DISSENTING OPINION OF JUDGE *AD HOC* GUILLAUME

[Translation]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Moreover, as observed by the Court,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

24. In the meantime, the competent authorities in Nairobi had become alarmed about the situation. In a Note of 12 February 2014, Ms Mwangi, Head/Legal and Host Country Affairs Directorate (Kenyan Ministry of Foreign Affairs), notified the Cabinet Secretary that "[i]t is . . . imperative that diplomatic and bilateral consultations be initiated at the highest level of Government as soon as possible to resolve the situation to ensure that the submissions are considered in 2014 without undue delay". One week later, Kenya contacted Somalia to propose holding negotiations.

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

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

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

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

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

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

28. What about in this case?

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

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

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

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

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

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

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

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

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

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

(*Signed*) Gilbert GUILLAUME.