Telephone: 070 350 42 15
Telefax: 070 355 35 94
E-mail: info@kenyanembassy-nl.com
Website: www.kenyaembassy.nl

EMBASSY OF THE REPUBLIC OF KENYA
Nieuwe Parklaan 21
2597 LA The Hague
The Netherlands

When replying please quote: **KEH/LEG/5A/VOL.II (81)**

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 transmit herewith a copy of letter Ref. AG/CONF/19/153/2 VOL.IV dated 29th September, 2016 by the Agent of the Republic of Kenya on comments to the written statement of the Federal Republic of Somalia dated 27 September 2016.

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, 30 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/19/153/2 VOL.IV 29th September, 2016

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

Dear Registrar,

In regard to the case concerning *Maritime Delimitation in the Indian Ocean (Somalia v Kenya)*, the Republic of Kenya has the honour herewith to submit its comments to the written statement of the Federal Republic of Somalia dated 27 September 2016 responding 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.

In response to Judge Crawford's first question, the Parties are in agreement that the two 2014 technical level meetings covered all maritime areas in dispute and that there would ultimately be a single agreed maritime boundary covering the territorial sea, the EEZ, and the continental shelf within and beyond 200 nautical miles.[1] This confirms the Parties' understanding in the penultimate paragraph of the MOU that they "shall agree" on a final delimitation after CLCS recommendations in regard to all the "maritime boundaries in the areas in dispute" and not just the continental shelf beyond 200 nautical miles as asserted by Somalia.[2] Thus, the MOU agreement to negotiate covers a single maritime boundary in all areas in dispute, such that Kenya's reservation is triggered in respect of UNCLOS Articles 15, 74, and 83, notwithstanding that the Part XV procedures also apply to those same provisions.

The Parties are not agreed on the response to Judge Crawford's second question. By way of summary, Kenya's basic position is that the MOU: (a)

[1] Somalia's Response to the questions posed by Judge Crawford, 27 September 2016, para. 3.
[2] See, eg, POK, para. 53; CR 2016/10 (Akhavan, pp. 19-20, paras 15-16; Forteau, p. 33, para. 3, p. 39, para. 18; Lowe, p. 63, para. 16)

SHERIA HOUSE, HARAMBEE AVENUE
P.O. Box40112-00100, NAIROBI, KENYA. TEL: +254 20 2227461/2251355/0711944555/0732529995
E-MAIL: info.statelawoffice@kenya.go.ke WEBSITE. www.attorney-general.go.ke

DEPARTMENT OF JUSTICE
CO-OPERATIVE BANK HOUSE, HAILLE SELLASIE AVENUEP.O. Box 56057-00200, Nairobi-Kenya TEL: Nairobi 2224029/ 2240337
E-MAIL: legal@justice.go.ke WEBSITE: www.justice.go.ke

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requires delimitation by negotiated agreement; (b) requires finalization of the agreed maritime boundary after CLCS recommendations; (c) does not exclude interim agreements or "provisional arrangements of a practical nature" in accordance with UNCLOS Articles 74(3) and 83(3); and (d) if a Party *expressly* waives its rights under the MOU, or if the Parties *expressly* agree upon a different procedure for settlement of the dispute, that would have had the effect of amending any inconsistent provision of the MOU. Nothing in the circumstances of the two meetings in 2014 is inconsistent with the MOU, and there was nothing in them that called for a waiver or variation of the terms of the MOU.

Somalia's written statement fails properly to respond either to Judge Crawford's question or to Kenya's basic position.

First, Kenya observes that Somalia has repeated some of its earlier arguments that are wholly irrelevant both to Judge Crawford's questions and to Kenya's Preliminary Objections. In particular, Somalia emphasizes once again that even if "the text of the MOU *did* establish an obligation to negotiate an agreed settlement only after the CLCS had made its final recommendations", the two technical level meetings in 2014 "met any standard to negotiate that might have been imposed. 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."[3] This assertion is wholly irrelevant because: (a) Judge Crawford's second question only concerns the requirement of prior CLCS recommendations and not the separate obligation to negotiate; and (b) Somalia continues to ignore the fact that the agreement to negotiate under the MOU, even without an additional requirement of CLCS review, would still fall squarely within Kenya's reservation on other methods of settlement and thus exclude the Court's jurisdiction.[4]

