JAMHUURIYADDA FEDERAALKA SOOMAALIYA
Wasaaradda Arrimaha Dibadda
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جمهورية الصومال الفيدرالية
وزارة الشؤون الخارجية
وتشجيع الإستثمار

FEDERAL REPUBLIC OF SOMALIA
Ministry of Foreign Affairs & Investment Promotion

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27 September 2016

Mr. Philippe Couvreur
Registrar
International Court of Justice
Peace Palace
2517 KJ The Hague
Netherlands

Dear Sir:

With reference to the case concerning *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, I have the honour to refer to the questions put to the Parties by Judge Crawford at the end of the Court's public sitting on 23 September 2016.

Pursuant to the instructions of the President, I have the honour to submit herewith the written reply of Somalia to Judge Crawford's questions.

Given the short time between the submission of the Parties' answers to Judge Crawford's questions and the date fixed for their observations on each other's answers, I request that you transmit Kenya's answers by, in addition to the usual method, email at your earliest convenience to me (mona.alsharmani@gmail.com) and to Paul Reichler (paul.reichler@gmail.com). Thank you very much for accommodating this request.

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

Sincerely,

Mona Al-Sharmani
Deputy Agent of the Federal Republic of Somalia

Attachment

INTERNATIONAL COURT OF JUSTICE
SOMALIA v. KENYA
HEARING ON KENYA'S PRELIMINARY OBJECTIONS

Response on behalf of the Federal Republic of Somalia to the questions posed by Judge Crawford on Friday 23 September 2016

27 September 2016

Question 1: Which maritime zones (territorial sea, EEZ, continental shelf within or beyond 200 miles) did those negotiations cover?

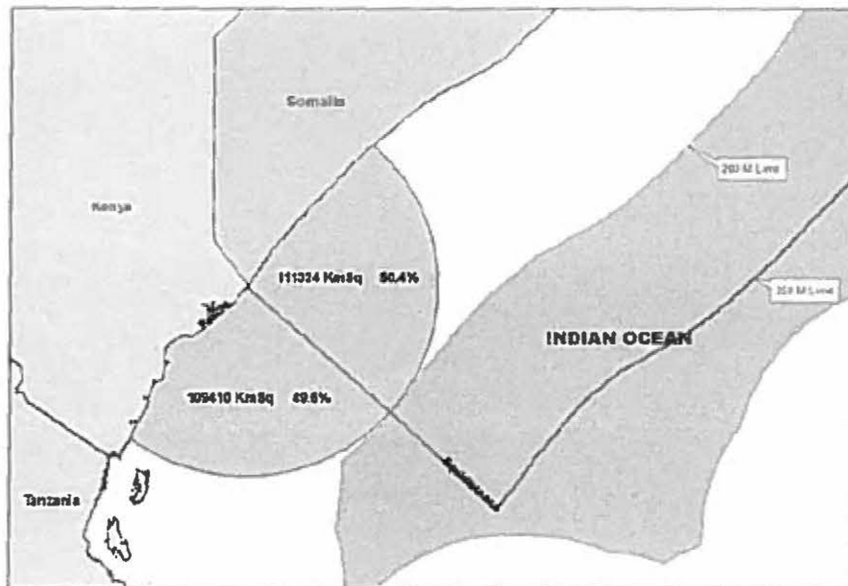
1. The bilateral negotiations in 2014 explicitly covered the territorial sea, the exclusive economic zone (EEZ) and the continental shelf both within and beyond 200 M. The negotiations therefore covered *all* of the Parties' disputed maritime zones.

2. During the course of the negotiations, both Parties made detailed presentations explaining their respective positions concerning the boundary in each of those maritime zones. In March 2014, Kenya presented a detailed PowerPoint submission that specifically addressed the delimitation of the territorial sea, the EEZ and the continental shelf by reference to Articles 15, 74 and 83 of UNCLOS respectively,[1] and included a map illustrating the "combined Kenya-Somalia EEZ area to be equitably shared".[2] The Somali internal report on the second round of negotiations contained a map—as depicted below—which Somalia displayed during the negotiations, illustrating Somalia's position that the entire maritime boundary should follow an equidistance line throughout all of the disputed maritime zones from the start of the territorial sea at the land boundary terminus to the limit of the outer continental shelf.[3]

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

[2] *Ibid.*, Slide 7.

