DISSENTING OPINION OF VICE-PRESIDENT YUSUF

Judgment fails to distinguish three cases brought by the Marshall Islands — Different facts and arguments relevant to each case — Existence of a dispute — Matter for objective determination — Positively opposed juridical views required — Subjective criterion of "awareness" not a condition — "Awareness" has no basis in jurisprudence of Court — It also undermines sound administration of justice — Incipient dispute must exist prior to application to the Court — Dispute can crystallize during proceedings — Subject-matter of a dispute must be defined — At issue is the United Kingdom's compliance with its obligation under Article VI of the Nuclear Non-Proliferation Treaty — Evidence shows nascent dispute prior to application.

I. Introduction

1. I find myself unable to subscribe to the decision of the Court which upholds the first preliminary objection of the United Kingdom based on the absence of a dispute. The reasons for my dissent are succinctly set forth in the following paragraphs.

2. First, the Judgment fails to distinguish the objections raised by the United Kingdom, and its arguments regarding the inexistence of a dispute with the Republic of the Marshall Islands, from those in the two other cases of the *Marshall Islands* v. *India* and *Marshall Islands* v. *Pakistan*. The issues of fact and law underlying the objections raised were quite different in the three cases. But the Judgments treat the three cases as though they were almost identical and argued in the same manner by the respondent States. I will discuss in this opinion the distinctive features and the facts underlying the *Marshall Islands* v. *United Kingdom* case and the preliminary objections submitted by the United Kingdom.

3. Secondly, I disagree with the introduction by the majority of the subjective criterion of "awareness" in the determination of the existence or inexistence of a dispute. This is a clear — and undesirable — departure from the consistent jurisprudence of the Court on this matter.

4. Thirdly, it is difficult in my view to determine the existence or inexistence of a dispute without specifying its subject-matter. The Judgment does not clearly identify or circumscribe the subject-matter of the dispute which is claimed to exist between the Parties.

5. Finally, I am of the view that an incipient dispute existed between the Marshall Islands and the United Kingdom prior to the submission of the Application by the former, and that this dispute further crystallized during the proceedings before the Court. The evidence on which this conclusion is based is examined in Section VI below.

II. The Distinctive Features of the *Marshall Islands* v. *United Kingdom* Case with regard to the Existence of a Dispute

6. The first distinctive feature of this case, as compared to the other two cases submitted by the Marshall Islands against India and Pakistan respectively, which deserves to be noted is that both the Marshall Islands and the United Kingdom are parties to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT), the former having acceded to it in 1995, while the latter ratified it in 1968. The proceedings instituted by the Marshall Islands against the United Kingdom are about the interpretation and application of this Treaty, and in particular Article VI thereof.

7. Article VI reads as follows:

> "Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control."

8. The Marshall Islands contends that the United Kingdom failed to pursue nuclear disarmament negotiations in good faith, and has consequently violated its obligations under Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons. It affirms that it made its views known to the United Kingdom through, among others, its statement at the Second Conference on the Humanitarian Impact of Nuclear Weapons held in Nayarit, Mexico, on 13 February 2014. At this conference, it expressed its belief that States possessing nuclear arsenals are failing to fulfil their legal obligations regarding nuclear disarmament negotiations, and declared that the "immediate commencement and conclusion of such negotiations is required by legal obligation of nuclear disarmament resting upon each and every State under Article VI of the Non-Proliferation Treaty and customary international law" (Memorial of the Marshall Islands (MMI), para. 99). The Marshall Islands requests the Court to order the United Kingdom to take all steps necessary to comply with those obligations, including through "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" (MMI, para. 240).

9. Other distinguishing features relate to the main arguments put forward by the United Kingdom in its preliminary objections to claim the inexistence of a dispute between the Parties. In the first place, the United Kingdom contended that:

> "on the date of the filing of the Marshall Islands' Application, there was no justiciable dispute between the United Kingdom and Marshall Islands in relation to the United Kingdom's obligations, whether arising under the NPT or under customary international law, to pursue negotiations in good faith on effective measures of nuclear disarmament" (Preliminary Objections of the United Kingdom (POUK), para. 26).

