

INTERNATIONAL COURT OF JUSTICE

Maritime Delimitation in the Indian Ocean

(Somalia v Kenya)

**PRELIMINARY OBJECTIONS OF THE
REPUBLIC OF KENYA**

Pursuant to Article 79 of the Rules of Court

VOLUME I

7 OCTOBER 2015

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INTRODUCTION

1. Pursuant to Article 79(1) of the Rules of Court, the Republic of Kenya (“Kenya”) submits the following Preliminary Objections to jurisdiction and admissibility in the case concerning *Maritime Delimitation in the Indian Ocean (Somalia v Kenya)*, instituted by the Application of the Federal Republic of Somalia (“Somalia”) dated 28 August 2014.

A. Summary of Kenya’s Preliminary Objections

2. Kenya and Somalia have expressly agreed on a method of settlement other than the Court for delimitation of their maritime boundary. Kenya’s acceptance of the Court’s jurisdiction, in its Declaration of 19 April 1965 under Article 36(2) of the Statute of the Court, specifically excludes:

Disputes in regard to which the Parties to the dispute have agreed or shall agree to have recourse to some other method or methods of settlement.¹

Somalia’s case is thus outside the Court’s jurisdiction and otherwise inadmissible.

3. In the *Memorandum of Understanding between the Government of the Republic of Kenya and the Transitional Federal Government of the Somali Republic* signed on 7 April 2009 (“the MOU”)² the Parties agreed to grant to each other “no-objection” in respect of submissions on the outer limits of

¹ The Declaration of Kenya is cited in full in Somalia’s Memorial at fn 5. It was deposited on 19 April 1965. It is referred to below as “Kenya’s Declaration”.

² The MOU is at Annex 6 of Somalia’s Memorial. As noted below, the MOU was registered by the UN on 11 June 2009 and has remained on the UN registry to date (2599 UNTS 35 (2009)). See also Annex 1 (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 (7 Apr. 2009, entered into force 7 Apr. 2009)).

the continental shelf beyond 200 nautical miles (“NM”) to the Commission on the Limits of the Continental Shelf (“CLCS”), and further agreed that the Parties would delimit the full extent of their maritime boundary, both within and beyond 200 NM:

- a) Only after the CLCS has made its recommendations concerning establishment of the outer limits of the continental shelf; and
- b) By means of a negotiated agreement, not by recourse to the Court.

4. More specifically:

- a) The dispute before the Court concerns the delimitation of the maritime boundary in the area where Kenya and Somalia’s maritime claims overlap;³
- b) The 2009 MOU was Somalia’s first indication, after Kenya’s Presidential Proclamation of 1979 (whereby Kenya established a maritime boundary in its Exclusive Economic Zone (“EEZ”) at the parallel of latitude), that it considered a maritime boundary dispute to exist with Kenya in this area of overlap;⁴
- c) In the MOU, Kenya and Somalia expressly agreed that:

³ See Somalia’s Application Instituting Proceedings at paras. 2 and 17. Somalia’s Memorial states at para 1.1 “As set out in the Application, this case concerns the interpretation and application of the 1982 United Nations Convention on the Law of the Sea (“UNCLOS” or the “Convention”) and customary international law with respect to the establishment of “the single maritime boundary between Somalia and Kenya in the Indian Ocean delimiting the territorial sea, exclusive economic zone ... and continental shelf, including the continental shelf beyond 200 nautical miles...”. Para 1.15 identifies Somalia’s first objective as “to obtain the definitive delimitation of its maritime boundary in the territorial sea, the EEZ and the continental shelf, including the continental shelf beyond 200 M”.

⁴ Somalia’s Memorial does not refer to any earlier recognition of a maritime boundary dispute with Kenya.

- i. "...each of them will make separate submissions to the Commission on the Limits of the Continental Shelf ... that may include the area under dispute, asking the Commission to make recommendations with respect to the outer limits of the continental shelf beyond 200 nautical miles without regard to the delimitation of maritime boundaries between them. The two coastal States hereby give their prior consent [i.e. under Article 5(a), Annex I, of the CLCS Rules of Procedure] to the consideration by the Commission of these submissions in the area under dispute” (fourth operative paragraph);
- ii. “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 [i.e., Kenya and Somalia] 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” (fifth operative paragraph, emphasis added); and that
- iii. “This Memorandum of Understanding shall enter into force upon its signature” (sixth operative paragraph).

5. Somalia’s Memorial admits that the MOU did in fact enter into force upon its signature by the Parties on 7 April 2009.⁵ It asserts however that it is

⁵ See Somalia’s Memorial at Annex 6 “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

“non-actionable” because the Somali Federal Parliament had “decided against its ratification”.⁶ There is clearly no requirement of ratification under the MOU, and Somalia does not explain how such an alleged requirement suddenly appeared after its entry into force. Both the Head of State and the Head of Government of Somalia approved the MOU prior to its signature.⁷ Furthermore, subsequent to its signature, the Somali Head of Government twice confirmed its validity, including after its registration and publication by the UN Secretary-General in accordance with Article 102 of the UN Charter.⁸ There can be no doubt that the MOU continues to be legally binding.

6. Somalia’s initiation of this proceeding before the Court is in plain violation of its obligations under the MOU to negotiate an agreement following CLCS review. It is also in plain disregard of the fact that this agreement on the method of dispute settlement falls squarely within the reservation in Kenya’s Declaration.
7. Accordingly, contrary to Somalia’s assertion that “[t]he jurisdiction of the Court, in regard to these matters, is plainly established on the basis of Declarations made by the Parties under the optional clause contained in Article 36, paragraph 2”,⁹ Kenya’s reservation categorically excludes this case in its entirety from the jurisdiction of the Court. In addition to Kenya’s reservation, Somalia’s case is inadmissible because recourse to the Court is

Continental Shelf beyond 200 Nautical Miles to the Commission on the Limits of the Continental Shelf, 2599 U.N.T.S. 35 (7 Apr. 2009), entered into force 7 Apr. 2009” (emphasis added). The MOU is referred to in the Memorial at paras. 3.38 to 3.42, 3.46, 3.52 and 7.20.

⁶ At paras. 3.40–3.41.

⁷ See Part I section B below.

⁸ See Part I section E below.

⁹ Memorial at para. 1.16.

in plain breach of the agreed method of dispute settlement under the MOU, which obligation Somalia must perform in good faith.

B. Structure of Kenya's Preliminary Objections

8. These Preliminary Objections are divided into four parts.
9. First, the circumstances and context leading to the conclusion and entry into force of the MOU on 7 April 2009, and its subsequent confirmation by Somalia are set forth (**Part I**). Second, the continuing legally-binding nature of the MOU under treaty law is addressed, followed by discussion of why, because of the Parties' express agreement to settle the dispute by a method other than recourse to the Court, the case is outside of the Court's jurisdiction and otherwise inadmissible (**Part II**). Third, the conclusions of Kenya on the facts and the law relevant for its preliminary objections are presented (**Part III**). Finally, Kenya's submissions are set forth, requesting the Court to adjudge and declare that it has no jurisdiction over the dispute and that the case is inadmissible (**Part IV**).
10. These preliminary objections are accompanied in Volume II by annexes 1 to 47 referred to herein, and a list of those annexes.

I. ENTRY INTO FORCE OF THE 2009 MOU

11. This Part sets forth the context of the MOU's conclusion (section A), Somalia's proposal of the MOU to Kenya (section B), the details of the signing of the MOU (section C), the object and purpose, and terms of the MOU (section D), the subsequent conduct of the Parties and Somalia's confirmation of the MOU (section E), and the events following Somalia's attempt to unilaterally reject the MOU in February 2014 (section F).

A. The context of the MOU's conclusion

12. The proposal for the conclusion of the 2009 MOU first emerged in the context of UN, African Union (“AU”) and Kenyan support for Somalia’s gradual transition from a period of conflict towards the establishment of a unified and stable Somali Government. Its timing was prompted by the 13 May 2009 deadline fixed by the CLCS for submissions on the outer limits of the continental shelf, and the need for an agreed procedure for the full and final delimitation of the maritime boundary.

Kenya–Somalia bilateral relations

13. The MOU was concluded in the context of Kenya’s strong policy of friendly relations with Somalia, including humanitarian assistance, support for a more stable government, and establishment of regional security.¹⁰
14. Since 1992, Kenya has hosted an estimated half million Somalis in “the world’s biggest refugee camp” in Dadaab that according to the UN, “has been able to provide refuge for so many years and to so many people ... thanks first and foremost to the Government and people of Kenya”.¹¹
15. Kenya has also hosted the Transitional Federal Government of Somalia in Nairobi from its establishment in 2004 until security conditions allowed for its gradual return to Mogadishu beginning in 2007.¹² That return was made possible in substantial part through Kenya’s contribution to both the military and civilian components of the UN-authorized AU Mission in

¹⁰ Following the overthrow of the Government of President Siad Barre in 1991, the Somali State collapsed, leading to a period of armed conflict and lawlessness.

¹¹ Annex 2 (Article from the website of the United Nations Human Rights Commissioner on Refugees (UNHCR) “Dadaab – World’s Biggest Refugee Camp 20 Years Old” (21 Feb. 2012), available at <http://www.unhcr.org/4f439dbb9.html>)

¹² The Somali President Abdullahi Yusuf Ahmed took office in 2004, but first set foot in Mogadishu in January 2007.

Somalia (AMISOM), established in 2007 with a mandate to liberate Somalia from Al-Shabaab militants and to establish stable governmental institutions.¹³ The AU and UN have recognized Kenya's "huge"¹⁴ and "extraordinary sacrifices"¹⁵ in Somalia.

16. Because of its support for the Somali Government, Kenya has suffered retaliatory terrorist attacks by Al-Shabaab. This includes the shocking civilian massacres in Westgate Shopping Mall in November 2013 and at Garissa University College in April 2015. Given Somalia's lack of maritime enforcement capacity, Kenya's contribution to AMISOM has included a maritime component, endorsed by the UN Security Council.¹⁶ The regular patrolling of these vulnerable waters, for interdiction of Al-Shabaab weapon smuggling, and to arrest and prosecute piracy, has incurred significant costs for Kenya.¹⁷

Negotiation as the method of settlement for the maritime boundary dispute

17. The Parties expressly agreed in the 2009 MOU on a negotiated settlement of their maritime boundary. This was consistent with Kenya's legislation requiring delimitation by agreement with Somalia. It was also consistent with the provisions of UNCLOS.
18. Kenya first established its maritime boundary along the parallel of latitude by Presidential Proclamation in 1979, providing that "the Exclusive

¹³ In 2007, with the escalation of terrorism and piracy, the UN Security Council authorized the establishment of AMISOM with a peacekeeping mandate, aimed at stabilizing Somalia and building viable State institutions (see UNSC resolution 1744 (2007)).

¹⁴ See e.g. the statement of the Chairperson of the AU in April 2015 (reported at <http://www.herald.co.zw/au-condemns-kenya-terrorist-attack/>).

¹⁵ See e.g. the Communiqué on the Secretary-General's mini-summit on Somalia dated 26 September 2012 (available at <http://www.un.org/press/en/2012/sg2187.doc.htm>).

¹⁶ UNSC Res 1846 S/RES/1846 (2008) (December 2008).

¹⁷ See e.g. the Statement of Kenya at the twenty-fifth meeting of State Parties to UNCLOS, dated 11 June 2015.

Economic Zone of Kenya shall ... in respect of its northern territorial waters boundary with Somali Republic be on eastern latitude South of Diua Damasciaca Island being latitude 1° 38' South".¹⁸ A subsequent Presidential Proclamation in 2005 slightly adjusted this boundary for greater accuracy.¹⁹ This boundary, established shortly before the Third UN Conference on the Law of the Sea adopted UNCLOS in 1982, was consistent with regional practice, as reflected in the 1976 and 2009 Kenya–Tanzania maritime boundary agreements,²⁰ and the 1988 Tanzania–Mozambique maritime boundary agreement.²¹ In the years that followed Kenya's 1979 Proclamation, the Somali Democratic Republic (as it then was) did not dispute Kenya's maritime boundary claim and exercise of jurisdiction at the parallel of latitude. It did not even protest at the time that it ratified UNCLOS in 1989. It was only in 2009 that Somalia first disputed Kenya's 1979 EEZ maritime boundary. Indeed, Somalia's Memorial does not point to any earlier recognition of a dispute.²²

19. Following Kenya's ratification of UNCLOS in 1989 (the same year as Somalia's ratification), its Parliament adopted the Maritime Zones Act of 1989.²³ Section 4(4) of the Act provided that the maritime boundary "shall be delimited ... pursuant to an agreement between Kenya and Somalia on the basis of international law". This reflected UNCLOS Articles 74(1) and 83(1), providing that in the first place, maritime boundary delimitation "shall be effected by agreement". The agreement between Kenya and

¹⁸ Somalia's Memorial, Annex 19.

¹⁹ Somalia's Memorial, Annex 21.

²⁰ Somalia's Memorial, Annex 5 and Annex 7.

²¹ Agreement between the Government of the United Republic of Tanzania and the Government of the People's Republic of Mozambique regarding the Tanzania/Mozambique Boundary (28 Dec. 1988) (Annex 3).

²² See Somalia's Memorial at paras. 3.36 and 3.38.

²³ Somalia's Memorial, Annex 20 (Republic of Kenya, Chapter 371, Maritime Zones Act (25 Aug. 1989)).

Somalia in the 2009 MOU that delimitation shall be by negotiated settlement was therefore consistent with both UNCLOS and Kenya's legislation.

20. Somalia's Memorial notes that its 1988 Maritime Law (implementing UNCLOS that it ratified in 1989),²⁴ provided in Article 4(3) that the width of the Somali territorial sea is 12 NM.²⁵ However, Law No. 37 of 10 September 1972 on the Somali Territorial Sea and Ports provided in Article 1(1) that "[t]he Somali Territorial Sea includes the portion of the Sea to the extent of 200 nautical miles,"²⁶ and this law was reportedly reaffirmed on 8 October 2011 by the Somali Federal Parliament²⁷ and on 6 June 2013 by the Somali Council of Ministers.²⁸
21. From 1979, when Kenya first established its EEZ, it has pursued a policy of neighbourly relations in regard to its maritime boundary with Somalia. This question did not affect bilateral relations until 2009. Throughout this period, Kenya has been committed (and is now obligated under the MOU) to negotiate a delimitation agreement with Somalia based on international law.

