INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

# MARITIME DELIMITATION IN THE INDIAN OCEAN

(SOMALIA *v.* KENYA)

PRELIMINARY OBJECTIONS

**JUDGMENT OF 2 FEBRUARY 2017**

# 2017

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

# DÉLIMITATION MARITIME DANS L'OCÉAN INDIEN

(SOMALIE c. KENYA)

EXCEPTIONS PRÉLIMINAIRES

**ARRÊT DU 2 FÉVRIER 2017**

Official citation:

*Maritime Delimitation in the Indian Ocean*
*(Somalia* v. *Kenya), Preliminary Objections, Judgment,*
*I.C.J. Reports 2017*, p. 3

Mode officiel de citation:

*Délimitation maritime dans l'océan Indien*
*(Somalie c. Kenya), exceptions préliminaires, arrêt,*
*C.I.J. Recueil 2017*, p. 3

ISSN 0074-4441
ISBN 978-92-1-157313-8

**Sales number**
**N° de vente: 1115**

UAL-81

2 FEBRUARY 2017

JUDGMENT

# MARITIME DELIMITATION IN THE INDIAN OCEAN

(SOMALIA *v.* KENYA)

PRELIMINARY OBJECTIONS

---

# DÉLIMITATION MARITIME DANS L'OCÉAN INDIEN

(SOMALIE c. KENYA)

EXCEPTIONS PRÉLIMINAIRES

2 FÉVRIER 2017

ARRÊT

# TABLE OF CONTENTS

INTERNATIONAL COURT OF JUSTICE

YEAR 2017

2017
2 February
General List
No. 161

**2 February 2017**

# MARITIME DELIMITATION IN THE INDIAN OCEAN

(SOMALIA *v.* KENYA)

PRELIMINARY OBJECTIONS

*Geography — Somalia and Kenya both parties to United Nations Convention on the Law of the Sea — Article 76, paragraph 8, of UNCLOS — Role of Commission on the Limits of the Continental Shelf — Article 4 of Annex II of UNCLOS — Annex I of CLCS Rules of Procedure — Commission requires prior consent from all States that are parties to unresolved land or maritime disputes — 2009 Memorandum of Understanding (MOU) — History of each Party's submissions to CLCS with respect to outer limits of continental shelf beyond 200 nautical miles — Objections by both Parties to CLCS's consideration of each other's submissions raised and withdrawn — Consideration of Parties' submissions by CLCS.*

*

*Jurisdiction based on declarations under Article 36, paragraph 2, of Statute of the Court — Two objections raised — Jurisdiction and admissibility.*

*

*Kenya's first preliminary objection.*

*Contentions by Kenya — Court lacks jurisdiction as a result of one of Kenya's reservations to its optional clause declaration — Disputes in regard to which parties have agreed "to have recourse to some other method or methods of settlement" excluded from the Court's jurisdiction — MOU is an agreement on such other method of settlement — Relevant provisions of*

*UNCLOS on dispute settlement also amount to agreement on method of settlement.*

*Analysis by the Court — Legal status of MOU under international law — Signing of MOU and registration with United Nations Secretariat — MOU a written document recording Parties' agreement on certain points governed by international law — Provision addressing entry into force indicative of instrument's binding character — Somali Minister for National Planning duly authorized as signatory — MOU to enter into force upon signature — No ratification requirement in MOU — MOU is a valid treaty that entered into force upon signature and is binding on Parties under international law.*

*Interpretation of MOU — Rules of interpretation in Articles 31 and 32 of Vienna Convention — Ordinary meaning, context and object and purpose to be considered as a whole — Role of CLCS in process of delineation of outer limits of continental shelf beyond 200 nautical miles — Distinction between delineation and delimitation.*

*Title of MOU — Meaning of individual paragraphs — Title and first five paragraphs indicative of a purpose — MOU a no-objection agreement enabling CLCS to make recommendations despite existence of a dispute — Whether sixth paragraph of MOU contains agreed dispute settlement method — Sixth paragraph relating only to continental shelf — Delineation of outer limits of continental shelf beyond 200 nautical miles without prejudice to maritime boundary delimitation — Similarity in language between Article 83, paragraph 1, of UNCLOS and sixth paragraph of MOU — Sixth paragraph did not prevent Parties from engaging in negotiations in good faith to reach agreement — No temporal restriction contained in sixth paragraph in that regard — Sixth paragraph not prescribing a method of dispute settlement — Parties did not consider themselves bound to wait for CLCS recommendations before engaging in negotiations — Interpretation confirmed by* travaux préparatoires *and circumstances in which MOU was concluded — Initiative of Special Representative of UN Secretary-General for Somalia — Assistance provided by Norway — Conclusion that MOU not an agreement "to have recourse to some other method or methods of settlement" within meaning of Kenya's reservation to its optional clause declaration — Kenya's reservation not applicable.*

*Whether Part XV ("Settlement of Disputes") of UNCLOS amounted to agreement on a method of settlement of maritime boundary dispute within meaning of Kenya's reservation — Structure and provisions of Part XV — Article 282 — Ordinary meaning of Article 282 encompasses agreement to*

*Court's jurisdiction resulting from optional clause declarations — Interpretation confirmed by* travaux préparatoires *— Procedure before the Court to apply "in lieu" of procedures under Section 2 of Part XV — Part XV does not provide for "other method" of dispute settlement within meaning of Kenya's reservation — Finding that the Court has jurisdiction gives effect to intent reflected in Kenya's declaration — Present case does not, by virtue of Part XV, fall outside scope of Parties' consent to the Court's jurisdiction.*

*Conclusion that neither MOU nor Part XV of UNCLOS within scope of Kenya's reservation to its optional clause declaration — Kenya's preliminary objection to jurisdiction rejected.*

*

*Kenya's second preliminary objection.*

*Contention by Kenya that Application is inadmissible for two reasons — First argument that under MOU Parties agreed to delimit their boundary by negotiation only after CLCS review of their submissions — Previous finding by the Court that MOU did not contain such agreement — Premise of objection rejected — Second argument that Somalia's withdrawal of consent to CLCS consideration was in breach of MOU — Invocation of clean hands doctrine — Finding of the Court that admissibility of an application not* per se *affected by breach of a treaty at issue in a case — No need to address in general question of whether conduct of Applicant might render application inadmissible — Kenya's preliminary objection to admissibility rejected.*

# JUDGMENT

*Present:* *President* Abraham; *Vice-President* Yusuf; *Judges* Owada, Tomka, Bennouna, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Crawford, Gevorgian; *Judge* ad hoc Guillaume; *Registrar* Couvreur.

In the case concerning maritime delimitation in the Indian Ocean,

*between*

the Federal Republic of Somalia,

represented by

H.E. Mr. Abdusalam Hadliyeh Omer, Minister for Foreign Affairs of the Federal Republic of Somalia,

as Agent;

H.E. Mr. Ali Said Faqi, Ambassador of the Federal Republic of Somalia to the Kingdom of Belgium,

as Co-Agent;

Ms Mona Al-Sharmani, Attorney-at-Law, Senior Legal Adviser to the President of the Federal Republic of Somalia,

as Deputy-Agent;

Mr. Paul S. Reichler, Attorney-at-Law, Foley Hoag LLP, member of the Bars of the United States Supreme Court and the District of Columbia,

Mr. Alain Pellet, Emeritus Professor, University of Paris Ouest, Nanterre-La Défense, former member and former chairman of the International Law Commission, member of the Institut de droit international,
Mr. Philippe Sands, Q.C., Professor of International Law at University College London, Barrister at Matrix Chambers, London,

as Counsel and Advocates;

Mr. Lawrence H. Martin, Attorney-at-Law, Foley Hoag LLP, member of the Bars of the United States Supreme Court, the District of Columbia and the Commonwealth of Massachusetts,
Ms Alina Miron, Professor of International Law at the University of Angers,
Mr. Edward Craven, Barrister at Matrix Chambers, London,
Mr. Nicholas M. Renzler, Attorney-at-Law, Foley Hoag LLP, member of the Bars of the District of Columbia and the State of New York,

as Counsel;

Ms Lea Main-Klingst, Matrix Chambers, London,

as Junior Counsel;

Mr. Mohamed Omar, Senior Adviser to the President of the Federal Republic of Somalia,
Mr. Ahmed Ali Dahir, Attorney-General of the Federal Republic of Somalia,

H.E. Mr. Yusuf Garaad Omar, Ambassador, Permanent Representative of the Federal Republic of Somalia to the United Nations, New York,

Admiral Farah Ahmed Omar, former Admiral of the Somali Navy and Chairman of the Research Institute for Ocean Affairs, Mogadishu,
Mr. Daud Awes, Spokesperson of the President of the Federal Republic of Somalia,
Mr. Abubakar Mohamed Abubakar, Director, Maritime Affairs, Ministry of Foreign Affairs,

as Advisers;

Ms Kathryn Kalinowski, Foley Hoag LLP, Washington, DC,
Ms Nancy Lopez, Foley Hoag LLP, Washington, DC,

as Assistants,

*and*

the Republic of Kenya,

represented by

Professor Githu Muigai, E.G.H., S.C., Attorney-General of the Republic of Kenya,

as Agent;

H.E. Ms Rose Makena Muchiri, Ambassador of the Republic of Kenya to the Kingdom of the Netherlands,

as Co-Agent;

Mr. Vaughan Lowe, Q.C., member of the Bar of England and Wales, Emeritus Professor of International Law, University of Oxford, member of the Institut de droit international,
Mr. Payam Akhavan, LL.M. S.J.D. (Harvard), Professor of International Law, McGill University, member of the State Bar of New York and of the Law Society of Upper Canada, member of the Permanent Court of Arbitration,
Mr. Mathias Forteau, Professor at the University of Paris Ouest, Nanterre-La Défense, former member of the International Law Commission,
Mr. Alan Boyle, Professor of International Law at the University of Edinburgh, member of the Bar of England and Wales,
Mr. Karim A. A. Khan, Q.C., member of the Bar of England and Wales,

as Counsel and Advocates;

Ms Amy Sander, member of the Bar of England and Wales,
Ms Philippa Webb, Reader in Public International Law, King's College, London, member of the Bar of England and Wales and of the New York Bar,
Mr. Eirik Bjorge, Junior Research Fellow in Law at the University of Oxford,

as Counsel;

Hon. Senator Amos Wako, Chair of the Senate Standing Committee on Legal Affairs and Human Rights,
Hon. Samuel Chepkonga, Chair of the Parliamentary Committee on Justice and Legal Affairs,
Ms Juster Nkoroi, E.B.S., Head, Kenya International Boundaries Office,

Mr. Michael Guchayo Gikuhi, Director, Kenya International Boundaries Office,
Ms Njeri Wachira, Head, International Law Division, Office of the Attorney-General and Department of Justice,
Ms Stella Munyi, Director, Legal Division, Ministry of Foreign Affairs,

Ms Stella Orina, Deputy Director, Ministry of Foreign Affairs,
Mr. Rotiken Kaitikei, Foreign Service Officer, Ministry of Foreign Affairs,
Ms Pauline Mcharo, Senior Principal State Counsel, Office of the Attorney-General and Department of Justice,
Ms Wanjiku Wakogi, Governance Adviser, Office of the Attorney-General and Department of Justice,
Mr. Samuel Kaumba, State Counsel, Office of the Attorney-General and Department of Justice,
Mr. Hudson Andambi, Ministry of Energy,

as Advisers,

The Court,

composed as above,

after deliberation,

*delivers the following Judgment:*

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

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,
H.E. 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.

*

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.

