

## The Relationship Between Declarations Under the Optional Clause of the Statute of the International Court of Justice and Part XV of the Law of the Sea Convention

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**Case Commented On:** *Maritime Delimitation in the Indian Ocean (Somalia v Kenya)*, Preliminary Objections, [Judgment, 2 February 2017](#)

Somalia instituted proceedings against Kenya in the International Court of Justice (ICJ or the Court) in August 2014 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” ([Somalia’s Application](#)). In so doing Somalia relied upon Optional Declarations made by both states pursuant to Article 36(2) of the [Statute of the Court](#). Kenya raised a preliminary objection as to the jurisdiction of the Court and also argued that the Court should treat Somalia’s application as inadmissible. On 2 February 2017, the Court released its judgment in respect of these preliminary objections.

This post explains the basis of Kenya’s arguments in respect of the jurisdiction of the Court and the admissibility of Somalia’s claim. It reviews the Court’s Judgment and dissenting opinions and declarations and offers some concluding remarks focussing on the relationship between declarations under the optional clause of the Statute of the International Court of Justice and Part XV of the [Law of the Sea Convention](#) (LOSC).

### Kenya’s arguments

[Kenya’s declaration](#) read as follows:

...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.* (emphasis added, and hereafter “the Kenyan reservation”)

Kenya’s objection to jurisdiction had two branches. The first branch was to the effect that Kenya and Somalia had agreed “to have recourse to some other method or methods of settlement” with respect to the dispute between them and that therefore the matter was covered by the Kenyan reservation. Kenya based this argument on the terms of an agreement between the parties entitled

“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” (the MOU) (reproduced in its entirety at para. 37 of the 2 February 2017 Judgment).

The second branch of Kenya’s objection to jurisdiction (assuming it could not rely on the terms of the MOU) was that in ratifying LOSC neither Kenya nor Somalia had made a declaration concerning the choice of means of compulsory dispute resolution under section 2 of Part XV and therefore both parties must be taken to have elected to refer any dispute that could not be settled by negotiation or other means to arbitration under Annex VII of LOSC (pursuant to Article 287(3) of LOSC) and this too fell within the terms of Kenya’s reservation. In Kenya’s view, Article 282 of LOSC does not trump this reasoning because in this case the Kenyan reservation was broader than that of the Somalia reservation and the two declarations therefore did not constitute “an agreement, under Article 282, to submit a dispute concerning the interpretation or application of the Convention to this Court.”

Kenya’s objections to admissibility were also two-fold. First, Kenya objected that the MOU precluded resolution of delimitation questions until the Commission on the Limits of the Continental Shelf (Commission or CLCS) had concluded its process. Second, Kenya objected that Somalia’s application should be treated as inadmissible because Somalia had breached the terms of the MOU by raising objections to the Commission’s consideration of Kenya’s submission.

### **The objection to jurisdiction based on the Memorandum of Understanding**

Kenya had to demonstrate two things in order to successfully argue its objection to jurisdiction based on the language of the MOU. First it had to show that the MOU was an agreement within the meaning of the Kenyan reservation, and second that it was an agreement as to a method of settling the dispute.

While titled a MOU, this seven paragraph agreement was couched in legal terms, dealt with legal issues and in its final operative paragraph indicated that it would enter into force upon signature. The MOU was executed by the Minister for Foreign Affairs of the Government of Kenya and the Minister for National Planning and International Cooperation of the Transitional Federal Government of Somalia and contained a declaration to the effect that both signatories were “duly authorized by their respective governments”.

The Court took the view (Somalia actually considered it (at para. 41) unnecessary to determine “the status of the MOU under international law”) that the MOU could only affect its jurisdiction if the MOU was a treaty in force between the Parties. The Court had little difficulty concluding that the MOU was a treaty. As the Court observed it was (at para. 42) “a written document, in which Somalia and Kenya record their agreement on certain points governed by international law” and the “inclusion of a provision addressing the entry into force of the MOU is indicative of the instrument’s binding character”. The MOU was executed by Ministers who, in accordance with Article 7 of the [Vienna Convention on the Law of Treaties](#) (VCLT), are assumed to be capable of binding their states “by virtue of their functions and without having to produce full powers” (at para. 43). Neither State is a party to the VCLT but the Court was of the view that this provision codified customary law. In any event, the evidence showed (at para. 43) that the Prime Minister of the Somali Transitional government had signed a document affording the Minister

