret, I had to vote against the decision of the Court finding that it has jurisdiction over Somalia's request.

In its Application of 28 August 2014, Somalia founded the Court's jurisdiction on the optional clause declarations made by the Parties, on 11 April 1963 (Somalia) and 19 April 1965 (Kenya), pursuant to Article 36, paragraph 2, of the Statute of the Court. In its first preliminary objection, raised on 7 October 2015, Kenya contended that one of the reservations to its declaration recognizing the Court's jurisdiction should apply in the present case; that reservation excludes from the Court's jurisdiction "[d]isputes in regard to which the parties to the dispute have agreed or shall agree to have recourse to some other method or methods of settlement". In Kenya's view, the Memorandum of Understanding (MOU) that it concluded with Somalia on 7 April 2009 provides for a method of settlement which falls squarely within the scope of that reservation. Somalia's Application thus relates to a dispute in respect of which Kenya has not accepted the Court's jurisdiction. There is nothing unusual about the reservation made by Kenya, since it appears in over 40 optional clause declarations recognizing the jurisdiction of the Court.

The Parties disagree on the meaning of the MOU and, in particular, as to whether or not, in stipulating another method of settlement for maritime delimitation, it falls within the scope of Kenya's reservation to its declaration recognizing the Court's jurisdiction. In this regard, it must be borne in mind that in the Application instituting proceedings, dated 28 August 2014, Somalia asked the Court "to determine, on the basis of international law, the complete course of the single maritime boundary dividing all the maritime areas appertaining to Somalia and to Kenya in the Indian Ocean, including in the continental shelf beyond 200 nautical miles". This is how Somalia defines its dispute with Kenya which it has submitted to the Court, but, as we know, it is for the Court to determine objectively the content and scope of such a dispute, in accordance with the established jurisprudence.

Having determined the legal status of the MOU as a "treaty that entered into force upon signature and is binding on the Parties", the Court proceeds to interpret it in order to make a finding on its own jurisdiction in this case. Kenya considers that the MOU defines the dispute as one concerning delimitation, since it states (in the second paragraph) that "[t]his unresolved delimitation issue between the two coastal States is to be considered as a 'maritime dispute'. The claims of the two coastal States cover an overlapping area of the continental shelf which constitutes the 'area under dispute'." Kenya adds that paragraph 6 of the MOU provides for a dispute settlement procedure which excludes the Court's jurisdiction.

Somalia denies that paragraph 6 provides for another method of settlement for a delimitation dispute between the Parties and claims that this paragraph merely recalls the Parties' obligation to negotiate to reach an agreement in accordance with Articles 74 and 83 of UNCLOS.

Faced with this dispute over the interpretation of the MOU as an international treaty, the Court should have had recourse to the general rule of interpretation in Article 31 of the Vienna Convention on the Law of Treaties, which has customary status: "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

Thereafter, it should have focused on the interpretation of paragraphs 2 (definition of the dispute) and 6 (method of settlement for a delimitation dispute), which have given rise to the difference of views between the Parties. The Court takes a different approach, however, without really explaining why. While recognizing that the sixth paragraph of the MOU is at the heart of the first preliminary objection currently under consideration, it immediately adds:

> "It is, however, difficult to understand that paragraph without a prior analysis of the text of the MOU as a whole, which provides the context in which any particular paragraph should be interpreted and gives insight into the object and purpose of the MOU. The Court will therefore proceed first of all to such an analysis. It will then turn to an examination of the sixth paragraph." (Judgment, para. 65.)

This approach, which is highly unusual, ultimately amounts to inverting the order set out in Article 31 of the Vienna Convention and even the scope of the general rule of interpretation enshrined therein. For it is a question of ascertaining "the ordinary meaning to be given to the terms of the treaty in their context", and thus beginning with the terms whose meaning poses difficulties and then, where necessary, placing those terms in their context. The Court decided from the outset that the sixth paragraph was, in itself, difficult to understand, without even taking the trouble to explain the reasons why this text was supposedly unclear, ambiguous, unreasonable or incompatible with other rules of international law *(ibid.)*. While it is true that the general rule of interpretation

contains interrelated elements, the Court has consistently held that the ordinary meaning of the text should be the starting point (see, for example, *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, pp. 21-22, para. 41: "Interpretation must be based above all upon the text of the treaty.").