2. To determine the maritime boundary between Somalia and Kenya in the Indian Ocean on the basis of the following geographical co-ordinates:

| *Point No.* | *Latitude* | *Longitude* |
|---|---|---|
| 1 (LBT) | 1° 39′ 44.07″ S | 41° 33′ 34.57″ E |
| 2 | 1° 40′ 05.92″ S | 41° 34′ 05.26″ E |
| 3 | 1° 41′ 11.45″ S | 41° 34′ 06.12″ E |
| 4 | 1° 43′ 09.34″ S | 41° 36′ 33.52″ E |
| 5 | 1° 43′ 53.72″ S | 41° 37′ 48.21″ E |
| 6 | 1° 44′ 09.28″ S | 41° 38′ 13.26″ E |
| 7 (intersection with 12 [nautical-mile] limit) | 1° 47′ 54.60″ S | 41° 43′ 36.04″ E |
| 8 | 2° 19′ 01.09″ S | 42° 28′ 10.27″ E |
| 9 | 2° 30′ 56.65″ S | 42° 46′ 18.90″ E |
| 10 (intersection with 200 [nautical-mile] limit) | 3° 34′ 57.05″ S | 44° 18′ 49.83″ E |
| 11 (intersection with 350 [nautical-mile] limit) | 5° 00′ 25.71″ S | 46° 22′ 33.36″ E |

3. To adjudge and declare that Kenya, by its conduct in the disputed area, has violated its international obligations to respect the sovereignty, and sovereign rights and jurisdiction of Somalia, and is responsible under international law to make full reparation to Somalia, including *inter alia* by making available to Somalia all seismic data acquired in areas that are determined by the Court to be subject to the sovereignty and/or sovereign rights and jurisdiction of Somalia, and to repair in full all damage that has been suffered by Somalia by the payment of appropriate compensation.

(All points referenced are referred to WGS-84.)"

13. In the preliminary objections, the following submissions were presented on behalf of the Government of Kenya:

"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."

In the written statement of its observations and submissions on the preliminary objections raised by Kenya, the following submissions were presented on behalf of the Government of Somalia:

"For these reasons, Somalia respectfully requests the Court:

(1) To reject the Preliminary Objections raised by the Republic of Kenya; and
(2) To find that it has jurisdiction to entertain the Application filed by the Federal Republic of Somalia."

14. At the oral proceedings on the preliminary objections, the following submissions were presented by the Parties:

*On behalf of the Government of Kenya,*

at the hearing of 21 September 2016:

"The Republic of Kenya respectfully requests the Court to 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."

*On behalf of the Government of Somalia,*

at the hearing of 23 September 2016:

"On the basis of its Written Statement of 5 February 2016, and its oral pleadings, Somalia respectfully requests the Court:

1. To reject the Preliminary Objections raised by the Republic of Kenya; and
2. To find that it has jurisdiction to entertain the Application filed by the Federal Republic of Somalia."

* * *

## I. Introduction

15. Somalia and Kenya are adjacent States on the coast of East Africa. Somalia is located in the Horn of Africa. It borders Kenya to the south-west, Ethiopia to the west and Djibouti to the north-west. Somalia's coastline faces the Gulf of Aden to the north and the Indian Ocean to the east. Kenya, for its part, shares a land boundary with Somalia to the north-east, Ethiopia to the north, South Sudan to the north-west, Uganda to the west and Tanzania to the south. Its coastline faces the Indian Ocean.

16. Both States signed the United Nations Convention on the Law of the Sea (hereinafter "UNCLOS" or the "Convention") on 10 December 1982. Kenya and Somalia ratified UNCLOS on 2 March and 24 July 1989, respectively, and the Convention entered into force for the

Parties on 16 November 1994. Under Article 76, paragraph 8, of UNCLOS, a State party to the Convention intending to establish the outer limits of its continental shelf beyond 200 nautical miles shall submit information on such limits to the Commission on the Limits of the Continental Shelf (hereinafter "CLCS" or the "Commission"). The role of the Commission is to make recommendations to coastal States on matters related to the establishment of the outer limits of their continental shelf beyond 200 nautical miles (see paragraph 66 below). Pursuant to Article 4 of Annex II to UNCLOS, a State party intending to establish such limits shall submit the required information to the Commission "as soon as possible but in any case within 10 years of the entry into force of [the] Convention for that State".

In May 2001, bearing in mind the difficulties encountered by some developing States in meeting the requirements of Article 4 of Annex II to the Convention, the eleventh Meeting of States Parties to UNCLOS decided that the ten-year period (referred to in Article 4 of Annex II) would be deemed to have commenced on 13 May 1999 for those States parties to the Convention for which UNCLOS had entered into force before 13 May 1999 (see doc. SPLOS/72). Consequently, the ten-year time-limit for such States to make their respective submissions to the CLCS was due to expire on 13 May 2009. Kenya and Somalia were among those States to which this time-limit applied. In June 2008, at the eighteenth Meeting of States Parties to UNCLOS, it was decided that the ten-year time-limit could be satisfied by the submission to the Secretary-General of the United Nations of preliminary information indicative of the outer limits of the continental shelf beyond 200 nautical miles (see doc. SPLOS/183).

With regard to disputed maritime areas, under Annex I of the CLCS Rules of Procedure, entitled "Submissions in case of a dispute between States with opposite or adjacent coasts or in other cases of unresolved land or maritime disputes", the Commission requires the prior consent of all States concerned before it will consider submissions regarding such areas (see paragraphs 68-69 below). In particular, Article 5 *(a)* of this Annex reads as follows:

> "In cases where a land or maritime dispute exists, the Commission shall not consider and qualify a submission made by any of the States concerned in the dispute. However, the Commission may consider one or more submissions in the areas under dispute with prior consent given by all States that are parties to such a dispute."

17. On 7 April 2009, the Kenyan Minister for Foreign Affairs and the Somali Minister for National Planning and International Co-operation signed a "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" (hereinafter the "MOU"), the text of which is reproduced at paragraph 37 below. On 14 April 2009, Somalia submitted to the Secretary-General of the United Nations preliminary information indicative of the outer limits of the continental shelf beyond 200 nautical miles, enclosing a copy of the MOU. On 6 May 2009, Kenya deposited with the CLCS its submission with respect to the continental shelf beyond 200 nautical miles. On 3 September 2009, at the twenty-fourth session of the CLCS, Kenya made an oral presentation of its submission.

18. The MOU was registered by the Secretariat of the United Nations on 11 June 2009 at Kenya's request. On 19 August 2009, in a letter to the Secretary-General of the United Nations, the Prime Minister of Somalia referred to the MOU and reiterated Somalia's consent to the CLCS considering Kenya's submission. However, as will be explained in further detail below (see paragraph 38), by a letter dated 2 March 2010, the Permanent Representative of Somalia to the United Nations forwarded a letter from the Somali Prime Minister dated 10 October 2009, informing the Secretary-General of the United Nations that the MOU had been rejected by the Transitional Federal Parliament of Somalia, and requesting that it be treated "as non-actionable".

19. On 4 February 2014, the Minister of Foreign Affairs and International Co-operation of Somalia sent two letters to the Secretary-General of the United Nations. In the first letter, Somalia objected to the registration with the Secretariat of the United Nations, nearly five years earlier, of what it termed the "[p]urported MoU". In the second letter, Somalia objected to the consideration by the CLCS of Kenya's submission on the ground that there existed a maritime boundary dispute between itself and Kenya and that the MOU was "void and of no effect".

20. Given Somalia's objection, the CLCS determined, during its thirty-fourth session (held from 27 January to 14 March 2014), that it "was not in a position to proceed with the establishment of a subcommission [to consider Kenya's submission] at that time".

21. The Parties subsequently engaged in negotiations on various questions of maritime delimitation. The Foreign Ministers of Kenya and Somalia held a meeting on 21 March 2014, at which it was agreed that a technical meeting be held among relevant officials. A first bilateral meeting was held in Nairobi on 26 and 27 March 2014. On 28 and 29 July 2014, a second bilateral meeting was held in the same city which was attended by the two Foreign Ministers. The Parties agreed to reconvene on 25 and 26 August 2014 for a third meeting, but that meeting never took place.

22. In view of the partial change in the membership of the CLCS that had occurred since the twenty-fourth session of the Commission in 2009 (at which Kenya had first made an oral presentation of its submission), the Government of Kenya, by means of a Note Verbale dated 7 July 2014, requested that the CLCS allow it the opportunity to make another oral presentation. This presentation was made on 3 September 2014 at the thirty-fifth session of the CLCS. Taking note thereof, the Commission reiterated its decision taken at the thirty-fourth session of the CLCS (see paragraph 20 above) to defer further consideration of the submission.

23. On 21 July 2014, Somalia deposited with the CLCS its submission with respect to the outer limits of the continental shelf beyond 200 nautical miles.

24. On 28 August 2014, Somalia filed in the Registry of the Court an Application instituting proceedings against Kenya.

25. By means of a Note Verbale addressed to the Secretary-General of the United Nations dated 24 October 2014, and with reference to the communications of Somalia of 4 February 2014 (see paragraph 19 above), Kenya protested against "the actions by the Somali Federal Republic" aimed at blocking the CLCS's consideration of Kenya's submission. By a further Note Verbale addressed to the Secretary-General dated 4 May 2015, Kenya, in turn, "object[ed] to the consideration of the Submission by Somalia". However, in a Note Verbale addressed to the Secretary-General dated 30 June 2015, Kenya withdrew its objection to the CLCS's consideration of Somalia's submission.

26. On 7 July 2015, Somalia sent a letter to the Secretary-General of the United Nations in which it withdrew its objection to the CLCS's consideration of Kenya's submission. On 16 July 2015, Somalia submitted an Amended Executive Summary of its submission to the CLCS, which was intended to replace the earlier Summary submitted by Somalia on 21 July 2014.

27. At its thirty-ninth session in New York held from October to December 2015, a CLCS subcommission met to begin consideration of Kenya's submission. In February and March 2016, the subcommission commenced the main scientific and technical examination of the submission. It continued its consideration of the submission in July-August, and October-November 2016, and intends to resume its consideration thereof at the forty-third session in February 2017.

Regarding its submission, Somalia made a presentation thereof on 22 July 2016 during the forty-first session of the CLCS. The CLCS deferred further consideration of Somalia's submission until it was next in line to be considered in the order in which submissions had been received.

*

28. Somalia invokes as the basis for the jurisdiction of the Court in the present case the declarations which Somalia and Kenya have made under

Article 36, paragraph 2, of the Statute of the Court. Somalia deposited its declaration with the Secretary-General of the United Nations on 11 April 1963 while Kenya did so on 19 April 1965. In the view of Somalia, "[n]o condition or reservation to either declaration applies".

29. Kenya, however, raised, pursuant to Article 79 of the Rules of Court, two preliminary objections. One concerns the jurisdiction of the Court, the other the admissibility of the Application.

30. The Court will begin by considering Kenya's objection to the Court's jurisdiction.

## II. The First Preliminary Objection: The Jurisdiction of the Court

31. In its first preliminary objection, Kenya asserts that one of the reservations in its declaration accepting the compulsory jurisdiction of the Court applies in this case. Kenya's declaration, in its relevant part, provides that:

> "the Republic of Kenya . . . accepts, in conformity with paragraph 2 of Article 36 of the Statute of the International Court of Justice until such time as notice may be given to terminate such acceptance, as compulsory *ipso facto* and without special Agreement, and on the basis and condition of reciprocity, the jurisdiction over all disputes arising after 12th December, 1963, with regard to situations or facts subsequent to that date, other than:
>
> 1. 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." (United Nations, *Treaty Series (UNTS)*, Vol. 531, p. 114.)

32. Kenya argues that its reservation applies for two reasons. First, Kenya contends that in the MOU (see paragraph 17 above) the Parties agreed on a method of settlement of their maritime boundary dispute other than having recourse to the Court, namely by agreement to be concluded by Somalia and Kenya after the CLCS has made its recommendations to them concerning the establishment of the outer limits of the continental shelf beyond 200 nautical miles.

33. Secondly, Kenya argues that Part XV of UNCLOS makes provision for methods of settlement of disputes concerning the interpretation or application of UNCLOS, to which both Kenya and Somalia are States parties. As neither Party has made a declaration regarding the choice of one or more means of dispute settlement pursuant to Article 287, paragraph 1, of UNCLOS, Kenya submits that the Parties are deemed, under paragraph 3 of that Article, to have accepted arbitration in accordance with Annex VII to UNCLOS for the settlement of disputes concerning

the interpretation or application of the Convention. According to Kenya, the relevant provisions of UNCLOS on dispute settlement therefore amount to an agreement "to have recourse to some other method or methods of settlement" within the meaning of Kenya's reservation, which thus applies in the present case.

