

International Court of Justice — United Nations Convention on the Law of the Sea, 1982 — Memorandum of Understanding between Kenya and Somalia, 2009 — Commission on the Limits of the Continental Shelf — Territorial sea — Exclusive economic zone — Continental shelf — Continental shelf beyond 200 nautical miles — Delimitation of maritime boundary — Delineation of outer limits of continental shelf

International Court of Justice — Jurisdiction — Article 36(2) of Court’s Statute — Optional clause — Kenya’s reservation to its optional clause declaration — Memorandum of Understanding between Kenya and Somalia, 2009 (“MOU”) — Whether MOU preventing Court from having jurisdiction over case brought by Somalia — Character of MOU as a binding international agreement — Whether MOU requiring Parties to delimit their boundary after recommendation of Commission on the Limits of the Continental Shelf (“CLCS”) on the outer limits of the continental shelf — Part XV of United Nations Convention on the Law of the Sea, 1982 (“UNCLOS”) — Whether optional clause declarations falling within scope of Article 282 of UNCLOS — Whether Article 282 entailing Parties’ agreement to settle their maritime dispute pursuant to provisions of Part XV of UNCLOS — Whether circular *renvoi* from Article 282 back to Kenya’s reservation — Admissibility of Somalia’s Application — Relevance of Somalia’s objection to consideration of Kenya’s submission by the CLCS — Clean hands doctrine

Treaties — Interpretation — Memorandum of Understanding between Kenya and Somalia, 2009 — Whether binding treaty under international law — Character of MOU as a binding international agreement — Whether MOU requiring Parties to delimit their boundary after recommendation of CLCS on the outer limits of the continental shelf — Article 83 of UNCLOS — Vienna Convention on the Law of Treaties, 1969, Article 31(3)(c) — *Travaux préparatoires* of MOU — Whether MOU preventing Court from having jurisdiction over case brought by Somalia

MARITIME DELIMITATION IN THE INDIAN OCEAN¹

(SOMALIA *v.* KENYA)

International Court of Justice

Judgment on Preliminary Objections. 2 February 2017

(Abraham, *President*; Yusuf, *Vice-President*; Owada, Tomka, Bennouna, Cañado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Crawford and Gevorgian, *Judges*; Guillaume, *Judge ad hoc*)

SUMMARY:² *The facts*:—On 28 August 2014, Somalia filed with the International Court of Justice an Application instituting proceedings against Kenya in a case concerning the delimitation of the maritime boundary in the Indian Ocean within and beyond 200 nautical miles. Somalia presented the following claims:

The Court is asked to determine, on the basis of international law, the complete course of the single maritime boundary dividing all the maritime areas appertaining to Somalia and to Kenya in the Indian Ocean, including in the continental shelf beyond 200 [nautical miles].

Somalia further requests the Court to determine the precise geographical co-ordinates of the single maritime boundary in the Indian Ocean.

Somalia maintained that the Court had jurisdiction by virtue of the Parties' declarations pursuant to Article 36(2) of the Statute of the Court ("the optional clause"). Kenya had made a reservation to its optional clause declaration, under which it did not accept the Court's jurisdiction in "[d]isputes in

¹ The Federal Republic of Somalia was represented by HE Mr Abdusalam Hadliyah Omer, as Agent; HE Mr Ali Said Faqi, as Co-Agent; Ms Mona Al-Sharmani, as Deputy-Agent; Mr Paul S. Reichler, Mr Alain Pellet and Mr Philippe Sands QC, as Counsel and Advocates; Mr Lawrence H. Martin, Ms Alina Miron, Mr Edward Craven and Mr Nicholas M. Renzler, as Counsel; Ms Lea Main-Klingst, as Junior Counsel; Mr Mohamed Omar, Mr Ahmed Ali Dahir, HE Mr Yusuf Garaad Omar, Admiral Farah Ahmed Omar, Mr Daud Awes and Mr Abubakar Mohamed Abubakar, as Advisers; and Ms Kathryn Kalinowski and Ms Nancy Lopez, as Assistants.