²⁴ Memorial, para. 3.3. The Somali Maritime Law of 1988 provides that the width of Somalia's territorial sea is 12 NM (Article 4(3)) and it also provides for a 200 NM EEZ (Article 7): Somalia's Memorial, Annex 10.

²⁵ Somalia's Memorial, Annex 10.

²⁶ Somalia's Memorial, Annex 9.

²⁷ See para. 86 below.

²⁸ See para. 90 below.

Time limits for making submissions to the CLCS

22. The conclusion of the 2009 MOU was most immediately precipitated by the 13 May 2009 time limit imposed on both Parties for making their respective submissions to the CLCS.²⁹
23. Kenya and Somalia had ratified UNCLOS on 2 March and 24 July 1989 respectively,³⁰ and the Convention had entered into force for the Parties on November 1994. In accordance with Article 76(8) and Article 4 of Annex II, Kenya and Somalia were under an obligation to make submissions on the outer limits of the continental shelf to the CLCS “as soon as possible but in any case within 10 years of the [Convention’s] entry into force”.
24. In May 2001, however, bearing in mind the difficulties encountered by some developing States in complying with their obligations under Article 4 of Annex II to the Convention, the Eleventh Meeting of States Parties to the Convention decided that with regard to those States Parties for which UNCLOS had entered into force before 13 May 1999, the ten-year period referred to in Article 4 of Annex II would be deemed to have commenced on 13 May 1999.³¹ Consequently, the ten-year limit for both Kenya and Somalia to make their respective submissions to the CLCS expired on 13 May 2009.

²⁹ See Somalia’s Memorial at para. 3.38, which states “Bilateral discussion about these issues were held in 2009, in the context of the Parties’ soon-to-be forthcoming Submissions to the CLCS. In April 2009, they entered into a Memorandum of Understanding (the “2009 MOU”) concerning those Submissions”.

³⁰ This is referred to in Somalia’s Memorial at paras. 3.2 and 3.7. See also Somalia’s Memorial, Annex 72 (United Nations, Office of Legal Affairs, Division for Ocean Affairs and the Law of the Sea, Table recapitulating the status of the Convention and of the related Agreements (10 Oct. 2014), available at http://www.un.org/depts/los/reference_files/status2010.pdf).

³¹ Somalia’s Memorial, Annex 55 at para. (a) (U.N. Convention on the Law of the Sea, Meeting of States Parties, Eleventh Meeting, Decision regarding the date of commencement of the ten-year period for making submissions to the Commission on the Limits of the Continental Shelf set out in article 4 of Annex II to the United Nations Convention on the Law of the Sea, U.N. Doc. SPLOS/72 (29 May 2001)). See also U.N. Doc. SPLOS 73 (14 June 2011) at para 101.

25. In June 2008, the Eighteenth Meeting of UNCLOS States Parties further discussed the “difficulties faced by a number of developing States in connection with the 10-year time period for making a submission to the Commission, which for many of these States ends in May 2009, and on identifying a solution of a practical nature”.³² It was decided that the ten-year time limit could be satisfied by each State submitting to the Secretary-General preliminary information indicative of the outer limits of the continental shelf beyond 200 NM, and a description of the status of preparation and intended date for making a full submission.³³
26. In October 2008, given the lack of resources and instability in Somalia, the Special Representative of the Secretary-General for Somalia (“SRSG”), Mr. Ahmedou Ould Abdallah,³⁴ initiated assistance to Somalia for submission of its preliminary information to the CLCS, in compliance with the CLCS time limits.³⁵
27. Somalia was among the developing States that faced particular challenges in fulfilling the requirements of UNCLOS Article 4 of Annex II because of its lack of the necessary expertise and resources. This was compounded by

³² UN. Doc. SPLOS/184, at para. 89. See also at paras. 90–99.

³³ In accordance with the requirements of article 76 of the Convention and with the Rules of Procedure and the Scientific and Technical Guidelines of the Commission on the Limits of the Continental Shelf. See Somalia’s Memorial, Annex 58 at para. 1(a) (U.N. Convention on the Law of the Sea, Meeting of States Parties, Eighteenth Meeting, Decision regarding the workload of the Commission on the Limits of the Continental Shelf and the ability of States, particularly developing States, to fulfil the requirements of article 4 of annex II to the United Nations Convention on the Law of the Sea, as well as the decision contained in SPLOS/72, paragraph (a), U.N. Doc. SPLOS/183 (20 June 2008)). See also UN. Doc. SPLOS/184 at para. 99.

³⁴ From September 2007 until July 2010, Mr. Ould Abdallah served as Special Representative for the UN Secretary-General for Somalia. Prior to this, from 2003 to 2007, Mr. Ould Abdallah was jointly Special Representative of the Secretary-General for West Africa and Chairman of the Cameroon-Nigeria Mixed Commission.

³⁵ As noted in Somalia’s Preliminary Information Submission dated April 2009 (Somalia’s Memorial, Annex 66) and Somalia’s submission dated 21 July 2014 (Somalia’s Memorial, Annex 70).

other constraints arising from the volatile political and security situation in the country.³⁶

28. It was in this context that Norway came to the assistance of Somalia in preparing its submission to the CLCS.³⁷ The key figure in this process was a senior Norwegian diplomat and jurist, Mr. Hans Wilhelm Longva, *Ambassadeur en Mission Spéciale* of the Norwegian Ministry of Foreign Affairs. He worked in close contact with the Somali Prime Minister (Hon. Omar Abdirashid Ali Sharmarke), and the Somali Deputy-Prime Minister and Minister of Fisheries and Marine Resources (Hon. Professor Abdirahman Haji Adan Ibbi).
29. Norway provided both technical and scientific expertise to Somalia, as well as its good offices to facilitate an agreement with Kenya.³⁸ This included “the assistance of international law experts in the Norwegian Ministry of Foreign Affairs, experts in the geosciences in the Norwegian Petroleum Directorate and experts from the UNEP Shelf Programme, represented by

³⁶ As stated in Somalia’s Preliminary Information Submission dated April 2009 (Somalia’s Memorial, Annex 66) at page 3 “Somalia is among the developing States that faces particular challenges in fulfilling the requirements of article 4 of Annex II to the Convention due to lack of financial and technical resources and relevant capacity and expertise. Moreover, Somalia continues to experience a number of other constraints relating to the political and security situation in the country, substantially hindering the fulfilment of these requirements.”

³⁷ Note Verbale from the Permanent Mission of Norway to the United Nations to the Secretariat of the United Nations (17 Aug. 2011) (Annex 4). See also Somalia’s Preliminary Information Submission dated April 2009 (Somalia’s Memorial, Annex 66) and the July 2014 Submission (Somalia’s Memorial, Annex 70) which noted that “On this basis, in October 2008, the Special Representative of the Secretary-General of the United Nations for Somalia (SRSG), Mr. Ahmedou Ould Abdallah, initiated the preparation of preliminary information... In order to prepare this material, the SRSG accepted an offer of assistance from the Government of Norway”.

³⁸ As stated in Somalia’s Preliminary Information Submission dated April 2009 (Somalia’s Memorial, Annex 66).

GRID-Arendal”.³⁹ All of the considerable expenses relating to the preparation of the submission were covered by Norway.⁴⁰

30. Norway’s assistance was prompted by its “commitment to a comprehensive and lasting settlement of the situation in Somalia and as an expression of Norway's support to the SRSB in carrying out his mandate.”⁴¹ Norway provided similar assistance to the member States of the Economic Community of West African States (“ECOWAS”) that made a joint submission to the CLCS.⁴²

B. Somalia’s proposal of the MOU to Kenya

31. The proposal to conclude the MOU originated from Somalia, not from Kenya. As set out in further detail in section C below, Norway and Somalia wanted to ensure Kenya’s non-objection to Somalia’s submission. In particular, Annex 1, Article 5(a) of the CLCS Rules of Procedure requires the prior consent of affected States before the CLCS can issue recommendations concerning disputed maritime areas.⁴³ The preparation of submissions involved considerable costs. Furthermore, CLCS recommendations were necessary to establish the outer limits of the continental shelf in order to allow for agreement on a full and final delimitation of the maritime boundary. Therefore, the MOU was drafted

³⁹ Press Release of the Norwegian Ministry of Foreign Affairs, “Somalia submits preliminary information indicative of the outer limits of its continental shelf with Norwegian assistance” (17 Apr. 2009), available at https://www.regjeringen.no/en/aktuelt/shelf_assistance/id555771/ (Annex 5).

⁴⁰ As stated in Somalia’s Preliminary Information Submission dated April 2009 (Somalia’s Memorial, Annex 66).

⁴¹ As stated in Somalia’s Preliminary Information Submission dated April 2009 (Somalia’s Memorial, Annex 66) at page 4. See also SC Resolution 1801 (2008) of 20 February 2008 and GA Resolution A/RES/63/111 of 5 October 2008.

⁴² See the Joint Submission of West African States to the CLCS dated 25 September 2014.

⁴³ CLCS Rules of Procedure, Annex 1, Article 5(a); UN Doc. CLCS/40/Rev. 1 (Somalia’s Memorial Annex 57 and available at <http://daccess-ods.un.org/TMP/1568814.81409073.html>).

by Norway on Somalia's behalf, to facilitate the preparation of Somalia's CLCS submission and a subsequent agreement with Kenya on delimitation.⁴⁴

32. On 10 March 2009, a meeting was held in Nairobi between the Somali Deputy Prime Minister, the Deputy Special representative of the UN Secretary-General for Somalia (Mr. Charles Petrie), and Norwegian Ambassador Longva. At that meeting Somalia⁴⁵ was informed about the initiative of the SRSG and the Norwegian offer of assistance with the CLCS submission.⁴⁶
33. It was at this meeting that Ambassador Longva first presented the draft MOU to the Somali Deputy Prime Minister.⁴⁷
34. The draft MOU was accepted, first by Somalia, and then by Kenya, with only minor revisions of a purely technical and formalistic nature.⁴⁸
35. In March 2009, the Somali Council of Ministers approved the draft MOU and the preliminary submission to the CLCS.⁴⁹ The Somali Council

⁴⁴ E-mail from Mr. Hans Wilhelm Longva to Ms. Juster Nkoroi (Mar. 2009) (Annex 6) and E-mail exchange between Ms. Rina Kristmoen, Prof. Abdirahman Ibbi, Mr. Hans Wilhelm Longva, and Ms. Juster Nkoroi (10–22 Mar. 2009) (Annex 7).

⁴⁵ The new Transitional Federal Government of the Somali Republic was sworn in on 22 February 2009.

⁴⁶ See the final paragraph on page 4 of Somalia's Preliminary Information Submission dated April 2009 (Somalia's Memorial, Annex 66).

⁴⁷ E-mail from Mr. Hans Wilhelm Longva to Ms. Juster Nkoroi (Mar. 2009) (Annex 6).

⁴⁸ E-mail exchange between Mr. Hans Wilhelm Longva, Prof. Abdirahman Ibbi and Ms. Juster Nkoroi (27 Mar. 2009) (Annex 8), e-mail exchange between Ms. Edith K. Ngungu and Mr. Hans Wilhelm Longva (30 Mar. 2009) (Annex 9) and e-mail exchange between Ms. Edith K. Ngungu and Mr. Hans Wilhelm Longva (30–31 Mar. 2009) (Annex 10).

⁴⁹ See the first paragraph at page 5 of Somalia's Preliminary Information Submission dated April 2009 (Somalia's Memorial, Annex 66) and e-mail exchange between Ms. Rina Kristmoen, Prof. Abdirahman Ibbi, Mr. Hans Wilhelm Longva, and Ms. Juster Nkoroi (10–22 Mar. 2009) (Annex 7).

expressed its gratitude to the SRSG and to Norway for its assistance.⁵⁰ Ambassador Longva informed the Kenyan representative that the Somali Council of Ministers had approved both the MOU and the preliminary submission.⁵¹

36. In the following days, the Somali Deputy Prime Minister, Ambassador Longva, and the representative of the Kenyan Government, made preparations for the signing of the MOU.⁵² The Prime Minister of Somalia confirmed to Ambassador Longva that he would arrive in Nairobi on 2 April 2009 to sign the agreement.⁵³ Because of scheduling difficulties however, Ambassador Longva subsequently contacted the Somali Deputy Prime Minister, indicating that:

Should the Prime Minister not be able to travel to Nairobi as planned, I would suggest that the Minister of National Planning and International Cooperation, Hon Abdirahman Adishakur Warsame, who is currently in Nairobi, receive the necessary authorization to sign the Memorandum of Understanding in order to be able to procede [*sic*] with the signing on 3 April 2009.⁵⁴

37. On 5 April 2009, at the invitation of the Somali Prime Minister and Deputy Prime Minister, Ambassador Longva visited Mogadishu.⁵⁵ He was also received by the Somali President (Hon. Sharif Sheikh Ahmed) and given

⁵⁰ See the first paragraph at page 5 of Somalia's Preliminary Information Submission dated April 2009 (Somalia's Memorial, Annex 66).

⁵¹ E-mail exchange between Ms. Rina Kristmoen, Prof. Abdirahman Ibbi, Mr. Hans Wilhelm Longva, and Ms. Juster Nkoroi (10–22 Mar. 2009) (Annex 7).

⁵² E-mail exchange between Mr. Hans Wilhelm Longva, Prof. Abdirahman Ibbi and Ms. Juster Nkoroi (27 Mar. 2009) (Annex 8).

⁵³ E-mail from Mr. Hans Wilhelm Longva to Mr James Kihwaga (Annex 11) and e-mail from Mr. Hans Wilhelm Longva to Prof. Abdirahman Ibbi (2 Apr. 2009) (Annex 12).

⁵⁴ E-mail from Mr. Hans Wilhelm Longva to Prof. Abdirahman Ibbi (2 Apr. 2009) (Annex 12).

⁵⁵ As set out at page 5 of Somalia's Preliminary Information Submission dated April 2009 (Somalia's Memorial, Annex 66).

the opportunity to meet the Council of Ministers for further explanation of the continental shelf issues.⁵⁶

38. The following day, on 6 April 2009, the Somali Council of Ministers reconfirmed its approval of the MOU and its signature.⁵⁷ This decision was endorsed by the Somali President, and the Minister of National Planning and International Cooperation was authorized by the Somali Prime Minister to sign the MOU on behalf of the Government.⁵⁸
39. The Kenyan representative was informed by Ambassador Longva that the Somali President had approved the conclusion of the MOU and that “[f]rom the Somali side the MoU will be signed by the Minister of National Planning and International Cooperation Hon Abdirahman Abdishakur Warsame”.⁵⁹
40. A Norwegian report confirmed that:

The Transitional Federal Government of the Somali Republic and the President gave their final approval [of the MOU] on 6 April 2009 following meetings in Mogadishu attended by Ambassador Hans Wilhelm Longva of the Norwegian Ministry of Foreign Affairs.⁶⁰

⁵⁶ As set out at page 5 of Somalia’s Preliminary Information Submission dated April 2009 (Somalia’s Memorial, Annex 66).

⁵⁷ Press release issued by former Somali Minister of National Planning and International Cooperation, Dr. Abdirahman Abdishakur, reported by Network Al Shahid (7 July 2012), available at: <http://english.alshahid.net/archives/30036> (Annex 13).

⁵⁸ *Ibid.*

⁵⁹ E-mail from Mr. Hans Wilhelm Longva to Mr. James Kihwaga (Annex 14).

⁶⁰ Press Release of the Norwegian Ministry of Foreign Affairs, “Somalia submits preliminary information indicative of the outer limits of its continental shelf with Norwegian assistance” (17 Apr. 2009), available at https://www.regjeringen.no/en/aktuelt/shelf_assistance/id555771/ (Annex 5).

41. Similarly, the Somali Minister of National Planning and International Cooperation confirmed that:⁶¹

On 6th April 2009, the then TFG [i.e. the Transitional Federal Government of Somalia] cabinet discussed the issue of continental shelves of Somalia at the request of Minister for fisheries and marine resources Prof. Abdirahman Ibbi. The cabinet listened reports [*sic*] by experts from the United Nation [*sic*] and Norwegian government and afterwards decided to sign the MoU, then passed the issue to the President who met with the experts and endorsed the cabinet's decision. It is worth noting that all cabinet ministers were alive at that time and it was before the Shamo blast [⁶²] and the assassination of Minister Omar Hashi. I am not sure whether all the 39 cabinet ministers attended the session, because I myself was in Nairobi, back from a conference I attended in Botswana.

42. The Minister explained that:

After the decision by the TFG cabinet and president, I was called by the then Prime Minister Omar Abdirashid who told me to sign the MoU with Kenya adding that there was a deadline to beat (07.04.2009) which if Somalia misses, it can lose the continental shelf... I requested the Premier to make a formally written document on the job he wants me to do on behalf of the TFG, in which he agreed. I also called the President and he confirmed to me that he met with the experts from the UN and Norway and is ok with MoU.

43. The Minister further noted that:

⁶¹ Press release issued by former Somali Minister of National Planning and International Cooperation, Dr. Abdirahman Abdishakur, reported by Network Al Shahid (7 July 2012), available at: <http://english.alshahid.net/archives/30036> (Annex 13).

⁶² In December 2009, an Al-Shabaab suicide bomber attacked the Shamo Hotel in Mogadishu, killing 25 people, including four government ministers.

The Premier explained for me how they [*sic*] decision was made and when I asked him whether they consulted any legal experts on the issue, he mentioned to me Abdikawi Yussuf [*sic*] – a Somali judge at the International Court in Hague [*sic*], whom he said was consulted and recommended the signing of the MoU.

44. Accordingly:

- a) The MOU was proposed by Somalia to Kenya;
- b) It was drafted and reviewed by Norwegian and Somali experts;
- c) It was approved by the Somali Prime Minister, the Somali Council of Ministers, and the Somali President; and
- d) The Minister of National Planning and International Cooperation was authorised by the Prime Minister to sign it on behalf of the Somali Government.

C. Signature and entry into force of the MOU on 7 April 2009

45. On 7 April 2009, the Kenyan Minister of Foreign Affairs and the Somali Minister of National Planning and International Cooperation, duly authorised by their respective Governments, signed the MOU at a formal ceremony in Nairobi. The MOU provided that it “shall enter into force upon its signature”.

D. The object and purpose, and terms of the MOU

The object and purpose of the MOU

46. The 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. It recognized the need for the Parties' prior consent to each other's submissions so that the CLCS could issue its recommendations, and confirmed that this would be without prejudice to a subsequent agreement on the maritime boundary. 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. The Parties also 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.

47. This two-step sequencing procedure is consistent with the jurisprudence of the Court requiring review by the CLCS prior to delimitation of the outer continental shelf.⁶³ Notwithstanding the 1979 EEZ boundary, this is an important consideration because the concavity of the African coastline on the Indian Ocean produces a magnified cut-off effect for Kenya beyond the 200 NM limit. It is, therefore, necessary to determine precisely the entire maritime area to be delimited in order to arrive at an 'equitable solution' in accordance with international law.

The terms of the MOU

48. The MOU's terms are plain and unambiguous. Its legally binding nature is equally straightforward.

⁶³ In *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, I.C.J. Reports 2012, p 624 at para. 126, the Court confirmed its finding in *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 2007, p. 759 that "any claim of continental shelf rights beyond 200 miles [by a State party to UNCLOS] must be in accordance with Article 76 of UNCLOS and reviewed by the Commission on the Limits of the Continental Shelf established thereunder" (at para. 319).

49. The MOU's first operative paragraph provides as follows:

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

50. The second operative paragraph emphasizes that the MOU is without prejudice to the final delimitation of the maritime boundary, and that it reflects the Parties' "common interest" in establishing the outer limits of their respective continental shelf:

The two coastal States are conscious that the establishment of the outer limits of the continental shelf beyond 200 nautical miles is without prejudice to the question of delimitation of the continental shelf between states with opposite or adjacent coasts. While the two coastal States have differing interests regarding the delimitation of the continental shelf in the area under dispute, they have a strong common interest with respect to the establishment of the outer limits of the continental shelf beyond 200 nautical miles, without prejudice to the future delimitation of the continental shelf between them. On this basis the two coastal States are determined to work together to safeguard and promote their common interest with respect to the establishment of the outer limits of the continental shelf beyond 200 nautical miles.

51. The third operative paragraph explains that because Somalia was not ready to make a full submission, it would only submit preliminary information to the CLCS by the impending deadline of 13 May 2009, and that Kenya would not object thereto:

Before 13 May 2009, the Transitional Federal Government of the Somali Republic intends to submit to the Secretary-General of the United Nations preliminary information indicative of the outer limits of the continental shelf beyond 200 nautical miles. This submission may include the area under dispute. It will solely aim at complying with the time period referred to in article (4) of Annex II to the United Nations Convention on the Law of the Sea (UNCLOS). It shall not prejudice the positions of the two coastal States with respect to the maritime dispute between them and shall be without prejudice to the future delimitation of maritime boundaries in the area under dispute, including the delimitation of the continental shelf beyond 200 nautical miles. On this understanding the Republic of Kenya has no objection to the inclusion of the areas under dispute in the submission by the Somali Republic of preliminary information indicative of the outer limits of the continental shelf beyond 200 nautical miles.

52. The fourth operative paragraph stipulates that Kenya would make its full submission by the 13 May 2009 deadline, that Somalia would make its full submission at a later date, and that neither of the Parties will object to the submission of the other:

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

them and shall be without prejudice to the future delimitation of the maritime boundaries in the area under dispute, including the delimitation of the continental shelf beyond 200 nautical miles.

53. The fifth operative paragraph of the MOU then sets forth the method of dispute settlement that would follow CLCS review, and specifies that it shall apply to the entire maritime boundary, both within and beyond 200 NM:

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.⁶⁴

54. Finally, the MOU stated in unequivocal terms that it “shall enter into force upon its signature”.⁶⁵ The signatures of the Kenyan and Somali Ministers appear on the final page, preceded by the statement that they are “duly authorized by their respective Governments” to sign the MOU.⁶⁶

⁶⁴ The MOU did not preclude on-going negotiations pending completion of the CLCS review, but provided that the final agreement would only be reached after the CLCS had made its recommendations.

⁶⁵ As already noted, this paragraph is not referred to in Somalia’s Memorial.

⁶⁶ As set out below, that authorization was subsequently confirmed on at least two occasions by the Somali Prime Minister.

No reference in the MOU either to ratification or to withdrawal

55. Somalia's Memorial does not dispute that the MOU in fact entered into force upon its signature on 7 April 2009.⁶⁷ It merely states that the Somali Federal Parliament rejected "ratification" of the MOU.⁶⁸ Notwithstanding that ratification was not required and is thus irrelevant, Somalia has not even produced a record of either the Parliamentary vote or debates, or any other document, demonstrating that formal ratification was in fact required and the asserted grounds for the MOU's rejection. There is only a passing reference to a letter of 10 October 2009 claiming that the Federal Parliament's rejection of the MOU rendered it "non-actionable".⁶⁹
56. Somalia's assertion is, in any event, wholly inapposite. Nothing in the terms of the MOU refers to any requirement of subsequent ratification. To the contrary, as noted above, the MOU provides in categorical terms that it "shall enter into force upon its signature". There is also nothing in the exchanges leading to adoption of the MOU suggesting that the Parties ever considered a requirement of ratification.

⁶⁷ See Somalia's Memorial at Annex 6 "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 U.N.T.S. 35 (7 Apr. 2009), entered into force 7 Apr. 2009" (emphasis added).

⁶⁸ Somalia's Memorial at para. 3.40.

⁶⁹ At fn 117. The meaning of the term "non-actionable" is not explained. As set out below, in the same month, at a meeting of the Somali diaspora held in London, the signatory of the MOU, the Minister of National Planning and International Cooperation (Hon. Abdirahman Abdishakur Warsame), in the presence of the Prime Minister of Somalia (H.E. Omar Abdirashid Ali Sharmarke), confirmed that the MOU had been approved by the Somali Prime Minister: Transcript of a Meeting of the Somali Diaspora in London with Somali Prime Minister Omar Abdirashid Ali Sharmarke and Dr Abdirahman Adishakur Warsame (Annex 15). Video available at Annex 47.

57. The MOU, furthermore, did not contain any provisions on, nor was there any discussion of, the possibility of unilateral denunciation or withdrawal by the Parties. Such a possibility would have been manifestly inconsistent with the very object and purpose of the MOU to establish a method for the full and final settlement of the maritime boundary dispute.

E. The subsequent conduct of the Parties

8 April 2009: Somalia's confirmation of the MOU in its submission of preliminary information to the CLCS

58. On 8 April 2009 (the day following the conclusion of the MOU) the Prime Minister of Somalia submitted the *Preliminary information indicative of the outer limits of the continental shelf* to the UN Secretary-General.⁷⁰
59. Somalia was aware that pursuant to the third operative paragraph of the MOU, Kenya would not object to its submission of preliminary information. Indeed, Somalia reproduced the MOU in full within its submission to the CLCS, and also enclosed a copy of the original signed instrument.⁷¹
60. The Somali submission to the CLCS also expressly confirmed that the MOU had been validly concluded, as follows:

On 7 April 2009, following consultations between the two sides, the Minister of Planning and International Cooperation of the Transitional Federal Government of the Somali Republic, and the Minister of Foreign Affairs of the Republic

⁷⁰ Somalia's Memorial, Annex 66.

⁷¹ *Ibid.*, pp. 8–9. As noted above, Somalia's Memorial does not refer to this. It simply states at para. 3.28 that "On 14 April 2009, within the time limits adopted by the State Parties to the Convention, Somalia submitted preliminary information indicative of the outer limits of its continental shelf beyond 200 M".

of Kenya, both being duly [*sic*] authorized by their respective Governments, signed in Nairobi a Memorandum of Understanding... (emphasis added).⁷²

May 2009: Kenya's confirmation of the MOU in its submission to the CLCS

61. In compliance with the time limits fixed under UNCLOS Article 76(8) and Article 4 of Annex II, Kenya made its full submission to the CLCS on 6 May 2009.⁷³ The UN confirmed receipt of Kenya's submission on 11 May 2009, and the CLCS Chairman stated that it would be placed on the provisional agenda of the 24th session of the CLCS.⁷⁴
62. Kenya had spent considerable resources on the preparation of its CLCS submission, with the participation of relevant technical and scientific experts.⁷⁵ As stated by Kenya at the nineteenth meeting of States Parties of UNCLOS held in June 2009:⁷⁶

This delegation wishes to remember the enormous resources that have been employed to complete the delineation of the outer limits of the continental shelf beyond 200 M, particularly by the developing and small Island states. Such resources have been utilized, among other things, in training of manpower,

⁷² *Ibid.*, p. 8.

⁷³ Somalia's Memorial, Annex 59 (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)).

⁷⁴ Somalia's Memorial, Annex 60 (United Nations, Division for Ocean Affairs and the Law of the Sea, Receipt of the submission made by the Republic of Kenya to the Commission on the Limits of the Continental Shelf, U.N. Doc. CLCS.35.2009.LOS (11 May 2009)) and Annex 61 (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, U.N. Doc. CLCS/64 (1 Oct. 2009)).

⁷⁵ The process of preparing the submission to CLCS entailed collection of bathymetric and geophysical data (seismics, magnetics and gravity) and its analysis. The exercise required highly specialized technical expertise and substantial funding, particularly in sourcing and hiring of survey ships.

⁷⁶ Kenya Statement in the Nineteenth Meeting of States Parties to the United Nations [Convention] on the Law of the Sea (22–26 June 2009) (Annex 16).

data acquisition and analysis, as well as in putting forth the just submitted reports.

