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When replying please quote: **KEH/LEG/5A/VOL.II (72)**

The Embassy of the Republic of Kenya in the Royal Kingdom of the Netherlands presents its compliments to the Registrar of the International Court of Justice and has the honour refer to the questions put to Parties by Judge Crawford at the end of the public sitting on 23 September 2016 in the somali v. Kenya case.

The Embassy wishes to transmit herewith a copy of letter Ref. AG/CONF/19/153/2 VOL.IV dated 26th September 2016 by the Attorney General and Agent of the Republic of Kenya.

The Embassy wishes to inform that the original letter will be transmitted once received through the usual diplomatic channels.

The Embassy of the Republic of Kenya in the Royal Kingdom of the Netherlands avails itself of this opportunity to renew to the Registrar of the International Court of Justice the assurances of its highest consideration.

The Hague, 27 September 2016



The Registrar of the International Court of Justice
Peace Palace,
Carnegieplein 2, 2517 KJ
The Hague

Encl:



REPUBLIC OF KENYA

OFFICE OF THE ATTORNEY-GENERAL
&
DEPARTMENT OF JUSTICE

AG/CONF/19/153/2VOL.IV

26th September 2016

H.E. Mr Philippe Couvreur
Registrar
International Court of Justice

Dear Registrar,

In regard to *Maritime Delimitation in the Indian Ocean (Somalia v Kenya)*, the Republic of Kenya has the honour herewith to submit its response to the two questions posed by Judge Crawford to the Parties upon the conclusion of the second round of oral pleadings on 23 September 2016 in the hearing on Kenya's Preliminary Objections.

Preliminary Clarifications

In respect of the introductory statement in Judge Crawford's question that the Parties "conducted negotiations" over maritime delimitation "without making any express reservation as to the timeliness of such negotiations in terms of the penultimate paragraph of the Memorandum of Understanding", it is necessary to make two preliminary clarifications.

First, as set out in Kenya's written and oral pleadings,¹ the penultimate paragraph of the MOU requires *finalization* of a negotiated agreement after CLCS review.² It

¹ POK, paras. 31, 46, 69, 73, 116 and 146; CR 2016/10 (Agent, p. 15, para. 10; Akhavan, pp. 20-21, para. 18; Lowe, p. 64, para. 17).

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obviously does not prohibit the Parties from concluding one or more interim agreements that are subsequently finalized after the recommendation of the CLCS on the terminus point of the outer continental shelf beyond 200 nautical miles. Accordingly, negotiations between the Parties prior to the recommendation of the CLCS, even if it resulted in one or more interim agreements on delimitation covering some or all maritime areas in dispute, would still be subject to finalization under the MOU's agreed procedure.

Second, as set out in Kenya's written and oral pleadings, the two technical meetings in 2014 were in fact held immediately after and directly because of Somalia's objection to Kenya's CLCS submission and repudiation of the MOU as "null and void" in its letter to the UN Secretary-General on 4 February 2014.³ Prior to that, following the Somali Parliament's 1 August 2009 vote purporting to reject the MOU, Somalia had submitted a Note Verbale on 2 March 2010 to the UN Secretary-General, asserting that the MOU was "non-actionable", but without specifically objecting to Kenya's CLCS submission.⁴ On 17 August 2011, Norway had submitted a letter to the UN Secretariat noting that Somalia's Note Verbale of 2 March 2010 was "without legal effects" but had "created a new political situation casting doubt on the commitment of [Somalia to the MOU] and creating doubts as to the capability of [Somalia] to enter into legally binding international commitments."⁵ On 31 May 2013, following diplomatic efforts, the Parties agreed in a Joint Statement to "work on a framework of modalities for embarking on maritime demarcation" consistent with implementation of the MOU, indicating Somalia's willingness to respect its commitments.⁶ On 6 June 2013, however, Somalia reversed its position and declared that it "does not consider it appropriate to open new

² POK, Annex 1: Memorandum of Understanding Kenya-Somalia, 2599 *UNTS* 35 (2009), p. 38: '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 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.'

³ POK, para. 98-102 and 109; CR 2016/10 (Muchiri, pp. 46-7, paras. 2, 7). See also letter dated 12 February 2014 from the Head of the Legal and Host Country Affairs Directorate of the Kenyan Ministry for Foreign Affairs to the Cabinet Secretary, Kenya's Judges' Folder First Round, Tab 11.

⁴ POK, para. 77; referred to at paras. 3.40-3.41 of MS.

⁵ POK, para 81 and Annex 4.