Secondly, the United Kingdom asserted that "no legal dispute can be said to exist where the State submitting the dispute has given no notice thereof to the other State" (POUK, para. 27).

10. These arguments are clearly distinguishable from those advanced by India and Pakistan in the two other cases under consideration by the Court with respect to the Applications by the Marshall Islands. The issues of fact and law relating to the existence of the dispute are also different, but I will deal with those below in paragraphs 48 to 60. Two elements of the first argument deserve to be highlighted here: the use of the old concept of "justiciable dispute", and the requirement that the dispute must have existed on the date of the filing of the Application by the Marshall Islands. The Judgment addresses the second element, which I will also deal with in paragraphs 33 to 41 below, but is totally silent on the unusual use by the United Kingdom of the old and controversial concept of "justiciable dispute", which had some currency in international law literature in the late nineteenth and early twentieth century.

11. At that time, "non-justiciable" disputes were used to denote either political disputes, as opposed to legal ones, or disputes generally unsuitable for juridical settlement either because adjudication would not provide a genuine settlement or because the dispute was not about the interpretation or application of existing international law. The United Kingdom has not explained, during the proceedings before the Court, why it had decided to unearth this legal relic for the specific purposes of this case, but it might be reasonable to assume that this has much to do with the subject-matter of the Application by the Marshall Islands, namely the obligation contained in the Treaty on the Non-Proliferation of Nuclear Weapons to pursue negotiations on nuclear disarmament.

12. Interestingly, it might be recalled that the Institute of International Law, at its meeting in Grenoble in 1922, adopted the following resolution:

> "1. All disputes, whatever their origin and character, are, as a general rule, and subject to the following reservations, susceptible to judicial settlement or arbitral decision.

2. At the same time, when in the opinion of the defendant State, the dispute is not susceptible of being settled judicially, the preliminary question, whether it is or is not justiciable, is to be submitted to the Permanent Court of international Justice, which will decide in accordance with its ordinary procedure."

13. If it was the intention of the respondent State in this case to signal to the Court that the dispute submitted to it by the applicant was not susceptible of being settled judicially, that signal went undetected by the Court, which has not at all taken up the issue of "non-justiciable" disputes in its analysis of the preliminary objection of the United Kingdom. It is indeed a pity that the Court missed the opportunity to say something about the use of this concept in proceedings before it in the twenty-first century. It could have at least referred in this context to its Statute, and in particular to Article 36, paragraph 2, which contains a list of categories of legal disputes in respect of which the Court may exercise its jurisdiction.

14. The other distinctive argument presented by the United Kingdom on the inexistence of a dispute with the Marshall Islands is the absence of notice by the latter to the United Kingdom authorities prior to the institution of judicial proceedings. Such notice is, in the view of the United Kingdom, a condition of the existence of a legal dispute over which the Court may exercise its jurisdiction. The Judgment of the Court correctly notes that "the Court has rejected the view that notice or prior negotiations are required where it has been seised on the basis of declarations made pursuant to Article 36, paragraph 2, of the Statute, unless one of those declarations so provides" (Judgment, para. 45).

With regard to Article 43 of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA), the Judgment refers to the commentary on Article 44, paragraph 1, which specifies that the Articles "are not concerned with questions of the jurisdiction of international courts and tribunals, or in general with the conditions for the admissibility of cases brought before such courts or tribunals" *(ibid.)*.

15. Having rejected the requirement of notice for the existence of a dispute, the Judgment unfortunately raises "awareness" to a precondition for the existence of a dispute. This clearly contradicts the jurisprudence of the Court on the concept of a dispute and the objective determination of its existence by the Court.

