INTERNATIONAL COURT OF JUSTICE

The Case concerning the Aerial Incident of 10th August, 1999

(Pakistan vs. India)

Preliminary Objections to the Jurisdiction of the Court

Counter Memorial of the Government of India

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A. Introduction: The Arguments Advanced by Pakistan

1. It may be recalled that India filed its preliminary objections on 2 November 1999 to the jurisdiction of the Court in response to the Application submitted by the Government of Pakistan concerning the *Aerial Incident of 10 August 1999.* Pakistan has now submitted its observations by way of a Memorial on the Jurisdiction on 7 January 2000 (hereinafter referred to as the Memorial) and reiterated that the Court has jurisdiction.

2. In this connection, Pakistan makes the following submissions:

i) That the Court has jurisdiction in the present case by virtue of Article 17 of the General Act for Pacific Settlement of International Disputes read with Article 36(1) and Article 37 of the Statute of the Court;

ii) That the jurisdiction of the Court is also founded on the provision contained in Article 36(1) of the Statute which states, "the jurisdiction of the Court comprises all cases which parties refer to it and *all matters specifically provided for in the Charter of the United Nations or in treaties and conventions in force* ", together with Articles 1(1), 2(3) & (4), 33, 36(3) and 92 of the UN Charter. In this connection, it also cited Article 1 of the Agreement on Bilateral Relations between India and Pakistan of 2 July 1972 which states that "the principles and purposes of the United Nations Charter shall govern the relations between the two countries";

iii) That the Commonwealth reservation of India in its Declaration under Article 3 6(2) of the Statute of the Court is invalid on the ground that it is contrary to Articles 92 and 93 of the UN Charter and Article 35 of the Statute. It also questions the same on the further ground that it violates the condition of reciprocity and other conditions laid down in Article 3 6(3) of the Statute. Accordingly, in its view, the Indian Declaration under Article 3 6(2) should be given effect by discounting the Commonwealth reservation;

iv) That the Government of India is estopped from invoking the "Commonwealth members" reservation specifically against Pakistan by virtue of the obligation undertaken by the Government of India under Article 1(2) of the Agreement on Bilateral Relations of 2 July 1972, whereby the parties have agreed to settle their differences by negotiations or "by any other peaceful means mutually agreed upon between them"; that the compulsory procedure for settlement of dispute under Article 3 6(2) constituted such a 'peaceful means' agreed upon between them and that therefore the unilateral reservation made by India thereunder could not be invoked against Pakistan or recognized by the Court;

v) That the Indian declaration made under Article 3 6(2), being a treaty obligation cannot carry with it the Commonwealth reservation, being a prohibited reservation and hence could not be made at all by virtue of Article 19(b) of the Vienna Convention on the Law of Treaties;

vi) That the "multilateral convention" reservation invoked by India cannot oust the compulsory jurisdiction of the Court; and

3. Rejecting the above contentions as without any legal basis or authority, the Government of India respectfully submits the following:

B. Allegations of Pakistan concerning the Aerial Incident

4. The factual allegations made by Pakistan in its Application and in its Memorial are squarely denied. Pakistan's claim for compensation is purely a propaganda exercise and an attempt to cover up its misdeeds. Pakistan is entirely responsible for its own acts. India reserves its right to counter specifically all allegations made by Pakistan. At the present stage, the Government of India do not intend to engage the Court with submissions on facts and will thus confine this Counter Memorial only to the issues concerning *Preliminary Objections* to the jurisdiction of the Court.

C. There is No Basis for Jurisdiction

5. The Memorial of Pakistan signally fails to indicate any basis of consent to the jurisdiction of the Court in accordance with Article 36 of the Statute. As the Court itself has frequently recalled, the "well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent" exists *(Case of the Monetary Gold Removed from Rome in 1943, I.C.J. Reports 1954,* p. 32; see also e.g.: P.C.I.J., *Rights of Minorities in Upper Silesia (Minority Schools),* Series A, N° *15,* p. 22; I.C.J., *Anglo-Iranian Oil Co., I.C.J. Reports* 1952, pp. 102-103; *Ambatielos, I.C.J. Reports* 1953, p. 19; *Phosphate Lands in Nauru, I.C.J. Reports* 1992, p. 260; *East Timor, I.C.J. Reports 1995,* p. 101).

As Sir Hersch Lauterpacht observed in 1958:

"The temper of caution exhibited by the Court in its formulation and exposition of the law manifests itself with some persistence in its attitude of restraint in relation to the question of its own jurisdiction. A very substantial number of the decisions of the Court have been concerned with that question. When appearing before the Court as defendants under a clause giving it obligatory jurisdiction, Governments show no reluctance to plead that they have not in fact conferred upon it jurisdiction, which must be proved up to the hilt. Numerous Judgements show the Court as 'bearing in mind the fact that its jurisdiction is limited, that it is

invariably based on the consent of the respondent and only exists in so far as this consent has been given'. Nothing should be done which creates the impression that the Court, in an excess of zeal, has assumed jurisdiction where none has been conferred upon it. The rule *boni judicis est ampliare jursdictionem* applies, so far as the Court is concerned, only subject to that fundamental limitation." *[The Development of International Law by the International Court (London, 1958),* p. 91].

6. The Court's jurisprudence has consistently affirmed the necessity for clear agreement between the parties. Sir Gerald Fitzmaurice has also emphasised the importance of consent. In his opinion:

"As to the application in contentious cases of the principle of the consent of the parties as the basis of jurisdiction, there is no room for doubt. In the period covered by the *1948-51* cycle of this series, this principle was emphatically affirmed by the Court in the *Peace Treaties* cases, when it is said that 'The consent of States, parties to a dispute, is the basis of the Court's jurisdiction in contentious cases.' In the period under review, this principle, which is reflected in paragraph 1 of Article 36 of the Statute, was equally affirmed and acted upon by the Court; and in all the three cases in which the question of jurisdiction specifically arose, the issue was whether or not, in the circumstances, the consent of both parties had been given to the exercise of jurisdiction by the Court. In the *Anglo-Iranian Oil* cases the *Court (I.C.J., 1952,* 103) referred to:

'...the principle that the jurisdiction of the Court to deal with and decide a case on the merits depends on the will of the Parties. Unless the parties have conferred jurisdiction on the Court in accordance with Article 36 [sc. of the Statute], the Court lacks jurisdiction.'

In the first phase of the *Ambatielos* case also, the Court, after referring to doubts as to the existence of an 'unequivocal agreement between the Parties' on a certain jurisdictional issue, went on to say *(I.C.J., 1952,* 38) that it had no doubt that

'.. .in the absence of a clear agreement between the Parties in this respect, the Court has no jurisdiction to go into. ..the merits of the present case...'

Similarly, in the second phase of the case, the Court said (I.C.J., 1953, 44) that the function it was carrying out in that case did not involve departing from

'...the principle, which is well established in international law, and accepted by its own jurisprudence as well as that of the Permanent Court of International Justice, that a State may not be compelled to submit its disputes to arbitration without its consent'.

[British Year Book of International Law, vol. 34 (1958), pp. 67-8; Sir Gerald Fitzmaurice, The Law and Procedure of the International Court of Justice, vol. 11 (Cambridge, 1986), pp. 493-*4].*

7. The more recent decisions of the Court have maintained the rigour of the principle of consent. In this connection, the observations made by the Court in the *Fisheries Jurisdiction case (Spain v. Canada)* dated 4 December 1998 may be noted:

" 42. Spain and Canada have both recognized that states enjoy a wide liberty in formulating, limiting, modifying and terminating their declarations of acceptance of the compulsory

jurisdiction of the Court under Article 36, paragraph 2, of the Statute. They equally both agree that a reservation is an integral part of a declaration accepting jurisdiction.

43. . . Spain emphasized that a reservation to the acceptance of the Court's jurisdiction must be interpreted so as to be in conformity with, rather than contrary to, the Statute of the Court, the Charter of the United Nations, and general international law.

For its part, Canada emphasized the unilateral nature of such declarations and reservations and contended that the latter were to be interpreted in a natural way, in context and with particular regard to the intention of the reserving state.

44. The Court recalls that the interpretation of declarations made under Article 36, paragraph 2, of the Statute, and of any reservations they contain, is directed to establishing whether mutual consent has been given to the jurisdiction of the Court.