⁶ POK, para. 88 and Annex 31.

discussions on maritime demarcation or limitations on the continental shelf with any parties”.⁷ It was in this context that the agenda of the first meeting, initiated by Kenya, included discussion of the MOU as the first agenda item.⁸ Somalia, however, immediately objected to any discussion of the MOU and demanded that it be removed from the agenda because in its view the MOU was “void and of no effect”.⁹

Owing to Somalia’s categorical rejection of the MOU, therefore, it cannot be said that the two meetings in 2014 were held in order to implement the agreed procedures under the MOU. The absence of an express reservation as to the timeliness in terms of the penultimate paragraph of the MOU was thus irrelevant and cannot be construed as subsequent conduct in interpreting the terms of the MOU. In fact, Kenya was focused on a confidence-building process to persuade Somalia to withdraw its objection to Kenya’s CLCS submission and to gradually agree on a structure and guiding principles for negotiations consistent with the MOU’s agreed procedure.¹⁰ Even if there had been a deviation from that procedure because of Somalia’s unwillingness to implement its commitments, it would have been subject to the consent of Kenya, and would not have nullified or modified existing obligations under the MOU.

In any event, on 4 August 2014, Kenya made clear that it was expecting Somalia to eventually reverse its position on the MOU; Kenya underlined that, even though “Somalia did not discuss the MOU during the first meeting”, Kenya had “witnessed friendlier attitude towards the MOU during the second meeting” held in July 2014.¹¹ In October 2014, Kenya also stressed 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 on with their delimitation of the continental shelf beyond 200 NM in the*

⁷ POK, paras. 89-90.

⁸ POK para. 99; MS, Annex 31, p. 1.

⁹ POK para. 100; MS, Annex 24.

¹⁰ CR 2016/10 (Muchiri, p. 47, para. 8); CR 2016/12 (Lowe, p. 33, para. 20).

¹¹ POK, Annex 41. 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).

manner originally envisioned in the 7 April 2009 MOU and the 19 August 2009 communication".¹²

Questions of Judge Crawford

Bearing this context in mind, Kenya provides the following response to the two questions in regard to the two preliminary technical meetings:

- (1) The discussions covered all maritime zones, including the territorial sea, the EEZ, and the continental shelf within and beyond 200 nautical miles, as Somalia acknowledged in its Application.¹³ This is apparent from the discussion of Kenya's 1972 Territorial Waters Act, the 1989 Maritime Zones Act, the 1979 and 2005 Presidential Proclamations on the EEZ, and the range of the slides in the PowerPoint presentation covering all maritime areas in dispute.¹⁴ It is apparent from those slides that the discussions were carried out at a high level of generality and Kenya observed that it required further time for a proper presentation of its views.¹⁵ In this regard, it should also be noted that, at the first meeting, the Parties considered "several options and methods for equitable delimitation, including bisector, perpendicular, median and parallel of latitude" as potential maritime boundaries, and that these methods were considered in regard to all maritime areas in dispute.¹⁶

¹² MS, Annex 50, p. 3 (emphasis added). 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.

¹³ See Application, para. 30; see also MS, Annex 41, paras 2-3.

¹⁴ MS Annex 31, Joint report of the Government of the Republic of Kenya and the Federal Republic of Somali on the Kenya-Somali maritime boundary meeting held on the 26th-27th March, 2014 at the Ministry of Foreign Affairs and International Trade Nairobi, Kenya; WSS, para 2.49; Somalia's Judges' Folder First Round.

¹⁵ Kenya's Judges' Folder First Round, Tab 12, Brief on a Meeting between the Governments of the Republic of Kenya and the Federal Republic of Somalia on the Maritime Boundary held on the 28th-29th July, 2014, Nairobi, Kenya, dated 8 August 2014, page 2, first paragraph (provided to the Court on 14 June 2016).

¹⁶ MS, Annex 31, p. 6.

The Parties made progress at the first meeting and agreed on the “starting point” for maritime delimitation,¹⁷ and at the second meeting agreed to reconvene with a view to agreement on a structure and guiding principles for further discussions.¹⁸ There was no commitment or expectation that negotiations would result in an agreed boundary for all maritime areas at once. Given the complex circumstances prevailing between the Parties, it was entirely possible that agreements, whether conceived as temporary or permanent components of the boundary regime between Kenya and Somalia, may have initially covered one or more maritime areas (such as the territorial sea, or waters within, say, 50 nautical miles off the coast) and with one or more purposes (such as law enforcement, anti-piracy patrols, enforcement of fisheries regulations, scope of hydro-carbon exploration licenses, joint development zones, etc.) before the conclusion of a comprehensive, final agreement. There was, and is, no pressing need to settle the entire maritime boundary immediately, whereas there was, and is, a pressing need to agree upon practical arrangements of a provisional nature for maritime enforcement in the waters close to the land boundary between Kenya and Somalia.¹⁹ Negotiations and agreements allow for such flexibility and pragmatism.

Had the two technical meetings in 2014 been held pursuant to the MOU's agreed procedure, such partial delimitation or practical arrangements would have been entirely consistent with the penultimate paragraph of the MOU. After the recommendation of the CLCS made a final agreement possible, the Parties could either reaffirm the earlier partial agreements or decide to modify them in favour of a new agreement, depending on the circumstances prevailing at that time. In contrast, a final and binding judicial decision would pre-empt an agreed delimitation; it would tie the hands of the Parties and not allow for any measure of flexibility in arriving

¹⁷ MS, para 3.50 and MS, Annex 31, pp. 3–4.

¹⁸ Kenya's Judges' Folder First Round, Tab 12, Brief on a Meeting between the Governments of the Republic of Kenya and the Federal Republic of Somalia on the Maritime Boundary held on the 28th-29th July, 2014, Nairobi, Kenya, dated 8 August 2014, page 2, first paragraph (provided to the Court on 14 June 2016).

¹⁹ CR 2016/10 (Muigai, p. 15, para. 8; Akhavan, p. 23, para 25; Lowe, p. 63, para. 16); CR 2016/12 (Akhavan, p. 14, para 10; Muigai, p. 38, para. 3).

at a mutually acceptable solution that takes into consideration a complex and multidimensional situation. This was how Kenya envisaged the implementation of the penultimate paragraph of the MOU and helps to explain why Kenya regards litigation as an inappropriate and unhelpful means of deciding on the maritime boundary in this case.

- (2) As set out in Kenya's written and oral pleadings, it cannot be said that Somalia negotiated in good faith during the two technical meetings in 2014 or that there were "meaningful negotiations" on delimitation of the maritime boundary consistent with the jurisprudence of the Court.²⁰ Furthermore, as noted above, Somalia had clearly rejected its commitments under the MOU such that the two technical meetings in 2014 cannot be construed as subsequent conduct or any form of waiver among the Parties in regard to their rights and obligations under the penultimate paragraph of the MOU. Nor would any interim agreement on the maritime boundary subject to finalization after the recommendation of the CLCS be inconsistent with the agreed procedure under the MOU as explained above. It is further noted that even if the parties agreed by mutual consent to conclude a final agreement prior to CLCS recommendation, that would constitute a subsequent agreement replacing the agreed procedure under the MOU.²¹ To date there has been no such agreement and thus the MOU procedures remain in force.

In regard to a possible waiver of rights under the MOU, Kenya has consistently held the view, whether before or after Somali Parliament's rejection of the MOU in 2009,²² or during the 2014 technical meetings despite Somalia's unwillingness even to discuss the MOU,²³ as well as prior

²⁰ *North Sea Continental Shelf (Germany v. Denmark/Netherlands)*, Judgment, I.C.J. Reports 1969, p. 47, para. 85 (a); CR 2016/10 (Akhavan, p. 20, para. 17; Muchiri, pp. 46-51); POK, paras 98-102, 109.

²¹ CR 2016/12 (Akhavan, p. 13, para. 7).

²² POK para. 72; MS, Annex 61, para. 95.

²³ POK paras. 99-100 and 109.

to and immediately after Somalia's initiation of proceedings before the Court,²⁴ that:

- (a) The MOU remains legally binding upon the Parties; and
- (b) The MOU requires a negotiated agreement, to be finalized after CLCS recommendations.²⁵

Kenya therefore categorically rejects any suggestion that by initiating and participating in the two technical meetings in 2014, it was waiving its rights under the MOU to a recommendation of the Commission prior to a final agreement with Somalia on maritime delimitation.

Finally, Kenya underscores that irrespective of any purported waiver of a right to a prior recommendation of the CLCS, there has manifestly been no waiver of a right to a negotiated *agreement* as the method of settlement under the MOU. In view of Kenya's reservation relating to agreed procedures other than recourse to the Court under its Optional Clause Declaration, the penultimate paragraph of the MOU by requiring a negotiated agreement excludes the Court's jurisdiction irrespective of the additional requirement of CLCS review.

As set out in its written and oral pleadings, Kenya's position in regard to Part XV procedures is that CLCS recommendations prior to a final agreement on maritime boundary delimitation constitutes a "time limit" within the meaning of Article 281 of UNCLOS.²⁶ Nonetheless, that is not a matter that is properly before the Court given that it has no bearing whatsoever on whether either the MOU or the Part XV procedures, separately or in combination, constitute an agreed method of settlement in regard to the maritime boundary dispute within the meaning of Kenya's reservation. Furthermore, Kenya maintains its position that the MOU operates to exclude the Court's jurisdiction, such that it is not necessary to

²⁴ POK, para. 104 and Annex 37; POK, para. 116 and Annex 43; paras. 119-22 and MS, Annex 50; POK, paras. 124-5 and Annex 44.

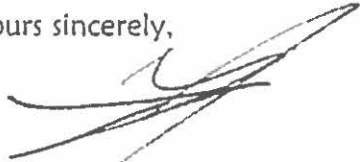
²⁵ See, eg, CR 2016/10 (Akhavan, pp. 20-1, para. 18; Lowe, p. 63, para. 13).

²⁶ CR 2016/10 (Akhavan, p. 24, para. 31; Boyle, pp. 57-8, para. 20).

make a decision of wider application on the legal effect of Part XV procedures in regard to States with similar reservations in regard to other methods of settlement.

Please accept, Excellency, the assurances of my highest consideration.

Yours sincerely,



Githu Muigai, EGH, SC
Attorney-General and the Agent of the Republic of Kenya