full powers. Finally, the MOU expressed on its face that it was to enter into force upon signature, and (at para. 45) “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.” Neither could Somalia escape the binding effect of the MOU by relying on the provisions of “the Transitional Federal Charter of the Somali Republic, applicable between 2004 and 2012, which ‘made the President’s authority to sign binding international agreements conditional upon subsequent ratification by Parliament’, and that such ratification did not take place” (at para. 39). Article 46 of the VCLT generally precludes reliance on the provisions of domestic law and in this case there was no reason to suppose that Kenya was aware of, or should have been aware of, any constitutional impediment to the exercise of full powers by the Minister.

However, the conclusion that the agreement was a binding agreement was not enough to exclude the jurisdiction of the Court under the terms of Kenya’s reservation. It was also necessary for Kenya to show that the MOU constituted an agreement to settle the dispute by an alternative method. That required the interpretation of the MOU and in particular its paragraph 6 which provided as follows:

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.

The Court observed (at paras 63 – 64) that interpretation should be in accordance with the terms of Articles 31 and 32 of the VCLT which reflect customary international law (at para. 63) and these terms require attention to ordinary meaning, context and object and purpose and “together with the context” any relevant rules of international law, as well as, and where appropriate, the *travaux*.

In this case, the *context* required that attention be given not only to the entire MOU, but also Article 76(8) of LOSC which contemplates that a party to LOSC can only establish final and binding outer limits (the exercise of delineation) to its continental shelf following submissions to the Commission and on the basis of the recommendation of the CLCS. Referencing the Court’s own judgment in *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 of 17 March 2016](#), paras 107-108, the Court here again emphasised (at para. 67) that delineation is different from delimitation: “The two tasks are distinct and the delimitation of the continental shelf ‘can be undertaken independently of a recommendation from the CLCS’.” (pinpoint references from *Nicaragua v. Colombia* omitted).

The *purpose* of a treaty may be evidenced, *inter alia* by its title and in this case (at para. 70), “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.” The title, reinforced by the first five paragraphs of the MOU, was thus designed to allow the CLCS to consider submissions in relation to the delineation of the shelf notwithstanding the existence of a dispute as to delimitation. These provisions of the MOU thus preserved (at para. 75) “the distinction between

the ultimate delimitation of the maritime boundary and the CLCS process leading to delineation.”

That said, and having maintained that distinction, the real issue was whether any of these provisions supported Kenya’s contention that the MOU and its paragraph 6 represented an agreement as to the “method for settling the dispute relating to the delimitation of the Parties’ maritime boundary” (at para. 77). The Court saw nothing in that contention in relation to the first five paragraphs (at paras 70 – 87).

The Court reviewed paragraph 6 of the MOU. In light of Article 31(3)(c) of the VCLT, and in light of the fact that both Kenya and Somalia are parties to LOSC, the provisions of Article 83 of LOSC on the delimitation of the continental shelf are relevant to the interpretation of paragraph 6 of the MOU especially given (at para. 90) the “similarity in language between Article 83, paragraph 1, of UNCLOS and the sixth paragraph of the MOU.” Perhaps the Court’s crucial conclusion on this point was that (at para. 91) “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 proceedings, preclude recourse to dispute settlement procedures in case agreement could not be reached.” While paragraph 6 of the MOU goes beyond Article 83 (at para. 92) insofar as it suggests that delimitation as to the extended shelf should be agreed *after* the Commission had concluded its examination and made its recommendations, that did not, in the view of the Court (at para. 95), preclude “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 wording in paragraph 6 “shall be agreed” did not mean that the Parties were obliged to reach an agreement. It actually meant (at *ibid.*) “that the Parties are under an obligation to engage in negotiations in good faith with a view to reaching an agreement.” But negotiations were not the only means of reaching an agreement, especially in light of the commitments of both parties under Part XV of LOSC and under their Optional Clause declarations. Absent express language, the Court did not consider that the Parties could “be taken to have excluded recourse to such procedures until after receipt of the CLCS’s recommendations” (at *ibid.*). In sum (at para. 98), paragraph 6 “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.” The Court confirmed this interpretation by reference to the *travaux* which reinforced the proposition that the MOU was concluded for the limited purpose of facilitating consideration of the Parties’ submission by the Commission. Had paragraph 6 been intended to have the far-reaching consequences suggested by Kenya it would in all likelihood (at paras 102 & 103) have been the subject of additional discussions between the parties.