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



Somalia's Proposed Single Equidistance Line (July 2014)

3. The inclusion of all maritime zones in the Parties' negotiations is further confirmed by their consistent reference to a single maritime boundary in the contemporaneous documentation, including joint and internal reports,[4] as well as their diplomatic correspondence.[5] Both Parties proposed a single, straight line running from the land boundary terminus continuously beyond 200 M.[6] In Kenya's case, the

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[4] *See* Somalia and Kenya, *Joint Report on Maritime Boundary Meeting, 26-27 Mar. 2014*. MS, Vol. III, Annex 31; Government of Somalia and Government of Kenya, *Joint Report on the Kenya-Somalia Maritime Boundary Meeting, 28-29 July 2014* (July 2014); 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 March 2014* (1 Apr. 2014); M. Al-Sharmani and M. Omar, Representatives of the Ministry of Foreign Affairs of the Federal Republic of Somalia, *Report to the File of the Meeting between the Federal Republic of Somalia and the Republic of Kenya On Maritime Boundary Dispute, Nairobi, Kenya, 28-29 July 2014* (5 Aug. 2014), p. 4. WSS, Vol. II, Annex 4; *Memorandum* from S. Mokaya-Orina, Head/Legal & Host Country Affairs Directorate, to Cabinet Secretary, Ministry of Foreign Affairs & International Trade, Republic of Kenya (8 Aug. 2014); *Memorandum* from Ag. Director, Horn of Africa Director, to Cabinet Secretary, Ministry of Foreign Affairs & International Trade, Republic of Kenya (15 Aug. 2014).

[5] *See Letter* from H.E. Dr. Abdirahman Beileh, Minister of Foreign Affairs and International Cooperation of the Federal Republic of Somalia, to H.E. Ms. Amina Mohamed, Minister of Foreign Affairs & International Trade of the Republic of Kenya, No. MOFA/SER/MO/ /2014 (13 Mar. 2014). MS, Vol. III, Annex 43; *Note Verbale* from the Ministry of Foreign Affairs and International Trade of the Republic of Kenya to the Ministry of Foreign Affairs & Investment Cooperation of the Federal Republic of Somalia, No. MFA/REL/13/21A (24 July 2014). WSS, Vol. II, Annex 24; *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); *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).

[6] *See* M. Al-Sharmani and M. Omar, Representatives of the Ministry of Foreign Affairs of the Federal Republic of Somalia, *Report to the File of the Meeting between the Federal Republic of Somalia and*

line followed a parallel of latitude; Somalia proposed an equidistance line. Neither Party drew any distinction between the continental shelf within or beyond 200 nautical miles. It is well established and accepted by the Parties that there is a single continental shelf. As observed by the Arbitral Tribunal in *Barbados v. Trinidad & Tobago*, a case addressed during the second round of negotiations,[7] the "continental shelf" includes both the area within and beyond 200 M.[8]

4. As Somalia has explained, despite the Parties' lengthy and detailed exchanges regarding the legal and factual merits of their respective positions—which included extensive reference to the case law of this Court and other international tribunals and State practice—they were unable to even agree on the proper methodology for delimiting the disputed boundary.[9] This is not challenged by Kenya. Kenya has also not contested that the lack of progress in respect of any of the Parties' disputed maritime zones led the Somali Foreign Minister to ask in frustration "how long would both countries continue to have their delegations entangled in these heated discussions without any possible solution", or the response of the Kenyan Foreign Minister, agreeing that the Parties were "far apart" and requesting that they schedule one more meeting to "attempt one *final* time to find an amicable solution".[10] It is also

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the Republic of Kenya On Maritime Boundary Dispute, Nairobi, Kenya, 28-29 July 2014 (5 Aug. 2014), pp. 4-5. WSS, Vol. II, Annex 4; 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), pp. 9, 15. MS, Vol. III, Annex 59.

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

[8] *Barbados v. Trinidad & Tobago*, UNCLOS Annex VII Tribunal, Award (11 Apr. 2006), XXVII UNRIAA 147, para. 213 (rejecting Barbados' objection to the inclusion of the outer continental shelf in the scope of the dispute because, in part, "there is in law only a single 'continental shelf'...".).

[9] *See* WSS, paras. 2.41-2.72, 4.4-4.5; CR 2016/11, pp. 43-44, 46-47 , paras. 31-33, 38-46 (Reichler); CR 2016/11, pp. 58-60, paras. 21-24 (Sands); CR 2016/13, pp. 23-28, paras 10-18 (Reichler); CR 2016/13, pp. 31-32, paras. 9-11 (Sands). *See* Somalia and Kenya, *Joint Report on Maritime Boundary Meeting, 26-27 Mar. 2014*. MS, Vol. III, Annex 31; Government of Somalia and Government of Kenya, *Joint Report on the Kenya-Somalia Maritime Boundary Meeting, 28-29 July 2014* (July 2014); 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 March 2014* (1 Apr. 2014); M. Al-Sharmani and M. Omar, Representatives of the Ministry of Foreign Affairs of the Federal Republic of Somalia, *Report to the File of the Meeting between the Federal Republic of Somalia and the Republic of Kenya On Maritime Boundary Dispute, Nairobi, Kenya, 28-29 July 2014* (5 Aug. 2014), p. 4. WSS, Vol. II, Annex 4; *Memorandum* from S. Mokaya-Orina, Head/Legal & Host Country Affairs Directorate, to Cabinet Secretary, Ministry of Foreign Affairs & International Trade, Republic of Kenya (8 Aug. 2014); *Memorandum* from Ag. Director, Horn of Africa Director, to Cabinet Secretary, Ministry of Foreign Affairs & International Trade, Republic of Kenya (15 Aug. 2014).