Second, Somalia's assertion that Kenya has "shifted"[5] its position on the obligation to negotiate under the MOU has no merit whatsoever. In both its written and oral pleadings, and in its response to Judge Crawford's second question, Kenya has clearly and consistently maintained that: (a) the MOU requires *finalization* of an agreement only after CLCS recommendations;[6] (b) that consistent with the MOU's agreed procedure, the Parties may obviously negotiate prior to CLCS recommendations and even conclude interim agreements over all or part of the maritime areas in dispute that are subsequently finalized after CLCS recommendations;[7] and (c) that the Parties

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[3] Somalia's Response, para. 7.
[4] See, eg, CR 2016/10 (Akhavan, pp. 20-21, paras 17 and 22) and CR 2016/12 (Akhavan. pp. 10-11, para. 4).
[5] Somalia's Response, para. 6.
[6] 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); POK, Annex 1: Memorandum of Understanding Kenya–Somalia, 2599 *UNTS* 35 (2009), p. 38.
[7] The Parties, for example, agreed on the "starting point" for maritime delimitation at the first technical meeting in 2014: MS, para. 3.50 and Annex 31, pp. 3-4.

are obviously free to agree on a different procedure by mutual consent, but that without such a subsequent agreement, the Parties continue to have obligations to respect the agreed procedure under the MOU.[8]

Third, Somalia's continued assertion that alleged "lengthy and detailed" negotiations were exhausted after two technical level meetings[9] at which preliminary views were exchanged is both irrelevant to Judge Crawford's questions and wholly inconsistent with the evidence before the Court.[10] In fact, Somalia's assertion that the second technical level meeting consisted of "heated discussions without any possible solution" and that the Kenya Foreign Minister allegedly agreed that the Parties were so "far apart" that there would only be one "final" attempt at an amicable resolution,[11] is based solely on its internal "Report to the File", prepared in English (and therefore for English speakers) rather than Somali, just a few days prior to the filing of Somalia's Application.[12] Kenya has challenged the accuracy and credibility of this document,[13] which is in direct contradiction with the Joint Report of the second technical meeting of 28-29 July 2014 – that the Parties agreed was an "accurate reflection" of the discussion – and which states that "both sides agreed to adjourn and to reconvene on 25th - 26th August 2014 in Mogadishu, Somalia to continue working on these issues in an attempt to bridge the gaps between the two parties' positions." [14] The formula "to bridge the gaps between the two parties" was in fact inserted in the Joint Report upon the proposal of Somalia.[15] Furthermore, even if Somalia's implausible assertion that the Kenyan delegation's inability to visit Mogadishu in view of security concerns somehow immediately exhausted negotiations is accepted, it would still have no bearing whatsoever on the fact that the MOU's agreed procedure falls squarely within Kenya's reservation and thus excludes the Court's jurisdiction.

Fourth, Somalia sets out what it considers to be the applicable law[16] on amendment of treaties and waiver of rights but fails both to mention that according to the jurisprudence of the Court, any waiver of rights must be express,[17] and to establish that the doctrine of waiver can be applied to the

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[8] CR 2016/12 (Akhavan, p. 13, para. 7).
[9] Somalia's Response, paras. 2, 4 and 6.
[10] POK, paras. 98-102 and 109; CR 2016/10 (Muchiri, pp. 46-9, paras. 4-11).
[11] Somalia's Response, para. 4.
[12] WSS, Annex 4.
[13] CR 2016/10 (Muchiri, p. 50, para. 17).
[14] MS, Annex 32.
[15] Internal Memorandum from AG Director, Horn of Africa Directorate to the Cabinet Secretary, dated 15 August 2014 (provided to the Court on 14 June 2016).
[16] Somalia's Response, paras. 9-10.
[17] *Case of Certain Norwegian Loans (France v Norway) (Preliminary Objections) I.C.J. Reports 1957*, p 9, 26 ('[a]bandonment cannot be presumed or inferred; it must be declared expressly'); *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, 33, para. 45 ('[u]nless unequivocally waived, the reservation constitutes a limitation on the extent of the jurisdiction voluntarily accepted by the United States'); *Certain Phosphate Lands in Nauru (Nauru v Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 240, 247, para. 13 ('[i]t will suffice to note that in fact those authorities did not at any time effect a clear and unequivocal waiver'); *Armed Activities on the*

