



INTERNATIONAL COURT OF JUSTICE

Peace Palace, Carnegieplein 2, 2517 KJ The Hague, Netherlands

Tel.: +31 (0)70 302 2323 Fax: +31 (0)70 364 9928

Website: www.icj-cij.org Twitter Account: @CIJ_ICJ

Summary

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

Summary of the Judgment of 2 February 2017

I. INTRODUCTION (PARAS. 15-30)

The Court first notes that 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. Both States signed the United Nations Convention on the Law of the Sea (UNCLOS) 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 (CLCS). 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. 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.

The Court recalls that, on 7 April 2009, the Kenyan Minister for Foreign Affairs and the Somali Minister for National Planning and International Cooperation 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". 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. On 6 May 2009, Kenya deposited with the CLCS its submission with respect to the continental shelf beyond 200 nautical miles. 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. In the following years, both Parties raised and withdrew objections to the consideration of each other's submissions by the CLCS. Those submissions are now under consideration.

On 28 August 2014, Somalia instituted proceedings against Kenya before the Court, requesting the latter 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 the continental shelf beyond 200 nautical miles. As basis for the Court's jurisdiction, Somalia invoked the declarations recognizing the Court's jurisdiction as compulsory made by the two States. Kenya, however, raised two preliminary objections: one concerning the jurisdiction of the Court, the other the admissibility of the Application.

II. THE FIRST PRELIMINARY OBJECTION: THE JURISDICTION OF THE COURT (PARAS. 31-134)

In its first preliminary objection, Kenya argues that the Court lacks jurisdiction to entertain the present case as a result of one of the reservations to its declaration accepting the compulsory jurisdiction of the Court, which excludes disputes in regard to which the parties have agreed "to have recourse to some other method or methods of settlement". It asserts that the MOU constitutes an agreement to have recourse to another method of settlement. It adds that the relevant provisions of UNCLOS on dispute settlement also amount to an agreement on the method of settlement.

The Court first considers the MOU and whether that instrument falls within the scope of Kenya's reservation. It begins by examining the legal status of the MOU under international law. It explains that 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 (paras. 36-106)

1. The legal status of the MOU under international law (paras. 36-50)

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.

Under the customary international law of treaties, which is applicable in this case since neither Somalia nor Kenya is a party to the 1969 Vienna Convention on the Law of Treaties, an international agreement concluded between States in written form and governed by international law constitutes a treaty. The MOU is a written document, in which the Parties 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 considered 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. Furthermore, it is clear from the actual terms of the MOU, which make express provision for it to enter into force upon signature, and the terms of the authorization given to the Somali Minister, that this signature expressed Somalia's consent to be bound by the MOU under international law. 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 (paras. 51-105)

The Court turns to the interpretation of the MOU. This instrument consists of seven paragraphs, which are unnumbered. In order to facilitate references to the paragraphs, the Court considered it convenient to insert numbering in its analysis.

In interpreting the MOU, the Court applies 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. 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.

The sixth paragraph of the MOU is at the heart of the first preliminary objection 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 purpose of the MOU. The Court therefore proceeds first of all to such an analysis, before examining the sixth paragraph.

The Court observes that 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. 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 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.

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. 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. In addition, 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. 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.

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.

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. 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.

The Court considers that it is reasonable to read the sixth paragraph of the MOU in light of Article 83, paragraph 1, of UNCLOS. 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 preclude recourse to dispute settlement procedures in case agreement could not be reached. 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 . . .”. It is clear from the case file that Kenya did not consider itself bound by the wording of the sixth paragraph to wait for the CLCS’s 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. 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. 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.

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, 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, 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. Finally, the MOU repeatedly indicates that the CLCS process leading to delineation is to be without prejudice to delimitation, treating the two as distinct.

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.

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.

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 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 (para. 106)

The Court concludes that the MOU does not 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
(paras. 107-133)

The Court next considers whether Part XV of UNCLOS (entitled “Settlement of disputes”) amounts to an agreement on a method of settlement for the maritime boundary dispute within the meaning of Kenya’s reservation.

It first recalls that 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). Finally, while Article 282 makes no express reference to an agreement to the Court’s jurisdiction resulting from optional clause declarations, it nevertheless provides 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 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, 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.

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. 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.

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.

As previously noted, Kenya’s acceptance of the Court’s jurisdiction extends to “all disputes”, 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. Accordingly, this dispute does not, by virtue of Part XV of UNCLOS, fall outside the scope of Kenya's optional clause declaration.

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.

C. Conclusion (para. 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 (PARAS. 135-144)

The Court then considers Kenya's preliminary objection to the admissibility of Somalia's Application. In support of its contention that the Application is inadmissible, Kenya makes two arguments.

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. The Court having previously found that the MOU did not contain such an agreement, it must also reject this aspect of Kenya's second preliminary objection.

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. 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.

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

IV. OPERATIVE PART (PARA. 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.

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.

Declaration of Vice-President Yusuf

1. Vice-President Yusuf agrees with the Court's decision on the preliminary objections raised by Kenya and the reasoning that led the Court to its decision. Nevertheless, the circumstances in which the present dispute regarding the jurisdiction of the Court has arisen call for some observations to be made.

2. The Memorandum of Understanding ("MOU") in this case was drafted, as a matter of fact, by Ambassador Hans Wilhelm Longva of Norway in the context of assistance provided by Norway to African 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 UN Convention on the Law of the Sea.

