

## DISSENTING OPINION OF JUDGE SIR PERCY SPENDER

I greatly regret that I cannot agree with the Judgment of the Court on certain important issues, though I do agree with certain of its conclusions.

As to the Fifth and Sixth Preliminary Objections of the Republic of India to the jurisdiction of the Court, I agree that these cannot be sustained.

On the merits I agree: that Portugal in 1954 had acquired by local custom a right of passage to the extent necessary for the exercise of Portuguese sovereignty over the enclaves, subject however to the regulation and control of India, which right extended at least to the passage of private persons, Portuguese civil officials and goods in general.

I am unable, however, to agree that no right of passage had been acquired by it in respect of armed forces or armed police or arms and ammunition, or that India did not act contrary to its obligation resulting from the right of passage which the Court has found to have been acquired by Portugal. I shall state my reasons.

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I do not think it necessary to determine whether, under the Treaty of Punem and the *Sanads* of 1783 and 1785, sovereignty over the enclaves became vested in Portugal. Whatever was the precise nature of the grant made thereunder, even if it were one in *jagir* or *saranjam*, merely fiscal in character and unilaterally revocable at any time in the absolute discretion of the Marathas, the grant whilst it endured necessarily implied some right of passage in Portugal between Daman and the villages of Dadra and Nagar-Aveli, and the record establishes that during the Maratha period it did imply a right of passage which, for all practical purposes, was under the circumstances then existent, in substance the same as would have resulted had the grant been one of sovereignty over these villages.

The grant was made for the purpose of supporting the Portuguese fortress of Daman. The authority of the Portuguese within the villages included the collection of taxes, the maintenance of order, the punishment of offenders and the power to quell rebellion (see Capitulations of 1785, paras. 3, 4, 7 and 11, Annex 8 to Portuguese Memorial; see also Indian Annex F. No. 40 at p. 181). In point of fact, the Portuguese during the Maratha period exercised passage between Daman and the villages not only for administrative per-

sonnel, but also for armed troops and armed police, to an extent sufficient to enable them to exercise their authority over them.

This authority remained somewhat precarious until about 1814. From then onwards, however, it appears to have been reasonably entrenched.

The record further establishes that the passage between Daman and the villages which in fact took place, was effected in exercise of a right acknowledged by the Marathas. Taxes were levied in kind. Timber, rice and other products were transported to Daman; herds of cattle were driven in the same direction. Stall-holders in the villages brought supplies from Daman. It was necessary for Portuguese officials frequently to pass from Daman to the villages and vice versa; in fact they did so pass and passed freely. When occasion demanded, military officers, men and equipment were sent to them from Daman for the purpose of preserving order.

The Maratha period was in 1818 followed by that of the British.

It has been contended that the British, from the commencement of their rule, refused to be bound by any rights granted to the Portuguese by the Marathas under the Punem Treaty and the *Sanads* of 1783 and 1785. In my view, the record fails to support this contention. It is true that the British did refuse to acknowledge or be bound by certain exemptions from customs and other taxes on "all articles and timber" which might be exported from Nagar-Aveli to Daman, which exemptions the Portuguese claimed had been granted to them as the result of the Treaty, but the record does not support the view that the British refused to accept the Treaty and the *Sanads*.

At the very commencement of the British rule the Portuguese claimed that sovereignty over the villages had been ceded to them by the Marathas. It is improbable that the British would not have made any enquiries of their own in relation not only as to the Treaty and the *Sanads*, but also as to the practice as to passage between Daman and the villages which had existed under the Marathas. The Maratha records relating to the area in which the villages lie, for ten years up to 1818, running into some hundreds of bundles, were despatched from Poona to the British in Bombay on 6 December 1818. There is specific evidence that the British did make some enquiries both in 1819 and 1859. It is in any event beyond dispute that, from the commencement of and throughout British rule, whatever the premises on which their conduct was based, the British treated the Portuguese as sovereign over the villages (hereafter called "the enclaves"). It is a proper inference from the record that the British were aware of the practice as to passage which was in existence in 1818 and were aware that the Portuguese were exercising that passage under a claim of right.

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In order to determine whether Portugal acquired by custom any right of passage and, if so, the nature and extent of the same, it is necessary to examine the practice which was from time to time followed.

The proper way of measuring the nature and extent of any such custom, if established, is to have regard to the practice which itself both defines and limits it. The first element in a custom is a constant and uniform practice which must be determined before a custom can be defined.

