INTERNATIONAL DECISIONS

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International Court of Justice—jurisdiction—admissibility—interpretation of optional clause declarations accepting the optional clause—relationship between different dispute settlement mechanisms—United Nations Convention on the Law of the Sea

MARITIME DELIMITATION IN THE INDIAN OCEAN (Somalia v. Kenya). Preliminary Objections. *At* http://www.icj-cij.org.
International Court of Justice, February 2, 2017.

On February 2, 2017, the International Court of Justice (ICJ or Court) delivered a judgment rejecting preliminary objections to its jurisdiction in *Maritime Delimitation in the Indian Ocean*.[1] The underlying contentious case between Somalia and Kenya concerns the establishment of a single maritime boundary between the two states. The decision on preliminary objections provides important insights on the Court's interpretation of optional clause declarations that include a reservation for alternative methods of dispute settlement.

Somalia and Kenya are adjacent coastal states facing south-southeast onto the Indian Ocean. They have long had overlapping maritime claims in the northwestern part of that ocean. In particular, they disagree on the proper method of maritime delimitation to resolve those claims. Somalia has advocated for the equidistance line while Kenya has sought to use the line along the parallel of latitude passing through the starting point of the land boundary. The choice will have significant impact on the portion of sea that would fall under their respective sovereignty and the exploitation of living and non-living resources therein. Notably, this may affect oil-exploitation activities that Kenya is currently carrying out in the disputed area.

At this stage of the proceedings, the issue before the Court was whether it had jurisdiction under the Statute of the International Court of Justice. In its application, Somalia had invoked the optional clause declarations that both parties had made under Article 36, paragraph 2, of the Court's Statute. Kenya raised two preliminary objections, the first concerning the jurisdiction of the Court, and the second concerning the admissibility of Somalia's application. Only the first one will retain our attention.

Kenya advanced two alternative grounds in order to maintain that the Court lacked jurisdiction. Kenya argued first that its reservation to the optional clause declaration applied. The reservation provides that "[d]isputes in regard to which the parties to the dispute have agreed

[1] Maritime Delimitation in the Indian Ocean (Som. v. Kenya), Preliminary Objections (Int'l Ct. Just. Feb. 2, 2017) [hereinafter Judgment]. The International Court of Justice (ICJ) documents cited herein are available on the Court's website at http://www.icj-cij.org.

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or shall agree to have recourse to some other method or methods of settlement" are excluded from the subject-matter jurisdiction of the Court.[2] As a consequence, Kenya maintained that the dispute should be settled through negotiations, because that was the method agreed upon by the parties in a Memorandum of Understanding (MOU) they had concluded on April 7, 2009.[3] In the second part of the first preliminary objection, Kenya contended that the ICJ had no jurisdiction because Part XV of the UN Convention on the Law of the Sea (UNCLOS) falls within the scope of Kenya's reservation.

According to its title, the MOU was intended by the parties to "grant 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."[4] Both states are parties to UNCLOS. Pursuant to UNCLOS, coastal states intending to establish the outer limit of their continental shelf beyond two hundred nautical miles must submit an application to the Commission on the Limits of the Continental Shelf (CLCS).[5] In cases of dispute between the parties, the Rules of the CLCS require the "prior consent" of the states before the CLCS will consider their submissions.[6] Thus, the MOU was intended to qualify as "prior consent" under the CLCS Rules and allow the parties to file their submissions with the CLCS. Both countries did so in 2009. In 2014 the CLCS deferred consideration of Kenya's submission because Somalia had repeatedly contested the validity of the MOU, and as a consequence, the parties engaged in negotiations that soon came to a deadlock. On August 28, 2014, Somalia instituted proceedings before the ICJ. When the Court adopted the judgment, the process before the CLCS was ongoing as previous objections advanced by the parties had been withdrawn.

With respect to Kenya's contention that the Court lacked jurisdiction, the Court had to determine first whether the MOU was a commitment by the parties to settle the maritime dispute through negotiations. The sixth paragraph of the MOU states that:

> The delimitation of maritime boundaries in the areas under dispute, including the delimitation of the continental shelf beyond 200 nautical miles, shall be agreed between the two coastal States on the basis of international law after the [CLCS] 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]

[2] The text of the declaration recognizing jurisdiction of the Court as compulsory deposited by Kenya on April 19, 1965 is available at http://www.icj-cij.org/en/declarations/ke.

[3] 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, para. 6, *entered into force* April 7, 2009 [hereinafter Kenya/Somalia MOU].

[4] *Id.*

[5] *See* United Nations Convention on the Law of the Sea, Art. 76, para. 8, *opened for signature* Dec. 10, 1982, 1833 UNTS 397 [hereinafter UNCLOS]. Under Article 8 of UNCLOS Annex II, "[i[n the case of disagreement by the coastal State with the recommendations of the Commission, the coastal State shall, within a reasonable time, make a revised or new submission to the Commission."

[6] *See* Commission on the Limits of the Continental Shelf Article Rules of Procedure, Annex I, Rule 5(a).

[7] Kenya/Somalia MOU, *supra* note 3, para. 6.

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The Court established that the MOU did constitute a treaty in force between the parties (para. 50) and it then turned to the central issue of whether the sixth paragraph of the MOU established an alternative method for the settlement of the boundary dispute between the parties.

The Court interpreted the MOU as a whole. It reasoned that the main purpose of the MOU was to allow the CLCS to make recommendations on the delineation of the outer limits of the continental shelf of the parties. The Court reasoned that the special circumstances under which the MOU was concluded meant that, in the MOU, triggering the process that would lead to the *delineation* of the continental shelf would take priority over the maritime *delimitation* (para. 78). However, the judgment stressed that the MOU did not prevent the parties from engaging in delimitation negotiations concerning the entire maritime boundary (para. 96), and that they did so. The Court also used Article 83 of UNCLOS to substantiate this interpretation of the MOU. Article 83 provides that the delimitation of the continental shelf "shall be effected by agreement on the basis of international law," and it does not prevent the parties to have recourse to other methods of dispute settlement. As the MOU contained very similar wording, the Court stated that the two instruments should be interpreted consistently. Thus, the Court concluded that the parties—in the sixth paragraph of the MOU—agreed to engage in negotiations but not that those negotiations must necessarily be successful; the parties could therefore have recourse to other methods of dispute settlement in case negotiations did not result in an agreement (para. 91). In other words, the MOU did not preclude recourse to the ICJ.

In light of all these elements, the Court concluded that "[n]othing 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" (para. 96). The *travaux préparatoires* confirmed that the "MOU was not intended to establish a procedure for the settlement of the maritime boundary dispute between the parties" (para. 105). Accordingly, the MOU did not fall within the scope of Kenya's reservation.

The second part of Kenya's first preliminary objection focused on another alternative method of dispute settlement agreed upon by the parties, namely the provisions of Part XV of UNCLOS. In that respect, the Court had to decide whether Part XV constituted an alternative method of dispute settlement that would fall within Kenya's reservation. Both parties accepted Annex VII arbitration as default mechanism for the settlement of future disputes under UNCLOS.

First, the Court reasoned that the plain language of the reservation, which included a general reference to "methods of settlement," was at odds with Kenya's contention that preference should be given to agreements selecting "a method of dispute settlement that is *lex specialis* and *lex posterior* in relation to the Parties' optional clause declarations" (para. 120). For the Court, whether an alternative procedure would fall under the purview of Kenya's reservation should be determined based on the language of the agreement providing for such a procedure. In this case, that agreement was Part XV of UNCLOS.

The Court's most important reasoning concerns the interpretation of Article 282 of UNCLOS.[8] The Court concluded that the binding procedures under Section 2 of Part XV

[8] UNCLOS Article 282 reads: "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

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—i.e., arbitration for Kenya and Somalia—are secondary to other means of dispute settlement, because Article 282 accords priority to those other means if agreed upon by the parties; that the ordinary meaning of Article 282 is sufficiently broad to encompass optional clause declarations under the Court's Statute; that Article 282 accordingly affords priority to the Court's jurisdiction; and, finally, that the scope of Article 282 should be interpreted so as to cover also optional clause declarations containing a reservation such as that of Kenya (para. 133).

The Court reasoned that the *travaux préparatoires* of UNCLOS evinced no intention to exclude from the scope of Article 282 the majority of the ICJ optional clause declarations that included, at that time, reservations similar to Kenya's. The Court also used a *reductio ad absurdum* argument:

> 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." (Para. 130)

Finally, the Court reasoned that if it declined jurisdiction and gave priority to Part XV dispute settlement mechanism, there would have been "no certainty" that the maritime dispute between Kenya and Somalia would be settled (para. 132).

* * * *

The judgment is noteworthy for two main reasons: it is one of the rare occasions on which the Court examined a reservation to its jurisdiction based on a preexisting agreement to pursue alternative means of dispute settlement, which is one of the most common kinds of reservation to optional clause declarations; and its interpretation departs from the Court's traditional approach to optional clause declarations. Consistent with its prior decisions on reservations, the Court upheld its own jurisdiction.[9]

In previous cases, the Court had interpreted optional clause declarations by focusing on the declaration itself and on the reservation. The Court also "has not hesitated to place a certain emphasis on the intention" of the party accepting the Court's jurisdiction,[10] either through recourse to "objective" means of interpretation according to Article 31 of the Vienna Convention on the Law of Treaties or "subjective" means of interpretation according to Article 32.

In this case, by contrast, the Court determined the scope of Kenya's reservation by taking into account external factors rather than by focusing on the reservation itself and the intent of the party expressed therein. In paragraph 129, the Court stated that it had to "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*" (emphasis added). Had the Court applied the usual method for determining the scope of the reservation, it would have rather proceeded the other way around: it would have interpreted the reservation in order to

decision, that procedure shall apply in lieu of the procedures provided for in this Part, unless the parties to the dispute otherwise agree."

[9] *See* The Electricity Company of Sofia and Bulgaria, Preliminary Objections, 1939 PCIJ SERIES A/B N. 77, at 76 (Apr. 4); Case Concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v. Sen.), 1991 ICJ REP. 53, paras. 24–25 (Nov. 12); Certain Phosphate Lands in Nauru (Nauru v. Austl.), Preliminary Objections, 1992 ICJ REP. 240, para. 11 (June 26).

[10] Fisheries Jurisdiction (Spain v. Can.), Jurisdiction of the Court, 1998 ICJ REP. 432, paras. 48–49 (Dec. 4).

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establish whether *the relevant external factor could fall within the scope of the reservation*. It is less evident, but the same approach was adopted when interpreting Kenya's reservation in relation to the MOU: there again the Court did not focus on the reservation but on the MOU, and it interpreted the sixth paragraph of that agreement in light of Article 83 of UNCLOS and the subsequent practice of the parties.

This new approach did not raise criticism among the members of the Court,[11] and is confirmed in the central part of the judgment. On the one hand, the Court recognized that according to its consistent case law, jurisdiction is established when "the force of the arguments militating in favour of jurisdiction is preponderant, and . . . an intention on the part of the Parties exists to confer jurisdiction upon it" (para. 116). On the other hand, the Court reached a conclusion that was based only on the "the force of the arguments" (para. 133). The novelty is that those preponderant arguments concerned the interpretation of Article 282 of UNCLOS, not Kenya's reservation.

According to the traditional approach, the Court would have focused on Kenya's intention rather than the objective interpretation of Article 282 of UNCLOS. However, the risk in this approach was to decline jurisdiction in favor of arbitration under UNCLOS because Kenya's reservation was broad enough to give priority to Part XV of UNCLOS, when compared to similar and more specific reservations as discussed below.