III. The Concept of a Dispute and the New "Awareness" Test

16. The jurisdiction of the Court is to be exercised in contentious cases only in respect of legal disputes submitted to it by States. This case was

submitted to the Court on the basis of Article 36, paragraph 2, of the Statute. This provision does not define what is meant by a "legal dispute"; it therefore falls to the Court not only to define it, but also to determine its existence or inexistence in a case such as this one before proceeding to the merits.

17. The jurisprudence of the Court is replete with such definitions. The first one, which is still frequently cited by the Court, was in the *Mavrommatis Palestine Concessions* case, in which the Court stated that: "A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons." (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11.) It has since then, however, been further elaborated and enriched by subsequent jurisprudence.

18. The Court has clearly established in its jurisprudence that: "[w]hether there exists an international dispute is a matter for objective determination" (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 74). It has also observed, in elaborating further on the definition given by the PCIJ in the *Mavrommatis* case, that:

> "A mere assertion is not sufficient to prove the existence of a dispute any more than a mere denial of the existence of the dispute proves its non-existence. Nor is it adequate to show that the interests of the two parties to such a case are in conflict. It must be shown that the claim of one party is positively opposed by the other." (*South West Africa* cases *(Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328.)

19. More recently, the Court stated in *Georgia* v. *Russian Federation* that: "The Court's determination must turn on an examination of the facts. The matter is one of substance, not of form." (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 84, para. 30).

20. Notwithstanding this jurisprudence of the Court, it is stated in paragraph 41 of the Judgment that: "a dispute exists when it is demonstrated, on the basis of the evidence, that the respondent was aware, or could not have been unaware, that its views were 'positively opposed' by the applicant". The Judgment claims that this requirement is reflected "in previous decisions of the Court in which the existence of a dispute was under consideration", and invokes as authority for this statement two judgments, namely the Judgments on preliminary objections in the cases of *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia)* and the *Application of the Inter-*

national Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. *Russian Federation)* (Judgment, para. 41).

21. Neither of the two referenced Judgments provides support for a subjective requirement of "awareness" by the respondent in the determination of the existence of a dispute. In the *Alleged Violations* Judgment on preliminary objections, the Court determined that a dispute existed on the basis of statements made by the "highest representatives of the Parties" (*Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, pp. 32-33, para. 73). The Court simply stated as a matter of fact that Colombia was aware that its actions were positively opposed by Nicaragua. "Awareness" was not identified as a criterion for the existence of a dispute, nor was it treated as such by the Court.

22. Similarly, in the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation)*, the Court merely noted that Russia was or was not aware of the position taken by Georgia in certain documents or statements. It did not identify "awareness" as a requirement for the existence of a dispute at any point in the Judgment nor was this implicit in the Court's reasoning (*Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, pp. 117-120, paras. 106-113).

23. It is indeed the first time that such a subjective element has been introduced into the assessment by the Court of the existence of a dispute. As pointed out above, the Court's jurisprudence has always viewed the existence of a dispute as an objective matter. The Court has underlined on many occasions that the determination of the existence of a dispute is a "matter . . . of substance, not of form" (see, for example, *ibid.*, p. 84, para. 30). The function of the Court is to determine the existence of a conflict of legal views on the basis of the evidence placed before it and not to delve into the consciousness, perception and other mental processes of States (provided they do possess such cerebral qualities) in order to find out about their state of awareness. Moreover, I find it contradictory that the Court should reject notice and notification as a condition of the existence of a dispute, but then raise to a precondition of such existence the subjective element of awareness. How is such "awareness" to be created if not through notification or some sort of notice?

24. The introduction of an "awareness" test into the determination of the existence of a dispute would not only go against the consistent jurisprudence of the Court; it would also undermine judicial economy and the sound administration of justice by inviting submissions of second applications on the same dispute. If a subjective element or a formalistic requirement such as "awareness" is to be demanded as a condition for the

existence of a dispute, the applicant State may be able to fulfil such a condition at any time by instituting fresh proceedings before the Court. The respondent State would, of course, be aware of the existence of the dispute in the context of these new proceedings. It is to avoid exactly this kind of situation that the Permanent Court of International Justice observed in the *Polish Upper Silesia* case that: "the Court cannot allow itself to be hampered by a mere defect of form, the removal of which depends solely on the Party concerned" (*Jurisdiction, Judgment No. 6, 1925, P.C.I.J., Series A, No. 6*, p. 14).

25. More recently, in the *Military and Paramilitary Activities in and against Nicaragua* case *(Nicaragua* v. *United States of America)*, the Court stated that: "It would make no sense to require Nicaragua now to institute fresh proceedings based on the Treaty, which it would be fully entitled to do." (*Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, pp. 428-429, para. 83.)

26. Thus, in those circumstances where an applicant State may be entitled to bring fresh proceedings to fulfil an initially unmet formal condition, it is not in the interests of the sound administration of justice to compel it to do so (see, for example, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, para. 87). The introduction of a test of "awareness" constitutes an open invitation to the applicant State to institute such proceedings before the Court, having made the respondent State aware of its opposing views.

27. The existence of a dispute has to stand objectively by itself. What matters is that there is a positive opposition of juridical viewpoints, a disagreement on a point of law or fact. It is not for both parties to define or to circumscribe the dispute before it comes to the Court, except when drawing up a *compromis*. In all other instances it is the task of the Court to do so. Nor is it a legal requirement for the existence of a dispute that the applicant State provide prior notice or raise awareness of the respondent before coming to the Court.

28. The positively opposed legal viewpoints may consist of a claim by one party, which is contested or rejected by the other, or by a course of conduct of one party which is met by the protest or resistance of another party (see *South West Africa* cases *(Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*; dissenting opinion of Judge Morelli, p. 567, para. 2). In the latter case, the dispute may be considered to be only at an incipient stage until such time as the State whose conduct is protested is afforded an opportunity either to reject the protest or to accede to the protesting States' demands and consequently change its conduct. The institution of proceedings before

the Court may, however, result in the subsequent crystallization of the nascent dispute if the juridical viewpoints of the parties in relation to the subject-matter of the dispute continue to be positively opposed (see paragraphs 39-40 below).

29. Thus, what matters is the presence of the constitutive elements of a legal dispute susceptible of adjudication by the Court in the form of two conflicting legal views, or legal positions positively opposed to each other, which are manifested by the parties with respect to the subject-matter of the dispute and which may be subsequently defined and argued by the parties before the Court. It is the function of the Court, as a judicial organ, to ascertain the existence of such conflicting legal views.

30. Nevertheless, as the Court stated in its Advisory Opinion on the *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*:

> "where one party to a treaty protests against the behaviour or a decision of another party, and claims that such behaviour or decision constitutes a breach of the treaty, the mere fact that the party accused does not advance any argument to justify its conduct under international law does not prevent the opposing attitudes of the parties from giving rise to a dispute concerning the interpretation or application of the treaty" (*I.C.J. Reports 1988*, p. 28, para. 38).

31. Similarly, the Court held previously that "the existence of a dispute may be inferred from the failure of a State to respond to a claim in circumstances where a response is called for" (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 84, para. 30). Thus, the absence of a reaction in the face of events, such as a protest or a complaint that call for a reaction, may be considered to give rise to an incipient dispute.

32. In the present case, it appears from the evidence on the record, which is examined in paragraphs 48 to 60 below, that there was the start of a dispute between the Marshall Islands and the United Kingdom resulting from the alleged course of conduct of the United Kingdom with respect to the obligation under Article VI of the Non-Proliferation Treaty to pursue and conclude negotiations on a general treaty on nuclear disarmament and the Marshall Islands' protest through statements in multilateral forums, in particular its statement at the Nayarit conference on 14 February 2014. This is another important feature which distinguishes this case from the two other cases in *Marshall Islands* v. *India* and *Marshall Islands* v. *Pakistan*.

IV. The Existence of a Dispute prior to the Filing of an Application

33. One of the important arguments put forward by the United Kingdom in support of its preliminary objections to jurisdiction and admissibility was that the dispute must have existed on the date of the filing of the Application by the Marshall Islands. The Court has recently stated in some of its Judgments that a dispute must "in principle" exist at the time of the Application (*Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 27, para. 52; *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II)*, p. 442, para. 46; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 84, para. 30). The term "in principle" clearly indicates that this does not always have to be the case, and that there are bound to be exceptions.

34. The use of the term "in principle" also suggests that it is not an absolute precondition for the Court's jurisdiction that a full-fledged dispute exist at the date of the application. Such a dispute may be in the process of taking shape or at an incipient stage at the time the application is submitted but may clearly manifest itself during the proceedings before the Court. The Court's insistence on the use of the term "in principle" evidences its desire to avoid excessive formalism in the determination of the existence of a dispute, which is a matter of substance, and not of form.

35. This flexible approach regarding the date for the determination of the existence of a dispute is borne out by the case law of the Court, in which it has occasionally founded the existence of a dispute on opposing statements of parties made during written and oral pleadings. For example, in the preliminary objections phase of the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia)*, the Court noted that:

> "While Yugoslavia has refrained from filing a Counter-Memorial on the merits and has raised preliminary objections, it has nevertheless wholly denied all of Bosnia and Herzegovina's allegations, *whether at the stage of proceedings relating to the requests for the indication of provisional measures, or at the stage of the present proceedings relating to those objections*.
>
> In conformity with well-established jurisprudence, the Court accordingly notes that there persists
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> 'a situation in which the two sides hold clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations' [. . .]

> and that, by reason of the rejection by Yugoslavia of the complaints formulated against it by Bosnia and Herzegovina, 'there is a legal dispute' between them." (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, pp. 614-615, paras. 28-29; emphasis added, citation omitted.)

36. The Court in the above-mentioned case did not examine any evidence that demonstrated that the parties held positively opposed views prior to the date of application; it solely relied on the views expressed in written and oral proceedings before it.

37. A slightly different situation arose in the *Aerial Incident at Lockerbie* cases. In those cases, the Court established the existence of several disputes between the parties. The main dispute concerned the question of whether the destruction of the plane over Lockerbie was governed by the Montreal Convention. This dispute was evidenced by the assertion of the relevance of the Montreal Convention by Libya and the subsequent rejection of its applicability by the United Kingdom and the United States prior to the submission of the Application to the Court. More interesting for our purposes is that the Court determined that more specific disputes existed between the parties regarding the interpretation of Articles 7 and 11 of the Montreal Convention, which were evidenced by the parties' opposing positions advanced in written and oral pleadings (*Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998*, paras. 28, 32; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, paras. 29, 33). These disputes, according to the Court, fell within the compromissory clause of the Montreal Convention and were therefore subject to the jurisdiction of the Court.

38. More recently, the Court founded its holding in *Certain Property* on the ground that the parties' expressed positively opposed views in written and oral proceedings. In the paragraph in which the Court determined the existence of a dispute, it mentioned only the positions that the parties adopted in pleadings, concluding that "[t]he Court thus finds that in the present proceedings complaints of fact and law formulated by Liechtenstein against Germany are denied by the latter", and hence that a dispute existed (*Certain Property (Liechtenstein* v. *Germany), Preliminary Objections, Judgment, I.C.J. Reports 2005*, p. 19, para. 25). Later in that paragraph, the Court went on to note that this conclusion was supported by the positions taken by parties in the course of bilateral negotiations and by letters exchanged by the parties prior to the submission of the Application.