### **The objection to jurisdiction based on Part XV of the Law of the Sea Convention**

Kenya’s second argument was that even if the MOU did not constitute an agreement “to have recourse to some other method or methods of settlement” within the meaning of the Kenyan reservation then Part XV of LOSC surely constituted such an agreement pursuant to which the Parties, by default of any other election, had committed to resolve any dispute by means of Annex VII arbitration.

The short answer to this argument from the perspective of the Court is that Annex VII arbitration is referenced in section 2 of Part XV and section 2 only becomes relevant “where no settlement has been reached by recourse to section 1” and section 1 contains, *inter alia*, Article 282 which preserves the compulsory jurisdiction of the ICJ arising from complementary optional declarations. The Court put the point this way (at para. 126):

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.

The Court went on to note that this interpretation was confirmed (at paras 127 – 128) by the *travaux* which made it clear that the “or otherwise” language was intended to embrace declarations under Article 36(2) of the Statute. Thus, in the event of broadly framed complementary declarations under the Optional Clause, it must follow that it is the ICJ that has jurisdiction in relation to a dispute as to the interpretation or application of LOSC and not a Part XV, section 2 tribunal, unless, as the final words of Article 282 state, “the parties to the dispute agree otherwise”. A specific reservation in an Optional Clause declaration as to a class of disputes (*e.g.*, disputes relating to maritime delimitation) would lead to a different result and thus confer jurisdiction to the extent of the reservation on a Part XV section 2 tribunal (provided that neither party had made a similar reservation under Article 298(1)(a) of LOSC). The same reasoning did not follow with respect to Kenya’s reservation on “[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.”

The Court seems to give two reasons to support this last conclusion. The first is the “ordinary meaning” of the “or otherwise language” referenced above. The second, draws on the *travaux* but also on the Court’s understanding with respect to the practice of states in relation to optional clause declarations. The Court noted that reservations of the type filed by Kenya were very common at the time of the adoption of LOSC and remain common (at para. 129). In effect, given the express references in the *travaux* to the optional clause declarations, the Court simply could not believe (at para. 129) that the parties to LOSC did not intend to preserve the existing jurisdiction of the Court under Article 36(2) of its Statute (for the contrary view see the Dissenting Opinion of Judge Robinson discussed below). In effect, therefore, the Court gave short shrift to Kenya’s arguments (at para. 120) based on both *lex specialis* and *lex posterior* to the effect that the agreement under LOSC to use a section 2 tribunal (*i.e.* in this case, and by default, an Annex VII tribunal), trumped jurisdiction under the Optional Clause. The Court concluded as follows (at para. 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.

### **Kenya’s objections as to admissibility**

Kenya’s first argument with respect to admissibility was based upon an interpretation of the MOU which precluded resolution of delimitation questions until the Commission had concluded its process. The Court had already rejected that interpretation of the MOU and accordingly (at para. 138) this objection as to admissibility necessarily failed.

Kenya’s second argument was that Somalia’s application should be treated as inadmissible because Somalia had breached the terms of the MOU by raising objections to the Commission’s consideration of Kenya’s submission (even though it subsequently withdrew those objections). While Kenya relied at least in part on the clean hands doctrine (at para. 139) the Court preferred to dismiss the objection on narrower grounds (at para. 143):

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. (at para. 142)

### **Declarations and Dissenting Opinions**

Judges Gaja and Crawford filed a [Joint Declaration](#) in which they took issue with the manner in which the majority concluded that the MOU did not trigger the application of Kenya’s reservation. In their view the majority paid too much attention to the legal status of the MOU and too little attention to the proposition that paragraph 6 was not an agreement to a “method or methods of *settlement*” (emphasis added). However it does appear that Judges Gaja and Crawford did consider that paragraph 6 would have precluded (at para. 7) either party from *unilaterally* triggering binding dispute resolution before the CLCS had made its recommendations had the Parties not agreed by their conduct to modify paragraph 6 by mutually engaging in negotiations to try and resolve the delimitation issues. Judge Guillaume is critical of this particular conclusion in his [Dissenting Opinion](#).