[10] M. Al-Sharmani and M. Omar, Representatives of the Ministry of Foreign Affairs of the Federal Republic of Somalia, *Report to the File of the Meeting between the Federal Republic of Somalia and*

undisputed that no such meeting took place, even though a date and location were fixed, because, without prior notice or subsequent explanation, the Kenyan delegation failed to show up for the meeting, and failed to respond to the Somali Foreign Minister's request for an explanation.[11]

Question 2: In such circumstances, could such delimitation negotiations, conducted in good faith, be understood as waiving any rights either party may have had to a prior recommendation of the Commission?

5. For the reasons explained in its written and oral pleadings, Somalia's position is that paragraph 6 of the MOU did not constitute an agreement that the Parties' maritime boundary would be settled through negotiations after the CLCS issued its recommendations on the outer limits of the continental shelf.

6. Kenya's position has shifted. It first argued that the MOU established negotiations as the only permissible means of resolution of the Parties' maritime boundary dispute, and that the MOU prevented them from negotiating an agreed settlement until after the CLCS had made its recommendations many years later.[12] At the oral hearings, however, Kenya changed position. In the first round it argued that the MOU permitted the Parties to negotiate the delimitation of maritime boundary prior to the completion (or even initiation) of the CLCS's processes, provided they did not reach an agreement.[13] In the second round, Kenya amended its position once again, arguing for a third view, namely that the Parties were free at any time to settle the boundary dispute by mutual consent, including before the CLCS issued its recommendations.[14]

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the Republic of Kenya On Maritime Boundary Dispute, Nairobi, Kenya, 28-29 July 2014 (5 Aug. 2014), p. 2. WSS, Vol. II, Annex 4 (emphasis added).

[11] CR 2016/11, p. 47, para. 45 (Reichler); CR 2016/13, p. 25, para. 10(vii) (Reichler). *See Letter* from H.E. Dr. Abdirahman Beileh, Minister of Foreign Affairs and Investment Promotion of the Federal Republic of Somalia, to Ms. Amina Mohamed, Minister of Foreign Affairs of the Republic of Kenya, No. 2231 (26 Aug. 2014). MS, Vol. III, Annex 47.

[12] KPO, para. 73 (arguing that the method of settlement of the boundary dispute under the MOU was "to negotiate a full and final agreement on maritime boundary delimitation *after* CLCS review of their respective submissions") (emphasis added); CR 2016/10, p. 63, para. 12 (Lowe) ("the agreed procedure is that the actual negotiation of the agreed boundary must come *after* the CLCS has made its recommendations in respect of the claims made by Kenya and by Somalia.") (emphasis added).

[13] CR 2016/10, p. 20, para. 18 (Akhavan).

[14] CR 2016/12, p. 13, para. 7 (Akhavan).

7. Somalia considers that neither the text, nor the relevant context, nor the subsequent conduct of the Parties can support any of the three contradictory interpretations of the MOU that Kenya has sought to advance. However, as Somalia argued in rebuttal, even if, *quod non*, the text of the MOU *did* establish an obligation to negotiate an agreed settlement only after the CLCS had made its final recommendations, the conduct of the Parties in engaging in detailed, high level, substantive and good faith, albeit failed, negotiations on delimitation in 2014 met any standard to negotiate that might have been imposed.[15] Accordingly, following those negotiations the MOU could no longer serve as a bar to other means of settlement of the boundary dispute, including recourse to the Court.

8. Judge Crawford's second question is premised on an assumption that the MOU may grant the Parties "rights" to "a prior recommendation of the Commission," before settling the boundary dispute, a proposition that Somalia contests. However, accepting that premise for the sole sake of discussion, Somalia submits that any such "rights" were waived by the Parties' conduct—specifically, by their voluntary and good faith engagement in detailed, substantive and high-level negotiations that were intended to reach an amicable settlement of their maritime boundary dispute *before* the CLCS had even considered their respective submissions, let alone issued recommendations in respect of them.

