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CR 2016/11

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2016

Public sitting

held on Tuesday 20 September 2016, at 10 a.m., at the Peace Palace,

President Abraham presiding,

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

Preliminary Objections

VERBATIM RECORD

ANNÉE 2016

Audience publique

tenue le mardi 20 septembre 2016, à 10 heures, au Palais de la Paix,

sous la présidence de M. Abraham, président,

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

Exceptions préliminaires

COMPTE RENDU

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

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

M. Couvreur, greffier

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as Deputy-Agent;

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

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

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

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

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

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

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

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Mme Amy Sander, membre du barreau d'Angleterre,

Mme Philippa Webb, ***~~chargée d'enseignement~~ maître de conférences*** en droit international public au King's College (Londres), membre du barreau d'Angleterre et du barreau de New York,

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comme conseillers.

Le PRESIDENT : Veuillez vous asseoir. L'audience est ouverte.

La Cour se réunit aujourd'hui pour entendre le premier tour de plaidoiries de la Somalie. Je donne à présent la parole à S. Exc. Mme Mona Al-Sharmani, agent adjoint. Excellence, vous avez la parole.

Ms AL-SHARMANI:

INTRODUCTION AND STRUCTURE OF ORAL ARGUMENT

1. Mr. President, distinguished Members of the Court, it is a great honour and a privilege for me to appear before you today as Deputy-Agent for the Federal Republic of Somalia. With me on behalf of the Somali Government is our Co-Agent, H.E. Ali Said Faqi, Somalia's Ambassador to the Kingdom of Belgium, and the Honourable Ahmed Dahir, Attorney-General of the Federal Republic of Somalia.

2. Please allow me to begin with an expression of thanks. The President of Somalia, H.E. Hassan Sheikh Mohamud, has personally asked me to convey to you — to the entire Court — the gratitude of the Somali nation. This is the first time Somalia has appeared as a party before an international court or tribunal. Even at this early stage, we have been greatly comforted by the efficiency and impartiality with which you have managed our case. We are confident that this Court will — as its name attests — do justice in accordance with international law.

3. We also wish to thank the Honourable Agent of Kenya for the kind greetings he extended to us yesterday, and return them to him and his team warmly.

4. Mr. President, distinguished Members of the Court, it is no secret that Somalia has faced considerable challenges. Our recent history has been fraught with instability, poverty and conflict. For long years, we have endured civil war, humanitarian disasters and the scourge of terrorism.

5. But a brighter future is within our grasp. Since 2012, Somalia has had a functioning federal government under the leadership of President Hassan Sheikh Mohamud. With the support of international partners, we have a constitution that enshrines the rule of law and parliamentary democracy as bedrock principles.

6. Public institutions are being rebuilt. Next month we will have presidential and parliamentary elections. And life is springing back to cities like Mogadishu, Hargeissa, Bossaso,

Kismayo, Galkayo, Baidoa and many other places in Somalia. Local businesses are doing well. A new generation of Somalis is graduating with educational training, and many in the Somali diaspora are returning to assist with the rebuilding efforts.

7. We recognize, and express our deep gratitude to our Kenyan brothers and sisters for their enormous assistance in making this possible. In fact, we wish to thank all our African and other partners who continue to stand shoulder-to-shoulder with us in taking our country forward.

8. Mr. President, Members of the Court, for the first time, Somalia is in a position to have recourse to international dispute settlement mechanisms to protect our rights under international law — including our rights over maritime areas and the resources they hold. As one of the world's poorest countries, those resources are critical natural assets, vital to the future prosperity and stability of our nation. They will play a key role in assuring Somalia's continued development in a way that benefits our people.

9. Yet, our ability to explore for, let alone exploit, those natural resources has been seriously hindered by the lack of a defined maritime boundary with Kenya. In the absence of an established boundary, Somalia has exercised restraint and refrained from activities in the disputed area. Regrettably, Kenya has not taken the same approach. It seems to consider that the area in dispute belongs to it. Yesterday, you heard the Honourable Agent for Kenya claim that "Kenya has exercised uncontested jurisdiction in this maritime area since . . . 1979"[1]. Somalia does not agree, but the statement does reflect Kenya's misguided attitude. Kenya has, moreover, granted concessions in the area and exploration activities are already taking place.

10. Kenya's approach is of great concern to Somalia. The resolution of this case in a manner that achieves an equitable solution in accordance with the rule of law will allow us and others to know what is rightfully ours, and realize our full potential.

11. It is for that reason that the issues that are at the heart of this case unite all Somalis. Whatever other differences may divide us, it is no exaggeration to say that the eyes of the entire Somali nation are upon us today, and they will remain upon us until this Court renders its ultimate decision.

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[1]CR 2016/10, p. 14, para. 8 (Muigai).

12. Mr. President, distinguished Members of the Court, I know the issue that brings us here today concerns Kenya's objection to the Court's jurisdiction, not the merits of the case. But, speaking on behalf of the Government of Somalia, we think it is important for you to understand something of our motivation for coming before you, and how the Somali nation has entrusted its aspirations to you.

13. Yesterday, you heard Ambassador Muchiri suggest that Somalia rushed to the Court without giving negotiations a chance to succeed. The Honourable Ambassador hinted that the institution of these proceedings was an act of bad faith; she even accused us of "deception"[2].

14. With great respect to our neighbours Somalia takes great exception to that unfortunate and erroneous characterization. Appeal to international justice should never be considered an act of bad faith. On the contrary, the institution of proceedings in this great Court is an act of faith: faith in Somalia's capacity to defend its sovereignty and sovereign rights, faith in international justice, and faith in this Court's wisdom. *That* is why we are here today.

15. We seek nothing more and nothing less than to have our maritime boundary dispute with our Kenyan brothers and sisters be resolved finally and definitely in an equitable manner, in accordance with the requirements of international law, including the Law of the Sea Convention. Doing so will serve the interests of peace and stability in the region and it will confirm the central role of this Court in resolving disputes of this kind.

16. Somalia has not rushed to the Court prematurely. As the evidence Somalia has placed before you demonstrates, we negotiated in good faith, and with great effort and energy before initiating those proceedings, but to no avail. I personally had the honour of participating in those negotiations, over two intense rounds. They were not just "technical level" meetings as you heard yesterday[3]. Indeed, our respective Foreign Ministers personally presided at the second round.

17. The talks were hard and sometimes heated. The positions taken by the Parties were far apart and irreconcilable. Kenya insisted that the boundary must follow a parallel of latitude. Somalia insisted that the jurisprudence of the Court and other international tribunals required a delimitation based on equidistance. We could not even agree on a method of delimitation, let alone

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[2]CR 2016/10, p. 50, para. 14 (Muchiri).

[3]CR 2016/10, p. 46, para. 2 (Muchiri).

a boundary. Views were exchanged. No movement occurred. Kenya then failed to honour its commitment to attend a subsequent meeting — a meeting that it insisted on having as a last and final resort — and did so without prior notice or later explanation. We only learned of its purported security concerns when it filed its Preliminary Objections in October 2015.

18. Counsel for Kenya asked yesterday why we submitted our Application so promptly after Kenya failed to attend those meetings. The answer is very simple. As you will hear our counsel will explain shortly, this third meeting was specifically intended to be a final opportunity, a last try to bridge our differences. There had been no movement during the prior sessions and Kenya's unilateral activities in the disputed area were ongoing. Adding to the sense of urgency was the knowledge that Kenya could, by its terms, withdraw its Article 36 (2) declaration at any time and forever prevent us from accessing this great Court.

19. Under the circumstances, Somalia did what any prudent State would do: we considered our options and prepared for all contingencies. When Kenya failed to turn up for the third and final round of talks without explanation, we felt we had no alternative but to come before this Court to protect our rights under international law.

20. Mr. President, Members of the Court, Kenya's objection to your jurisdiction is, as you heard yesterday, founded primarily on the argument that the 2009 MOU constitutes an agreement to have recourse to some other method of dispute settlement within the meaning of Kenya's reservation to its Article 36 (2) declaration. Somalia disagrees.

21. In our view, the one — and the only — purpose of the MOU was to assure that there would be no obstacle to the CLCS's consideration of our two countries' submissions concerning the establishment of the continental shelf beyond 200 nautical miles. The very title of the document confirms this. The MOU is entitled "Memorandum of Understanding between the Government of the Republic of Kenya and the Transitional Federal Government of the Somali Republic to grant 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"[4]. There is no indication that the MOU was intended to, or indeed in fact, establish an agreed method of dispute settlement that could bar this Court's jurisdiction.

22. As our very able counsel will show you in the course of this morning, at no time, whether before or after the signing of the MOU did Kenya or Somalia understand the MOU to have the effect Kenya now seeks to ascribe to it. As I said, we did negotiate, and negotiate hard. The record shows that we engaged in a substantive and detailed exchange of views. Kenya never once expressed the view that negotiations were provisional only, and that any agreement, should there be one, would have to wait until after the CLCS has issued its recommendations. That would have been illogical and contrary to Kenya's expressed wish to reach an amicable solution promptly.

23. Mr. President, Members of the Court, in Somalia's view, Kenya cannot truly believe that the MOU created a binding commitment to an alternative method of dispute settlement. Rather, it appears that Kenya is looking for a way to avoid the Court's exercise of jurisdiction, and thus avoid a binding judgment upon the Parties. It is hard to avoid the conclusion that Kenya lacks confidence in the merits of its case. The Court has never delimited a boundary on the basis of Kenya's approach, and the applicable international law — the 1982 Convention — does not direct it. Nor do the decisions of other international courts or arbitral tribunals offer support to Kenya's unlikely arguments.

24. Perhaps that is why Kenya has now fallen back to an even more unlikely argument: that UNCLOS itself constitutes an agreement to an alternative method of dispute settlement within the meaning of its reservation to its Article 36 (2) declaration. This argument, which took up all of one sentence in Kenya's written pleading, has now assumed a much greater prominence. As Professor Sands will show, it can be rejected just as easily.

25. Kenya is represented by able and experienced counsel. It knows that it does not have a serious case on the merits. But if they can force us back into negotiations, without hope of judicial recourse, they can refuse to agree unless we give them a large portion of our EEZ and continental shelf, something no self-respecting Somali Government could ever do. Kenya can use its greater

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[4]Memorandum of Understanding between the Government of the Republic of Kenya and the Transitional Federal Government of the Somali Republic to Grant to Each Other No-Objection in Respect of Submissions on the Outer Limits of the Continental Shelf beyond 200 Nautical Miles to the Commission on the Limits of the Continental Shelf, 2599 United Nations, *Treaty Series (UNTS)* 35 (7 Apr. 2009); MS, Vol. III, Ann. 6.

political and economic power to prevent us from accessing the resources to which international law entitles us.

26. Moreover, continued uncertainty over the course of our maritime boundary does not benefit anyone. The dispute will remain an unwelcome source of tension between our two countries at a time when what is needed is more increased co-operation. If we are to have any hope of a durable and equitable solution that contributes to regional peace and security, it lies here, in this Great Hall of Justice, and in the hands of the distinguished Members of this Court.

27. Mr. President, Members of the Court, with that I come to the organization of our first round presentations. Following me to the podium this morning will be Professor Alain Pellet. He will explain why, as a simple matter of treaty interpretation, the MOU does not constitute an agreement to settle the Parties' delimitation dispute by the exclusive means of negotiation only after the CLCS issues its recommendations.

28. Professor Pellet will be followed by Mr. Paul Reichler who will address the evidence relevant to Kenya's preliminary objection. Mr. Reichler will address the circumstances of the MOU's conclusion and show that no one, at any time, took the view that the MOU created — or was intended to create — a dispute settlement mechanism. This includes Norway, which was instrumental in the drafting and signing of that document. Mr. Reichler will show that the only purpose of the document was to enable the CLCS to consider both Somalia's and Kenya's submission in respect of the continental shelf beyond 200 nautical miles.

29. Mr. Reichler will also show that the conduct of the Parties following the execution of the MOU constitutes further compelling evidence that neither Kenya nor Somalia considered the MOU to have established a specific or exclusive means of settling the maritime boundary dispute, let alone one that obligated the Parties to resolve the dispute only by agreement and only after the CLCS had issued recommendations on their respective submissions.

30. Finally, Professor Philippe Sands will demonstrate that the MOU does not fall within the scope of Kenya's reservation to its Optional Clause declaration. He will also show that, even if the MOU had created an obligation to engage in negotiations — which Somalia emphatically rejects — any such obligation has been amply fulfilled. He will also show that Kenya's newly developed

argument based on UNCLOS is ill-conceived. On any view, then, there is no bar to this Court's jurisdiction.

31. Mr. President, Members of the Court, thank you for your time and courteous attention. I ask that you now invite Professor Pellet to the podium.

Le PRESIDENT : Je vous remercie, Madame. La parole est à M. le professeur Alain Pellet.

M. PELLET :

L'INTERPRÉTATION CORRECTE DU *MOU*

1. Merci Monsieur le président. Monsieur le président, Mesdames et Messieurs de la Cour, tout à l'heure, le professeur Sands montrera que le Memorandum of Understanding — le «*MoU*» — n'entre pas dans les prévisions de la réserve du Kenya à la compétence de la Cour. Cela suppose de préciser sa signification — telle est la tâche que M[e] Reichler et moi nous partageons, en suivant la voie tracée par les articles 31 et 32 de la convention de Vienne sur le droit des traités : il m'échet d'établir que l'interprétation du *MoU* avancée par le Kenya conduit à un résultat manifestement absurde et déraisonnable lorsqu'on en interprète le texte de bonne foi, dans son contexte, et à la lumière de son objet et de son but. Ensuite, *il maestro* montrera que tant la pratique ultérieurement suivie par les Parties que les travaux préparatoires et les circonstances dans lesquelles le mémorandum a été conclu confirment entièrement l'interprétation que nous en faisons.

2. Et je vous prie, Monsieur le président, comme je prie les mânes de Basdevant, de bien vouloir me pardonner : ce mémorandum, je le désignerai par son sigle anglais — *MoU* — car «Mémorandum de compréhension» ne signifie strictement rien en français et ni «MOU» ni «M.O.U.» ne sonnent particulièrement bien dans la langue de Racine et de Baudelaire...

3. Toute l'argumentation du Kenya contestant votre compétence pour vous prononcer sur la requête de la Somalie repose sur le dernier paragraphe du *MoU* — ou, plus exactement sur un membre de phrase de ce paragraphe qu'il isole de son contexte[5] :

[5] Voir CR 2016/10 (Akhavan, par. 14-22 ; Forteau, par. 11-12).

> «The delimitation of maritime boundaries in the areas under dispute, including the delimitation of the continental shelf beyond 200 nautical miles,» — and this is the phrase: «*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*»[6].

Kenya contends that this paragraph

> «sets forth the method of dispute settlement that would follow the CLCS review, and specifies that it shall apply to the entire maritime boundary, both within and beyond 200 NM»[7].

4. Négligeant la «règle générale d'interprétation» (I.), cette approche originale ne tient compte ni du contexte de la disposition sur laquelle le Kenya fait fond, ni de l'objet et du but du *MoU* (II.), ce qui conduit à un résultat qui est manifestement absurde et déraisonnable (III.).

I. Bref rappel d'évidences méconnues par le Kenya sur la «règle générale d'interprétation»

5. Monsieur le président, dans sa présentation d'hier matin, Mathias Forteau a résumé en moins de deux minutes les cinq premiers paragraphes du *MoU*[8] pour se concentrer exclusivement sur ce paragraphe 6. Quant au professeur Akhavan il a «embrayé» immédiatement sur celui–ci, sans s'embarrasser le moins du monde des paragraphes précédents[9]. Ce faisant, ils ne tiennent aucun compte de la «règle générale d'interprétation» énoncée à l'article 31 de la convention de Vienne de 1969, dont j'ose à peine rappeler qu'il exprime le droit international coutumier[10].

6. Je précise au passage, Monsieur le président, que je me fonde sur cette disposition sans, pour autant, concéder — ni d'ailleurs nier — que le *MoU* soit un traité en vigueur entre les Parties. Il n'est pas nécessaire de prendre position sur ce point : il suffit d'interpréter cet instrument pour

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[6] Mémorandum d'accord entre le Gouvernement de la République du Kenya et le Gouvernement fédéral de transition de la République somalienne, afin d'accorder à chacun non-objection à l'égard des communications à la Commission des limites du plateau continental sur les limites extérieures du plateau continental au-delà de 200 milles marins, Nairobi (7 avril 2009), *Recueil des traités des Nations Unies (RTNU)*, vol. 2599, I-46230 (mémoire de la Somalie (MS), vol. III, annexe 6).

[7] Exceptions préliminaires du Kenya (EPK), p. 25, par. 53. Voir aussi CR 2016/10 (Forteau, par. 3-4).

[8] CR 2016/10 (Forteau, par. 3).

[9] CR 2016/10 (Akhavan, par. 14-15).

