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International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2016

Public sitting

held on Thursday 10 March 2016, at 10 a.m., at the Peace Palace,

President Abraham presiding,

***in the case regarding* Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands *v.* India)**

Jurisdiction

VERBATIM RECORD

ANNÉE 2016

Audience publique

tenue le jeudi 10 mars 2016, à 10 heures, au Palais de la Paix,

sous la présidence de M. Abraham, président,

***en l'affaire des* Obligations relatives à des négociations concernant la cessation de la course aux armes nucléaires et le désarmement nucléaire (Iles Marshall c. Inde)**

Compétence

COMPTE RENDU

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

Présents : M. Abraham, président
M. Yusuf, vice-président
MM. Owada
Tomka
Bennouna
Cançado Trindade
Greenwood
Mmes Xue
Donoghue
M. Gaja
Mme Sebutinde
MM. Bhandari
Robinson
Crawford
Gevorgian, juges
M. Bedjaoui, juge *ad hoc*

M. Couvreur, greffier

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Mr. John Burroughs, New York, United States of America,

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Mr. Peter Weiss, New York, United States of America,

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Mr. Lucas Lima, Ph.D. Candidate, University of Macerata, Italy,

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Ms Alison E. Chase, Attorney, Santa Barbara, United States of America,

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Ms Chetna Nayantara Rai,

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comme conseillers ;

Mme Chetna Nayantara Rai,

M. Benjamin Samson,

comme conseils auxiliaires.

Le PRESIDENT : Veuillez vous asseoir. L'audience est ouverte. Ce matin, la Cour entendra les plaidoiries de l'Inde pour le premier tour de la procédure orale en l'affaire des *Obligations relatives à des négociations concernant la cessation de la course aux armes nucléaires et le désarmement nucléaire (Iles Marshall c. Inde)*.

Je donne la parole à Mme Chadha, agent de la République de l'Inde. Madame, vous avez la parole.

Ms CHADHA: Thank you, Mr. President.

1. Mr. President, distinguished Members of the Court, it is an honour and privilege for me to appear before this Court as India's Agent and to open India's presentation.

2. Mr. President, I will give a brief overview of India's case while my colleagues will dwell in greater detail on the legal issues raised by the Marshall Islands in this preliminary objections proceeding.

3. On 24 April 2014, the Republic of Marshall Islands, "the RMI", submitted an Application against nine States in possession of nuclear weapons, including India, alleging a failure of these respondent States to honour their obligation to pursue in good faith, and bring to a conclusion, negotiations leading to nuclear disarmament in all its aspects under strict and effective international control. In its letter of 6 June 2014 to the International Court of Justice, India explained that there was no legal dispute between India and the RMI and objected to the jurisdiction of the Court in this matter.

4. At the outset, I would like to State that India's objection to the jurisdiction of the ICJ should not be construed as detracting from its deference to the Court. It should not also ***be*** seen as lack of its commitment to the subject-matter of the Application, namely nuclear disarmament. India is committed to the goal of a nuclear-weapon-free world, through global, verifiable and non-discriminatory nuclear disarmament. India believes that this goal can only be achieved through a step-by-step process that is underwritten by a universal commitment and an agreed global and non-discriminatory multilateral framework. Such commitment and framework does not exist today. In India's view this is a policy matter that needs to be resolved in the competent multilateral

forums with the participation of all stakeholders and cannot be adjudicated legally against a few States.

5. On Monday, the Co-Agent of the RMI presented a horrific picture of the Bravo Test but, Mr. President, the countries that tested nuclear weapons on their soil are not before the Court — and India is; India shares the RMI's concerns; but it had no role in that catastrophe. In fact its leadership was the first to condemn it.

6. The subject-matter of the present dispute brought before the Court by the RMI is the

> "failure of the Republic of India to honour its obligation towards the Applicant (and other States) to pursue in good faith, and bring to a conclusion, negotiations leading to nuclear disarmament. This obligation, according to RMI, arises for India under customary international law. It may be recalled that, RMI itself has stated in its Application, that the source of this obligation is set forth in Article VI of the NPT."[1]

7. Mr. President, India is a not a party to the NPT and its objections to the Treaty are well known and have been articulated in all the relevant forums. Therefore I will only note that, in the *Asylum* case, this Court had held that a custom cannot be invoked against a State when that State has repudiated a convention by refraining from ratifying it and that convention is at the origin of the customary rule that has crystallized between the Parties[2].

8. Coming back to the case, India's objection to the jurisdiction of the Court is based primarily on four arguments:

— First, that there is no dispute between the Parties;

— Second, even if the Court finds that there is a dispute, it could only be settled if, at least, all the States possessing nuclear weapons — and certainly more than one — were parties to the proceedings; this not being the case, the Court can only decline to exercise jurisdiction;

— Third, several reservations to India's optional declaration under Article 36 (2) bar the Court's jurisdiction; and

— Fourth, that any judgment rendered in these circumstances would be devoid of any concrete practical effect.

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[1] Application of the Marshall Islands (AMI), paras. 41-44.

[2] *Asylum (Colombia/Peru), Judgment, I.C.J. Reports 1950*, pp. 15-16.

Non-existence of a dispute

9. Mr. President, in the *Border and Transborder Armed Actions* case, this Court, speaking on the juridical qualification of the concept of dispute, had held that:

> "the Court, as a judicial organ, [has] . . . to establish, first, that the dispute before it is a legal dispute, in the sense of a dispute . . . being settled by the application and principles of international law, and second[], [whether] the Court has jurisdiction to deal with it, and that . . . jurisdiction is not fettered by any circumstance rendering the application inadmissible"[3]

which, of course, presupposes that the dispute in question is precisely defined. The RMI's Application and the Memorial in fact raise two different disputes with India. There is lack of clarity on the precise dispute that the RMI alleges it has with India. India's counsel, Mr. Salve, will elaborate further on this matter.

10. The existence of the dispute thus, on the date of filing the Application, is a primary condition for the Court to exercise jurisdiction. The first question therefore that needs to be asked is whether on the date the Application was filed by the RMI, a legal dispute existed between the Parties.

11. The RMI recognizes in its Memorial that for a dispute to exist between the Parties, there have to be some "exchanges" though, in its view, there is no necessity of formal discussions. However in the oral arguments it completely negates the requirement for prior negotiations. In this regard it may be noted that in *Belgium* v. *Senegal* this Court had held that it needs to be ascertained whether there was, at the very least, a genuine attempt to engage in discussions with the other party with a view to resolving the dispute and those discussions failed.

12. Mr. President, the RMI has never raised the alleged dispute with India bilaterally, either specifically or generally, in spite of the fact that there have been several meetings between the two States in the last few years. The RMI's reference to the general statement in the Nayarit conference is what it describes as "clear evidence that the RMI had raised a dispute with each and every one of the States possessing nuclear weapons, including with India"[4]. This statement, made in February 2014, two months before the RMI filed its Application, is actually of no help to the RMI as the position of the parties at that conference regarding the need for nuclear disarmament actually

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[3] *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 91, para. 52.

[4] Memorial of the Marshall Islands (MMI), para. 18.

coincided. Further, the RMI itself acknowledges, India has always been a strong supporter of the necessity of nuclear disarmament[5].

13. Therefore in reality there is no dispute between the Parties on the subject-matter of the relief being sought from the Court.

Absence of key parties

14. Further, even if the Court were to find that the dispute as identified in the RMI's Memorial exists, the Court would nonetheless lack jurisdiction since the other indispensable parties are not taking part in the proceedings. The relief that the RMI seeks from the Court is only amenable to resolution through a multilateral effort and cannot be enforced bilaterally.

15. The RMI's argument, based on the alleged *erga omnes* character of Article VI of the NPT — a treaty obligation on which India, as a non-party to the NPT and as a persistent objector to that treaty, does not take a position — also does not help it since it also clearly demonstrates that this issue is definitely not bilateral.

16. In the *East Timor* case, the ICJ made it clear that:

> "the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things. Whatever the nature of the obligations invoked, the Court could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case. Where this is so, the Court cannot act, even if the right in question is a right *erga omnes*."[6]

17. Therefore, the *erga omnes* character of the allegedly violated norm cannot be a ground for establishing the jurisdiction of the Court against States who are not before the Court and thus not a party to the dispute. A unilateral direction to India to carry out negotiations without the same decision being equally applicable to other States would be meaningless.

18. The nuclear disarmament régime therefore necessarily has to be the subject-matter of a multilateral treaty. Unless all the nuclear and other States participating in negotiations on nuclear disarmament arrive at a consensus, global nuclear non-proliferation and disarmament cannot be achieved.

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[5]Memorial of the Marshall Islands (MMI), para. 19.

[6]*East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 102, para. 29.

India's reservations bar jurisdiction

19. Mr. President, India's 1974 declaration under Article 36 (2) accepting compulsory jurisdiction of the Court contains several reservations. Some of these exclude the jurisdiction of the Court in the present proceedings.

20. This Court has held that the reservations define the parameters of the State's acceptance of the compulsory jurisdiction of the Court[7]. According to the RMI while both Parties have made reservations to their respective declarations under Article 36 (2), a plain reading of the text of these two declarations makes clear that neither of those two declarations places a limit on the Court's jurisdiction in relation to the present case[8].

21. However India contends that the RMI's claims against India are excluded from the jurisdiction of the Court in view of several reservations to its 1974 declaration which have been numbered in India's Counter-Memorial for ease of reference. Reservations 4, 5, 7 and 11 take the present case outside the purview of the jurisdiction of the Court. India's counsel will elaborate on these reservations in our pleadings.

Order of pleadings

22. Mr. President, India's pleadings will be presented in the following manner.

23. Mr. Amandeep Singh Gill, Co-Agent of India, in his presentation will highlight some basic facts on nuclear disarmament, India's nuclear policy and its commitment to global nuclear disarmament.

24. Mr. Harish Salve will in his first pleadings highlight the inconsistencies in the RMI's Application and the Memorial to show absence of any real dispute between the Parties and the RMI's abuse of process.

25. Then, Professor Pellet will deal successively with the absence of any dispute between the Parties concerning the subject-matter of the dispute brought by the RMI before the Court, the effects of the "*Monetary Gold* principle", and the absence of practical consequences a judgment on the merits of the case would have.

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[7] *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998,* pp. 452-453, para. 44.

[8] MMI, para. 27.

26. Mr. Salve will then return to expound on India's reservations contained in its optional declaration that bar the jurisdiction of the Court in this matter.

Thank you, Mr. President. May I now request you to give the floor to my colleague and Co-Agent, Mr. Amandeep Singh Gill.

Le PRESIDENT : Merci, Madame. Je donne la parole à M. Gill, coagent de la République de l'Inde.

Mr. GILL:

1. Mr. President, distinguished Members of the Court. It is an honour to address the ICJ on behalf of the Government of India. At this stage, I would like to place before the Court in three parts some essential facts regarding nuclear disarmament and India's positions thereon. I am fully aware that this hearing is on jurisdiction and admissibility; it is not on the merits of the case. However, these facts would allow the Court to appreciate the substantive context of the arguments that will follow on jurisdiction and admissibility.

Disarmament and United Nations forums; plural nuclear landscape

2. Disarmament is a Charter responsibility of the United Nations. Article 11, Article 26 and Article 47 (1) of the Charter provide a role for the United Nations General Assembly, the United Nations Security Council and its Military Staff Committee on "the principles governing disarmament", and "plans" related to the establishment of a system for the "regulation of armaments". Although termed pre-atomic, the Charter presaged two sets of forums to deal with nuclear disarmament — universal and deliberative to deal with nuclear disarmament principles, and, second, restricted and purposeful to focus on actual negotiations in the presence of all the key stakeholders. When the 51-member General Assembly met for the first time in early 1946 in London, its very first resolution (General Assembly res. I (I) of 24 January 1946) established the United Nations Atomic Energy Commission comprising of the 11 members of the United Nations Security Council plus Canada and gave it the urgent task of making specific proposals for the elimination from national armaments of atomic weapons and all other major weapons of mass destruction.

3. This broad scheme is reflected today in the multilateral forums dealing with nuclear disarmament. The first Special Session on Disarmament of the United Nations General Assembly (also known as SSOD-I) held in 1978 adopted by consensus a Final Document that created the current triad of forums entrusted with nuclear disarmament. The first leg of this triad is a universal deliberative body, the United Nations Disarmament Commission, to discuss principles and approaches to conventional and nuclear disarmament; the second leg is the First Committee of the United Nations General Assembly, to debate broader issues of disarmament and international security in a universal setting that brings forth the broader political and security context of disarmament through non-binding decisions and resolutions such as the resolution on the ICJ Advisory Opinion; and finally, this disarmament triad consists of the Conference on Disarmament (CD) in Geneva, a 65-member, consensus-ruled negotiating forum to negotiate legally binding instruments. The CD, which has all the "militarily significant States" including all the nine States possessing nuclear weapons is the international community's "single multilateral negotiating forum". It has on its agenda a specific item titled "cessation of the nuclear arms race and nuclear disarmament". Other forums, specific to treaties, such as the Review Conferences of the NPT are *ad hoc*, deliberative and only implicate the States parties to those treaties. This diverse landscape of differential constraints is the main characteristic of the current nuclear order. The RMI acknowledges this in fact by submitting nine Applications in respect of the five permitted to possess nuclear weapons by the NPT, the three who have never signed the NPT and are thus under no obligation not to possess nuclear weapons and one that was party to the NPT but now considers itself not bound by the treaty's obligations.

4. Mr. President, Members of the Court, the first Special Session of the United Nations General Assembly on Disarmament (SSOD-I) also recognized that together with other "militarily significant States", the nuclear-weapon States have the primary responsibility for nuclear disarmament, and it is important therefore to secure their active participation. It also recognized that disarmament is the responsibility of all States and that all States have the duty to contribute to efforts in the field of disarmament. This is natural since in addition to the States having tested and declared possession of nuclear weapons, there are States which rely on the extended deterrence provided by nuclear weapons — at current count this includes the 28 members of NATO and

countries such as Japan, Republic of Korea (ROK) and Australia in the Asia-Pacific — as well as States that have the advanced nuclear fuel cycle capabilities which would need to be monitored and verified in any global and verifiable nuclear disarmament and non-proliferation instrument.