Vice-President Yusuf’s [Declaration](#) seemingly questions the manner in which the Court used the *travaux* to the MOU to assist it in its deliberations. Clearly Vice-President Yusuf finds this quite anomalous (and Judge Bennouna makes the same point in his [Dissenting Opinion](#)) given that the text of the MOU was not drafted by either or both parties but by the Norwegian Ambassador Longva as part of Norway’s assistance to African countries in meeting the deadlines imposed by LOSC and the CLCS on the filing of claims.

The most trenchant of the [Dissenting Opinions](#) is that filed by Judge Robinson. While Judge Robinson dissented from all aspects of the majority’s judgment he focuses his attention on the relationship between Kenya’s reservation and dispute settlement under Part XV of LOSC. While Judge Robinson accepts that the “or otherwise” language of Article 282 clearly contemplates reciprocal declarations under the Optional Clause, he contends that not every form of declaration can qualify. The majority of the Court accepts that qualification in some cases (see comments

above with respect to a declaration that contains a reservation as to matters related to delimitation) but Judge Robinson argues that the majority was too quick to conclude that a declaration of the type made by Kenya fits within Article 282. In his view the only declarations that might qualify under Article 282 should be (at para. 26) declarations “without reservations”. Finally he notes (at para. 34) that one of the consequences of the majority’s broad understanding of the “or otherwise” language is to privilege the position of the ICJ which he suggests is incompatible with the intentions of the LOSC drafters who “did not wish to give any particular prominence to the ICJ”.

By contrast Judge Bennouna focused his attention on paragraph 6 of the MOU. In his view the plain meaning of this provision was clear (and he criticizes the way in which the majority applies the VCLT rules on interpretation by jumping too quickly to context) and it provided a procedure for the settlement of the dispute between the parties by negotiations and agreement once the CLCS has made its recommendation. Judge *Ad Hoc* Guillaume in his [Dissenting Opinion](#) (in French only) makes similar points especially with reference to the manner in which the majority applied Article 31 of the VCLT.

Neither Judge Bennouna nor Judge *Ad Hoc* Guillaume dissent from the views of the majority in relation to Part XV of LOSC (Article 282).

## Comment

This decision offers an important clarification as to the choice of judicial forum with respect to disputes as to the interpretation or application of LOSC where the parties to the dispute also have extant Optional Clause declarations under Article 36(2) of the Statute. The decision stands for the proposition that where the dispute, properly characterized, falls within the terms of relevant Optional Clause declarations, the matter must be litigated before the ICJ under the Optional Clause jurisdiction and not before a Part XV, section 2, tribunal. Article 282 trumps the choice of forum under Article 287 of LOSC and this is the case even where the declaration in question includes a reservation in the form of the Kenyan reservation which reserves out disputes that the parties have agreed to resolve by some other mode of settlement. In effect the Court has concluded that the selection of a preferred tribunal under Part XV, section 2 by election or by default is not a relevant agreement. It is not relevant because the structure of Part XV accords priority to section 1 and its emphasis on the freedom of parties to choose their preferred means of dispute settlement.

The same logic must apply to the jurisdiction of the Court arising under a regional dispute settlement agreement such as the [Pact of Bogotá](#). Such an agreement, if applicable to disputes in relation to the interpretation or application of LOSC, and if qualifying under Article 282, must equally serve to preclude the choice of a dispute resolution mechanism under Part XV, section 2.

The choice is a jurisdictional choice and not a choice of convenience or preference. This is because, as the Court emphasises (at paras 128 & 130) the procedure before the ICJ under the terms of the Optional Clause declarations applies “in lieu” of the procedures provided by Part XV (see Articles 282 and 286). A tribunal empanelled under section 2 of Part XV can have no jurisdiction (and see the Court’s rather odd comment at para. 132 as to the consequences were the Court to decline jurisdiction) “unless the parties to the dispute otherwise agree”. Accordingly, parties who might have thought (on the basis of either *lex specialis* or in at least

some cases *lex posterior*) that their choice of tribunal under LOSC Part VX, section 2 (either expressly or by default) should prevail over the general acceptance of the Court's jurisdiction through their Optional Clause declarations (or similar), will need to confirm that they are both of the same mind (*i.e.*, they will need a further agreement as referenced in the closing words of Article 282).

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