63. Kenya expected that pursuant to the fourth operative paragraph of the MOU Somalia would not object to its submission. It therefore noted that:

[T]he two countries have signed a Memorandum of Understanding (MOU) dated 7 April 2009 granting each other no objection in respect of submissions on the outer limits of the continental shelf to the Commission on Limits of the Continental Shelf.⁷⁷

June 2009: registration and publication of the MOU by the UN

64. On 11 June 2009, in accordance with Article 102 of the UN Charter, the MOU was formally registered with the UN Secretariat.⁷⁸ A Certificate of Registration was issued by the UN Secretariat on 14 August 2009.⁷⁹ The MOU was subsequently published in the *UN Treaty Series* Volume 2599 (2009)⁸⁰ and the *Law of the Sea Bulletin* No 70 (2009).⁸¹

1 August 2009: Somali Parliament's rejection of the MOU

65. Sometime after its signature, the MOU unexpectedly became the subject of acute controversy within Somali media and political circles. Rumours circulated that the MOU was part of a conspiracy (between Somalia, Kenya, Norway, and the UN) aimed at “selling the sea” to Kenya.⁸² It was reported

⁷⁷ Somalia's Memorial Annex 59 at para. 7-3.

⁷⁸ 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 UN Secretariat (14 Aug. 2009) and Certificate of Registration (stating registration of Memorandum of Understanding on 11 June 2009) (Annex 17).

⁷⁹ *Ibid.*

⁸⁰ Somalia's Memorial, Annex 6.

⁸¹ United Nations Law of the Sea Bulletin No 70 (2010) (Annex 18).

⁸² Article from *The Somaliland Times*, “Somalia–Kenya Sign MoU for Maritime ‘Area under Dispute’: Exclusive”, Issue 376 (11 Apr. 2009) available at

that these inflammatory accusations had been initiated by Al-Shabaab to incite popular anger against the Somali Government. As reported by the *Somaliland Times* on 11 April 2009:

Rebels opposed to the TFG in the Somali capital Mogadishu have spread information and accused the Somali government of “selling the sea” to the neighbouring Republic of Kenya. This information, rightly or wrongly, has largely been accepted at face-value by a Somali public reeling from nearly 20 years of civil war, gross abuse of public trust and a legacy inherited from the colonial years.⁸³

66. Norway, which had invested considerable resources in assisting Somalia, was portrayed as an enemy of the Somali people. Threatening messages sent to the Norwegian Embassy in Nairobi claimed that Norway had supported “a Kenyan bid to claim waters of the coast of neighbouring Somalia for oil exploration” and that Kenya was “the enemy of Islam ... and must (be) ready (for) Al Qaeda attacks and revenge any time”.⁸⁴ The fear of terrorist acts was so serious that it resulted in the closure of the Norwegian embassy in Nairobi for several days in May 2009.⁸⁵
67. As this campaign of misinformation spread, it resulted in heated debates on the MOU in the Somali Parliament. This controversy culminated in the Parliamentary vote of 1 August 2009, rejecting the MOU. As already mentioned, Somalia’s Memorial now asserts that the MOU is “non-

<http://www.somalilandtimes.net/sl/2009/376/14.shtml> (Annex 19). See also Mr. Aburahman Hosh Jibril, *WardheerNews.Com*, “The MOU between Somalia and Kenya: A Big Fat Fact Check” (10 Sept. 2009) (Annex 20).

⁸³ Article from *The Somaliland Times*, “Somalia–Kenya Sign MoU for Maritime ‘Area under Dispute’: Exclusive”, Issue 376 (11 Apr. 2009), available at <http://www.somalilandtimes.net/sl/2009/376/14.shtml> (Annex 19).

⁸⁴ Article from *Reuters*, “Norway embassy in Kenya threatened with attack” (27 May 2009), available at <http://www.reuters.com/article/2009/05/27/idUSLR986749> (Annex 21).

⁸⁵ Mr. Rolleiv Solholm, *The Norway Post*, “Norway’s Nairobi Embassy re-Opened” (29 May 2009) (Annex 22).

actionable” because the Somali Parliament had “decided against its ratification”.⁸⁶ It has been noted above that Somalia’s Memorial does not produce the record of the Parliamentary vote or debates, or any other document, demonstrating that formal ratification was either the grounds for the MOU’s rejection or that it was in fact required.⁸⁷ As Somalia’s Memorial recognises, the MOU had already entered into force, upon signature.⁸⁸

19 August 2009: Somalia’s confirmation of the MOU in its letter to the UN

68. Despite this heated controversy, Somalia did not question the validity of the MOU. To the contrary, just a few days after the 1 August 2009 Parliamentary vote, the Prime Minister of Somalia confirmed to the UN Secretary-General that the MOU is in force.⁸⁹ In a letter dated 19 August 2009 (in a paragraph that is wholly disregarded in Somalia’s Memorial) the Somali Prime Minister stated as follows:

On 7 April 2009 the Minister of Foreign Affairs of the Republic of Kenya and the Minister of National Planning and International Cooperation of the Somali Republic, both being duly authorised by their respective governments, signed in

⁸⁶ At paras. 3.40–3.41.

⁸⁷ See at para. 3.40. As noted above, Somalia cites only the letter from H.E. Omar Abdirashid Ali Sharmarke, Prime Minister of the Transitional Federal Government of the Somali Republic, to H.E. Ban Ki-Moon, Secretary-General of the United Nations, No. OPM/IC/00./016/11/09 (10 Oct. 2009). MS, Vol. III, Annex 3. Reports of the vote in the Somali media – including film recording of what appears to be the parliamentary debate – indicate that the decision was to “reject” the MOUs, but without any explanation of the legal basis for such a vote or a purported requirement of “ratification”: Report and Transcript on Vote on a Motion in connection with the 2009 Memorandum of Understanding in Parliamentary Session of Transitional Federal Parliament of Somalia (Aug. 2009) (Annex 23). Video available at Annex 46.

⁸⁸ See Somalia’s Memorial, Annex 6.

⁸⁹ Somalia’s Memorial, Annex 37 (Letter from H.E. Omar Abdirashid Ali Sharmarke, Prime Minister of the Transitional Federal Government of the Somali Republic, to H.E. Ban Ki-Moon, Secretary-General of the United Nations, (19 Aug. 2009)).

Nairobi a [MOU]. A copy of the [MOU] is enclosed to the preliminary information.⁹⁰

69. Furthermore, with specific reference to the “maritime dispute” between Kenya and Somalia, the Somali Prime Minister confirmed in the same letter to the UN Secretary-General the two-step method of dispute settlement agreed to by the Parties, replicating the fifth operative paragraph of the MOU in full in the text of his letter, as follows:

In accordance with the Memorandum of Understanding, 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.

70. The Prime Minister’s communication to the UN Secretary-General also confirmed once again Somalia’s consent to the CLCS’s examination of Kenya’s submission.⁹¹

⁹⁰ The letter is referred to at para. 7.15 of Somalia’s Memorial. The reference to the MOU is not cited.

⁹¹ See communication from Kenya of 24 October 2014 stating “In a letter to the United Nations Secretary General referenced XRW/00506/08/09 dated August 19 2009, the Transitional Federal Government of the Somali Republic confirmed the rationale, intent and legitimacy of the MOU and further reiterated her consent in accordance with R 5 (c) of the Rules of Procedure of the Commission, to the examination of Kenya’s submission by the Commission and further reiterated that the delimitation of the 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 examinations of the separate submissions made by each of the two coastal states.” (Note Verbale from the Permanent Mission of Kenya to the United Nations to the UN Secretary-General (24 Oct. 2014) (Annex 24).

71. Furthermore, in August 2009, at the request of the Somali Government, Norway proceeded to assist Somalia in the preparation of a full submission to the CLCS, to be delivered in July 2014.⁹²

October 2009: Kenya's confirmation of the MOU at the 24th session of CLCS

72. Kenya made the presentation of its full submission at the 24th session of the CLCS in New York.⁹³ In a Statement dated 1 October 2009, the Chairman of the CLCS noted the statement of the Kenyan representative as follows:

...pending negotiations with the Transitional Federal Government of the Republic of Somalia, provisional arrangements of a practical nature had been entered into, in accordance with article 83, paragraph 3, of the Convention. These arrangements are contained in a memorandum of understanding signed on 7 April 2009, whereby the parties undertake not to object to the examination of their respective submissions. In this connection, Ms. Nkoroi pointed out that one of the notes verbales from Somalia dated 19 August 2009 was consistent with the memorandum of understanding and confirmed that, at an appropriate time, a mechanism will be established to finalize the maritime boundary negotiations with Somalia.⁹⁴

73. Kenya therefore confirmed the two-step method of settlement in the fifth operative paragraph of the MOU by which the Parties agree to negotiate a full and final agreement on maritime boundary delimitation after CLCS review of their respective submissions.

⁹² Somalia's submission of July 2014 at page 2 (Executive Summary) (Somalia's Memorial Annex 70).

⁹³ 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, U.N. Doc. CLCS/64 (1 Oct. 2009) (Somalia's Memorial, Annex 61).

⁹⁴ *Ibid*, para. 95.

74. Given that the MOU expresses Somalia's consent under Article 5(a), Annex I, of the CLCS Rules of Procedure, the CLCS decided to establish a sub-commission for consideration of Kenya's submission⁹⁵ which was the next submission in line at its 35th session.⁹⁶
75. The procedure for delimitation of the maritime boundary agreed upon by the Parties was thus unfolding as anticipated. Kenya had made its submission in May 2009, and Somalia would make its full submission in July 2014, at the same session that Kenya's submission would be considered. The CLCS would thereafter issue recommendations on the outer limits of the continental shelf, following which the Parties would conclude a final agreement on their maritime boundary.
76. The following month, in November 2009, at a Pan-African Conference on Maritime Boundary Delimitation and the Continental Shelf, Ambassador Longva hailed the MOU as one of the:

Important breakthroughs in handling of unresolved issues of maritime delimitation between neighbouring States in the context of the establishment of the outer limits of the continental shelf beyond 200 nautical miles.⁹⁷

March 2010: Somalia's letter to the UN

77. On 2 March 2010, almost one year after the MOU's entry into force, and its registration in the *UN Treaty Series* and *UN Law of the Sea Bulletin*, the Permanent Mission of the Somali Republic to the UN forwarded to the UN

⁹⁵ *Ibid*, para. 97.

⁹⁶ Scheduled for 2 July to 5 September 5 2014. See United Nations, Commission on the Limits of the Continental Shelf, Progress of work in the Commission on the Limits of the Continental Shelf: Statement by the Chair, U.N. Doc. CLCS/83 (31 Mar. 2014) at para. 18 (Somalia's Memorial, Annex 65).

⁹⁷ Prepared Remarks by Mr. Hans Wilhelm Longva at Pan African Conference on Maritime Boundary Delimitation and the Continental Shelf, Accra (9–10 Nov. 2009) (Annex 25, at p. 5).

Secretary-General a letter from the Somali Prime Minister dated 10 October 2009 (referred to at paragraph 55 above). That letter informed the UN Secretary-General that the MOU “was considered by the Transitional Federal Parliament of Somalia and that the members voted to reject the ratification of that MOU on August 1st 2009”. The letter requested “the relevant offices of the UN to take note of the situation and treat the MOU as non-actionable”.⁹⁸ No explanation was given of what was meant by “non-actionable”.

78. Somalia’s Memorial asserts that the letter was first sent on 10 October 2009.⁹⁹ The UN Division of Ocean Affairs and Law of the Sea (“DOALOS”) website however, refers only to a Note Verbale of 2 March 2010, indicating that as the date the communication was first received.¹⁰⁰
79. It seems that at some point after the Somali Prime Minister’s letter of 19 August 2009 confirming the MOU, intensifying political pressures had persuaded the Government to attempt to unilaterally withdraw from the MOU. Somalia’s Note Verbale of 2 March 2010, however, does not explain whether or how the Somali Parliament vote to “reject” the MOU

⁹⁸ This letter is referred to at paras. 3.40–3.41 of the Somali Memorial.

⁹⁹ The Memorial states at para. 3.40: “On 10 October 2009, Somalia informed the Secretary-General of United Nations that, on 1 August 2009, the Somali Parliament had voted on the 2009 MOU and had decided against its ratification”. As noted above, it was in October 2009, at a meeting of the Somali diaspora held in London, that the signatory of the MOU, the Minister of National Planning and International Cooperation (Hon Abdirahman Adishakur Warsame), in the presence of the Prime Minister of Somalia (H.E. Omar Abdirashid Ali Sharmarke), confirmed that the MOU had been approved by the Somali Prime Minister (Annex 15). The video is available at Annex 47.

¹⁰⁰ Webpage on Somalia on the website of the UN Division of Ocean Affairs and the Law of the Sea (DOALOS) (updated 16 Dec. 2014), available at <http://www.un.org/depts/los/LEGISLATIONANDTREATIES/STATEFILES/SOM.htm> (updated 16 Dec. 2014) (Annex 26). The relevant footnote reads “By a note verbale dated 2 March 2010, the Permanent Mission of the Somali Republic to the United Nations informed the Secretariat that the MOU had been rejected by the Parliament of the Transitional Federal Government of Somalia, and ‘is to be hence treated as non-actionable.’”. See also the CLCS website containing the Note Verbale of 2 March 2010 attaching the 10 October 2009 letter.

was pursuant to an alleged requirement of formal “ratification”, the meaning or effect of the term “non-actionable” under treaty law, or what action (if any) Somalia wished the UN to take as a consequence. Most notably, Somalia did not object to consideration of Kenya’s CLCS submission.

80. Somalia’s Memorial states that “Kenya registered no objection” to the Note Verbale.¹⁰¹ It fails to acknowledge that it was addressed only to the UN (and not Kenya) despite the fact that it concerned a bilateral agreement. Furthermore, Somalia’s conduct at that point in time was still consistent with the terms of the MOU. Absent an objection to Kenya’s CLCS submission, there was no breach of the MOU that would have required a response from Kenya. It was only in February 2014 that Somalia first registered such an objection.

August 2011: Norway’s letter to the UN

81. Following Somalia’s Note Verbale of 2 March 2010, Norway submitted a letter dated 17 August 2011 to the UN Secretariat.¹⁰² It may be recalled that the MOU was concluded under the good offices of Norway and it had assumed the substantial costs for the on-going preparation of Somalia’s full CLCS submission, scheduled for 2014. The letter, which is not mentioned in Somalia’s Memorial, stated that the MOU continues to be valid and that Norway’s continued assistance to Somalia is conditioned on respect for the terms of the MOU.
82. In particular, Norway emphasised the legally binding nature of the MOU:

¹⁰¹ At para. 3.41.