This inverted reasoning leads the Court to find that the purpose of the MOU as a whole is to enable the CLCS to consider the submissions made by Somalia and Kenya regarding the outer limit of their continental shelf (Judgment, para. 75). And it is based on this assessment of the MOU alone that the Court examines the sixth paragraph, which was a source of disagreement between the Parties throughout the proceedings on jurisdiction:

> "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."

According to the ordinary meaning of this paragraph, the Parties have resolved to delimit their continental shelf definitively by means of an agreement, once the CLCS had made its recommendations, on the outer limits of the continental shelf beyond 200 nautical miles.

Thus, paragraph 6 of the MOU provides for a procedure for the settlement of the dispute between the Parties by negotiation and by agreement once the CLCS has made its recommendations.

However, in order to conclude that paragraph 6 does not contain such a procedure, which is capable of triggering Kenya's reservation, the Court will consider that there is no such dispute settlement procedure, on the one hand, and that it does not involve any time constraints, on the other hand.

Applying a reasoning by analogy, the Court finds a "similarity" between paragraph 6 of the MOU and Article 83, paragraph 1, of UNCLOS, according to which "[t]he delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution".

For the Court, "it is a provision on the establishment of a maritime boundary between States . . . in respect of the continental shelf, which does not prescribe the method for the settlement of any dispute relating to the delimitation of the continental shelf" (Judgment, para. 90). In my view, it is a matter of disregarding the fact that negotiation is the first dispute settlement procedure provided for in Article 33 of the Charter of the United Nations. On the other hand, the commencement of negotia-

tions under Article 83, paragraph 1, of UNCLOS concerns not only the establishment of the maritime boundary, as the Court indicates, but also the settlement of the dispute relating to the latter and which would arise from the opposing views of the parties. Finally, the Court disregards Article 83, paragraph 2, of UNCLOS, which states that "[i]f no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided in Part XV". We are indeed in the realm of negotiation as a dispute settlement procedure that must be conducted in good faith and within a reasonable time before resorting to more complex procedures and which involve third parties.

Moreover, the reasoning by analogy may lead to erroneous conclusions if it is applied in respect of provisions which are not comparable, as is the case with paragraph 6 of the MOU and Article 83, paragraph 1, of UNCLOS. In fact, paragraph 6 provides for a time constraint which gives priority to the delineation of the continental shelf by the CLCS over its delimitation by the Parties.

It is not sufficient to assert, as the Court does, that "Kenya did not consider itself bound to wait for those [CLCS's] recommendations before engaging in negotiations on maritime delimitation, or even reaching agreements thereon" (Judgment, para. 92). Indeed, if the two rounds of negotiations between the Parties held in 2014, at a time when Somalia was denying the validity of the MOU, had succeeded, the question of the submission to the Court would no longer have arisen, nor would it have required the Court's assessment of the scope of Kenya's reservation.

Therefore, the Court cannot avoid interpreting paragraph 6 of the MOU in relation to Kenya's reservation. And that paragraph clearly and unambiguously states that the Parties have agreed to find common ground once the CLCS has made its recommendations. This reading of what is a clear text is neither absurd nor unreasonable given the purpose of the MOU, which gives priority to the work of the CLCS, the Parties setting aside any objections they may have. Other countries, in international practice, have agreed to do the same[1]. In the present case, the Court should give effect to the commitments made by the Parties, as confirmed by its jurisprudence:

> "When the Court can give effect to a provision of a treaty by giving to the words used in it their natural and ordinary meaning, it may not interpret the words by seeking to give them some other meaning." (*Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, I.C.J. Reports 1950*, p. 8.)

[1] See, for example, in 2006, the Agreed Minutes between the Faroe Islands, Iceland and Norway; in 2010, the Agreement between Norway and Russia, and, in 2013, the Agreed Minutes between Denmark (Greenland) and Iceland.

