# DISSENTING OPINION OF JUDGE BENNOUNA

*[Original English Text]*

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

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

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

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

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

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

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

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

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

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

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

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

> "The delimitation of maritime boundaries in the areas under dispute, including the delimitation of the continental shelf beyond 200 nautical miles, shall be agreed between the two coastal States on the basis of international law after the Commission has concluded its examination of the separate submissions made by each of the two coastal States and made its recommendations to two coastal States concerning the establishment of the outer limits of the continental shelf beyond 200 nautical miles."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*(Signed)* Mohamed BENNOUNA.