The Republic of Kenya was represented by Professor Githu Muigai, as Agent; HE Ms Rose Makena Muchiri, as Co-Agent; Mr Vaughan Lowe QC, Mr Payam Akhavan, Mr Mathias Forteau, Mr Alan Boyle and Mr Karim A. A. Khan QC, as Counsel and Advocates; Ms Amy Sander, Ms Philippa Webb and Mr Eirik Bjorge, as Counsel; Hon. Senator Amos Wako, Hon. Samuel Chepkonga, Ms Juster Nkoroï, Mr Michael Guchayo Gikuihi, Ms Njeri Wachira, Ms Stella Munyi, Ms Stella Orina, Mr Rotiken Kaitikei, Ms Pauline Mcharo, Ms Wanjiku Wakogi, Mr Samuel Kaumba and Mr Hudson Andambi, as Advisers.

² Prepared by Dr M. Lando.

regard to which the parties . . . have agreed or shall agree to have recourse to some other method or methods of settlement”.

Pursuant to Article 76(8) of the United Nations Convention on the Law of the Sea, 1982 (“UNCLOS”), a State which wished to establish the outer limits of its continental shelf beyond 200 nautical miles had to submit information to the Commission on the Limits of the Continental Shelf (“CLCS”), which would, in turn, deliver a recommendation stating where these outer limits lay (a process called “delineation”). Under the terms of the Memorandum of Understanding between Kenya and Somalia signed on 7 April 2009 (“MOU”),³ the Parties agreed not to object to each other’s submission to the CLCS. On 11 June 2009, the MOU was registered in accordance with Article 102 of the Charter of the United Nations at Kenya’s request. Kenya made a full submission to the CLCS on 6 May 2009, while Somalia submitted preliminary information relating to its submission on 14 April 2009.

By a letter dated 2 March 2010, the Permanent Representative of Somalia to the United Nations forwarded to the United Nations Secretary-General a letter dated 10 October 2009 from the Prime Minister of Somalia informing the Secretary-General that the Transitional Federal Parliament of Somalia had rejected the MOU. On 4 February 2014, Somalia lodged a formal objection to the registration of the MOU. On the same day, Somalia objected to Kenya’s CLCS submission on the ground that there existed a maritime boundary dispute between the two States. The CLCS subsequently decided not to consider Kenya’s submission until the settlement of the outstanding dispute, pursuant to Article 5(a) of Annex I to the CLCS’s Rules of Procedure.⁴ The Parties entered into negotiations in order to settle their maritime dispute.

Kenya argued that the Court lacked jurisdiction because of the reservation to Kenya’s optional clause declaration. Kenya contended that the MOU was a binding agreement which had entered into force upon signature. First, Kenya maintained that, by the MOU, the Parties had agreed to settle their maritime dispute through negotiations after the recommendation of the CLCS on the outer limits of their continental shelves, following a two-step procedure. Kenya interpreted the MOU as making delimitation subject to delineation and to entail that, should the negotiation required under the MOU fail, the Parties would have recourse to the dispute settlement procedures under Part XV of UNCLOS.

Somalia stated that it was unnecessary to determine the legal validity of the MOU in order to dispose of Kenya’s preliminary objection, but also that, in any event, the MOU had never been ratified by Somalia. According to Somalia, the MOU was without prejudice to the issue of delimitation. Somalia argued that the MOU simply repeated the Parties’ obligation to agree on a maritime boundary codified under Articles 74 and 83 of UNCLOS.

³ For the text of the Memorandum of Understanding between Kenya and Somalia, see para. 37 of the judgment.

⁴ For the text of Article 5(a) of Annex I of the CLCS’s Rules of Procedure, see para. 16 of the judgment.

Somalia also emphasized that the MOU only mentioned the continental shelf and concerned neither the territorial sea nor the exclusive economic zone.

Secondly, Kenya contended that the Court lacked jurisdiction because the Parties had agreed to solve their maritime dispute pursuant to Part XV of UNCLOS. Kenya added that Part XV of UNCLOS was *lex specialis* and *lex posterior* with respect to the Parties' optional clause declarations and that such declarations were not an agreement conferring jurisdiction on the Court within the meaning of Article 282 of UNCLOS. Somalia argued that the Parties, by their optional clause declarations, had agreed to the Court's jurisdiction, thereby displacing the dispute settlement procedures of Part XV of UNCLOS. According to Somalia, UNCLOS specifically gave priority to optional clause declarations over its own dispute settlement procedures.

Kenya also disputed the admissibility of Somalia's Application on the ground that the Parties had agreed in the MOU to negotiate delimitation of their maritime boundary only after completion of the CLCS review and that Somalia had withdrawn its consent to the CLCS examining Kenya's submission only to consent again immediately before filing the case with the Court. Somalia replied that accusations of bad faith could not bar the admissibility of the Application.