34. For its part, Somalia argues that the MOU does not establish a method for resolving the delimitation dispute between the Parties and that, consequently, Kenya's reservation does not apply in the present case. Moreover, it disagrees with Kenya's assertion that Part XV of UNCLOS falls within the scope of Kenya's reservation. In Somalia's view, the agreement of the Parties to the jurisdiction of the Court — expressed through declarations under Article 36, paragraph 2, of the Court's Statute — takes priority, under Article 282 of UNCLOS, over the procedures provided for in Section 2 of Part XV.

35. The Court will first consider the MOU and whether that instrument falls within the scope of Kenya's reservation. It will begin by examining the legal status of the MOU under international law. Should it find the MOU valid, the Court will embark on its interpretation and outline what effects, if any, the MOU has in respect of the jurisdiction of the Court in this case. If the Court reaches the conclusion that the MOU does not render Kenya's reservation to its optional clause declaration under Article 36, paragraph 2, of the Court's Statute applicable in the present case, it will then address Kenya's submission that the case falls outside the Court's jurisdiction because of the provisions of Part XV of UNCLOS.

### *A. The Memorandum of Understanding*

#### *1. The legal status of the MOU under international law*

36. As noted above (see paragraph 17), on 7 April 2009, the Minister for Foreign Affairs of the Government of Kenya and the Minister for National Planning and International Co-operation of the Transitional Federal Government of Somalia signed a

> "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".

In June 2009, the MOU was submitted by Kenya to the Secretariat of the United Nations for registration and publication pursuant to Article 102 of the Charter of the United Nations. The Secretariat registered it on 11 June 2009, and published it in the United Nations, *Treaty Series* (*UNTS*, Vol. 2599, p. 35).

37. The MOU consists of seven paragraphs, which are unnumbered. In order to facilitate references to the paragraphs, the Court considers it convenient to insert numbering in its analysis. It is also useful to reproduce the text of the MOU *in toto*. It reads as follows:

> "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.
>
> [1] The Government of the Republic of Kenya and the Transitional Federal Government of the Somali Republic, in the spirit of co-operation and mutual understanding have agreed to conclude this Memorandum of Understanding:
>
> [2] 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'.
>
> [3] 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.
>
> [4] 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.

[5] 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 maritime boundaries in the area under dispute, including the delimitation of the continental shelf beyond 200 nautical miles.

[6] 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.

[7] This Memorandum of Understanding shall enter into force upon its signature.

IN WITNESS WHEREOF, the undersigned being duly authorized by their respective Governments, have signed this Memorandum of Understanding.

DONE in Nairobi this seventh day of April two thousand and nine, in duplicate, in the English language, both texts being equally authentic."

38. The MOU caused some domestic controversy in Somalia in the months after it was signed. It was debated and rejected by the Transitional Federal Parliament of Somalia on 1 August 2009. In a letter addressed to the Secretary-General of the United Nations dated 10 October 2009, but only forwarded to him under cover of a letter from the Permanent Representative of Somalia to the United Nations dated 2 March 2010, the Prime Minister of the Transitional Federal Government informed the Secretary-General of this rejection, and "request[ed]

the relevant offices of the UN to take note of the situation and treat the MOU as non-actionable". Several years later, in a letter to the Secretary-General of the United Nations dated 4 February 2014, the Somali Minister of Foreign Affairs and International Co-operation maintained that "no [MOU] is in force", highlighting that ratification thereof had been rejected by the Parliament of Somalia. In that letter, he referred to customary international law reflected, in his view, in Article 7 of the 1969 Vienna Convention on the Law of Treaties (hereinafter the "Vienna Convention"), which addresses the circumstances in which a person may, by producing "full powers" or otherwise, enter into a treaty on behalf of a State. He contended that the Minister who had signed the MOU "did not produce appropriate documents demonstrating his powers to represent the Somali Republic for the purpose of agreeing to the text of the MOU", that it was not customary for Somalia to allow that Minister "to enter into binding bilateral arrangements which concern maritime delimitation and the presentation of submissions to the [CLCS] and its consideration of them", and that the Kenyan representatives had been informed at the time of signing that "the MOU would require ratification".

*

39. In these proceedings, Somalia does not expressly invoke the alleged invalidity of the MOU as a reason for rejecting the preliminary objection raised by Kenya. It takes the view that it is unnecessary "to determine the legal validity *vel non* of the MOU" on the basis that

> "[e]ven if it were effective *(quod non)*, it does not constitute an agreement on a method for settling the Parties' maritime boundary dispute, let alone one that could preclude this Court from resolving it on the basis of the Parties' matching Optional Clause declarations".

In its written statement on Kenya's preliminary objections Somalia nonetheless highlights that the Transitional Federal Charter of the Somali Republic, applicable between 2004 and 2012, "made the President's authority to sign binding international agreements conditional upon subsequent ratification by Parliament", and that such ratification did not take place. Somalia argues that, while the MOU "does not expressly require ratification", the relevant Minister's "authorization to sign the MOU did not constitute, and could not have constituted, authorization under Somali law for him to dispense with the ratification requirement".

*

40. For its part, Kenya argues that the MOU is an international treaty, duly registered pursuant to Article 102 of the Charter of the United Nations, that is legally binding on the Parties. In respect of Somalia's earlier contentions regarding the absence of authorization on the part of the Minister who signed the MOU, Kenya argues that the Minister had been authorized to sign the MOU by the Prime Minister of Somalia, including in writing by way of "full powers", and points to the fact that the MOU specifies that both Ministers are "duly authorized by their respective Governments". In respect of ratification, Kenya emphasizes that the MOU does not refer to a need for ratification, but instead provides "in categorical terms" for its entry into force "upon its signature". In addition, it contends that there was "nothing in the exchanges leading to adoption of the MOU suggesting that the Parties ever considered a requirement of ratification" and that there is no evidence that its representatives were ever told of such a requirement. Kenya argues that the validity of the MOU was confirmed in Somalia's April 2009 submission of preliminary information to the CLCS. Kenya further contends that the MOU's validity was not questioned in a letter from the Somali Prime Minister to the Secretary-General of the United Nations dated 19 August 2009, shortly after the vote in the Parliament of Somalia, but was challenged only at a later date. It contends that any inconsistency with the internal law of Somalia does not affect the validity of the MOU under international law.

*

41. While Somalia has invited the Court to reject Kenya's preliminary objection without considering the status of the MOU under international law, the Court considers that in order to determine whether the MOU has any effect with respect to its jurisdiction, it is appropriate first to address the issue whether the MOU constitutes a treaty in force between the Parties.

*

42. Under the customary international law of treaties, which is applicable in this case since neither Somalia nor Kenya is a party to the Vienna Convention, an international agreement concluded between States in written form and governed by international law constitutes a treaty (see *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 429, para. 263, referring to Article 2, paragraph 1, of the Vienna Convention). The MOU is a written document, in which Somalia and Kenya record their agreement on certain points governed by international law. The inclusion of a provision addressing the entry into force of the MOU is indicative of the instrument's binding character. Kenya consid-

ered the MOU to be a treaty, having requested its registration in accordance with Article 102 of the Charter of the United Nations, and Somalia did not protest that registration until almost five years thereafter (see paragraph 19 above).

43. Somalia no longer appears to contest that the Minister who signed the MOU was authorized to do so as a matter of international law. The Court recalls that, under international law, as codified in Article 7 of the Vienna Convention, by virtue of their functions and without having to produce full powers, Heads of State, Heads of Government and Ministers for Foreign Affairs are considered as representing their State for the purpose of performing all acts relating to the conclusion of a treaty. These State representatives, under international law, may also duly authorize other officials to adopt, on behalf of a State, the text of a treaty or to express the consent of the State to be bound by a treaty. The Court observes that the Prime Minister of the Transitional Federal Government of Somalia signed, on 6 April 2009, full powers by which he "authorized and empowered" the Somali Minister for National Planning and International Co-operation to sign the MOU. The MOU explicitly states that the two Ministers who signed it were "duly authorized by their respective Governments" to do so. The Court is thus satisfied that, as a matter of international law, the Somali Minister properly represented Somalia in signing the MOU on its behalf.

44. It may be added that the Norwegian diplomat who had, as discussed in further detail below (see paragraphs 100-104), been deeply involved in the drafting of the MOU, informed Kenya, in an email sent before the MOU was signed, that "the President of the Somali Republic has now approved the signing of the Memorandum of Understanding".

45. In respect of Somalia's contentions regarding the ratification requirement under Somali law, the Court recalls that, under the law of treaties, both signature and ratification are recognized means by which a State may consent to be bound by a treaty. As the Court has previously outlined:

> "while in international practice a two-step procedure consisting of signature and ratification is frequently provided for in provisions regarding entry into force of a treaty, there are also cases where a treaty enters into force immediately upon signature. Both customary international law and the Vienna Convention on the Law of Treaties leave it completely up to States which procedure they want to follow." (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 429, para. 264.)

The Court notes that the MOU provides, in its final paragraph, that "[t]his Memorandum of Understanding shall enter into force upon its signature" and that it does not contain a ratification requirement. Under customary international law as codified in Article 12, paragraph 1 *(a)*, of the Vienna

Convention, a State's consent to be bound is expressed by signature where the treaty so provides.

46. In his letter of 4 February 2014 to the Secretary-General of the United Nations, the Foreign Minister of Somalia stated that the Kenyan representatives present for the signing of the MOU had been informed orally by the Somali Minister who signed it of the requirement that it be ratified by the Transitional Federal Parliament of Somalia. Kenya denies that such a communication took place and there is no evidence to support Somalia's assertion. Indeed, any such statement by the Minister would have been inconsistent with the express provision of the MOU regarding its entry into force upon signature. The Court also notes that the full powers, dated 6 April 2009, by which the Prime Minister of the Transitional Federal Government of Somalia "authorized and empowered" the Minister to sign the MOU, give no indication that it was Somalia's intention to sign the MOU subject to ratification.

47. In light of the express provision of the MOU that it shall enter into force upon signature, and the terms of the authorization given to the Somali Minister, the Court concludes that this signature expressed Somalia's consent to be bound by the MOU under international law.

48. Regardless of the possibility under international law to conclude a treaty that enters into force upon signature, Somalia has contended that Somali law required ratification of the MOU. A similar question was considered by the Court in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening)*. In its Judgment on the merits, the Court addressed an argument made by Nigeria that a declaration, signed by its Head of State and that of Cameroon, was not valid because it had not been ratified in accordance with Nigerian law (*I.C.J. Reports 2002*, pp. 427-428, para. 258). Having concluded that the relevant agreement had entered into force upon signature under international law (*ibid.*, p. 430, para. 264), the Court went on to consider Article 46 of the Vienna Convention, which provides that:

> "1. 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.
>
> 2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith."

The Court considered that:

> "The rules concerning the authority to sign treaties for a State are constitutional rules of fundamental importance. However, a limitation of a Head of State's capacity in this respect is not manifest in the sense of Article 46, paragraph 2, unless at least properly publicized. This is particularly so because Heads of State belong to the group of persons who, in accordance with Article 7, paragraph 2, of the Convention '[i]n virtue of their functions and without having to produce full powers' are considered as representing their State." (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 430, para. 265.)

49. In this case, there is no reason to suppose that Kenya was aware that the signature of the Minister may not have been sufficient under Somali law to express, on behalf of Somalia, consent to a binding international agreement. As already noted, the Prime Minister of the Transitional Federal Government of Somalia had, by full powers "authorized and empowered" the Minister, under international law, to sign the MOU. No caveat relating to a need for ratification was mentioned in those full powers, nor in the MOU itself, which on the contrary provided for its entry into force upon signature. As the Court has previously observed, "there is no general legal obligation for States to keep themselves informed of legislative and constitutional developments in other States which are or may become important for the international relations of these States" (*ibid.*, p. 430, para. 266). Moreover, even after the MOU had been rejected by the Somali Parliament, the Prime Minister of Somalia did not question its validity in his letter to the Secretary-General of the United Nations dated 19 August 2009. In this respect, the Court observes that under customary international law, reflected in Article 45 of the Vienna Convention, a State may not invoke a ground for invalidating a treaty on the basis of, *inter alia*, provisions of its internal law regarding competence to conclude treaties if, after having become aware of the facts, it must by reason of its conduct be considered as having acquiesced in the validity of that treaty. Somalia did not begin to express its doubts in this respect until some time later, in March 2010 (see paragraph 38 above). The Court further notes that Somalia has never directly notified Kenya of any alleged defect in its consent to be bound by the MOU.

50. In light of the foregoing, the Court concludes that the MOU is a valid treaty that entered into force upon signature and is binding on the Parties under international law.

*2. The interpretation of the MOU*

51. The Court will now turn to the interpretation of the MOU, which is reproduced above (see paragraph 37).

52. Kenya argues that, in the sixth paragraph of the MOU, which provides that "[t]he delimitation of maritime boundaries in the areas under dispute . . . shall be agreed between the two coastal States . . . after the Commission has concluded its examination of the separate submissions made by each of the two coastal States and made its recommendations", the Parties agreed on a method of settlement of their maritime boundary dispute. Kenya submits that the agreed method of settlement was an agreement negotiated by the Parties which would only be concluded following receipt of the CLCS's recommendations, and that recourse to the Court is therefore excluded by virtue of Kenya's reservation in its optional clause declaration (see paragraphs 31-32).

53. According to Kenya, the MOU's object and purpose was to agree on such a method for the final settlement of the Parties' maritime boundary. Kenya maintains that the MOU envisages a "two-step sequencing procedure" in which the Parties agreed not to object to the CLCS submission of the other in order to allow the Commission to consider their submissions and to issue its recommendations and that, following CLCS review, the delimitation of the full extent of the Parties' maritime boundary would be settled through an agreement. Kenya emphasizes that undertaking the delineation of the outer limits of the continental shelf beyond 200 nautical miles prior to the delimitation of the maritime boundary between the Parties is "logical" as delimitation first requires the determination of the seaward extent of the Parties' entitlements and the relevant maritime zones. In particular, it submits that review by the CLCS prior to delimitation is important in this case in view of

> "the concavity of the African coastline on the Indian Ocean [which] produces a magnified cut-off effect for Kenya beyond the 200 [nautical-mile] 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."

54. Kenya contends that the structure of the MOU makes clear that it was intended to address both delineation and delimitation. It argues that, in the MOU, the Parties first recognized the existence of a maritime delimitation dispute between them (para. 2) and then, at the end of the MOU, agreed on the procedure to settle that dispute (para. 6). It emphasizes that, in the paragraphs which are related to delineation (paras. 3, 4 and 5), the Parties referred to the "future delimitation". Kenya maintains that the paragraphs of the MOU are therefore all interdependent, and make clear that delimitation was related to delineation, with the Parties

establishing a temporal link between the two procedures that gave priority to delineation over delimitation. Accordingly, it contends that, while the text of the MOU provides that delineation is without prejudice to delimitation, the latter was, at the procedural level, to be subject to prior delineation. Thus, Kenya argues, the text of the MOU and its object and purpose "are perfectly coherent": the Parties agreed not to block the CLCS from making its recommendations, so that they could then carry out the maritime delimitation on the basis of those recommendations. In other words, according to Kenya, the object and purpose of the MOU was to organize the procedures for both delineation and delimitation. Kenya further argues that, regardless of the MOU's object and purpose, that instrument contains a provision relating to delimitation, namely the sixth paragraph, to which effect must be given, in accordance with the principle of *effet utile*.

55. In respect of that paragraph, Kenya appears to accept that it does not impose an obligation on the Parties to reach an agreement regarding delimitation in the relevant areas, but contends that use of the word "shall" indicates "a legal undertaking, a binding obligation, not merely to negotiate in good faith, but to do so with a view to concluding an agreement". Kenya also appears to accept that, in the event that negotiations were to prove unsuccessful, the Parties would be able to have recourse to third party dispute settlement procedures under UNCLOS, but argues that such negotiations have not yet been exhausted.

56. In addition, Kenya contends that the sixth paragraph imposes a "temporal requirement" that an agreement be concluded only after receipt of the CLCS's recommendations. Kenya does not submit that the MOU prevented the Parties from negotiating before the CLCS makes its recommendations. Indeed, in its reply to a question asked by a Member of the Court, Kenya accepted that the sixth paragraph of the MOU "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". However, in Kenya's view, even if negotiations prior to receipt of the CLCS's recommendations "resulted in one or more interim agreements on delimitation covering some or all maritime areas in dispute", those negotiations would "still be subject to finalization under the MOU's agreed procedure". Thus, it argues that while under the MOU the Parties may negotiate, and even agree on some parts of the delimitation, they have to wait for the CLCS's recommendations before those negotiations can be finalized.

57. With regard to the scope of the sixth paragraph of the MOU, Kenya contends that the use of the plural of "maritime boundaries" and "areas under dispute", as well as the word "including" indicate that all maritime areas were intended to be covered by that paragraph. In any event, Kenya submits that "[a]ny single line of delimitation is . . . composed of a series of indivisible and interdependent delimitations . . . In these circumstances, the overall maritime delimitation depends on the delimitation of the continental shelf" and thus the MOU affects the maritime delimitation as a whole.

*

58. For its part, Somalia contends that the sixth paragraph of the MOU does not establish a method for the settlement of the boundary dispute between the Parties.

59. Somalia argues that the object and purpose of the MOU was to allow the CLCS to examine the submissions of Somalia and Kenya, without prejudice to their respective delimitation claims. It points out that, according to the Rules of Procedure of the CLCS, that body will not make any recommendations based on submissions made by a State regarding the outer limits of the continental shelf if there is an ongoing dispute with another State. However, it may give consideration to submissions involving areas that are in dispute if that other State gives its consent. Somalia contends that the MOU's object and purpose was to provide that requisite mutual consent and that, insofar as the MOU addressed the Parties' delimitation dispute, it was solely to confirm that the agreement on no-objection did not affect, and was without prejudice to, their respective positions. It suggests that it would be "illogical" to require continental shelf delimitation within 200 nautical miles to await delineation beyond 200 nautical miles because the former is not in any way dependent upon the latter. It maintains that the purpose of the MOU's sixth paragraph was therefore not to settle, or provide a means for settling, the Parties' maritime boundary dispute, but was instead to insulate that dispute from the effects of the Parties' understanding on no-objection.

Somalia submits that the title of the MOU makes clear its object and purpose as a no-objection agreement and that the introductory paragraphs, particularly the third paragraph, also reflect this purpose, as do the fourth and fifth paragraphs, which are concerned with enabling delineation. It emphasizes that, in these introductory and operative paragraphs, including by use of the words "without prejudice", the MOU treats delineation and delimitation as two distinct processes, neither one dependent on the other except as regards the endpoint of the maritime boundary beyond 200 nautical miles. It contends that the references to

"future" delimitation in the text refer solely to actions occurring after the date of signature.

60. Somalia argues that the text of the sixth paragraph "does nothing more than reiterate the Parties' standing obligation to attempt to agree on the delimitation of their maritime boundary", pointing to the similarity between that paragraph and Articles 74, paragraph 1, and 83, paragraph 1, of UNCLOS. It compares the use of the passive voice in that paragraph with the more active formulation elsewhere in the text, regarding the sixth paragraph as descriptive rather than prescriptive, and pointing out that other paragraphs, such as the fourth paragraph, contain similarly descriptive language. Consequently, it contends that

> "[f]ar from establishing a binding agreement to negotiate — and only negotiate — their maritime boundary, and then only *after* the CLCS has made its recommendations, [the sixth paragraph] merely acknowledges the Parties' existing obligations under [UNCLOS]" (emphasis in the original).

In any event, Somalia argues that negotiations between the Parties regarding their maritime boundary have been tried and exhausted.

61. In respect of the alleged temporal requirement contained in the sixth paragraph, Somalia refers to the subsequent practice of the Parties, including in undertaking negotiations with respect to their maritime boundary prior to receiving the recommendations of the CLCS, and argues that the MOU cannot be considered as an "agreement not to agree" in the sense that "[i]t would provide for negotiation of the maritime boundary dispute, but only so long as *no agreement was reached*" (emphasis in the original). It considers that the sixth paragraph of the MOU denotes "that the *complete* delimitation of the maritime boundaries between the two States shall be carried out by agreement after the CLCS has made its recommendations" (emphasis in the original). In this respect, it argues that "the MOU in no way prevents the Parties from negotiating an agreement . . . however, it cannot be *finalized* (or 'completed') by fixing its terminus until the Commission's recommendations have been received" (emphasis in the original). It contends that this does not mean that the Parties cannot agree on the direction of the line of delimitation before the CLCS has made its position known, or that the Court must wait for the CLCS's recommendations before proceeding to a delimitation.

62. As to the scope of the sixth paragraph, Somalia contends that "the MOU itself defines the maritime area in dispute strictly in terms of the continental shelf" and makes no reference to the territorial sea or the exclusive economic zone. It considers that the MOU is concerned only

with the continental shelf beyond 200 nautical miles and observes that it contains no reference to the maritime boundary within 200 nautical miles. In respect of the use of plurals in the sixth paragraph, Somalia points out that both the singular "area" and plural "areas" are used interchangeably in the MOU and contends that the word "including" simply reflects the fact that the two States will not be able to determine the endpoint of their common maritime boundary until the CLCS's recommendations have been received. Somalia suggests that the circumstances of conclusion and drafting history of the MOU confirm its interpretation, pointing particularly to statements made by the Norwegian diplomat involved in the drafting of the MOU, as well as Norway itself.

* *

63. In interpreting the MOU, the Court will apply the rules on interpretation to be found in Articles 31 and 32 of the Vienna Convention, which it has consistently considered to be reflective of customary international law (see, e.g., *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 116, para. 33; *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2009*, p. 237, para. 47, referring to *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, pp. 109-110, para. 160 and *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, pp. 21-22, para. 41; *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 812, para. 23).

64. Article 31, paragraph 1, of the Vienna Convention provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". These elements of interpretation — ordinary meaning, context and object and purpose — are to be considered as a whole. Paragraph 2 of Article 31 sets out what is to be regarded as context. Article 31, paragraph 3, provides that there shall be taken into account, together with the context, any subsequent agreement between the parties regarding the interpretation or application of the treaty, any subsequent practice which establishes such an agreement, and any relevant rules of international law applicable in the relations between the parties.

65. The sixth paragraph of the MOU is at the heart of the first preliminary objection currently under consideration. It is, however, difficult to understand that paragraph without a prior analysis of the text of the MOU as a whole, which provides the context in which any particular paragraph should be interpreted and gives insight into the object and pur-

pose of the MOU. The Court will therefore proceed first of all to such an analysis. It will then turn to an examination of the sixth paragraph.

66. As the MOU makes reference to the role of the CLCS in the process of the delineation of the outer limits of the continental shelf beyond 200 nautical miles, it is useful first to clarify the framework within which the Commission operates. It will be recalled that Article 76, paragraph 8, of UNCLOS provides that:

> "Information on the limits of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured shall be submitted by the coastal State to the Commission on the Limits of the Continental Shelf set up under Annex II on the basis of equitable geographical representation. The Commission shall make recommendations to coastal States on matters related to the establishment of the outer limits of their continental shelf. The limits of the shelf established by a coastal State on the basis of these recommendations shall be final and binding."

The effect of this provision is that, for States parties to UNCLOS, the establishment of "final and binding" outer limits for their continental shelf beyond 200 nautical miles depends on information having been submitted to the CLCS, the CLCS having made recommendations thereon, and the relevant State having established its limits "on the basis of [those] recommendations" (see generally *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 136, paras. 107-108).