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: "The jurisdiction only exists within the limits within which it has been accepted" *(Phosphates in Morocco, Judgment, 1938, P.C.I.J., Series A/B, No. 74,* p. 23). 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..."

The Court further added in the same case:

"46. A declaration of acceptance of the compulsory jurisdiction of the Court, whether there are specified limits set to acceptance or not, is a unilateral act of State sovereignty. At the same time, it establishes a consensual bond and the potential for a jurisdictional link with the other states which have made declarations pursuant to Article 36, paragraph 2, of the Statute and 'makes a standing offer to the other states party to the Statute which have not yet deposited a declaration of acceptance'. *[Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections, I.C.J. Reports 1998,* para. 25]. *[I.C.J. Reports, Judgment,* 4 December 1998)".

8. To the same effect is the observation made by President McNair, in his Separate Opinion, in the *Anglo-Iranian Oil Company* case:

"A State, being free either to make a Declaration or not, is entitled, if it decides to make one, to limit the scope of its Declaration in any way it chooses, subject always to reciprocity. *(I.C.J. Reports, 1952,* p. 116)."

9. Judge Lauterpacht, in his Separate Opinion in *Certain Norwegian Loans (I.C.J. Reports, 1957,* p. 46) expressed in a similar vein:

"In accepting the jurisdiction of the Court Governments are free to limit its jurisdiction in a drastic manner. As a result, there may be little left in the Acceptance, which is subject to the jurisdiction of the Court. This the Governments, as trustees of the interests entrusted to them, are fully entitled to do. Their right to append reservations which are not inconsistent with the Statute is no longer in question".

10. In the context of establishing a legal basis for the exercise of jurisdiction by the Court, the proposal by Pakistan that India should make a voluntary submission to the jurisdiction of the Court (see the Memorial, paras. 5 and 6) speaks for itself. This proposal constitutes a clear admission that, in the absence of such a submission, jurisdiction is lacking. In any case the Government of India rejects this invitation.

D. Bases of Jurisdiction Proposed by Pakistan: Article 17 of the General Act for the Settlement of International Disputes

11. Article 17 of the General Act (**Annex-A**) provides as follows:

"All disputes with regard to which the parties are in conflict as to their respective rights shall, subject to any reservations which may be made under Article 39, be submitted for decision to the Permanent Court of International Justice, unless the parties agree, in the manner hereinafter provided, to have resort to an arbitral tribunal. It is understood that the disputes referred to above include in particular those mentioned in Article 36 of the Statute of the Permanent Court of International Justice".

12. With reference to this provision Pakistan relies upon Article 37 of the Statute of the Court, which preserves compromissory clauses in the following conditions:

"Whenever a treaty or convention in force provides for reference of a matter to a tribunal to have been instituted by the League of Nations, or to the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice."

13. The contention by the Government of Pakistan lacks any basis, first because the General Act was the subject of an unequivocal notification of termination by the Government of India in its letter to the Secretary General of the United Nations received on 18 September 1974 (Annex-B). The key passage in the letter is as follows:

"I have the honour to refer to the General Act of 26 September 1928 for the Pacific Settlement of International Disputes, which as accepted for British India by the then His Majesty's Secretary of State for India by a communication addressed to the Secretariat of the League of Nations dated 21st May 1931, and which was later revised on 15th February 1939."

"The Government of India never regarded themselves as bound by the General Act of 1928 since her independence in 1947, whether by a succession or otherwise. Accordingly, India has never been and is not a party to the General Act of 1928 ever since her independence. I write this to make our position absolutely clear on this point so that there is no doubt in any quarter."

14. In the same communication, the Government of India provided a detailed explanation of its conclusion. The relevant passages are as follows:

"2.In the aforementioned communication, the Prime Minister of Pakistan has stated, *inter alia,* that as a result of the constitutional arrangements made at the time when India and Pakistan became independent, Pakistan has been a separate party to the General Act of 1928 for the Pacific Settlement of International Disputes from the date of her independence, i.e. 14 August 1947, since in accordance with Section 4 of the Indian Independence (International

Arrangements) Order 1947, Pakistan succeeded to the rights and obligation of British India under all multilateral treaties binding upon her before her partition into the two successor States.