¹⁰² Note Verbale from the Permanent Mission of Norway to the United Nations to the Secretariat of the United Nations (17 Aug. 2011) (Annex 4).

Article 46 of the Vienna Convention on the Law of Treaties reads: “A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance”. Irrespective of whether and if so to what extent this provision is expressive of customary international law, Norway considers both Somalia and Kenya to remain bound by the provisions of the MoU.

83. Furthermore, Norway also clarified that further assistance to Somalia was linked to compliance with the MOU:

It is on this basis that Norway has decided to continue its assistance to Somalia both in preparing a submission by Somalia to the CLCS regarding the establishment of the outer limits of the continental shelf beyond 200 nautical miles and in preparing the establishment by Somalia by an exclusive economic zone in the maritime areas off Somalia.

Somalia was presumably aware that by accepting continued assistance from Norway it was accepting the continued validity of the MOU. Somalia did indeed continue to receive assistance from, and to express its appreciation to, Norway for the preparation of its CLCS submission.

84. Norway stated further in its 17 August 2011 letter that Somalia’s attempted unilateral withdrawal from the MOU cast doubt on the Somali Government’s capability to enter into legally binding commitments. Norway emphasized the importance of finding an opportunity to reaffirm the MOU’s legally binding nature:

While the above mentioned letter from the Prime Minister of Somalia [i.e. the Note Verbale of 2 March 2010] appears to be without legal effects, it has created a new political situation casting doubt on the commitment of the TFG to the MoU

between Somalia and Kenya, and creating doubts as to the capability of the TFG to enter into legally binding international commitments. Notwithstanding the political sensitivity of the issue, it is therefore to be hoped that at an appropriate time it will be possible to find a way to reaffirm the legally binding nature of the MoU.

85. In October 2011, not long after Norway sent this letter to the UN, terrorist threats were made once again against the Norwegian Embassy in Nairobi.¹⁰³ Ambassador Longva reportedly stated that “[t]hose who are behind this are looking to undermine the Somali government and we have been drawn into this conspiracy theory”.

October 2011: Somali Parliament resolution regarding territorial sea of 200 NM

86. With continuing public outrage in Somalia over the MOU, the campaign of misinformation spread and further politicised the maritime boundary dispute. For example, it is reported that on 8 October 2011, the Somali Parliament warned that the declaration of an EEZ would amount to the relinquishment of a 200 NM territorial sea¹⁰⁴ and constitute “treason”.¹⁰⁵ A few days earlier, the SRSG had observed before the International Contact Group on Somalia¹⁰⁶ that “there is still work to be done to win the hearts

¹⁰³ Ms. Elisabeth Rodum, Mr. Anders Nordstoga, and Mr. John Harbo, *Aftenposten*, “Norway Drawn into a Somali Conspiracy” (16 Oct. 2011), available at <http://www.aftenposten.no/nyheter/uriks/--Norge-er-trukket-inn-i-ensomalisk-konspirasjonsteori-5577035.html> (Annex 27).

¹⁰⁴ See supra. para. 21.

¹⁰⁵ Mr. Mohamud M. Uluso, *Hiiraan Online*, “Somali Parliament warned K-TFG leaders against committing treason” (22 Oct. 2011) (Annex 28).

¹⁰⁶ The International Contact Group (ICG) on Somalia is a group of UN Ambassadors and intergovernmental organizations, initiated by the United States at the UN headquarters in June 2006, following the Transitional Federal Government’s loss of control of Mogadishu to the Supreme Islamic Courts Union. Its mandate is to assist in peace, reconciliation and developing law enforcement capacity in Somalia.

and minds of many Somali's [sic] (particularly MPs) who believe that declaring the EEZ will in some way give away Somali sovereignty."¹⁰⁷

July 2012: statement of the Somali MOU signatory

87. In light of the continuing political controversy, in July 2012, the Somali Minister who had signed the MOU was compelled to defend his actions in a public statement as follows:¹⁰⁸

I read the MoU several times before I put the pen to it, because I am a lawyer even though I didn't specialize in maritime law. I am sure I didn't sign a MoU on sea border or one that I saw as to be committing mistake by the TFG leadership. Ladies and Gentlemen, respected fellow Somalis I assured you that I never for a second intended to be part of something that will harm my Country and People and history is on my side. I tried my best to be sure of what I was signing, consulted with several people... The rightness or wrongness of the MoU is something we have to leave to the experts and legal practitioners in maritime laws... But that issue shouldn't be used as slandering, defaming and false accusation... I have forgiven all those who talked bad about me due to their misinformation about the matter.

¹⁰⁷ "SRSG Statement on Piracy to ICG", Copenhagen (29 Sept. 2011), available at <http://eunavfor.eu/wp-content/uploads/2011/10/SRSG-STATEMENT-ON-PIRACY-TO-Copenhagen-ICG.pdf> (Annex 29).

¹⁰⁸ Statement by Mr. Warsame, *Mareeg.com*, "Ex somalia minister Clarify [sic] on the Memorandum of Understanding between Somalia and Kenya", available at <http://www.mareeg.com/fidsan.php?sid=24893&tirsan=3> (Annex 30). He stated "I want to clearly share with you an incident that has repeatedly emerged recently and which is misleadingly reported by some media houses. In this press release, I want to clarify myself instead of others doing so on my behalf. It is about a Memorandum of Understanding on Continental Shelves between Somalia and Kenya that I signed on behalf of Transitional Federal Government (TFG) as the Minister of Planning and International Cooperation".

June 2013: statement of the Somali Government on refusal to negotiate with Kenya

88. On 31 May 2013, the Kenyan Cabinet Secretary for Foreign Affairs (Hon. Amina Mohamed) and the Somali Minister for Foreign Affairs (Hon. Fauzia Yusuf Adam) issued a Joint Statement in which “the two ministers underlined the need to work on a framework of modalities for embarking on maritime demarcation.”¹⁰⁹ The Statement further noted that “[t]he ministers reviewed previous agreements and Memorandum of Understandings (MoU) signed between Kenya and Somalia, and their level of implementation”.
89. The Somali media quickly seized on the Joint Statement’s reference to maritime delimitation, reportedly forcing the Somali Foreign Minister to deny that Somalia had signed any agreement on the maritime boundary, emphasising that Kenya “requested if talks can be reopened on this issue but I declined”.¹¹⁰ Furthermore, despite the Joint Statement’s apparent reference to the MOU, she also claimed to have informed Kenya that “the issue will remain as rejected by Somalia parliament in 2009”.
90. It was also reported on 6 June 2013 that the Somali Council of Ministers had issued a similar statement, rejecting any negotiations with Kenya as follows:

¹⁰⁹ Joint Press Release by Kenyan Cabinet Secretary for Foreign Affairs (Hon. Amina Mohamed) and Somali Deputy Prime Minister, Minister of Foreign Affairs & International Cooperation (Hon. Fawzia Yusuf H. Adam) (31 May 2013) (Annex 31) and Article from *Hiiraan*, “Somalia Cabinet rejects appeal for talks on border dispute with Kenya” (10 June 2013), available at http://www.hiiraan.com/news4/2013/Jun/29774/somalia_cabinet_rejects_appeal_for_talks_on_border_dispute_with_kenya.aspx (Annex 32).

¹¹⁰ Article from *Hiiraan*, “Somalia Cabinet rejects appeal for talks on border dispute with Kenya” (10 June 2013), available at http://www.hiiraan.com/news4/2013/Jun/29774/somalia_cabinet_rejects_appeal_for_talks_on_border_dispute_with_kenya.aspx (Annex 32).

The Federal Government of Somalia does not consider it appropriate to open new discussions on maritime demarcation or limitations on the continental shelf with any parties.¹¹¹

2 February 2014: Somalia's material breach of the MOU by objection to Kenya's CLCS submission

91. The CLCS had decided at its September 2009 meeting to establish a sub-commission to consider Kenya's submission, which was next in line according to the order in which it had been received.¹¹² By the 34th session of the CLCS, held from 27 January to 14 March 2014, Kenya's submission had come to the head of the queue and at that stage was expected to be considered at the 35th session, scheduled for September 2014.¹¹³
92. Despite the political controversy surrounding maritime issues, the Somali Government had never given any indication that it might object to Kenya's submission. The MOU had clearly indicated, consistent with Article 5, Annex I, of the CLCS Rules of Procedure, that recommendations on the limits of the outer shelf are "without prejudice" to maritime boundary

¹¹¹ Kenya has not been able to locate the original of this document, which is presumably in the possession of Somalia. See Press Release of Somali Council of Ministers, posted on *Horseedmedia*, "Somalia: Somali Federal Government clarifies its position on territorial waters" (6 June 2013), available at <http://horseedmedia.net/2013/06/06/somalia-somali-federal-government-clarifies-its-position-on-territorial-waters/> (Annex 33); Article on *Radio Kulmiye*, "Somali Federal Government clarifies its position on territorial waters" (6 June 2013) (Annex 34); Mr. Malkhadir Muhumed, *Wardheer News*, "Somalia Cabinet Rejects Appeal for Talks on Border Dispute with Kenya" (9 June 2013), available at <http://www.wardheernews.com/somalia-cabinet-rejects-appeal-for-talks-on-border-dispute-with-kenya/> (Annex 35); Statement from Somali Prime Minister's Media Office, posted on *Somalitalk*, "Somali Federal Government clarifies its position on territorial waters" (6 June 2013), available at <http://somalitalk.com/2011/badda/difaac96.html> (Annex 36).

¹¹² Somalia's Memorial, Annex 61 at para. 97: "the Commission decided that, as provided for in article 5 of annex II to the Convention and in rule 42 of the rules of procedure, the submission would be addressed by way of a sub-commission to be established in accordance with rule 51, paragraph 4 ter, of the rules of procedure, at a future session. The Commission decided to revert to the consideration of the submission at the plenary level at the time when the submission is next in line for consideration as queued in the order in which it was received".

¹¹³ Somalia's Memorial, Annex 65 at para. 18.

delimitation. Under these circumstances, it was to Kenya's surprise that on 4 February 2014 (some five years after the MOU entered into force), the Minister of Foreign Affairs and International Cooperation of Somalia sent a letter to the UN Secretary-General,¹¹⁴ withdrawing its earlier consent by objecting for the first time to the CLCS's consideration of Kenya's submission.¹¹⁵

93. This letter is presented in Somalia's Memorial as being "prompted" by Kenya's submission to the CLCS.¹¹⁶ However, the letter is dated 4 February 2014, whereas Kenya's submission had been made in May 2009.
94. In the 4 February 2014 letter, Somalia also objected to the UN registration, five years earlier, of what it now called the "purported MOU". The Somali letter attached a Note Verbale,¹¹⁷ stating the basis on which the "purported MOU was deemed void and of no effect". The letter also demanded that the UN Secretary-General "immediately" remove the agreement from the UN Register of treaties – a demand with which the UN did not comply.
95. The Note Verbale once again invoked the Somali Parliamentary vote of 1 August 2009. However, it made the remarkable claim, for the very first time, that "at the time of signature" the Somali Minister for National Planning and International Cooperation had "informed the representatives of the Government of Kenya that in accordance with the Transitional

¹¹⁴ Letter from Dr. Abdirahman Beileh, Minister of Foreign Affairs and International Cooperation of the Somali Federal Republic, to H.E. Ban Ki-Moon, Secretary-General of the United Nations, No. MOFA/SFR/ MO/259/2014 (4 Feb. 2014) (Somalia's Memorial, Annex 41); Letter from Dr. Abdirahman Beileh, Minister of Foreign Affairs and International Cooperation of the Somali Federal Republic, to H.E. Ban Ki-Moon, Secretary-General of the United Nations, No. MOFA/SFR/MO/258/2014 (4 Feb. 2014) (Somalia's Memorial, Annex 42). See also Somalia's Memorial, Annex 41 which is the Note Verbale attached to that letter.

¹¹⁵ Somalia's Memorial does not refer to any earlier objection.

¹¹⁶ At para. 7.20.

¹¹⁷ Somalia's Memorial, Annex 41.

Federal Charter of the Somali Government of February 2004, the MOU would require ratification by the Transitional Federal Parliament of the Somali Republic”. There is no record of any such statement having ever been made, and Kenya does not accept that any such statement was in fact ever made. Furthermore, the alleged statement plainly contradicts the express provision in the MOU that “it shall enter into force upon signature”.

96. The Note Verbale also made the astonishing claim, again for the very first time,¹¹⁸ that the Minister who had been “duly authorised” to sign the MOU on behalf of Somalia, was in fact not “duly authorised” at all. The new Somali theory was that, notwithstanding both his prior authorisation and subsequent confirmation by the Head of Government, he did not possess “full powers” within the meaning of Article 7 of the Vienna Convention on the Law of Treaties because he “did not produce appropriate documents demonstrating his powers to represent the Somali Republic for the purpose of agreeing to the text of the MOU on behalf of the Somali Republic”.¹¹⁹
97. In any event, the letter and the Note Verbale were never addressed to Kenya. Indeed, as discussed below, to this day, Kenya has not received any proper notice from Somalia of a purported withdrawal from the MOU.

¹¹⁸ In its April 2009 submission, Somalia expressly stated that the MOU had been signed by the duly authorized representatives of their respective Governments (Somalia’s Memorial, Annex 66 at p.8). See also the letter dated 19 August 2009 from the Somali Prime Minister which again confirmed that the “duly authorized” representatives of Kenya and Somalia signed the MOU (Somalia’s Memorial, Annex 37).

¹¹⁹ Article 7(1) provides “A person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty if: (a) he produces appropriate full powers; or (b) it appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as representing the State for such purposes and to dispense with full powers”.

F. Events following Somalia’s attempt in 2014 to unilaterally reject the MOU

March 2014: first technical meeting between Kenya and Somalia

98. Following the 4 February 2014 objection, Kenya resorted to diplomacy to persuade Somalia to comply with its obligations under the MOU. The respective Foreign Ministers held a meeting on 21 March 2014. A joint report recorded that the Ministers agreed that a “technical level” meeting be held among relevant officials.¹²⁰ Accordingly, the Parties agreed to hold their first bilateral meeting, at the technical level, at the Ministry of Foreign Affairs of Kenya in Nairobi on 26 and 27 March 2014.¹²¹
99. Given Somalia’s objection to Kenya’s submission, it was Kenya that had requested this first technical meeting.¹²² Accordingly, consistent with the agreed two-step procedure, “Kenya submitted a proposed agenda for the meeting which included the following substantive issues: a) The Memorandum of Understanding; and b) The maritime boundary.”¹²³ For Kenya, the primary purpose of the March 2014 meeting was to secure Somalia’s consent to CLCS review, in order to resume and eventually conclude the method of settlement agreed under the MOU.

¹²⁰ Somalia’s Memorial, Annex 31, at para. 1.

¹²¹ Somalia’s Memorial, Annex 24 states that the Somali delegation consisted of Ms. Mona Al-Sharmani (Senior Adviser and head of the delegation) and Mr. Omar Mohamed (Senior Adviser). Annex 24 states that the Kenyan delegation was led by Ms. Juster Nkori in addition to 15 members from different branches of the Kenyan Government. The Kenyan Ambassador to Somalia, His Excellency Josephat Maikara and Mr. Daniel Tanui, the deputy director/horn of Africa participated in the opening and closing of the meetings.

¹²² See Government of Somalia and Government of Kenya, Joint Report on the Kenya–Somali Maritime Boundary Meeting, 26–27 Mar. 2014 (1 Apr. 2014) (Somalia’s Memorial, Annex 31); Federal Republic of Somalia, Report on the Meeting between The Federal Republic of Somalia and The Republic of Kenya On Maritime Boundary Dispute, Nairobi, Kenya, 26–27 Mar. 2014 (1 Apr. 2014) which records that the meeting was convened “At the request of the Kenyan Government” (Somalia’s Memorial, Annex 24).

¹²³ Somalia’s Memorial, Annex 31 at page 1.

100. Somalia's own report of the meeting indicates that from the very outset it objected to any discussion of the MOU and demanded that it be removed from the agenda.¹²⁴ The Somali delegation argued again that because its Parliament had rejected the MOU in 2009, it was "void and of no effect".
101. However, Somalia added yet another new theory to justify its purported withdrawal from the MOU. In an apparent attempt to retroactively justify the lack of any proper notice, Somalia made the remarkable claim, for the very first time, that it had previously notified Kenya "orally". Again, this alleged "oral" notification is in direct contradiction with the express terms of the MOU. There is no record whatsoever, and no Kenyan official has any recollection, of any such notification.
102. The Kenyan delegation was surprised by the refusal of the Somali delegation to discuss the MOU. However, in a spirit of compromise, and in order for the preliminary technical discussions to proceed, the Kenyan delegation agreed to remove the MOU from the agenda on the understanding that it would be discussed at a subsequent meeting.¹²⁵ Somalia's Memorial notes that "Kenya agreed and amended the agenda".¹²⁶ However, the only thing that Kenya agreed to was to postpone the discussion of, and not to accept, Somalia's rejection of the MOU.

¹²⁴ Somalia's Memorial, Annex 24. See also Annex 31 which is the Joint Report of the meeting.

¹²⁵ Somalia's Memorial, Annex 24 records that the Somali delegation confirmed discussions would include "the Somali Government's refusal to consent to the consideration by the Commission on the Limitation of Continental Shelf (the "Commission") of the Kenyan submission for an extended continental shelf" and that "The Somali delegation stated that they are 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 with the aim of resolving the existing dispute in a speedy manner." It notes: "The Kenyan delegation agreed to proceed on that basis."

¹²⁶ Somalia's Memorial, para. 3.46.

March 2014: CLCS decision to delay consideration of Kenya's submission

103. In light of Somalia's refusal to withdraw its objection at the first technical meeting, the CLCS determined on 31 March 2014, that notwithstanding its earlier decision to consider Kenya's submission at its 35th session,¹²⁷ it "was not in a position to proceed with the establishment of a sub-commission at that time."¹²⁸
104. At the twenty-fourth meeting of UNCLOS States Parties, held on 9–13 June 2014, Kenya noted with concern Somalia's refusal to withdraw its objection. Kenya's representative emphasised that "[t]he timely consideration of submissions by CLSC [*sic*] continues to be of great interest to my country", and that "any slight delay in considering a country's submission results in huge human and material costs used to ensure that the country maintains her ability to defend the submission". Kenya stressed that:

our concern arises in instances where the principle of good faith does not seem to guide the actions of a member State. This may arise in situations where a State may simply refuse to grant consent for no apparent reason. The situation is further compounded where State Parties grant each other consent for the Commission to consider a submission and the consent is withdrawn shortly before or during the course of consideration of the submission.¹²⁹

¹²⁷ The 35th session ran from 21 July to 5 September 2014.

¹²⁸ Somalia's Memorial, Annex 65 at para. 18 (United Nations, Commission on the Limits of the Continental Shelf, Progress of work in the Commission on the Limits of the Continental Shelf: Statement by the Chair, U.N. Doc. CLCS/83 (31 Mar. 2014)).

¹²⁹ Statement by Kenya during the 24th Meeting of States Parties to the United Nations Convention on the Law of the Sea, New York (9–13 June 2014) (Annex 37).

July 2014: Somalia's submission to the CLCS

105. While blocking Kenya's submission in breach of the MOU, Somalia made its own submission to the CLCS on 21 July 2014, at the very session when Kenya's submission was to be considered.¹³⁰ Somalia's submission acknowledged that:

The Government of Norway has provided assistance and advice to the Federal Government of Somalia (FGS) in the preparation of the present submission, and the Royal Norwegian Ministry of Foreign Affairs, the Norwegian Petroleum Directorate and the Norwegian Mapping Authority have been involved in this work.¹³¹

106. Somalia noted that its submission "includes the areas under dispute between the two coastal States".¹³²

107. It then stated that Somalia is:

ready to enter into consultations with the Republic of Kenya with a view to reaching an agreement or understanding which will allow the Commission to consider and make recommendations on submissions by each of the two coastal States in the areas under dispute without prejudice to the final delimitation of the continental shelf to be concluded subsequently in the areas under dispute by the two coastal States.

Somalia's willingness to "reach an agreement or understanding" on prior consent with Kenya was curious. It had already concluded exactly such an agreement some five years earlier, namely the 2009 MOU. In any event,

¹³⁰ Somalia's Memorial Annexes 69 and 70. The previous month, 30 June 2014, Somalia had issued a proclamation of its co-ordinates on the EEZ (Somalia's Memorial Annex 14 and Annex 15).

¹³¹ Somalia's Memorial, Annex 70 at p. 4.

¹³² Somalia's Memorial, Annex 70 at p. 9.

Somalia's statement clearly admitted that any delimitation has to be concluded "subsequently", i.e. after CLSC review.

108. Despite Somalia's breach of the MOU, Kenya did not object to the consideration of Somalia's submission at the 37th session of the CLCS on 20 April 2015.¹³³ Kenya continued to pursue diplomacy to persuade Somalia to withdraw its objection, consistent with its obligations under the MOU.

July 2014: second technical meeting between Kenya and Somalia

109. On 28–29 July 2014, exactly one month before Somalia's initiation of this proceeding before the Court, a second technical meeting was held in Nairobi.¹³⁴ Kenya expected finally to discuss the MOU. However, Somalia, once again refused to discuss the withdrawal of its objection. Instead, Somalia used the meeting to advance a detailed argument on equidistance as the only possible solution to the maritime boundary dispute.¹³⁵ Kenya responded by presenting its preliminary views in order to establish a framework for further discussions. The Parties agreed to reconvene on 25–26 August 2014 for a third technical meeting.

¹³³ "Progress of Work in the Commission on the Limits of the Continental Shelf. Statement by the Chair", Commission on the Limits of the Continental Shelf (CLCS), thirty-seventh session, CLCS/88 (20 Apr. 2015), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N15/112/55/PDF/N1511255.pdf?OpenElement> (Annex 38). Para. 6 states that the Commission considered the provisional agenda (CLCS/L.38) and adopted it, as amended (CLCS/87). That agenda listed Somalia at item 15 "Provisional Agenda", CLCS, thirty-seventh session, CLCS/L.38 (26 Nov. 2014), available at http://www.un.org/ga/search/view_doc.asp?symbol=CLCS/L.38 (Annex 39).

¹³⁴ Government of Somalia and Government of Kenya, Joint Report on the Kenya-Somalia Maritime Boundary Meeting, 28–29 July 2014 (July 2014) (Somalia's Memorial, Annex 32).

¹³⁵ Somalia's Memorial, Annex 32 at para. 3.

August 2014: Somalia's application to the Court

110. The third technical meeting did not take place. Somalia's Memorial states that Kenya simply did not "send its delegation to Mogadishu".¹³⁶ It completely disregards the perilous security situation in Somalia and the fact that the Kenyan delegation could not travel without proper security arrangements. In fact, on 4 August 2014, immediately after the second technical meeting was concluded on 29 July, the Kenyan Ministry of Foreign Affairs had requested the advice of the Kenyan National Intelligence Service. It was informed that "due to the volatile security situation prevailing in Mogadishu, it is not advisable for such high powered delegation to visit the country in such circumstances."¹³⁷
111. Somalia was well aware of this situation. Kenya had already expressed its concern about an earlier proposal to hold the July 2014 second technical meeting in Mogadishu. The incidents of terrorist bombings, assassinations and hostage-taking were an obvious problem in Somalia. This included the notorious 2009 Al-Shabaab suicide bombing incident at the Shamo Hotel in Mogadishu, which claimed the lives of four Somali Ministers.¹³⁸
112. Kenya was clearly eager to hold a third technical meeting. Contemporaneous internal documents expressed its intention "to discuss maritime boundary including lifting of objection by Somalia on MOU

¹³⁶ Memorial at para. 3.54.

¹³⁷ Dr. Karanja Kibicho, Confidential Note to Ms. Juster Nkoroj regarding "Proposal for the Cabinet Secretary MFA and Other Senior Government Official to Visit Mogadishu to Discuss Maritime Boundary Including Lifting of Objection by Somalia on MOU Granting No Objection to Consideration of Kenya's Submission", MFA.INT.8/15A (23 Aug. 2014) (Annex 40).

¹³⁸ See e.g. <http://news.bbc.co.uk/1/hi/8392468>.

granting no objection to consideration of Kenya’s submission”.¹³⁹ At the first two technical meetings, Kenya had failed to persuade Somalia even to discuss withdrawing its objection. Without CLCS review, further progress on delimitation was not possible.

113. To Kenya’s astonishment, on 28 August 2014, (in the same week that the Parties had scheduled the third technical meeting), Somalia initiated this proceeding against Kenya before the Court. It had given no prior indication that it was contemplating such a step. Kenya had reasonably assumed that Somalia’s objection to CLCS review had to be resolved before formal negotiations could even start. Furthermore, the Somali Application, which had presumably been prepared earlier in 2014 during on-going preliminary technical meetings, was in breach of the MOU’s agreed method for settlement of the maritime boundary dispute. In these circumstances, Somalia’s assertion that it came before the Court because it was “[d]isappointed by Kenya’s non-responsiveness, frustrated by the lack of progress made during the two earlier rounds of negotiations”, and that “further negotiations would be pointless”¹⁴⁰ is disingenuous.

2 September 2014: Somalia’s letter to the UN

114. The matter of the MOU did not end with Somalia’s filing of its Application before the Court. The CLCS was apparently confused by Somalia’s letter

¹³⁹ Dr. Karanja Kibicho, Confidential Note to Ms. Juster Nkoroi regarding “Proposal for the Cabinet Secretary MFA and Other Senior Government Official to Visit Mogadishu to Discuss Maritime Boundary Including Lifting of Objection by Somalia on MOU Granting No Objection to Consideration of Kenya’s Submission”, MFA.INT.8/15A (23 Aug. 2014) (Annex 40) and Dr. Karanja Kibicho, Confidential Note to the Director General of the National Intelligence Service Regarding “Proposal for the Cabinet Secretary MFA and Other Senior Government Official to Visit Mogadishu to Discuss Maritime Boundary Including Lifting of Objection by Somalia on MOU Granting No Objection to Consideration of Kenya’s Submission”, MFA.INT.8/15A (4 Aug. 2014) (Annex 41).

¹⁴⁰ Memorial at para. 3.56.

of 4 February 2014, rejecting the MOU and objecting to Kenya's submission. On the one hand, the CLCS had determined in its March 2014 report that it could no longer establish a sub-commission to consider Kenya's submission.¹⁴¹ On the other hand, the presentation of Kenya's submission was included in the provisional agenda for the 35th session.¹⁴²

115. This prompted Somalia, on 2 September 2014, to submit a second Note Verbale to the CLCS.¹⁴³ In a letter to the UN Secretary-General of the same date, Somalia emphasised that it “has not given its consent (and does not hereby give its consent) to the consideration by the Commission of the submissions made (or to be made) or presented (or to be presented) by the Government of Kenya”.¹⁴⁴ The letter also notified the UN Secretary-General that: “The maritime dispute between Somalia and Kenya is presently before the International Court of Justice, following Somalia's Application to the Court filed on 28 August 2014”.¹⁴⁵

3 September 2014: Kenya's confirmation of the MOU at the 35th session of the CLCS

116. On 3 September 2014, Kenya presented its submission to the CLCS.¹⁴⁶ The Head of the delegation, the Attorney-General for Kenya (Hon. Githu

¹⁴¹ Somalia's Memorial, Annex 65 at para. 18 (United Nations, Commission on the Limits of the Continental Shelf, Progress of work in the Commission on the Limits of the Continental Shelf: Statement by the Chair, U.N. Doc. CLCS/83 (31 Mar. 2014)).

¹⁴² “Agenda”, CLCS, thirty-fifth session, CLCS/84 (4 Aug. 2014), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N14/494/70/PDF/N1449470.pdf?OpenElement> (Annex 42 at item 17).

¹⁴³ “Progress of Work in the Commission on the Limits of the Continental Shelf. Statement by the Chair”, CLCS, thirty-fifth session, CLCS/85 (24 Sept. 2014), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N14/547/71/PDF/N1454771.pdf?OpenElement> (Annex 43). See para. 65.