Held (by thirteen votes to three, Judges Bennouna, Robinson and Judge ad hoc Guillaume dissenting):—The Court had jurisdiction to entertain the Application filed by Somalia and that Application was admissible.

(1) (by thirteen votes to three, Judges Bennouna, Robinson and Judge ad hoc Guillaume dissenting) Kenya's objection to the jurisdiction of the Court based upon the MOU was rejected.

(a) The MOU was a valid treaty that had entered into force upon signature. The Somali Minister for National Planning and International Co-operation had been duly authorized to sign the MOU on behalf of Somalia. In the circumstances, that Minister's signature expressed Somalia's consent to be bound by the MOU. There was no reason to suppose that Kenya was aware that the signature would not have sufficed for the MOU to become binding. Moreover, even after the Somali Parliament had refused to ratify the MOU, Somalia's President had not doubted its validity in his communications with the UN Secretary-General. The MOU was therefore a binding treaty under international law (paras. 42-50).

(b) (i) Delimitation was a task distinct from delineation; the former could be carried out independently of the latter. The entire text of the MOU was the context in which the sixth paragraph, which was the most contentious one, had to be interpreted. Its introductory paragraphs did not contain commitments but listed the circumstances which had led to the MOU's conclusion, namely that the Parties recognized that they had an unresolved maritime dispute and nevertheless wished to proceed to delineate the outer limits of their continental shelves. The purpose of the fourth and fifth paragraphs was to allow the CLCS to delineate the outer limits of the

continental shelf without prejudice to the outstanding delimitation dispute. References to maritime delimitation outside the sixth paragraph fulfilled two functions: describing the “area in dispute” and clarifying that the delineation exercise was without prejudice to the delimitation of the maritime boundary. The sixth paragraph did not necessarily mean that the Parties had intended to bind themselves to delimiting their boundary after delineation by the CLCS. The sixth paragraph concerned the delimitation of the continental shelf to the exclusion of the territorial sea and the exclusive economic zone (paras. 67-86).

(ii) Read in its context, and in light of the object and purpose of the MOU, as well as Article 83 of UNCLOS,⁵ the sixth paragraph of the MOU set out the expectation of the Parties that an agreement would be reached on the delimitation of their continental shelf after they had received the recommendations of the CLCS. It did not, however, prescribe a method of dispute settlement. The *travaux préparatoires* of the MOU confirmed this conclusion. The MOU did not, therefore, constitute an agreement “to have recourse to some other method or methods of settlement” within the meaning of Kenya’s reservation to its optional clause declaration (paras. 89-106).

(2) (by fifteen votes to one, Judge Robinson dissenting) Kenya’s objection to jurisdiction based on Part XV of UNCLOS was rejected.

(a) Kenya’s reservation did not distinguish between a special agreement and a general agreement for the settlement of disputes. The language of the reservation was also at odds with the suggestion that preference was to be given to dispute settlement agreements concluded after the optional clause declaration. UNCLOS gave States wide discretion as to the means to settle disputes concerning the interpretation or application of that Convention. The procedures under Section 2 of Part XV were residual with respect to those under Section 1 thereunder. The ordinary meaning of Article 282 of UNCLOS was sufficiently broad to encompass agreement to jurisdiction based upon matching optional clause declarations. This interpretation was confirmed by UNCLOS’s *travaux préparatoires*. These *travaux préparatoires* also showed that it had not been the intention to exclude optional clause declarations containing a reservation similar to Kenya’s from the scope of Article 282; the contrary interpretation entailed that, by ratifying a treaty giving priority to optional clause declarations, States would have actually achieved the opposite aim of giving priority to the dispute settlement provisions of that treaty. It followed that optional clause declarations took priority over Part XV of UNCLOS (paras. 120-30).

(b) Part XV did thus not provide a dispute settlement method over which the Parties had agreed within the meaning of Kenya’s reservation; the dispute therefore did not fall outside the scope of Kenya’s optional clause declaration (para. 130).

⁵ For the text of Article 83 of UNCLOS, see para. 89 of the judgment.

(3) (by fifteen votes to one, Judge Robinson dissenting) Kenya's objection to the admissibility of the Application was rejected. Since the Court had already held that the MOU did not contain an agreement to settle disputes by negotiation and only after completion of the CLCS review, it followed that the first limb of Kenya's objection to admissibility had to be rejected. With regard to the second limb, the fact that a State had breached a treaty did not per se affect the admissibility of its application. The objection by Somalia to the consideration of Kenya's submission by the CLCS did not constitute a bar to admissibility. The Court did not have to decide whether there existed other situations in which an applicant State's conduct would determine the inadmissibility of an Application (paras. 142-3).