The Prime Minister of Pakistan has further stated that accordingly, the Government of Pakistan did not need to take any steps to communicate its consent *de novo* to acceding to multilateral conventions by which British India had been bound. However, in order to dispel all doubts in this connection, the Government of Pakistan has stated that they continue to be bound by the accession of British India to the General Act of 1928. The communication further adds that 'the Government of Pakistan does not, however, affirm the reservations made by British India'.

3. In this connection, the Government of India has the following observations to make:

(1) The General Act of 1928 for the Pacific Settlement of International Disputes was a political agreement and was an integral part of the League of Nations system. Its efficacy was impaired by the fact that the organs of the League of Nations to which it refers have now disappeared. It is for these reasons that the General Assembly of the United Nations on 28 April 1949 adopted the Revised General Act for the Pacific Settlement of International Disputes.

(2) Whereas British India did accede to the General Act of 1928, by a communication of 21 May 1931, revised on 15 February 1939, neither India nor Pakistan, into which British India was divided in 1947, succeeded to the General Act of l928, either under general International law or in accordance with the provisions of the Indian Independence (International Arrangements) Order, 1947.

(3) India and Pakistan have not yet acceded to the revised General Act of 1949.

(4) Neither India nor Pakistan has regarded itself as being party to or bound by the provisions of the General Act of 1928. This is clear from the following:

(a) In 1947, a list of treaties to which the Indian Independence (International Arrangements) Order, 1947 was to apply was prepared by 'Expert Committee No. 9 on Foreign Relations'. Their report is contained in Partition Proceedings, volume III, pages 217-276.

The list comprises 627 treaties in force in 1947. The 1928 General Act is not included in that list. The report was signed by the representatives of India and Pakistan. India should not therefore have been listed in any record as a party to the General Act of 1928 since 15 August 1947.

(b) In several differences or disputes since 1947, such as those relating to the uses of river waters or the settlement of the boundary in the *Rann of Kutch* area, the 1928 General Act was not relied upon or cited either by India or by Pakistan.

(c) In a case decided in 1961, the Supreme Court of Pakistan while referring to the Indian Independence (International Arrangements) Order, 1947 held that this Order 'did not and, indeed, could not provide for the devolution of treaty rights and obligations which were not capable of being succeeded to by a part of a country, which is severed from the parent State and established as an independent sovereign power, according to the practice of States'. Such

treaties would include treaties of alliance, arbitration or commerce. The Court held that ‘an examination of the provision of the said Order of 1947 also reveals no intention to depart from this principle’."

15. Two distinct legal elements stand out from the above submission of India. The first consists of the proposition that in customary international law treaties of this type are not transmissible. The Indian communication quoted above refers to several leading authorities. The general rule is that when a new State emerges, it is not bound by the treaties of the predecessor sovereign by virtue of the principles of State succession. The general rule is that treaties are not transmissible. Whilst there are exceptions to the rule, the Memorial of Pakistan provides no evidence that the General Act falls within the exceptions.

16. The general position is explained very clearly in the ninth edition of Oppenheim:

"A state’s consent to be bound by a treaty establishes not only a legal relationship between that state and the other party (or parties) but also a legal nexus between the treaty and that state’s territory in relation to which its consent to be bound was given. It does not follow, however, that, where there is a change in the responsibility for the international relations of the state’s territory, that nexus is necessarily sufficient to require the state which has assumed those responsibilities for the territory to succeed to all treaties previously applying to it. For example, no succession takes place with regard to rights and duties of the extinct state arising from its purely political treaties. Thus treaties of alliance or of arbitration or of neutrality or of any other political nature fall to the ground with the extinction of the state which concluded them. They presuppose the continuing existence of the contracting state and may be regarded as in a sense personal to it: their continued application, in respect of the successor state, would radically alter the assumptions underlying their operation."