In fact, the Court's real concern was the certainty of dispute settlement. It is true that the judgment made reference to Kenya's reservation when it deduced the intention to leave no doubt as to the existence of a method for the solution of future disputes from the fact that Kenya accepted the Court's jurisdiction "over all disputes . . . other than . . ." those that had to be settled by having recourse to other means (para. 119). However, the same need to ensure recourse to a dispute settlement procedure seems to be at the basis of every optional clause declaration containing a reservation on alternative methods of dispute settlement. Interpreting such declarations in light of the necessity of avoiding a negative conflict of jurisdiction and to ensure the priority of the Court's jurisdiction rather depended on a choice made by the Court on the best means to administer justice (para. 132).

The Court's new approach has the main advantage of ensuring consistency in the interpretation of external procedures of dispute settlement that may fall within the scope of various optional clause declarations. Today, the optional clause has been accepted by seventy-two states, and forty-three declarations include reservations referring to alternative methods of dispute settlement agreed upon by the parties. The large majority (thirty-four) are generic clauses, analogous to Kenya's reservation, drafted in similar terms and usually excluding from the Court's jurisdiction "disputes in respect of which the parties have agreed or shall agree to have recourse to another means of peaceful settlement." A small group of reservations (seven) restrict the alternative procedures that may exclude the Court's jurisdiction as they refer either to other tribunals' decisions or to procedures entailing a "final and binding" settlement of the dispute. Finally, two reservations have specific features: Italy excludes disputes

[11] The Dissenting Opinion of Judge Robinson criticized the outcome of the Court's reasoning, especially the interpretation given to Article 282 in light of the *travaux préparatoires* of UNCLOS (Robinson, J., diss. op., para. 11), and the Dissenting Opinion of Judge Bennouna criticized the order in which the Court decided to take the relevant elements into account in the interpretation of the Kenya/Somalia MOU (Bennouna, J., diss. op., at 2), but the fact that the Court decided to interpret the Kenya/Somalia MOU and Article 282 instead of Kenya's reservation was not put into question.

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in respect of which "the Parties thereto have agreed to have recourse *exclusively* to some other method of peaceful settlement"; and Suriname *excludes* "disputes in respect of which the parties . . . have agreed to settlement by means of arbitration, mediation or other methods of conciliation and accommodation." With respect to all these reservations, the judgment clarifies that the basic requirement for their application is the existence of an *agreement* between the parties (para. 119), and that the agreement must imply that the parties accepted an *obligation* to use the alternative procedure of settling the dispute (para. 95).[12]

The Court's reasoning that all optional clause declarations containing a reservation such as that of Kenya fall within Article 282, leads to questions about the construction of other reservations on alternative dispute settlement mechanisms. In the words of the Court, UNCLOS Article 282 includes optional clause declarations containing "a reservation with an effect similar to that of Kenya's reservation"[13] (para. 95), a category which would likely include the generic reservations drafted in similar terms and the reservations generally referring to final and binding mechanisms. However, the Court's approach may be problematic if applied to reservations with more specific language. For those reservations, an interpretation based on external factors could be at odds with the text of the reservation. At least in principle, differently worded reservations should be interpreted differently. It is difficult to maintain that the objective interpretation of an external provision on dispute settlement be always applicable to the interpretation of optional clause reservations without taking into account the express formulation of the reservation making reference to it. The Suriname and Italian optional clause reservations illustrate the problem.

If the interpretation of Article 282—allowing the Court to uphold jurisdiction—were applied to the Suriname reservation, it would be in tension with the text of that reservation. The text suggests that when arbitration is the default mechanism under UNCLOS, the parties will be deemed to have implicitly excluded the Court's jurisdiction. Article 282 should accordingly fall within the scope of the reservation and the Court should not have jurisdiction. In this case, a solution can be found by simply considering that the interpretation of the reservation should have priority over the interpretation of Article 282.