The record in my opinion establishes:

1. For the first two or three decades after 1818 there was no essential change in the practice in relation to passage which had been followed during the Maratha period.

2. The British—as subsequently did the Republic of India—recognized Portuguese sovereignty over the enclaves.

This is established beyond all reasonable controversy. The conduct of the British and India is wholly inconsistent with any other conclusion. The record is heavy with instances of this recognition. [During the British period: Counter-Memorial, Vol. II, Indian Annexes at pages 158, 164, 166, 167, 169-173, 174, 225, 251, 266, 565, 584; Rejoinder, Vol. II, Indian Annexes at pages 226, 233, 235, 249. During the Indian period: Counter-Memorial, Vol. II, Indian Annexes at pages 398, 401, 402, 407; Rejoinder, Vol. II, Indian Annexes at pages 250-252, 253, 267-268.] The notes from India to Portugal of 1950 and 1953, seeking the transfer by Portugal to India of all the former's possessions in India, in themselves provide powerful evidence of India's recognition.

During the oral hearing, on 12 October, Counsel for India admitted the existence of Portuguese sovereignty. At a later date, on 29 October, when Counsel for Portugal put the following question "Does India admit that Portuguese sovereignty still subsists", it was not disputed by India that Portugal still had sovereignty over the enclaves.

As between the Parties to and for the purposes of this dispute, Portugal's sovereignty is not open to question.

This recognition of sovereignty in Portugal, both by the British and India, is in my view the central fact in this dispute.

3. Despite the closest regulation and control from time to time of many aspects of passage, the constant and uniform practice of the British was to allow passage in respect of all six categories mentioned in the Judgment of the Court to an extent which was at least sufficient to enable Portugal continuously to administer the enclaves.

The Court holds, and I agree, that the practice followed during the British period and continued during that of India, resulted in Portugal acquiring by local custom a right of passage in respect of private persons, civil officials and goods. It is my opinion, however, that the practice resulted in a custom by virtue of which Portugal acquired a right of passage not only in respect of these categories, but also in respect of armed forces, armed police, and arms and ammunition.

These three categories require separate examination.

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Movement of members of the armed forces passing between Daman and the enclaves was, at least after the middle of the nineteenth century, not very great. They appear to have discharged in the main strictly police functions. The numbers who exercised passage at any given time were small. Their functions related primarily to the maintenance of internal order within the enclaves; passage between Daman and the enclaves, and between the latter, was largely, if not principally, in relation to relief of detachments, posting or re-posting, proceeding on leave, escorting government funds or prisoners and other duties of a police character. The movement of armed police presents a somewhat similar picture.

The constant and uniform practice during the British period was to permit under regulation and control the passage of members of the armed forces and police officials and arms and ammunition. There appears never to have been an occasion when this passage was not permitted.

In 1947 India succeeded the British as sovereign over the intervening territory. From that time onwards, until shortly before July 1954, when the events arose from which this dispute stems, the practice which had been followed during the British period was continued.

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The right of passage claimed by Portugal is an indivisible one which was, however, in its exercise subject to regulation and control

by India. Portugal did not claim one right of passage for goods, another for private individuals and a separate one for each of the six categories into which, for the purposes of the Court's Judgment, the passage has been divided.

This, however, presents no difficulty so long as the indivisible character of the claim made by Portugal is kept constantly in mind. Unless, however, this is done, distinctions in degree between the regulation and control of passage exercised by the British and later by India, on different occasions and from time to time in respect of one or some of these different categories, may lead to impermissible conclusions as to the nature and extent of the right itself.

In reaching its conclusion that Portugal did not have in July 1954 any right of passage in respect of armed forces, armed police or arms and ammunition, the Court has pursued certain distinctions which it sees between one set of categories and another; which in my opinion are but distinctions of degrees of regulation and control; and has treated these distinctions as decisive. This has led it to reach one conclusion in respect of what may conveniently be described as the first three categories and an opposite one in respect of the other three.

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There cannot be any real dispute that it was the constant and uniform practice during the British and post-British periods to permit passage in respect of all six categories.

Each of these categories was at different times subject to different regulation and control. The passage of private persons and civil officials was, until just prior to the events which occurred at Dadra, subject to routine control, although the frontier controls included during one period, 1857-1863, the prohibition of entry without a licence of all foreigners; during the first World War the reporting by Portuguese Europeans to the police on arrival in Indian territory; and from 1935 the requirement of all Portuguese not domiciled in India to carry a passport when entering Indian territory from a Portuguese possession over the land frontier (Counter-Memorial, para. 46). The passage of goods in general was subject at certain times to customs regulation and such regulation and control as was necessitated by considerations of security or revenue. Indeed, India's case was that the passage of goods was "subject at all times to control and on occasion even to prohibitions" (para. 358 of Rejoinder).

In respect of the first three categories, these controls did not preclude the Court from finding that a custom had arisen creating a right of passage as at July 1954, which right was itself subject to the regulation and control by India. This finding, as I read the Court's decision, depended on the fact that in respect of private persons and civil officials there was no restriction beyond routine control, whilst in respect of goods in general, despite certain prohibitions referred to in the Court's Judgment, in all other cases the passage of goods was free, "no authorization or licence was required".

It is in the absence or presence of any need to obtain prior permission or licence for passage in respect of any category that the Court finds a decisive distinction between the first three categories and the other three.

When, therefore, the Court turns to consider whether any right of passage has been established in respect of armed forces, armed police and arms and ammunition, its decision in respect of them is based upon a preliminary finding that in this respect the position as regards these three categories is clearly different.

It is then for consideration in what material respects, if any, it was different, and whether any difference established is decisive.

Firstly, the difference is stated to lie in the fact that from 1818 to 1878, the passage of armed forces and armed police between British and Portuguese possessions was regulated on a basis of general reciprocity.

It is not apparent in what way this difference can be decisive. Reciprocal arrangements between the British and the Portuguese were not confined to the passage of armed forces and armed police between their respective possessions; there were, during certain periods, some reciprocal arrangements which also covered the passage of certain goods, between specifically Daman and the enclaves, free from customs or transit duties (see e.g. Indian Annex C. No. 35; Counter-Memorial, Vol. II, Indian Annexes at pp. 134, 145, 149, 158, 163, 170, 177; Rejoinder, Vol. II, Indian Annexes at p. 293).

It needs to be constantly stressed that we are concerned not with the matter of general entry by British or Portuguese armed forces or armed police into the possessions of the other, but with the special case of passage between Daman and the enclaves. To the extent to which the general covers the specific, the regulation of entry and transit on the basis of reciprocity is quite consistent with the right claimed by Portugal, consistent with freedom of passage between Daman and the enclaves, and in no way inconsistent with a long continued practice giving rise through custom to a right of passage between Daman and the enclaves. Passage

could be regulated and controlled wholly or in part through agreed-to arrangements just as it could through unilateral acts by the British and India. The factual difference stated provides in my view no foundation for a conclusion that throughout this period the Portuguese knew that the British were entitled at any time at their absolute and arbitrary discretion to stop all passage of armed forces and armed police between Daman and the enclaves.

Moreover, the question with which we are concerned cannot be dealt with as if the existence of the enclaves had no special significance; passage between Daman and the enclaves cannot be equated to any entry into or over British or Indian territory.

Secondly, the Court finds that after 1878 the position was that passage could only take place with the previous authorization of the British, and later of India, whether under a reciprocal arrangement already agreed to or in individual cases, whereas, in the case of private persons, civil officials and goods in general, no previous authorization was required.

On the basis of these preliminary findings, the conclusion is reached that "having regard to the special circumstances of the case" the necessity for authorization before passage could take place constitutes a negation of passage as of right in respect of armed forces and armed police. This in the Court's view predicates that the territorial sovereign had the absolute and arbitrary power to refuse or withdraw permission at any time.

It is not evident what these special circumstances are.

India submitted that the essence of a right of passage is the power to pass without permission; that the need for prior permission or licence negates any right.

It does not appear to what extent, if at all, this proposition, which, in my opinion is, as stated, unsound, has been accepted. If it be that in this case the necessity for authorization before passage took place constitutes a negation of passage as of right solely because of certain special circumstances, it is important to know what those special circumstances are. I assume the Court is referring to the preliminary findings of fact just mentioned, which in my view do not support its decision. No other special circumstances have been suggested, and I am not aware of any.

With regard to arms and ammunition, the Court's decision appears to turn wholly on the finding that since 1878 the importation or exportation of the same has been subject to prior permission or licence. This seems to disregard as unimportant the practice which had been followed from 1818 to 1878.

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In my opinion the record establishes that, prior to the Treaty of 1878, it was not the practice to seek prior permission of the British before any passage of armed forces or armed police or arms and ammunition took place, nor was it necessary to do so.

As regards the armed forces, the Treaty of Commerce and Extradition of 1878, which terminated in 1892, contained a clause (Article XVIII thereof) which provided that "The armed forces of one of the two High Contracting Parties shall not enter the Indian dominions of the other, except for the purposes specified in former Treaties, or for the rendering of mutual assistance as provided for in the present Treaty, or except in consequence of a formal request made by the party desiring such entry to the other." This Article was of general application directed to entry into the dominions of the other. It was proposed not by the British but by the Portuguese, who had for just on 100 years prior thereto continuously exercised passage in respect of armed forces between Daman and the enclaves. The reasons for Portugal's request for the inclusion of this clause had nothing to do with any question of passage between Daman and the enclaves, but were concerned with matters of high policy. The overriding reason was its desire to protect and preserve its sovereignty over its overseas possessions in India. It explained "the exact meaning of this Article" (see Indian Annex F. No. 54, Rejoinder, Vol. II, at page 227).

After the Treaty had come into force, and before 1890, although there were apparently times when prior permission was in fact applied for, there were a number of occasions when members of the Portuguese armed forces passed between Daman and the enclaves without seeking or having any prior permission to do so. The Portuguese claim that these occasions numbered twenty-three. Whatever the precise number, it is quite clear on the record that there were several (Indian Annex F. No. 53, Rejoinder, Vol. II, at pages 212, 213, 214, 216, 218, 219 and 220).

This gave rise in 1890 and 1891 to correspondence which passed between the British and the Portuguese authorities in which the former took up the position that, by virtue of Article XVIII of the Treaty, formal request for permission should in all cases be made whenever any Portuguese armed forces passed through British territory. Whether the provisions of Article XVIII justified the construction then placed upon it by the British authorities is a question which need not be answered. The fact is that thereafter it became a habit for the Portuguese to apply for prior permission. This marked a point of departure in respect of the administrative practice which had prevailed before 1878.



In reaching its conclusion as to the practice with regard to the passage of armed forces, the Court appears to have been much persuaded by letter of the 22nd December 1890 from the Governor General of Portuguese India to the Governor of Bombay (Indian Annex F. No. 53, Rejoinder, Vol. II, at page 215) and the Treaty of 1741 between the Marathas and the Portuguese. On examination, however, these I think provide slender support for its conclusion.

On 8 December 1890 the Bombay Government communicated with the Portuguese Government in India to the effect that "armed men in the service of the Portuguese Government are in *the habit* of passing without *formal* request" between Daman and Nagar-Aveli and that this appeared in breach of Article XVIII of the Treaty of 1878. It was to this legal contention that the Governor General of Portuguese India replied on 22 December, in which *inter alia* he stated: "On so delicate a subject I request leave to observe that Portuguese troops never cross British territory without previous permission and that *small detachments* whenever on the march meet a military post or any force or British Authority, they halt and only proceed further after applying for and obtaining fresh permission. For centuries has this practice been followed, whereby the treaties have been respected and due deference shown to the British authorities." The Bombay Government replied by letter of 9 April 1891 in which it stated that application for permission, claimed to be necessary under the terms of Article XVIII of the Treaty, had not been observed in several instances. It was, however, made quite clear that permission, when applied for in respect to Portuguese armed men, "would be accorded *in consonance with past practice*". (Rejoinder, Vol. II, Indian Annexes at page 223.)

Whatever the precise meaning to be given to the statement in the letter of the Portuguese Governor General it is, I think, apparent on the reading of the relevant correspondence that:

(a) The request for permission was treated very much as a formality, though a not unimportant one. The "formal request" under Article XVIII of the Treaty had first to be made.

(b) When permission was applied for, it would be forthcoming "in consonance with past practice".

That this letter of the Portuguese Governor General cannot be accepted as establishing that the practice which had existed prior to 1878 in relation to passage of armed forces between Daman and the enclaves was to seek for and obtain permission or that prior permission was necessary is, I think, reasonably clear elsewhere in the record.

India contended that since 1879, when the Treaty came into force, permission was necessary (para. 355 of Rejoinder). But "The

fact is ... that before 1879 the entry of *troops* or *armed police* of either Government into the territory of the other was governed by a reciprocal arrangement. The existence of such an arrangement *naturally made it unnecessary for a formal request to be made and permission to be granted on each occasion of entry* (para. 333 of the Rejoinder). (See also paras. 296 and 333 of Rejoinder, and paras. 132 and 136 of Counter-Memorial; Indian Annex F. No. 53, Rejoinder, Vol. II, at pages 216, 218, 219 and 220; Indian Annex C. No. 39, Counter-Memorial, Vol. II, pages 192-193).

As for the Treaty of 1741, referring as it does to circumstances and a time forty years prior to the Portuguese obtaining possession of the enclaves, it seems sufficiently remote from the issues with which we are called upon to deal as to provide little assistance. It seems therefore clear that prior to 1878 it was not usual for the Portuguese to request prior permission nor does it appear that such permission was necessary before passage took place.

When the Treaty of 1878 was entered into the crystallization into custom of the practice existing between 1818-1878 was already far advanced, if indeed it had not by that time become a local custom, as I incline to think was the case.

Whenever, however, subsequently permission was in fact applied for, passage was allowed not generally, but always. It was "accorded in *consonance with past practice*".

In the case of armed police different arrangements were agreed to from time to time or different administrative practices were followed, which endured for certain periods. During some periods no prior permission was applied for or appears to have been required. During other periods it was required, or required when the number intended to exercise the passage exceeded a given figure. On other occasions previous intimation of intention was all that seemed to be called for (see e.g. Indian Annex C. No. 53, Counter-Memorial, Vol. II, at p. 307 (1912); Indian Annex C. No. 57, *ibid.*, p. 323 (1940)). It was necessary to have "some sort of control or check over the movements of armed police forces" (*ibid.*, at p. 324). Prior permission never appears however to have been necessary before 1878 nor was there any practice to apply for the same.

With respect to arms and ammunition, subsequent to 1878 it was the usual practice that permission had first to be applied for. But the evidence does not establish that this was so during the period 1818-1878, or that it was usual during that period for the Portuguese to ask permission.

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But assuming that it were otherwise and that there was at all times an administrative or agreed-to requirement, either general in

application or specifically applicable to passage between Daman and the enclaves, that prior permission should be sought before armed forces, armed police or arms and ammunition entered or passed over British, and later Indian, territory, that, in my opinion, would not preclude a custom arising creating in Portugal a right of passage, subject of course at all times to its regulation and control by the sovereign of the intervening territory.

Portugal has throughout made it clear that the right claimed by her to have arisen from local custom is subject in its exercise to India's regulation and control. Despite such regulation and control as from time to time applied to all categories, it was the constant and uniform practice, extending over more than a century and a quarter, for both the British and India, to allow passage for each of these categories. Never, until about the time of the events of 1954, did this practice alter.

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Regulation and control take different forms, which may vary from time to time. As times and circumstances change, so may regulation and control. The requirement of a licence to do an act is a common, useful and practical form of administrative regulation and control. (See in this case, for example, Counter-Memorial, Vol. II, Indian Annex D. No. 4, Act of 5 December 1857 relating to foreigners, which provided that no foreigner should travel or pass through British territory without a licence which could be revoked at any time; Annex D. No. 5, Act of 12 February 1864 making similar provision to prevent (*inter alia*) subjects of foreign States from passing through British India without the consent of the Government of British India.) A necessity to apply for a licence before an act is done is not necessarily incompatible with a right to do that act. The legal systems of many countries will provide examples where before an admitted right may be exercised application for permission must first be made, but where the right to accord or refuse permission is, in all the circumstances, interpreted not as one of absolute discretion but as a controllable discretion, one which must be used reasonably and not capriciously, one which must be exercised in good faith.

In the present case, in respect of the three categories where the Court has held a right of passage in Portugal to have arisen, there were at different times routine controls or such regulations and controls as were necessitated by considerations of security or revenue. It is not without significance that whereas the passage of certain goods was at different times and over substantial periods totally prohibited, the passage of armed forces, armed police, and arms and

ammunition were, until just before July 1954, always allowed. The constant and uniform practice was to allow passage in respect of all six categories sufficient to enable Portuguese authority to function, subject however to the different controls in force from time to time.

In respect of any of the first three categories, the Judgment of the Court confirms that the right of passage which arose out of local custom may properly, in respect to matters connected with the exercise thereof, be controlled or regulated by India. Custom, which created the right, attached to it the qualification of regulation and control by the sovereign of the intervening territory.

This also, in my opinion, was the case in relation to armed forces, armed police, and arms and ammunition where a stricter degree of control and regulation may for obvious reasons be necessary. The checking of the movement of any of these categories over the intervening territory, the numbers, or quantity involved and the purpose for which the passage is sought, the time, the route to be taken, and other modalities of passage, are all matters properly the subject of control and regulation (cf. Indian Annex C. No. 57, Counter-Memorial, Vol. II, at p. 324).

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Whether it was in respect of goods or persons or civil officials, or armed forces or armed police, or arms and ammunition, it was the constant and uniform practice to allow their passage. In respect of each category controls of different kinds operated on different occasions or during different periods. But the controls differed only in degree. The administrative need to apply for prior authority in respect of any one or more category is not decisive in this dispute any more than was the general prohibition of passage of goods during the Second World War or prohibitions on transit imposed on different kinds of goods. Each in my opinion fell within the field of regulation and control of the exercise of the right of passage. In principle, I do not see any decisive difference between any of the regulations and controls which applied to the various categories at different times.

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The Court in its Judgment places little emphasis, if any, upon the fact of recognition by the British and India of Portuguese sover-

eighty over the enclaves, yet this recognition is not only an indisputable, it is as well the central, fact in the case. Another vital and indisputable fact is that this sovereignty could not be exercised unless some passage was accorded the Portuguese. Another is that this was recognized by both the British and India.

In the course of the oral hearing, Counsel for India conceded "that Portugal's sovereignty cannot operate if she is forbidden all passage of official organs and at the present time of police forces". In determining whether custom has created a right of passage, and, if so, its nature and extent, the facts above referred to have a special importance. The maintenance of internal order is an essential aspect of the exercise of sovereignty. Its maintenance in these enclaves was not possible if all access were denied to the Portuguese organs of government except unarmed civilian officials.

The history of the enclaves, their geographical situation, the recognition of Portugal's sovereignty thereover, the obvious necessity for some right of passage sufficient to enable Portuguese sovereignty to be exercised, presents as well the background against which the conduct of the Parties and the practice they followed must be measured. Sovereignty is not a mere status, it connotes an ability to exercise the rights of sovereignty. Recognition that sovereignty over the enclaves was vested in Portugal was a recognition of Portugal's rights to exercise sovereignty within them; otherwise the recognition of sovereignty would have been meaningless.

For Portugal to exercise its rights of sovereignty, passage not only for private persons, unarmed Portuguese civil officials and goods in general, but also for armed forces, armed police and arms and ammunition was in fact indispensable. Necessity for passage being implicit in the very existence of the enclaves, the recognition of Portuguese sovereignty, taken in conjunction with the constant and uniform practice which was followed, establishes in my opinion that a right of passage in respect of all the six categories referred to had been acquired by Portugal long before the events of 1954.

The long, uninterrupted, and continuous passage permitted by the British and India in respect of armed forces, armed police, and arms and ammunition is, in all the circumstances, far more consistent with a conclusion that both the British and India recognized an obligation on their part, subject to their regulation and control, to allow their passage, than with a conclusion that the matter of passage was solely one for their absolute and arbitrary discretion and that they were at liberty, if they so wished, at any time to put an end forever to further passage, isolate, for all practical purposes,

the enclaves from Portuguese authority and thus effectively prevent the Portuguese from exercising their acknowledged sovereignty over the enclaves.

In my opinion the record establishes a practice during the British and post-British periods, accepted as law by the Parties, to allow the passage of armed forces, armed police, and arms and ammunition, as well as that of private persons, civil officials and goods in general, to the extent necessary in the exercise of Portuguese sovereignty over the enclaves, and subject to the regulation and control of India, for the purposes of, but only for the purposes of, the normal day-to-day administration thereof, including the maintenance of law and order.

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A right of passage having been established, there was a correlative obligation on India not to prevent the exercise of that passage; it could regulate and control it; it could not prevent it or render it nugatory or illusive.

The Court has held that no breach by India of its international obligation has been proved. Again, I regret that I am unable to agree, even assuming—as for the purpose of this part of my opinion I do—that the right of passage acquired by Portugal was limited to the first three categories mentioned in the Court's Judgment.

In 1954 India did not acknowledge that Portugal had any right of passage. India had persuaded itself that it was in its absolute discretion, if it wished, completely to prevent Portugal from having any access to the enclaves.

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In order to ascertain whether any breach was committed by India it is, I think, proper to have regard to the background furnished by certain events which occurred over a period of upwards of four years prior to July 1954. These disclose a widening estrangement between Portugal and India and a progressive tightening of restrictions on all movement by the Portuguese into and across Indian territory including ultimately and specifically movement between Daman and the enclaves.

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On 27 February 1950 the Government of India approached the Portuguese Ministry of Foreign Affairs with the view that Portugal should agree to the integration of her territories in the Indian Peninsula within the Republic of India. It sought the acceptance

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of this principle by Portugal, leaving to be discussed the ways and means to give it effect.

By Memorandum dated 15 June 1950, Portugal made it clear that the transfer of any Portuguese territory could not be considered.

On receipt of this Memorandum the Indian Minister in Portugal stated that his Government could not accept the Portuguese refusal of India's proposal as a final disposition of the question or acquiesce in the continuance of the existing position.

On 14 January 1953, the Indian Government addressed a further Note on the same subject to the Government of Portugal. It asked that the principle of direct transfer should be accepted first and that this should be followed by a *de facto* transfer of the administration. "No longer ... is it compatible with the status of India ... that pockets of foreign territory, however small in area ... should continue to exist on Indian soil..." "The Government of India has come to the conclusion that no solution is now possible except on the basis of a direct transfer which would ensure the merger of these territories at an early date with the Indian Union."

On 1 May 1953, Portugal having refrained from replying to this renewed request and having refused to discuss the question of a direct transfer with the Indian Chargé d'Affaires, India, by Note of this date, notified Portugal that unless it was prepared to discuss the question of direct transfer, it proposed to close its Legation in Lisbon. The Note stressed again the Government of India's view that Portuguese possessions should become an integral part of the territory of the Union of India.

Portugal, on 15 May 1953, replied to both the preceding Notes. It adhered to its refusal to discuss India's request, and asked India to reconsider its intention to close its Legation.

On 26 May 1953 India notified Portugal that its Legation would be closed from 11 June 1953.

In October 1953 India prohibited the transit of armed Portuguese police or military personnel across Indian territory.

On 2 December 1953 the Portuguese Legation at New Delhi, by Note to India's Foreign Affairs Ministry, stated that information had been received that Indian authorities had as from 26 November 1953 forbidden the transit of the Governor of Daman District, of the European officials and the car of the Portuguese police through Indian territory between Daman and Nagar-Aveli unless provided with passports and Indian visas. The Portuguese Note stated that it would "hamper administration of the said territories"; it was felt that the measure was unfriendly.

This complaint was referred to in an Indian Note of 23 December 1953. India stated that it had been compelled to review its policy in view of the "general unfriendly attitude" of the Portuguese and the "misuse" of concessions hitherto enjoyed by Portuguese officials. However, to facilitate the administration of Nagar-Aveli the District Magistrates at Surat were "as a very special case" authorized to grant transit visas to permanent Portuguese European officials of Daman and Silvassa but no further concession could be considered. This practice as applied to transit between Daman and Nagar-Aveli was, I think, an innovation (see Annexes 35 and 39 to Portuguese Memorial, and Indian Annexes E. 51 and 52). It was the subject of further protests on the part of the Portuguese, on 18 January 1954 and 11 February 1954 (Annexes 39 and 40 to Memorial). The Note of 18 January (para. 4) stated that "the Governors of Daman, as well as the other officials of the district, including the Europeans, had always been allowed, by custom and tradition, to cross Indian territory between Daman and Nagar-Aveli ... without any formalities of visas or of presenting themselves to the Indian authorities".

On 3 February 1954, with immediate effect, trans-shipment through India from and to the Portuguese possessions in India of arms and ammunition of all categories was prohibited. The prohibition extended also to Portuguese civil and military personnel, excepting only the Governor-General of Goa and diplomatic and career consular officials accredited to the Government of India (Annex 45 to Memorial).

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We now come to the events which occurred at Dadra and Nagar-Aveli.

It is, I think, important to consider those which took place at Nagar-Aveli separately from those at Dadra. India has throughout this case dealt with the two series of events as in substance one occurrence. There was of course an interconnection between them but they were quite separate occurrences.

On the evening of 21 July 1954 a band of men entered Dadra from Indian territory for the purpose of taking over the administration there. A *mélée* ensued. Two Portuguese officers were killed. Portuguese resistance was overcome and its control displaced.

On 13 June 1954, the transit of vehicles between Daman and the enclaves had been interrupted by the Indian authorities. On 17 July 1954, India "decided to make certain changes in the



concessions hitherto granted to the Portuguese administration at Daman and Nagar-Aveli" with immediate effect. A number of new restrictions were imposed, the most important of which was that "the transport of firearms, and ammunition and military stores by a Portuguese officer, or intended for the Portuguese India Government, passing through Indian territory, will be prohibited". On the day preceding 21 July the Governor of Daman, proceeding to Dadra, was prevented from crossing the border. The Indian explanation is that he had merely been asked to submit certain clarifications regarding his return visa, that he had refused to give them and said he would obtain separate visas for the outward and return journeys. This he did, and he passed through to Dadra on 21 July. At the same time, on 20 July 1954, a bus on the regular service between Daman and Nagar-Aveli was forced to return when it was nearing Dadra.

It is stated by India that "in April 1954 the position in regard to travel between Portuguese possessions and India was that Goans who were not in the service of the Portuguese Government could enter Indian territory without formalities and freely move within it; and that Indian nationals also could enter the Portuguese possessions without requirement of passport and visa, but were required to report to the police authorities within a certain time of arrival and were subject to inspection of identity certificates. Portuguese Europeans and Portuguese native subjects who were in the service of the Portuguese Government were required to produce 'Guias' or passports having a visa for entry in or transit through India. *There was no ban on such entry or transit right up to the date of the insurrection in Dadra.* The day before the insurrection in Dadra, that is, on 21 July 1954, the Governor of Daman had been allowed to enter Indian territory and proceed to Dadra and to complete the return journey on the strength of visas granted by the Indian Government. *After the insurrection in Dadra, the Indian Government ceased to grant visas to Portuguese Europeans or to native subjects in the service of the Portuguese Government wishing to go to Dadra and Nagar-Aveli.*" (Indian Counter-Memorial, para. 211.)

On 26 July the Portuguese Government requested that delegates of the Governor of Daman (if necessary limited to three) should be permitted to go to Nagar-Aveli in order to enter into contact with the population, examine the situation and take the necessary measures on the spot. The request stated that if possible this delegation would also visit Dadra and examine the situation there. It mentioned that the delegation could be routed directly to Nagar-Aveli from Daman and need not necessarily pass through Dadra. This request was refused (Annex 52 to Memorial).

This was prior to any occurrences in Nagar-Aveli. It was not until 29 July that the first event which led during August to the overthrow of Portuguese authority in Nagar-Aveli occurred. Up to 29 July conditions within Nagar-Aveli were normal.

From the time of the events in Dadra and thenceforward the passage of all Portuguese civil officials or employees to either of the enclaves was banned. All passage was refused. In my opinion the banning of all transit by and the stopping of all further visas to Portuguese civil officials, whether native or European, followed by the refusal to permit the passage of these few delegates—the refusal of all passage to the enclaves—was in breach of India's international obligation in relation to Portugal's right of passage, unless it can be excused as within the qualification to Portugal's right which permitted India to regulate and control its exercise.

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India contends that to have granted passage could have resulted in increased tensions and could have led to undesirable consequences.

It is relevant to observe that India did not purport in any way to regulate and control any right of Portugal to passage. Her attitude is that no such right existed.

If India had in fact purported to regulate and control Portugal's right of passage, it would have been relevant to enquire whether the action taken by India was in reality a regulation or control of the right of passage, or was directed to another and different purpose. It would have been relevant to enquire whether it was in fact directed to control and regulation as such, or whether it was directed to the right of passage as such so as to render it nugatory. India cannot be in any better position in this case than she would have been had she purported to have regulated and controlled Portugal's right of passage.

In my opinion, the key to the question whether its actions were or were not a breach of its obligation to conduct itself in consonance with the international right acquired by Portugal, is to be found in the conduct of India and the series of progressive restrictions on passage imposed by it since 1953. The refusal to grant visas to any civil officials after the incursion into Dadra and the refusal to permit the passage to Nagar-Aveli of but a few delegates of the Governor of Daman cannot be seen in isolation. They were part of the pattern already formed by the past.

An examination of the evidence forces me to the conclusion that the dominant purpose of India immediately after the events at Dadra, to which all other considerations were subordinated, was to

exclude the Portuguese thenceforth from any further access to the enclaves. For reasons unconnected with any question of regulation or control of passage as such or of any right of passage, it was not prepared to permit civil officials or any organ of Government to pass to the enclaves under any circumstances and acted accordingly. By India's actions Nagar-Aveli became isolated from the Portuguese authorities at Daman before the events which occurred there had taken place, and has, in the events which have happened, continued to be so ever since.

The qualification of Portugal's right making it in its exercise subject to India's control and regulation affords in the circumstances no protection to India. Breach of its international obligation has been established. In my opinion the Court should have so found and should then have proceeded to consider the resulting situation, and the contentions advanced by India to the effect that any obligations with regard to passage binding on it in July 1954 should be regarded as having lapsed or become unenforceable against it as a result of events and circumstances which have since occurred.

*(Signed)* Percy SPENDER.