[Oppenheim ‘s International Law, by Sir Robert Jennings and Sir Arthur Watts (eds.), volume-i, (Ninth Edition, 1992), p. 211. See also Sir Humphrey Waldock’s Second Report (Article 3) and Third Report (Articles 6 & 7) on State Succession submitted to the International Law Commission in 1969 and 1970 respectively; Succession of States and Governments, doc. A/CN.4/149-Add. 1 and AICN. 4/150-Memorandums prepared by UN Secretariat on 3 December 1962 and 10 December 1962 respectively. In a recent publication, M.N. Shaw, writes, ‘Political or Personal treaties... do not bind successor states for they are seen as exceptionally closely tied to the nature of the state, which has ceased to exist.’ Malcolm N. Shaw, *International Law* (Fourth Edition, 1997), pp. 685-686].

17. While reviewing the question of transmissibility of certain treaties on renunciation of war and pacific settlement of international disputes, copyright and counterfeiting and weights and measures upon state succession, O’Connell observed: "Clearly not all these treaties are transmissible". He noted further that "no state has yet acknowledged its succession to the General Act for the Pacific Settlement of International Disputes". (D.P. O’Connell, *State Succession in Municipal Law and International Law,* vol. 2, International Relations, 1967, p. 213).

18. Pakistan in its Memorial refers to the Indian Independence (International Arrangements) Order of 1947 **(Annex-C)** as a basis for claiming that it is a successor to the General Act along with India. In this connection, reference could be made to paragraph 4 of the schedule which states:

"4. Subject to Articles 2 and 3 of this agreement, rights and obligations under all international agreements to which India is a party immediately before the appointed day will devolve both upon the Dominion of India and upon the Dominion of Pakistan, and will, if necessary, be apportioned between the two Dominions."

19. From the above the Government of Pakistan concludes that it is entitled to regard itself as a party to the General Act along with India. It is the submission of Government of India that the General Act being one not having any territorial nexus but only a political treaty cannot devolve upon either India or upon Pakistan. Paragraph 4 of the schedule to the Indian Independence Order of 1947 could only refer to those treaties which are capable of being automatically transmitted to the successor state under international law. This point has been well brought out by Oscar Schachter:

"The intended effect of this provision appears to extend to Pakistan treaty rights and duties, which would not devolve upon it under the generally accepted rule of law. For it has been recognized that when a territory breaks off and becomes a state, succession takes place only 'with regard to such international rights and duties of the predecessor as are locally connected with the part of the territory ceded or broken off, and with regard to the fiscal property found on that part of the territory'. Conversely, it has been clear that no succession occurs in regard to rights and duties of the old state which arise from its political treaties such as treaties of alliance or of pacific settlement. It has also been the view of the majority of writers that the new state does not succeed to other non-local agreements, such as treaties of commerce and extradition."

20. He continued:

"In view of these principles, what effect must be given to the bilateral agreement between the two dominions purporting to transfer to the new state all treaty rights and obligations? *It may be doubted that it will be given effect (even if intended) with respect to agreements which are essentially political, since both precedent and principle are contrary to recognizing succession in these matters.* On the other hand, it does not appear improbable that succession will be recognized with respect to multipartite treaties concerned with social, economic, and technical matters. As an indication of this development, it may be observed that the Secretariat, as depositary, raised no objection to Pakistan signing the Protocols providing for the transfer of functions under the Convention for the Suppression of Traffic in Women and Children of 1921 and under the Convention on Obscene Publications of 1923." [Oscar Schachter, "The Development of International Law through the Legal Opinions of the United Nations Secretariat", *British Yearbook of International Law,* XXV (1948), pp. 91-132, at page 106.]

21. The above clearly establishes that the General Act cannot devolve upon India *being a political treaty* (emphasis supplied) and this rules out any possibility for Pakistan to invoke the same against India. Moreover and in any case, no authority has ever suggested that new States *automatically* succeed to multilateral treaties, whatever their nature. Thus, even Article17 of the 1978 Vienna Convention on Succession of States in Respect of Treaties demands that a newly independent State wishing to establish its status as a party to any multilateral treaty does it by way of a formal "notification of succession" (Paragraph 1). This is all the more noticeable given that this Convention is seen as an effort to promote as large a participation as possible to multilateral treaties (see P. Daillier et A. Pellet, *Droit international public (Nguyen Quoc Dinh),* Paris, 6th ed., 1999, p. *548*). India never made such a

notification. By contrast, it is revealing to note that Pakistan felt obliged to make such a formal notification when it deemed it useful to become a Party in 1973 (even though India considers that, in any case, this treaty has ceased to be in force since the termination of the League of Nations).