Declaration of Vice-President Yusuf: The MOU had been drafted by Norway's Ambassador. However, there was a distinction between the technical assistance provided by Norway and the actual drafting of the MOU which should have been carried out by the States concerned. Nowadays, governments, especially African ones, could not put their signature to bilateral agreements which they had not negotiated (paras. 2-11).

Dissenting Opinion of Judge Bennouna: In interpreting the MOU, which was an international treaty, the Court should have had recourse to interpretation pursuant to Article 31 of the Vienna Convention on the Law of Treaties, 1969. However, the Court had inverted the order of the means of interpretation under that provision, starting with analysing the context of the MOU's sixth paragraph. The ordinary meaning of the sixth paragraph indicated that the Parties intended to delimit their maritime boundary after the CLCS's recommendation on the outer limits of the continental shelf. This interpretation was supported by the MOU's object and purpose, namely, to give priority to the work of the CLCS. The Court's analogy between the MOU's sixth paragraph and Article 83(1) of UNCLOS was not entirely convincing. The sixth paragraph fell within the scope of Kenya's reservation, which determined that the Court lacked jurisdiction in respect of Somalia's Application (paras. 6-20).

Joint Declaration of Judges Gaja and Crawford: (1) The MOU's sixth paragraph would fall within Kenya's reservation only if it required the Parties to agree on delimitation (i.e., a *pactum de contrahendo*) or provided that negotiation was the only means of dispute settlement. If States agreed to negotiate while leaving the result of those negotiations open, they would not necessarily agree on a method of settlement. For this reason, the Parties did not agree to exclude settlement of their dispute by means other than negotiation (paras. 3-6).

(2) The MOU precluded the admissibility of an Application made before the CLCS's recommendation on the outer limit of the continental shelf, as it

followed from the plain language of the sixth paragraph. The sixth paragraph was justified in relation to the delimitation of the continental shelf, which meant that the Parties could have delimited the boundaries of other maritime zones prior to the CLCS's recommendation. However, by starting negotiations in 2014 in relation to the entire boundary, the Parties derogated from the timescale originally agreed in the MOU (paras. 8-12).

Dissenting Opinion of Judge Robinson: Absent an agreement or otherwise between the Parties, Article 282 did not exclude the settlement of their maritime dispute with reference to the provisions of Part XV of UNCLOS. Whether, in the light of a reservation to an optional clause declaration, there was an agreement falling within the scope of Article 282 was a matter to be decided by a case-by-case examination. It was wholly unreasonable to conclude that Kenya's optional clause declaration fell within the scope of Article 282 because Article 287 of UNCLOS provided for other methods of settlement applicable to the dispute between the Parties. Whether the *travaux préparatoires* of Article 282 indicated that it also covered optional clause declarations could not be decided on the basis of the number of Kenya-like declarations during the UNCLOS negotiations (paras. 7-12 and 17-24).

Dissenting Opinion of Judge ad hoc Guillaume: The MOU's sixth paragraph imposed a method applicable to settle the Parties' maritime dispute, which brought it within the purview of Kenya's reservation. Such a reservation was general in character and thus included all dispute settlement means. This interpretation of the sixth paragraph was based on its ordinary meaning, which stood uncontradicted by the object and purpose of the MOU. The comparison between the sixth paragraph and Article 83(1) of UNCLOS was unjustified as the two provisions had different objects. By the sixth paragraph the Parties had also agreed that delimitation was to take place after delineation. Moreover, Kenya's willingness to engage in maritime boundary negotiations with Somalia between 2010 and 2015 could not suggest that, in the circumstances, the former renounced its rights under the MOU (paras. 6-16 and 21-8).

The text of the judgment, dissenting opinions and declarations is set out as follows:

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...

[9] 1. On 28 August 2014, the Government of the Federal Republic of Somalia (hereinafter "Somalia") filed in the Registry of the Court an Application instituting proceedings against the Republic of Kenya (hereinafter "Kenya") concerning a dispute in relation 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".

In its Application, Somalia seeks to found the jurisdiction of the Court on the declarations made, pursuant to Article 36, paragraph 2, of the Statute of the Court, by Somalia on 11 April 1963 and by Kenya on 19 April 1965.

