

The Application of the Rules on Interpretation of Treaties in the light of the Judgment on Preliminary Objections in the case between Somalia v. Kenya¹

La aplicación de las reglas sobre interpretación de los tratados a la luz de la sentencia sobre excepciones preliminares en el caso entre Somalia v. Kenia

Francisco Lertora Pinto

franciscolertora@gmail.com

Abogado. Licenciado en Ciencias Jurídicas y Sociales de la Universidad de Chile.

Abstract: The judgment on preliminary objection was pronounced by the International Court of Justice on 2 February 2017. In this sentence, the Court rejected all the preliminary objections presented by Kenya. One of the most important task realized by the Court in every judgment is the work of interpretation of treaties. In the present case, the interpretation was relevant for the purpose of determinate both, why the Court has jurisdiction and why all the preliminary objections should be rejected. The interpretation according to the rules of the Vienna Convention on the Law of Treaties, in particular the Articles 31 and 32, are the purpose of the present study in relationship to its application in this case, particularly in the interpretation of the MOU.

Keywords: Interpretation of treaties, Vienna Convention (Articles 31 and 32), Memorandum of Understanding (MOU).

Resumen: La sentencia sobre excepciones preliminares fue pronunciada por la Corte Internacional de Justicia con fecha 2 de febrero de 2017. En ésta, la Corte rechazó todas las excepciones preliminares presentadas por Kenia. Una de las más importantes tareas que realiza la Corte en toda sentencia es el trabajo de interpretación de los tratados. En el presente caso, la interpretación fue relevante con el propósito de determinar por qué la Corte tiene jurisdicción y por qué todas las excepciones preliminares debían ser rechazadas. La interpretación acorde a las reglas de la Convención de Viena sobre el Derecho de los Tratados, en especial los artículos 31 y 32, son objeto del presente estudio en relación a su aplicación en este caso, particularmente en la interpretación del MOU.

Palabras claves: interpretación de los tratados, Convención de Viena (artículos 31 y 32), Memorándum de entendimiento (MOU).

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1. Introduction

On date 28 August 2014, Somalia filed in the Registry of the International Court of Justice (ICJ) an Application instituting proceedings against Kenya.² In this submission, Somalia stated that this case “concerns the establishment of the single maritime boundary between Somalia and Kenya in the Indian Ocean delimiting the territorial sea, exclusive economic zone (“EEZ”) and continental shelf, including the continental shelf beyond 200 nautical miles (“M”)”. Regarding to the specifics claims of Somalia, these are the followings:

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

Furthermore, Somalia requested to the Court in the written proceedings of the merits³, 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.”

Somalia founded the jurisdiction of the ICJ on the declarations made, pursuant to the dispositions of the Statute of the Court, in special the article 36, paragraph 2, by Somalia on 11 April 1963 and by Kenya on 19 April 1965.

For its part, Kenya presented two preliminary objections, the first regarding to the jurisdiction of the Court, and the second concerning the admissibility of Somalia´s Application.

In the first preliminary objection, the Government of Kenya point out that the ICJ hasn´t jurisdiction in this case under the reservation made by Kenya to the optional clause of jurisdiction and because both States are parties of the United Nations Convention on the Law of the Sea (UNCLOS), specifically by application of the Part XV of UNCLOS.

² To consult the case, see: Maritime Delimitation in the Indian Ocean (Somalia v. Kenya), Preliminary Objections. Available in: <http://www.icj-cij.org/en/case/161>

³ In the written proceeding, there are little differences in relationship with the claims in the Application.

For a better understanding of the above, is key to know the reservation made by Kenya, which says:

[T]he 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).⁴

Then, the position of Kenya is that they have agreements about methods of settlement of disputes. For this reason, it would not be applicable the optional clause of jurisdiction. These agreements would be the followings:

1) 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 (MOU).

2) Kenya 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”.

As a consequence of the above, Kenya request 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.

By its part, Somalia 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.

The votes of the judgment of the ICJ were very strong by their uniformity. In this respect, the vote on the first preliminary objection was how follows:

⁴ ICJ, Somalia v. Kenya, Judgment of 2 February 2017, para. 31. Available in: <http://www.icj-cij.org/files/case-related/161/161-20170202-JUD-01-00-EN.pdf>

- 1) In relationship to the MOU, the ICJ rejected the preliminary objection by fifteen votes to one.
- 2) In relationship to the Part XV of the UNCLOS, the ICJ rejected the preliminary objection by fifteen votes to one.

The second preliminary objection was rejected by fifteen votes to one. On the other hand, the approve of the jurisdiction to entertain the Application filed by the Federal Republic of Somalia, on 28 August 2014, and that the Application is admissible, by thirteen votes to three.

With this brief summary of the case, the present study aims to review the application of the rules on interpretation of treaties made by the ICJ in relationship with the first preliminary objection, specifically, related to the MOU.

2. The First Preliminary Objection: Analysis of the application of the rules on interpretation of treaties in the case of the MOU

The MOU is an agreement between Somalia and Kenya. This agreement has seven paragraphs, which are unnumbered. For the same reason that the Court had, the paragraphs of the MOU will be enumerated in order to do a better study of the text.

The agreement is the next:

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 7th day of April Two Thousand and Nine, in duplicate, in the English Language, both texts being equally authentic.⁵

For the interpretation of this treaty the ICJ started out by know whether the parties are or not parties of Vienna Convention on the Law of Treaties (Vienna Convention). Neither Somalia nor Kenya are parties to the Convention, but the ICJ has considered in previous cases that the Vienna Convention, and in particular the Articles 31 and 32, reflects customary international law.⁶ For this reason, it is applicable in the specie.

The applicable rules are the articles 31 and 32 of the Vienna Convention. The first set out the general rule of interpretation, and the second the supplementary means of interpretation. All the rules on interpretation are based in the good faith. The particular rules could be divided between objective and subjective rules. The article 31 point out 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.” The objective rules would be the text (*grammatical* interpretation), context (*logical-systematic*) and the object and purpose (*teleological*). The subjective rule would be the supplementary means of interpretation (Article 32). But all these elements should be applied as a whole, and not in order of preference. This situation is not pacific in doctrine, due to the fact that some scholars and some sentences of the Court, has said that the supplementary means of interpretation only have application when the text is not clear. However, the ICJ seems have change this paradigm and considered that the supplementary means of interpretation can be utilized for confirm to result of application of the rules of the interpretation of the Article 31. One example of this situation, is in the case between Georgia v. Russia, where the Court point out that: “In light of this conclusion, the Court need not resort to supplementary means of interpretation such as the *travaux préparatoires* of CERD and the circumstances of its conclusion, to determine the meaning of Article 22. However, the Court notes that both Parties have made extensive arguments relating to the *travaux préparatoires*, citing them in support of their respective interpretations of the phrase ‘a dispute which is not settled...’. Given this and the further fact that in other cases, the Court had resorted to the *travaux préparatoires* in order to confirm its reading of the relevant texts (see, for example,

⁵ ICJ, Somalia v. Kenya, Judgment, para. 37.

⁶ Some examples: 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, para. 33; Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, ICJ 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, ICJ Reports 2007 (I), pp. 109-110, para. 160 and Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, ICJ Reports 1994, pp. 21-22, para. 41; Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, ICJ. Reports 1996 (II), p. 812, para. 23.

Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, ICJ Reports 1994, p. 27, para. 55; Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Jurisdiction and Admissibility, Judgment, ICJ Reports 1995, p. 21, para. 40; Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, ICJ Reports 2002, p. 653, para. 53), the Court considers that in this case a presentation of the Parties' positions and an examination of the *travaux préparatoires* is warranted".⁷

For other hand, the treaty which goes to be interpreted should be interpreted as a whole, and not separated. The ICJ point out that: "[is] 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 purpose of the MOU".⁸

In the opinion of the same Court, "[t]he sixth paragraph of the MOU is at the heart of the first preliminary objection currently under consideration".⁹ But, this paragraph can't be interpreted without know the others dispositions of the MOU. This view is strongly criticized by the judge Bennouna in his dissenting opinion. For him, the Court is so clear when say that the VI paragraph is the "heart of the preliminary objection". So, why the Court need make a review of the others paragraphs of the MOU? In the dissenting opinion of the judge Bennouna, he stated out that the ICJ "should have focused on the interpretation of paragraphs 2 (definition of the dispute) and 6 (method of settlement for a delimitation dispute), which have given rise to the difference of views between the Parties".¹⁰ Then, if the ICJ said that the paragraph VI is the heart of the MOU, he considered that the approach of the Court of make an interpretation as a whole "is highly unusual, ultimately amounts to inverting the order set out in Article 31 of the Vienna Convention and even the scope of the general rule of interpretation enshrined therein. For it is a question of ascertaining "the ordinary meaning to be given to the terms of the treaty in their context", and thus beginning with the terms whose meaning poses difficulties and then, where necessary, placing those terms in their context. The Court decided from the outset that the sixth paragraph was, in itself, difficult to understand, without even taking the trouble to explain the reasons why this text was supposedly unclear, ambiguous, unreasonable or incompatible with other rules of international law".¹¹

Although it is true that the Court in the past has said that the ordinary meaning of the text prevails¹², it is also true that the process of interpretation often requires the interpreter to turn

⁷ Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, ICJ Reports 2011, para. 142.

⁸ ICJ, Somalia v. Kenya, Judgment, para. 65.

⁹ ICJ, Somalia v. Kenya, Judgment, para. 65.

¹⁰ ICJ, Somalia v. Kenya, Dissenting Opinion, p. 2.

¹¹ ICJ, Somalia v. Kenya, Dissenting Opinion, p. 2.

¹² For example: Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, ICJ Reports 1994; Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, ICJ Reports 2002.

to other means of interpretation in order to ascertain the true scope of the provisions of a treaty. For example, in the case about Sovereignty over Pulau Ligitan and Pulau Sipadan, 2002, the ICJ point out that: “In view of the foregoing, the Court does not consider it necessary to resort to supplementary means of interpretation, such as the *travaux préparatoires* of the 1891 Convention and the circumstances of its conclusion, to determine the meaning of that Convention; however, as in other cases, it considers that it can have recourse to such supplementary means in order to seek a possible confirmation of its interpretation of the text of the Convention”.¹³

It is important to keep in mind that in both cases the ICJ never said that the process of interpretation of a treaty should bypass the other elements of interpretation, but just of the supplementary means of interpretation. Even in the latter case, the ICJ points out that they should apply if is necessary to confirm its reading of the text.¹⁴

In the present case, the ICJ applied the Article 31 as the norm stated. Of course, the Court must know the context where the words of the treaty are found, and to do so, review the entire MOU. In this context, the ICJ is called to carry out this operation. And there are examples of this practice, like in the case of the Whaling in the Antarctic, where the ICJ point out that: “The Court notes that Article VIII is an integral part of the Convention. It therefore has to be interpreted in light of the object and purpose of the Convention and taking into account other provisions of the Convention, including the Schedule”.¹⁵

Therefore, the ICJ not to inverting the order set out in Article 31 of the Vienna Convention, as point out the Judge Bennouna, doing a correct application of the Article 31.

Furthermore, the ICJ considered that the title of the MOU is an important element for know what it was the real intention of the parties of the treaty. In opinion of the Court, “[t]he 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”.¹⁶ In other words, the MOU could be considered as an agreement on “no-objection”.

The interpretation of the Court on the paragraph six is crucial for the reason that according to Kenya a method of settlement of the Parties maritime boundary dispute with respect to that area was set out. The area of dispute is that established in the paragraph 2, namely, “[t]he 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

¹³ Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, ICJ Reports 2002, para. 53.

¹⁴ Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, ICJ Reports 1994, para. 55.

¹⁵ Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), Judgment, ICJ Reports 2014, para. 55.

¹⁶ ICJ, Somalia v. Kenya, Judgment, para. 70.

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’. So, the ICJ is clear when stated that there are “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”.¹⁷ In consequence, the MOU is not an agreement for the settlement of dispute over delimitation of all maritime spaces, but only for the continental shelf and extensive continental shelf, in the case that the MOU were considered as a method of settlement of dispute.

In the Kenya’s view, the MOU established the obligation to negotiate to reaching agreement on the maritime delimitation. Thus, for Kenya there would be a dispute settlement mechanism already agreed between the parties. For this reason, it would be applicable the reserve of jurisdiction.

Then, the Court must know whether the paragraph VI sets out a method of settlement of the Parties maritime boundary dispute with respect to that area. The Court turn to attention on the rules on interpretation of the treaties, in specific, with respect to the Article 31 (3) of the Vienna Convention, that point out that: “[a]ny relevant rules of international law applicable in the relations between the parties” should be taken into account, together with the context. So, being parties both States of UNCLOS, the ICJ fixes its attention on the Article 83 of UNCLOS.