67. As the Court has recently observed, "the role of the CLCS relates only to the delineation of the outer limits of the continental shelf, and not delimitation" (*ibid.*, para. 110). The two tasks are distinct (*ibid.*, p. 137, para. 112) and the delimitation of the continental shelf "can be undertaken independently of a recommendation from the CLCS" (*ibid.*, para. 114). In this respect, Article 76, paragraph 10, of UNCLOS provides that "[t]he provisions of this article are without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts". Nonetheless, as the Court has highlighted, "it is possible that the two operations may impact upon one another" and the rules of the CLCS therefore contain provisions that seek "to ensure that its actions do not prejudice matters relating to delimitation" (*ibid.*, para. 113).

68. In this respect, paragraphs 1 and 2 of Rule 46 of the Rules of Procedure of the CLCS, which is entitled "Submissions in case of a dispute between States with opposite or adjacent coasts or in other cases of unresolved land or maritime disputes", provide:

> "1. In case there is a dispute in the delimitation of the continental shelf between opposite or adjacent States or in other cases of unre-

solved land or maritime disputes, submissions may be made and shall be considered in accordance with Annex I to these Rules.

2. The actions of the Commission shall not prejudice matters relating to the delimitation of boundaries between States."

Article 5 of Annex I, referred to therein, provides:

"5. *(a)* In cases where a land or maritime dispute exists, the Commission shall not consider and qualify a submission made by any of the States concerned in the dispute. However, the Commission may consider one or more submissions in the areas under dispute with prior consent given by all States that are parties to such a dispute.

*(b)* The submissions made before the Commission and the recommendations approved by the Commission thereon shall not prejudice the position of States which are parties to a land or maritime dispute."

69. The CLCS has therefore taken the approach that it will not consider a submission made by a State, nor issue recommendations in respect thereof, if there is a maritime delimitation dispute between that State and one or more other States, without the consent of all States concerned. A State will thus be unable to establish the outer limits of its continental shelf if it has a dispute with one or more other States and they have not consented to the consideration of its submission by the CLCS.

*

70. The Court now turns to the text of the MOU set out above (see paragraph 37), which it will consider as a whole. The title of the MOU is "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". As the Court has previously had occasion to note, a treaty's purpose may be indicated by its title (*Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 118, para. 39; *Certain Norwegian Loans (France* v. *Norway), Judgment, I.C.J. Reports 1957*, p. 24). The MOU's title suggests that its purpose is to allow Somalia and Kenya each to make a submission on the outer limits of the continental shelf to the CLCS without objection from the other, so that the Commission could consider those submissions and make its recommendations, in accordance with Annex I to the CLCS's Rules of Procedure.

71. The first paragraph of the MOU notes the Parties' "spirit of co-operation and mutual understanding", while the second outlines the "maritime dispute" relating to the "delimitation of the continental shelf" between them. The third indicates the Parties' understanding that the establishment of continental shelf outer limits "is without prejudice to the question of delimitation of the continental shelf", and that while they have "differing interests regarding the delimitation", they have a "strong common interest with respect to the establishment of the outer limits".

72. These introductory paragraphs do not contain any commitments but rather outline the circumstances leading to, and reasons for, the conclusion of the MOU. They provide context and are indicative of its purpose. By their terms, they suggest that the two States recognize that they have a "maritime dispute" that is "unresolved" but that they wish to move forward with establishing the outer limits of their continental shelf without prejudice to delimitation, a position that is in line with Article 46, paragraph 2, of the Rules of Procedure of the CLCS and Article 5 *(b)* of Annex I thereto.

73. The MOU's fourth paragraph outlines that Kenya "has no objection to the inclusion of the areas under dispute" in Somalia's preliminary information on the understanding that it shall not prejudice either State's position in respect of the dispute or "future delimitation". The fifth paragraph similarly records that the two States "hereby give their prior consent" to consideration of the submission of the other by the CLCS, even if those submissions include "the area under dispute", on the same understanding that their respective positions on the dispute and "future delimitation" shall not be prejudiced. Again, considered in light of the Rules of Procedure of the CLCS, and particularly Article 5 *(a)* of Annex I, it is apparent that the purpose of these two paragraphs is, without prejudicing the Parties' positions in respect of the dispute or future delimitation, to enable the CLCS to make its recommendations. The Parties' "strong common interest", as identified in the third paragraph, in the establishment of the outer limits of the continental shelf could thus be realized.

74. Finally, the sixth paragraph, on which the Parties' arguments focused in particular since Kenya contends that it contains the agreed dispute settlement method regarding the Parties' maritime boundary, provides that delimitation in the disputed areas "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". The sixth paragraph is examined in greater detail below (see paragraphs 79-96). The seventh paragraph, as already noted, provides for the MOU's entry into force upon its signature.

75. The title of the MOU and its first five paragraphs indicate the purpose of ensuring that the CLCS could proceed to consider submissions made by Somalia and Kenya regarding the outer limits of the continental shelf beyond 200 nautical miles, and to issue recommendations thereon, notwithstanding the existence of a maritime dispute between the two States, thus preserving the distinction between the ultimate delimitation of the maritime boundary and the CLCS process leading to delineation.

76. Indeed, Kenya does not deny that one of the purposes of the MOU is to enable delineation to take place, though it suggests that this is a stepping-stone toward achieving the objective of reaching a final maritime delimitation by agreement after receipt of the recommendations of the CLCS.

77. The Court observes that there are various references to maritime delimitation throughout the text of the MOU, in addition to that found in the sixth paragraph. However, none of these references to maritime delimitation elsewhere in the text of the MOU supports Kenya's contention that the MOU serves the purpose of providing a method for settling the dispute relating to the delimitation of the Parties' maritime boundary. The references to maritime delimitation that appear outside of the sixth paragraph fulfil two functions.

The first function of the references to delimitation is to define the delimitation dispute between the Parties in order to establish that the Parties may include the "area under dispute" in their respective submissions to the CLCS and to allow the Commission, irrespective of that dispute, to issue its recommendations. In this respect, the second paragraph of the MOU refers to the "unresolved delimitation issue" between the Parties and defines it as a "maritime dispute", before going on to define the "area under dispute", which is then referred to in the fourth and fifth paragraphs. These references to maritime delimitation do nothing more than further the objective of securing no-objection by either Party to the consideration of the submission of the other Party by the CLCS notwithstanding the delimitation dispute between them.

The second function of the references to delimitation is to make clear that the CLCS process leading to the delineation of the outer limits of the continental shelf is without prejudice to the Parties' dispute regarding maritime delimitation and its resolution. The third paragraph provides that the establishment of outer limits is "without prejudice to the question of delimitation of the continental shelf" and that the Parties' interest in such delineation is "without prejudice to the future delimitation of the continental shelf". In the fourth and fifth paragraphs, Somalia's submission of preliminary information, the two States' submissions to the CLCS and the recommendations of the CLCS are said to be "without prejudice to the future delimitation of maritime boundaries in the area under dispute". The question of delimitation was therefore to be kept separate from the process leading to the delineation of the outer limits of the con-

tinental shelf, suggesting that if the MOU addressed delineation it did not, at least in the first five paragraphs, address delimitation or treat delineation as a step in the process of delimitation.

78. It is true that the MOU refers to "future delimitation" a number of times. This suggests that the process leading to delineation was to be prioritized, in a temporal sense, over delimitation. However, the Parties agree that the MOU of 7 April 2009 was signed in the context of the fast-approaching deadline by which Somalia and Kenya had either to file preliminary information with, or to make their submission to, the CLCS (see paragraph 16 above). In those circumstances, it is unsurprising that commencing the process that would lead to the delineation of the outer limits of the continental shelf would take priority over the resolution of delimitation issues between the Parties and that, at least from the point in time of signing the MOU, any such delimitation would be in the future. While the fifth paragraph of the MOU, in providing, *inter alia*, that the recommendations of the CLCS "shall be without prejudice to the future delimitation", could be construed as implying that delimitation was to occur after the recommendations of the CLCS had been made, the Court is not convinced that the use of the word "future" in this context can be taken, in and of itself, to indicate a temporal restriction on when delimitation was to take place.

79. The sixth paragraph does contain a more explicit reference to delimitation occurring "after" the CLCS has made its recommendations. This may suggest that the Parties contemplated that delimitation would occur after the respective outer limits of their continental shelf had been delineated. However, this does not necessarily mean that they intended to bind themselves to proceed to delimitation only in that way.

80. The question for the Court is whether the Parties, in that sixth paragraph, agreed on a method of settlement of their delimitation dispute other than by way of proceedings before the Court, and agreed to wait for the CLCS's recommendations before any such settlement could be reached.

81. It will be recalled that the sixth paragraph of the MOU provides:

> "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."

82. It is appropriate first to clarify to which maritime zones that paragraph refers. This has implications for the interpretation of the MOU and also for the extent to which Kenya's reservation might be applicable, if at all, in this case.

83. The subject-matter of the sixth paragraph of the MOU relates to "[t]he delimitation of maritime boundaries in the areas under dispute, including the delimitation of the continental shelf beyond 200 nautical miles . . .". The use of the word "including" implies that the Parties intended something more to be encompassed by delimitation in "the areas under dispute" than delimitation in respect of the continental shelf beyond 200 nautical miles. Clarification is provided in the second paragraph of the MOU, which outlines that:

> "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'*." (Emphasis added.)

84. The Parties have explicitly given a meaning to the term the "area under dispute" as the area in which the claims of the two Parties to the continental shelf overlap, without differentiating between the shelf within and beyond 200 nautical miles. It is true that where the term appears in the sixth paragraph, it is rendered in the plural, "the *areas* under dispute", the plural form having been used only in the final draft of the MOU.

85. However, the Court observes, first, that there is no record explaining this change. Secondly, the singular and plural versions of the term are used interchangeably elsewhere in the text, even in the same paragraph, such as the fourth paragraph, which provides that Somalia's submission of preliminary information "may include the *area* under dispute" and that Kenya has no objection to "the inclusion of the *areas* under dispute" in that submission (emphasis added). This suggests that no differentiation in meaning was intended by the use of the plural form "areas" in the MOU. Thirdly, the text as a whole makes it apparent that the MOU was concerned, in so far as it addressed delimitation, solely with the area of the continental shelf, both within and beyond 200 nautical miles from the two States' respective coasts. Thus, the second paragraph notes that "[t]he *delimitation of the continental shelf* between [them] . . . has not yet been settled" (emphasis added) and defines "[t]his unresolved delimitation issue" as a "maritime dispute", a concept which is referred to in the fourth and fifth paragraphs. Moreover, the third paragraph of the MOU notes

that the establishment of outer limits "is without prejudice to the question of *delimitation of the continental shelf*" (emphasis added) and that the States' interest in "the establishment of [such] outer limits . . . [is] without prejudice to *the future delimitation of the continental shelf*" (emphasis added). In this context, even if the term "area under dispute" had not otherwise been defined, the reference in the sixth paragraph to "[t]he delimitation of maritime boundaries in the areas under dispute" must have been taken to relate to the "maritime dispute" addressed in the second paragraph and referred to elsewhere in the MOU, namely the delimitation of the continental shelf between the two States.

86. The Court thus sees no reason to conclude that a different meaning has to be given to the term "areas under dispute" in the sixth paragraph than to the term "area under dispute" contained in the definition in the second paragraph, namely the areas in which the claims of the two Parties to the continental shelf overlap. The sixth paragraph therefore relates only to delimitation of the continental shelf, "including the delimitation of the continental shelf beyond 200 nautical miles", and not to delimitation of the territorial sea, nor to delimitation of the exclusive economic zone. Accordingly, even if, as Kenya suggests, that paragraph sets out a method of settlement of the Parties' maritime boundary dispute, it would only apply to their continental shelf boundary, and not to the boundaries of other maritime zones.

*

87. The Court turns to the question of whether the sixth paragraph, by providing that the delimitation of the continental shelf between the Parties "shall be agreed . . . on the basis of international law after the Commission has concluded its examination of [their] separate submissions . . . and made its recommendations . . .", sets out a method of settlement of the Parties' maritime boundary dispute with respect to that area.

88. As already noted, Kenya argues that the phrase "shall be agreed between the two coastal States on the basis of international law" imposes an obligation to negotiate with a view to reaching agreement, while Somalia argues that it does not impose any obligation but merely acknowledges the Parties' pre-existing obligations under UNCLOS.

89. The Court recalls that, according to the applicable rule of customary international law, the sixth paragraph of the MOU must be interpreted in good faith in accordance with the ordinary meaning given to its terms in their context and in light of the object and purpose of the MOU (see paragraphs 63-64 above). Pursuant to Article 31, paragraph 3 *(c)* of

the Vienna Convention, "[a]ny relevant rules of international law applicable in the relations between the parties" should be taken into account, together with the context. In this case, both Somalia and Kenya are parties to UNCLOS, which is expressly mentioned in the MOU. UNCLOS therefore contains such relevant rules. Moreover, given that the sixth paragraph of the MOU concerns the delimitation of the continental shelf, Article 83 of UNCLOS, entitled "Delimitation of the continental shelf between States with opposite or adjacent coasts", is particularly relevant. That Article provides as follows:

> "1. The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.
>
> 2. If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part XV."

90. There is a similarity in language between Article 83, paragraph 1, of UNCLOS and the sixth paragraph of the MOU. The MOU provides that "delimitation . . . shall be agreed . . . on the basis of international law", while Article 83, paragraph 1, provides that "delimitation . . . shall be effected by agreement on the basis of international law".

By its terms, Article 83, paragraph 1, of UNCLOS sets out the manner in which delimitation of the continental shelf is to be effected by States parties thereto, namely by way of agreement as distinct from unilateral action; it is a provision on the establishment of a maritime boundary between States with opposite or adjacent coasts in respect of the continental shelf, which does not prescribe the method for the settlement of any dispute relating to the delimitation of the continental shelf. This is made clear by paragraph 2 of Article 83, which requires that, if no agreement can be reached within a reasonable time, the States concerned shall resort to the dispute settlement procedures of Part XV, entitled "Settlement of disputes" (which will be discussed in further detail below). The Court notes that Article 83, paragraph 1, of UNCLOS, in providing that delimitation shall be effected by way of agreement, requires that there be negotiations conducted in good faith, but not that they should be successful (see *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 424, para. 244).

91. In line with Article 31, paragraph 3 *(c)*, of the Vienna Convention, and particularly given the similarity in wording between the sixth paragraph of the MOU and Article 83, paragraph 1, of UNCLOS, the Court considers that it is reasonable to read the former in light of the latter. In that context, the reference to delimitation being undertaken by agreement on the basis of international law, which is common to the two provisions, is not prescriptive of the method of dispute settlement to be followed and does not, as indeed Kenya appeared to accept during the oral proceed-

ings, preclude recourse to dispute settlement procedures in case agreement could not be reached.

92. As Kenya emphasizes, the sixth paragraph of the MOU goes beyond the wording of Article 83, paragraph 1, by inclusion of the second part of the clause under consideration, providing that "delimitation . . . shall be agreed . . . *after* the Commission has concluded its examination . . . and made its recommendations . . ." (emphasis added). As already noted (see paragraph 56), Kenya accepts that the text of the sixth paragraph did not preclude it from engaging in negotiations with Somalia on their maritime boundary prior to the CLCS making its recommendations. Indeed, Kenya's own conduct in engaging in two rounds of negotiations in 2014, before Somalia filed its Application instituting proceedings in this case, is consistent with that interpretation. The record before the Court establishes that those negotiations concerned all maritime zones, including the continental shelf, and that the Parties discussed in detail the methodology to be used in the delimitation exercise. Even after Somalia's Application was filed, Kenya, in a Note Verbale to the Secretary-General of the United Nations dated 24 October 2014, stated that "bilateral diplomatic negotiations, at the highest levels possible, are ongoing with a view to resolving [the delimitation of the maritime boundary] expeditiously". As noted above (see paragraph 56), Kenya has also admitted that the Parties could have reached certain agreements in respect of their maritime boundary before the CLCS had made its recommendations. All of the above confirms that Kenya did not consider itself bound to wait for those recommendations before engaging in negotiations on maritime delimitation, or even reaching agreements thereon, and could at least commence the process of delimitation before that of delineation was complete.

93. However, Kenya has advanced the argument that negotiations on maritime delimitation could not be finalized and, therefore, that no final agreement could be reached, until after the recommendations of the CLCS had been received.

94. It may be the case that, as the Parties agree, the endpoint of their maritime boundary in the area beyond 200 nautical miles cannot be definitively determined until after the CLCS's recommendations have been received and the outer limits of the continental shelf beyond 200 nautical miles established on the basis of those recommendations. This is consistent with Article 76, paragraph 8, of UNCLOS. A lack of certainty regarding the outer limits of the continental shelf, and thus the precise location of the endpoint of a given boundary in the area beyond 200 nautical miles, does not, however, necessarily prevent either the States concerned or the Court from undertaking the delimitation of the boundary in appropriate circumstances before the CLCS has made its recommendations.

95. The Court does not consider that the sixth paragraph of the MOU can be interpreted as precluding the Parties from reaching an agreement on their maritime boundary, or either of them from resorting to dispute settlement procedures regarding their maritime boundary dispute, before receipt of the CLCS's recommendations.

The Parties could have reached an agreement on their maritime boundary at any time by mutual consent. Moreover, read in light of Article 83, paragraph 1, of UNCLOS (see paragraphs 90 and 91 above), the use of the phrase "shall be agreed" in the sixth paragraph does not mean that the Parties have an obligation to conclude an agreement on a continental shelf boundary; it rather means that the Parties are under an obligation to engage in negotiations in good faith with a view to reaching an agreement. The Parties agree that the sixth paragraph did not prevent them from engaging in such negotiations before receipt of the CLCS's recommendations. There is no temporal restriction contained in the sixth paragraph on fulfilling this obligation to negotiate. The fact that the Parties set an objective as to the time for concluding an agreement does not, given that this paragraph is not prescriptive of a method of settlement to be followed (see paragraphs 90-91), prevent a Party from resorting to dispute settlement procedures prior to receiving the recommendations of the CLCS.

Furthermore, both Somalia and Kenya are parties to UNCLOS, which contains in Part XV comprehensive provisions for dispute resolution, and both States have optional clause declarations in force. The Court does not consider that, in the absence of express language to that effect, the Parties can be taken to have excluded recourse to such procedures until after receipt of the CLCS's recommendations.

96. Finally, the MOU repeatedly indicates that the CLCS process leading to delineation is to be without prejudice to delimitation, treating the two as distinct. This contradicts Kenya's argument that delimitation was, in accordance with the sixth paragraph, to be conditioned on delineation. Nothing suggests that the Parties would have agreed in 2009 that delimitation was dependent on delineation to such an extent that the former had to await the latter.

97. In summary, the Court observes the following in respect of the interpretation of the MOU. First, its object and purpose was to constitute a no-objection agreement, enabling the CLCS to make recommendations notwithstanding the existence of a dispute between the Parties regarding the delimitation of the continental shelf. Secondly, the sixth paragraph relates solely to the continental shelf, and not to the whole maritime boundary between the Parties, which suggests that it did not create a dispute settlement procedure for the determination of that boundary.

Thirdly, the MOU repeatedly makes clear that the process leading to the delineation of the outer limits of the continental shelf beyond 200 nautical miles is to be without prejudice to the delimitation of the maritime boundary between the Parties, implying — consistently with the jurisprudence of this Court — that delimitation could be undertaken independently of a recommendation of the CLCS. Fourthly, the text of the sixth paragraph of the MOU reflects that of Article 83, paragraph 1, of UNCLOS, suggesting that the Parties intended to acknowledge the usual course that delimitation would take under that Article, namely engaging in negotiations with a view to reaching agreement, and not to prescribe a method of dispute settlement. Fifthly, the Parties accept that the sixth paragraph did not prevent them from undertaking such negotiations, or reaching certain agreements, prior to obtaining the recommendations of the CLCS.

98. Given the foregoing, the Court considers that the sixth paragraph of the MOU reflected the expectation of the Parties that, in light of Article 83, paragraph 1, of UNCLOS, they would negotiate their maritime boundary in the area of the continental shelf after receipt of the CLCS's recommendations, keeping the two processes of delimitation and delineation distinct. As between States parties to UNCLOS, such negotiations are the first step in undertaking delimitation of the continental shelf. The Court does not, however, consider that the text of the sixth paragraph, viewed in light of the text of the MOU as a whole, the object and purpose of the MOU, and in its context, could have been intended to establish a method of dispute settlement in relation to the delimitation of the maritime boundary between the Parties. It neither binds the Parties to wait for the outcome of the CLCS process before attempting to reach agreement on their maritime boundary, nor does it impose an obligation on the Parties to settle their maritime boundary dispute through a particular method of settlement.

*

99. In line with Article 32 of the Vienna Convention, the Court has examined the *travaux préparatoires*, however limited, and the circumstances in which the MOU was concluded, which it considers confirm the meaning resulting from the above interpretation (see *Maritime Dispute (Peru* v. *Chile), Judgment, I.C.J. Reports 2014*, p. 30, para. 66 and references therein).

100. The Parties signed the MOU in the context of the 13 May 2009 deadline for States to make submissions, or at least to submit preliminary information, to the CLCS regarding the outer limits of their continental shelf. In October 2008, Mr. Ahmedou Ould Abdallah, the then Special Representative of the Secretary-General of the United Nations for Somalia, initiated, in view of the impending deadline, the preparation of pre-

liminary information on behalf of Somalia, which at that time was facing instability and lacked the resources necessary for the preparation thereof. In this task, the Special Representative was assisted by the Kingdom of Norway, and particularly Ambassador Hans Wilhelm Longva, former Legal Adviser of the Norwegian Ministry for Foreign Affairs, and Mr. Harald Brekke, then the Norwegian member of the CLCS.

101. The Transitional Federal Government of Somalia was sworn into office on 22 February 2009. On 10 March 2009, the Transitional Federal Government was informed of the initiative of the Special Representative and the assistance of Norway, and was given a draft of the preliminary information that had been prepared for it. On that occasion, it was also presented with a draft of the MOU that had been prepared by Ambassador Longva. Somalia made a change to the title by adding the words "to each other". It appears that Kenya suggested some changes to the text, but these changes do not appear to have affected the substance of the MOU, in particular its sixth paragraph.

102. The fact that the MOU was prepared by Ambassador Longva in connection with the assistance Norway was providing to Somalia for the preparation of its submission of preliminary information to the CLCS, and that the two documents were presented together as part of the process for ensuring Somalia met the 13 May 2009 deadline, tends to confirm that the MOU was concerned with the CLCS process. It appears from the record that the Parties considered the MOU as a no-objection agreement, necessary in connection with their forthcoming submissions to the CLCS.

103. Furthermore, there is no apparent mention of, or explanation provided for, the inclusion of the sixth paragraph in the text of the MOU. Were that paragraph to have the potentially far-reaching consequences asserted by Kenya, it would in all likelihood have been the subject of some discussion. Yet, in a presentation given in November 2009 at the Pan-African Conference on Maritime Boundary Delimitation and the Continental Shelf, Ambassador Longva discussed the MOU without making any mention of the legal elements allegedly implicit in the sixth paragraph. Indeed, in his presentation, Ambassador Longva

> "stress[ed] from the outset that the establishment of the outer limits of the continental shelf is a different and separate issue from the delimitation of the continental shelf between States with opposite or adjacent coasts. The establishment of the outer limits of the continental shelf is without prejudice to, i.e. it does not affect, matters relating to the delimitation of the continental shelf between States. Consequently it is not necessary to solve issues of maritime delimitation between neighbouring States before embarking on the establishment of the outer limits of the continental shelf."

104. Moreover, in a Note Verbale dated 17 August 2011, the Permanent Mission of Norway to the United Nations provided the Secretariat of the United Nations with its comments in response to the Secretary-General's Report "on the protection of Somali natural resources and waters, and alleged illegal fishing and illegal dumping, including of toxic substances, off the coast of Somalia". In the context of a discussion of "unresolved issues of maritime delimitation", the Note makes reference to the MOU and summarizes aspects thereof. That summary of the MOU mentions its title, the contents of the fifth paragraph, and the provision for its entry into force contained in the seventh paragraph. No mention is made of the sixth paragraph. If it had the significance given to it by Kenya, it is to be expected that this would have been highlighted by the State whose representative had been instrumental in drafting the MOU. Norway said the following in this Note regarding maritime delimitation:

> "The politically most sensitive issues involved may be the unresolved issues of maritime delimitation between Somalia and neighbouring coastal States. Norway takes no position on these issues other than laying as a premise for its assistance that such issues of maritime delimitation with other States not be prejudiced."