India's contribution to nuclear disarmament

5. India has been closely associated with the multilateral construction of the idea of nuclear disarmament. It was the Indian Prime Minister, Pandit Jawahar Lal Nehru, who was the first leader to give a call on 2 April 1954 for negotiations for the prohibition and elimination of nuclear weapons and a "stand still" agreement to halt nuclear testing in the interim[9]. This was when thermonuclear weapons were being tested over ground including unfortunately on the soil of the Republic of the Marshall Islands. It was on the combined urging of India and Canada in 1961 that the Soviet Union and the United States became co-chairs of the first standing negotiating forum on nuclear disarmament — the Eighteen Nation Disarmament Committee, precursor to the CD of today. It was India, again, along with a group of non-aligned countries that inscribed the item on "non-proliferation of nuclear weapons" on the agenda of the United Nations General Assembly in 1965 and put forward the idea of an international non-proliferation agreement under which the nuclear-weapon States would agree to give up their arsenals while other countries would refrain from developing or acquiring nuclear weapons.

6. It is another matter that instead of genuine non-proliferation, whereby the nuclear-weapon States would commit to stopping vertical proliferation while non-nuclear-weapon States would commit to halting horizontal proliferation, what followed after the conclusion of the NPT in July 1968 was an acceleration of the nuclear arms race and a massive build-up of arsenals. A discriminatory paradigm emerged instead of a balance of rights and obligations. India's position on the NPT has been consistent right from the time of its negotiation and India's objections to the treaty — discriminatory, unmindful of India's national security concerns, ineffectual on nuclear disarmament — as laid out in the Annexures to the Indian Counter-Memorial are a matter of record. In particular I would like to draw the attention of the Court to Annex 20 of India's Counter-Memorial in which Ambassador Azim Hussain describes eloquently why India considers

[9]Statement by Prime Minister Nehru in the Lower House (Lok Sabha) of the Indian Parliament, 3 Apr. 1954.

Article VI of the NPT to be deficient and how it cannot be considered to be creating a juridical obligation. India's position on the NPT has not changed and this position is reflected in India's voting on resolutions at the United Nations General Assembly and in formal statements in India's parliament and at United Nations forums, thus clearly establishing that India has persistently and openly expressed dissent to this instrument over the past five decades.

7. Mr. President, India's nuclear programme is one of the oldest in the world and India's was the first reactor to go critical in Asia in 1956. Apart from the four then nuclear-weapon States, India was the only country in 1965 with a chemical reprocessing plant that could separate significant quantities of plutonium. This was followed by India's first nuclear power plant in 1969. Among the nuclear-weapons States, India's nuclear programme is unique in being technology driven rather than weapons driven.

8. Historically, there has been a consensus in India on nuclear issues that has revolved around support for universal and non-discriminatory global nuclear disarmament and safeguarding of India's security interests in a nuclearized world through the guarding of India's options and capabilities. I have mentioned Pandit Nehru's lead on "stand still" in 1954 and India's proposal for a genuine non-proliferation instrument in 1965. India stayed away from the NPT but continued to contribute to efforts on nuclear disarmament through initiatives at the United Nations such as the resolution tabled since 1982 on a Convention on the Prohibition of Use of Nuclear Weapons. It demonstrated a capability in May 1974 but exercised unparalleled restraint in testing for 24 years even as testing continued around the globe and proliferation deepened India's national security concerns. In 1988, India presented an action plan for the complete elimination of nuclear weapons in phases within a specified time frame[10]. If implemented, the plan would have rid the planet of nuclear weapons by now.

9. Even when India declared itself a nuclear-weapon State in 1998, India's commitment to nuclear disarmament, a basic tenet of its foreign policy, was reiterated at the highest level solemnly in parliament and in the United Nations General Assembly, where Prime Minister ***Vajpayee*** invited all States, in particular nuclear-weapon States, to join India to arrive at an agreement for a phased

[10]Counter-Memorial of India (CMI), Ann. 4.

programme for the elimination of all nuclear weapons[11]. When India's doctrine was finalized in 2003 and elements of this nuclear doctine released in the public domain, commitment to the goal of a nuclear-weapon-free world through global, verifiable and non-discriminatory nuclear disarmament was one of these elements[12]. India is in fact the only nuclear-weapon State committed to the negotiation of a Nuclear Weapons Convention that would prohibit and ban nuclear weapons on the lines of what has been done for chemical weapons through the global, non-discriminatory and verifiable instrument that the Chemical Weapons Convention is and whose implementation is being overseen a short distance from here. India is also one of the two nuclear-weapon States committed to no-first-use of nuclear weapons, a posture respectful of the 1996 Advisory Opinion of the ICJ and in line with our tradition of restraint and responsibility. Our resolution on "Reducing Nuclear Danger" tabled at the United Nations General Assembly since 1998 calls for a review of nuclear doctrines and proposes a number of measures to reduce the risk of unintentional and accidental use of nuclear weapons. In 2002, India took the lead on a resolution on WMD Terrorism highlighting the risks of non-State actor access to nuclear materials and technologies and calling for international co-operation to thwart these risks. In 2006, India submitted a Working Paper on Nuclear Disarmament at the United Nations General Assembly and followed up by introducing it in the Conference on Disarmament in 2007[13]. The Paper lists a set of practical measures for working towards the goal of a nuclear-weapons-free world. In 2009, India joined consensus on a programme of work in the Conference on Disarmament that included negotiations on a treaty to ban the production of fissile material for nuclear weapons and other nuclear explosive devices without prejudice to India's priority of negotiations on nuclear disarmament. As late as January 2015, India extended support to a programme of work at the CD that includes commencement of negotiations on a Comprehensive Nuclear Weapons Convention in the Conference on Disarmament, which is the designated international negotiating forum[14].

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[11]CMI, Ann. 5; speech by Prime Minister Vajpayee at the UN General Assembly on 24 Sep. 1998.

[12]CMI, Ann. 24.

[13]CMI, Ann. 1.

[14]Statement at the CD Plenary by Ambassador D. B. Venkatesh Varma, 27 Jan. 2015.

10. Mr. President, at a time when there is a lot of divisiveness in the debates on nuclear issues, India calls for unity and maintains that nuclear disarmament can be achieved through a step-by-step process underwritten by a universal commitment and an agreed global and non-discriminatory multilateral framework. We have also called for a meaningful dialogue among all States possessing nuclear weapons to build trust and confidence and to reduce the salience of nuclear weapons in international affairs and security doctrines. We believe that increasing restraints on the use of nuclear weapons would reduce the probability of their use — deliberate, unintentional or accidental and this process could contribute to the progressive de-legitimization of nuclear weapons, an essential step for their eventual elimination, as has been the experience with chemical and biological weapons. It is clear from the foregoing that India, perhaps uniquely among the nuclear-weapon States, has had a consistent and coherent view on nuclear disarmament and has never shied away from engaging actively in international forums with a view to advancing towards the goal of a nuclear-weapon-free world. It is ironic, indeed perverse, that India should be here at this tribunal in this manner to speak about its commitment to nuclear disarmament. For India has been unwavering in its commitment to the goal of universal, non-discriminatory, verifiable nuclear disarmament and the complete elimination of nuclear weapons in a time-bound manner.

No dispute; global disarmament cannot be litigated

11. In closing, I would like to reiterate that there is no dispute between the Republic of the Marshall Islands and India. Annex 9 to India's Counter-Memorial shows without the shadow of a doubt that while India consistently voted for, in fact even co-sponsored, the resolution on the Advisory Opinion of the ICJ calling upon "all States immediately to fulfil that obligation by commencing multilateral negotiations leading to an early conclusion of a nuclear weapons convention prohibiting the development, production, testing, deployment, stockpiling, transfer, threat or use of nuclear weapons and providing for their elimination", the Republic of the Marshall Islands mostly abstained and once even voted "No" on that resolution. This underlines like no other fact the contrived nature of this dispute. Likewise, the RMI argument that its statement at the Conference on Humanitarian Consequences of Nuclear Weapons in Nayarit in February 2014

raised a dispute with each and every one of the States possessing nuclear weapons, including India, actually underlines the absence of a dispute. India was present at that Conference unlike the NPT nuclear-weapon States and stated on record its support for nuclear disarmament and its commitment to the complete elimination of nuclear weapons in a time-bound, universal, non-discriminatory, phased and verifiable manner. We agreed with the RMI in substance if not in semantics on the need to move towards "an effective and secure disarmament". The question of a dispute does not arise.

12. Finally, Mr. President, global nuclear disarmament by its very nature cannot be litigated between two States or among a handful of States; it is a goal that has to be supported by all States; it has to be negotiated in the presence of and with the active participation of all the relevant States, in particular States whose interests are specially affected. As I have shown in the first part of my presentation, this essential fact is recognized in the United Nations Charter and is implicit in the disarmament machinery established by consensus by the international community. This essentiality is also recognized in India's position that the first step toward a nuclear-weapons-free world is a universal commitment and an agreed global and non-discriminatory multilateral framework. We remain ready to work for this noble goal in the designated multilateral forums.

13. Mr. President, I thank you for your patience. May I request you now to invite Mr. Harish Salve to make his presentation?

Le PRESIDENT : Merci. Je donne à présent la parole à M. Salve.

Mr. SALVE: Honourable President, esteemed Members of the Court, I am indeed honoured to appear in this Court for the first time and I am privileged to represent my country, India, in these proceedings.

PART I
OPENING REMARKS

1. Mr. President, India is the only State possessing nuclear weapons that has co-sponsored and that votes for the United Nations General Assembly resolution on the "Follow-up to the advisory opinion of . . . [this Court] on the legality of the threat or use of nuclear weapons."[15]

[15]Counter-Memorial of India (CMI), Ann. 8.

2. The Co-Agent has just quoted the resolution that "calls upon all States to immediately commence multilateral negotiations leading to an early conclusion of a nuclear weapons convention prohibiting the development, production, testing, . . . of nuclear weapons".

3. India has consistently voted for and sponsored the resolution aforesaid, the Marshall Islands either voted against or abstained on nine occasions, and it voted in favour of the resolution only once.

4. And yet, surprisingly, I am standing here, Sir, to defend India in an application that not only alleges that India has participated vigorously in the nuclear arms race but that India is remiss in its obligations to negotiate in good faith and conclude treaties for nuclear disarmament.

5. As I will endeavour to show, Sir, India and the Marshall Islands are fully aligned on the need for elimination of nuclear weapons. There was no occasion for the Marshall Islands to initiate these proceedings against India. But yet it has chosen to do so. This is why, Professor Pellet and I will endeavour to show that the dispute is artificial and there is really no reason or basis to invoke the jurisdiction of the Court.

6. I will in my first part, address the Court on the following issues:

(i) First, that the proceedings and their conduct is an abuse of process.

(ii) Secondly, that there is no real dispute between India and the Marshall Islands, and

(iii) Thirdly, that there was no prior notification of the dispute by the Marshall Islands.

My address on the second issue, about the absence of a real dispute, will be limited to only two facets. I am sharing the advocacy with Professor Pellet on this issue.

7. Professor Pellet will then address you on three issues:

(i) The absence of dispute between the Parties.

(ii) The absence of indispensable parties — that is, the *Monetary Gold* principle.

(iii) The absence of any practical consequences of any judgment on the merits.

8. I will then again, Sir, take the floor to address you on the four reservations on account of which, India claims, that this Court lacks jurisdiction. My opening address should take less than 50 minutes. Professor Pellet will take less than 40 minutes and my closing address shall be not more than 35 minutes.

I. ABUSE OF PROCESS

A. Vacillation in the Marshall Islands' formulation of the dispute

9. The course of the proceedings, Mr. President, leaves no manner of doubt that the entire venture has been an abuse of process. The proceedings were initiated by an application that raised various disputes, and sought remedies and relief far beyond those that would flow if this Court were to accept that paragraph 2 (F) of the *dispositif* in the Advisory Opinion of the Court[16] reflected a principle of customary international law. The Application, Mr. President, was based on a far broader principle of customary international law.

10. The Memorial failed to set out facts and law in support of the broad allegations in the Application that India's actions, by way of what was described as a quantitative build up and a qualitative improvement of its nuclear arsenal, violated customary international law. On the contrary, the Memorial stated that the only dispute that arises relates to India's alleged inaction in the matter of negotiating treaties for disarmament.

11. In the course of submissions, some of the counsel appearing for the Marshall Islands have supported the thesis of the Memorial as to the limited remit of the dispute. Other counsel have placed reliance on the allegations that relate to India's alleged actions in relation to its nuclear weapons programme, and have categorically asserted that they continue to seek the declarations and the order sought in the Application.

12. Although on reading the Memorial it appeared that the Marshall Islands had scaled down its case, it is now apparent that this is a carefully crafted duplicity, which I call an abuse of the process. It is clear that the Marshall Islands has no real dispute with India, but it seeks to sustain its position on the jurisdiction of the Court by resorting to contradictory positions.

13. The key disputes raised in the Application — and on which reliance has now been placed in oral submissions — were unambiguously abandoned in the Memorial. These disputes can be categorized — for the sake of clarity — into firstly those:

(i) Arising out of allegations relating to actions by India, such as its alleged quantitative increase and qualitative improvement of nuclear weapons, and its vertical proliferation, etc. — which allegations I shall refer to as India's nuclear weapons programme.

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[16] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, para.105.

(ii) Secondly, there were allegations of inaction — failure to stop further alleged advancement of the alleged nuclear weapons programme and to take steps to unilaterally disarm itself, which I shall refer to as unilateral disarmament, and

(iii) Thirdly, the failure to negotiate, in good faith, and bring to a conclusion, multilateral treaties for nuclear disarmament, which I shall refer to as negotiating disarmament.

14. The Memorial abandons the allegations that stem from the alleged nuclear weapons programme and the failure to resort to unilateral disarmament, and confines itself to those relating to the alleged lapses in negotiating disarmament.

15. Paragraph 47 of the Memorial states:

> "*Ex abundanti cautela*, it can be added that, more broadly, this dispute does not concern the question of India's right to possess a nuclear arsenal or to use nuclear weapons in self-defence. The present dispute, as defined in the Marshall Islands' Application, is about whether India has complied and is complying with its obligation to pursue in good faith, and bring to a conclusion, negotiations leading to nuclear disarmament in all its aspects under strict and effective international control."

16. This assertion is made in the context of the Marshall Islands' reply to India's challenge to jurisdiction based on reservation 4. The Memorial fails to state the basis on which the declarations and the order sought in the Application could be sustained on this formulation of the dispute between the Parties.

17. Counsel defending the challenge to jurisdiction on the basis of some of the reservations relied on the allegations relating to the alleged nuclear weapons programme, and counsel refuting India's submission that no purpose would be served by entertaining the Application, made it clear that the Marshall Islands continues to press for all the remedies by way of declarations and the order sought in the Application.

18. Mr. President, Members of the Court, an analysis of the Application and the Memorial will expose this duplicity.

B. Rules of the Court establish a clear procedure

19. Article 38 (1) requires proceedings to be instituted before this Court "by means of an application addressed as specified in Article 40, paragraph 1, of the Statute".

20. Article 40, paragraph 1, of the Statute requires cases to be brought before the Court by a written application addressed to the Registrar and requires that "the subject of the dispute and the parties . . . be indicated".

21. Subparagraph (2) of Article 38 sets out three distinct elements which must be found in an application presented to the Court and sets three different standards for each of them.

22. The three elements are:

(i) A statement as far as possible of the legal grounds on which the jurisdiction of the Court is to be based.

(ii) A statement of "the *precise nature* of the claim".

(iii) A "succinct statement of the facts and grounds on which the claim is based".

23. These Rules set out the rubric of the pleadings with differing emphasis. The application needs to specify the *precise nature* of the claim — the use of the word *precise*, I submit, is significant. The legal grounds need not exhaustively be set out in the first instance, for they are to be set out *as far as possible*. The narration of the facts and the grounds on which the claim is based — at the stage of the application — needs to be *succinct*.

24. There is a duality in the hearing procedure followed by the Court — the written and the oral. The Memorials and Counter-Memorials are part of the written procedure. Under Article 45, the Memorials and the Counter-Memorials are considered as a part of the pleadings "in a case begun by means of an *application*".

25. Article 49 of the Rules requires a Memorial to contain a statement of the relevant facts, a statement of law and the submissions. Unsurprisingly, a Memorial need not restate the claim as it is to set out the facts and the law *in extenso* in support of the claim already made in the Application. Mr. President, Members of the Court, in my submission, the Memorial supports and supplements the claim — it cannot be allowed to supplant the claim.

26. The Rules have been described by this Court, in *Republic of Guinea* v. *Democratic Republic of the Congo* as being "essential from the point of view of legal security and the good administration of justice"[17].

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[17] *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010 (II)*, p. 656, para. 38, recounting the observation in *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 267, para. 69.

27. The Rules are, in the ultimate analysis, procedural and must serve the cause of justice, but at the same time the Rules designed to govern adversarial proceedings, and which rules have stood the test of time, cannot be bypassed with disdain. Where the consequence of laxity is an attempt to create confusion as to the subject-matter of the dispute itself, so as to be able to raise contradictory arguments so as to somehow sustain jurisdiction, this breach assumes serious overtones, and the course of the present proceedings demonstrates the hazards of taking such serious liberties with the established procedure.

28. The Application proceeds on the premise that customary international law *mandates* a cessation of the nuclear race, and mandates disarmament — and negotiations of treaties flow from these basic obligations. The Application, read holistically, appears to argue that the need to enter into good faith negotiations and to conclude treaties is a route to eliminate nuclear weapons and achieve disarmament, and thus is a vital step to comply with the customary obligation of cessation of the nuclear race and nuclear disarmament. It goes on to suggest that the obligation of unilateral disarmament also flows from customary international law. Reliefs sought flow from this fundamental formulation of obligations *erga omnes* to cease the production of nuclear weapons and thereby cease the nuclear arms race.

29. This approach of the Application is unabashedly abandoned in the Memorial — the obligation to negotiate that is asserted in the Application as a facet of the obligations under customary international law, is now made out to be *the* obligation and the Memorial argues that the dispute, and the ***only*** dispute relates to alleged lapses in negotiating disarmament.

30. The Memorial, Mr. President, Members of the Court, fails to tell us how the Marshall Islands would sustain the remedies sought in the Application if the dispute is only as formulated in the Memorial.

C. Analysis of the Application

31. In paragraph 2, the Application, while asserting that it is not an attempt to reopen the question of the legality of nuclear weapons, states that "the focus of this Application is the failure to fulfil the obligations of customary international law with respect to cessation of the nuclear arms

race at an early date and nuclear disarmament *enshrined in* Article VI of the NPT and declared by the Court".

32. Paragraph 6 of the Application refers to "underlying claims" as those arising from India being in continuing breach of its obligations under customary international law, *including specifically* its obligation to pursue in good faith negotiations to cease the nuclear arms race at an early date, as well as to pursue in good faith negotiations leading to nuclear disarmament in all its aspects under strict and effective international control; and in continuing to breach its obligation to perform its international legal obligations in good faith. The latter set of allegations of breach of the obligation to perform its international obligations in good faith, are explained in the last section of the Application. These allegations, Mr. President, relate to actions in the matter of India's alleged nuclear weapons programme, and they are not limited to its alleged inaction in the matter of negotiating disarmament.

33. Paragraph 13 of the Application alleges that India is taking actions to improve and expand its nuclear forces and to maintain them for an indefinite future.

34. Paragraph 14 alleges a breach of obligation under customary international law to pursue in good faith negotiations leading to nuclear disarmament, in particular by its actions by way of a quantitative build-up and qualitative improvement of its nuclear force.

35. *Paragraph 58 argues that a quantitative build-up and a qualitative improvement of nuclear forces is contrary to the objective of nuclear disarmament and is a breach of the obligation of customary international law.*

36. Paragraph 59 merits a quotation verbatim. It states:

> "The customary international law obligation of cessation of the nuclear arms race at an early date is rooted in Article VI of the NPT and resolutions of the General Assembly and the Security Council and is inherent in *the obligation of nuclear disarmament enunciated by the Court*. The Respondent is failing to comply with this obligation; on the contrary, it is engaged in all-out nuclear arms racing."

The allegation suggests that until such time as a treaty is arrived at, States are under an obligation *erga omnes* to pause their nuclear weapons programme, and a failure to do so violates customary international law. Untrue as these allegations are, they are qualitatively different from the assertion in the Memorial that the international law obligations are to engage in good faith negotiations and to conclude disarmament treaties — no less, but no more.

37. Paragraph 60 continues in the same vein and alleges — we say falsely — that India's conduct in quantitatively building up its nuclear forces and qualitatively improving and diversifying them, and planning and preparing to maintain them for an indefinite future is — in the Marshall Islands' words — "clear *evidence of India's ongoing breach* of the obligation regarding . . . cessation of the nuclear arms race at an early date".

38. Part B, commencing with paragraph 61, alleges breaches by India to perform its obligations in good faith. Paragraph 62 repeats what we say are false allegations relating to India's alleged engagement in quantitative build-up, diversification and qualitative improvement of its nuclear arsenal and states that — in the Marshall Islands' words — a "vertical nuclear proliferation that clearly conflicts with the Respondent's obligations of nuclear disarmament and cessation of the nuclear arms race at an early date". Paragraph 64 concludes by alleging, again in Marshall Islands' words, that "by engaging in conduct that directly conflicts with the obligations of nuclear disarmament and cessation of the nuclear arms race at an early date, the Respondent has breached and continues to breach its legal duty to perform its obligations under customary international law in good faith".

39. Two of the declarations sought by the Marshall Islands are based on what we say are false allegations. In substance they are:

(i) that India has violated and continues to violate its international obligations . . . by taking actions to quantitatively build up its nuclear forces, to qualitatively improve them, and to maintain them for the indefinite future . . . by taking actions to quantitatively build up its . . . forces, to qualitatively improve them, and . . . maintain them ***indefinitely*** for the . . . future;

(ii) that India has failed and continues to fail to perform in good faith its obligations under customary international law by taking actions to quantitatively build up its forces and to qualitatively improve them, and to maintain them for the future;

40. The Order that the Marshall Islands seeks — after these declarations — in the Marshall Islands' words is, "India to take all steps necessary to comply with its obligations under customary international law with respect to cessation of the nuclear arms race at an early date *and nuclear disarmament within one year of the Judgment, including* the pursuit, by initiation *if*

necessary, of negotiations in good faith aimed at the conclusion of a convention on nuclear disarmament in all its aspects under strict and effective international control".

41. The Memorial fails to support this case — on the contrary it argues against such a case by formulating principles of customary international law in a manner that completely undermines the Application to which I have just alluded.

42. The subject-matter of the dispute is a disagreement between the States on a point of law or fact. Whether there is a dispute, and if so, what the dispute is, is a matter for objective determination by the Court. In the *South West Africa* cases, this Court held that it has to assess whether the "claim of one party is positively opposed by the other"[18]. It is the claim and not the legal submissions in support of the claim which would delineate the contours of the dispute.

43. In *Fisheries Jurisdiction (Spain* v. *Canada)*, this Court referred to Article 40 (1) of the Statute and Article 38 (2) of the Rules — provisions which have been characterized as essential from the point of view of legal security and the good administration of justice — and came to the conclusion that there may be uncertainties with regard to the real subject-matter of the dispute, and the Court must for its objective evaluation give "*particular attention* to the formulation of the dispute chosen by the Applicant"[19].

44. Reading the Application as a whole, it cannot be gainsaid that the assertion in paragraph 2 of the Application, that it does not seek to reopen the issue of legality of nuclear weapons, is plainly untrue and is belied by the allegations in the paragraphs that follow. India submits that the characterization of India's actions in relation to its alleged nuclear weapons programme is founded on false assertions. But for the present hearing, it becomes necessary to examine the Application for what it says as, at this stage, the veracity of the factual allegations on controversial issues cannot be investigated. A reading of the Application would leave no manner of doubt that the dispute is not about the failure to negotiate treaties — the alleged shortcomings in compliance with the alleged obligation to negotiate disarmament treaties, but that is a facet of the alleged breach of the asserted principles of customary international law.

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[18] *South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328.

[19] *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 448, para. 30; emphasis added.

D. Memorial concedes the main dispute

45. The Memorial filed by the Marshall Islands concedes the principal dispute raised in the Application and it seeks to preserve the alleged failure to negotiate disarmament treaties in good faith as the *only* dispute.

46. When called upon by the Rules to state the law in support of the Application, the Memorial unsurprisingly draws back from the assertions of the principles of customary international law in the Application, and the interpretation placed upon the Advisory Opinion of this Court (*Legality of the Threat or Use of Nuclear Weapons*) found in the Application. Instead, it formulates the principle of customary international law as being limited to pursuing negotiations of disarmament in good faith and concluding treaties. The dispute is now limited to the alleged failure to negotiate and conclude disarmament treaties.

47. The reason for this is not far to seek. The Memorial fastens upon paragraph 2 (F) of the *dispositif* of the Advisory Opinion — and this appears to be the sheet anchor of the case of the Marshall Islands even in the oral submissions.

48. The Memorial attempts to shield this tectonic change in Marshall Islands' case under the argument that, for the present, it is not articulating the case on merits but is only dealing with jurisdictional issues. Nonetheless, called upon to formulate the dispute on account of India's challenges that there is no real dispute, the Memorial seeks to formulate the dispute, and the propositions of customary international law on which it bases this dispute abandon the case run in the Application.

49. There are some significant features of the Memorial that are worthy of mention.

(i) In contradistinction to paragraph 2 of the Application, paragraphs 2, 3, 6 of the Memorial describe the subject-matter of the Application as being based upon the obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament — no less but no more.

(ii) Paragraphs 13 and 15 of the Memorial suggest that the dispute between the Marshall Islands and India concerns India's alleged non-compliance with the obligation to pursue and bring to a conclusion negotiations leading to disarmament.

(iii) Having given up matters arising out of the allegations in relation to the alleged nuclear weapons programme and failure in the matter of unilateral disarmament, paragraph 19 of the Memorial is disingenuous; it refers to India's conduct as evidence of opposition to the Marshall Islands' claims only to support Marshall Islands' submission that a dispute has indeed arisen between the Marshall Islands and India.

(iv) In an abandonment of the assertions in paragraphs 59 to 62 of the Application that alleged a breach of customary international obligation in relation to India's alleged nuclear weapons programme and its failure to unilaterally disarm itself, the Memorial in paragraph 47 asserts that the dispute does not concern the question of India's right to possess a nuclear arsenal or to use nuclear weapons in self-defence. I have quoted it a moment ago. It said that "this dispute does not concern . . . India's right to possess a nuclear arsenal or to use nuclear weapons in self-defence".

50. A Memorial must, Mr. President, Members of the Court, justify invocation of the jurisdiction of the Court for the issues raised in the Application — it should not advance a disingenuous basis to distance itself from the Application to get past some of the jurisdictional challenges, keeping the disputes raised in the Application available at hand to meet other jurisdictional challenges, and if the jurisdiction is upheld, then to be able to run the case based upon the allegations in its Application. That the intention of Marshall Islands was to do this has become apparent from the oral submissions made and which I shall deal with shortly.

51. The issue of nuclear proliferation and nuclear disarmament raise questions of great sensitivity not only between nuclear weapon States but also equally affecting non-nuclear weapon States. The Advisory Opinion did not declare the possession of nuclear weapons a violation of international law. The Application does not suggest that after the Advisory Opinion of the Court, the principles of customary international law have been radically altered by the conduct of States — on the contrary it laments the failure of the world over the decades to find a solution leading to nuclear disarmament. And yet, the claim made in the Application alleges precisely that — it says that the production of nuclear arms and the failure to take unilateral measures of disarmament violate customary international law. The Memorial abandons this position.

52. India submits that the manner in which the Marshall Islands has conducted this case is in brazen violation of the procedural rules, and the consequence is that there are two parallel cases before the Court:

(i) one based upon allegations of breach by India of its alleged obligations under customary international law by its pursuit of its alleged nuclear weapons programme, and by its failure to take steps to unilaterally disarm itself;

(ii) the second case based upon the alleged rule of customary international law limited to the obligation to negotiate in good faith and conclude disarmament treaties, and India's alleged failure to discharge this limited obligation.

53. Having run these parallel cases, the Marshall Islands draws alternately upon one or the other to sustain its contentions in defence to India's challenge to the jurisdiction.

E. Oral submissions draw upon one or the other cases being run by the Marshall Islands to defeat the challenges to jurisdiction

54. The Agent and the Co-Agent of the Marshall Islands asserted that:

(i) the production of arms can never be justified;

(ii) the case against India is based on its conduct in the quantitative build up and qualitative improvement of its nuclear arsenal.

55. In replying to India's contention in the Counter-Memorial that there was only a contrived dispute, the Marshall Islands relied upon paragraphs 2, 6, and 64 of its Application.

56. Paragraph 64 of the Application states:

> "In short, by engaging in conduct that directly conflicts with the obligations of nuclear disarmament and cessation of the nuclear arms race at an early date, the Respondent has breached and continues to breach its legal duty to perform its obligations under customary international law in good faith."

Paragraph 64 refers to India's actions in the matter of its alleged nuclear weapons programme — not to India's alleged omissions in the area of negotiating disarmament treaties. This position is further clarified by reference to earlier paragraphs. I submit, Sir, paragraph 64 has to be read with paragraphs 60, 62 and 63 which allege that actions of India in relation to its alleged nuclear weapons programme and the fact that its plans and policies manifest an intention to rely on its nuclear arsenal for decades to come.

57. In defending India's challenge to the jurisdiction of the Court on the principle of *ratione temporis*, counsel relied on India's conduct post-1974 by way of, what we call, the falsely alleged affirmative actions of quantitative build-up and qualitative improvement of its nuclear weapons arsenal — apart from India's failure to negotiate.

58. In dealing with India's challenge to the jurisdiction of the Court, for want of presence of the other States — the *Monetary Gold* principle — counsel relied on allegations of quantitative build-up and qualitative improvement as being part of the focus of the Marshall Islands' claims, and argued that for this purpose the Marshall Islands does not need to prove any other act against any other State.

59. Finally, while dealing with India's contention that no legitimate purpose would be served in entertaining this Application, in oral submissions counsel asserted that the reliefs Marshall Islands seeks are the declarations and the order as set out in the Application.

60. However, when dealing with India's challenge based upon reservation 4, and its right to secure its defence, counsel submitted that all that Marshall Islands seeks is to enforce the obligation to negotiate a disarmament treaty, and that such a relief did not tread upon reservation 4.

61. India submits that the Memorial filed in this Court must have some sanctity — it must state the facts and the law in support of an application so that the respondent is put to notice of the case it has to meet. The manner in which the proceedings have been conducted has thrown all order to the winds. If the Marshall Islands be confined to its bold assertion in paragraph 47 of the Memorial, then:

(i) firstly, in my submission, Sir, all submissions in defence to the challenge to jurisdiction based on the assertions in the Application and also the remedies sought in the Application, would stand excluded. I have just mentioned some of the submissions that drew on the Application and departed from the Memorial;

(ii) secondly, the jurisdictional challenge would then have to be decided solely on the basis of the Memorial.

62. It would not be possible for the Court to do this rather involved exercise of recasting submissions to exclude those based upon the Application but conceded in the Memorial — the Rules do not require the Court to do this for salvaging a case presented in this fashion.

F. Conclusion

63. This course of proceedings, Mr. President, Members of the Court, has resulted in the Court being seised of an application which asserts that India's alleged quantitative build-up and qualitative improvement of its nuclear armoury is violative of customary international law, and suggests that India is indulging in a nuclear arms race (while not pursuing the path of negotiations for disarmament) and that India's actions are therefore violative of customary international law.

64. The Application sets out a slew of declarations and seeks an order on this hypothesis.

65. The Memorial concedes the point and alleges that the only principle of customary international law that the Marshall Islands relies upon is that enshrined in Article VI of the NPT and in paragraph 2 (F) of the *dispositif* of the Advisory Opinion of this Court. India does not consider it appropriate to enter into a discussion of this issue at this stage of the hearing of a challenge to the jurisdiction, and invites the Court to consider these points raised by the Marshall Islands on a provisional basis at this stage, *de bene esse*.

66. On the basis of the principles of law set out in the Memorial, and in particular on account of what is said in paragraph 47 of the Marshall Islands' Memorial and which I have quoted earlier, this Application should be dismissed as it does not raise a real dispute between the Parties on the interpretation of the principle of customary international law — as the Memorial acknowledges, there is indeed no such principle of customary law as would be necessary to sustain the Application and the remedies sought in the Application.

II. NO REAL DISPUTE BETWEEN THE MARSHALL ISLANDS AND INDIA

67. I now move to my second point: that there is no real dispute between the Marshall Islands and India. Professor Pellet will develop this point fully, but I only want to make two short submissions on this vital issue. The first relates to the failure to articulate a dispute with clarity, and the second to show that the Marshall Islands and India are aligned on the question of the need for negotiating a treaty that would lead to global disarmament.

68. My first point relates to the amorphous formulation of the real dispute. Assuming that there is a principle of customary international law that obliges States to negotiate in good faith and conclude disarmament treaties, it would be necessary for the Application and the Memorial to

contain at least two elements. In my submission, Mr. President, Members of the Court, the Marshall Islands should have told you:

(i) what are the steps under the principle of customary international law, as per their perception of the law, that States should take, and in which forum; and,

(ii) secondly, what are the steps that India has taken or failed to take, and in which forum, that render it in breach of its obligations.

69. It cannot be denied that there are some basic differences between the States that have bedevilled a nuclear disarmament processes. The Marshall Islands does not expostulate how customary law principle requires parties to address this and other fundamental differences which have prevented a consensus on the issue.

70. The Memorial — as indeed even the Application — is hopelessly vague and lacking in material particulars as neither of the elements that I have mentioned above find mention. A dispute must arise on concrete facts — the absence of concluded treaties cannot be treated as irrefutable evidence of the failure to negotiate. Lesser still would India's alleged nuclear weapons programme, during such time as global disarmament is not achieved, and nuclear weapons continue to exist and be deployed — represent India's failure to take steps to bring about global consensus on nuclear disarmament.

71. I do not propose to discuss the jurisprudence of the Court on what constitutes a dispute — but I do want to point out that the Memorial seeks to oversimplify the matter by suggesting that the fact that the Marshall Islands alleges, and India denies, that it is in breach of its obligations under customary international law, gives rise to a dispute that can and should be resolved by this Court.

72. The observations in the *Northern Cameroons* case which Professor Pellet will cite in detail, are, in my submission, apposite in the present case. Some of the factors that the Court would bear in mind while deciding this issue are as follows:

(i) The Marshall Islands acknowledges in its Memorial that India has always been a strong supporter of the necessity for disarmament.

(ii) In the conference in February 2014 held at Nayarit, the Indian statement resonated the views expressed by the Marshall Islands. In the very first paragraph of its statement, India

said "given the catastrophic humanitarian consequences of use of nuclear weapons, India has been unwavering in its support for nuclear disarmament and complete elimination of nuclear weapons . . ." India said "we believe that nuclear disarmament can be achieved through a step-by-step process underwritten by a universal commitment and an agreed global and non-discriminatory multilateral framework. We have called for a meaningful dialogue among all States possessing nuclear weapons to build trust and confidence and for reducing the salience of nuclear weapons in international affairs and security doctrines . . ." There is, indeed, no difference between the stand of the Marshall Islands and India on the need to bring about global elimination of nuclear weapons.

(iii) India's statements in February 2015 and July 2015, referred to in paragraph 14 of the Counter-Memorial, establish that there is indeed no difference on the general understanding for the need of a multilateral resolution of the nuclear problem.

73. India's conduct in the matter of nuclear disarmament is elaborately discussed in the Counter-Memorial based on India's stated position, information of which is available in public domain. I would invite the Court to consider, in this context, paragraphs 6-14 of that document. I would only mention one matter that is striking, and that is the position of the Marshall Islands, which I have already alluded to when I opened.

III. NO PRIOR NOTIFICATION OF THE DISPUTE BY MARSHALL ISLANDS — NO ATTEMPTS AT A BILATERAL NEGOTIATION WITH INDIA

74. The Marshall Islands in its statement made in February 2014 in the Second Conference on the Humanitarian Impact of Nuclear Weapons said "we urgently renew our call to all States possessing nuclear weapons to intensify efforts to address their responsibilities in moving towards an effective and secure disarmament". The statement alleged that the nuclear-weapon States were failing to fulfil their legal obligations under Article VI of the NPT and customary international law. This statement, Mr. President and Members of the Court, did not suggest that the Marshall Islands had engaged with India — or indeed any other country — on a bilateral basis — for this purpose.

75. Soon after its statement at Nayarit, the Marshall Islands on 24 April 2014 moved the Application in this Court. I have analysed the Application and the Memorial. I would only remind

the Court that the Memorial suggests that India has failed in discharging its obligation to negotiate in good faith and conclude a nuclear disarmament treaty.

76. The reasons for the failure to arrive at a consensus on issues that have divided the international community and rendered disarmament out of reach cannot be discussed today. Suffice it to say that unless such differences are resolved, nuclear disarmament will elude the global community. These differences cannot be examined on a country by country basis and thus there cannot be a *dispute* — as understood in the Statute and the Rules of this Court - between the Marshall Islands and one State.

77. A good indicia of whether there is a dispute between two States is to examine whether there was any attempted settlement by negotiations before the dispute is brought to the Court.

78. The Marshall Islands argues that the obligations to achieve disarmament are *erga omnes* binding on all States and that each State must take steps in this direction, and supports its position by suggesting that it is possible that negotiations may result in a bilateral treaty that could then become the basis for a larger global consensus — you heard that, Sir, in the submissions.

79. This submission ignores the lessons of history. But assuming that this suggestion was indeed true, the Marshall Islands then fails to identify what steps it has taken to arrive at a bilateral treaty with some other non-nuclear-weapons State or with India, or with the United Kingdom.

80. Professor Pellet will address you on the issue of attempted negotiations preceding an application in Court, but I would only like to make one point, Sir.

81. Whatever may be the jurisprudence, clearly where negotiations are possible, and designated fora are available and indeed engaged in the process, it would be premature to suggest that a dispute has arisen unless an attempt is made to resolve matters through the route of negotiation.

82. It is worth reminding ourselves, Sir:

(i) firstly, that the context in which jurisdiction is conferred by States under subparagraph 2 of Article 36 is reciprocity. In other words, there must in the first instance be a dispute between two States, both of which accept the jurisdiction of the Court under Article 36 (2); and

(ii) for there to be a dispute between two States, clearly there must be a claim by a State, repudiated by another, and a dispute which has been — to whatever degree — attempted to be resolved between the States.

83. We must remind ourselves, Sir, of what the PCIJ said in the *Free Zones* case "the judicial settlement of international disputes, with a view to which the Court has been established, is simply an alternative to the direct and friendly settlement of such disputes between the Parties"[20].

84. Implicit in the language of Article 36 (2) is the need for there to be more negotiations — however minimal —in which some claim is raised by one State, repudiated by the other, and an attempt albeit brief is made to resolve the dispute which has arisen. Mr. President, Sir, and Members of the Court, I would submit that States should not be encouraged to move this Court every time they have some problem with another State. A dispute arises when a claim is made — and this must be made bilaterally, not for the first time in an application presented to this Court.

85. Since the Marshall Islands has seriously argued that negotiations would be of great practical value for theoretically they may result in a bilateral treaty that could be at the core of a global consensus, let us not allow our imagination to boggle while considering this legal fiction. Continuing with this thought, it could be argued that the Marshall Islands should have made attempts to negotiate a treaty with one of its non-nuclear-weapon State neighbours — for maybe these negotiations may have resulted in a treaty which would then have shown the light to a beleaguered world. Admittedly it has not made any such effort. Mr. President, Sir, I would request you now, to allow Professor Alain Pellet to take the floor.

[20] *Free Zones of Upper Savoy and the District of Gex, Order of 19 August 1929, P.C.I.J., Series A, No. 22*, p. 13.

Le PRESIDENT : Merci. La Cour entendra la plaidoirie du Professeur Pellet après une pause de 15 minutes. L'audience est suspendue.

L'audience est suspendue de 11 h 15 à 11 h 30.

Le PRESIDENT : Veuillez vous asseoir. La parole est à M. le professeur Alain Pellet.

M. PELLET : Merci beaucoup.

ABSENCE DE DIFFÉREND, PRINCIPE DE L'*OR MONÉTAIRE* ET ABSENCE DE SUITES PRATIQUES D'UN ARRÊT SUR LE FOND

1. Monsieur le président, Mesdames et Messieurs les juges, quelle drôle d'affaire ! Certes, ce n'est pas la première fois qu'un Etat utilise le forum de la Cour à des fins politiques. Mais, en la présente occurrence, les apparences ne sont même pas sauves : il n'existe aucun litige entre les Iles Marshall et l'Inde, les autres Etats parties prenantes au prétendu différend global sont absents, et un arrêt sur le fond n'aurait strictement aucun intérêt pratique. Ce sont, Monsieur le président, les trois points que je vais développer successivement.

I. Absence de différend entre les Parties

2. Mesdames et Messieurs les juges, la première condition mise à l'exercice de votre compétence est qu'il existe un différend entre les parties. C'est tellement évident et votre jurisprudence est si bien établie à cet égard que j'hésite à insister ; mais les Iles Marshall contestent tant d'évidences que je ne puis, malheureusement, pas m'en dispenser complètement.

3. La Cour l'a rappelé avec force dans ses arrêts dans les affaires des *Essais nucléaires*, qu'elle a cités à plusieurs reprises dans des décisions plus récentes :

> «La Cour, comme organe juridictionnel, a pour tâche de résoudre des différends existant entre Etats. L'existence d'un différend est donc la condition première de l'exercice de sa fonction judiciaire ; on ne peut se contenter à cet égard des affirmations d'une partie car [et ici vous citez votre avis de 1950 dans l'affaire de

l'*Interprétation des traités de paix*][21] «l'existence d'un différend international demande à être établie objectivement» par la Cour.»[22]

4. Et, selon la formule de votre arrêt de 1962 dans les affaires du *Sud-Ouest africain* :

> «En d'autres termes, il ne suffit pas que l'une des parties à une affaire contentieuse affirme l'existence d'un différend avec l'autre partie. La simple affirmation ne suffit pas pour prouver l'existence d'un différend, tout comme le simple fait que l'existence d'un différend est contestée ne prouve pas que ce différend n'existe pas. Il n'est pas suffisant non plus de démontrer que les intérêts des deux parties à une telle affaire sont en conflit. Il faut démontrer que la réclamation de l'une des parties se heurte à l'opposition manifeste de l'autre.»[23]

Et je relève d'ailleurs que les Iles Marshall sont d'accord sur le principe : elles ont, à deux reprises, cité ces mêmes passages[24]. C'est sur l'application de ce principe, que nous divergeons : contrairement aux affirmations de l'autre Partie, dans la présente affaire, il n'y a eu ni réclamation des Iles Marshall ni opposition, qu'elle soit manifeste ou implicite, de l'Inde.

5. Certes, «l'existence d'un différend et la tenue de négociations [sont] par principe deux choses distinctes», mais, vous l'avez souligné dans *Géorgie c. Russie,* «les négociations peuvent aider à démontrer l'existence du différend et à en circonscrire l'objet»[25]. Comme l'a relevé la Cour permanente dès son deuxième arrêt, «avant qu'un différend fasse l'objet d'un recours en justice, il importe que son objet ait été nettement défini au moyen de pourparlers diplomatiques»[26]. Et c'est aussi ce qui ressort de l'article 43 des Articles de la Commission du droit international (CDI)

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[21] *Interprétation des traités de paix conclus avec la Bulgarie, la Hongrie et la Roumanie, première phase, avis consultatif, C.I.J. Recueil 1950*, p. 74.

[22] *Essais nucléaires (Australie c. France), arrêt, C.I.J. Recueil 1974*, p. 270-271, par. 55 ; *Essais nucléaires (Nouvelle-Zélande c. France), arrêt, C.I.J. Recueil 1974*, p. 476, par. 58. Voir aussi *Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Géorgie c. Fédération de Russie), exceptions préliminaires, arrêt, C.I.J. Recueil 2011 (I)*, p. 84, par. 30 et *Questions concernant l'obligation de poursuivre ou d'extrader (Belgique c. Sénégal), arrêt, C.I.J. Recueil 2012 (II)*, p. 442, par. 46.

[23] *Sud-Ouest africain (Ethiopie c. Afrique du Sud ; Libéria c. Afrique du Sud), exceptions préliminaires, arrêt, C.I.J. Recueil 1962*, p. 328. Voir aussi *Activités armées sur le territoire du Congo (nouvelle requête : 2002) (République démocratique du Congo c. Rwanda), compétence et recevabilité, arrêt, C.I.J. Recueil 2006*, p. 40, par. 90 ; *Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Géorgie c. Fédération de Russie), exceptions préliminaires, arrêt, C.I.J. Recueil 2011 (I)*, p. 84, par. 30 ; *Questions concernant l'obligation de poursuivre ou d'extrader (Belgique c. Sénégal), arrêt, C.I.J. Recueil 2012 (II)*, p. 442, par. 46.

[24] CR 2016/1, p. 30, par. 4 et p. 37, par. 21 (Condorelli).

[25] *Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Géorgie c. Fédération de Russie), exceptions préliminaires, arrêt, C.I.J. Recueil 2011 (I)*, p. 84, par. 30. Voir aussi *Questions concernant l'obligation de poursuivre ou d'extrader (Belgique c. Sénégal), arrêt, C.I.J. Recueil 2012 (II)*, p. 442, par. 46 ; *Obligation de négocier un accès à l'océan Pacifique (Bolivie c. Chili)*, arrêt du 24 septembre 2015, par. 26.

[26] *Concessions Mavrommatis en Palestine, arrêt n° 2, 1924, C.P.J.I. série A n° 2*, p. 15. Voir aussi *Droit de passage sur territoire indien (Portugal c. Inde), exceptions préliminaires, arrêt, C.I.J. Recueil 1957*, p. 148-149.

de 2001[27] : «l'Etat lésé qui invoque la responsabilité d'un autre Etat notifie sa demande à cet Etat»[28]. Et ce n'est certainement pas parce qu'il s'agirait de la violation d'une obligation *erga omnes*[29] que les Iles Marshall se trouveraient dispensées d'une telle formalité : dans l'article 48 de son projet, la CDI a pris soin de rappeler que les conditions posées par l'article 43 «s'appliquent à l'invocation de la responsabilité par un Etat en droit de le faire» lorsque «l'obligation violée est due à la communauté internationale dans son ensemble»[30].

6. Cette démarche s'imposait avec une force toute particulière dans la présente affaire, qui constitue, pour l'Etat requérant, un prétexte pour mettre en accusation l'ensemble des puissances nucléaires alors même que les positions de celles-ci sont fort diverses et que l'Inde, pour sa part, partage les préoccupations des Iles Marshall, comme elle l'a montré dans son contre-mémoire[31].

7. Pour illustrer mon propos, malgré la solennité de ce vénérable grand hall de justice, je vous propose, Mesdames et Messieurs de la Cour, un petit jeu de devinettes à base de citations.

— Qui a dit : «Given the catastrophic humanitarian consequences of use of nuclear weapons, [my country] has been unwavering in its support for nuclear disarmament and the complete elimination of nuclear weapons»[32] ? Les Iles Marshall ? Vous n'y êtes pas ! C'est l'Inde…

— Et qui a dit ceci: «We cannot accept the logic that a few nations have the right to pursue their security by threatening the security of mankind. It is not only those who live by the nuclear sword who, by design or default, shall one day perish by it. All humanity will perish»[33] ? Cela

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[27] Nations Unies, résolution 56/83 de l'Assemblée générale, «Responsabilité de l'Etat pour fait internationalement illicite», (12 décembre 2001).

[28] *Annuaire de la Commission du droit international*, 2001, vol. II, 2e partie, p. 119.

[29] Voir MIM, p. 11, par. 21.

[30] *Annuaire de la Commission du droit international*, 2001, vol. II, 2e partie, p. 126.

[31] CMI, p. 4-10, par. 6-14.

[32] Déclaration de l'Inde lors de la seconde conférence sur l'impact humanitaire des armes nucléaires, Nayarit (Mexique), 14 février 2014 (http ://www.mea.gov.in/Speeches-Statements.htm?dtl/22936/Statement_by_India_at_the_Second_Conference_on_the_Humanitarian_Impact_of_Nuclear_Weapons_at_Nayarit_Mexico).

[33] «A World Free of Nuclear Weapons : An Action Plan», déclaration du premier ministre indien Rajiv Gandhi lors de la troisième session spéciale de l'Assemblée générale concernant le désarmement, 9 juin 1988 (annexe 4 au contre-mémoire de l'Inde) ; également cité *ibid*.

aurait pu être les Iles Marshall – mais non ! C'est à nouveau l'Inde... ; et ce n'est qu'un exemple parmi de nombreux autres[34].

— Encore une devinette : «[We have] a particular awareness of the potentially dire consequences of nuclear weapons and in recent years [we have] enhanced [our] commitment to promoting greater global progress to nuclear disarmament»[35]. L'Inde aurait pu le déclarer — mais, cette fois, ce sont les Iles Marshall.

8. On pourrait, Monsieur le président, multiplier les exemples de déclarations de ce type pouvant être attribuées à l'une comme à l'autre Partie. J'ai retenu les deux premières — qui résument fort bien ce qui a été et continue d'être la politique de l'Inde — car elles ont été faites à l'occasion de la seconde conférence sur l'impact humanitaire des armes nucléaires tenue à Nayarit en février 2014 et à laquelle nos contradicteurs attachent une importance toute particulière[36]. C'est là, nous disent-ils curieusement, que les Iles Marshall auraient notifié à l'Inde l'existence d'un différend entre les deux Etats — j'y reviendrai, ce n'est pas ce qui nous intéresse dans l'immédiat. Pour l'instant, je cherche à déterminer le contenu du pseudo-différend qui serait à l'origine de la requête marshallaise et il m'apparaît que ces déclarations établissent, sans l'ombre d'un doute, qu'un tel différend n'existe pas.

9. Mon très cher ami, Luigi Condorelli, l'a excellemment dit : la Cour ne pourrait «exercer sa compétence qu'à condition d'avoir vérifié elle-même l'existence réelle du différend»[37] et il appartient à l'Etat requérant de faire la démonstration que, pour reprendre l'expression de la Cour dans son arrêt de 1962 dans les affaires du *Sud-Ouest africain*, «la réclamation de l'une des parties se heurte à l'opposition manifeste de l'autre»[38]. Cette démonstration est «essentielle» a insisté mon contradicteur[39].

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[34] Voir aussi, par exemple, la déclaration de Salman Khurshid, ministre des affaires étrangères de l'Inde, réunion de haut niveau de l'Assemblée générale sur le désarmement nucléaire (26 septembre 2013) (annexe 6 au contre-mémoire de l'Inde) ou celle de l'ambassadeur D.B. Venkatesh Varma, représentant permanent de l'Inde à la Commission du désarmement (24 février 2015) (annexe 10 au contre-mémoire de l'Inde).

[35] MIM, p. 7, par. 16.

[36] Voir CR 2016/1, p. 19, par. 14 (deBrum) et p. 36-37, par. 19-20 et p. 38, par. 22 (Condorelli). Voir aussi MIM, p. 19, par. 16.

[37] CR 2016/1, p. 30, par. 4 (Condorelli).

[38] *Sud-Ouest africain (Ethiopie c. Afrique du Sud ; Libéria c. Afrique du Sud), exceptions préliminaires, arrêt, C.I.J. Recueil 1962*, p. 328.

[39] CR 2016/1, p. 30, par. 4 (Condorelli).

10. Mission impossible pour les Iles Marshall même si, non sans aplomb, le professeur Condorelli, a inventé une solution de substitution qui ne saurait faire illusion. Après avoir évoqué «des prises de position [au pluriel donc] très significatives que les Iles Marshall [auraient] adoptées avant la saisine de la Cour», dont ni le mémoire ni mon contradicteur ne donnent le moindre exemple, il se polarise sur la seule déclaration de Nayarit de février 2014[40]. Elle serait le sésame ouvrant la voie à la compétence de la Cour. Mais cette clef n'ouvre aucune porte ; les Iles Marshall se bornent, de façon générale et abstraite, à appeler les puissances nucléaires à mener des négociations conformément à l'article VI du traité de non-prolifération (TNP) et au droit coutumier international. On voit mal, Monsieur le président, comment l'Inde aurait pu interpréter cette déclaration comme l'affirmation de l'existence d'un différend entre elle-même et les Iles Marshall : cette déclaration était faite, si je puis dire, à la cantonade ; et, d'autre part l'article VI du TNP, auquel l'Inde n'est pas partie, y était mentionné comme le premier fondement de l'obligation de négocier invoquée. C'est pourtant sur cette base fragilissime que notre contradicteur se fonde pour affirmer que les Iles Marshall avaient nettement défini l'objet de leur différend «au moyen de pourparlers diplomatiques»[41].

11. Cela eût, à vrai dire, été surprenant : les deux Etats partagent les mêmes vues sur l'objet de la requête marshallaise — telle, en tout cas qu'elle ressort quelque peu corrigée de son mémoire : l'urgente nécessité de négociations de bonne foi en vue de parvenir à un désarmement nucléaire. Comme l'ont rappelé notre coagent et M[e] Salve[42], l'Inde coparraine depuis 1996 la résolution récurrente de l'Assemblée générale appelant à de telles négociations. Sauf erreur, les Iles Marshall ne l'ont jamais fait ; comme M[e] Salve et M. Gill l'ont souligné, elles ont voté contre en 2003 et ce sont en général abstenues jusqu'au moment où elles ont déposé leur requête dans la présente affaire. A cette époque, Monsieur le président, il y avait peut-être un différend entre les parties puisque les Iles Marshall ne semblaient pas considérer du tout que les négociations immédiates en vue d'un désarmement nucléaire complet s'imposaient, alors que ceci était et a toujours été la position indienne. Fort heureusement, les Iles Marshall semblent aujourd'hui

[40] CR 2016/1, p. 36-37, par. 19-20 et p. 38, par. 22 (Condorelli). Voir aussi p. 18-19, par. 14 (deBrum).

[41] *Concessions Mavrommatis en Palestine, arrêt n[o] 2, 1924, C.P.J.I. série A n[o] 2*, p. 15 . Voir aussi *Droit de passage sur territoire indien (Portugal c. Inde), exceptions préliminaires, arrêt, C.I.J. Recueil 1957*, p. 148-149.

[42] Voir aussi CMI, p. 8, par. 12.

revenues à de meilleurs sentiments et partagent les positions de l'Inde, qui est heureuse de constater que, depuis 2013, elles votent en faveur de la résolution en question[43].

12. Un mot toutefois, en guise de codicille. Nos amis, de l'autre côté de la barre, se sont donné beaucoup de mal pour vous expliquer qu'ils n'imputaient pas à l'Inde un manquement à l'article VI du TNP, mais à une règle coutumière qui en reprendrait la substance[44]. Deux remarques à ce sujet, Monsieur le président :

— En premier lieu, je relève que le professeur Condorelli a — longuement — cité la requête, en insistant sur le fait que c'est elle qui fait foi pour identifier la réclamation[45]. Et pourtant dans ces longues citations, il a, curieusement, omis de mentionner les passages qui se réfèrent expressément à l'article VI[46] ou, plus généralement, au traité lui-même[47].

— Ceci étant, et en second lieu, mis à part ce lien conventionnel, l'Inde ne remet évidemment pas en cause la conclusion de la Cour dans son avis de 1996 que, contrairement aux Iles Marshall, elle a toujours approuvée et soutenue — à savoir, pour reprendre les termes des résolutions de l'Assemblée générale consacrées aux suites de l'avis, que l'on vous a déjà cité*s*, à savoir qu'il existe «une obligation de poursuivre de bonne foi et de mener à terme des négociations conduisant au désarmement nucléaire sous tous ses aspects, assorti d'un contrôle international strict et efficace» ;

et qu'en conséquence,

> «tous les Etats [devraient] s'acquitter immédiatement de cette obligation en engageant des négociations multilatérales afin de parvenir sans tarder à la conclusion d'une convention relative aux armes nucléaires interdisant la mise au point, la fabrication, l'essai, le déploiement, le stockage, le transfert, la menace ou l'emploi de ces armes et prévoyant leur élimination»[48].

N'est-ce pas très exactement ce que les Iles Marshall veulent faire décider par la Cour ? En tout cas, c'est ce que l'Inde, pour sa part, a toujours soutenu.

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[43] Voir documents A/68/PV.60 (5 décembre 2013), p. 19 et A/69/PV.62 (2 décembre 2014), p. 15.

[44] Voir, par exemple, CR 2016/1, p. 24, par. 3, p. 25, par. 6 (Grief) et p. 32, par. 9 (Condorelli).

[45] CR 2016/1, p. 30, par. 6 (Condorelli).

[46] *Ibid.*, p. 31, par. 7 — voir les paragraphes 2 et 5 de la requête.

[47] Voir, par exemple, requête, par. 7, 10 ou 59.

[48] Nations Unies, résolution 51/45 de l'Assemblée générale, «Avis consultatif de la Cour internationale de Justice sur la licéité de la menace ou de l'emploi d'armes nucléaires» (10 décembre 1996), par. 2 et 3 ; formules identiques dans toutes les résolutions ultérieures jusqu'à celle du 7 décembre 2015 incluse (A/RES/70/56, par. 1 et 2).

13. Mesdames et Messieurs les juges, il n'y a pas de différend entre les Parties et cela suffit à exclure votre compétence pour vous prononcer dans l'affaire que les Iles Marshall ont cru pouvoir vous soumettre d'une manière totalement artificielle, probablement parce qu'il fallait faire un paquet des neuf Etats dotés d'armes nucléaires.

II. L'absence de parties indispensables — le principe de l'*Or monétaire*

14. Monsieur le président, bien que les Iles Marshall aient présenté neuf requêtes distinctes à la Cour, c'est bien d'une requête collective qu'il s'agit : ces neuf requêtes sont rédigées sur le même modèle et à peine adaptées au cas de chacun des défendeurs supposés dont six sont absents de la présente instance — et encore, puisque dans votre sagesse et pour d'excellentes raisons d'ailleurs, vous n'avez pas cru devoir joindre les trois affaires que vous examinez cette semaine, ce sont, à vrai dire, *huit* Etats visés par cette demande collective qui sont absents de cette procédure.

15. Comme la Cour l'a rappelé de manière particulièrement ferme dans l'affaire du *Timor-Oriental* :

> «l'un des principes fondamentaux de son Statut est qu'elle ne peut trancher un différend entre des Etats sans que ceux-ci aient consenti à sa juridiction. Ce principe a été réaffirmé dans l'arrêt rendu par la Cour en l'affaire de l'*Or monétaire pris* à *Rome en 1943*, puis confirmé dans plusieurs de ses décisions ultérieures»[49].

Et la Cour de citer les affaires du *Plateau continental Libye/Malte*, des *Activités militaires et paramilitaires au Nicaragua*, du *Différend frontalier Burkina Faso/Mali*, de la requête d'intervention du Nicaragua dans l'affaire du différend entre El Salvador et le Honduras et l'affaire de *Certaines terres* à *phosphates à Nauru*[50].

16. L'affaire qui nous réunit est très différente de cette dernière, à laquelle les Iles Marshall tentent cependant de l'assimiler. Dans *Nauru*, la Cour a estimé que toute décision qu'elle prendrait sur la responsabilité que Nauru imputait à l'Australie pourrait certes avoir des incidences sur la

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[49] *Timor oriental (Portugal c. Australie), arrêt, C.I.J. Recueil 1995*, p. 101, par. 26. Voir aussi : sentence arbitrale, *Larsen/Hawaian Kingdom*, sentence du 5 février 2001, par. 11.11 (Crawford, Griffith, Greenwood) (disponible à l'adresse : http://173.254.28.178/~pcacases/web/sendAttach/123).

[50] Voir *Plateau continental (Jamahiriya arabe libyenne/Malte), requête à fin d'intervention, arrêt, C.I.J. Recueil 1984*, p. 25, par. 40 ; *Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique), compétence et recevabilité, arrêt, C.I.J. Recueil 1984*, p. 431, par. 88 ; *Différend frontalier (Burkina Faso/République du Mali), arrêt, C.I.J. Recueil 1986*, p. 579, par. 49 ; *Différend frontalier terrestre, insulaire et maritime (El Salvador/Honduras), requête à fin d'intervention, arrêt, C.I. J. Recueil 1990*, p. 114-116, par. 54-56, et p. 122, par. 73 ; et *Certaines terres* à *phosphates à Nauru (Nauru c. Australie), exceptions préliminaires, arrêt, C.I.J. Recueil 1992*, p. 259-262, par. 50-55.

situation juridique des deux autres Etats — le Royaume-Uni et la Nouvelle-Zélande, mais qu'elle n'aurait pas, pour autant, «à se prononcer sur cette situation juridique pour prendre sa décision sur les griefs formulés par Nauru contre l'Australie»[51]. Outre que ce raisonnement a été critiqué, les choses se présentent très différemment dans la présente instance.

17. Comme s'ils répondaient par avance à l'argumentation du professeur Palchetti[52], plusieurs juges, sir Robert Jennings et Roberto Ago en particulier, ont fait valoir, dans leurs opinions jointes à l'arrêt, que, je cite d'abord sir Robert Jennings «la Cour rendra inévitablement et simultanément une décision sur les intérêts juridiques de ces deux autres Etats»[53] et que, cette fois c'est l'opinion dissidente de Roberto Ago,

> «[e]n fait, c'est précisément en se prononçant sur ces griefs adressés à la seule Australie que la Cour affectera, inévitablement, la situation juridique des deux autres Etats, à savoir leurs droits et leurs obligations. [L'] exercice par la Cour de sa juridiction se trouverait privé de son indispensable base consensuelle.»[54]

Il en va *a fortiori* ainsi dans l'affaire qui nous réunit. Inévitablement, tout prononcé de la Cour impliquerait «une appréciation de la licéité du comportement» d'autres Etats qui ne sont pas parties à l'instance[55].

18. En effet, la détermination de l'existence d'une violation — ou non — de l'obligation de mener de bonne foi des négociations en vue de la conclusion d'un traité sur le désarmement nucléaire implique nécessairement que la Cour se penche sur la manière dont les négociations ont été conduites ou les raisons pour lesquelles elles n'ont pas eu lieu ou n'ont pas abouti. Leur échec ne pourrait être attribué à l'Inde qu'après un examen du comportement des autres Etats participant, ou ayant l'obligation de participer, aux négociations. Il s'agit donc bien d'un préalable, d'une précondition, d'un *prerequisite* et ceci différencie encore davantage notre affaire de celle de *Nauru*, dans laquelle la Cour a jugé que la responsabilité de l'Australie pourrait avoir des implications pour

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[51] *Certaines terres à phosphates à Nauru (Nauru c. Australie), exceptions préliminaires, arrêt, C.I.J. Recueil 1992*, p. 261-262, par. 55.

[52] CR 2016/1, p. 53, par. 7 (Palchetti).

[53] *Certaines terres à phosphates à Nauru (Nauru c. Australie), exceptions préliminaires, arrêt, C.I.J. Recueil 1992*, opinion dissidente du juge Jennings, p. 302.

[54] *Ibid.*, opinion dissidente du juge Ago, p. 328. Voir aussi l'opinion dissidente du juge Schwebel, *ibid*., p. 331-337.

[55] *Timor oriental (Portugal c. Australie), arrêt, C.I.J. Recueil 1995*, p. 102, par. 29.

les deux autres Etats concernés mais qu'elle pouvait prendre sa décision sans se prononcer sur ce point.

19. En effet, les manquements que l'Etat requérant reprochait à l'Australie étaient identiques à ceux qu'il aurait pu imputer aux Etats absents, mais il s'agissait d'obligations «parallèles» ; or il est bien connu que «deux droites parallèles ne se rencontrent jamais aussi loin qu'on les prolonge»[56]. Mais ce n'est pas le cas dans notre espèce ; ce que les Iles Marshall reprochent, non pas à l'Inde seule, mais aux neuf puissances nucléaires, c'est justement, pour pousser un peu la métaphore, c'est justement de *ne pas* se rencontrer. Elles ne les critiquent pas pour ne pas négocier avec elles (Iles Marshall) ; elles leur reprochent de ne pas négocier les unes avec les autres. En d'autres termes, la mise en œuvre de l'obligation prétendument violée par l'Inde nécessite inévitablement la participation active d'Etats auxquels le même manquement est reproché mais qui ne participent pas à la présente instance et à l'égard desquels la Cour n'a, de toute manière, pas compétence pour se prononcer. Pour que la Cour puisse déterminer si l'Inde a manqué à l'obligation de négocier de bonne foi, il lui faudrait d'abord et inévitablement s'interroger — et prendre position — sur le comportement des autres Etats concernés.

20. On ne négocie pas tout seul, Monsieur le président. L'Inde ne peut négocier avec elle-même ; en l'absence, au minimum, des autres puissances nucléaires, la requête des Iles Marshall est, au mieux, sans objet, au pire — mais c'est sans doute le cas — abusive et je vais y revenir.

21. Et l'on peut même aller plus loin, et constater, comme l'a fait la Cour dans son avis de 1996, que, «[d]e fait, toute recherche réaliste d'un désarmement général et complet, en particulier nucléaire, nécessite la coopération de *tous* les Etats»[57]. Et cela met l'accent sur un autre aspect de l'affaire qui vous est soumise, Mesdames et Messieurs les juges : au fond, les Iles Marshall ne vous demandent rien de moins que de vous ériger en une espèce de législateur — que dis-je de législateur ? de gouvernement mondial ! Je l'ai déjà dit : l'Inde est un chaud partisan d'un désarmement nucléaire complet. Mais il s'agit là d'un problème complexe,

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[56] Postulat d'Euclide, *in Les éléments*, Livre I, en 300 avant J.-C.

[57] *Licéité de la menace ou de l'emploi d'armes nucléaires, avis consultatif, C.I.J. Recueil 1996 (I)*, p. 264, par. 100 (les italiques sont de nous).

éminemment politique, qui suppose que les Etats concernés, et d'abord l'ensemble des puissances nucléaires, soient prêts, comme l'Inde l'est, à négocier de bonne foi ; c'est un problème d'état d'esprit ; cela ne se décrète pas et ne se juge pas.

22. Selon mon contradicteur et ami, le professeur Palchetti, «*[t]he Monetary Gold* principle has nothing to do with the effectiveness of the remedies sought by a party»[58]. Je ne suis pas si sûr, car dans l'affaire ayant donné lieu à l'arrêt de 1954, il s'agissait bien de l'exécution d'un accord entre les trois Etats défendeurs et même, plus indirectement, de l'arrêt que la Cour elle-même avait rendu dans l'affaire du *Détroit de Corfou*[59]. Au demeurant, ceci, Monsieur le président, n'a pas beaucoup d'importance dans notre affaire : même si les circonstances sont différentes de celles de l'*Or monétaire*, l'impossibilité d'exécution de l'arrêt qu'il vous est demandé de rendre, du fait de l'absence de parties indispensables, n'en doit pas moins vous conduire à faire application du fameux principe que vous avez posé en 1954.

III. Absence de suites pratiques d'un arrêt sur le fond

23. En effet, Mesdames et Messieurs les juges, si, par impossible, vous donniez suite à la requête des Iles Marshall, votre arrêt demeurerait inévitablement sans aucune espèce de conséquences pratiques. Il y a de multiples raisons à cela :

— des raisons politiques d'abord : je le dis, Monsieur le président, avec tout le respect dû à la Cour, les questions en cause sont si délicates, elles touchent de si près à la souveraineté de l'Etat et à sa sécurité qu'il paraît assez vain d'espérer qu'un arrêt rendu dans ce domaine puisse avoir une influence décisive sur la politique du ou des Etats concernés ;

— mais d'autres raisons sont plus directement juridiques : si arrêt au fond il devait y avoir, l'autorité de la chose jugée qui s'y attacherait ne pourrait produire ses effets qu'à l'égard de l'Inde or, comme je l'ai dit il y a quelques instants, on ne négocie pas tout seul ; et l'on retrouve ici le principe de *l'Or monétaire* et l'obstacle constitué par l'absence des parties indispensables ;

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[58] CR 2016/1, p. 53, par. 8 (Palchetti).

[59] *Or monétaire pris à Rome en 1943, question préliminaire, arrêt, C.I.J. Recueil 1954*, p. 31-32.

— et pour ce qui est des Parties à la présente instance, on voit mal l'intérêt et la portée que pourraient avoir des négociations menées entre l'Inde et les Iles Marshall ; il n'y a décidément pas de différend entre ces deux Etats.

24. De tout ceci, Monsieur le président, il résulte qu'un arrêt de la Cour sur le fond de la requête des Iles Marshall n'aurait aucune espèce de portée concrète, ce qui serait contraire à la mission même de la Cour qui est de «*régler* conformément au droit international les différends qui lui sont soumis». En se prêtant à ce qu'il faut bien qualifier de manœuvre de l'Etat requérant, la Cour sortirait de son rôle exclusivement judiciaire en rendant une décision dont elle ne peut pas ignorer qu'elle n'aurait aucun effet concret. Il n'appartient pas à la haute juridiction de donner des avis consultatifs à la demande d'un Etat[60].

25. A cet égard, l'arrêt du 2 décembre 1963 dans l'affaire du *Cameroun septentrional* indique fermement quels sont les principes applicables en la matière. On a déjà beaucoup cité les extraits les plus significatifs de cet arrêt depuis lundi[61]. Mais ils sont tellement probants qu'il ne me paraît pas superflu de les lire à nouveau ***(***et cela permet de raccourcir les plaidoiries***)*** :

> «Si la Cour devait poursuivre l'affaire et déclarer toutes les allégations du demandeur justifiées au fond, elle n'en serait pas moins dans l'impossibilité de rendre un arrêt effectivement applicable.»[62]

Autre citation du même arrêt :

> «L'arrêt de la Cour doit avoir des conséquences pratiques en ce sens qu'il doit pouvoir affecter les droits ou obligations juridiques existants des parties, dissipant ainsi toute incertitude dans leurs relations juridiques. En l'espèce, aucun arrêt rendu au fond ne pourrait répondre à ces conditions essentielles de la fonction judiciaire.»[63]

Troisième citation :

> «II ne servirait donc à rien d'entreprendre l'examen de l'affaire au fond pour aboutir à une décision qui, dans les circonstances sur lesquelles la Cour a déjà attiré l'attention, est inéluctable … Tout arrêt qu'elle pourrait prononcer serait sans objet.»[64]

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[60] Voir *Interprétation de l'accord gréco-bulgare du 9 décembre 1927, avis consultatif, 1932, C.P.J.I. série A/B n° 45,* p. 87. Voir aussi *Cameroun septentrional (Cameroun c. Royaume-Uni), exceptions préliminaires, arrêt, C.I.J. Recueil 1963*, p. 30.

[61] Voir notamment CR 2016/1, p. 57, par. 4 (Clark).

[62] *Cameroun septentrional (Cameroun c. Royaume-Uni), exceptions préliminaires, arrêt, C.I.J. Recueil 1963*, p. 33.

[63] *Ibid.*, p. 34.

[64] *Ibid.*, p. 38.

26. Ce florilège n'appelle pas de commentaire supplémentaire. Alors même que les circonstances de notre affaire sont bien sûr différentes[65], la Cour peut faire au sujet des demandes des Iles Marshall les mêmes observations : si elles étaient accueillies favorablement, elles ne pourraient avoir aucune conséquence pratique ; «tout arrêt qu'elle pourrait prononcer serait sans objet». Dans ces conditions, la Cour n'a aucune «raison de laisser se poursuivre une procédure qu'elle sait condamnée à rester stérile. Si le règlement judiciaire peut ouvrir la voie de l'harmonie internationale lorsqu'il existe un conflit, il n'est pas moins vrai que la vaine poursuite d'un procès compromet cette harmonie»[66], comme vous l'avez excellemment dit dans les affaires des *Essais nucléaires*.

27. Quant à la pertinence de l'affaire des *Essais nucléaires* justement, je suis bien d'accord avec le professeur Clark pour considérer que, contrairement à ce qui était le cas alors, en la présente occurrence, aucune circonstance n'a changé entre l'introduction de l'instance et aujourd'hui — «no disappearing act here»[67] : mais il n'y a tout simplement pas d'«act», pas de situation factuelle permettant d'établir l'existence d'un différend.

28. Et, honnêtement, Monsieur le président, il n'est pas très sérieux de prétendre que la négociation que l'Inde a toujours appelée de ses vœux et que les Iles Marshall revendiquent aujourd'hui à grands cris pourrait être menée en présence d'un seul Etat possédant l'arme nucléaire[68]. Et si ce qui est important, c'est de conclure un traité prévoyant un désarmement nucléaire complet en priant les dieux de la paix pour que tous les Etats intéressés s'y rallient[69], alors on ne voit pas très bien pourquoi les Iles Marshall n'ont pas pris l'initiative d'une telle négociation : leur déclaration à la conférence de Nayarit ne ressemble ni de près, ni de loin, à une telle invitation.

29. Mesdames et Messieurs les juges, je vous remercie d'avoir à nouveau prêté attention à cette plaidoirie que j'ai eu le plaisir et l'honneur de présenter au nom de l'Inde, que je remercie

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[65] CR 2016/1, p. 57-58, par. 4-5 (Clark).

[66] *Essais nucléaires (Australie c. France), arrêt, C.I.J. Recueil 1974*, p. 271, par. 58 ; *Essais nucléaires (Nouvelle-Zélande c. France), arrêt, C.I.J. Recueil 1974*, p. 477, par. 61.

[67] CR 2016/1, p. 58, par. 6 (Clark).

[68] *Ibid.*, p. 60, par. 11 (Clark).

[69] *Ibid.*

pour sa confiance renouvelée. Je vous prie, Monsieur le président, de bien vouloir donner à nouveau la parole à M[e] Salve, qui montrera que les réserves dont l'Inde a assorti sa déclaration facultative excluent, en l'espèce, la compétence de la Cour. Je vous remercie.

Le PRESIDENT : Merci, Monsieur le professeur. Je donne la parole à M. Salve.

Mr. SALVE: Thank you, Mr. President. I will briefly address the Court now on the four reservations on the basis of which India asserts this Court lacks jurisdiction. I will begin, Sir, with some general submissions on the interpretation of reservations, as some of the submissions seek possibly to question this established jurisprudence.

PART II

THE DISPUTES FALL OUTSIDE INDIA'S DECLARATION ON ACCOUNT OF THEIR FALLING FOUL OF FOUR RESERVATIONS

General submissions on interpretation

1. The jurisprudence of the Court, in the matter of construction of the declarations filed by States under Article 36 (2) of the Statute, including the reservations in such declarations, is well settled. Since some of the arguments by counsel for the Marshall Islands suggest that limitations should be read into the language of some of the reservations — especially reservation 4 — it is necessary to revisit a leading authority of this Court on the subject.

2. In the *Fisheries Jurisdiction (Spain* v. *Canada)* case this Court made strong observations, some of which are as follows:

(a) "It is for each State, in formulating its declaration, to decide upon the limits it places upon its acceptance of the jurisdiction of the Court."[70]

(b) "Conditions or reservations thus do not by their terms derogate from a wider acceptance already given. Rather, they operate to define the parameters of the State's acceptance of the compulsory jurisdiction of the Court. There is thus no reason to interpret them restrictively. All elements in a declaration under Article 36, paragraph 2, of the Statute which, read together,

[70] *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998,* para. 44.

comprise the acceptance by the declarant State of the Court's jurisdiction, are to be interpreted as a unity, applying the same legal principles of interpretation throughout."[71]

(c) "An additional reservation contained in a new declaration of acceptance of the Court's jurisdiction, replacing an earlier declaration, is not to be interpreted as a derogation from a more comprehensive acceptance given in that earlier declaration; thus, there is no reason to interpret such a reservation restrictively. Accordingly, it is the declaration in existence that alone constitutes the unity to be interpreted, with the same rules of interpretation applicable to all its provisions, including those containing reservations."[72]

(d) "The régime relating to the interpretation of declarations made under Article 36 of the Statute is not identical with that established for the interpretation of treaties by the Vienna Convention on the Law of Treaties."[73]

(e) "The Court observes that the provisions of that Convention may only apply analogously to the extent compatible with the *sui generis* character of the unilateral acceptance of the Court's jurisdiction."[74]

(f) "Every declaration 'must be interpreted as it stands, having regard to the words actually used' (*Anglo-Iranian Oil Co., Preliminary Objection, Judgment, I.C.J. Reports 1952*, p. 105). Every reservation must be given effect 'as it stands' (*Certain Norwegian Loans, Judgment, I.C.J. Reports 1957*, p. 27)."[75]

(g) "The Court will thus interpret the relevant words of a declaration including a reservation contained therein in a natural and reasonable way, having due regard to the intention of the State concerned at the time when it accepted the compulsory jurisdiction of the Court. The intention of a reserving State may be deduced not only from the text of the relevant clause, but also from the context in which the clause is to be read, and an examination of evidence regarding the circumstances of its preparation and the purposes intended to be served."[76]

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[71] *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, para. 44.

[72] *Ibid.*, para. 45.

[73] *Ibid.*, para. 46.

[74] *Ibid.*, para. 46.

[75] *Ibid.*, para. 47.

[76] *Ibid.*, para. 49.

(h) "Where, moreover, an existing declaration has been replaced by a new declaration which contains a reservation, as in this case, the intentions of the Government may also be ascertained by comparing the terms of the two instruments."[77]

(i) "Whether or not States accept the jurisdiction of the Court, they remain in all cases responsible for acts attributable to them that violate the rights of other States. Any resultant disputes are required to be resolved by peaceful means, the choice of which, pursuant to Article 33 of the Charter, is left to the parties."[78]

3. In its Judgment in the *Aerial Incident* case, the Court considered the question of jurisdiction in the context of the reservation by India, and rejected the contention that the reservation was "extra-statutory" going beyond the conditions allowed for under Article 36, paragraph 3, of the Statute. It held that "paragraph 3 of Article 36 of its Statute has never been regarded as laying down in an exhaustive manner the conditions under which declarations might be made"[79]. Recalling the passage from the *Fisheries Jurisdiction* case to the effect that the words of a declaration including a reservation have to be interpreted in a natural and reasonable way, the Court held that even if the

> "historical reasons for the initial appearance of the Commonwealth reservation in the declarations of certain States under the optional clause may have changed or disappeared, such considerations cannot, however, prevail over the intention of a declarant State, *as expressed in the actual text of its declaration*"[80].

4. One of the oft-cited authorities on the subject is the *Anglo-Iranian* case[81]. Rejecting the suggestion that a grammatical meaning should be given to the reservation in the Iranian declaration, the Court held that it cannot base itself on a purely grammatical interpretation of the text but must find a natural and reasonable way of reading it. Explaining the distinction between interpretation of treaties and the interpretation of a declaration, the Court clarified that a declaration

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[77] *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998,* para. 50.

[78] *Ibid.*, para. 56.

[79] *Aerial Incident of 10 August 1999 (Pakistan* v. *India), Jurisdiction, Judgment, I.C.J. Reports 2000*, pp. 29-30, para. 37.

[80] *Ibid.*, para. 44; emphasis added.

[81] *Anglo-Iranian Oil Co. (United Kingdom* v. *Iran), Jurisdiction, Preliminary Objection, Judgment, I.C.J. Reports 1952*, p. 93.

"is the result of unilateral drafting." and thus may contain words inserted as a measure of abundant caution, which may be superfluous.

5. The Indian declaration has 11 reservations. Mr. President, Members of the Court, India invokes four reservations to establish its contention that the Court lacks jurisdiction.

Reservation 4: Disputes relating to or connected with facts or situations of hostilities, armed conflicts, individual or collective actions taken in self-defence, resistance to aggression, fulfilment of obligations imposed by international bodies, and other similar or related acts, measures or situations in which India is, has been or may in future be involved.

6. The first thing to be noticed is the width of the plain language of the reservation. Its important features may be analysed as follows:

(a) it covers disputes *relating to* the specified facts or situations;

(b) it covers disputes *connected with* specified facts or situations.

7. Similar words in the Canadian declaration in the *Fisheries Jurisdiction* case I have cited earlier were considered by the Court. In that case, the expression was "disputes arising out of or concerning". On this language, the Court held "[t]he words of the reservation exclude not only disputes whose immediate 'subject-matter' is the measures in question and their enforcement, but also those *'concerning'* such measures"[82].

8. In the *Aegean Sea* case, the Court considered the reservation removing from the jurisdiction of the Court "disputes concerning questions which by international law are solely within the domestic jurisdiction of States, and in particular disputes relating to…". The contention before this Court was that on a grammatical interpretation, the exclusion that followed the words "in particular" should be considered as limited to a species of the generic disputes that were set out prior to those words. It was argued that the words that followed the words "in particular" should not be construed as introducing, and thus excluding from jurisdiction, an autonomous category of disputes.

9. The Court rejected this approach, holding that it could not base itself on a purely grammatical interpretation of the text. The Court looked behind the plain language to see the

[82] *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 458, para. 62; emphasis in original.

circumstances in which the reservation had been made and considered other factors to give a reasonable meaning to the expressions. The Court held

> "historical evidence may justifiably be said to show that in the period in question the *motive* which led States to include in treaties provisions regarding 'territorial status' was, in general, to protect themselves against possible attempts to modify territorial settlements established by the peace treaties. But it does not follow that they intended those provisions to be confined to questions connected with the revision of such settlements."[83]

This Court went on to add "the strong probability is that a State which had recourse to a reservation of disputes relating to territorial status, or the like, intended it to be quite general"[84].

10. Applying these settled principles to the construction of this reservation, it is submitted that the measures taken by India, acting in its sovereign capacity, to strengthen its defence capabilities would clearly fall within this exception.

11. Mr. President, Members of the Court, India has been involved in armed hostilities with its neighbours in the past, and the defence programme of India is based upon its assessed threat, perception and need. Reservation 4 excludes "other similar or related acts, measures or *situations* in which India is, has been or *may in future be involved*". If India finds it necessary to develop nuclear weapons to augment its defences against situations it may *in future* be involved — whether as measures of self-defence or of deterrence, any such measures, I submit, would stand excluded from the jurisdiction of the Court.

12. Indisputably, India lives in a proliferating region, and the development of missile and nuclear capabilities in Asia and, indeed, beyond, has impacted India's national security. India's concerns have been articulated since the 1960s. India has placed as annexes along with its Counter-Memorial, statements made from time to time articulating India's position in the matter of nuclear disarmament. In its statement made in 1965 at the Conference of the 18-Nation Committee on Disarmament, India said: "Further proliferation is in fact a consequence of existing proliferation and unless we deal with the disease itself, we can effect no cure. By ignoring the disease and trying to deal with vague symptoms and unreal lists of probable nuclear countries, we

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[83] *Aegean Sea Continental Shelf (Greece* v. *Turkey), Judgment, I.C.J. Reports 1978*, p. 30, para. 73.

[84] *Ibid.*

shall only make the disease more intractable."[85] India, however, made it clear that: "[a]n opposition to the concept of nuclear monopoly or privileged-club membership is thus our fundamental response in any examination of a draft treaty or convention on non-proliferation"[86].

13. Mr. President, it is India's position that the assessment of threat and all corresponding measures to deal with such threat including measures that would act as a deterrent, are sovereign functions, and India's nuclear programme is based entirely on its assessment of need, based on its own threat perception. These matters, I submit, would stand excluded on the basis of the plain language of this reservation.

14. The point has been made earlier that the nature of the international obligation and reservations which relate to the jurisdiction of the Court are separate matters. India strongly supports the need for a multilaterally negotiated treaty for global nuclear disarmament based on principles of non-discrimination and international verification — but at the same time, Mr. President and Members of the Court, I respectfully submit, India does not agree to the jurisdiction of the Court in this area which has a vital bearing on its defence preparedness.