[10] *Ile de Kasikili/Sedudu (Botswana/Namibie), arrêt, C.I.J. Recueil 1999 (II)*, p. 1059, par. 18 (citant *Différend territorial (Jamahiriya arabe libyenne/Tchad), arrêt, C.I.J. Recueil 1994*, p. 21, par. 41 ; *Plates-formes pétrolières (République islamique d'Iran c. Etats-Unis d'Amérique), exception préliminaire, arrêt, C.I.J. Recueil 1996 (II)*, p. 812, par. 23). Voir aussi *Sentence arbitrale du 31 juillet 1989 (Guinée-Bissau c. Sénégal), arrêt, C.I.J. Recueil 1991*, p. 70, par. 48 ; *Délimitation maritime et questions territoriales entre Qatar et Bahreïn (Qatar c. Bahreïn), compétence et recevabilité, arrêt, C.I.J. Recueil 1995*, p. 18, par. 33 ; *Licéité de l'utilisation des armes nucléaires par un Etat dans un conflit armé, avis consultatif, C.I.J. Recueil 1996 (I)*, p. 75, par. 19 ; *Certaines questions concernant l'entraide judiciaire en matière pénale (Djibouti c. France), arrêt, C.I.J. Recueil 2008*, p. 222, par. 123 ; *Différend maritime (Pérou c. Chili), arrêt, C.I.J. Recueil 2014*, p. 28, par. 57.

constater qu'il ne constitue nullement un obstacle à l'exercice de votre compétence ; et il est reconnu et indiscutable que la règle de l'article 31 de la convention de Vienne s'applique aussi, par analogie, à des instruments non conventionnels[11].

7. En vertu du premier paragraphe de cette disposition «[u]n traité doit être interprété de bonne foi suivant le sens ordinaire à attribuer aux termes du traité dans leur contexte et à la lumière de son objet et de son but». «Conformément à l'article 31 de la *convention de Vienne*, le «sens ordinaire» des termes d'un traité ne peut être défini *que* dans leur contexte et à la lumière de l'objet et du but du traité»[12]. Et c'est cela, Monsieur le président, *la* règle générale d'interprétation : c'est une norme globale et complexe dont on ne peut détacher les éléments un par un comme on effeuille la marguerite — une règle tellement bien établie que la Cour n'a pas besoin de s'y attarder longuement : elle l'applique dans sa globalité sans ressentir le besoin de s'en expliquer[13]. Dans son rapport final sur le droit des traités de 1966, la Commission du droit international avait expliqué qu'

> «en mettant le titre de l'article (*Règle* générale d'interprétation) au singulier, [... la Commission avait] voulu indiquer que l'application des moyens d'interprétation prévus dans l'article constituait *une seule opération complexe*. Tous les différents éléments, tels qu'ils se trouvent présents dans une situation donnée, seraient jetés dans le creuset et la résultante de leur interaction constituerait l'interprétation juridiquement pertinente. Ainsi, l'article 27 [qui allait devenir l'article 31] est intitulé la «*Règle* générale d'interprétation», au singulier, et non «*Règles* générale<u>s</u>», au pluriel, parce que la Commission a voulu souligner que le processus d'interprétation constitue un tout et que les dispositions de l'article forment une seule règle, étroitement intégrée.»[14]

8. Cette caractéristique essentielle de l'article 31 et ses conséquences pratiques ont été excellemment rappelées dans la sentence arbitrale du 12 mars 2004 rendue dans l'affaire de l'*Apurement des comptes entre la France et les Pays–Bas*, qui a insisté vigoureusement sur l'unité

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[11] Voir, par exemple, sentence arbitrale du 22 juillet 2009, *in the Matter of an Arbitration before a Tribunal Constituted in accordance with Article 5 of the Arbitration Agreement between the Government of Sudan and the Sudan People's Liberation Movement/Army on Delimiting Abyei Area*, par. 572 ; sentence arbitrale partielle du 30 janvier 2007, *Eurotunnel c. Royaume-Uni et France*, par. 92 ; *Conformité au droit international de la déclaration unilatérale d'indépendance relative au Kosovo, avis consultatif, C.I.J. Recueil 2010 (II)*, p. 494, par. 94.

[12] Rapport de l'organe d'appel de l'OMC (21 décembre 2009), Chine — Mesures affectant les droits de commercialisation et les services de distribution pour certaines publications et certains produits de divertissement audiovisuels, AB-2009-3, par. 348 ; les italiques sont de nous.

[13] Voir, pour des exemples récents, *Différend maritime (Pérou c. Chili), arrêt, C.I.J. Recueil 2014*, p. 28, par. 57 ; ou *Chasse à la baleine dans l'Antarctique (Australie c. Japon ; Nouvelle-Zélande (intervenant)), arrêt, C.I.J. Recueil 2014*, p. 250-251, par. 55.

[14] Commission du droit international (CDI), projet d'articles sur le droit des traités, *Annuaire de la CDI, 1966*, vol. II, p. 239, paragraphe 8 du commentaire du projet d'article 27 ; les italiques sont de nous. Voir aussi *Annuaire de la CDI, 1966*, vol. II, p. 103 (observations du rapporteur). Voir aussi l'exposé écrit de la Somalie (EES), par. 3.12.

de la règle générale d'interprétation posée à l'article 31[15]. Telle est aussi la jurisprudence constante de la Cour, qui a toujours pris grand soin de ne pas détacher les uns des autres les quatre éléments clefs énumérés à l'article 31 : texte, objet et but, contexte, et pratique ultérieure[16]. Comme le disait déjà la Cour permanente en 1922 : lorsque l'on procède à l'interprétation d'un traité, «il faut évidemment lire celui-ci dans son ensemble, et l'on ne saurait déterminer sa signification sur la base de quelques phrases détachées de leur milieu et qui, séparées de leur contexte, peuvent être interprétées de plusieurs manières»[17]. C'est dire aussi que «[l]'interprétation selon la règle coutumière codifiée à l'article 31 de la *convention de Vienne* [est] en dernière analyse un exercice global qui ne devrait pas être mécaniquement scindé en parties rigides»[18]. Or c'est très exactement ainsi que procède le Kenya.

9. Au lieu de s'interroger sur le sens de la disposition à interpréter, il le postule, pour décréter ensuite qu'il n'y a rien à interpréter. C'est procéder à l'envers : il faut *d'abord* interpréter à la lumière de la règle générale de l'article 31 — et ce n'est *qu'ensuite* que l'on peut déterminer si le texte est clair ou non. Lorsqu'on se livre de bonne foi à cette opération, on constate que le *MoU* est en effet dénué de toute ambiguïté — mais qu'il signifie le contraire de ce que nos amis voudraient lui faire dire... S'il y avait une ambiguïté, il faudrait alors recourir aux moyens complémentaires de l'article 32. Ici, on peut y recourir, mais non pour dissiper une ambiguïté — il n'y en a pas —, mais pour confirmer l'interprétation qui résulte de l'application de la règle — générale, globale, complexe — de l'article 31[19]. L'interprétation qu'avance le Kenya s'en émancipe totalement. Elle ne tient compte ni de l'objet et du but du *MoU*, ni de son contexte.

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[15] *Affaire concernant l'apurement des comptes entre le Royaume des Pays-Bas et la République Française en application du Protocole du 25 septembre 1991 additionnel à la Convention relative à la protection du Rhin contre la pollution par les chlorures du 3 décembre 1976, Recueil des sentences arbitrales (RSA)*, vol. XXV, p. 295, par. 62 ; les italiques sont de nous. Voir aussi le paragraphe 64.

[16] Voir, par exemple, *Différend maritime (Pérou c. Chili*), *arrêt C.I.J. Recueil 2014*, p. 28, par. 57.

[17] *Compétence de l'OIT pour la réglementation internationale des conditions du travail des personnes employées dans l'agriculture, avis consultatif, 1922, C.P.J.I. série B n° 2*, p. 22. Voir aussi, notamment, *Composition du Comité de la sécurité maritime de l'Organisation intergouvernementale consultative de la navigation maritime, avis consultatif, C.I.J. Recueil 1960*, p. 158. Voir également, *Sentence arbitrale du 31 juillet 1989 (Guinée-Bissau c. Sénégal), arrêt, C.I.J. Recueil 1991*, opinion dissidente de M. Weeramantry, p. 133.

[18] Rapport de l'organe d'appel de l'OMC (21 décembre 2009), Chine - Mesures affectant les droits de commercialisation et les services de distribution pour certaines publications et certains produits de divertissement audiovisuels, AB-2009-3, par. 348.

[19] CR 2016/10 (Forteau, par. 10, 12, 20 ; Akhavan par. 20).

II. Le texte du *MoU* dans son contexte et à la lumière de son objet et de son but

10. Anzilotti, Monsieur le président, n'avait pas toujours raison ; mais on ne peut que partager, au sujet de l'«évidentialisme kényan»[20], la perplexité qu'exprimait le grand juge italien au sujet de l'*Interprétation de la convention de 1919 concernant le travail de nuit des femmes*, lorsqu'il se demandait

> «comment il est possible de dire qu'un article d'une convention est clair *avant* d'avoir déterminé l'objet ou le but de la convention, car c'est seulement dans cette convention et par rapport à cette convention que l'article assume sa véritable signification. ... La première question qui se pose est donc celle de savoir quels sont l'objet et le but de la convention dans laquelle trouve place l'article qu'il s'agit d'interpréter.»[21]

Et vous-mêmes, Mesdames et Messieurs les juges, avez souvent et abondamment insisté sur la nécessité de tenir compte, dans toute interprétation, du but et de l'objet de l'instrument en cause[22].

11. Comme l'a relevé assez récemment la CDI, «[i]l n'est pas facile de synthétiser en une formule unique l'ensemble des éléments qui doivent être pris en considération pour déterminer, dans chaque cas concret, l'objet et le but du traité. Cette opération relève sans aucun doute davantage de l'«esprit de finesse» que de l'«esprit de géométrie»[23]...»[24] — esprit de finesse dont j'ai le regret de constater que nos amis et contradicteurs manquent fâcheusement lorsqu'il s'agit du *MoU*, dont ils s'obstinent à vouloir interpréter «géométriquement» une phrase isolée de son contexte.

12. Dans cette même étude récente, la CDI a tenté la synthèse suivante :

> «L'objet et le but du traité doivent être déterminés de bonne foi, en tenant compte de ses termes dans leur contexte, en particulier du titre et du préambule du traité. On peut également avoir recours aux travaux préparatoires du traité et aux circonstances de sa conclusion et, le cas échéant, à la pratique subséquente des parties.»[25]

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[20] Voir par exemple, EPK, vol. I, par. 57, 130 ou 133. Voir aussi CR 2016/10, (Akhavan, par. 15 ; Forteau, par. 2-4, 28).

[21] *Interprétation de la convention de 1919 concernant le travail de nuit des femmes, avis consultatif, 1932, C.P.J.I. série A/B n° 50*, p. 383 ; les italiques sont de nous.

[22] Voir notamment, *Application de la convention de 1902 pour régler la tutelle des mineurs (Pays-Bas c. Suède), arrêt, C.I.J. Recueil 1958*, p. 67-68 ; *Plates-formes pétrolières (République islamique d'Iran c. Etats-Unis d'Amérique), exception préliminaire, arrêt, C.I.J. Recueil 1996 (II)*, p. 813, par. 27 et p. 815, par. 31 ; *Avena et autres ressortissants mexicains (Mexique c. Etats-Unis d'Amérique), arrêt, C.I.J. Recueil 2004 (I)*, p. 48, par. 85.

[23] Note de bas de page 1630 dans le texte original : «Blaise Pascal, *Pensées*, dans Œuvres complètes (Paris, Bibliothèque de la Pléiade, N. R. F. Gallimard 1954), p. 1091».

[24] CDI, *Guide de la pratique sur les réserves aux traités*, Nations Unies, doc. A/66/10/Add.l (2011), paragraphe 1 du commentaire de la directive 3.1.5.1. «Détermination de l'objet et du but du traité», p. 381.

[25] *Ibid.*, directive 3.1.5.1. «Détermination de l'objet et du but du traité», p. 382.

Ici encore, précise la Commission, «il ne s'agit pas de «décortiquer» le traité, d'examiner ses dispositions l'une après l'autre, mais bien d'en dégager l'«essence», le «projet» global»[26]. Ceci suppose que l'on se réfère non à quelques mots ou membres de phrase isolés mais, comme la Cour l'a fait à plusieurs reprises, à la «structure» même de l'instrument interprété telle qu'elle ressort de ses dispositions prises dans leur ensemble[27].

Projection n° 1 : Le *MoU* (titre officiel)

13. Non sans bon sens, la Cour a rappelé que l'objet d'un traité «est celui qui est indiqué dans son titre»[28]. Quel est-il en l'espèce ? «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 on the continental shelf beyond 200 nautical miles to the Commission of the limits of the continental shelf» — je répète : «afin d'accorder à chacun *non-objection à l'égard des communications* à la Commission des limites du plateau continental (CLPC) *sur les limites extérieures du plateau continental au-delà de 200 milles marins*». Tel est, Mesdames et Messieurs les juges, l'objet du *MoU*. Il n'est pas d'échapper à la compétence de votre Cour comme le voudrait le Kenya, qui affirmait dans ses exceptions que «[t]he object and purpose of the 2009 MoU was to agree on a method for the final settlement of the maritime boundary between Kenya and Somalia, both within and beyond 200 NM»[29]. Comme l'indique clairement son titre, le but du *MoU* est de permettre à la CLPC de s'acquitter de sa fonction de délinéation du plateau continental des deux Etats, nonobstant leur différend en ce qui concerne sa délimitation latérale — chacun s'engageant à ne pas objecter aux communications de l'autre. Et je comprends dans ces conditions que nos amis de l'autre côté de la barre aient préféré faire «profil bas» sur ce point. Tout juste le professeur Forteau a-t-il fait

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[26] CDI, *Guide de la pratique sur les réserves aux traités*, Nations Unies, doc. A/66/10/Add.l (2011), paragraphe 2) du commentaire de la directive 3.1.5, («Incompatibilité d'une réserve avec l'objet et le but du traité»), p. 374.

[27] Voir, par exemple, *Souveraineté sur Pulau Ligitan et Pulau Sipadan (Indonésie/Malaisie), arrêt, C.I.J. Recueil 2002*, p. 652, par. 51 ; voir aussi *Plates-formes pétrolières (République islamique d'Iran c. Etats-Unis d'Amérique), exception préliminaire, arrêt, C.I.J. Recueil 1996 (II)*, p. 813, par. 27.

[28] *Certains emprunts norvégiens (France c. Norvège), arrêt, C.I.J. Recueil 1957*, p. 24. Voir aussi *Plates-formes pétrolières (République islamique d'Iran c. Etats-Unis d'Amérique), exception préliminaire, arrêt, C.I.J. Recueil 1996 (II)*, p. 819, par. 47.

[29] EPK, p. 21-22, par. 46.

une allusion furtive au titre du mémorandum pour ensuite procéder «à l'envers» : «quel que soit l'objet et le but du traité ou son intitulé, il n'en demeure pas moins que l'accord de 2009 *contient* une disposition consacrée à la délimitation...»[30]. Assurément, Monsieur le président ! Mais que signifie-t-elle cette disposition ? C'est notre problème et il ne peut être résolu que si les termes de cette disposition sont interprétés «dans leur contexte et à la lumière de» l'objet et du but du traité.

14. Et je remarque en passant que ce long titre délibérément explicite n'a pas été donné au mémorandum *ex post*, au moment de son enregistrement par le Kenya, mais a fait l'objet de discussions entre les représentants des trois Etats impliqués dans son adoption. Proposé à l'origine par l'ambassadeur norvégien Longva au chef du service juridique du ministère kényan des affaires étrangères, M. Kihwaga, ce titre a été modifié à la demande expresse de la Somalie qui a souhaité que soit ajoutée la mention: «to each other» («à chacun»)[31].

Fin de la projection n° 1 — Projection n° 2 : Le *MoU* (par. 3)

15. Compte tenu de la nature indécise du *MoU*, il est difficile de parler d'un préambule *stricto sensu*, mais il est patent que les signataires ont été incités à préciser leur «principal souci»[32] dans un paragraphe, le troisième, qui est tout à fait éclairant et qui contribue très utilement à «clarifier le sens à attribuer à ses termes»[33] (je relève au passage que le Kenya décompte différemment les paragraphes — ce décalage n'a pas d'incidence sur le raisonnement). Ce paragraphe 3 est projeté à l'écran. Permettez-moi, Monsieur le président, d'en faire une lecture commentée :

— «Les deux Etats côtiers sont conscients que l'établissement des limites extérieures du plateau continental au-delà de 200 milles marins est *sans préjudice* [je souligne : «*sans préjudice*»] de la question de la délimitation du plateau continental entre des Etats ayant des littoraux adjacents ou qui se font face». La précaution est utile car, bien que la formule soit reprise tant par l'article 76, paragraphe 10, de la convention des Nations Unies sur le droit de la mer que

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[30] CR 2016/10 (Forteau, par. 17 ; les italiques sont dans l'original).