It is only during a second phase, once the ordinary meaning of the treaty provision in question has been established, that the Court can set it against other elements, such as the context, object and purpose of that instrument. Moving away from the ordinary meaning is possible only if it can be established that it is incompatible with those elements (*South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 336). The Court, however, has failed to demonstrate such an incompatibility. Instead it makes a series of assumptions about what the Parties might have agreed in the MOU (Judgment, para. 95); whereas, in matters of interpretation, one should rely on the content of the text, its intrinsic aspects, and not on what it could or should have provided. Thus, according to the Court, the "sixth paragraph of the MOU can [not] be interpreted as precluding the Parties from reaching an agreement on their maritime boundary, or either of them from resorting to dispute settlement procedures regarding their maritime boundary dispute, before receipt of the CLCS's recommendations" *(ibid.)*.

However, would this prevent Kenya from invoking its reservation to the declaration recognizing the jurisdiction of the Court? That reservation refers to "some other method or methods of settlement". Therefore, it is sufficient that the MOU establish a single method of settlement, with a time constraint in this instance, in order for the reservation to apply. In other words, the meaning of the reservation cannot be changed in the light of the MOU's purported shortcomings as a treaty.

By means of the obligation set out in paragraph 6, the Parties have undertaken to conclude an agreement on the delimitation of the continental shelf only once the CLCS has made its recommendations in that respect. This is a temporal clause, which clearly distinguishes this method of settlement from that provided for in Article 83, paragraph 1, of UNCLOS. Paragraph 6 thus falls within the scope of Kenya's reservation, which precludes the Court from settling the dispute submitted to it by Somalia.

At the end of its reasoning on this first preliminary objection, the Court ultimately gives a different meaning to the terms of the sixth paragraph, one which is at odds with their ordinary meaning. The Court considers that "the text of the sixth paragraph of the MOU reflects that of Article 83, paragraph 1, of UNCLOS" (*ibid.*, para. 97). And thus, as if by magic, the obligation, agreed on in this paragraph, to negotiate and conclude a maritime delimitation agreement in the area in dispute once the CLCS has made it recommendations, vanishes.

Is the Court required to refer to the *travaux préparatoires* of the MOU (*ibid.*, paras. 99-105)? I do not think so. At the outset, recourse to the *travaux* is a supplementary means of interpretation used either to confirm the meaning resulting from the application of Article 31 of the Vienna Convention on the Law of Treaties or to determine the meaning when it

remains ambiguous or obscure, or where the result is manifestly absurd or unreasonable. Further, in this case, there are simply no such *travaux* in the relations between the two States parties to the MOU. At most, there are elements concerning the assistance extended by the Norwegian Ambassador Longva to the Parties to conclude this agreement. It is surprising that the Court has relied on a note by Ambassador Longva, referring to the MOU, to the extent that this note makes no mention of the sixth paragraph. The Court draws a conclusion therefrom that "[i]f it [MOU] had the significance given to it by Kenya, it is to be expected that this would have been highlighted by the State whose representative had been instrumental in drafting the MOU" (Judgment, para. 104). How can one interpret the silence of a text in such a way?

In the end, one must not forget that when international courts, whose jurisdiction depends on the consent of the States concerned, do not respect that condition, they run the risk of the very issues they have failed to address at this level resurfacing when the judgment is implemented.

(Signed) Mohamed BENNOUNA.

JOINT DECLARATION OF JUDGES GAJA AND CRAWFORD

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(*Signed*) Giorgio GAJA.

(*Signed*) James CRAWFORD.

DISSENTING OPINION OF JUDGE ROBINSON

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

9. Other scholarly works reflect the same conclusion:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[17] See *supra* note 1.

[18] See *supra* note 13.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Signed) Patrick ROBINSON.

[31] See *supra* note 12.

DISSENTING OPINION OF JUDGE *AD HOC* GUILLAUME

[Translation]

The Court has no jurisdiction — Declarations made under the optional clause — Reservation excluding disputes in regard to which the parties to the dispute have agreed to have recourse to some other method of settlement — Negotiation as a dispute settlement procedure —Interpretation of the MOU of 7 April 2009 as providing a method of settlement for the maritime dispute — Absence of a subsequent agreement between the Parties concerning the interpretation of the MOU — No renunciation of the rights provided for by the MOU — Non-exhaustion of the obligation to negotiate.

1. It is with regret that I must express my disagreement with the Judgment by which the Court has found that it is competent to entertain Somalia's Application. In my opinion, in concluding the Memorandum of Understanding (MOU) of 7 April 2009, the two Parties undertook to resolve their maritime dispute by negotiation with a view to reaching an agreement at a future date, and consequently, in view of Kenya's reservation to its declaration recognizing the Court's compulsory jurisdiction, the Court has no jurisdiction.