105. The Court is of the view that the *travaux préparatoires* and the circumstances in which the MOU was concluded confirm that the MOU was not intended to establish a procedure for the settlement of the maritime boundary dispute between the Parties.

*3. Conclusion on whether the reservation contained in Kenya's declaration under Article 36, paragraph 2, is applicable by virtue of the MOU*

106. The Court has concluded that the sixth paragraph of the MOU, read in its context and in light of the object and purpose of the MOU, sets out the expectation of the Parties that an agreement would be reached on the delimitation of their continental shelf after receipt of the CLCS's recommendations. It does not, however, prescribe a method of dispute settlement. The MOU does 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 Article 36, paragraph 2, declaration, and consequently this case does not, by virtue of the MOU, fall outside the scope of Kenya's consent to the Court's jurisdiction.

*B. Part XV of the United Nations Convention on the Law of the Sea*

107. According to Kenya, there is a second basis, independent of the MOU, for the Court to conclude that it lacks jurisdiction over Somalia's Application. Kenya again invokes the reservation to its declaration under Article 36, paragraph 2, of the Statute that excludes disputes as to which the parties agree to have recourse to "some other method or methods of settlement", asserting that "Part XV of UNCLOS manifestly provides agreed methods for the settlement of maritime boundary disputes".

108. Kenya points out that Article 287, paragraph 1, of UNCLOS, which is contained in Part XV, provides that States parties may make a written declaration choosing one or more fora for the binding settlement of disputes concerning the interpretation or application of the Convention. Pursuant to Article 287, paragraph 3, States parties that have not made such a declaration are deemed to have accepted arbitration in accordance with Annex VII to UNCLOS. Neither Kenya nor Somalia has made such a declaration. It follows that, in Kenya's view, by operation of the Convention, both Parties are deemed to have accepted arbitration as the method of settling disputes concerning the interpretation or application of the Convention, including maritime boundary disputes, and therefore that the Parties have agreed to "a method of settlement other than recourse to the Court". Accordingly, Kenya submits that its reservation excludes the Court's jurisdiction under Article 36, paragraph 2, of the Statute.

109. In support of this position, Kenya states that its reservation recognizes "the significant role of alternative and more specialized dispute settlement systems and procedures" and that it gives priority to Part XV of UNCLOS as the *lex specialis* and *lex posterior* to the optional clause declarations of the Parties.

110. Kenya also addresses the implications of Article 282 of UNCLOS, a provision in Part XV of the Convention that states:

> "If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed, through a general, regional or bilateral agreement or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in this Part, unless the parties to the dispute otherwise agree."

Kenya acknowledges that, pursuant to Article 282, if two States parties to the Convention have made optional clause declarations containing no reservations excluding from the jurisdiction of the Court the dispute submitted to it, those declarations would constitute an agreement to have recourse to a procedure (namely adjudication by this Court) that would apply in lieu of other procedures provided for in Section 2 of Part XV of UNCLOS. However, Kenya maintains that, because Part XV provides agreed methods for the settlement of disputes within the meaning of the reservation to its optional clause declaration, the optional clause declarations of the Parties do not coincide in conferring jurisdiction upon the Court and thus do not constitute an agreement, under Article 282, to submit a dispute concerning the interpretation or application of the Convention to this Court.

*

111. Somalia agrees with Kenya that optional clause declarations providing for the jurisdiction of this Court can constitute an agreement to submit a dispute concerning the interpretation or application of the Convention to a procedure entailing a binding decision that applies, pursuant to Article 282, in lieu of any procedure provided for in Section 2 of Part XV of UNCLOS. Somalia points out that Kenya does not dispute that the drafters of UNCLOS "specifically and explicitly intended Optional Clause jurisdiction to have precedence over Part XV" and invokes the *travaux préparatoires* of Article 282, as well as the consistency of scholarly commentary, to support this argument. Thus, in Somalia's view, by making optional clause declarations, the Parties have agreed to the jurisdiction of the Court and this agreement "takes priority over the dispute resolution procedures contained in Article 287 of UNCLOS".

112. As to Kenya's characterization of UNCLOS as *lex specialis* and *lex posterior* in relation to the Parties' optional clause declarations, Somalia maintains that

> "[r]atifying a treaty that explicitly gives *priority* to Optional Clause jurisdiction over Part XV procedures cannot logically have the effect of giving priority to Part XV procedures over the Optional Clause" (emphasis in the original).

113. Somalia points out that the relationship between the Parties' optional clause declarations and Part XV of UNCLOS might seem to give rise to circularity, because the reservation to Kenya's optional clause declaration could lead to Part XV, which, in turn (by virtue of Article 282) could lead back to the optional clause declaration, with the back and forth continuing indefinitely. However, Somalia argues that there is no circularity in this case because Article 282 of UNCLOS gives priority to

jurisdiction based on optional clause declarations, noting that "[i]t would turn logic on its head if an instrument that expressly *excludes* cases covered by the Optional Clause could constitute an alternative method of settlement for cases covered by the Optional Clause" (emphasis in the original).

114. As to the possibility of circularity, Kenya responds that there is no *"double renvoi"* in this case. The reservation in Kenya's declaration leads to consideration of Part XV, but the analysis ends there, because Part XV procedures, which are *lex specialis* and *lex posterior*, fall within the reservation to Kenya's declaration. There is therefore no "*renvoi*" from Article 282 back to Kenya's declaration.

* *

115. As the Court has previously stated, "since two unilateral declarations are involved . . . jurisdiction is conferred upon the Court only to the extent to which the Declarations coincide in conferring it" (*Certain Norwegian Loans (France* v. *Norway), Judgment, I.C.J. Reports 1957*, p. 23). Although the declarations of both Parties contain reservations, only one reservation — contained in Kenya's declaration — is at issue here. The Court must therefore look to Kenya's declaration to determine the extent of the jurisdiction conferred upon it by the Parties.

116. To decide whether it has jurisdiction in this case, the Court must evaluate "whether the force of the arguments militating in favour of jurisdiction is preponderant, and . . . 'ascertain whether an intention on the part of the Parties exists to confer jurisdiction upon it'" (*Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 76, para. 16, quoting *Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9*, p. 32; see also *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, pp. 450-451, para. 38).

117. The Court will begin by considering the interpretation of Kenya's declaration and will then turn to the provisions of Part XV, which, according to Kenya, provide the method of settling this dispute to which the Parties have agreed.

118. As the Court has previously stated,

> "[a]ll elements in a declaration under Article 36, paragraph 2, of the Statute which, read together, comprise the acceptance by the declarant State of the Court's jurisdiction, are to be interpreted as a unity, applying the same legal principles of interpretation throughout" (*Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 453, para. 44).

In addition,

> "what is required in the first place for a reservation to a declaration made under Article 36, paragraph 2, of the Statute, is that it should be interpreted in a manner compatible with the effect sought by the reserving State" (*I.C.J. Reports 1998*, p. 455, para. 52).

119. It will be recalled that Kenya's declaration pursuant to Article 36, paragraph 2, of the Court's Statute provides, in relevant part, that it accepts the Court's jurisdiction "over all disputes . . . other than . . . [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". Kenya's declaration therefore reflects an intention that "all disputes" with another State accepting the Court's jurisdiction under Article 36, paragraph 2, of the Statute (other than those addressed by the reservations not relevant to the present case) will be subject to a method of dispute settlement, either in this Court or pursuant to another method to which the parties have agreed. Thus, to give effect to the intent reflected in Kenya's declaration, "interpreted as a unity", the Court may come to the conclusion that it lacks jurisdiction only if it is satisfied that there is an agreement between the Parties to resort to another method of settling the dispute that is the subject-matter of Somalia's Application.

120. Kenya maintains that its reservation attaches special significance to an agreement to a method of dispute settlement that is *lex specialis* and *lex posterior* in relation to the Parties' optional clause declarations. The Court notes, however, that there is nothing in the text of Kenya's reservation that makes a distinction between a highly specific agreement, such as a special agreement in respect of a particular dispute, and a general agreement on the pacific settlement of disputes. Moreover, by using the phrase "have agreed or shall agree", the reservation refers expressly to existing or future agreements between the parties to a dispute. Thus, its plain language is at odds with the suggestion that preference is to be given to agreements concluded subsequent to the date of the Parties' declarations. A determination whether a particular agreement between the Parties falls within Kenya's reservation does not turn on the degree of specificity or the date of that agreement, but must be answered by examining the content of the particular agreement. Accordingly, the Court next examines the relevant provisions of Part XV of UNCLOS.

121. Somalia's Application calls upon the Court to interpret and apply provisions of UNCLOS relevant to maritime delimitation. In general terms, Part XV of UNCLOS sets out methods of settling disputes concerning the interpretation or application of that Convention. However, in order to determine whether, by ratifying the Convention, the Parties have agreed to a method of settling the present dispute other than recourse to the Court, the Court must look more closely at the structure and provisions of Part XV.

122. Part XV, entitled "Settlement of disputes", comprises three sections. Section 1 sets out general provisions regarding the peaceful settlement of disputes. It requires States parties to settle disputes concerning the interpretation or application of the Convention by peaceful means (Art. 279) but expressly provides that they are free to employ "any peaceful means of their own choice" (Art. 280). States parties may agree between themselves to a means of settlement that does not lead to a binding decision of a third party (e.g., conciliation). However, if no settlement has been reached by recourse to such means, either of those States parties may submit the dispute to the court or tribunal having jurisdiction under Section 2 of Part XV, unless their agreement to such means of settlement excludes the procedures entailing a binding decision in Section 2 (Art. 281, para. 1). In addition, Article 282 provides that States parties may agree "through a general, regional or bilateral agreement or otherwise" to submit a dispute to a procedure entailing a binding result. If they do so, that agreed procedure shall apply "in lieu" of the procedures provided for in Part XV.

123. Section 2 of Part XV sets out the provisions regarding compulsory procedures entailing binding decisions. Pursuant to Article 286, those procedures apply when a dispute has not been settled "by recourse to section 1". As to settlement of such disputes, Article 287, entitled "Choice of procedure", allows a State party to choose, by means of a written declaration, one or more of the following bodies (para. 1): the International Tribunal for the Law of the Sea, the International Court of Justice, an arbitral tribunal constituted under Annex VII of the Convention or a special arbitral tribunal constituted under Annex VIII of the Convention. If a State party has not made an express choice, then it is deemed to have accepted arbitration in accordance with Annex VII (Art. 287, para. 3). If the parties to a dispute have not accepted the same procedure, the dispute may be submitted only to arbitration in accordance with Annex VII (Art. 287, para. 5).

124. Article 288, paragraph 1, provides that "[a] court or tribunal referred to in Article 287 shall have jurisdiction over any dispute concerning the interpretation or application of [UNCLOS] which is submitted to it in accordance with this Part". Section 3 of Part XV however sets out limitations on the applicability of Section 2 with respect to certain kinds of disputes (Art. 297). It further permits a State party to declare in writing that it does not accept any one or more of the procedures under Section 2 with respect to certain categories of disputes listed therein (Art. 298).

125. The dispute settlement provisions of Part XV of UNCLOS are an integral part of the Convention, rather than being in the form of an optional protocol. Given that the Convention does not permit reservations (Art. 309), all States parties are subject to Part XV. However, the Convention gives States parties considerable flexibility in the choice of means to settle disputes concerning its interpretation or application. Sec-

tion 1 permits them to agree either to procedures that do not lead to a binding result (Arts. 280 and 281) or to procedures leading to a binding result (Art. 282), and accords priority to such agreed procedures over the procedures of Section 2 of Part XV. The first article in Section 2 of Part XV, entitled "Application of procedures under this section" (Art. 286), provides that the procedures of Section 2 are only available when a dispute has not been settled pursuant to Section 1. Thus, the procedures in Section 2 complement Section 1 in ensuring the integrity of the Convention, by providing a basis for binding dispute settlement (subject to Section 3), but those procedures are residual to the provisions of Section 1. In particular, a procedure that is agreed between States parties and that falls within the scope of Article 282 shall apply "in lieu" of (i.e. instead of) the procedures of Section 2 of Part XV.