[31] Voir EPK, vol. II, annexe 14, courriel adressé à M. James Kihwaga par M. Hans Wilhelm Longva et lettre adressée par le Kenya à la Somalie le 29 janvier 2016.

[32] *Ile de Kasikili/Sedudu (Botswana/Namibie), arrêt, C.I.J. Recueil 1999 (II)*, p. 1073, par. 43.

[33] *Ibid.*, p. 1072.

par l'article 9 de son annexe II, l'article 5, alinéa *a)* de l'annexe I des Règles de procédure de la CLPC dispose que, «[d]ans le cas où il existe un différend terrestre ou maritime, la Commission n'examine *pas* la demande présentée par un Etat Partie à ce différend et ne se prononce *pas* sur cette demande» en l'absence d'«accord préalable de tous les Etats Parties à ce différend».

— Je reprends la lecture du *MoU* : «Bien que les deux Etats côtiers aient des intérêts divergents en ce qui concerne la délimitation du plateau continental dans la zone en litige, ils ont un sérieux intérêt commun à établir les limites extérieures du plateau continental *au-delà de 200 milles marins, sans préjudice* [je souligne à nouveau : «without prejudice»] de la future délimitation du plateau continental entre les deux Etats». Nous y voilà : tel est l'objet même du *MoU* : s'assurer que la ***délinéation*** — «l'établissement des limites extérieures» — du plateau continental des deux Etats ne soit pas retardée par l'absence de règlement du différend sur la délimitation. Je note d'ailleurs que les deux Etats sont au moins d'accord sur ce point : le Kenya écrit dans ses exceptions préliminaires : «It was apparent that an objection by either Party would waste the considerable costs of gathering and analysing data for the submissions and create a situation of perpetual limbo.»[34]

— Et le *MoU* enfonce le clou : «Sur cette base, les deux Etats côtiers sont déterminés à travailler ensemble à la sauvegarde et à la promotion de *leur intérêt commun en ce qui concerne l'établissement des limites extérieures du plateau continental* <u>*au-delà de 200 milles marins*</u>.»

16. L'élément clef de cette disposition est que les deux problèmes — de délimitation du plateau continental dans la zone en litige d'une part, de délinéation vers le large du plateau continental auquel chacun des deux Etats a droit d'autre part — que ces deux problèmes, disais-je, sont découplés et que, sauf en ce qui concerne le point d'aboutissement de la frontière maritime, la solution de l'un n'est pas conditionnée par celle de l'autre. Et le Kenya en convient : «*The second operative paragraph* emphasizes *that the MoU is without prejudice to the final delimitation of the maritime boundary…*»[35]. Chassez l'interprétation naturelle, elle revient au galop...

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[34] EPK, p. 22, par. 46.

[35] EPK, p. 23, par. 50, les italiques sont de nous ; voir aussi CR 2016/10 (Forteau, par. 4).

17. Ce paragraphe 3 «est de nature à éclairer l'interprétation des autres dispositions du traité»[36].

Fin de la projection n° 2 — Projection n° 3 : Le *MoU* (par. 4)

18. Le paragraphe suivant commence par des développements largement «explicatifs» (par opposition à «normatifs»). Il y est indiqué que le Gouvernement somalien entend soumettre des informations préliminaires sur la limite extérieure de son plateau continental au-delà de 200 milles marins avant la date-butoir du 13 mai 2009, y compris sur la zone en litige. Ainsi se trouve réaffirmé, par la Somalie, le but du *MoU* — étant entendu que cette communication

> «n'influera pas sur les positions des deux Etats côtiers en ce qui concerne le différend qui les oppose et sera sans préjudice de la future délimitation des frontières maritimes dans la zone en litige, y compris *la délimitation du plateau continental au-delà de 200 milles marins*».

Deux remarques textuelles sur cette sorte d'exposé des motifs de ce qui suit, Monsieur le président :

1) Sur l'expression «y compris» *(including)* : le professeur Akhavan en déduit que la portée du *MoU* «n'est clairement pas limitée au plateau continental étendu comme le prétend la Somalie»[37]. Assurément : cela veut dire en effet que les deux Etats ne pourront déterminer le point d'aboutissement de leur frontière commune — *«y compris au-delà de 200 milles marins»* qu'une fois reçues les recommandations de la CLPC.
2) Nos contradicteurs font grand cas du pluriel dans les expressions «frontières maritimes» et «zones en litige»[38]. Je ne suis pas sûr que ceci ait une très grande importance : c'est une façon de parler fort habituelle et l'on utilise couramment en la matière, de façon interchangeable le pluriel et le singulier. D'ailleurs, s'agissant de l'expression «zones en litige», elle n'est utilisée au pluriel que deux fois dans tout le *MoU* ; elle est au singulier dans le paragraphe 2 qui la décrit comme étant «*une* zone de chevauchement du plateau continental» ; même chose dans le paragraphe suivant et au début du paragraphe 4, celui actuellement projeté ; et puis le singulier

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[36] Affaire relative aux *Plates-formes pétrolières (République islamique d'Iran c. Etats-Unis d'Amérique), exception préliminaire, arrêt, C.I.J. Recueil 1996 (II),* p. 815, par. 31 ; voir aussi, *Certaines questions concernant l'entraide judiciaire en matière pénale (Djibouti c. France), arrêt, C.I.J. Recueil 2008*, p. 218, par. 109.

[37] CR 2016/10 (Akhavan, par. 16).

[38] CR 2016/10 (Akhavan, par. 16 ; Forteau, par. 4, 18, 20).

se meut au pluriel à la fin de ce même paragraphe ; et on revient au singulier dans tout le paragraphe suivant avant de repasser au pluriel dans le texte anglais du paragraphe 6 (le seul qui fait foi, il est vrai — mais les traducteurs français, peut-être plus cartésiens, s'en sont tenus, eux, au singulier !). Que déduire de tout ceci, Monsieur le président ? D'abord sûrement que ce mémorandum, rédigé en toute hâte, l'a sans doute été moins «précisément et méticuleusement» que nos contradicteurs ***voudraient*** le faire croire[39]. Ensuite, que, n'en déplaise à Mathias Forteau, on ne peut pas déduire grand-chose du «double pluriel» dont il fait si grand cas.

19. Et je reprends ma lecture : on en arrive, à la fin du paragraphe 4, à l'énoncé de l'une des clauses de fond — qui, elle, n'intéresse que la Somalie : «Sur la base de cet accord, la République du Kenya ne voit aucune objection à faire figurer les zones en litige dans la communication par la République somalienne des informations préliminaires indiquant *les limites extérieures du plateau continental au-delà de 200 milles marins.*»

Fin de la projection no 3 -- Projection n° 4 : Le *MoU* (par. 5)

20. Le paragraphe suivant est synallagmatique et constitue le cœur du *MoU*. Il y est convenu que, «à un moment approprié, ... chacun d'eux soumettra séparément une communication» à la CLPC ; que cette communication, qui pourra comprendre la zone en litige, demandera à la Commission «de formuler des recommandations *à l'égard des limites extérieures du plateau continental au-delà de 200 milles marins, sans tenir compte des frontières maritimes qui les séparent*» — «sans tenir compte de...» [«*without regard to...*»] — décidément les deux exercices sont distincts. Ensuite vient la phrase clef à laquelle renvoie le titre du *MoU* :

> «*Les deux Etats côtiers donnent par la présente leur consentement préalable à l'examen par la Commission de ces communications portant sur la zone en litige*. Les communications formulées devant la Commission et les recommandations approuvées par cette dernière à cet égard n'influenceront pas la position adoptée par les deux Etats côtiers concernant le différend maritime qui les oppose *et seront sans préjudice de la future délimitation des frontières maritimes dans la zone en litige, y compris la délimitation du plateau continental au-delà de 200 milles marins.*»

Toujours la même chose : deux opérations distinctes, non conditionnées l'une par l'autre : la délinéation par la CLPC peut se faire sans préjudice de la délimitation latérale — et vice-versa.

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[39] Voir CR 2016/10 (Akhavan, par. 16). Voir aussi, *ibid*. (Forteau, par. 20).

Fin de la projection n° 4 — Projection n° 5 : Le *MoU* (par. 6)

21. Et c'est alors, mais alors seulement, que l'on en arrive au paragraphe 6, le seul que le Kenya daigne lire, la disposition pour laquelle il a les yeux de Chimène[40]. Il faut la lire, bien sûr, *mais* dans son contexte et à la lumière de son objet et de son but :

> «La délimitation des frontières maritimes dans la zone en litige, y compris *la délimitation du plateau continental au-delà de 200 milles marins*, fera l'objet d'un accord entre les deux Etats côtiers sur la base du droit international après que la Commission aura achevé l'examen des communications séparées effectuées par chacun des deux Etats côtiers et formulé ses recommandations aux deux Etats côtiers *concernant l'établissement des limites extérieures du plateau continental au-delà de 200 milles marins.*»

Fin de la projection n° 5 — Projection n° 6 : Le paragraphe 6 du *MoU* revu et corrigé par le Kenya

22. Et voici maintenant la «traduction» qu'en donne le Kenya au paragraphe 47 de ses exceptions préliminaires :

> «The Parties … agreed that following CLCS review, after which the outer limits of the continental shelf could be definitively established, the method of settlement for delimitation of the full extent of the maritime boundary would be a negotiated agreement rather than recourse to any compulsory procedures.»[41]

Interprétation, trahison !

23. Bien entendu, le paragraphe 6 ne dit nullement ceci ! Il dit ... ce qu'il dit. A savoir que la délimitation *complète* des frontières maritimes entre les deux Etats se fera par accord après que la CLPC aura formulé ses recommandations. Ah, je sais, Monsieur le président, j'ai ajouté un mot : l'adjectif «complète» après «délimitation» et, *horresco referens*, il n'est pas dans le texte. Il n'y est pas, mais il y est nécessairement impliqué ; l'y insérer n'ajoute rien à la signification inévitable du texte, mais il en facilite la compréhension compte tenu du contexte de cette disposition et de l'objet et du but du *MoU* dans son ensemble. Et d'ailleurs, ce n'est pas moi qui l'ajoute, c'est le Kenya lui-même : un accord devrait permettre d'arrêter la délimitation *complète* de la délimitation maritime — «the method of settlement for delimitation *of the full extent* of the maritime boundary». Et hier, à plusieurs reprises, le Kenya a reconnu que c'est bien de *finalisation* qu'il s'agit[42] : le *MoU* n'empêche nullement les Parties de négocier un accord (et cela implique

[40] Voir Pierre Corneille, *Le Cid*.

[41] EPK, p. 22, par. 46 ; voir aussi p. 60, par. 133.

[42] CR 2016/10 (agent, par. 10 ; Akhavan, par. 18 ; Forteau, par. 18 ; Lowe, par. 15 et 19).

qu'elles peuvent le conclure !) ; en revanche, celui-ci ne peut être *finalisé* («finalized», «completed») par la fixation de son point terminal qu'une fois acquises les recommandations de la Commission.

24. Et cela est fort sensé, Monsieur le président ! Il relève en effet de l'évidence que le dernier segment de la frontière maritime ne peut être établi d'une manière définitive, complète, «full», que lorsque la CLPC aura déterminé que les deux Etats ont effectivement un titre maritime au-delà de 200 milles marins. En l'absence de titres qui se chevauchent, la délimitation du plateau continental au-delà de cette limite n'est pas nécessaire (ou elle devient caduque, si elle a été établie). De ce point de vue, il n'y a pas de désaccord entre les Parties qui reconnaissent, l'une et l'autre, que les deux Etats ont bel et bien des droits au-delà de 200 milles marins et que leurs titres — leurs «entitlements» — se chevauchent. Par ailleurs, il n'est pas douteux que le *point d'aboutissement* de la délimitation entre les Parties dépend des recommandations de la CLPC. Mais ceci ne signifie pas que les Parties ne peuvent pas décider par accord l'orientation de la ligne de délimitation avant que la Commission se soit prononcée, ni que la Cour (ou un tribunal arbitral) doive attendre les recommandations de la Commission pour établir une telle délimitation. Simplement, à la différence de ce qui se produit pour les autres espaces maritimes, la délimitation du plateau continental *au-delà de 200 milles marins* ne devient définitive — et n'autorise les Etats à y exercer leurs droits souverains — *que* lorsque la CLPC s'est prononcée sur leurs titres.

Fin de la projection n° 6 — Projection n° 7 : Accord entre le Kenya et la Tanzanie sur la délimitation de leur frontière maritime (23 juin 2009 — art. 2)

25. J'en veux pour preuve la pratique de nombreux Etats qui ont conclu des accords de délimitation fixant la limite de leur plateau continental étendu avant que la Commission ait adopté ses recommandations[43]. Et d'ailleurs, le Kenya lui-même n'a-t-il pas signé, le 23 juin 2009 (soit

[43] Treaty between Australia and the Independent State of Papua New Guinea concerning sovereignty and maritime boundaries in the area between the two countries, including the area known as Torres Strait, and related matters, 18 December 1978; Agreement on Marine Delimitation between the Government of Australia and the Government of the French Republic, New Caledonia, Chesterfield Islands, 4 January 1982; Treaty between the Government of Australia and the Government of the Republic of Indonesia establishing an exclusive economic zone boundary and certain seabed boundaries, 14 March 1997; Treaty between the Republic of Trinidad and Tobago and the Republic of Venezuela on the delimitation of marine and submarine areas, 18 April 1990; Treaty between the Government of the United States of America and the Government of the United Mexican States on the Delimitation of the Continental Shelf in the Western Gulf of Mexico beyond 200 Nautical Miles, 9 June 2000. Voir aussi Bjarni Már Magnússon, *The Continental Shelf Beyond 200 Nautical Miles: Delineation, Delimitation and Dispute Settlement*, Hotei Publishing 2015, p. 209-210.

deux mois après la conclusion du *MoU*), un accord avec la Tanzanie, qui délimite la zone économique exclusive et le plateau continental entre les deux Etats, y inclus au-delà de 200 milles marins ? L'article 2 de cet accord prévoit que «*the Parties agree that the boundary line extends eastwards* to a point where it intersects the outermost limits of the continental shelf and such other outermost limits of national jurisdiction as may be determined by international law»[44].

Fin de la projection n° 7

26. Cela confirme, si besoin était, que la délimitation n'est nullement dépendante de la délinéation comme le soutenait le Kenya dans ses exceptions préliminaires[45] et comme il a continué de le soutenir hier mais, m'a-t-il semblé, avec un peu moins de conviction. Car, quoiqu'en ait dit Mathias Forteau[46], la jurisprudence est maintenant logiquement et fermement établie[47]. Et, contrairement à ce qu'a laissé entendre mon excellentissime ami, je ne pense pas que l'arrêt de votre haute juridiction du 17 mars 2016, qui va dans le même sens, constitue un revirement de jurisprudence ; vous avez simplement saisi la première occasion qui se présentait à vous pour préciser que :

> «La procédure devant la Commission vise la délinéation de la limite extérieure du plateau continental, et, par conséquent, la détermination de l'étendue des fonds marins qui relèvent des juridictions nationales. Elle est distincte de la délimitation du plateau continental, régie par l'article 83 de la CNUDM, qui est effectuée par voie d'accord entre les Etats concernés ou par le recours aux procédures de règlement des différends.»[48]

Projection n° 8 : Le paragraphe 6 du *MoU* revu et corrigé par le Kenya

27. Ceci dit, Monsieur le président, ce qui n'est assurément pas dans le texte c'est la précision que donne le Kenya selon laquelle les Parties se seraient engagées à procéder «par la voie

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[44] Agreement between the United Republic of Tanzania and the Republic of Kenya on the delimitation of the maritime boundary of the exclusive economic zone and the continental shelf, 2603 U.N.T.S. 37, 23 June 2009, entered into force 23 June 2009 (MS, vol. III, annexe 7).

[45] Voir EPK, vol. I, p. 16, par. 31 ; p. 22, par. 47 ; ou p. 66, par. 146.

[46] CR 2016/10 (Forteau, par. 22).

[47] Voir Tribunal international du droit de la mer (TIDM), *Différend relatif à la délimitation de la frontière maritime entre le Bangladesh et le Myanmar dans le golfe du Bengale (Bangladesh/Myanmar)*, arrêt du 14 mars 2012, par. 376 ; et *Arbitrage entre le Bangladesh et l'Inde concernant la délimitation de la frontière maritime du golfe du Bengale*, sentence arbitrale du 7 juillet 2014, par. 456.

[48] *Question de la délimitation du plateau continental entre le Nicaragua et la Colombie au-delà de 200 milles marins de la côte nicaraguayenne (Nicaragua c. Colombie)*, C.I.J., arrêt du 17 mars 2016, par. 112.

de négociations, *et non en ayant recours à une procédure contraignante*» («*rather than recourse to any compulsory procedures*»). Ce n'est plus de l'interprétation, Monsieur le président, c'est de l'invention, c'est de la broderie ! Le texte ne dit rien de tel ; le contexte ne conduit nullement à penser que ce soit le cas ; et ceci n'a aucun rapport avec le but poursuivi par les représentants des deux Etats lorsqu'ils ont signé le *MoU* — but qui était d'obtenir que la CLPC établisse les limites extérieures de leur plateau continental au-delà de 200 milles. Et ce n'est en effet qu'une fois cette délinéation acquise que la Somalie et le Kenya pourront conclure un accord délimitant *complètement* leur frontière maritime (delimiting the *full extent* of the maritime boundary).