22. The second legal element, which stands out from the communication of the Government of India of 18 September 1974 is the attitude or conduct of the parties. Until 1973, that is to say, 26 years after independence in 1947, the Government of Pakistan did not regard the General Act as applicable to relations between India and Pakistan, as the Indian Government explained in its communication of 1974 (quoted above):

23. Only in 1973 did Pakistan seek to rely upon the General Act in the *Trial of Prisoners of War* case in 1973. The position of the Government of India on the General Act was indicated in a communication to the Registrar of the Court dated 4 June 1973 (**Annex D**). [See *I.C.J., Pleadings, Trial of Pakistani Prisoners of War, 1973* (sales no. 426), pp. 139 to 152].

24. In the submission of the Government of India, Pakistan has *by her conduct* recognized that the General Act is not in force between Pakistan and India. Such conduct is opposable to Pakistan: [see *Arbitral Award of the King of Spain I.C.J. Reports, 1960,* p. 192 at p. 213,. *Temple case (Merits), ibid., 1962,* p. 6 at pp. 32-33].

25. Alternatively, it may also be noted that the Instrument of Accession (May 21, 1931) submitted by British India while becoming a party to the General Act had several conditions attached to it, which is reproduced below:

"Subject to the following conditions:

That the following disputes are excluded from the procedure described in the General Act, including the procedure of conciliation:

(i) Disputes arising prior to the accession of His Majesty to the said General Act or relating to situations or facts prior to the said accession;

(ii) Disputes in regard to which the parties to the dispute have agreed or shall agree to have recourse to some other method of peaceful settlement;

(iii) Disputes between the Government of India and the Government of any other Member of the League which is a Member of the British Commonwealth of Nations, all of which disputes shall be settled in such a manner as the parties have agreed or shall agree;

(iv) Disputes concerning questions which by international law are solely within the domestic jurisdiction of States; and

v) Disputes with any Party to the General Act who is not a Member of the League of Nations.

2. That His Majesty reserves the right in relation to the disputes mentioned in Article 17 of the General Act to require that the procedure prescribed in Chapter II of the said Act shall be suspended in respect of any dispute which has been submitted to and is under consideration by the Council of the League of Nations, provided that notice to suspend is given after the dispute has been submitted to the Council and is given within ten days of the notification of

the initiation of the procedure, and provided also that such suspension shall be limited to a period of twelve months or such longer period as may be agreed by the parties to the dispute or determined by a decision of all the Members of the Council other than the parties to the dispute.

3. (i) That, in the case of a dispute not being a dispute mentioned in Article 17 of the General Act which is brought before the Council of the League of Nations in accordance with the provisions of the Covenant, the procedure prescribed in Chapter I of the General Act shall not be applied, and, if already commenced, shall be suspended, unless the Council determines that the said procedure shall be adopted.

(ii) That, in the case of such a dispute, the procedure described in Chapter III of the General Act shall not be applied unless the Council has failed to effect a settlement of the dispute within twelve months from the date on which it was first submitted to the Council, or, in a case where the procedure prescribed in Chapter I has been adopted without producing an agreement between the parties, within six months from the termination of the work of the Conciliation Commission. The Council may extend either of the above periods by a decision of all its Members other than the parties to the dispute."

26. According to paragraph 2(1) of the schedule of the Indian Independence Order of 1947, Pakistan cannot claim membership of any international organization together with the rights and obligations attached to such membership, as a successor to British India. Such rights of membership of international organizations 'will devolve solely upon the Dominion of India'. Accordingly, Pakistan cannot be regarded as a member of the League of Nations. Even if we consider for a moment but not conceding its argument that the General Act is still available to states parties for settlement of disputes, Pakistan, in view of the condition (v) of the Indian Accession noted above, cannot invoke the General Act against India, not being and not having been a member of the League of Nations.