39. Although these Judgments lend some support to the idea that a dispute can be evidenced by positions taken by the parties in the course of proceedings subsequent to the filing of an application, they do not overturn the basic position taken by the Court in previous cases that a dispute cannot solely arise from the institution of proceedings before the Court. There must be, as a minimum, the start or the onset of a dispute prior to the filing of an application, the continuation or crystallization of which may become more evident in the course of the proceedings. However, the seisin of the Court cannot by itself bring into being a dispute between the parties.

40. In other words, although the beginning of a dispute must have existed prior to the filing of the application (*Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*, separate opinion of Sir Gerald Fitzmaurice, p. 109) the decisive factor is that the positively opposed viewpoints have continued to be evidenced by the position of the parties during the post-application period when the Court takes cognizance of the positions of the parties (see *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 476, para. 58; *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, pp. 270-271, para. 55)). Thus, there is a continuum between the pre-application and post-application state of the dispute in the sense that while it must have its beginning prior to the application, its persistence must be confirmed by the Court during the judicial proceedings.

41. The relevance of this to the present case is that it appears from the evidence placed before the Court, as discussed in paragraphs 48 to 60 below, that there was an incipient dispute arising from the alleged course of conduct of the Respondent in relation to the obligation, under Article VI of the Non-Proliferation Treaty, to pursue negotiations and conclude a general treaty on nuclear disarmament that was met by a protest of the Applicant prior to the filing of its Application, particularly through its statement at the Nayarit conference. This nascent opposition of legal viewpoints in relation to the Non-Proliferation Treaty further manifested itself during the proceedings as the Parties expressed positively opposed positions in relation to the interpretation and application of Article VI of the Non-Proliferation Treaty obligations, and the obligation to pursue and conclude negotiations on nuclear disarmament.

V. The Subject-Matter of the Dispute

42. It is for the Court itself to determine on an objective basis the subject-matter of the dispute between the parties, that is, to "isolate the real issue in the case and to identify the object of the claim" (*Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 262, para. 29;

Nuclear Tests (New Zealand v. *France), Judgment, I.C.J. Reports 1974*, p. 466, para. 30). However, in doing so, the Court examines the positions of both parties, while giving particular attention to the manner in which the subject-matter of the dispute is framed by the applicant State (*Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 448, para. 30; see also *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II)*, p. 848, para. 38).

43. In its Written Statement, the Marshall Islands describes the scope of its dispute with the United Kingdom in the following terms: the 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" (Written Statement, para. 30).

44. This framing of the subject-matter of the dispute was further clarified during the oral proceedings when the Co-Agent of the Republic of the Marshall Islands stated that:

> "[a]t no time during these proceedings or — for that matter — outside of these proceedings, has the United Kingdom claimed that it entirely honours the obligation which is central to these proceedings. I will repeat this in order to clarify to the Respondent what precisely the case is about: 'There exists an 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.'" (CR 2016/5, pp. 15-16, para. 5 (van den Biesen).)

45. Moreover, the Marshall Islands relies on its statement at the Nayarit conference, as evidence of the existence of a dispute with the United Kingdom. In that statement, the Marshall Islands declared that the immediate commencement and conclusion of negotiations on nuclear disarmament is "required by legal obligation of nuclear disarmament resting upon each and every State under Article VI of the Non-Proliferation Treaty and customary international law".

46. Thus, the subject-matter of the dispute in this case may be defined as whether the alleged opposition of the United Kingdom to various initiatives for the immediate commencement and conclusion of multilateral negotiations on nuclear disarmament constitutes a breach of the obligation to negotiate nuclear disarmament in good faith under Article VI of the Non-Proliferation Treaty.

47. This is confirmed by the fact that the main focus of the Marshall Islands' written and oral submissions, as well as its statement at the Nayarit conference on which it relies for the existence of the dispute, is on the alleged non-compliance of the United Kingdom with its obligation to pursue in good faith negotiations on nuclear disarmament and bring them to a conclusion. In this connection, the Marshall Islands refers to the statements of British officials and the United Kingdom's voting record in the United Nations General Assembly in support of its claim that the

United Kingdom has "opposed the efforts of the great majority of States to initiate such negotiations" (Application of the Marshall Islands, para. 104). We will examine those statements and voting record below in so far as they have been presented as evidence of the existence of a dispute between the Parties, since the issue of the alleged non-compliance of the United Kingdom with its Non-Proliferation Treaty obligations belongs to the merits and cannot be dealt with here.

VI. The Opposing Viewpoints of the Parties on the Interpretation and Application of Article VI of the Non-Proliferation Treaty

48. For the Marshall Islands, the dispute is about the interpretation and application of Article VI of the Non-Proliferation Treaty, and in particular the 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. This was expressed prior to the submission of the Application by the representative of the Marshall Islands at the Nayarit conference and has been reiterated in these proceedings. In the words of the Co-Agent of the Marshall Islands, "[s]o far as the application of Article VI of the Non-Proliferation Treaty is concerned, the Marshall Islands believed that each one of the nuclear-weapon States, including the United Kingdom, were and, indeed, continued to be in breach of those obligations" (CR 2016/9, p. 8, para. 2 (van den Biesen)).

49. To support these allegations, the Marshall Islands refers to the opposition of the United Kingdom to all the attempts made in the context of resolutions adopted by the United Nations General Assembly to call for the immediate commencement of negotiations with a view to the conclusion of a convention on nuclear disarmament, to convene a working group to prepare the ground for such a convention, or to ensure concrete follow-up to the advisory opinion of the Court which underscored the existence of an obligation to pursue negotiations on nuclear disarmament.

50. According to the Marshall Islands, this opposition is also evidenced by the statements made by the United Kingdom's representatives to the United Nations organs following the adoption of resolutions by such organs, including the United Nations General Assembly, or to international conferences on nuclear disarmament as well as the statements made by the United Kingdom's politicians in parliamentary forums or in documents published by the United Kingdom's Government.

51. With regard to the United Nations resolutions, the Marshall Islands argues that the United Kingdom has consistently voted against all United Nations General Assembly resolutions on the follow-up to the Advisory Opinion of the International Court of Justice of 8 July 1996,

which have been adopted every year since December 1996. These resolutions called for immediate commencement of multilateral negotiations to fulfil the obligations underlined by the Court. The United Kingdom does not deny this consistent pattern of conduct vis-à-vis the fulfilment of the obligation underlined in the Advisory Opinion and the United Nations General Assembly's attempts to implement it, but it claims that various political and legal factors account for its position on these resolutions (see response dated 23 March 2016 of the United Kingdom to the questions by Judge Cançado Trindade, para. 2).

52. It is true that it is not always easy to infer from votes cast in the United Nations General Assembly the existence of a dispute on matters covered by the resolution. However, such votes are not devoid of evidentiary value, particularly where there is a consistent pattern of voting against a series of resolutions which call for the same type of action, in this case the immediate commencement of negotiations and conclusion of a general convention on nuclear disarmament, or where statements of explanation of vote were made by the party voting against the resolutions.

53. The Republic of the Marshall Islands provides several examples of explanation of vote made by the United Kingdom in conjunction with the casting of a negative vote on resolutions adopted by the United Nations General Assembly on commencement of immediate negotiations on nuclear disarmament or the establishment of mechanisms for such negotiations. Some of the statements were made on behalf of the United Kingdom only, while others were made by the United Kingdom jointly with other nuclear-weapons States (NWS)[1].

54. Some of these resolutions called for taking forward multilateral disarmament negotiations for the achievement of a world without nuclear weapons. The United Kingdom, after voting, for example, against one of these resolutions, stated in its explanation of vote that "we see little value in this initiative to take forward multilateral nuclear disarmament negotiations outside of the established fora"[2]. Other resolutions called for a "high-level meeting of the General Assembly on nuclear disarmament". Again, the United Kingdom voted against them and stated in explanation of its negative vote that: "we question the value of holding a high-level meeting of the General Assembly on nuclear disarmament when there are already sufficient venues for such discussion"[3].