28. Et il n'est, bien sûr, pas davantage exact que cet engagement de procéder par voie d'accord à la délimitation *complète* de leur frontière maritime commune lorsque seront connues les recommandations de la CLPC

— exclue qu'un tel accord puisse intervenir *avant* les recommandations de la CLPC : «après» *(after)* ne signifie pas «exclusivement après» et rien n'empêche les Parties de se mettre d'accord *ex ante* sous réserve d'un éventuel ajustement *ex post* au cas où il résulterait des recommandations de la Commission que leur accord empiète sur la Zone internationale — ici encore le professeur Forteau se laisse aller au *wishful thinking* : «l'accord de 2009», nous dit-il, «précise par ailleurs que cette délimitation devrait faire l'objet d'un accord *seulement* après que la Commission des limites du plateau continental aura achevé l'examen des communications de chacun des deux Etats et après qu'elle aura formulé ses recommandations»[49]. Eh bien non ! «seulement» est une pure invention, qui n'est conforme ni à la lettre ni à l'esprit du texte ;

— le *MoU* n'exclut pas davantage qu'un accord partiel sur la partie du plateau continental dont la détermination ne dépend pas de la CLPC ne puisse pas être conclu ;

— ni que des négociations en vue d'un accord global puissent être menées, quitte à réserver la détermination du point d'aboutissement de la frontière à l'après-recommandations de la CLPC ;

— pas plus que ceci n'empêche les Parties de recourir à un règlement judiciaire ou arbitral si elles ne peuvent se mettre d'accord.

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[49] CR 2016/10 (Forteau, par. 4 ; voir aussi *ibid*., par. 6) ***(italiques ajoutées)***.

III. L'interprétation kényane conduit à un résultat absurde et déraisonnable

29. Monsieur le président, Mesdames et Messieurs de la Cour, non seulement l'interprétation du *MoU* défendue par le Kenya fait fi de la règle générale d'interprétation, mais encore elle conduit à un résultat manifestement absurde et déraisonnable.

30. L'interprétation soutenue par le Kenya a plusieurs effets pratiques particulièrement pervers mais qui, au fond, se ramènent à un seul : il serait extraordinaire, pour ne pas dire extravagant, que deux Etats pauvres, pour lesquels l'exploitation de leurs ressources halieutiques et, possiblement, pétrolières, se soient entendus pour remettre aux calendes le règlement de leur différend frontalier — dont le *MoU* reconnaît l'existence tout en s'efforçant d'en hâter l'aboutissement. Au bénéfice de cette remarque générale, ***quatre*** points méritent, je pense, quelques brefs développements.

31. *Premièrement*, s'il fallait en croire le Kenya, les deux Etats côtiers auraient conclu un accord établissant une méthode de règlement des différends inaccessible aux Parties pendant de très nombreuses années[50]. Car il ne faut pas se méprendre : très malheureusement, les prédictions du professeur Akhavan sur la perspective de voir la CLPC se prononcer sur la demande somalienne dans un futur proche sont démesurément optimistes. D'abord, parce qu'il est hors de question que la Commission permette aux Etats de «resquiller» *(to jump the queue)*. L'article 51.4 *ter)* de son règlement intérieur ne laisse aucun doute : «Les demandes prennent place dans l'ordre où elles sont reçues.» Or s'il est concevable — quoique improbable — que la plénière de la CLPC examine la demande kényane l'an prochain, grâce au retrait de l'objection somalienne[51], celle de la Somalie se trouve au 74e rang et, au rythme actuel, d'environ trois recommandations par an, sachant que 53 demandes ont la priorité sur celle de la Somalie, cela nous conduit vers l'année 2033. Je me permets, Mesdames et Messieurs les juges, de vous renvoyer à l'onglet no 3 de votre dossier qui fait le point sur l'état d'avancement des travaux de la Commission au 8 juillet de cette année[52]. Et

[50] Voir EES, vol. I, par. 1.21 et 1.23.

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

[52] Submissions, through the Secretary-General of the United Nations, to the Commission on the Limits of the Continental Shelf, pursuant to article 76, paragraph 8, of the United Nations Convention on the Law of the Sea of 10 December 1982 (http://www.un.org/depts/los/clcs_new/commission_submissions.htm).

l'optimisme de l'adroit avocat du Kenya est démenti par l'Assemblée générale des Nations Unies qui, cette année encore, a pris «*note avec préoccupation* du calendrier proposé pour les travaux de la Commission consacrés aux demandes reçues»[53]. Est-il raisonnable d'interpréter le *MoU* comme excluant tout accord de délimitation tant en deçà qu'au-delà de 200 milles, jusqu'à 2033, privant ainsi ces deux pays, qui aspirent à un développement économique rapide, de la possibilité d'exploiter les ressources de l'importante zone en litige ? NON, Monsieur le président !

32. *Deuxièmement*, si le Kenya avait raison et si le paragraphe 6 du mémorandum excluait «d'avoir recours à un autre mode ou à d'autres modes de règlement», il s'ensuivrait que les termes équivalents des articles 74 et 83 de la CNUDM (ou de tout autre instrument prévoyant une délimitation par accord) devraient être interprétés comme excluant également tout recours à un juge ou un arbitre pour le règlement du différend de délimitation. Cette interprétation est tellement absurde qu'à ma connaissance aucun Etat (ni même aucun auteur, c'est tout dire !) ne l'a avancée jusqu'ici. Pourrait-elle être retenue par la Cour ? NON, Monsieur le président !

33. *Troisièmement*, une autre raison, tout à fait décisive, qui traduit le caractère déraisonnable de l'interprétation kényane tient à ce qu'elle exclut la possibilité pour la Cour (ou tout autre organe de règlement obligatoire des différends) de trancher un litige relatif à une délimitation maritime tant que la CLPC ne s'est pas prononcée sur la délinéation du plateau continental. Voilà, Mesdames et Messieurs les juges, qui risque de tarir sérieusement l'une des principales sources de litiges inscrits à votre rôle... Indépendamment de cette considération — qui a son importance !, je vois mal comment nos amis de l'autre côté de la barre concilient cette position avec la jurisprudence que j'ai citée il y a un instant et avec leur reconnaissance (et la reconnaissance expresse par le *MoU*) que la délinéation est sans préjudice de la délimitation : l'interprétation du Kenya introduit des contradictions irréconciliables dans l'instrument interprété[54]. Peut-on admettre que le *MoU*, qui indique expressément qu'il est conclu «sans préjudice de la question de la délimitation du plateau continental», ait imposé aux Etats signataires de se plier à

[53] *Les océans et le droit de la mer* (23 septembre 2015), A/RES/70/235.

[54] Voir, par exemple, *Temple de Préah Vihéar (Cambodge c. Thaïlande), exceptions préliminaires, arrêt, C.I.J. Recueil 1961*, p. 32-34 ; voir aussi *Composition du Comité de la sécurité maritime de l'Organisation intergouvernementale consultative de la navigation maritime, avis consultatif, C.I.J. Recueil 1960*, p. 166.

des procédures inutiles à seule fin de retarder ou d'entraver le règlement de leur différend sur la délimitation ? NON, Monsieur le président !

34. *Quatrièmement,* hier, il m'a semblé que le Kenya en avait encore rajouté dans l'absurde en affirmant que la disposition contestée : «does not mean that the parties cannot negotiate prior to CLCS review. That would be absurd. The parties may negotiate prior to the CLCS recommendations: but they may finalize an agreement only after delineation of the outer limits of the shelf.»[55] Nous n'avons pas, Monsieur le président, la même conception de l'absurdité : ce qui est absurde, c'est, je pense, que les Parties auraient conclu un accord leur interdisant de conclure un accord. L'idée d'un *pactum de negociando* sous réserve de ne pas conclure est totalement excentrique ! Peut-on l'envisager ? NON, Monsieur le président !

35. Monsieur le président, Mesdames et Messieurs de la Cour, l'interprétation que nos contradicteurs veulent vous convaincre de retenir est déraisonnable et aurait des conséquences absurdes. Si vous l'envisagiez comme ayant un semblant de vraisemblance, il vous appartiendrait de faire appel aux «moyens complémentaires» d'interprétation pour déterminer la portée véritable du paragraphe 6 du *MoU*. Mais, en l'espèce, vous n'êtes aucunement réduits à une telle extrémité : comme je crois l'avoir montré, un raisonnement simple, fondé sur la «règle générale d'interprétation» de l'article 31, permet d'arriver à un résultat logique et parfaitement sensé.

36. Néanmoins, comme l'article 32 l'envisage également et comme la Cour l'a souvent admis, tant avant[56] qu'après la conclusion de la convention de Vienne, même lorsque le texte est clair et l'interprétation que l'on peut en donner objective, il est possible de rechercher dans les travaux préparatoires et dans les circonstances dans lesquelles le traité a été conclu «une

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[55] CR 2016/10, par. 18 (Akhavan).

[56] *Compétence de l'Assemblée générale pour l'admission d'un Etat aux Nations Unies, avis consultatif, C.I.J. Recueil 1950*, p. 8 ; *Droits des ressortissants des Etats-Unis d'Amérique au Maroc (France c. Etats-Unis d'Amérique), arrêt, C.I.J. Recueil 1952*, p. 209 ; *Incident aérien du 27 juillet 1955 (Israël c. Bulgarie), arrêt, C.I.J. Recueil 1959*, p. 139-140.

confirmation éventuelle de l'interprétation» tirée du texte[57]. C'est à quoi M[e] Reichler va s'employer, *ex abundanti cautela*, dans un instant.

37. Avant de vous demander, Monsieur le président, de bien vouloir lui donner la parole, permettez-moi, je vous prie, une dernière remarque de portée plus vaste. Je dois dire que, en règle générale, l'attitude de la Partie kényane dans cette affaire me laisse pour le moins perplexe. Voilà un pays, en développement, légitimement pressé de se développer, qui a, je crois comprendre, de bonnes relations avec son voisin, lui aussi démuni et désireux de faire le meilleur usage de ses ressources naturelles. Et pourtant, le Kenya semble s'ingénier à faire traîner les choses et à empêcher que le différend sur leur frontière commune qui oppose les deux pays et qui handicape lourdement leur développement soit réglé rapidement. Son interprétation du *MoU* en témoigne. Il en va de même des exceptions préliminaires artificielles et stériles qu'il a soulevées. J'avoue, Monsieur le président, que quelque chose m'échappe.

38. Merci, Mesdames et Messieurs les juges, pour votre très aimable attention. Et merci, Monsieur le président, de bien vouloir appeler M[e] Reichler à cette barre maintenant ou après la pause.

Le PRESIDENT : Merci, Monsieur le professeur. C'est le moment adéquat pour faire une pause de quinze minutes après laquelle je donnerai la parole à M. Reichler. La séance est suspendue.

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

Le PRESIDENT : Veuillez vous asseoir. La parole est à M. Paul Reichler.

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[57] *Délimitation maritime et questions territoriales entre Qatar et Bahreïn (Qatar c. Bahreïn), compétence et recevabilité, arrêt, C.I.J. Recueil 1995*, p. 21, par. 40 ; voir aussi *Ambatielos (Grèce c. Royaume-Uni), exception préliminaire, arrêt, C.I.J. Recueil 1952*, p. 45 ; *Actions armées frontalières et transfrontalières (Nicaragua c. Honduras), compétence et recevabilité, arrêt, C.I.J. Recueil 1988*, p. 85 et suiv. et p. 89 ; *Certaines terres à phosphates à Nauru (Nauru c. Australie), exceptions préliminaires, arrêt, C.I.J. Recueil 1992*, p. 247 ; *Ile de Kasikili/Sedudu (Botswana/Namibie), arrêt, C.I.J. Recueil 1999 (II)*, p. 1074-1075, par. 46 ; *Souveraineté sur Pulau Ligitan et Pulau Sipadan (Indonésie/Malaisie), arrêt, C.I.J. Recueil 2002*, p. 653, par. 53 ; *Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Géorgie c. Fédération de Russie), exceptions préliminaires, arrêt, C.I.J. Recueil 2011 (I)*, p. 128, par. 142.

Mr. REICHLER:

THE EVIDENCE PERTAINING TO THE PARTIES' UNDERSTANDING OF THE MOU

I. Introduction

1. Mr. President, distinguished Members of the Court, it is, as always, an honour for me to appear before you. Today I am privileged today to speak on behalf of the Federal Republic of Somalia.

2. Professor Pellet has meticulously taken you through the text of the MOU. He has shown you, based on well-established principles of treaty interpretation, that the MOU is not an agreement on a means for settlement of the Parties' maritime boundary dispute. *N*or does it prevent the Parties from seeking to have that dispute resolved by this Court.

3. My role today will probably not come as a surprise to you. As is often my fate, I am tasked — once again — with analysing the evidence that is before you. I make no complaint about that. I know my place. And, especially in this case, I am content with it, because the evidence of what the Parties intended when they executed the MOU, and how they understood it, as reflected in their practice, is an important part of the case. It can be of great assistance to the Court in determining the proper interpretation to be given to the MOU.

4. We say: the evidence fully supports Somalia's interpretation of the MOU, which is the one Professor Pellet has just given you. We do not invoke the evidence, in regard to the object and purpose of the MOU, or the context in which it came about, in opposition to a proper reading of the text. We invoke it to confirm our reading of the text. That evidence falls into two categories, in relation to two different time periods: first, the evidence of the Parties' intentions at the time the MOU was signed in April 2009; second, the evidence of how they understood and interpreted the MOU subsequent to its execution, from then until this case was commenced in August 2014.

II. The evidence of the Parties' intentions at the time of signing the MOU

5. I begin with the evidence of the Parties' intentions at the time they signed the MOU. An important fact is that the MOU was neither conceived nor drafted by Kenya or Somalia. As

counsel for Kenya acknowledged yesterday, both the idea and the text came from Norway. The context helps explain what was intended.

6. In early 2009, time was running out for coastal States to submit their outer continental shelf claims to the CLCS. Some States lacked the technical expertise to prepare these highly complex submissions. If they missed the deadline, their potential rights beyond 200 nautical miles might be lost forever. This was a particular concern in Africa. To address this situation, the General Assembly called upon United Nations Member States "to assist . . . coastal African States . . . in the preparation of submissions to the Commission regarding the outer limits of the continental shelf beyond 200 nautical miles"[58].

7. Norway, to its credit, answered the call. It did so in several ways. First, it provided technical assistance to a number of coastal States in East and West Africa to help them prepare timely submissions to the CLCS[59]. Second, because the Commission's rules of procedure permits States to block consideration of their neighbours' submissions merely by asserting the existence of a dispute, Norway facilitated and drafted agreements between and among neighbouring States committing them to refrain from objecting to CLCS review of each other's submissions[60]. This was to allow the CLCS to issue recommendations on the outer limits of the continental shelf, with the understanding that these would be without prejudice to any boundary delimitation disputes.

8. In West Africa, for example, Norway provided technical assistance to ECOWAS members in respect of their CLCS submissions, and also drafted and facilitated an agreement among them not to object to each other's submissions[61]. As a consequence, even though Ghana and Côte d'Ivoire are now in litigation before a Special Chamber of ITLOS over their disputed maritime boundary, both have complied with the non-objection agreement drafted by Norway and refrained from objecting to each other's submissions to the CLCS.

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[58]Federal Republic of Somalia, Preliminary Information Indicative of the outer limits of the continental shelf and Description of the status of preparation of making a submission To the Commission on the Limits of the Continental Shelf for Somalia (14 Apr. 2009), p. 4; Memorial of Somalia (MS), Vol. III, Ann. 66.

[59]Preliminary Objections of Kenya (POK), para. 30.

[60]Amb. Hans Wilhelm Longva, Prepared Remarks at Pan African Conference on Maritime Boundary Delimitation and the Continental Shelf, Accra (9–10 Nov. 2009), pp. 113-115; POK, Vol. II, Ann. 25.

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

9. Norway played a similar role in East Africa. It signed on to provide technical assistance to Somalia, which needed its help. The deadline for the submission of its preliminary information to the CLCS was May 2009. Somalia, at the time, had no capacity to prepare its own submission. The Transitional Federal Government was newly functioning. Its Herculean task was to create a viable State, following from the collapse of governmental authority, two decades of chaos and civil war, and a militant insurgency which then controlled much of the country. Because of Norway's invaluable assistance, Somalia was able to submit its preliminary information in a timely manner.

10. As it did in West Africa, Norway also sought to avoid objections from neighbouring States that would preclude the CLCS from considering Somalia's submission. That was the reason Norway proposed the MOU. Like the non-objection agreement Norway brokered among the members of ECOWAS, Norway offered the MOU as a non-objection agreement between Somalia and Kenya, so that the CLCS could review both States' submissions without objection from either one, notwithstanding their disputed maritime boundary. Norway had no interest in the boundary dispute itself. Its only concern was securing the non-objection of the Parties so that their submissions could be properly reviewed by the CLCS.