¹⁴⁴ Somalia's Memorial, Annex 48.

¹⁴⁵ Somalia's Memorial, Annex 48.

¹⁴⁶ “Progress of Work in the Commission on the Limits of the Continental Shelf. Statement by the Chair”, CLCS, thirty-fifth session, CLCS/85 (24 Sept. 2014), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N14/547/71/PDF/N1454771.pdf?OpenElement>

Muigai), reaffirmed the Parties' obligations under the MOU not to object to each other's submissions, and to finalise an agreement only after a CLCS review:

Kenya had yet to conclude a maritime boundary agreement with Somalia, although negotiations were ongoing. He noted that provisional arrangements of a practical nature had been entered into, in accordance with article 83, paragraph 3, of the Convention, as contained in a memorandum of understanding signed on 7 April 2009, whereby the parties had undertaken not to object to the examination of their respective submissions. Mr. Muigai noted that the note verbale from Somalia dated 19 August 2009 affirmed the position mutually agreed upon by the two States in the memorandum of understanding.

117. In light of the MOU, Kenya urged the CLCS to establish a sub-commission to consider its submission. However, given Somalia's objection under Article 5, Annex 1 of the CLCS Rules of Procedure, the CLCS "reiterated its decision to defer further consideration of the submission and the communications from Kenya and Somalia".¹⁴⁷
118. The CLCS took note of Somalia's second Note Verbale but determined that no change in its earlier decision was required.¹⁴⁸

ny.un.org/doc/UNDOC/GEN/N14/547/71/PDF/N1454771.pdf?OpenElement (Annex 43). Para 57 records that the presentation was made by the Head of the delegation, Githu Muigai, Attorney General, and by Michael Gikuhi, Geophysicist and member of the task force on delineation of Kenya's outer continental shelf. The delegation of Kenya also included the Permanent Representative of Kenya to the United Nations, Macharia Kamau, and the Deputy Permanent Representative of Kenya to the United Nations, Koki Muli Grignon, as well as a number of scientific, legal and technical advisers.

¹⁴⁷ "Progress of Work in the Commission on the Limits of the Continental Shelf. Statement by the Chair", CLCS, thirty-fifth session, CLCS/85 (24 Sept. 2014), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N14/547/71/PDF/N1454771.pdf?OpenElement> (Annex 43) at para. 64.

¹⁴⁸ *Ibid.*, at para. 65.

24 October 2014: Kenya's confirmation of the MOU

119. On 24 October 2014, Kenya submitted a Note Verbale to the UN Secretary-General expressing its “surprise” at Somalia’s continuing objection to its CLCS submission and its attempt to withdraw the MOU from the UN Registry.¹⁴⁹ Once again Kenya confirmed the agreed method of settlement under the MOU:

Kenya confirms that prior to the filing of her Submission to the Commission on 6 April 2009, which submission was acknowledge [*sic*] and published by the United Nations vide Continental Shelf Notification, reference, CLCS.35.2009.LOS dated 11th May 2009, and the subsequent presentation to the Commission on 3rd September 2009, Kenya had, in the spirit of understanding and cooperation, negotiated arrangements of a practical nature with the Transitional Federal Government of the Republic of Somalia in accordance with Article 83, paragraph 3, of the Convention. These arrangements were contained in a Memorandum of Understanding (hereinafter MOU) signed on 7th April 2009, whereby both parties, undertook not to object to the examination of their respective submission [*sic*]. At the time, Kenya indicated to the Commission that pending further negotiations, a mechanism will be established to finalise the maritime boundary negotiations with Somalia.

120. In particular, Kenya referred to the Somali letter of 19 August 2009 pursuant to which:

The Transitional Federal Government of the Somali Republic confirmed the rationale, intent and legitimacy of the MOU and further reiterated her consent in accordance with R 5 (c) of the

¹⁴⁹ 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) (Somalia’s Memorial Annex 50 at p. 1).

Rules of Procedure of the Commission, to the examination of Kenya's submission by the Commission and further reiterated that the delimitation of the 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 examinations of the separate submissions made by each of the two coastal states.¹⁵⁰

121. Kenya emphasised that:

The attempt, by the Somali Federal Republic, to reverse this common understanding and agreement was undertaken unilaterally and without consultation or the consent of the co-signatory to the MOU. The Somali Federal Republic further aggravates this change of mind in a communication reference, MOFA/SFR/MO/1258/14 dated February 4, 2014 by purporting to have nullified the previous MOU and replacing the same with an objection to consideration of Kenya's submission owing to the existence of a maritime boundary dispute between the Somali Federal Republic and Kenya.¹⁵¹

122. Kenya urged the CLCS to consider its submission consistent with the method of settlement under the “bilateral agreement with the Somali Federal Republic”:

From the foregoing, Kenya wishes to object to the actions by the Somali Federal Republic and affirms that these aforementioned actions are not only regrettable and unfortunate but are also not in the best interests of either State. Kenya is of the opinion that it would be in the best interests of both States as well as good international order that the Commission proceeds to consider Kenya's submission at the earliest opportunity; precisely to allow the two States to carry

¹⁵⁰ At p. 2.

¹⁵¹ At p. 2.

on with their delimitation of the continental shelf beyond 200 NM in the manner originally envisioned in the 7 April 2009 MOU and the 19 August 2009 communication.¹⁵²

May–July 2015: communications by the Parties concerning the obligation of non-objection under the MOU

123. On 4 May 2015, Somalia’s intransigence and continuing material breach of the MOU finally prompted Kenya to object to Somalia’s CLCS submission.¹⁵³ Having failed through diplomatic means, this temporary and partial suspension of the MOU was intended to persuade Somalia to comply with its obligations. Shortly afterwards, in a Note Verbale dated 30 June 2015, Kenya ended its suspension of the MOU. In a spirit of compromise, it invited the CLCS to proceed to consider Somalia’s submission, but on the condition that Somalia would fully comply with the agreed dispute settlement procedure under the MOU.¹⁵⁴

124. Kenya’s Note Verbale explained the basis for this temporary suspension as follows:

Somalia’s objection was a material breach of the Memorandum of Understanding (MOU) between Kenya and Somalia dated 7 April 2009, registered with the United Nations Secretariat on June 11, 2009, in accordance with Article 102 of the United Nations Charter. Under the terms of the MOU, the Parties are under an obligation not to object to each other’s submissions to the Commission, and then to conclude an agreement on the delimitation of the maritime boundary after the Commission

¹⁵² At p. 3.

¹⁵³ 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. 141/15 (4 May 2015) (Somalia’s Memorial, Annex 51).

¹⁵⁴ Note Verbale from Permanent Mission of Kenya to the United Nations to the UN Secretary-General, Note No 210/15 (30 June 2015) (Annex 44).

has concluded the examination of each submission and made its recommendations concerning the establishment of the outer limits of the continental shelf beyond 200 nautical miles. Kenya was entitled to respond to Somalia's material breach of its obligation not to object to Kenya's submission by temporarily suspending the operation of the MOU in whole or in part. In its Note 141/15, Kenya indicated that it was suspending the operation of the MOU in part, by objecting to the consideration of Somalia's submission to the Commission.

125. The Note Verbale further clarified that Kenya's withdrawal of its objection to Somalia's CLCS submission was conditioned on Somalia's compliance with the agreed dispute settlement procedure under the MOU:

In light of this position, Kenya has given careful consideration to the possibility of enabling the Commission to proceed with its work expeditiously, without prejudice to the rights and interests of either Kenya or Somalia in relation to their maritime boundary dispute. Kenya considers that, as long as [sic] as the Commission is aware of the area, of overlapping claims, and that in respect of that area it gives all due consideration to the submissions made by both States, the Commission may proceed to make recommendations concerning the outer limits of the continental shelf off the coasts of Kenya and Somalia, in accordance with the procedure agreed upon in the MOU. Accordingly, and on that basis, Kenya no longer objects to the consideration by the Commission of Somalia's submission.

126. On 7 July 2015, within a week of Kenya's Note Verbale to the CLCS, Somalia suddenly changed course. Less than a week before submission of its Memorial to the Court, and after a year and a half of obstruction and intransigence, Somalia sent a letter to the UN Secretary-General stating that

it “hereby extends its consent to the Commission’s consideration of the Kenyan submission”.¹⁵⁵

127. This was followed, on 16 July 2015, just three days after the submission of its Memorial, by submission of an Amended Executive Summary to the CLCS. This was intended to replace the earlier Summary submitted by Somalia on 21 July 2014.¹⁵⁶ The new Summary states that: “Somalia decided that there is no longer any impediment for the Commission to examine and make recommendations on Kenya’s and its own submissions”.¹⁵⁷
128. Somalia’s explanation for this sudden change in course was that an objection was not necessary because its dispute with Kenya was now before the Court.¹⁵⁸ The case, however, had already been initiated for almost a year. It may be that Somalia now appreciates the consequences of breaching its obligations under the MOU, including the perpetual limbo that would result if the Parties objected to each other’s CLCS submissions. Presumably, it also became apparent to Somalia that it could not continue to block Kenya’s submission whilst at the same time asking the Court to delimit the maritime boundary beyond 200 NM in the outer continental shelf, given the requirement of prior CLCS review. In any event, the

¹⁵⁵ 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) (Somalia’s Memorial, Annex 52).

¹⁵⁶ “Continental Shelf Submission of the Federal Republic of Somalia. Executive Summary. Amended”, 2015-07-16_SOM-DOC-001 (16 July 2015), available at http://www.un.org/Depts/los/clcs_new/submissions_files/som74_14/2015-07-16_SOM-DOC-001.pdf (Annex 45). It states that “This Amended Executive Summary is intended to replace the Executive Summary submitted to the United Nations Division for Ocean Affairs and the Law of the Sea (hereinafter referred to as “DOALOS”) on 21 July 2014” (at p. 2).

¹⁵⁷ *Ibid.* p. 6.

¹⁵⁸ See Somalia’s Memorial at para. 7.27.

Parties' agreement under the MOU was that following CLCS review, they would conclude a negotiated settlement.

129. Somalia's last-minute reversal of its position concerning its consent under Article 5, Annex I, of the CLCS Rules of Procedure is welcome; but its obligations under the MOU do not end there. Having consented to CLCS consideration of Kenya's submission, Somalia is no longer in material breach of its obligation of non-objection under the MOU. However, the initiation of this proceeding before the Court itself constitutes a two-fold material breach of Somalia's obligations with respect to the agreed method of dispute settlement between the Parties; namely, that the Parties must first await CLCS recommendations on the outer limits of the continental shelf, and then conclude an agreement on the maritime boundary by negotiation, rather than by recourse to the Court.

II. THE 2009 MOU EXCLUDES THE COURT'S JURISDICTION

130. Despite the centrality of the MOU to the Court's jurisdiction, it is given only a desultory, passing reference in Somalia's Memorial.¹⁵⁹ There is a rather curious attempt to evade its direct relevance by asserting that "[t]he MOU, whatever its status, did not purport to resolve the Parties' maritime boundary dispute".¹⁶⁰ This argument is wholly inapposite. It is obvious that the MOU did not settle the maritime boundary dispute. It is equally obvious, however, that it constitutes a legally binding agreement on the method of settlement for that same unsettled dispute.

¹⁵⁹ As already noted, the MOU is only referred to briefly at paras. 3.38 to 3.42, 3.46, 3.52 and 7.20.

¹⁶⁰ Para. 3.42.

131. Whilst attempting to cast doubt on the MOU's status, Somalia's Memorial admits that the MOU did in fact enter into force¹⁶¹ and does not take the express position that it is not legally binding. It relies solely upon the vague assertion that the MOU is "non-actionable" because the Somali Federal Parliament had "decided against its ratification".¹⁶² It is remarkable that Somalia's Memorial reproduces all the operative paragraphs of the MOU with the sole exception of the final provision, which stipulates that the agreement "shall enter into force upon its signature". Furthermore, it does not provide any explanation or supporting document indicating the alleged legal basis or relevance of the Somali parliamentary vote, and why ratification suddenly became a purported precondition for the MOU's entry into force, after it had already entered into force. It is in light of these conspicuous omissions that Somalia can refer noncommittally to the MOU "whatever its status". In fact, there is nothing whatsoever in the Memorial that refutes the legal validity of the MOU.
132. It is also to be noted that Somalia avoids mentioning the argument to which it had referred (albeit without any detail) in its 2 February 2014 Note Verbale to the UN, that the Minister who signed the MOU somehow did not possess "full powers" and was not "duly authorized" to act on behalf of the

¹⁶¹ See Somalia's Memorial at Annex 6 "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 U.N.T.S. 35 (7 Apr. 2009), entered into force 7 Apr. 2009" (emphasis added).

¹⁶² See para. 3.40 ("On 10 October 2009, Somalia informed the Secretary-General of United Nations that, on 1 August 2009, the Somali Parliament had voted on the 2009 MOU and had decided against its ratification") and para. 3.41 ("On 2 March 2010 Somalia again wrote to the United Nations requesting it to "take note" of the Somali Parliament's rejection of the MOU and to treat it as "non-actionable"). See also para. 7.20 referring to "the rejection by its Parliament of the MOU".

Somali Government.¹⁶³ That wholly untenable argument was rightly abandoned.

133. There can be no doubt as to the legally binding nature of the 2009 MOU. It is an international agreement, plain and simple. As discussed below, the application of the law of treaties to the facts of this case clearly establishes the following:

- a) The MOU is a binding international agreement on the method of settlement of the maritime boundary dispute between the Parties;
- b) The agreed method of dispute settlement is a negotiated agreement subsequent to CLCS review and not recourse to the Court; and
- c) Settlement of the maritime boundary dispute is thus outside of the Court's jurisdiction and otherwise inadmissible because of the MOU.