[1] The resolutions cited included resolution 68/32 of 5 December 2013, resolution 68/46 of 5 December 2013, resolution 67/56 of 3 December 2012, and resolution 67/39 of 3 December 2012 (see CR 2016/9, pp. 13-14, para. 11 (van den Biesen)).

[2] See resolution 67/56 and the explanation of vote by the United Kingdom of 6 November 2012 (UN doc. A/C.1/67/PV.21).

[3] See resolution 67/39, and the explanation of vote by the United Kingdom of 7 November 2012 (UN doc. A/C.1/67/PV.22).

55. The statements on which the Republic of the Marshall Islands relies as evidence of the United Kingdom's opposition to the immediate commencement and conclusion of negotiations on nuclear disarmament also include statements made in the British House of Lords, or by the United Kingdom Prime Minister, in which the officials concerned explain the objections of their Government to such comprehensive negotiations and advocate a step-by-step approach to denuclearization.

56. For example, in a debate in the House of Lords, the Senior Minister of State for the Foreign and Commonwealth Office stated on 15 July 2013:

> "The United Kingdom voted against the resolution in the United Nations General Assembly First Committee that proposed the Open Ended Working Group (OEWG), has not attended past meetings of the OEWG, and does not intend to attend coming meetings . . . The Government considers that a practical step-by-step approach is needed, using existing mechanisms such as the Non Proliferation Treaty and the Conference on Disarmament."

57. Also, the Republic of the Marshall Islands refers to a statement of the United Kingdom Prime Minister David Cameron in August 2011, in which he declared, *inter alia*, that: "He did not agree that 'negotiations now on a nuclear weapons convention should be the immediate means of getting us to a world free of nuclear weapons'." However, he acknowledged that such a convention "could ultimately form the legal underpinning for this endpoint", but the prospects of reaching agreement on a convention "are remote at the moment" (MMI, para. 89).

58. The United Kingdom responded to the allegations made by the Republic of the Marshall Islands by declaring that:

> "the Marshall Islands at no stage, ever, at any time in the past raised with the United Kingdom its concerns, or allegations or claims, notwithstanding this apparent apprehension of long-term bad faith conduct by the United Kingdom. This goes to the United Kingdom's objection to jurisdiction . . . to the effect that there is no justiciable dispute between the Marshall Islands and the United Kingdom." (POUK, para. 20.)

59. The statement made by the Republic of the Marshall Islands at the Nayarit conference, as well as its other statements calling on nuclear powers, including the United Kingdom, to fulfil their obligation under Article VI of the Non-Proliferation Treaty, may be considered as a protest meant to contest the attitude of the United Kingdom towards the immediate commencement of negotiations on a comprehensive convention for the elimination of nuclear weapons. For the Marshall Islands this attitude

is evidenced by the course of conduct of the United Kingdom relating to the obligation to pursue and conclude such negotiations, evidenced by its voting record at the United Nations General Assembly, its statements in explanation of such votes, as well as statements made by United Kingdom leaders in parliamentary or diplomatic forums.

60. Thus, the Nayarit statement by the Marshall Islands, taken together with the statements made by the United Kingdom with regard to the calls by the United Nations General Assembly for the immediate commencement of nuclear disarmament negotiations appear, in my view, to have given rise to an incipient dispute prior to the submission of the Application by the Marshall Islands. The prior existence of the beginning of a dispute relating to the interpretation and application of Article VI of the Non-Proliferation Treaty, evidenced by the opposed positions of the Parties on negotiations on nuclear disarmament and their timely conclusion, distinguishes this case from the two other cases of *Marshall Islands* v. *India* and *Marshall Islands* v. *Pakistan*. This nascent dispute has fully crystallized during the proceedings before the Court where the Parties continued to manifest positively opposed views on the subject-matter of the dispute as defined in paragraph 46 above.

(*Signed*) Abdulqawi A. YUSUF.