15. The Marshall Islands argues that the fourth reservation is not about the threat of nuclear weapons, or about actions in self-defence, and cites this Court's Judgment in *Whaling in the Antarctic* case[87], in support of the proposition that the language of a reservation must be applied to concrete facts and actual events.

16. Observations in a judgment read out of context would not apply to reservations such as that found in reservation No. 4, and which is made in such wide language.

17. If the language grammatically read covers the dispute, its apparent width cannot be scaled down by reference to its history or to other factors.

18. The language of the declaration in the *Whaling in the Antarctic* case had two segments — the delimitation of maritime zones, and the disputes "arising out of, concerning or relating to the exploitation of any disputed area of or adjacent to any such maritime zone pending its delimitation". The dispute that arose in the case related to exploitation of the maritime zone by

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[85]Counter-Memorial of India (CMI), Ann. 13, p. 591.

[86]*Ibid.*, p. 594.

[87]*Whaling in the Antarctic (Australia* v. *Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014*, p. 226.

whaling, and Japan sought to rely upon Australia's reservation to exclude the dispute from the jurisdiction of the Court, on the principle of reciprocity. This was rejected, pointing out that the second segment of the reservation was inextricably linked to the first — i.e. delimitation of maritime zones. It is submitted that this was not only based on the plain language of the reservation but was also supported by a press release from the office of the Attorney General, which was contemporaneous and supported this interpretation.

19. In fact, India relies on this case since it reiterates the settled principles of interpretation. The Marshall Islands seeks to suggest by analogy, that the wide words of reservation 4 should be read down — a proposition not supported by the judgment.

20. This Court has always given the widest possible interpretation — at times even beyond the plain language — to reservations, rather than to read them down, narrowly reduced from their apparent textual width.

21. The Marshall Islands' submission — taken to its logical sequitur — would suggest that India would have the right to develop a nuclear weapon programme only if and after it has suffered hostilities inflicted by the use of nuclear weapons — a proposition which has to be stated to be rejected.

22. The second submission is that since the relief sought by the Marshall Islands is limited to an evaluation of whether India has undertaken negotiations in good faith to conclude disarmament treaties, it does not impinge upon reservation 4. This submission contradicts the position taken by other counsel in other contexts, relying upon India's alleged nuclear weapons programme and suggesting that it violates customary international law, and also clarifying that the Marshall Islands seeks to press the declarations. This has been developed by me in my opening argument.

Reservation 5: Disputes with regard to which any other party to a dispute has accepted the compulsory jurisdiction of the International Court of Justice exclusively *for or in relation to the purposes of such dispute*; or where the acceptance of the Court's compulsory jurisdiction on behalf of a party to the dispute was deposited or ratified less than 12 months prior to the filing of the application bringing the dispute before the Court

23. The record shows, I submit, that the Marshall Islands accepted the compulsory jurisdiction of the Court on 24 April 2013 and it filed the present Application on 24 April 2014. It

is obvious that the declaration was filed, we submit, to create a jurisdiction to move this Application.

24. It is submitted that behind such a reservation lies the principle of good faith governing relations between States. India has accepted, without discontinuance, the compulsory jurisdiction of the Court since 1940. It would be unfair if such conduct by the Marshall Islands is to be countenanced.

25. The Marshall Islands argued that since April 2013 it had publicly declared that it would raise the issue of climate change and leave no stone unturned to seek justice, including moving this Court, and from that it could be inferred that the declaration was not designed to create jurisdiction for the present application.

26. Mr. President and Members of the Court, I submit that this submission does not bear scrutiny. Climate change is a cause for global concern no less than nuclear disarmament, and yet until March 2016, this day, no application has been filed in this Court — when the present set of Applications have been filed — according to India — a day too early.

27. Equally the submission — that the declaration has not been withdrawn has little persuasive value. Surely the Marshall Islands would not act in a manner that would make it so very apparent that the declaration was designed to move these three Applications.

28. I submit that India's objection on this score is correct and borne out by the indisputable facts.

Reservation 7: Disputes concerning the interpretation or application of a multilateral treaty unless all the parties to the treaty are also parties to the case before the Court or Government of India specially agree to jurisdiction

29. There is no special agreement, so the first part would apply. India's position vis-à-vis the NPT is not relevant at the present stage where the Court is hearing issues on jurisdiction alone, and I would thus not venture into that territory beyond reminding the Court of what was said by India's Co-Agent in his remarks.

30. India's reservation 7 is widely worded. All disputes "concerning the interpretation" of treaties are excluded unless all the parties are present. Also excluded are all disputes "concerning the application" of a multilateral treaty.

31. In order to decide whether Article VI of the NPT applies *erga omnes* to all nations, or applies only to parties of the treaty, would involve the following steps:

(a) in the first instance, the treaty would have to be construed so as to establish the precise scope of Article VI. Even to conclude whether Article VI could be treated as a stand-alone provision, or is inextricably interwoven with other parts of the treaty, would involve interpretation of the treaty;

(b) the next step — after having established the meaning of Article VI — would be to then consider whether it is based upon pre-existing principles of customary international law, or whether it was meant to found the basis for an obligation *erga omnes*; and

(c) another step that may become necessary is to examine whether the text of Article VI is sufficient to achieve the objective of global nuclear disarmament.

32. Reservation 7 does not depend upon the complexity of the exercise of interpretation. Nor does it get defeated if the Court is invited to interpret a treaty in the light of its own precedent. The reservation is based on the subject-matter of the dispute — a dispute that is based or it involves the interpretation or application of a treaty.

33. The Marshall Islands relies upon the interpretation of the treaty in the Advisory Opinion and invites the Court to follow that interpretation. The fact that the case hinges upon the construction of Article VI in the Advisory Opinion establishes that the dispute involves the interpretation of a treaty. Following a precedent may be the way to interpret Article VI, but the very fact that this Court has to interpret the treaty to resolve the dispute renders its jurisdiction moot unless all the parties to the treaty are present.

34. The *Nicaragua* v. *United States of America* case is an interesting study in contrast and in fact establishes the correctness of India's objection.

35. Paragraph 69 of the Judgment notes that the United States recognizes that the multilateral treaty reservation applies in terms only to "disputes arising *under* a multilateral treaty". In paragraph 73, this Court noticed that Nicaragua's claims were not confined to the four multilateral conventions. The Court went on to hold:

> "The Court cannot dismiss the claims of Nicaragua under principles of customary and general international law, simply because such principles have been enshrined in the texts of the conventions relied upon by Nicaragua. The fact that the

> above-mentioned principles, recognized as such, have been codified or embodied in multilateral conventions does not mean that they cease to exist and to apply as principles of customary law, even as regards countries that are parties to such conventions."[88]

The Court then found that certain principles, i.e., "respect for the independence and territorial integrity of States, and the freedom of navigation, continue to be binding as part of customary international law, despite the operation of provisions of conventional law in which they have been incorporated"[89].

36. In sharp contrast, Mr. President, the Marshall Islands' Application, and particularly paragraph 39, cites the Advisory Opinion relating to the interpretation of Article VI of the NPT and states that the Advisory Opinion recognizes that — and I quote from that Application — "the provisions of Article VI . . . go beyond mere obligations of conduct — to pursue nuclear disarmament negotiations in good faith — and actually involve an obligation of result, i.e., to conclude those negotiations". Paragraph 59 states that the customary international law obligation of cessation of the nuclear arms race at an early date "is rooted in Article VI". Surely, Mr. President and Members of the Court, these matters cannot be decided unless the Court first establishes the meaning of Article VI.

Reservation 11: Disputes prior to the date of this declaration, including any dispute the foundations, reasons, facts, causes, origins, definitions, allegations or bases of which existed prior to this date, even if they are submitted or brought to the knowledge of the Court hereafter

37. On a plain construction of this widely worded clause, if the causes and the origins of the dispute — in fact the foundation of the dispute — existed prior to the date of the declaration, then I submit the dispute would be outside the jurisdiction of the Court.

38. Indian's declaration made in 1940 had a narrower temporal reservation — it covered "all disputes arising after February 5th, 1930 with regard to situations or facts subsequent to that date". Plainly, if the foundations, causes and origins were prior to the cut-off date but the dispute arose after that date on account of the situation which arose thereafter, it would not fall within the exclusion of that reservation.

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[88] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 424, para. 73.

[89] *Ibid.*

39. The Application alleges that India has steadfastly refused to sign the NPT and has not ratified the Comprehensive Nuclear Test-Ban Treaty (CTBT) and has given no clear signal that it intends to do so. Paragraph 59 complains that India is failing to comply with the obligation of the cessation of the nuclear arms race — which obligation is, as per the Marshall Islands, rooted in Article VI of the NPT.

40. Clearly, the foundation of the dispute as per the Application filed by the Marshall Islands lies in India's refusal to join the NPT. India's nuclear capability, Mr. President and Members of the Court, was demonstrated for the first time in May 1974. Thus, the foundation of this dispute was laid much prior to 1974 when India's declaration was filed. The declaration was filed after May 1974.

41. Counsel for the Marshall Islands argued that the rights on which the Application is based did not exist before 1974. This submission is plainly wrong.

42. Firstly, on the principle of reciprocity the cut-off date would be 1991 — and not 1974. This is for the reason that the Marshall Islands has in its declaration limited the jurisdiction of the Court to "all disputes arising after 17 September 1991, with regard to facts or situations subsequent to the same date . . .".

43. However, even if the issue of *ratione temporis* is decided on the basis of the date of India's declaration, that is 1974, the same result would follow.

44. Paragraph 2 of the Application filed by the Marshall Islands asserts the obligation of customary international law with respect to the cessation of the nuclear arms race at an early date, and nuclear disarmament *enshrined* in Article VI of the NPT and declared by the Court. This pleading borrows the language used by this Court, the words "enshrined in" in *Nicaragua* v. *United States of America* — where it was held that the matters enshrined in the conventions relied upon were based upon existing principles of customary law[90]. If Article VI *enshrines* this obligation, it defeats the argument that the rights came into being post-1974.

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[90] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports, 1984*, p. 424, para. 73.

45. Whether Article VI reflects a codification of an existing obligation, or whether arguably it created such obligations, in both events the rights asserted by the Marshall Islands date back at least to 1968.

46. Paragraph 47 of the Application suggests that the obligation set out in Article VI stands on its own as a customary international law obligation "based on the very widespread and representative participation of States in the NPT . . .". If this implies that the conduct of the States that subscribed to the Treaty transcends the obligation contained in Article VI to a principle of customary international law, it also negates the argument that the rights came into being post-1974.

47. Paragraph 59 repeats that the obligation of cessation of nuclear arms is rooted in Article VI, and also cites the resolution of the General Assembly and the Security Council — all the events that are prior to 1974.

48. This argument — that the rights came into being post-1974 — is on the faith and belief that these rights came into being on account of what is contained in paragraph 2 (F) of the *dispositif* of the Advisory Opinion. India questions the Marshall Islands' interpretation of the Advisory Opinion — although it does not address that issue for the present, and makes this submission *de bene esse*. It would follow that the Court held that the principles of customary international law reflected in Article VI created an obligation *erga omnes* and not merely limited to the parties to the Treaty. That is the Marshall Islands' interpretation. ***This*** again would imply that these rights were in place prior to 1974 — although recognized by this Court in 1996.

49. The Marshall Islands cites the United Nations General Assembly resolution of 4 November 1954 as having normative value and being indicative of the existence of a customary international law obligation — in support of its submission**, *~~that~~*** its assertion that *erga omnes* obligations exist — but then that implies that the rights asserted by the Marshall Islands date back to 1954.

50. The fact that the Marshall Islands was admitted to the United Nations in 1991 is irrelevant — reservation 11 is based on the time when the disputes arose, including the disputes, the foundations, the reasons, the facts, causes, which existed prior to the date of the declaration. Pre-existing disputes with other States based on allegations of violation of principles that apply

erga omnes will not bypass this reservation merely because that State making the application became a Member of the United Nations after 1974.

51. Equally, if the foundation of the dispute is based upon the alleged failure to negotiate a disarmament treaty, this is also something that commenced in 1968 when the NPT was signed, and continued thereafter in the attempts of the States to raise on global fora, the need for a global disarmament treaty. India, Mr. President, Members of the Court, continues to be in the same position post-1974 and the fact that no global disarmament treaty has as yet been arrived at would not take this dispute outside reservation 11.

Conclusion

52. I would therefore conclude by inviting the Court to dismiss this Application without expending any more time or effort on it. I would do so for the reason that:

(a) the entire exercise has been and is an abuse of the process;

(b) there is no real dispute between India and the Marshall Islands — for all the reasons the Court has heard from Professor Pellet and from me;

(c) the Marshall Islands has on its own part never made an attempt to negotiate disarmament treaties, and can hardly complain of the failure of others to do so;

(d) there can be no effective adjudication in the absence of other States;

(e) no real purpose will be served by any judgment on merits; and, finally,

(f) there are four reservations in India's declaration that result in the Court lacking jurisdiction to hear this case.

I thank you, Sir, and I thank all the Members of the Court for hearing us patiently. With that, Sir, India's oral presentation comes to an end.

Le PRESIDENT : Merci, Monsieur Salve. Cela met fin à l'audience d'aujourd'hui et clôt le premier tour de plaidoiries. Les audiences dans la présente affaire reprendront le lundi 14 mars à 10 heures, pour entendre le second tour de plaidoiries des Iles Marshall. A l'issue de l'audience, les Iles Marshall présenteront leurs conclusions finales sur la question de la compétence de la Cour.

L'Inde, pour sa part, prendra la parole le mercredi 16 mars, à 10 heures, pour son second tour de plaidoiries. A la fin de l'audience, l'Inde présentera à son tour ses conclusions finales.

Je rappellerai que le second tour de plaidoiries a pour objet de permettre à chacune des Parties de répondre aux arguments avancés oralement par l'autre Partie. Le second tour ne doit donc pas constituer une répétition des présentations déjà faites par les Parties, qui ne sont, au demeurant, pas tenues d'utiliser l'intégralité du temps de parole qui leur est alloué.

Je vous remercie. L'audience est levée.

L'audience est levée à 12 h 45.

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