Second, the Italian reservation only excludes from the Court's jurisdiction dispute settlement mechanisms that have *exclusive* jurisdiction, such as those provided for by the European Union Treaty. The textual interpretation of the reservation would arguably be consistent with the Court's interpretation of Article 282 because Article 282 is not exclusive. Instead, it permits recourse to the Court to settle disputes concerning the interpretation or application of the law of the sea. Therefore, as far as the Italian reservation is concerned, the traditional approach and the new approach of the Court lead to the same outcome. However, the former

[12] In their Joint Declaration, Judges Gaja and Crawford stated that, "in the context of a declaration concerned with the compulsory jurisdiction of the Court and with alternatives to it, a reservation as to another method of settlement should be construed as referring to a method that will actually settle the dispute when it is resorted to, not to one that is equally consistent with the dispute remaining unsettled in perpetuity" (Gaja & Crawford, JJ., joint dec., para. 4).

[13] The interpretation of the Kenya/Somalia MOU in the first part of the Judgment is subject to the same criticism. Assuming that two parties bring a case before the Court concerning the delimitation of the continental shelf, that a reservation such as that of Kenya can be invoked, and that there is an agreement between them according to which the delimitation "shall be agreed between the coastal states on the basis of international law," the Court would arguably conclude that the reservation does not apply because the agreement has to be interpreted in light of Article 83 of UNCLOS. Clearly, what might differ is the subsequent practice of the parties.

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would be the correct one. Otherwise, the interpretation of the reservation would depend on the construction of external provisions and not its carefully drafted text according to which the Court lacks jurisdiction only when the alternative settlement procedure is exclusive.

The same issue would arise if the judgment were given a broader implication. The Court's reasoning with respect to Part XV of UNCLOS might be applied broadly to other non-exclusive dispute settlement procedures. Thus, the judgment might be used to find that such procedures should be excluded from the scope of application of reservations relating to "other" dispute settlement procedures, especially when they offer no certainty that the dispute be settled. Such non-exclusive dispute settlement procedures may be found in a large number of international treaties, such as human rights conventions, environmental agreements, conventions against terrorism, space law treaties, as well as regional or bilateral treaties. Again, the Court should not lose sight of the need to consider the language of the reservation as reflecting the intent of the depositing party.

Therefore, it is suggested that the new approach of the Court be reconciled with the traditional approach at least when the former does not allow to take duly into account the intent of the depositing party. The ultimate effect of the Court's judgment is to expand its jurisdiction. It would be paradoxical that the decision would in the end prompt states to add further reservations, as recently happened,[14] or even worse to withdraw existing declarations. The interpretation of reservations to optional clause declarations is a particularly delicate issue where the individual interests of the parties are to be balanced with the general interest in the sound administration of justice: if the Court could ensure stability in the interpretation of fundamental aspects, such as the conditions on which rests its jurisdiction, access to the Court would become much more predictable.

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European Court of Justice—treaty interpretation—territorial scope of treaties—pacta tertiis *principle—subsequent practice of parties—principle of self-determination—application of agreement between the European Union and the Kingdom of Morocco to Western Sahara*

COUNCIL OF THE EUROPEAN UNION v. FRONT POPULAIRE POUR LA LIBÉRATION DE LA SAGUIA-EL-HAMRA ET DU RIO DE ORO (FRONT POLISARIO). Case C-104/16 P. *At* http://curia.europa.eu. European Court of Justice, December 21, 2016

On December 21, 2016, the Grand Chamber of the Court of Justice of the European Union (CJEU) dismissed an action brought by the Front Polisario challenging a decision

[14] See the new declaration deposited by the United Kingdom on February 22, 2017, including a new reservation that further limits the jurisdiction of the Court by requiring the applicant to notify the future respondent of the existence of a dispute between the parties. The new declaration appears to be a response to the Court's requirement that the parties be aware of a dispute in order for the Court to have jurisdiction. *See* Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. U.K.), Preliminary Objections, paras. 46–57 (Int'l Ct. Just. Oct. 5, 2016).