A. The MOU is a binding international agreement on the method of settlement of the maritime boundary dispute between the Parties

134. Neither Kenya nor Somalia has ratified the Vienna Convention on the Law of Treaties; but the customary law status of the elementary principles that are relevant to this case is not controversial. The MOU is an international agreement concluded between States in written form and governed by international law. It was submitted to the UN for registration as a treaty and was duly published in both the *United Nations Treaty Series* and the *Law of the Sea Bulletin*. The *UN Treaty Handbook* explains that “the title and form

¹⁶³ The letter of 4 February 2014 is cited and annexed to the Memorial (para 3.41, Annexes 41 and 42), but no reference is made to the argument advanced in that letter that the Minister who had signed the MOU did not possess “full powers” under Article 7 of the Vienna Convention on the Law of Treaties.

of a document submitted to the Secretariat for registration are less important than its content in determining whether it is a treaty or international agreement”.¹⁶⁴ What is key is that there was clearly an intention to be bound¹⁶⁵ by the MOU; namely, that “[t]he two Ministers signed a text recording commitments accepted by their Governments”.¹⁶⁶

135. It is obvious that the intention of Somalia and Kenya was to be bound by the MOU. The clearest indication is the express language of the MOU itself, which stipulates that “This Memorandum shall enter into force upon its signature.” Entry into force *means* that an agreement is legally binding. That stipulation could only have been included in the text of the MOU *because* it was intended to be legally binding. The Parties even clarified exactly *when* it became legally binding; namely, immediately, upon signature.

¹⁶⁴ United Nations Treaty Section, *Treaty Handbook*, available at <https://treaties.un.org/doc/source/publications/THB/English.pdf>, at para 5.3.2. See also the Vienna Convention Art 2(1)(a) which provides that an international agreement may be a treaty “whatever its particular designation”. See *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)*, *Jurisdiction and Admissibility*, ICJ Rep 1994, para 23 “international agreements may take a number of forms and be given a diversity of names”. See also the *Austro-German Customs Regime* opinion of 1931: “From the standpoint of the obligatory character of international engagements, it is well known that such engagements may be taken in the form of treaties, conventions, declarations, agreements, protocols, or exchanges of notes” (PCIJ, ser. A / B, no. 41, p. 47). In the “*Hoshinmaru*” case, ITLOS recognized the possibility that agreed minutes may constitute an agreement: “[t]he Protocol or minutes of a joint commission such as the Russian–Japanese Commission on Fisheries may well be the source of rights and obligations between Parties” (“*Hoshinmaru*” (*Japan v. Russian Federation*), Prompt Release, Judgment, ITLOS Reports 2007, para 86). See Schmalenbach, “Article 2”, in Dörr and Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2012) p. 29–30 (“Dörr and Schmalenbach”): “Memorandum of understanding” is a common term for international treaties .

¹⁶⁵ See for example J Crawford, *Brownlie’s Principles of Public International Law* (8th edn, Oxford University Press, 2012) p. 371.

¹⁶⁶ *Qatar v Bahrain (Jurisdiction)*, para. 27.

136. Furthermore, soon after its entry into force, the MOU was registered by the UN Secretary-General in accordance with Article 102 of the UN Charter. A Certificate of Registration was produced on 14 August 2009.¹⁶⁷ If there was any doubt as to the intention of the Parties to be bound, the UN Secretariat could have refrained from registering the MOU as a treaty.¹⁶⁸ There is also no record of any protest against that registration by Somalia until five years later, on 2 February 2014, when it first asked the UN to withdraw the MOU; a request that the UN did not comply with. There is also the approval of the MOU by the Somali Prime Minister, Council of Ministers and President,¹⁶⁹ and the formality of the signing ceremony itself.¹⁷⁰
137. There is also the subsequent practice after the MOU's entry into force. On at least two occasions, the Somali Head of Government confirmed its legal validity, categorically and unequivocally.¹⁷¹ Furthermore, Somalia did not hesitate to accept Norwegian assistance for its CLCS submission in 2014, although that assistance was explicitly conditioned on full compliance with the MOU.
138. The obligations assumed by the Parties under the MOU were obviously not vague or discretionary promises of cooperation. That agreement was an exchange of precise commitments as to how the two States shall resolve their maritime boundary dispute.¹⁷² Somalia cannot now unilaterally dispense with those obligations.

¹⁶⁷ Annex 17.

¹⁶⁸ United Nations Treaty Section, *Treaty Handbook*, para 5.3.1.

¹⁶⁹ See Part I Section B above.

¹⁷⁰ See Part I Section C above.

¹⁷¹ On 8 April 2009 and 19 August 2009 respectively. See Part I Section E above.

¹⁷² See Part I Section D above.

139. The MOU is plainly a legally binding agreement on a specific method for dispute settlement. Article 33(1) of the UN Charter provides that the parties to any dispute shall “seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice”. Similarly, Article 280 of UNCLOS provides that nothing in Part XV impairs the right of States parties to agree to “any peaceful means of their own choice.” As between Kenya and Somalia, a solution by negotiation, after CLCS review, is the method of settlement constituting the “peaceful means of their own choice”; the MOU leaves no doubt in this regard.

B. Somalia’s case is outside the jurisdiction of the Court, and is otherwise inadmissible

Kenya’s reservation to the Court’s jurisdiction where Parties to a dispute have agreed on another method of settlement

140. The agreed method of dispute settlement under the MOU falls squarely within the reservation to Kenya’s Declaration, excluding from the Court’s compulsory jurisdiction:

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.¹⁷³

Consequently, Somalia’s case clearly relates to a dispute over which Kenya has not accepted the Court’s jurisdiction.

¹⁷³ As noted above, Kenya’s Declaration is cited in full in Somalia’s Memorial at fn 5.

141. Kenya's Declaration was deposited on 19 April 1965, just two years after its independence. It was based on similar reservations in the declarations of the United Kingdom and several other Commonwealth States.
142. This reservation was first made by The Netherlands in 1921, at the time of the Permanent Court of International Justice. Since then, it has become "[t]he most frequent reservation" to acceptance of the Court's compulsory jurisdiction.¹⁷⁴ In addition to Kenya, this includes the declarations of: Australia,¹⁷⁵ Barbados,¹⁷⁶ Belgium,¹⁷⁷ Botswana,¹⁷⁸ Cambodia,¹⁷⁹ Canada,¹⁸⁰ Djibouti,¹⁸¹ Estonia,¹⁸² the Gambia,¹⁸³ Germany,¹⁸⁴ the Republic of Guinea,¹⁸⁵ Honduras,¹⁸⁶ Hungary,¹⁸⁷ India,¹⁸⁸ Ivory Coast,¹⁸⁹ Lesotho,¹⁹⁰ Liberia,¹⁹¹ Luxembourg,¹⁹² Madagascar,¹⁹³ Malawi,¹⁹⁴ Malta,¹⁹⁵ Mauritius,¹⁹⁶ The Netherlands,¹⁹⁷ New Zealand,¹⁹⁸ Nigeria,¹⁹⁹ the

¹⁷⁴ R Kolb, *The International Court of Justice* (Hart Publishing, 2013) 464.

¹⁷⁵ Declaration of 22 March 2002.

¹⁷⁶ Declaration of 1 August 1980.

¹⁷⁷ Declaration of 17 June 1958.

¹⁷⁸ Declaration of 16 March 1970.

¹⁷⁹ Declaration of 19 September 1957.

¹⁸⁰ Declaration of 10 May 1994.

¹⁸¹ Declaration of 2 September 2005.

¹⁸² Declaration of 21 October 1991.

¹⁸³ Declaration of 22 June 1966.

¹⁸⁴ Declaration of 1 May 2008.

¹⁸⁵ Declaration of 4 December 1998.

¹⁸⁶ Declaration of 6 June 1986.

¹⁸⁷ Declaration of 22 October 1992.

¹⁸⁸ Declaration of 18 September 1974.

¹⁸⁹ Declaration of 29 August 2001.

¹⁹⁰ Declaration of 6 September 2000.

¹⁹¹ Declaration of 20 March 1952.

¹⁹² Declaration of 15 September 1930.

¹⁹³ Declaration of 2 July 1992.

¹⁹⁴ Declaration of 12 December 1966.

¹⁹⁵ Declaration of 2 September 1983.

¹⁹⁶ Declaration of 23 September 1968.

¹⁹⁷ Declaration of 1 August 1956.

¹⁹⁸ Declaration of 22 September 1977.

¹⁹⁹ Declaration of 30 April 1998.

Philippines,²⁰⁰ Poland,²⁰¹ Portugal,²⁰² Senegal,²⁰³ Slovakia,²⁰⁴ Spain,²⁰⁵ Sudan,²⁰⁶ Suriname,²⁰⁷ and the United Kingdom.²⁰⁸

143. As one distinguished publicist has observed,²⁰⁹ this “is a reservation of potentially great importance, dealing as it does with the relationship between parallel commitments to dispute settlement and giving priority to the specific ... over the general”.²¹⁰
144. The Court has long recognized that Article 36(2) Declarations are “facultative, unilateral engagements” which States are “absolutely free” to qualify with “conditions or reservations”.²¹¹ There is “no reason to interpret them restrictively”.²¹² The Court must therefore give full effect to Kenya’s reservation concerning “[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”.

²⁰⁰ Declaration of 18 January 1972.

²⁰¹ Declaration of 25 March 1996.

²⁰² Declaration of 25 February 2005.

²⁰³ Declaration of 2 December 1985.

²⁰⁴ Declaration of 28 May 2004.

²⁰⁵ Declaration of 29 October 1990.

²⁰⁶ Declaration of 2 January 1958.

²⁰⁷ Declaration of 31 August 1987.

²⁰⁸ Declaration of 31 December 2014.

²⁰⁹ The UK reservation is worded in the following way: ‘any dispute which the United Kingdom has agreed with the other Party or Parties thereto to settle by some other method of peaceful settlement’.

²¹⁰ M Wood, “The United Kingdom’s Acceptance of the Compulsory Jurisdiction of the International Court” in OK Fauchald, H Jakhelln, and A Syse (eds), *Festschrift Carl August Fleischer* (Scandinavian University Press, 2006) 621, 637 (emphasis added).

²¹¹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 392, para. 59.

²¹² *Fisheries Jurisdiction (Spain v Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 432, para. 44.

145. In the *Case Concerning Certain Phosphate Lands in Nauru (Nauru v Australia)* (1992),²¹³ the Court confirmed that where a State has made such a reservation, and there is in fact “an agreed procedure other than recourse to the Court”,²¹⁴ it clearly does not have jurisdiction.
146. That is exactly the situation before the Court in this case. Kenya has made such a reservation, and Kenya and Somalia have “an agreed procedure other than recourse to the Court” under the MOU. Somalia’s recourse to the Court is in direct breach of that agreed two-step procedure for dispute settlement, namely that the Parties (a) “shall agree” on delimitation, and (b) only after CLCS review. Accordingly, the Court has no jurisdiction.
147. It is further noted that Somalia’s Memorial has dropped all reference to the assertion in its Application that “[t]he jurisdiction of the Court under Article 36, paragraph 2, is underscored by Article 282 of UNCLOS” (para. 5). In fact, quite apart from the 2009 MOU, the UNCLOS Part XV methods of settlement would also trigger Kenya’s reservation and exclude the Court’s jurisdiction.

The case before the Court is otherwise inadmissible because of Somalia’s breach of its obligations under the MOU

148. Somalia’s case is also inadmissible because it is in direct breach of its obligations under the MOU. It is elementary that “Every treaty in force is binding upon the parties to it and must be performed by them in good

²¹³ *Certain Phosphate Lands in Nauru (Nauru v Australia) Preliminary Objections, Judgment, ICJ Reports* 1992, p 240.

²¹⁴ At para. 11 (emphasis added).

faith”.²¹⁵ Somalia has done the exact opposite. In coming before the Court, it has knowingly and deliberately flouted the *pacta sunt servanda* principle.

149. First, it has consented, then objected, then consented again (immediately before filing its Memorial), to Kenya’s CLCS submission, causing significant costs and delay. Second, it has disregarded the requirement of CLCS review prior to delimitation that was specifically stipulated in the MOU. Third, it has attempted to circumvent its obligation to negotiate an agreement on delimitation after CLCS review, by opting unilaterally to bring the dispute before the Court.
150. Somalia has repeatedly violated its obligations under the MOU, acting in bad faith.²¹⁶ A party seeking relief before the Court must come with clean hands,²¹⁷ not least where it has expressly agreed to a method of dispute settlement other than recourse to the Court. To admit this case would be to validate Somalia’s wrongful conduct instead of its obligations under treaty law.
151. Accordingly, Somalia’s case is inadmissible.

²¹⁵ Vienna Convention on the Law of Treaties, Art.26.

²¹⁶ See e.g. *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, *Jurisdiction and Admissibility, Judgment*, *I.C.J. Reports 1988*, p. 69 at para. 94; *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment*, *I. C. J. Reports 1998*, p. 275 at para 38.

²¹⁷ *Diversion of Water from the Meuse Case (Netherlands v. Belgium) [1937]*, *PCIJ (Ser. A/B) No. 70*; *Gabčíkovo-Nagymaros Case (Hungary/Slovakia) ICJ Reports 1997*, para. 133. See also J Crawford, *Brownlie’s Principles of Public International Law* (8th edn, Oxford University Press, 2012), p.701. See also G Fitzmaurice, “General Principles of International Law”, 92 *Collected Courses, Academy of International Law, The Hague (1957-II)*, p. 119.

III. CONCLUSION

152. The MOU entered into force on 7 April 2009 and remains legally binding between Kenya and Somalia. Pursuant to the agreed method of settlement thereunder, Somalia is under an obligation to delimit the full extent of its maritime boundary with Kenya, both within and beyond 200 NM:
- a) Only after the CLCS has made its recommendations concerning establishment of the outer limits of the continental shelf; and
 - b) By means of a negotiated agreement, not by recourse to the Court.
153. Accordingly, Somalia's case is beyond the jurisdiction of the Court and otherwise inadmissible because:
- a) Kenya's Declaration under Article 36(2) of the Statute excludes "[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"; and
 - b) Somalia is acting in breach of the agreed method of dispute settlement under the MOU, which obligation it must perform in good faith.

IV. SUBMISSIONS

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

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




Githu Muigai, EGH, SC
Agent of the Republic of Kenya

7 October 2015

CERTIFICATION

I certify that the 47 annexes filed with these Preliminary Objections are true copies of the documents reproduced therein and that the translations provided are accurate.



Githu Mungai, EGH, SC
Agent of the Republic of Kenya
7 October 2015