11. Kenya acknowledges that Norway, through its *Ambassadeur en Mission Spéciale*, the late Hans Wilhelm Longva, drafted the MOU and presented it to the Parties.

12. Contemporaneous documentation shows that Ambassador Longva first presented a "Draft Memorandum of Understanding" to the Somali Deputy Prime Minister on 10 March 2009, after previously discussing it with the Chairperson of Kenya's Task Force on the Delineation of Kenya's Outer Continental Shelf[62]. Both Parties have appended to their written pleadings copies of the correspondence between Ambassador Longva and Kenya, on the one hand, and between him and Somalia on the other, in regard to the MOU and its text[63]. Significantly, there is not a single reference, in any of the contemporaneous correspondence, to settlement of the maritime boundary dispute, or to the establishment of a method for resolving that dispute.

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[62]E-mail from Amb. Hans Wilhelm Longva to Ms Juster Nkoroi (Mar. 2009); POK, Vol. II, Ann. 6.

[63]See E-mail exchange between Ms Edith K. Ngungu and Amb. Hans Wilhelm Longva (30 Mar. 2009), p. 44; POK, Vol. II, Ann. 9; E-mail exchange between Ms Edith K. Ngungu and Amb. Hans Wilhelm Longva (30-31 Mar. 2009), p.47; POK, Vol. II, Ann. 10; E-mail from Amb. Hans Wilhelm Longva to Mr. James Kihwaga (undated), p. 58; POK, Vol. II, Ann. 14; E-mail from Amb. Hans Wilhelm Longva to Hon. Prof. Abdirahman Haji Adan Ibbi (3 Apr. 2009), p. 1; Written Statement of Somalia (WSS), Vol. II, Ann. 20.

13. Somalia proposed one change to Ambassador Longva's draft, and that was to the title. At Somalia's request, the words "to each other" were inserted, so that the text read that Kenya and Somalia "grant to each other No Objection in respect of submissions on the Outer Limits of the Continental Shelf Beyond 200 Nautical Miles"[64]. As Professor Pellet explained, both the original title and the final one reflect, and are in keeping with, the central object and purpose of the instrument: to secure the non-objection of each State to the CLCS submission of the other.

14. The record shows that this is how the drafter of the MOU — Norway — and the two States that would be party to it, Somalia and Kenya, understood the object and purpose of the agreement. Ambassador Longva and Norway, in fact, took pains to distance themselves from, and avoid involvement in, settlement of the boundary dispute, and to separate that dispute as far as possible from the Parties' submissions to the CLCS. At tab 5, and on your screens, is an interview with Ambassador Longva, published in 2009. There, underneath his cheerful countenance, is his statement that, following his return to the Legal Department of the Foreign Ministry in 2008: "I am now responsible for a project relating to assistance to African coastal States in the establishment of the outer limits of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured."[65] He says nothing about having any responsibility for delimitation of boundaries, dispute settlement, areas up to 200 miles, or the exclusion of recourse to international adjudication.

15. At tab 6, and on your screens, are further remarks by Ambassador Longva, given in November 2009, this time in an intervention to the Pan African Conference on Maritime Boundary Delimitation and the Continental Shelf. They shed further light on his and Norway's intentions:

> "I want to stress 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 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."[66]

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[64] "Interview with Ambassador Hans Wilhelm Longva", *GRID-Arendal* (14 Oct. 2013), available at http://www.grida.no/marine/news.aspx?id=5828.

[65] *Ibid.*

[66] POK, Ann. 25, p. 1.

Neither Ambassador Longva, nor Norway, set about to solve the issues of maritime delimitation between Kenya and Somalia. Their only concern was in preventing that dispute from interfering with CLCS review of the Parties' continental shelf submissions.

16. Norway provided its understanding of the object and purpose of the MOU between Kenya and Somalia in a Note Verbale to the Secretary-General dated 17 August 2011; you will find this at tab 7, on page 4, and on your screens:

> "In the Memorandum of Understanding (MoU) the Parties agree that at an appropriate time each of them will make separate submissions to the Commission on the Limits of the Continental Shelf (CLCS) that may include areas under dispute between the two countries, without prejudice to the delimitation of maritime boundaries between them. In this MoU the two coastal States grant their prior consent to the consideration by the CLCS of these submissions in the areas under dispute. Furthermore it is stipulated that the submissions made before the CLCS and the recommendations approved by the CLCS thereon shall not prejudice the positions of the two coastal States with respect to the maritime dispute between them and shall be without prejudice to the future delimitation of maritime boundaries in the areas under dispute, including the delimitation of the continental shelf beyond 200 nautical miles. In its final paragraph it is stipulated that: 'This Memorandum of Understanding shall enter into force upon its signature.'"[67]

17. Tellingly, in describing the object and purpose of the MOU, Norway skipped right over the penultimate paragraph and said nothing about settlement of the Parties' maritime boundary dispute, stating only that their consent not to object to each other's CLCS submissions was without prejudice to their respective positions on the boundary. Norway did not describe the MOU as an agreement on a specific method or timetable for settlement of the boundary dispute. Norway made no reference to settlement of that dispute or to how such a settlement might be achieved. On the subject of delimitation, Norway's Note Verbale said only this, on page 3, and on your screens:

> "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."[68]

18. The Court has no reason not to take Norway at its word. By its own description, in proffering and recommending execution of the MOU, Norway was not addressing or attempting to facilitate resolution of the Parties' maritime boundary dispute; rather, it sought only to ensure that

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[67] Note Verbale from the Permanent Mission of Norway to the United Nations to the Secretariat of the United Nations (17 Aug. 2011), POK, Vol. II, Ann. 4.

[68] *Ibid.*

the Parties' submissions to the CLCS would be acted upon by that body. Norway's approach was thus to separate the Parties' submissions to the CLCS from their maritime boundary dispute, so that the former could be addressed by the CLCS without implicating, or prejudicing, the latter.

19. At the time the MOU was discussed and signed, no one — not Norway, not Somalia, and not Kenya — indicated that it considered the MOU to be concerned with settlement of the maritime boundary dispute. That intention is not present, not explicitly, and not implicitly, in any of the contemporaneous records.

20. Kenya's records confirm this. At tab 8 is the Kenyan Foreign Ministry's August 2009 internal memorandum regarding registration of the MOU with the United Nations. It describes the MOU as being "in respect of submissions on the outer limits of the continental shelf beyond 200 miles"[69]. Nothing about dispute settlement is mentioned.

21. Similarly, at tab 9, you will find a summary of Kenya's presentation to the CLCS in September 2009. There, the Chairperson of the Task Force on Delineation of Kenya's Outer Continental Shelf, the same person who was consulted about the MOU by Ambassador Longva prior to execution, is recorded as describing the MOU as a "provisional arrangement . . . of a practical nature . . . whereby the parties undertake not to object to the examination of their respective submissions"[70]. Nothing of that dispute settlement.

22. The executive summary of Kenya's submission to the CLCS, an excerpt of which is at tab 10, also describes the MOU only as "granting each other no objection in respect of submissions on the outer limits of the continental shelf"[71]. On the maritime boundary, the Executive Summary states merely that Kenya and Somalia will delimit their boundary "pursuant to an agreement . . . on the basis of international law"[72]. This is no more than a restatement of their mutual obligation under Articles 74 (1) and 83 (1) of UNCLOS.

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[69]Message from Jacqueline K. Moseti to the Legal Division, Ministry of Foreign Affairs regarding "Registration of Memorandum of Understanding between GOK and the Transitional Federal Government of the Somali Republic" (20 Aug. 2009) attaching Note Verbale from the United Nations Secretariat (14 Aug. 2009); POK, Vol. II, Ann. 17.

[70]United Nations, Commission on the Limits of the Continental Shelf, Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the progress of work of the Commission, United Nations doc. CLCS/64 (1 Oct. 2009), para. 95; MS, Vol. III, Ann. 61.

[71]Republic of Kenya, Submission on the Continental Shelf Submission beyond 200 nautical miles to the Commission on the Limits of the Continental Shelf: Executive Summary (Apr. 2009), para. 7-3; MS, Vol. III, Ann. 59.

[72]*Ibid.*

23. The MOU is mentioned in the same paragraph of Kenya's Executive Summary. Significantly, Kenya does not describe it as an instrument that addresses in any way the means to settle or reach agreement on the boundary. The contemporaneous evidence is thus conclusive. Kenya gave no indication that it regarded the MOU as imposing any obligations in regard to settlement of the boundary dispute. All of Kenya's statements from 2009 refer to the MOU solely as an agreement on non-objection to the Parties' respective submissions to the CLCS, without prejudice to issues of maritime delimitation. There is nothing more than that.

24. The same is true for Somalia's contemporaneous statements. The Transitional Federal Government was sworn in on 22 February 2009, just a few weeks before Ambassador Longva presented it with the draft MOU on 10 March. Senior Somali officials were informed of Norway's assistance with the submission to the CLCS at the same time that they received the draft MOU[73]. For this reason, they assumed that the MOU and the submission were indivisibly connected to one another, and that the MOU was necessary for the submission to be filed[74].

25. In an e-mail sent shortly after the 10 March meeting, the Deputy Prime Minister expressed his gratitude to Norway for "do[ing] all the work that we [were] supposed to do" regarding the preparation of the preliminary information and expressing his understanding that "we must have the mem[o]random of understanding that [Norway] ha[s] prepared"[75]. This understanding was confirmed by the Minister of Planning and International Co-operation, who said that the Somali Government believed it had "to sign the MOU with Kenya" in order to proceed with its submission to the CLCS[76]. Thus, for Somalia as well as Kenya, the MOU was linked directly to the submission to the CLCS. It was not understood as an agreement on the means for

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[73]Federal Republic of Somalia, Preliminary Information Indicative of the outer limits of the continental shelf and Description of the status of preparation of making a submission to the Commission on the Limits of the Continental Shelf for Somalia (hereinafter "Somalia, Preliminary Information to the CLCS") (14 Apr. 2009), p. 4; MS, Vol. III, Ann. 66.

[74]See POK, Ann. 13, p. 2 (Somali Minister of Planning and International Cooperation indicating that the Somali government had "to sign the MOU with Kenya" in order to proceed with its submission); POK, Ann. 7, pp. 1-2 (recording the Somali Deputy Prime Minister expressing his gratitude to Norway with regard to the CLCS submission and expressing his understanding that "we must have the mem[o]random of understanding that [Norway] ha[s] prepared").

[75]E-mail exchange between Ms Rina Kristmoen, Hon. Prof. Abdirahman Haji Adan Ibbi, Amb. Hans Wilhelm Longva and Ms Juster Nkoroi (10–22 Mar. 2009), pp. 1-2; POK, Vol. II, Ann. 7.

[76]Network Al-Shahid, Press Release issued by former Somali Minister of National Planning and International Co-operation, Dr. Abdirahman Abdishakur (7 July 2012), p. 2; POK, Vol. II, Ann. 13.

settlement of the boundary dispute. In sum, the evidence surrounding the adoption of the MOU in 2009 fully supports Professor Pellet's reading of the text.

III. The Parties' Subsequent Conduct

26. I turn then to the evidence of the Parties' practice following execution of the MOU.

27. The most important conduct during this period consists of the direct, bilateral negotiations on the maritime boundary that the Parties planned in 2013 and conducted in 2014. Kenya's own conduct directly contradicts its attempt to read into the MOU an agreement that the boundary would only be settled after the CLCS process was completed. At tab 11, and on your screens, is a joint statement by the Foreign Ministers of Somalia and Kenya, dated 31 May 2013. I apologize for the poor quality of the document but I believe it is still legible. You can see that, on page 2, the two Ministers "underlined the need to work on a framework of modalities for embarking on maritime delimitation"[77]. This was reflected in a newspaper article, dated 10 June 2013, which reported that it was Kenya itself that had "request[ed] . . . talks to demarcate maritime boundaries"[78]. Kenya has not disputed this. Notably, Kenya took this initiative to engage in negotiations to resolve the disputed maritime boundary well before the CLCS had issued any recommendations on delineation of the outer continental shelf. Indeed, at the time, the CLCS had not even taken up consideration of either the Kenyan or the Somali submission. Just as notably, the joint statement also contradicts Kenya's assertion that its main purpose in proposing talks with Somalia was not delimitation of the maritime boundary, but persuading Somalia to withdraw the objection it had filed with the CLCS. The date of the joint statement is May 2013. Somalia did not make its objection to the CLCS until February 2014, nine months later. What the joint statement therefore reflects is Kenya's understanding that there was no impediment in the MOU to resolving the maritime boundary dispute with Somalia before the CLCS had acted.

28. Bilateral negotiations on the maritime boundary were commenced following a meeting between the two Foreign Ministers on 19 February 2014. Contemporary documentary evidence,

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[77]F. Yusuf H. Adam, Minister of Foreign Affairs & International Cooperation, Federal Republic of Somalia, & A. Mohamed, Cabinet Secretary of Foreign Affairs, Republic of Kenya, *Kenya-Somalia Joint Press Release* (31 May 2013), p. 2; POK, Vol. II, Ann. 31.

[78]"Somalia Cabinet rejects appeal for talks on border dispute with Kenya", *Hiiraan* (10 June 2013), p. 1; POK, Vol. II, Ann. 32.

including a letter from the Somali Foreign Minister to the Kenyan Foreign Minister, which you can find at tab 12, and on your screens, shows that, at that meeting, Kenya again declared the "willingness of the Government of Kenya to engage the Somali government in regards to the existing dispute relating to the delimitation of the maritime boundary between the two countries"[79]. Kenya's Foreign Minister followed up the meeting with a Note Verbale to her Somali counterpart inviting Somalia to send a delegation to Nairobi to commence negotiations on the maritime boundary[80]. On this basis, the Parties agreed to meet in late March 2014 to "settle . . . the dispute . . . regarding the maritime boundary"[81]. There is no reference to the MOU, or to any other alleged impediment to the settlement of the boundary dispute, or to the fact that the CLCS had not issued recommendations to either Party. There is nothing to that effect in the Kenyan invitation, or in the Somali response, or in any other correspondence exchanged between the two States.

29. Now the significance of these exchanges is obvious. They contradict Kenya's current contentions that the MOU constitutes an agreement on a specific and exclusive means of settlement of the Parties' maritime boundary dispute, which may take place *only* "*after* the Commission has concluded its examination of the separate submissions made by each of the two coastal States and made its recommendations to the two coastal States"[82]. Plainly, in 2013 and 2014, neither Party regarded the absence of CLCS recommendations as an obstacle to the commencement of negotiations, to the resolution of the dispute by that means, or indeed to any other form of dispute settlement.

30. Kenya knows that its willingness to negotiate a boundary agreement with Somalia in 2013 and 2014 reflects an understanding of the MOU that is completely incompatible with the one that it adopted after this case was commenced, and which its counsel advocated yesterday. That is why they struggled so mightily to explain away those boundary negotiations. That unhappy task

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[79]Letter from H.E. Dr. Abdirahman Beileh, Minister of Foreign Affairs and International Cooperation of the Federal Republic of Somalia, to H.E. Ms. Amina Mohamed, Minister of Foreign Affairs & International Trade of the Republic of Kenya, No. MOFA/SER/MO/ /2014 (13Mar. 2014), p. 1; MS, Vol. III, Ann. 43.

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

[81]Letter from H.E. Dr. Abdirahman Beileh, Minister of Foreign Affairs and International Cooperation of the Federal Republic of Somalia, to H.E. Ms. Amina Mohamed, Minister of Foreign Affairs & International Trade of the Republic of Kenya, No. MOFA/SER/MO/ /2014 (13Mar. 2014), p. 1; MS, Vol. III, Ann. 43.

[82]2009 MOU, para. 5; MS, Vol. III, Ann. 6 ***(emphasis added)***.

fell primarily to Ambassador Muchiri. Mr. President, you will recall being told that what took place were only "two technical level meetings"[83]. That is incorrect. The delegations to the second meeting, in July 2014, were headed by the Foreign Ministers; and both were present during the talks.

31. The Court was also told that "the primary purpose was *not* to hold substantive negotiations on the maritime boundary"[84], but "to discuss the breach of the MOU"[85]. Again that is incorrect. In fact, it is, completely belied by the evidence. At tab 13, and on your screens, is the Joint Report on the meeting of 26 and 27 March 2014. It is referred to as the "Kenya-Somalia Maritime Boundary Meeting"[86]. The Report makes clear that the Parties focused almost entirely on the maritime boundary. There were extensive discussions on that subject. For example: under the heading "Discussions on the Maritime Boundary", on page 2, four topics are listed as having been addressed: "*(a)* Kenya's departure from the 'equidistance' methodology adopted by the Kenyan Government in the 1972 Territorial Waters Act [as revised in 1977] and the 1989 Maritime Zones Act to the 2005 Presidential Proclamation; *(b)* Starting point for the determination of the maritime boundary; *(c)* Baseline and base points; *(d)* Potential maritime boundary line."[87]

32. In an effort to downplay these negotiations and their significance, Ambassador Muchiri and others referred to them as merely "preliminary"[88] and only for purposes of "confidence building"[89]. But that is not how the Parties described them in their Joint Report, which contains a detailed record of their exchanges over two full days of meetings. The Joint Report refers, in particular, to a PowerPoint presentation Kenya made at the meeting. The Kenyan PowerPoint is at tab 14. As you will see when you review this document, this was a serious, substantive and detailed presentation. It includes a map of the East African coastline showing what Kenya considers to be a concavity giving rise to "special circumstances", detailed models and calculations

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[83]CR 2016/10, p. 46, para. 2 (Muchiri).