facts of the present case.[18] In particular, Somalia completely ignores the undisputed fact that: (a) Somalia unilaterally rejected the MOU and declared it "null and void" – that is, non-existent as a treaty – thus leaving in Somalia's view no treaty that could be amended by waiver;[19] (b) it subsequently objected to Kenya's CLCS submission in breach of the MOU;[20] and (c) that it categorically refused to even *discuss* the MOU at the first technical level meeting convened at the initiative of Kenya.[21] Under such circumstances, it is difficult to understand how Kenya's conduct in calling for negotiations can credibly be said to have been regarded by Somalia as having constituted an express waiver of Kenya's rights to prior CLCS recommendations[22] (or an implicit waiver for that matter), let alone its right to a negotiated settlement rather than recourse to judicial settlement.[23] It is also difficult to understand how Somalia can possibly suggest that Kenya should have explicitly "reserved" its rights under the MOU,[24] particularly at that initial stage in negotiations before any agreement that might have affected the maritime delimitation was in sight, and indeed when Somalia categorically refused even to discuss its rejection and breach of the MOU at the 2014 technical level meetings. Somalia cannot now benefit from its own unlawful conduct (*ex turpi causa non oritur actio*).[25]

Furthermore, the evidence before the Court clearly demonstrates that Kenya did not *ever* suggest, whether expressly or implicitly, that the agreed procedures under the MOU were no longer valid or no longer applicable or otherwise amended. Kenya was engaged in good faith confidence-building measures to persuade Somalia to withdraw its objection to Kenya's CLCS submission consistent with the MOU and to change Somalia's earlier position from June 2013 when it refused to negotiate on maritime boundary delimitation with Kenya.[26] To the contrary, Kenya clearly and consistently insisted on Somalia's compliance with the MOU, including its obligation of

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Territory of the Congo (Democratic Republic of the Congo v Uganda), Judgment, I.C.J. Reports 2005, p. 168, 266, para. 293 ('waivers or renunciations of claims or rights must either be express or unequivocally implied from the conduct of the State alleged to have waived or renounced its right', citing ILC report, doc. A/56/10, 2001, p. 308: '[a]lthough it may be possible to infer a waiver from the conduct of the States concerned or from a unilateral statement, the conduct or statement must be unequivocal'). Arbitral authority is to the same effect: *Campbell (United Kingdom v Portugal)* (1931) 2 RIAA 1145, 1156 ('il est de principe, admis par le droit de tous les pays, que les renonciations ne se présument jamais et que, constituent des abandons d'un droit, d'une faculté ou même d'une espérance, sont toujours de stricte interpretation'); *The 'Kronprins Gustaf Adolf' (Sweden, USA)* (1932) 2 RIAA 1239, 1299 ('A renunciation to a right or a claim is not to be presumed. It must be shown by conclusive evidence').

[18] POK, paras. 72, 99-100, 104 and Annex 37, para 109, para 116 and Annex 43, paras. 119-22 and MS Annex 50, paras 124-5 and Annex 44.

[19] MS, Annexes 24 and 41.

[20] MS Annexes 41 and 42.

[21] POK, para. 100 and MS, Annex 24.

[22] Somalia's Response, para. 11.

[23] For the same reason, Somalia's argument that the MOU was somehow "amended" by mutual agreement is baseless (para. 11). Such an amendment – like a waiver - must be express.

[24] Somalia's Response, para. 12.

[illegible] Nicaragua (Nicaragua v. US).

"no objection", and made express reference on multiple occasions, including in its communications with the CLCS,[27] and in the 31 May 2013 Joint Declaration of the Foreign Ministers of Kenya and Somalia,[28] to the establishment of a mechanism for a negotiated settlement of the maritime boundary dispute in accordance with the penultimate paragraph of the MOU.[29]

Fifth, and most importantly, there is no reason why Kenya would have had to "reserve" its position in relation to the MOU. That position is that the MOU is an agreement to settle the maritime boundary, not by litigation but by negotiation and agreement. The 2014 meetings were negotiations. The MOU stated that "the delimitation of maritime boundaries in the areas under dispute, including the delimitation of the continental shelf beyond 200 nautical miles, shall be agreed by the two coastal States on the basis of international law after the Commission has concluded the examination of the separate submissions made by each of the two coastal States and made its recommendations to two coastal States". Nothing precludes the making of particular arrangements and agreements prior to that stage. Those negotiations were consistent with delimitation of the areas in dispute by agreement: litigation is not.

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

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[27] See, eg, POK, para. 116 and Annex 43.
[28] POK, para. 88 and Annexes 31 and 32.
[29] CR 2016/12 (Akhavan, p. 13, para. 8, citing MS, Annex 61).