9. It is axiomatic that parties to a bilateral agreement may amend their obligations by mutual agreement. An intention to amend treaty obligations can be manifested expressly or by implication from the Parties' conduct. As *Brownlie's Principles of Public International Law* explains, Article 39 of the Vienna Convention on the Law of Treaties makes it clear that "a treaty may be amended by agreement without requiring any formality for the expression of the agreement".[16] Aust's *Modern Treaty Law and Practice* likewise explains that Article 39 VCLT, "recognises that it is perfectly possible to amend a treaty by an agreement that does not itself constitute a treaty", and that "A treaty can also be effectively amended by a subsequent agreement between the parties regarding the interpretation or application

[15] *See* CR 2016/11, pp. 57-60, paras. 16-26 (Sands); CR 2016/13, pp. 29-32, paras. 2-11 (Sands).

[16] J. Crawford, ed., *Brownlie's Principles of Public International Law* (8th ed., 2012), p. 386.

of the treaty". In this regard, "it is not necessary for an amendment to be in writing"; it may be expressed through the Parties' conduct instead.[17]

10. Similar principles govern the doctrine of waiver. Anzilotti described waiver as a voluntary abandonment of a right (*l'abandon volontaire de droit*).[18] *Brownlie's Principles of Public International Law* states that an abandonment of rights may occur "by unilateral acts of waiver or acquiescence implied from conduct, or by agreement."[19] In *Certain Phosphate Lands in Nauru*, the Court observed that a State impliedly waives its rights if it fails to take steps to assert them while engaging in activities inconsistent with their prosecution.[20] That standard for waiver—assuming it to be applicable in the present proceedings—has been amply met.[21]

11. By engaging in detailed, substantive negotiations with Somalia at the highest level, in an effort to reach an expeditious settlement of the boundary dispute in 2014, long before the CLCS had even taken up consideration of the Parties' submissions, Kenya waived, by its conduct, its "rights" to settlement of that dispute only by agreement after the CLCS has completed its processes. Whether this is viewed as a waiver by agreement of the Parties, or a unilateral waiver by Kenya, the result is the same. Kenya's conduct was entirely inconsistent with its assertion of "rights" to settle the boundary dispute only as set forth in the penultimate paragraph of the MOU (as interpreted by Kenya), and as such constituted a waiver of those purported "rights".

12. Finally, it is to be noted that in initiating and engaging in the negotiations with Somalia, Kenya *never* sought to reserve any "rights it may have had to a prior recommendation of the CLCS" under the penultimate paragraph of the MOU. In fact,

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[17] A. Aust, *Modern Treaty Law and Practice* (3d ed., 2013), pp. 233-234.

[18] D. Anzilotti, *Cours de droit international, traduction française par G. Gidep* (1929), pp. 349-350.

[19] J. Crawford, ed., *Brownlie's Principles of Public International Law* (8th ed., 2012), p. 700.

[20] *See Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, I.C.J. Reports 1992*, p. 240, paras. 12-21. *See also Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005*, p. 168, paras. 276-296.

[21] It is noteworthy that the waiver standard was deemed met by a distinguished arbitral tribunal in a case where a party, by its conduct, was found to have renounced its right to settle a dispute by a treaty-agreed method. In *EURAM v. Slovak Republic*, the tribunal held that the investor, by continuing to pursue the same claims in a national court that were asserted in the arbitration, had acted inconsistently with its arbitration rights under the Austria/Slovakia Bilateral Investment Treaty, and so had waived them. *European American Investment Bank AG (Austria) v. Slovak Republic*, PCA Case No. 2010-17, Second Award on Jurisdiction (4 June 2014), paras. 254-264.

Kenya cannot point to *any* statement, prior to the commencement of these proceedings by Somalia, to the effect that it considered the MOU as providing an exclusive method of dispute settlement only after the CLCS issues its recommendations, let alone "clear and repeated" statements to that effect.[22] This contrasts with the position of Nauru, in the case referred to above, which repeatedly made statements during the conduct at issue that had the effect of preserving the rights that it was claimed to have waived.[23]

13. In these circumstances, even if Kenya's construction of the MOU were correct—which it is not—by its subsequent conduct Kenya has waived, either by agreement with Somalia or unilaterally, its "rights" to invoke the MOU in order to postpone dispute settlement until after the CLCS has issued its recommendations or otherwise to deprive the Court of jurisdiction over the claims Somalia has asserted in its Application.

14. Moreover, the very fact that delimitation negotiations were held, and their substance, fully confirm Somalia's interpretation of the MOU.[24]

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[22] *See* CR 2016/11, pp. 44-45, para. 36 (Reichler).

[23] *See Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, I.C.J. Reports 1992*, p. 240, paras. 14, 18-20. *See also Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005*, p. 168, para. 290.

[24] *See* WSS, paras. 2.31-2.73, 3.34-3.47; CR 2016/11, pp. 41-50, paras. 26-53 (Reichler); CR 2016/13, pp. 23-29, paras. 10-24 (Reichler).