27. In addition, it is India's submission that under paragraph 2 of the Indian accession to the General Act of 21 May 1931 India was free at any time to seek a solution of the dispute by having recourse to the procedure before the Council of the League of Nations. If a party elected to have recourse to the League Council, any proceedings instituted before the Court would stand suspended. In the event of settlement being reached in the League Council, the proceedings before the Court would automatically terminate. This is a procedure which not only India but the United Kingdom and other Commonwealth countries reserved for themselves against any other party to the General Act from 1928. However, with the termination of the League of Nations such a procedure is no longer available to India. The original obligation of India, under the General Act of 1928, thus, got transformed to the disadvantage of India limiting its options to only one procedure, that is, the judicial settlement. This fundamental change would render paragraph 2 of the Indian accession to the General Act ineffective and make it unavailable to India with effect from the date of the termination of the League of Nations i.e., from 18 April 1946. Accordingly the Accession of British India to the General Act should be deemed to become invalid with the demise of the League of Nations.

28. The United Nations as per the Resolution of the General Assembly of 12 February 1946 (U.N. Doc. A/18) took over only the secretarial, technical and non-political functions and powers of the League, and not any of the political functions and powers of the League. Thus

India was no longer bound by its accession to the General Act after the demise of the League of Nations.

29. Pakistan in its Memorial (pages 9 and 10, paragraph A.1) contends that the communication by India to the Secretary-General on 18 September 1974, disclaiming succession to the General Act, 1928, and denouncing the treaty, does not amount to denunciation in accordance with the procedure allowed under the Convention. According to Article 45*(3)* of the General Act, 1928, "Denunciation shall be effected by a written notification addressed to the Secretary-General of the League of Nations, who shall inform all the Members of the League and the non-Member States referred to in Article 43". The Indian Note of 18 September 1974, is a formal Note, which states why it considered that its accession to the Act came to a termination, and in addition stated that if the obligation were considered as continuing India unequivocally was denouncing its obligations. The expression of the intention to denounce was crystal clear from the text of the note. The plea that there was no denunciation is totally untenable.

30. Therefore the termination of Indian accession to the General Act, 1928 was effective at the latest from August 31, 1976, assuming that the treaty obligation had survived after the fundamental and radical change of circumstances due to the dissolution of the League of Nations *quod non.* Under Article 44(2) of the General Act, the Act came into force by virtue of the first two accessions, i.e., the Act becomes effective from the ninetieth day after the receipt of the second accession by the Secretary-General of the League of Nations. The Indian accession communicated on May 21, 1931, came into effect on August 31, 1931. According to Article 45*(2),* the accession will remain in force for five years for the Contracting Party and for extended five-year period if the Contracting Party does not denounce six months before the expiry of the current period of five years. The ninth five years period came to an end on August 31, 1976. Assuming that the General Act was still in force at this date, *quod non,* the Note of the Government of India dated September 18, 1974, was clearly effective to terminate the Indian accession on August 31, 1976.

E. Bases of Jurisdiction Proposed by Pakistan: The Agreement on Bilateral Relations between the Government of India and the Government of Pakistan

31. The Memorial of Pakistan seeks to invoke the Agreement on Bilateral Relations of 1972 (**Annex E**) in the following passage:

"Assuming, but not conceding that the Indian Communication to the Secretary General, received on 18 September 74 amounts to a denunciation of the Convention, the means of pacific settlement of disputes under the Convention by reference to the Court has been preserved by Article I, paragraph 2 of the Agreement on Bilateral Relations between the Government of Pakistan and the Government of India of 2 July 1972 (The Simla Accord Annex 'H')". This provides as follows *"That the two countries are resolved to settle their differences by peaceful means through bilateral negotiations or by any other peaceful means mutually agreed between them...".* [Pakistan's Memorial pp. 7-8 *Emphasis added]*

32. This argument has no legal basis. In the first place the reference in the 1972 Agreement is said to include the General Act of 1928. But this wholly begs the question. The position of the Government of India is that the General Act was not in force for India at the material time.