The Article 83 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.

The ICJ considered that this article is very similar to the paragraph VI of the MOU. Therefore, the ICJ point out that:

¹⁷ ICJ, *Somalia v. Kenya*, Judgment, para. 86.

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 proceedings, preclude recourse to dispute settlement procedures in case agreement could not be reached.¹⁸

But for Kenya, the MOU established another requirement for to reach an agreement in the maritime dispute, and it is the temporal clause. This clause, according to Kenya, that is part of the paragraph six of the MOU, goes beyond of the Article 83, when say that “delimitation... shall be agreed... after the Commission has concluded its examination... and made its recommendations...”. For Kenya is clear that the word *after* can only have the meaning of be a temporal clause or temporal restriction, namely, only can be reached the agreement after the Commission give the recommendations to each of the States.

The interpretation of the Court is different. For the Court, “the sixth paragraph of the MOU can [not] 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”.¹⁹

The conclusion of the CIJ in the light of the rules of the interpretation contained in the Article 31 of the Vienna Convention is that:

[T]he 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

¹⁸ ICJ, *Somalia v. Kenya*, Judgment, para. 91.

¹⁹ ICJ, *Somalia v. Kenya*, Judgment, para. 95.

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.²⁰

For the confirmation of the above interpretation, the ICJ gives a further step and makes an application of the Article 32 of the Vienna Convention for the right interpretation of the MOU. This Article point out that:

Supplementary Means of Interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) Leaves the meaning ambiguous or obscure; or
- (b) Leads to a result which is manifestly absurd or unreasonable.

As it says the redaction of the Article, only is possible its recourse “in order to confirm the meaning resulting from the application of article 31”, or also, “when the interpretation according to article 31 leaves the meaning ambiguous or obscure; or leads to a result which is manifestly absurd or unreasonable”.

In this case, the ICJ resorts to supplementary means of interpretation for to confirm the meaning resulting from the application of Article 31. This situation is not new, for instance in the case between Peru v. Chile the ICJ point out that: “In light of the above, the Court does not need, in principle, to resort to supplementary means of interpretation, such as the *travaux préparatoires* of the 1952 Santiago Declaration and the circumstances of its conclusion, to determine the meaning of that Declaration. However, as in other cases [...] the Court has considered the relevant material, which confirms the above interpretation of the 1952 Santiago Declaration”.²¹ In the same sense, in the present case the ICJ point out that: “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”.²²

This method of interpretation is a subjective method. That means that it’s a historic interpretation. For this reason, the interpreter should go to the *travaux préparatoires* for understand the true sense of the words on the text.

²⁰ ICJ, Somalia v. Kenya, Judgment, para. 97.

²¹ Maritime Dispute (Peru v. Chile), Judgment, ICJ Reports 2014, para. 66.

²² ICJ, Somalia v. Kenya, Judgment, para. 99.

In opinion of the Court, and in the light of *travaux préparatoires* of the MOU, “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”.²³

The conclusion of the Court is as follows:

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.²⁴

3. Conclusion

The interpretation of the treaties is a complex process. For this reason, is not unusual that the Court should use the different available rules of interpretation, according to the particular case, and not only one.

Is clear that the Article 31 is the mandatory rule for does the interpretation of any treaty. In this sense, the Article 31 established in the *chapeau* that the next rules are “General Rule of Interpretation”, therefore all these rules have general application, namely, text, context and the object and purpose. Furthermore, all these methods of interpretation *shall* be used for the interpreter.

For the above reason, it seems that the ICJ did an accurate application of the Article 31 of the Vienna Convention. Ergo, the dissenting opinion of the Judge Bennouna, in my point of view, is not precise since is not logic and legal that the Court not should recourse to the context of an agreement, and neither, that the Court should does a strict application in the order of the rules of the interpretation contends in the Article 31.

²³ ICJ, Somalia v. Kenya, Judgment, para. 105.

²⁴ ICJ, Somalia v. Kenya, Judgment, para. 106.

In addition, in relation to the application of Article 32 of the Vienna Convention, the ICJ utilized this method of interpretation in order to confirm the interpretation was made in the light of the rules of the Article 31, and also, for understand what was the intention of the parties when they signed the MOU.

For all the previous arguments, I entirely agree that the ICJ did a correct application of the rules on interpretation of the treaties contained in the Vienna Convention.