2. By making declarations under Article 36, paragraph 2, of the Statute of the Court recognizing its jurisdiction as compulsory, Kenya and Somalia have both consented to its general jurisdiction. However, Kenya has appended a reservation to its declaration, excluding "[d]isputes in regard to which the parties to the dispute have agreed or shall agree to have recourse to some other method or methods of settlement".

3. Kenya maintains that this reservation is applicable in the present case. To that end, it relies in particular on the MOU concluded between the two States in 2009. The principal aim of this MOU was to enable the Commission on the Limits of the Continental Shelf (CLCS) to consider the Parties' submissions regarding the outer limits of their continental shelf beyond 200 nautical miles. For that purpose, Kenya and Somalia gave their prior consent to the consideration by the CLCS of the other's submission.

4. In addition, paragraph 6 of the MOU provides that:

> "[t]he 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".

5. According to the Court, this text "sets out the expectation of the Parties that an agreement would be reached on the delimitation of their continental shelf after receipt of the CLCS's recommendations" (Judgment, para. 106). It goes on to state that this paragraph

> "does not, however, prescribe a method of dispute settlement. The MOU does not, therefore, constitute an agreement 'to have recourse to some other method or methods of settlement' within the meaning of Kenya's reservation to its Article 36, paragraph 2, declaration." *(Ibid.)*

The Court concludes that "this case does not, by virtue of the MOU, fall outside the scope of Kenya's consent to the Court's jurisdiction" *(ibid.)*.

6. I do not agree with this analysis: in my view, paragraph 6 of the MOU does impose a method of settlement for the existing maritime dispute between the two States, and Kenya's reservation is therefore applicable.

7. I would first observe that this reservation excludes disputes in regard to which the parties have agreed or shall agree to have recourse to some other method or methods of settlement. This provision covers all methods of dispute settlement. It therefore includes negotiation, enquiry, mediation, conciliation, arbitration and judicial settlement, in accordance with Article 33, paragraph 1, of the United Nations Charter. It is thus very general in nature, which sets it apart from other reservations with a comparable object.

Indeed, many reservations of this type are more limited in scope. Some exclude only disputes, "the solution of which the parties shall entrust to other tribunals" (Estonia and Pakistan). Others cover disputes to be referred "for final and binding decision to arbitration or judicial settlement" (Japan). Finally, some refer to recourse to other procedures to settle disputes by a "final and binding decision" (Lesotho and Romania) of an arbitral or judicial body (Peru). Kenya's reservation, however, contains no restrictions of this kind.

8. As the Court has pointed out, the MOU is a treaty which creates obligations between the Parties. Paragraph 6 of the MOU must therefore be interpreted in accordance with the customary rules codified in Article 31 of the Vienna Convention on the Law of Treaties. Paragraph 1 of that Article states that: "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". Thus, according to the Court's usual practice, one must first consider the text of paragraph 6, and ascertain its ordinary meaning, before placing it in its context and analysing the object and purpose of the MOU.

9. It should first be noted in this regard that, according to paragraph 6, the delimitation of maritime boundaries "shall be agreed between the two

coastal States". The use of the word "shall" signals that this is an obligation. It is an obligation to negotiate with a view to reaching an agreement once the CLCS has reviewed the submissions of the two Parties concerning the outer limits of the continental shelf beyond 200 nautical miles. These negotiations must cover the "areas under dispute", including the continental shelf beyond 200 nautical miles.

10. At first sight, therefore, the text is clear. By agreeing to it, the Parties determined the method of settlement for their dispute, namely negotiation, which is one of the possible methods of settlement provided for by Article 33, paragraph 1, of the United Nations Charter and by Kenya's reservation.

11. In order to escape these facts, Somalia contends that paragraph 6 is inspired by Article 83, paragraph 1, of the United Nations Convention on the Law of the Sea (hereinafter the "Convention"), according to which, "[t]he delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law". It maintains that paragraph 6 merely recalls these provisions of the Convention. It is an obligation to negotiate in good faith, which adds nothing to the applicable international law.