2. In accordance with Article 40, paragraph 2, of the Statute of the Court, the Registrar immediately communicated the Application to the Government of Kenya; and, under paragraph 3 of that Article, all other States entitled to appear before the Court were notified of the Application.

3. Since the Court included upon the Bench no judge of Kenyan nationality, Kenya proceeded to exercise its right conferred by Article

31, paragraph 2, of the Statute to choose a judge *ad hoc* to sit in the case; it chose Mr Gilbert Guillaume.

4. By an Order of 16 October 2014, the President fixed 13 July 2015 as the time-limit for the filing of the Memorial of Somalia and 27 May 2016 for the filing of the Counter-Memorial of Kenya. Somalia filed its Memorial within the time-limit so prescribed.

5. On 7 October 2015, within the time-limit set by Article 79, paragraph 1, of the Rules of Court, Kenya raised preliminary objections to the jurisdiction of the Court and to the admissibility of the Application. Consequently, by an Order of 9 October 2015, the Court, noting that, by virtue of Article 79, paragraph 5, of the Rules of Court, the proceedings on the merits were suspended, and taking account of Practice Direction V, fixed 5 February 2016 as the time-limit for the presentation by Somalia of a written statement of its observations and submissions on the preliminary objections raised by Kenya. Somalia filed such a statement within the time-limit so prescribed, and the case thus became ready for hearing in respect of the preliminary objections.

6. Pursuant to the instructions of the Court under Article 43 of the Rules of Court, the Registrar addressed to States parties to the United Nations Convention on the Law of the Sea the notifications provided for in Article 63, paragraph 1, of the Statute of the Court. In addition, the Registrar addressed to the European Union, which is also party to that Convention, the notification provided for in Article 43, paragraph 2, of the Rules of Court, as adopted on 29 September 2005, and asked that organization whether or not it intended to furnish observations under that provision. In response, the Director-General of the Legal Service of the European Commission indicated that the European Commission, which represents the European Union, did not intend to submit observations in the case.

7. By a communication dated 21 January 2016, the Government of the Republic of Colombia, referring to Article 53, paragraph 1, of the Rules of [10] Court, asked to be furnished with copies of the pleadings and documents annexed in the case. Having ascertained the views of the Parties in accordance with that same provision, the Court decided, taking into account the objection raised by one Party, that it would not be appropriate to grant that request. By a letter dated 17 March 2016, the Registrar duly communicated that decision to the Government of Colombia and to the Parties.

8. Pursuant to Article 53, paragraph 2, of the Rules of Court, the Court, after ascertaining the views of the Parties, decided that copies of the pleadings and the documents annexed would be made accessible to the public on the opening of the oral proceedings.

9. Public hearings on the preliminary objections raised by Kenya were held from Monday 19 to Friday 23 September 2016, at which the Court heard the oral arguments of:

For Kenya: Mr Githu Muigai,
 Mr Payam Akhavan,
 Mr Karim A. A. Khan,
 Mr Mathias Forteau,
 HE Ms Rose Makena Muchiri,
 Mr Alan Boyle,
 Mr Vaughan Lowe.

For Somalia: Ms Mona Al-Sharmani,
 Mr Alain Pellet,
 Mr Paul S. Reichler,
 Mr Philippe Sands.

10. At the hearings, a Member of the Court put questions to the Parties, to which replies were given in writing within the time-limit fixed by the President in accordance with Article 61, paragraph 4, of the Rules of Court. Pursuant to Article 72 of the Rules of Court, each of the Parties submitted comments on the written replies provided by the other.

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11. In the Application, the following claims were presented by Somalia:

The Court is asked to determine, on the basis of international law, the complete course of the single maritime boundary dividing all the maritime areas appertaining to Somalia and to Kenya in the Indian Ocean, including in the continental shelf beyond 200 [nautical miles].

Somalia further requests the Court to determine the precise geographical co-ordinates of the single maritime boundary in the Indian Ocean.

12. In the written proceedings on the merits, the following submissions were presented on behalf of the Government of Somalia in its Memorial:

On the basis of the facts and law set forth in this Memorial, Somalia respectfully requests the Court:

1. To determine the complete course of the maritime boundary between Somalia and Kenya in the Indian Ocean, including in the continental shelf beyond 200 [nautical miles], on the basis of international law.
- [11] 2. To determine the maritime boundary between Somalia and Kenya in the Indian Ocean on the basis of the following geographical Coordinates: