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MARITIME DELIMITATION BY THE INTERNATIONAL COURT OF JUSTICE:

IMPLICATIONS OF *SOMALIA V KENYA*

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The subject matter of today's presentation is the impact on international dispute settlement under the *Law of the Sea Convention*[1] of the case concerning the *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*.[2]

I wish to discuss this morning the significance of this case for the settlement of maritime boundary disputes. My presentation will not address the substance of the dispute between Somalia and Kenya (for which public hearings will commence later in the year, in the week beginning 8 June).[3] Rather, I will examine the Judgment on Preliminary Objections of 2 February 2017.[4] I will focus on a particular finding of the majority on the relationship between Part XV of UNCLOS and declarations from countries as to the jurisdiction of the International Court of Justice.[5]

The majority rejected Kenya's preliminary objections and found that the ICJ did have jurisdiction to hear Somalia's claim. The reasoning of the Court provides direction on how to interpret countries' optional clause declarations, as well as how to interpret the dispute settlement provisions in Part XV. There are, I argue, two possible outcomes for countries embroiled in disputes over maritime boundaries, resulting from the Court's findings: (1) *more* maritime delimitation cases will be heard by the ICJ (instead of by

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[1] *United Nation Convention on the Law of the Sea,* opened for signature 10 December 1982, 1833 UNTS 397 (entered into force 16 November 1994) ('*UNCLOS*' or '*Convention*').

[2] https://www.icj-cij.org/en/case/161

[3] Marianthi Pappa, 'The Impact of Judicial Delimitation on Private Rights Existing in Contested Waters: Implications for the Somali-Kenyan Maritime Dispute' (2017) 61(3) *Journal of African Law* 393-418.

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

[5] Declarations made pursuant to Article 36(2) of the Statute of the International Court of Justice.

ad hoc arbitral tribunals or the International Tribunal for the Law of the Sea ('ITLOS')); and/or (2) countries may choose to revise the wording of their optional clause declarations to make clearer their preferences.

My presentation is in three parts: first, I will give a background to Kenya's preliminary objection as to jurisdiction. Next, I will analyse the ruling of the majority, juxtaposing it with the sole dissenting view (on that point) expressed by Judge Robinson. I will then close with some comments on the fragmentation of dispute settlement under Part XV of the Convention and the relationship between the law of the sea and general international law.

I. KENYA'S OBJECTION AS TO JURISDICTION

Let me begin with Kenya's objections as to jurisdiction. To do so, it might be helpful to go straight to the 'chicken or the egg' arguments that feature in this case (or perhaps I should call them the 'dugong or the calf' arguments). UNCLOS was negotiated over a long period in the 1970s and 1980s, during the Third United Nations Conference on the Law of the Sea, and it entered into force in 1994. The provisions in Part XV of the Convention are celebrated as instituting compulsory dispute settlement within the law of the sea (albeit with some significant exceptions), with no possibility for states to 'opt-out' due to the 'single undertaking' nature of the negotiations.[6] The so-called 'constitution for the oceans' thus promised much by way of a self-contained and ordered system of dispute settlement. Where states parties did not nominate a preferred forum for the resolution of disputes arising from the interpretation or application of the Convention, the default was to be an ad hoc arbitral body constituted according to Annex VII.

The International Court of Justice predates Part XV by several decades. Its post-war Statute is an earlier attempt at regularising and solidifying pacific dispute settlement between states. The Court's jurisdiction is general. Many states accepted the Court's

[6] Alan Boyle, 'Dispute settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction' (1997) 46 *International and Comparative Law Quarterly* 37, 38.

jurisdiction according to the optional clause procedure, though their declarations often contained reservations. A common form of reservation – which featured in about 50 per cent of all declarations – can be found in Kenya's 1965 declaration accepting as compulsory the jurisdiction of the Court except for a set list of certain types of disputes, including, most relevantly:

> 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[7]

Kenya's objection to the jurisdiction of the ICJ in the case brought by Somalia was that its acceptance of the Court's jurisdiction had been overridden by its acceptance of the Part XV methods of settlement.[8] For Kenya, the Court did not have jurisdiction, and instead, the parties' intentions for dispute settlement were to be revealed from a simple application of Part XV itself. This, on Kenya's argument, would lead to an interpretation of arbitration as the preferred forum. (Whether an arbitral tribunal would, then, have jurisdiction was not ruled upon, though the dissenting judge, Judge Robinson, alluded that jurisdiction could be found.)

At the broadest level, the situation confronting the parties in this case is a situation highly familiar to international lawyers: international law is fragmented, with rules developing at different times and in different places, and with no constitution or apex court to resolve inconsistencies (as would be available in a domestic legal context). Moreover, techniques for allocating priority to norms are very difficult to apply in practice. The Court heard arguments around Part XV being *lex posterior* (with Kenya submitting that the later in time rule prevails) and *lex specialis* (with Kenya submitting that the specialized rule prevails over the general rule) but did not find these arguments compelling. Somalia seized on the indeterminacy of the task by suggesting that interpreting Kenya's reservation would lead to Part XV, which would, in turn, (by virtue of Article 282, which I will come to), lead back to the optional clause declaration,

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[7] See further https://www.icj-cij.org/en/declarations/ke

[8] A second preliminary objection, which related to a memorandum of understanding between the parties, is not covered in the current remarks, although it is important to note that it too was rejected by the Court: see para 31-106.

"with the back and forth continuing indefinitely".[9] This delicious suggestion of circularity must strike fear into the hearts of diplomats everywhere!

Indeed, the attempt to suggest a hierarchy of dates and developments might be said to be particularly fraught in the law of the sea context: one could go back to Grotius and ask whether the law of the sea predates general international law, or the other way around. The 'dugong or the calf', once again. In the face of this historical complexity, the Court instead drew upon familiar tools of treaty interpretation to assess key terms of Part XV and key terms of Kenya's optional clause declaration.

II. THE RULING BY THE COURT

Let me turn now to the ruling by the Court. One of the key provisions of Part XV is Article 282 which provides that if states parties have agreed, outside of the confines of UNCLOS, that a dispute shall "be submitted to a procedure that entails a binding decision, that procedure shall apply".[10] Australia has had close familiarity with this provision, dating to its submissions (which were not accepted) in the *Southern Bluefin Tuna* dispute with Japan, when Australia sought unsuccessfully to persuade an arbitral tribunal that it had jurisdiction under UNCLOS.[11]

Article 282 is considered to refer to the optional clause declarations as part of the corpus of agreements '*or otherwise'* that express the wish of states to use the ICJ in lieu of Part XV procedures. This interpretation of Article 282 appears in much of the literature, as well as in judgments, including the *Southern Bluefin Tuna* one I have mentioned.[12] It

[9] See Judgment, para 113.
[10] The provision in full 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 decision, that procedure shall apply in lieu of the procedures provided for in this Part, unless the parties to the dispute otherwise agree."
[11] *Southern Bluefin Tuna (New Zealand-Japan, Australia-Japan)* 4 August 2000 VOLUME XXIII pp. 1-57; But see Dissenting Opinion of Sir Kenneth Keith.
[12] Ibid; see reference to Japan's arguments at para 39(c).

has been maintained by influential commentators, including Tullio Treves and Alan Boyle.[13]

In interpreting Part XV, the Court considered the ordinary meaning of Article 282 to be "broad enough to encompass an agreement to the jurisdiction of this Court that is expressed in optional clause declarations".[14] This was not controversial: it was the position agreed by Kenya and Somalia, and invoked by authors such as Alan Boyle. The Court then invoked the type of reservation to an optional clause declaration that *would* quash the Court's jurisdiction: it held 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".[15] This type of reservation is familiar in the Australian context, ever since the 2002 amendments to Australia's optional clause excluded disputes relating to the delimitation of maritime zones.[16]

For the Kenyan optional clause declaration, however, the Court found that the intention of Article 282 was that a Kenyan-type reservation would not operate in the same way as an exclusion of jurisdiction according to subject-matter. The Court reasoned that more than half of the existing optional clause declarations contained a Kenyan-type reservation at the time of the Third UN Conference on the Law of the Sea. The UNCLOS parties could not have intended that Article 282 would exclude these declarations, notwithstanding their reservations. The result was that Kenya was taken to have accepted the ICJ's jurisdiction.

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[13] Tullio Treves, 'Conflicts between the International Tribunal for the Law of the Sea and the International Court of Justice' (1999) 31:4 *New York University Journal of International Law and Politics* 812, cited in CR 2016/11, p. 64, para. 34 (Sands); Alan Boyle, 'Problems of Compulsory Jurisdiction and the Settlement of Disputes relating to Straddling Fish Stocks' (1999) 14;1 *International Journal of Marine and Coastal Law* 7, cited in CR 2016/11, p. 64, para. 37 (Sands).
[14] Judgment, para 126.
[15] Ibid, para 128.
[16] https://www.icj-cij.org/en/declarations/au

Judge Robinson, in dissent, was highly critical of this reasoning. The judge, who had considerable experience in negotiating at the Third UN Conference on the Law of the Sea, considered the approach of the majority to be untenable. "It is an oversimplification and an error to reduce the issue to one of numbers", his Honour held. "What is called for is not a quantitative assessment but a qualitative evaluation of the impact of the reservation on the optional clause declarations and thus, on whether there is an agreement that falls within the scope of Article 282 of UNCLOS." Judge Robinson would have ruled in favour of Kenya's submission that the reservation it made to its optional clause declaration excludes the Court's jurisdiction in this case.

III. IMPLICATIONS

Let me conclude by pointing to the implications for countries and for dispute settlement. The judgment has been said to have 'caused ripples' for law of the sea dispute settlement.[17] Judge Robinson, though a sole dissenter, provided a compelling critique of the approach taken by the majority. He considered Part XV to have been turned "on its head", given that the ICJ was being treated as the default mechanism for dispute settlement, when the states parties to UNCLOS had agreed, after extensive negotiations, to that role being taken by an Annex VII Tribunal. This concern also alerts us to a significant methodological choice made by the majority and by Judge Robinson: the invocation of *travaux preparatoire* and the background to the Third UN Conference on the Law of the Sea. For lawyers and diplomats who are focused on a black letter application of the Vienna Convention rules on treaty interpretation, this methodology is not necessarily aligned with the requirement to use preparatory works only as supplementary materials.[18]

Given that the Kenyan-type reservation still appears in over half of all current optional clause declarations, the assertion of jurisdiction by the ICJ over other forums under Part XV could provide to be significant. This may instigate a reinvigorated role for the ICJ,

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[17] https://www.ejiltalk.org/the-icjs-preliminary-objections-judgment-in-somalia-v-kenya-causing-ripples-in-law-of-the-sea-dispute-settlement/

[18] Vienna Convention on the Law of Treaties, Articles 31-33.

which has been heavily involved in law of the sea cases historically (such as *Corfu Channel* in 1949, the *Fisheries* case in 1951, and the *North Sea Continental Shelf* cases in 1969[19]), but which has been relatively quiet on such matters since UNCLOS entered into force.

The other implication (and it is always present in discussions on ICJ jurisdiction), is that countries may be tempted to reword their optional clause declarations so as to be clearer about their preferences.

Ultimately, one may view it as predictable (and consistent with justice) that the ICJ would interpret optional clause reservations restrictively.[20] Having rejected Kenya's preliminary objections, it is now on track to rule upon the substance of a maritime boundary dispute that seems particularly ripe for adjudication, given Kenya's alleged conduct in granting mining concessions within Somalia's territory. One may also assess the case as an application of dispute settlement provisions that remain inescapably fragmented and complex. Complexities as to forum and jurisdiction are inevitable when dealing with the law of the sea. For it to be otherwise would be to locate an integrative function within UNCLOS that is within the realm of 'ideal' rather than 'real'.[21]

Thank you.

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[19] *Corfu Channel* (United Kingdom of Great Britain v Northern Ireland-Albania) (Judgement) [1949] ICJ Rep 1949, 4; *Fisheries (United Kingdom v Norway) (Judgement)* [1951] ICJ Rep 1951, 116; *North Sea Continental Shelf (Federal Republic of Germany v Denmark)* [1969] ICJ Rep 1969, 3.
[20] Kai-chieh Chan, 'The ICJ's judgement in Somalia v. Kenya and its implications for the Law of the Sea' (2018) 34:2 *Utrecht Journal of International and European Law* 195.
[21] Philip Allott, 'Mare Nostrum: A New International Law of the Sea' (1992) 86 *American Journal of International Law* 783.