12. It is true that paragraph 6 creates an obligation to negotiate in terms that are similar to those of Article 83, paragraph 1. It should be noted, however, that these texts have fundamentally different objects. Article 83, paragraph 1, sets out the rules by which the delimitation of the continental shelf is to be carried out. It stipulates that this delimitation shall be effected by agreement. Paragraph 2 adds that if no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part XV of the Convention.

Paragraph 6 of the Memorandum is worded very differently: it provides that "[t]he delimitation of maritime boundaries in the areas under dispute . . . shall be agreed between the two coastal States". It creates an obligation to negotiate with a view to reaching a delimitation agreement in respect of specific areas. Furthermore, unlike Article 83, paragraph 2, it does not make provision for recourse to any other method of settlement besides negotiation.

Moreover, as observed by the Court,

> "the sixth paragraph of the MOU goes beyond the wording of Article 83, paragraph 1, by inclusion of the second part of the clause under consideration, providing that 'delimitation . . . shall be agreed . . . *after* the Commission has concluded its examination . . . and made its recommendations'" (Judgment, para. 92).

Thus, paragraph 6 obliges the Parties to resolve their dispute by negotiation with a view to reaching an agreement; however, this agreement

can only be reached once the CLCS has made its recommendations on the outer limit of the continental shelf. Paragraph 6 thus establishes a dispute settlement procedure.

13. Somalia tries to evade these facts by relying on the context and on the object and purpose of the MOU.

14. It is true that the principal object of the MOU — as reflected in its title and in paragraphs 1 to 5 — is, as the Court observed, to

> "ensur[e] that the CLCS could proceed to consider submissions made by Somalia and Kenya regarding the outer limits of the continental shelf beyond 200 nautical miles, and to issue recommendations thereon, notwithstanding the existence of a maritime dispute between the two States" (Judgment, para. 75).

However, this is not its sole object: paragraph 2 of the MOU also records the existence of a maritime dispute between the two States and obliges them to resolve that dispute in accordance with the conditions set out in paragraph 6.

15. Establishing the outer limits of the continental shelf and delimiting the maritime zones of the two States are separate operations, as noted by the Court. Furthermore, the MOU states in paragraphs 3, 4 and 5 that the CLCS procedure is without prejudice to the Parties' positions on their dispute or the maritime delimitation itself. From this the Court concludes that the MOU does not "treat delineation as a step in the process of delimitation" (*ibid.*, para. 77). This is perfectly correct, but it follows that delimitation may take place either before or after delineation. By agreeing to paragraph 6, the Parties chose the latter option.

16. This conclusion is, to my mind, confirmed by the fact the MOU makes several references to the future character of the delimitation. Paragraph 5 is particularly clear in this regard. It states that the submissions made before the CLCS and the recommendations approved by the latter will be without prejudice to the future delimitation of maritime boundaries in the area under dispute. This wording reflects the fact that delimitation will take place only after delineation. It is therefore difficult to see how the Court could state that it "is not convinced that the use of the word 'future' in this context can be taken, in and of itself, to indicate a temporal restriction on when delimitation was to take place" (*ibid.*, para. 78).

17. A more difficult question is what should be understood by the terms the "areas under dispute" in paragraph 6. The Court recalls in this regard that paragraph 2 of the MOU states that the delimitation of the continental shelf between the two States has not yet been settled and that this as yet unresolved issue must be regarded as a maritime dispute. It continues: "[t]he claims of the two coastal States cover an overlapping area of the continental shelf which constitutes the 'area under dispute'".

The Court concludes from this that the areas under dispute, in the sense of paragraph 6, can refer only to the continental shelf (and not to the territorial sea or the exclusive economic zone). It views the use of the plural in paragraph 6 as insignificant in this respect, since, it contends, the MOU uses the singular and the plural interchangeably.

18. In fact, the MOU typically uses the singular to characterize the dispute relating to the continental shelf. It does so on two occasions in paragraph 2, once again in paragraph 3, twice in paragraph 4, and three times in paragraph 5. It may therefore be asked whether, by using the plural in paragraph 6, the Parties did not intend to cover all issues of maritime delimitation. The *travaux préparatoires* might support this interpretation, since the singular in paragraph 6 was replaced by the plural at the last minute. Such an interpretation is further supported by the fact that it is impossible to establish the starting-point of the line of delimitation of the continental shelf between two States with adjacent coasts without first establishing the limits of their territorial seas.