[84]CR 2016/10, p. 47, para. 5 (Muchiri).

[85]CR 2016/10, p. 46, para. 2 (Muchiri).

[86]Somalia and Kenya, Joint Report on Maritime Boundary Meeting, 26-27 Mar. 2014, p. 1; MS, Vol. III, Ann. 31.

[87]Somalia and Kenya, Joint Report on Maritime Boundary Meeting, 26-27 Mar. 2014, p. 2; MS, Vol. III, Ann. 31.

[88]CR 2016/10, p. 46, para. 3 (Muchiri).

[89]CR 2016/10, p. 47, para. 8 (Muchiri).

of the relevant coasts and relevant area, and maps depicting what Kenya considered the "inequity" it would suffer if the boundary were based on equidistance, as Somalia advocated at the meeting[90]. The argument that you heard yesterday, that the meeting was not actually devoted to a detailed discussion of the maritime boundary, but was mainly concerned with Somalia's objection to the CLCS, is contradicted by the evidence before you.

33. This is also reflected in the Joint Report's conclusion:

> "The delegations after considering several options and methods including bisector, perpendicular, median and parallel of latitude could not reach a consensus on the potential maritime boundary line acceptable to both countries to be adopted. Consequently, the two delegations resolved to refer the matter to the principals [that is, the Foreign Ministers] for further guidance."[91]

34. Somalia does not dispute that Kenya sought to place the MOU on ***the*** Agenda for this meeting, or that Kenya wanted Somalia to withdraw its objection so that the CLCS would consider Kenya's submission. But that is not the critical issue here. We accept that the MOU says that neither State would object to the other's submission to the CLCS. That is not in dispute. The critical issue here is whether the MOU — beyond its no-objection language — obligates the Parties to a specific means of resolving their maritime boundary dispute.

35. On this issue, Kenya's conduct in 2013 and 2014 is telling. At no time during that period, when bilateral negotiations on the maritime boundary were being proposed and conducted, did Kenya ever suggest that the MOU established a method, let alone an exclusive method, for resolution of the boundary dispute. To the contrary, Kenya's sole contention about the MOU was that it was a non-objection agreement, with which Somalia had to comply. That was Kenya's only stated purpose in putting the MOU on the agenda for the bilateral meetings.

36. Kenya seems to have only belatedly discovered, after this lawsuit was commenced, that the MOU bars any resolution of the maritime boundary dispute except by negotiations following action by the CLCS. Kenya admits that it never previously expressed this interpretation of the MOU. Professor Forteau attempted to excuse this failure on the ground that Kenya had no prior

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[90]Somalia and Kenya, Joint Report on Maritime Boundary Meeting, 26-27 Mar. 2014, Annex 3; MS, Vol. III, Ann. 31.

[91]Somalia and Kenya, Joint Report on Maritime Boundary Meeting, 26-27 Mar. 2014, p. 6; MS, Vol. III, Ann. 31.

occasion to make its view of the MOU known[92]. We disagree. If this were truly Kenya's pre-litigation understanding of the MOU, it is reasonable to assume they would have brought it up in 2014, at which time, under Kenya's current view, the MOU would have prevented the Parties from conducting any negotiations for the purpose of resolving the boundary dispute, because there had been no action by the CLCS.

37. The March 2014 negotiations were followed by a second round of talks four months later. Ambassador Muchiri told you: "It is clear that Kenya initiated the meeting to discuss the MOU."[93] That, too, is at odds with the record. Tab 15, and on your screens, is a Note Verbale sent from Kenya to Somalia inviting it to a second round of negotiations in Nairobi, in July 2014. You will see that Kenya's invitation explicitly refers to "the negotiations between the Government of the Republic of Kenya and the Federal Republic of Somalia *on the delimitation of our overlapping maritime boundary*"[94]. In the following paragraph, the Note invites Somalia to the talks expressly to "discuss the issue on the delimitation of the two countries' overlapping maritime boundary"[95]. No reference is made to any discussion of the MOU or even to Somalia's objection to Kenya's submission to the CLCS.

38. At tab 16 is the Joint Report of that July 2014 meeting. You were told yesterday that "maritime delimitation was discussed only in the most preliminary way"[96]. That is not what the report says. It establishes that: the purpose of the meeting was reflected in its title—"the Kenya-Somalia Maritime Boundary Meeting"; the negotiating teams both made "presentations . . . on the issue of the maritime boundary"; and "intense discussions" between the two sides occurred in the presence of the two Foreign Ministers[97].

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[92]See CR 2016/10, p. 42, para. 26; p. 45, para. 34 (Forteau).

[93]***CR 2016/10, p. 47, para. 8 (Muchiri).***

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

[95]Note Verbale from the Ministry of Foreign Affairs and International Trade of the Republic of Kenya to the Ministry of Foreign Affairs & Investment Cooperation of the Federal Republic of Somalia, No. MFA/REL/13/21A (24 July 2014); WSS, Vol. II, Ann. 24.

[96]CR 2016/10, p. 46, para. 2 (Muchiri).

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

39. Kenya now attempts to recharacterize this negotiating session. Its effort is defeated not only by the Joint Report, but also by its own internal report on the meeting, dated 8 August 2014.

40. Somalia did not have this report at the time it filed its Written Statement in response to Kenya's Preliminary Objections, because Kenya chose not to disclose it when it filed those objections last year. The Kenyan report was only obtained by Somalia in June of this year, with the assistance of the Court after Somalia requested that Kenya produce all internal records pertaining to the negotiations that took place in March and July 2014.

41. You can see this internal Kenyan document at tab 17. It is addressed to the Foreign Minister of Kenya and reports on the "second boundary meeting" which it describes as "a continuation of the March meeting"[98]. It does not mention the MOU at all. This is a significant omission in a Kenyan document intended to memorialize the key points discussed at the meeting.

42. Instead, the document reports exclusively and extensively on the Parties' exchange of views with regard to their maritime boundary dispute. As this report makes clear, what occurred was far more than a mere expression of so-called "preliminary views". As described on the second page, Kenya's presentation addressed: "Applicable (maritime) laws in Kenya; factors considered in arriving at the parallel of latitude; and a conclusion presenting the scenario (parallel of latitude) after application of the said factors". The document also notes that Kenya referred to case law and cited State practice[99]. Such a detailed presentation is hardly a "preliminary view". According to the report, Somalia made an equally detailed substantive argument in favour of its position that the boundary should be based on equidistance, also making explicit reference to case law[100].

43. Tab 18 is Somalia's internal report of the meeting, which is consistent with Kenya's in regard to the matters discussed, including the extensive and detailed presentations made by each side in respect of its views on delimitation of the maritime boundary. Somalia's internal report of the July 2014 meeting, as you heard yesterday, includes remarks made by Kenya's Foreign Minister that are not reflected in Kenya's internal report, as seen on page 2, to the effect that "if no

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[98]Memorandum from S. Mokaya-Orina, Head/Legal & Host Country Affairs Directorate, to Cabinet Secretary, Ministry of Foreign Affairs & International Trade, Republic of Kenya (8 Aug. 2014), p. 1.

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

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

agreement could be reached between both countries, both countries might resort to international arbitration"[101].

44. Kenya has disavowed that statement, including by means of a declaration by the Foreign Minister, dated 5 May 2016, 21 months after this case was commenced. Somalia stands by the accuracy of its own contemporaneous, pre-litigation report. In particular, Somalia underscores the two sentences immediately preceding the one that Kenya disputes. The Foreign Minister notably does not dispute the accuracy of those two sentences in her late-filed Declaration prepared for purposes of these hearings. They are now on the screen:

> "Minister Beileh [that is, Somalia's Foreign Minister] asked Minister Mohamed [Kenya's Foreign Minister] as to how long would both countries continue to have their delegations entangled in these heated discussions without any possible solution. Minister Mohamed of Kenya stated that although both delegations are far apart, she would like both teams to meet again and attempt one final time to find an amicable solution."[102]

One final time to find an amicable solution.

45. As you heard from Somalia's Agent, a third and final meeting was scheduled, but without explanation, the Kenyan delegation simply failed to show up. Nor did it respond to Somalia's urgent inquiries, by e-mail and by letter correspondence, asking Kenya when or whether the meeting would take place. At tab 19, and on your screens, is a letter from Somalia's Foreign Minister to Kenya's, dated 26 August 2014. The letter reads, on page 2:

> "[Further] as your Excellency requested at the conclusion of the meeting on 29 July, the Somali delegation agreed to hold one more round of meetings in regard to the pending dispute, in Mogadishu on 25 and 26 August. The Somali delegation is deeply disappointed that the Kenyan delegation did not arrive on the agreed dates, preventing the meetings from taking place."[103]

46. No response to this letter was received. Somalia's decision to come to this Court, following unsuccessful substantive negotiations, which left the Parties far apart and without prospect of settlement, together with Kenya's unexplained no-show at what was agreed would be

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[101]M. Al-Sharmani and M. Omar, Representatives of the Ministry of Foreign Affairs of the Federal Republic of Somalia, Report to the File of the Meeting between the Federal Republic of Somalia and the Republic of Kenya On Maritime Boundary Dispute, Nairobi, Kenya, 28-29 July 2014 (5 Aug. 2014), p. 2; WSS, Vol. II, Ann. 4.

[102]*Ibid.*

[103]Letter from H.E. Dr. Abdirahman Beileh, Minister of Foreign Affairs and Investment Promotion of the Federal Republic of Somalia, to Ms Amina Mohamed, Minister of Foreign Affairs of the Republic of Kenya, No. 2231 (26 Aug. 2014); MS, Vol. III, Ann. 47.

the final meeting, cannot justly be described as precipitous. Much less can it be described as "deceptive"[104].

47. Mr. President, what you heard yesterday simply cannot be squared with the evidence, which, as you have seen, consists of contemporaneous documentation whose authenticity and reliability are unchallenged, and includes materials produced and signed by both Parties. That evidence makes it unmistakably clear that Kenya saw no contradiction, in 2013 and 2014 — before this case was filed — in proposing and engaging in negotiations to resolve the maritime boundary dispute, long before the CLCS could issue its recommendations, at the same time it was invoking the MOU to get Somalia to withdraw its objection to Kenya's submission. That is because there was no contradiction in Kenya's position then. It considered the MOU to be a non-objection agreement in regard to the Parties' submissions to the CLCS, no more and no less.

48. Kenya knows this evidence puts them in a difficult, if not desperate, situation in their attempt to invoke the MOU to escape the Court's jurisdiction. Desperate circumstances often breed desperate measures, or at least, desperate arguments. And that is the likely explanation for the argument elaborated for the first time yesterday. Previously, in its Preliminary Objections, Kenya argued that under the MOU the method of settlement of the boundary dispute was "to negotiate a full and final agreement on maritime boundary delimitation *after* CLCS review of their respective submissions"[105]. They changed that yesterday. Their new argument, fabricated to fit the uncomfortable facts, is that the MOU did *not* prevent the Parties from negotiating a resolution of their maritime boundary dispute prior to CLCS action; it *only* prevented them from reaching an *agreement*. That would make the MOU a very unique document, indeed, if not one of a kind. It would provide for negotiation of the maritime boundary dispute, but only so long as *no* agreement was *reached*. There are, of course, such things as agreements to agree. This would be the opposite: an agreement not to agree.

49. It is plainly no such thing. Kenya's new argument simply makes no sense. It is certainly not how Kenya understood the MOU during the negotiations that took place in 2014. The objective of those meetings was to reach an agreement on the maritime boundary. That is clear

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[104]CR 2016/10, p. 50, para. 14 (Muchiri).

[105]POK, para. 73 (emphasis added).

from the Joint Reports, as well as the Parties' internal reports. The exchange between Foreign Minister Beileh and Foreign Minister Mohamed[106], demonstrates this, as does the subsequent letter from Minister Beileh to Minister Mohamed[107]. The Ministers agreed at the end of the July meetings to meet again and attempt one final time to find an amicable solution. They did not say: "But, unfortunately, we cannot achieve a solution because the MOU doesn't allow us to."

50. Kenya's conduct, even after the present case was commenced, contradicts their new interpretation of the MOU. On 24 October 2014, two months after Somalia's Application was filed, Kenya sent a Note Verbale to the United Nations Secretary-General. It is at tab 20, and on your screens. In this document, on page 2, Kenya states:

> "Kenya remains committed and continues to pursue more legitimate avenues to have the delimitation of the maritime boundary amicably resolved, most preferably through a bilateral agreement with the Somali Federal Republic and in this regard wishes to inform that notwithstanding the aforementioned actions by Somalis [i.e., the objection to Kenya's CLCS submission], bilateral diplomatic negotiations, at the highest levels possible, are ongoing with a view to resolving the matter expeditiously and with a view to continuing peaceful cooperation, security and stability in the region."[108]

51. If another death blow to Kenya's new interpretation of the MOU is required, this Note Verbale deals it. It was sent at a time when Somalia's objection was still in effect, and after the CLCS determined that it could not even create a subcommission to review Kenya's claims. In other words, CLCS action was not even possible. Yet, Kenya represented to the Secretary-General that it would continue negotiations at the highest levels to achieve a resolution of the maritime boundary dispute *expeditiously*. Not ten or twenty years from now, not after the CLCS has acted, but "expeditiously". Obviously, Kenya did not then consider the MOU a bar either to negotiations or to an expeditious agreement.

52. Mr. President, Members of the Court, I can state my conclusions very succinctly. The contemporaneous evidence, consisting of statements and conduct of the Parties, and of Norway as

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[106]M. Al-Sharmani and M. Omar, Representatives of the Ministry of Foreign Affairs of the Federal Republic of Somalia, *Report to the File of the Meeting between the Federal Republic of Somalia and the Republic of Kenya On Maritime Boundary Dispute*, Nairobi, Kenya, 28-29 July 2014 (5 Aug. 2014), p. 2; WSS, Vol. II, Ann. 4.

[107]Letter from H.E. Dr. Abdirahman Beileh, Minister for Foreign Affairs and Investment Promotion of the Federal Republic of Somalia, to Ms Amina Mohamed, Minister for Foreign Affairs of the Republic of Kenya, No. 2231 (26 Aug. 2014); MS, Vol. III, Ann. 47.

[108]Note Verbale from the Permanent Mission of the Republic of Kenya to the United Nations to H.E. Ban Ki-moon, Secretary-General of the United Nations, No. 586/14 (24 Oct. 2014), p. 2; MS, Vol. III, Ann. 50.

drafter and broker of the MOU, shows clearly and unambiguously that neither Kenya, nor Somalia, nor Norway, ever considered the MOU to be a binding agreement on a specific means of settling the Parties' maritime boundary dispute. To the contrary, all of the principals saw it for what it was: an attempt to remove potential obstacles to CLCS consideration of their outer continental shelf submissions by obligating them not to raise objections to each other's submissions, and nothing else.

53. In so far as references were made to the maritime boundary dispute, these were understood to be for the purpose of separating that dispute from the claims submitted to the CLCS, and of preserving and avoiding prejudice to the Parties' respective positions on the boundary. The purpose of the penultimate paragraph of the MOU was not to settle the boundary dispute, or prescribe a means for doing so, but to separate and insulate it from the effects of the Parties' understanding on non-objection to their respective submissions to the CLCS. Mr. President, the interpretation given by the Parties to the MOU, as reflected in their consistent conduct, does not support Kenya's attempt to use the MOU to block Somalia's recourse to the Court in this case. And, as Professor Pellet has already shown you, neither does the MOU's text.

54. Mr. President, Members of the Court, I thank you for your kind courtesy and patient attention, and I ask that you call Professor Sands to the podium.

Le PRESIDENT : Merci. Je donne la parole au professeur Philippe Sands.

Mr. SANDS:

NEITHER THE MOU NOR PART XV OF UNCLOS FALLS WITHIN KENYA'S OPTIONAL CLAUSE RESERVATION

I. Introduction

1. Monsieur le président, Members of the Court, it is an honour for me to appear before you in these proceedings on behalf of the Federal Republic of Somalia. You have heard from Professor Pellet on the proper interpretation of the MOU — a slender document on which Kenya places much weight and you have also heard from Mr. Reichler on the manner in which the MOU was negotiated and understood by the Parties, a text and context that both indicate that the MOU is

not — and was never intended or understood to be — an agreement concerned with the delimitation of the Parties' maritime boundary.