126. It is in this context that Article 282 must be interpreted, pursuant to the law on the interpretation of treaties (see paragraphs 63 and 64 above). Article 282 makes no express reference to an agreement to the Court's jurisdiction resulting from optional clause declarations. It provides, however, that an agreement to submit a dispute to a specified procedure that applies in lieu of the procedures provided for in Section 2 of Part XV may not only be contained in a "general, regional or bilateral agreement" but may also be reached "otherwise". The ordinary meaning of Article 282 is broad enough to encompass an agreement to the jurisdiction of this Court that is expressed in optional clause declarations.

127. This interpretation is confirmed by the *travaux préparatoires*. Early in the negotiations of UNCLOS, delegations were aware that "[a] special provision may be needed when parties to a dispute are subject to the jurisdiction of the International Court of Justice as well as Parties to this Convention" (Working paper on the settlement of law of the sea disputes of 27 August 1974, resulting from informal consultations held between representatives of Australia, Belgium, Bolivia, Colombia, El Salvador, Luxembourg, the Netherlands, Singapore and the United States of America, doc. A/CONF.62/L.7). Drafts of the provision that became Article 282 addressed the relationship between procedures specified in UNCLOS and procedures entailing a binding decision accepted by the parties to a dispute not only through a general, regional or special agreement, but also through "some other instrument or instruments" (see, e.g., Informal single negotiating text (Part IV) of 6 May 1976, doc. A/CONF.62/WP.9/Rev.1). It is clear that this formulation encompassed the acceptance of the Court's jurisdiction under Article 36, paragraph 2, of its Statute. In subsequent stages of the negotiations, the expression "or some other instrument or instruments" was replaced with the equivalent expression "or otherwise" (see Report of the Chairman of the Drafting Committee to the plenary of 11 August 1981, doc. A/CONF.

62/L.75/Add.1, and Report to the plenary Conference on the recommendations of the Drafting Committee presented by the Chairman of the Drafting Committee on behalf of the President of the Conference and the Chairman of the First Committee of 30 September 1981, doc. A/CONF. 62/L.82).

128. The phrase "or otherwise" in Article 282 thus encompasses agreement to the jurisdiction of the Court resulting from optional clause declarations. Both Kenya and Somalia recognize this interpretation of Article 282 and agree that if two States have accepted the Court's jurisdiction under the optional clause with respect to a dispute concerning the interpretation or application of UNCLOS, such agreement would apply to the settlement of that dispute in lieu of procedures contained in Section 2 of Part XV. It is equally clear that if a reservation to an optional clause declaration excluded disputes concerning a particular subject (for example, a reservation excluding disputes relating to maritime delimitation), there would be no agreement to the Court's jurisdiction falling within Article 282, so the procedures provided for in Section 2 of Part XV would apply to those disputes, subject to the limitations and exceptions that result from the application of Section 3.

129. In the present case, however, the Court must decide whether Article 282 should be interpreted so that an optional clause declaration containing a reservation such as that of Kenya falls within the scope of that Article, i.e., whether the optional clause declarations of the Parties constitute an "agreement" to submit the dispute to a procedure that entails a binding decision within the meaning of Article 282. As the Court has already observed, the *travaux préparatoires* of UNCLOS make clear that the negotiators gave particular attention to optional clause declarations when drafting Article 282, ensuring, through the use of the phrase "or otherwise", that agreements to the Court's jurisdiction based on optional clause declarations fall within the scope of Article 282. During the period when the Third United Nations Conference on the Law of the Sea was held (1973-1982), more than half of the then-existing optional clause declarations contained a reservation with an effect similar to that of Kenya's reservation, excluding from the jurisdiction of the Court disputes as to which the parties had agreed or would agree on another method of settlement. Despite the prevalence of such reservations and the inclusion of "or otherwise" in the provision for the purpose of taking into account an agreement resulting from optional clause declarations, there is no indication in the *travaux préparatoires* of an intention to exclude from the scope of Article 282 the majority of optional clause declarations, i.e., those containing such reservations. It remains the case today that such reservations are found in more than half of the optional clause declarations in effect.

130. Article 282 should therefore be interpreted so that an agreement to the Court's jurisdiction through optional clause declarations falls within the scope of that Article and applies "in lieu" of procedures provided for in Section 2 of Part XV, even when such declarations contain a reservation to the same effect as that of Kenya. The contrary interpretation would mean that, by ratifying a treaty which gives priority to agreed procedures resulting from optional clause declarations (pursuant to Article 282 of UNCLOS), States would have achieved precisely the opposite outcome, giving priority instead to the procedures contained in Section 2 of Part XV. Consequently, under Article 282, the optional clause declarations of the Parties constitute an agreement, reached "otherwise", to settle in this Court disputes concerning interpretation or application of UNCLOS, and the procedure before this Court shall thus apply "in lieu" of procedures provided for in Section 2 of Part XV.

131. As previously noted, Kenya's acceptance of the Court's jurisdiction extends to "all disputes" (leaving aside reservations not relevant here), except those for which the Parties have agreed to resort to a method of settlement other than recourse to the Court. In the present case, Part XV of UNCLOS does not provide for such other method of dispute settlement (see paragraph 130). Accordingly, this dispute does not, by virtue of Part XV of UNCLOS, fall outside the scope of Kenya's optional clause declaration.

132. A finding that the Court has jurisdiction gives effect to the intent reflected in Kenya's declaration, by ensuring that this dispute is subject to a method of dispute settlement. By contrast, because an agreed procedure within the scope of Article 282 takes precedence over the procedures set out in Section 2 of Part XV, there is no certainty that this intention would be fulfilled were this Court to decline jurisdiction (see also Article 286 of UNCLOS). The Court is mindful, in this regard, of the observation of the Permanent Court of International Justice that

> "the Court, when it has to define its jurisdiction in relation to that of another tribunal, cannot allow its own competency to give way unless confronted with a clause which it considers sufficiently clear to prevent the possibility of a negative conflict of jurisdiction involving the danger of a denial of justice" (*Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9*, p. 30).

133. Taking into account all of these considerations, the Court concludes that "the force of the arguments militating in favour of jurisdiction is preponderant" (see paragraph 116 above), and that this case does not, by virtue of Part XV, fall outside the scope of the Parties' consent to the Court's jurisdiction.

### *C. Conclusion*

134. In light of the Court's conclusion that neither the MOU nor Part XV of UNCLOS falls within the scope of the reservation to Kenya's optional clause declaration, the Court finds that Kenya's preliminary objection to the jurisdiction of the Court must be rejected.

## III. The Second Preliminary Objection: The Admissibility of Somalia's Application

135. The Court will now consider Kenya's preliminary objection to the admissibility of Somalia's Application.

136. In support of its contention that the Application is inadmissible, Kenya makes two arguments.

137. First, Kenya claims that the Application is inadmissible because the Parties had agreed in the MOU to negotiate delimitation of the disputed boundary, and to do so only after completion of CLCS review of the Parties' submissions.

138. The Court has previously rejected Kenya's contention that the MOU contained an agreement to settle the Parties' maritime boundary dispute by negotiation and only after the completion of CLCS review of the Parties' submissions (see paragraphs 98 and 106 above). Thus, having rejected the premise on which this ground of inadmissibility is based, the Court must also reject this aspect of Kenya's second preliminary objection.

139. Secondly, Kenya states that the Application is inadmissible because Somalia breached the MOU by objecting to CLCS consideration of Kenya's submission, only to consent again immediately before filing its Memorial. According to Kenya, the withdrawal of consent was a breach of Somalia's obligations under the MOU that gave rise to significant costs and delays. Kenya also contends that a State "seeking relief before the Court must come with clean hands" and that Somalia has not done so. Consequently, it argues, Somalia's Application is inadmissible.

140. Somalia responds to this contention by claiming that "even if [it] were in breach of the MOU — which it is not — this would not preclude Somalia from invoking its entirely separate rights under Article 36 (2) of the Statute". Somalia adds that it has withdrawn its objection to CLCS consideration of Kenya's submission, which "is now before the CLCS, without any real delay". In addition, Somalia maintains that the "'unclean hands' doctrine" has never been recognized by the Court and that "the Court's case law confirms that accusations of bad faith of the type levelled against Somalia cannot bar the admissibility of an Application".

141. The Court recalls that, in a letter to the Secretary-General of the United Nations dated 10 October 2009, forwarded to him under cover of a letter dated 2 March 2010, Somalia requested that the MOU be treated "as non-actionable" (see paragraph 18 above). Somalia objected to consideration by the CLCS of Kenya's submission by letter dated 4 February 2014. It withdrew this objection by letter of 7 July 2015 (see paragraphs 19 and 26 above).

142. The Court observes that the fact that an applicant may have breached a treaty at issue in the case does not *per se* affect the admissibility of its application. Moreover, the Court notes that Somalia is neither relying on the MOU as an instrument conferring jurisdiction on the Court nor as a source of substantive law governing the merits of this case.

Thus, Somalia's objection to CLCS consideration of Kenya's submission does not render the Application inadmissible.

143. In the circumstances of this case, there is no need for the Court to address the more general question whether there are situations in which the conduct of an applicant would be of such a character as to render its application inadmissible.

144. In light of the foregoing, the Court finds that the preliminary objection to the admissibility of Somalia's Application must be rejected.

* * *

145. For these reasons,

THE COURT,

(1) *(a)* By thirteen votes to three,

*Rejects* the first preliminary objection raised by the Republic of Kenya in so far as it is based on the Memorandum of Understanding of 7 April 2009;

IN FAVOUR: *President* Abraham; *Vice-President* Yusuf; *Judges* Owada, Tomka, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari, Crawford, Gevorgian;

AGAINST: *Judges* Bennouna, Robinson; *Judge* ad hoc Guillaume;

*(b)* By fifteen votes to one,

*Rejects* the first preliminary objection raised by the Republic of Kenya in so far as it is based on Part XV of the United Nations Convention on the Law of the Sea;

IN FAVOUR: *President* Abraham; *Vice-President* Yusuf; *Judges* Owada, Tomka, Bennouna, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari, Crawford, Gevorgian; *Judge* ad hoc Guillaume;

AGAINST: *Judge* Robinson;

(2) By fifteen votes to one,

*Rejects* the second preliminary objection raised by the Republic of Kenya;

IN FAVOUR: *President* Abraham; *Vice-President* Yusuf; *Judges* Owada, Tomka, Bennouna, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari, Crawford, Gevorgian; *Judge* ad hoc Guillaume;

AGAINST: *Judge* Robinson;

(3) By thirteen votes to three,

*Finds* that it has jurisdiction to entertain the Application filed by the Federal Republic of Somalia on 28 August 2014 and that the Application is admissible.

IN FAVOUR: *President* Abraham; *Vice-President* Yusuf; *Judges* Owada, Tomka, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari, Crawford, Gevorgian;

AGAINST: *Judges* Bennouna, Robinson; *Judge* ad hoc Guillaume.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this second day of February, two thousand and seventeen, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Federal Republic of Somalia and the Government of the Republic of Kenya, respectively.

*(Signed)* Ronny ABRAHAM,
President.

*(Signed)* Philippe COUVREUR,
Registrar.

Vice-President YUSUF appends a declaration to the Judgment of the Court; Judge BENNOUNA appends a dissenting opinion to the Judgment of the Court; Judges GAJA and CRAWFORD append a joint declaration to the Judgment of the Court; Judge ROBINSON appends a dissenting opinion to the Judgment of the Court; Judge *ad hoc* GUILLAUME appends a dissenting opinion to the Judgment of the Court.

*(Initialled)* R.A.
*(Initialled)* Ph.C.