19. In any event, even if paragraph 6 were to be interpreted as referring only to the continental shelf, it is difficult to see how this could lead one to conclude, as the Court appears to do, that it does not create a dispute settlement procedure for the determination of the boundary (Judgment, para. 97). Indeed, if it were so interpreted, paragraph 6 would at the very least impose such a method of settlement for the continental shelf.

20. Under these circumstances, there is nothing in the context or in the object and purpose of the treaty that contradicts the ordinary meaning of the terms used in paragraph 6 of the MOU.

21. There remains one difficulty, which lies in the fact that the Parties entered into discussions regarding the delimitation of their maritime boundaries before the CLCS had made its recommendations. Somalia draws two conclusions from this:

(a) Kenya itself recognized that there was no need to wait for the recommendations of the CLCS before starting negotiations. It cannot now argue the contrary.

(b) Supposing that the MOU did impose an obligation to negotiate, negotiations have taken place and failed. Therefore, the Parties are in any event no longer bound by their initial obligation.

22. It is true that, at Kenya's suggestion, the two countries entered into discussions in 2014 regarding the delimitation of their entire maritime boundary. Two fruitless meetings took place, during which the experts of each Party set out their arguments; a third meeting was planned but not held. What conclusions should be drawn from these facts?

23. This episode must be placed back in its context to make an assessment. The chronology is crucial here. On 2 March 2010, Somalia informed the United Nations that, in view of the decision taken by its parliament

in August 2009, the MOU was to be treated as "non-actionable" (Judgment, para. 18).

Under these circumstances, there was a considerable risk that the CLCS would refuse to consider Kenya's submission. With the date for consideration of that submission by the CLCS drawing near, Kenya's Minister for Foreign Affairs discussed the situation with his Somali counterpart on 31 May 2013. According to a joint press release, the two ministers "underlined the need to work on a framework of modalities for embarking on maritime demarcation" and "reviewed previous agreements and MOUs signed between Kenya and Somalia, and their level of implementation". However, on 6 June 2013, the Somali Cabinet announced that it firmly rejected the MOU and did not intend to enter into negotiations "on maritime demarcation or limitations on the continental shelf".

As the date for consideration of Kenya's submission by the CLCS drew closer still, Somalia went one step further. On 4 February 2014, it asked the United Nations to remove the MOU from the register of treaties. The same day, it formally objected to the consideration by the CLCS of Kenya's submission. As a result, in March 2014, the CLCS postponed its examination of that submission.

24. In the meantime, the competent authorities in Nairobi had become alarmed about the situation. In a Note of 12 February 2014, Ms Mwangi, Head/Legal and Host Country Affairs Directorate (Kenyan Ministry of Foreign Affairs), notified the Cabinet Secretary that "[i]t is . . . 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". One week later, Kenya contacted Somalia to propose holding negotiations.

At the first meeting held on 26 and 27 March 2014, Kenya proposed an agenda addressing both the implementation of the MOU and the establishment of maritime boundaries. The Somali delegation, according to its own report, "objected to a line item in the proposed agenda referring to a discussion of the Memorandum of Understanding". However, it "stated that they [were] willing to discuss all issues relating to maritime delimitation, including the failure to consent to the Commission's review of Kenya's submission, as a comprehensive package". In other words, Somalia refused to include the implementation of the MOU on the agenda, but indicated that it could be discussed at a later date in a broader context. Discussions on the MOU were thus suspended and they turned to the delimitation of maritime spaces. As we know, those discussions did not succeed.

25. It should be added that subsequently, on 2 September 2014, Somalia renewed its opposition to the consideration of Kenya's submission by the CLCS. It was under these circumstances that, on 4 May 2015, Kenya in turn objected to the consideration of Somalia's submission. However, Kenya withdrew its objection on 30 June 2015 and Somalia followed suit on 7 July 2015.

26. Thus, from March 2010 to July 2015, Somalia continually refused to implement the MOU, which it regarded as "void and of no effect" (Judgment, para. 19). It was not until July 2015 that it withdrew its objection to the consideration of Kenya's submission by the CLCS.

It should further be noted that, up until May 2015, Kenya made repeated attempts to get Somalia to apply the MOU. Faced with the latter's persistent refusal, it tried to resolve the issue by proposing to discuss the implementation of the MOU and the delimitation of maritime boundaries simultaneously.