2. I shall address Kenya's claim that the MOU falls within the scope of the first reservation to its Optional Clause declaration. By that argument Kenya hopes to persuade the Court that it has no jurisdiction to examine Somalia's Application under Article 36 (2) of the Statute of the Court. I will seek to explain why Kenya's argument is without foundation, in fact and in law.

3. Before addressing that argument, however, an initial observation may be appropriate. In its written Preliminary Objections, Kenya invested considerable time and effort in seeking to persuade the Court *not* to render the impartial and legally authoritative binding ruling that would bring to an end the protracted maritime boundary dispute that so disrupts relations between the Parties. Kenya seems hostile to an authoritative judicial determination by this Court, although not necessarily to an Annex VII arbitration, depending on how one understands Professor Boyle.

4. The apparent hostility towards this Court was made rather clear again yesterday, and it is perhaps a reflection of Kenya's growing recognition that its claim to a maritime boundary based on a line of parallel is without merit, a claim that it has surely been advised would most likely fail before this Court. Equally without merit is Kenya's unhappy reliance in its pleadings on the doctrine of "unclean hands", an argument that might invite a wistful response: is Kenya's particular invocation of good faith and mutual consent simply a means of prolonging its own unilateral conduct in the disputed maritime area?

5. As Somalia has explained in its Written Statement, Kenya's reliance on its Optional Clause reservation — like its claim to a parallel maritime boundary, and, you would say, its "clean hands" argument — faces considerable legal and factual obstacles. Chapters 2 to 4 of our Written Statement contain a detailed exposition of the defects in Kenya's case. "Anywhere but the ICJ in The Hague", Kenya in effect told you yesterday, and nowhere else either, unless subject to a delay of the kind that would entrench the status quo, continue the uncertainty and prolong the instability. To accede to Kenya's request would extinguish the potential role of this Court, the principal judicial organ of the United Nations, not only in this case but in many others.

II. The MOU does not fall within Kenya's Optional Clause reservation

6. Let us start with Kenya's Optional Clause declaration, made under Article 36 (2), an integral aspect of the Court's jurisdictional framework. Somalia and Kenya have been parties to the Optional Clause system for more than half a century, as both States made declarations under Article 36 (2) shortly after they attained independence from colonial rule in the 1960s — Somalia on 11 April 1963, Kenya on 19 April 1965. Their long-standing participation in the Optional Clause system reflects a shared commitment to the object and purpose of the Statute. That purpose, as the Court observed in the *LaGrand* case, is "to enable the Court to fulfil the functions provided for therein, and, in particular, the basic function of judicial settlement of international disputes by binding decisions in accordance with Article 59 of the Statute"[109]. This aim underpins Somalia's Application. It is reflected, too, in the United Nations' General Assembly's aspirations that, "legal disputes should as a general rule be referred by the parties to the International Court of Justice"[110].

7. As this Court explained in the *Nottebohm* case, compulsory jurisdiction under Article 36 (2) "results from a previous agreement which makes it possible to seise the Court of a dispute without a Special Agreement"[111]. That previous agreement arises from the existence of convergent Optional Clause declarations by the States concerned. And, in this case, contrary to what we heard yesterday from counsel for Kenya, the declarations of Somalia and Kenya are convergent, and they do allow the Court to exercise jurisdiction.

8. As the Court explained in the *Nicaragua* case, Optional Clause declarations "establish a series of bilateral engagements with other States accepting the same obligation of compulsory jurisdiction"[112]. At its heart, therefore, the Optional Clause system involves a series of binding mutual obligations grounded in reciprocity. Those bilateral relationships reflect a shared recognition of this Court's unique and significant role in the peaceful resolution of disputes between States. The bilateral character of the obligations established under Article 36 (2) is significant, as it indicates that only a deliberate, clear and unambiguous exclusion of the Court's

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[109] *LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 502, para. 102.

[110] Article 5 of the Manila Declaration on the Peaceful Settlement of International Disputes, adopted by the General Assembly in resolution 37/10 of 15 Nov. 1982.

[111] *Nottebohm* (*Liechtenstein* v. *Guatemala), Preliminary Objection, Judgment, I.C.J. Reports 1953*, p. 122.

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

jurisdiction can operate to oust the right of one State to bring an Application before the Court against the other. In the present case it is readily apparent that no such exclusion applies.

9. Let us look at the first reservation to Kenya's Optional Clause declaration. It covers: "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."

10. As the Parties have explained in their written submissions, no fewer than 34 other States have entered materially identical reservations in their Optional Clause declarations[113]. To accede to Kenya's interpretation would therefore be to undermine the potential role of this Court, in respect of these declarations, a role for the Court that is more important today than ever before. It would also be a novel and unprecedented step in the Court's jurisprudence. As the then President of the Court observed in a speech in 2010:

> "40 States have limited their optional clause declarations by stipulating that any other mechanisms of dispute settlement as agreed between the parties will prevail over the general jurisdiction of the Court. In the few cases where this condition has been at issue, the Court found that it did not exclude recourse to ICJ adjudication."[114]

11. It is very difficult to see how this case could be any different. How the MOU could reasonably be interpreted as an agreement to have recourse to another method of settlement, or indeed to exclude the right of recourse to this Court.

12. Kenya's entire argument rests on the interpretation of a single sentence, an aspirational line that it says excludes judicial settlement of the dispute concerning the maritime boundary. That single sentence is located in a document that is, on its face, concerned exclusively with the delineation of the outer limit of the continental shelf. Without textual or contextual support, Kenya seeks to elevate that line into a binding agreement that requires the entire disputed maritime boundary — including the territorial sea, the EEZ and the inner continental shelf of which the MOU makes no mention at all — to be delimited only by negotiation between the two States. On Kenya's approach, that one line excludes any recourse to this Court on any matter of maritime delimitation.

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[113]POK, para. 142; WSS para. 1.29.

[114]President of the International Court of Justice, *Introductory Remarks at the Seminar on the Contentious Jurisdiction of the International Court of Justic*e, 26 Oct. 2010.

13. And as Professor Pellet has explained, the single sentence mirrors the language of Articles 74 (1) and 83 (1) of UNCLOS. This is boilerplate language, it goes no further than the general provisions of international law that have bound the Parties since they ratified UNCLOS. The line does not develop, supplement, modify or magnify those general obligations. It says nothing about the right of recourse to the Court, about the Optional Clause, or about other possible methods of judicial or arbitral determination. It contains no exclusionary language — not expressly, and not impliedly — and it offers no details about the form, duration and scope of any supposedly mandatory negotiations. It simply cannot bear the great weight that Kenya seeks to place upon it.

14. In assessing Kenya's far-fetched claim, we would invite you to bear in mind a number of points:

(1) First, Kenya's Optional Clause declaration does not contain any express exclusion in respect of maritime delimitation disputes in general, or the maritime boundary dispute with Somalia in particular. Had Kenya wished to exclude such disputes from the scope of its Optional Clause declaration under Article 36 (2), it could very easily have done so at any time during the five decades since it made its declaration in 1965, as many other States have done[115]. Indeed, Kenya's declaration expressly "reserves the right at any time . . . to add to, amend, or withdraw

[115]See, for example, the Optional Clause declarations of Australia (which excludes, *inter alia*, "any dispute concerning or relating to the delimitation of maritime zones, including the territorial sea, the exclusive economic zone and the continental shelf, or arising out of, concerning, or relating to the exploitation of any disputed area of or adjacent to any such maritime zone pending its delimitation"); Djibouti (which excludes, *inter alia*, "disputes with the Republic of Djibouti concerning or relating to… *(b)* The territorial sea, the continental shelf and the margins, the exclusive fishery zone, the exclusive economic zone and other zones of national maritime jurisdiction including for the regulation and control of marine pollution and the conduct of scientific research by foreign vessels; . . . and *(e)* the determination and delimitation of its maritime boundaries."); Greece (which excludes, *inter alia*, "any dispute concerning State boundaries or sovereignty over the territory of the Hellenic Republic, including any dispute over the breadth and limits of its territorial sea…"); Honduras (which excludes, *inter alia*, "*(d)* Disputes referring to: (i) territorial questions with regard to sovereignty over islands, shoals and keys; internal waters, bays, the territorial sea and the legal status and limits thereof; (ii) all rights of sovereignty or jurisdiction concerning the legal status and limits of the contiguous zone, the exclusive economic zone and the continental shelf"); India (which excludes, *inter alia*, "disputes with India concerning or relating to . . . *(b)* the territorial sea, the continental shelf and the margins, the exclusive fishery zone, the exclusive economic zone, and other zones of national maritime jurisdiction including for the regulation and control of marine pollution and the conduct of scientific research by foreign vessels; . . . and *(e)* the determination and delimitation of its maritime boundaries"); Malta (which excludes, *inter alia*, "Disputes with Malta concerning or relating to: *(a)* its territory, including the territorial sea, and the status thereof, *(b)* the continental shelf or any other zone of maritime jurisdiction, and the resources thereof, *(c)* the determination or delimitation of any of the above"); Nigeria (which excludes, *inter alia*, "disputes concerning the allocation, delimitation or demarcation of territory (whether land, maritime, lacustrine or superjacent air space) unless the Government of Nigeria specially agrees to such jurisdiction and within the limits of any such special agreement"); and Philippines (which excludes, *inter alia*, "any dispute . . . in respect of the territory of the Republic of the Philippines, including its territorial seas and inland waters").

any of the foregoing reservations". It did not do so — not before 2009, not in 2009, and not in 2014.

(2) Second, if the MOU had been intended to exclude judicial delimitation of the contested maritime boundary, and to enshrine negotiations as the exclusive method of resolving the dispute, then one would expect the document to contain express and unambiguous language to this effect, given the far-reaching consequences such an interpretation would entail for both Parties. It did not do so. There is no hint in the language of the MOU that the document was intended to exclude or to prescribe any particular method of resolving the boundary dispute. On the contrary, the title and text of the MOU make it clear that the document was concerned solely with delineation of the outer continental shelf. The MOU was not intended to — and does not — concern matters of delimitation, or dispute resolution relating to delimitation.

(3) Third, as Mr. Reichler pointed out, there is *no evidence* in the drafting history leading up to the signing of the MOU that either Party believed itself to be agreeing to exclude recourse to judicial determination of the disputed maritime boundary. Kenya has offered no contemporaneous evidence, nothing, to suggest that the Parties considered that they were renouncing recourse to the Court — or any other tribunal — in favour of perpetual negotiation.

(4) Fourth, Kenya's attempt to characterize the MOU as an instrument that established a mandatory process for delimiting the Parties' maritime boundary is undermined, fatally we say, by the fact that the document contained no reference to the maritime boundary within 200 miles. It did not contain *any* reference to the EEZ or the territorial sea, not expressly, not implicitly. Had the MOU also been intended to exclude the Court's jurisdiction to determine the boundaries of the territorial sea and the EEZ, and had it intended to make bilateral negotiations the only possible means of delimiting those boundaries, then the text of the document, we say, would surely have referred to these zones expressly. Yet it says nothing at all about them. Indeed, the MOU itself defines the maritime area in dispute strictly in terms of the continental shelf. As Professor Pellet explained with great clarity, this is consistent with the singular purpose of the MOU, a document concerned only with the delineation procedures for the outer continental shelf.

(5) Fifth, the Court will have noted that during protracted negotiations with Somalia in 2014, on no occasion did Kenya ever assert that the MOU fell within the scope of the first reservation to its Optional Clause declaration. Had it considered this to be the case, surely Kenya would have made that assertion. It did not do so.

(6) Sixth, and in relation to this last point, there is no evidence to indicate that before it filed its Preliminary Objections on 7 October 2015, that Kenya ever expressed the view, internally or externally, that the MOU was an agreement to settle the maritime boundary dispute by negotiation only, to the exclusion of all other means of peaceful settlement of dispute. It was only after Somalia seised the Court that Kenya sought to characterize the document in this new and different light. Kenya's radical new characterization of the MOU is an invention — an invention of the fertile legal minds whose task was to create an exception, after they were retained to assist in this case.

(7) Seventh, if, *quod non*, Kenya is right that the language of the MOU is an agreement "to have recourse to some other method or methods of settlement" then it would appear to follow that the materially identical language of Articles 74 and 83 of UNCLOS would have the same effect and this would have truly radical consequences that were surely not anticipated by the drafters of or the parties to UNCLOS. On Kenya's approach, Articles 74 and 83 have the effect of automatically depriving the Court of jurisdiction under Article 36 (2) of the Statute in respect of *any* delimitation dispute concerning the EEZ or continental shelf of a State that is a party to UNCLOS and whose Optional Clause declaration contains a similarly worded reservation to Kenya's reservation. That would be a truly startling outcome, to put it mildly. Given that at least 33 other States that are parties to UNCLOS and the Optional Clause have entered the same or a similar reservation as Kenya, the consequence of this Court acceding to Kenya's approach would seem to be to deprive the Court of its Optional Clause jurisdiction over maritime delimitation disputes involving almost half of the 72 States that have accepted jurisdiction under Article 36 (2).

15. Mr. President, Members of the Court, that is the conclusion that Kenya is inviting you to impose upon yourself. It cannot be right that so many States would have unwittingly deprived the Court of its jurisdiction in this way.

III. In any event, the Parties have fulfilled any obligation to negotiate

16. In short, our submission is that the MOU does not trigger Kenya's reservation to its Optional Clause declaration. Kenya's arguments to the contrary are unsustainable, as it surely knows, and would have dire implications for the future role of the Court, not least — but not only — in relation to the settlement of maritime boundary disputes.

17. However — even assuming, *arguendo*, that the MOU was a binding agreement that was capable of falling within the scope of Kenya's Optional Clause reservation — this would not deprive the Court of jurisdiction to hear Somalia's Application. The reason for this is simple: if the MOU created any obligation regarding a negotiated settlement of the disputed maritime boundary, it was at most a limited obligation of endeavour, not of end. The MOU was not a *pactum de contrahendo* — an agreement to agree. It was at most a *pactum de negociando* — an agreement to *attempt* to agree. As Mr. Reichler has explained, this is exactly what the Parties did over a period of several months in 2014, but to no avail. After high-level, forceful but ultimately futile discussions, negotiations between the Parties reached an intractable deadlock. The Parties themselves recognized this and, in a last ditch effort to reach an amicable solution, did as you have heard, agreed to have one final meeting, but it never took place because Kenya, without notice, simply failed to show up, and refused thereafter, as you have heard, to respond to Somalia's request for an explanation. Accordingly, having exhausted any obligation to negotiate under the MOU, the document could not trigger Kenya's reservation.

18. In the *Mavrommatis Palestine Concessions* case the Permanent Court of International Justice observed:

> "Negotiations do not of necessity always presuppose a more or less lengthy series of notes and despatches; it may suffice that a discussion should have been commenced, and this discussion may have been very short; this will be the case if a deadlock is reached, or if finally a point is reached at which one of the Parties definitely declares himself unable, or refuses, to give way, and there can therefore be no doubt that *the dispute cannot be settled by diplomatic negotiation*."[116]

19. And as the Court explained in *Nicaragua* v. *Honduras*, "[i]t is sufficient if, at the date on which a new procedure is commenced, the initial procedure has come to a standstill in such

[116] *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 13.

circumstances that there appears to be no prospect of its being continued or resumed"[117]. While the context was different, those words are an apt description of the situation in the present case.

20. This Court has defined "negotiation" as being "a genuine attempt by one of the disputing parties to engage in discussions with the other disputing party, with a view to resolving the dispute"[118]. It is very hard to see how it can be said that negotiations did not take place, even if Kenya now seeks to attach rather different labels to what happened. The reality too is that both sides knew they were involved in negotiations and they knew they were going nowhere and would lead nowhere — not in a real sense — with no prospect of moving beyond the standstill.

21. To recap, negotiations between the Parties began in March 2014. The first round took place in Nairobi. The title of the agenda referred to the "Kenya-Somalia Maritime Boundary Meeting"[119]. At that meeting, the Parties' delegations articulated their respective positions concerning delimitation of the maritime boundary. The Kenyan delegation presented a detailed, multi-slide PowerPoint presentation setting out Kenya's arguments in support of its claim to a boundary along a parallel of latitude. Amongst other things, the two negotiating teams discussed the reasons for Kenya's departure in 2005, a decade earlier, from its previous recognition of an equidistance boundary; they discussed the starting point for the determination of the maritime boundary; the location of the baseline and base points; and the path of the possible maritime boundary line[120]. Despite those detailed exchanges, the Joint Report recorded that the delegations "could not reach a consensus on the potential maritime boundary line acceptable to both countries to be adopted"[121].

22. Following consultations with their respective principals, a further round of high-level negotiations took place in Nairobi in July 2014. This was at a very senior level. The Foreign

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[117] *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 100, para. 80.

[118] *Application of the Convention on the Elimination Of All Forms Of Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 132, para. 157.