3. Many African States lack the requisite geological, geophysical, and hydrological technical expertise to compile a submission to the CLCS; in this respect, Norway's assistance was invaluable. However, this technical assistance should be distinguished from the drafting and conclusion of the MOU, which is a legal and policy matter that could have easily been directly negotiated by the two neighbouring States.

4. More than 50 years after their independence, it is surprising that Somalia and Kenya are in dispute over an agreement that they neither negotiated nor drafted. International law in the twenty-first century is more important than ever; its effects pervade the daily lives of people throughout the world. 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.

5. 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, should pay particular attention to the contents of such agreements.

Dissenting opinion of Judge Bennouna

In the case brought by Somalia concerning maritime delimitation in the Indian Ocean, the Court has rejected Kenya's first preliminary objection concerning the existence of another method of dispute settlement under paragraph 6 of the memorandum. The issue being one of interpretation of that paragraph, the Court referred to the general rule of interpretation enshrined in Article 31 of the Vienna Convention on the Law of Treaties. It lays down, as a starting point, the ordinary meaning of the terms of the treaty. But the Court proceeded differently and assumed that paragraph 6 was difficult to understand without an overall analysis of the context in which it should be interpreted, as well as its object and purpose. In doing so, the Court reversed the general rule of interpretation and reached the conclusion that the sixth paragraph did not constitute another method of settlement of the maritime dispute and therefore did not trigger Kenya's reservation. The reasoning by analogy between paragraph 6 and Article 83 of UNCLOS has led the Court to erroneous conclusions since these provisions are not comparable. In particular, unlike Article 83 of UNCLOS, paragraph 6 contains a precise time constraint. Ultimately, the Court has come to give a different meaning to the terms of the sixth paragraph which is unrelated to their ordinary meaning, holding that they do not establish a dispute settlement procedure likely to fall within the scope of Kenya's reservation.

Joint declaration of Judges Gaja and Crawford

Judges Gaja and Crawford disagreed with the reasons of the majority on issues of both jurisdiction and admissibility concerning the MOU.

On jurisdiction, they reasoned that paragraph 6 of the MOU, by setting an obligation to negotiate, would not affect the Court's jurisdiction unless it fell within Kenya's optional clause reservation. The words "other method . . . of settlement" in Kenya's reservation contemplate a method of resolving the dispute. But negotiations in good faith may not result in such a resolution. In order for negotiations to be caught by Kenya's reservation, either the Parties must have agreed to reach an agreement by negotiation (i.e., a pactum de contrahendo) or negotiation would have to be stipulated as the exclusive method of settlement. The Parties agree that paragraph 6 of the MOU does not impose an obligation to reach an agreement. Neither is there any ground for suggesting that the Parties intended to exclude resort to other methods of settlement if negotiations failed. Thus paragraph 6 was not caught by Kenya's optional clause reservation.

On admissibility, Judges Gaja and Crawford reasoned that paragraph 6 of the MOU bound each party to refrain from taking unilateral action to trigger dispute settlement before the CLCS had made its recommendation. However, the Parties were free to derogate from this time-limit, which they did in 2014 by commencing negotiations without reserving their position under paragraph 6. By doing so, they set aside the time-limit in paragraph 6, making the Application of Somalia admissible.

Dissenting opinion of Judge Robinson

Judge Robinson disagrees with the majority's rejection of Kenya's first preliminary objection. However, the opinion focuses on the rejection of the second basis advanced by Kenya for its first preliminary objection since, in his 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.

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".

Given this lucid and unambiguous text, Judge Robinson argues that it is wholly unreasonable for the majority 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.

Judge Robinson takes issue with the numerical criterion — the majority's conclusion relies on the fact that "more than half of the then-existing optional clause declarations" contained the Kenyan-type reservation — used by the majority to determine whether the travaux préparatoires can be construed as excluding the Kenyan-type reservation. He suggests that what is required is a qualitative evaluation of the impact of Kenya's reservation on the optional clause declarations of both States and that the signal failure of the majority decision is its refusal to carry out such an evaluation. In his view, such an evaluation clearly shows that the consensual bond required for optional clause declarations to found the jurisdiction of the Court cannot take root in the environment created by Kenya's reservation and that, therefore, there is no agreed procedure within the terms of Article 282 of UNCLOS to be applied in lieu of the procedures in Part XV.

He concludes that the net effect of the majority Judgment is to turn 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 referred to in Article 287, paragraph 1, subparagraph (c).

Dissenting opinion of Judge ad hoc Guillaume

Judge ad hoc Guillaume disagrees with the Court's decision to reject the first preliminary objection raised by Kenya in so far as it is based on the Memorandum of Understanding (MOU) of 7 April 2009. He takes the view that paragraph 6 of the MOU, interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in light of the MOU's object and purpose, establishes a method of settlement for the maritime delimitation dispute between Somalia and Kenya. By agreeing to it, the Parties undertook to negotiate with a view to reaching an agreement once the Commission on the Limits had reviewed their respective submissions concerning the outer limits of the continental shelf beyond 200 nautical miles.

Judge ad hoc Guillaume further considers that the discussions held by the Parties in 2014 cannot be construed as a subsequent agreement on the interpretation of paragraph 6 of the MOU, or as the expression of a renunciation by Kenya of its rights under that paragraph. Finally, in his view it cannot be argued that the obligation to negotiate contained in paragraph 6 has been exhausted.

Judge ad hoc Guillaume therefore concludes that, in view of Kenya's reservation to its declaration made under Article 36, paragraph 2, of the Statute — which excludes disputes in regard to which the parties to the dispute have agreed to have recourse to some other method of settlement — the Court should have found that it lacks jurisdiction.