27. Can this willingness to enter into boundary negotiations now be used against Kenya? In other words, by consenting to these negotiations, did Kenya renounce its rights under paragraph 6 of the MOU? I doubt it very much.

It is first worth noting that, according to extensive jurisprudence, any renunciation of a right must be clear and unequivocal. As the Court stated recently, "waivers or renunciations of claims or rights must either be express or unequivocally implied from the conduct of the State alleged to have waived or renounced its right" (*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 266, para. 293). In practice, I have been unable to find a single case in which the Court has recognized the existence of a renunciation.

28. What about in this case?

In 2014, Kenya undeniably entered into discussions with Somalia on the delimitation of all their maritime spaces. Should it be concluded that, in so doing, it implicitly waived its rights under paragraph 6 of the MOU?

I do not believe so. At that time, Somalia regarded the MOU in question as "void and of no effect", and objected to the consideration of Kenya's submission by the CLCS. With a view to lifting this veto, Kenya proposed holding simultaneous discussions on the implementation of the MOU and the establishment of maritime boundaries. Kenya initiated these twofold discussions in the hope that Somalia would withdraw its objection to the consideration of Kenya's submission by the CLCS. At the first meeting, Somalia refused to include the MOU on the agenda. At the same time, however, it stated that it was willing to consider a comprehensive agreement with Kenya and the latter then agreed to enter into a study of the boundaries. This consent was conditional. It was given on the understanding that the MOU would be discussed at a later date, which never happened.

In fact, what was envisaged in 2014 was the conclusion of a new, comprehensive agreement to replace the MOU. In this new agreement the Parties could have established their boundaries, consented to the consideration of their submissions by the CLCS and resolved the other maritime issues between them. They would thus have repealed or modified paragraph 6 of the old MOU, which they were free to do. They

did not do so, the MOU remained in force and Kenya can rely on it today.

Indeed, I find it difficult to see how one could conclude from the discussions that Kenya held with Somalia in 2014 with a view to signing a comprehensive agreement that, in so doing, it renounced its rights under the existing agreement, when those rights were denied by Somalia, when Kenya could not avail of them because of Somalia's stance and when Kenya was seeking to lift Somalia's veto by means of the discussions entered into.

29. There is one remaining argument put forward by Somalia. The Applicant claims, in the alternative, that, even if the MOU had created an obligation to negotiate, such negotiations took place in 2014 and therefore the Court can now be seised.

In my view, there are two problems with this argument. First, the 2014 discussions did not fall within the framework of the MOU, which Somalia rejected at the time and which Kenya was seeking to have implemented. Second, they were nothing more than two parallel presentations of the Parties' points of view, with no attempt at compromise. And as the Court pointed out in the case concerning the *North Sea Continental Shelf* (*Judgment, I.C.J. Reports 1969*, p. 47, para. 85), negotiations are not meaningful when the parties insist upon their own positions without contemplating any modification thereof (as was the case here).

30. Ultimately, at the time of the said negotiations, Somalia considered the MOU to be "void and of no effect". Thus, the Parties' conduct in 2014 cannot be regarded as an agreement on the interpretation of the MOU in the sense of Article 31, paragraph 3, of the Vienna Convention on the Law of Treaties. Furthermore, in the circumstances of the present case, Kenya cannot be regarded as having renounced the rights it derives from paragraph 6 of the MOU.

31. This leaves the *travaux préparatoires* and the circumstances in which the MOU was concluded. In the Court's view, these confirm its interpretation of paragraph 6. I do not agree with this assessment. Indeed, as the Court moreover recognized, the *travaux préparatoires* are virtually silent on paragraph 6. Nor do the circumstances in which the MOU was concluded provide us with any further clarification. Therefore, they can neither contradict nor confirm the interpretation of that paragraph.

32. Under these circumstances, I continue to disagree with the Court's interpretation of paragraph 6 of the MOU. This paragraph establishes the method and the time for settling the maritime dispute between the two Parties. That time had not come. Therefore, and by virtue of the reservation to Kenya's declaration recognizing the jurisdiction of the Court, it is not competent to entertain Somalia's Application.

(*Signed*) Gilbert GUILLAUME.