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

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

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

Ministers of Kenya and Somalia attended those talks, in Kenya's words they "took place at the highest levels possible"[122]. Yet Kenya maintained its insistence that the boundary line must follow a parallel of latitude; Somalia continued to emphasize that, in accordance with UNCLOS and established principles of general international law, the equidistance approach was the appropriate methodology for the delimitation. Despite intense discussions, the Parties did not make any progress at all, and they came no closer to reaching an agreed settlement of any part of the boundary, or even a common view after the appropriate method of delimitation. The state of deadlock was reflected in a comment by the Somali Foreign Minister, who asked in frustration at the end of the talks, "how long would both countries continue to have their delegations entangled in these heated discussions without any possible solution"[123].

23. I will just offer an aside, our friends from Kenya remarked on the curiosity of our distinguished Agent drafting that report on the July negotiations in English rather than Somali. Annex 24 to Somalia's Memorial is another Report in English submitted by the same Agent on 1 April 2014, and that illustrates that English is in fact the distinguished Agent's working language as she has lived and worked abroad for many years, and that she frequently submitted her reports in English[124].

24. Notwithstanding the deadlock, a third round of negotiations was scheduled to take place in Mogadishu, as you now know — a final opportunity to explore possible common ground. Contrary to what you heard yesterday, those negotiations were not seen merely as one of many potentially future rounds of negotiations, but were described by both Parties as an attempt "one final time" — *one final time* — to reach a negotiated solution[125]. As the Court has seen in our written pleadings, however, the Kenyan delegation chose not to show up. No explanation or

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[122]Note Verbale from the Permanent Mission of the Republic of Kenya to the United Nations to H.E. Ban Ki-moon, Secretary-General of the United Nations, No. 586/14 (24 Oct. 2014), p. 2; MS, Vol. III, Ann. 50.

[123]M. Al-Sharmani and M. Omar, Representatives of the Ministry of Foreign Affairs of the Federal Republic of Somalia, *Report to the File of the Meeting between the Federal Republic of Somalia and the Republic of Kenya on Maritime Boundary Dispute*, Nairobi, Kenya, 28-29 July 2014 (5 Aug. 2014), p. 2; WSS, Vol. II, Ann. 4.

[124]*Report on the Meeting between the Federal Republic of Somalia and the Republic of Kenya on Maritime Boundary Dispute*, Nairobi, Kenya, 26-27 March 2014 for file with the Somali Ministry of Foreign Affairs (1 Apr. 2014); MS, Ann. 24.

[125]M. Al-Sharmani and M. Omar, Representative of the Ministry of Foreign Affairs of the Federal Republic of Somalia, *Report to the File of the Meeting between the Federal Republic of Somalia and the Republic of Kenya on Maritime Boundary Dispute*, Nairobi, Kenya, 28-29 July 2014 (5 Aug. 2014); WSS, Ann. 4.

advance notification was provided: they just did not arrive, and they never gave any prior notice or any reason[126]. The first two rounds of talks having failed to make any progress, and the third having been thwarted by a Kenyan no-show, it was clear to Somalia that an impasse had been reached.

25. The position at the date of Somalia's Application to the Court is therefore reminiscent of the situation that pertained in the *Right of Passage* case, where the Court observed that, "While the diplomatic exchanges which took place between the two Governments disclose the existence of a dispute between them on the principal legal issue which is now before the Court . . . an examination of the correspondence shows that the negotiations had reached a deadlock"[127].

26. If Kenya's approach is correct then the Parties would be obliged to engage in an indefinite process of negotiation, notwithstanding that previous attempts had ended in intractable deadlock. The Parties must continue to negotiate — and only to negotiate — no matter how great the distance between their respective positions; no matter what unilateral activities Kenya is undertaking in the disputed area; and no matter how entrenched or unreasonable Kenya's stance may be in the negotiations. They must continue to negotiate, Kenya says, even after one of the Parties fails to attend a final meeting at which the negotiations are to conclude. Kenya's position, we say, is a recipe for deadlock, for a guarantee of indefinite conflict.

IV. Kenya's secondary argument: Part XV of UNCLOS

27. Mr. President, it seems that Kenya is now aware of the weakness of its primary argument, and that is why it has chosen to advance another argument, both subsidiary and lacklustre, which is said to be based on Part XV of UNCLOS. That argument was limited to a single paragraph in its Preliminary Objections, one in which Kenya contended — without explanation or elaboration — that, "the UNCLOS Part XV methods of settlement would also trigger Kenya's reservation and exclude the Court's jurisdiction"[128].

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[126]WSS, para. 2.72.

[127]*Right of Passage over Indian Territory (Portugal* v. *India), Preliminary Objections, Judgment, I.C.J. Reports 1957,* p. 149.

[128]POK, para. 147.

28. You heard Kenya's counsel yesterday, Professors Boyle and Lowe sought to add to that argument, or non-argument. They certainly made it longer — indeed so much longer that one is bound to wonder whether it reflects a recognition and understanding of the weakness of their main argument — but that length did not make it any more plausible.

29. And let me be blunt: the argument is hopeless, for Part XV of UNCLOS does not and cannot affect the binding agreement established by Kenya and Somalia's matching convergent overlapping Optional Clause declarations. If Kenya is right, the Court's jurisdiction would be extinguished with respect to maritime disputes between the States that are parties to UNCLOS with a similar Optional Clause reservation to Kenya.

30. The agreement that arises by virtue of the matching declarations made under Article 36 (2) of the Statute — and they are matching and they do converge and they do overlap — takes priority over the dispute resolution procedures contained in Article 287 of UNCLOS. Article 282 of UNCLOS makes the relationship between these provisions clear — a point we emphasized in our written Application and to which Kenya has offered no credible response in its written pleadings or yesterday[129].

31. Article 282 provides as follows:

> "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."

32. Many leading commentators have repeatedly confirmed that Article 282 has the effect of ensuring that the jurisdiction established by convergent Optional Clause declarations takes precedence over the dispute settlement procedures contained in Part XV of UNCLOS.

33. For example in his recent textbook on the *International Law of the Sea*, Professor Tanaka confirmed:

> "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

[129]See para. 5 of Somalia's Application, which emphasized that: "The jurisdiction of the Court under Article 36, paragraph 2, of its Statute, is underscored by Article 282 of UNCLOS . . ."

> optional clause, the jurisdiction of the ICJ prevails over procedures under Part XV of [UNCLOS] by virtue of Article 282."[130]

34. Professor Treves too concurs with that analysis. As he put it: "[T]he acceptance by all parties to a dispute of the Court's compulsory jurisdiction, under Article 36, paragraph 2 of the Court's Statute, can be considered the 'agreement' mentioned in Article 282." And he continues, "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'". Accordingly, Professor Treves states that whenever both parties to a dispute have accepted the Optional Clause, ITLOS "should declare that it has no jurisdiction" over the dispute as a consequence of the operation of Article 282[131].

35. And Judge P.C. Rao confirms this understanding of the relationship between Part XV of UNCLOS and Article 36 (2) of the Statute of the Court: He writes: "The agreement referred to in Art. 282 United Nations Convention on the Law of the Sea may be recorded 'otherwise', for example, through separate declarations, such as declarations made under Art. 36 (2) ICJ Statute"[132].

36. These authorities are fully consistent with the UNCLOS Commentary which we cited in our Written Statement. The authoritative commentary quoted at paragraph 3.83 of our statement explains:

> "Article 282 mentions that an agreement to submit a dispute to a specified procedure may be reached 'otherwise'. This reference was meant to include, in particular, the acceptances of the jurisdiction of the International Court of Justice by declarations made under Article 36, paragraph 2, of the Statute of that Court."[133]

37. And this has also been the view of Professor Boyle, at least until yesterday. In his article dealing with Article 282, which was published in 1999, he wrote: "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."[134]

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[130] Y. Tanaka, *The International Law of the Sea* (Cambridge University Publishing, 2nd Ed., 2015), pp. 423-424.

[131] T. 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) 809.

[132] P. C. Rao, "Law of the Sea, Settlement of Disputes", *Max Planck Encyclopaedia of Public International Law*, para. 11.

[133] M. H. Nordquist, S. Nandan & S. Rosenne (eds.), *United Nations Convention on the Law of the Sea 1982, A Commentary, Vol. V* (1989), pp. 26-27.

[134] 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.

38. This view seems to have been abandoned yesterday.

39. Professor Boyle began his new approach by accepting, correctly, that if two States entered "identical" Optional Clause declarations then, "Article 282 would ensure that these Optional Clause declarations prevail over any alternative UNCLOS Part XV procedure"[135]. Professor Boyle's hypothetical example rightly recognized that the Parties to UNCLOS intended the Court's jurisdiction under the Optional Clause to trump the other methods of dispute resolution set out in Part XV.

40. Professor Boyle proceeded to attempt to distinguish the present case from a case where there are "identical" Optional Clause declarations, and that is where, with the greatest respect, we say he fell into error. He says that Kenya's reservation means there are no "matching" Optional Clause declarations between the Parties, and therefore "the conditions stated in Article 282 are not met"[136].

41. It is not clear to us whether in making this argument, Professor Boyle now suggests that jurisdiction will only exist where Optional Clause declarations are identically worded. If so, that is very obviously wrong, as this Court has long ruled.

42. To bring the case within Kenya's reservation, Kenya has to establish that by signing UNCLOS the two Parties agreed to submit their maritime boundary dispute to the settlement procedures contained in Part XV. However, while Part XV of UNCLOS does establish dispute resolution, procedures as you know, it contains a specific exception in Article 282 where States have agreed that a dispute shall be submitted to some other procedure that entails a binding decision. As we have seen, that exception in Part XV is widely accepted to include situations where both States have entered Optional Clause declarations. Accordingly, in order to persuade you, this Court, that you lack jurisdiction under the Optional Clause, Kenya is now forced to rely on a treaty — UNCLOS itself — that contains a deliberate *renvoi* back to the Optional Clause, and which deliberately defers to jurisdiction under the Optional Clause. Kenya now argues that

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[135]CR 2016/10, p. 54, para. 7 (Boyle).

[136]CR 2016/10, p. 55, para. 9 (Boyle).

UNCLOS engages its reservation while simultaneously relying on its reservation to exclude a provision of UNCLOS.

43. One might call this a sort of theory of double *renvoi* — we might also call it double bootstraps — a sort of game of endless ping pong back and forth between the two instruments. But the essential idea is that each instrument extinguishes the other. The argument certainly has a quality that is dizzying, but perhaps not in the way it was intended.

44. In the present case, there can be no doubt that both conditions established by Article 282 of UNCLOS are met. The first condition — that the Parties have agreed to submit their dispute to a procedure that entails a binding settlement — is met by virtue of the converging Optional Clause declarations of Kenya and Somalia. The second condition — that the body selected by the Parties must have power to interpret and apply UNCLOS in order to resolve the dispute — is also undoubtedly satisfied. This Court has jurisdiction to interpret and apply UNCLOS. Indeed, that is a function it has found no difficulty in fulfilling in many recent cases[137]. Somalia and Kenya have both ratified UNCLOS and are therefore bound by its provisions vis-à-vis one another. Somalia's Application expressly states that, "[t]he law applicable to this dispute is the 1982 United Nations Convention on the Law of the Sea"[138]. The Application explicitly requests the Court to determine the disputed maritime boundary by applying Articles 15, 74 and 83 of UNCLOS[139]. So Somalia's Application falls squarely within Article 282.

V. Kenya's "unclean hands" objection to the admissibility of Somalia's Application

45. Lastly, I turn to Kenya's unhappy attempt to invoke as an admissibility argument the doctrine of "unclean hands" against Somalia. In its Preliminary Objections Kenya objected loudly to the steps that Somalia had previously taken in relation to Kenya's CLCS submission, and complained that Somalia had breached the MOU by seeking to resolve the issue of delimitation before the CLCS has delineated the outer continental shelf. Kenya claimed that this rendered

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[137]See, for example, *Maritime Dispute (Peru* v. *Chile), Judgment, I.C.J. Reports 2014*, p. 3; *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)*, p. 624; *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 61.

[138]Somalia's Application, para. 3.

[139]Somalia's Application, paras. 18 and 33.

Somalia's Application inadmissible. Kenya advanced this argument half-heartedly in its written pleadings just four terse paragraphs at the end of its written submission. Yesterday it received no more than an oblique, passing reference, if it can be called even that, in the oral submissions[140].

46. We understand why Kenya has gone light on this argument and said nothing about it yesterday, it is manifestly wrong. First, it is based on the same erroneous conflation of delimitation and delineation that permeates the entirety of Kenya's Preliminary Objections. Second, Somalia is not seeking to invoke the MOU as the basis for the Court's jurisdiction: even if Somalia 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. Third, there is no precedent for applying the "unclean hands" doctrine in proceedings between States. On every occasion when the Court has been invited to apply the doctrine, it has declined to do so. As noted in the latest edition of *Brownlie's Principles of Public International Law* — a text, I would add, that admirably reflects the spirit and approach of the distinguished author of earlier editions — "The International Court has never applied the doctrine, even in cases where it might have done so."[141] And fourth, regardless of whether it could ever be applied in the context of an inter-State case, the Court's case law confirms that accusations of bad faith of the type levelled against Somalia cannot bar the admissibility of an Application[142].

47. In any event, Kenya's allegations are unfounded in fact. Somalia's objection to Kenya's CLCS submission was a reasonable measure in the circumstance; it was taken as a last resort in response to Kenya's persistent and unjustified assertion of a parallel boundary claim and its persistent and unjustified unilateral activities in the disputed area; these jeopardized and hampered the possibility of reaching a final agreement, contrary to Articles 74 (3) and 83 (3) of UNCLOS. Somalia acted reasonably in the face of Kenya's unilateral conduct: it came to this Court. There is

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[140]Professor Akhavan stated that, "if the parties agree to a method of settlement, then they must perform their obligations in good faith. That alone renders Somalia's case inadmissible." (CR 2016/10, p. 22, para. 22 (Akhavan).) However in his opening remarks, Professor Akhavan appeared to disavow any argument based on the admissibility of Somalia's Application, focusing instead exclusively on the issue of the Court's jurisdiction in respect of the dispute: "The only question before the Court is whether the maritime boundary dispute between Kenya and Somalia falls within its jurisdiction." (CR 2016/10, p. 16, para. 3 (Akhavan).)

[141]J. Crawford (ed.), *Brownlie's Principles of Public International Law*, Eighth Edition, 2012, p. 701, fn. 66.

[142]See *Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004 (I)*, p. 38, para. 47: "Even if it were shown . . . that Mexico's practice as regards the application of Article 36 was not beyond reproach, this would not constitute a ground of objection to the admissibility of Mexico's claim."

no more reasonable act one could imagine. After Somalia's objection to the CLCS, it was withdrawn and Kenya's submission is now before the CLCS, without any real delay. Kenya has not been prejudiced in any way; the door to this Court, we say, cannot be shut.

Conclusion

48. Monsieur le président, Members of the Court, we hope you will see Kenya's Preliminary Objections for what they truly are: an effort to prolong an unjust and unprincipled status quo. To foreclose judicial determination of this dispute, Kenya calls for endless, pointless negotiations. It relies on an MOU that has nothing to do with delimitation. It attempts to bolster those submissions with two subsidiary arguments that are manifestly hopeless.

49. There is, of course, here a certain irony: it is Kenya that invokes endless negotiations and allegations of bad faith to exclude a realistic possibility of a resolution to this dispute and, in so doing, it has to be said, it seems to be willing to sacrifice you, the Court, depriving you of a meaningful role in resolving this maritime boundary dispute and, by consequence, many other maritime boundary disputes and possibly many other disputes. The outcome Kenya seeks is not justified in law and, in policy, it would have nefarious practical consequences. This Court offers the hope of an end to uncertainty and, with it, the tantalizing prospect of less instability in a region that craves progress. This Court has jurisdiction, and we trust you will exercise it. With this, I close Somalia's first round and, on behalf of my distinguished Agents, thank you very much, Sirs, for your kind attention.

Le PRESIDENT : Merci, Monsieur le professeur. Ceci met fin à l'audience d'aujourd'hui et clôt le premier tour des plaidoiries. La Cour se réunira à nouveau demain, mercredi 21, à 16 h 30, pour entendre le Kenya en son second tour de plaidoiries. A l'issue de l'audience, le Kenya présentera ses conclusions finales.

La Somalie prendra, pour sa part, la parole le vendredi 23, à 10 heures, pour son second tour de plaidoiries. A la fin de l'audience, elle présentera à son tour ses conclusions finales.

Je rappellerai que, conformément au paragraphe 1 de l'article 60 du Règlement de la Cour, les exposés oraux devront être aussi succincts que possible. J'ajouterai que le second tour de plaidoiries a pour objet de permettre à chacune des Parties de répondre aux arguments avancés

oralement par l'autre Partie ou aux questions posées par les juges. Le second tour ne doit donc pas constituer une répétition des présentations déjà faites par les Parties, lesquelles ne sont, au demeurant, pas tenues d'utiliser l'intégralité du temps de parole qui leur est alloué.

Je vous remercie. L'audience est levée.

L'audience est levée à 13 h 5.

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