33. Without prejudice to the general position as explained in the previous paragraph, the Government of India considers that the provisions of the 1972 Agreement do not refer to pre-existing instruments concerning arbitration or judicial settlement. The phrase *"settlement through bilateral negotiations or by any other peaceful means mutually agreed between them",* clearly relates to future negotiations and agreements on bilateral basis rather than by any other methods, such as judicial settlement through the Court. The agreement was primarily concerned to put an end to the conflict and to initiate the process of establishment of durable peace *inter alia* by withdrawing forces immediately after the end of war (see M.K. Nawaz, "Has the I.C.J. Jurisdiction in the POWs Case ? ", *Indian Journal of International Law,* vol. 13 (1973), pp. 25 1-61, at p. 260).

34. The submission made above is reinforced by the general character of the 1972 Agreement. The Agreement is concerned with confidence-building measures and the avoidance of conflict. The emphasis is upon normalizing general political relations. Consequently, the instrument does not employ the term 'disputes', but refers to 'differences'. (See in particular, Article 1(u) of the Agreement).

35. Further, assuming but not conceding that Pakistan is entitled to succeed to all the international agreements to which British India was a party by virtue of Article 4 of the Indian Independence Order of 1947, Pakistan did not adopt any uniform conduct in this respect [see D.P. O'Connell, *State Succession in Municipal and International Law,* vol. 11 (1967), p. 129]. Further in 1953, while informing the Secretary-General of the United Nations that it considered itself a party to certain treaties (see *Year Book of the ILC, 1962,* vol. 11, at p. 109), Pakistan did not inform him, nor the parties to 1928 General Act, that it considered itself to be a party to that Act.

36. In addition, Pakistan's contention that it is a successor to the General Act along with India is unsustainable on the following grounds:

37. *Firstly,* acceptance of Pakistan's contention would be contrary to the natural and plain meaning to be given to the word 'agreement' in a multilateral treaty. An agreement requires a minimum of two parties. An agreement cannot be created by a single party acting in different capacities: where one of the parties is an original party and the other claims to be an equal successor because of the split of the original party. In case of succession to British India it has been accepted by the international community that India is the same legal entity as British India and Pakistan a totally new state *(Year Book of I.L.C, 1962, vol. 11,* pp. 101-103). In state succession either the old entity continues or withers away while giving rise to other new entities in the place of the old entity. For example the USSR withered away, but the Russian Federation has been recognized as the continuator of the USSR. In other words, the Russian Federation is a continuing entity and belongs to the first category as it succeeds the erstwhile USSR. The example for the second category is the emergence of newly independent states such as Slovenia, Croatia and Bosnia on the collapse of Socialist Federal Republic of Yugoslavia (the SFRY). (Malcolm N. Shaw, *International Law* (Cambridge, Fourth Edition, 1997, p. 679 or Patrick Daillier et Main Pellet, *Droit international public (Nguyen Quoc Din/i)* (Paris, Sixth Edition, 1999, pages *522-523).*. It follows that there cannot be more than one party as the continuator state when state succession takes place in international law.

38. *Secondly,* it may be noted in this regard that the General Assembly of the UN itself has regarded that the efficacy of the General Act was impaired because of the fact that the organs of the League of Nations and the Permanent Court of Justice to which it refers has now

disappeared. As such, it cannot be the intention of India to preserve such an impaired multilateral treaty through the Simla Agreement of 1972. In addition, Pakistan never objected to the Indian denunciation of 1974 on this ground earlier nor did it send any protest note to this effect to the Secretary-General of the United Nations against the Indian communication. Pakistan, therefore, is precluded from raising this argument now.

F. Bases of Jurisdiction Proposed by Pakistan: Article 36(1) of the Statute of the Court and the United Nations Charter

39. The Pakistan Memorial also invokes a phrase in Article 36(1) of the Statute of the Court in order to support the following argument:

B. The jurisdiction of the International Court of Justice is also founded on the provision contained in Article 36(1) of the Statute of the Court which states, "The Jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided or in the Charter of the United Nations or in treaties and conventions in force". The said Article of the Statute is to be read with Article 1(1); Article 2 paras. 3 and 4; Article 33; Article 36(3) and Article 92 of the United Nation's Charter. The obligations undertaken under Article-1 of the agreement on bilateral relations between India and Pakistan of 2 July 1972, reaffirms (sic) this basis of jurisdiction in Article (1), which states that "The principles and purposes of the United Nations Charter shall govern the relations between the two countries".

40. The phrase invoked provides no basis for the jurisdiction of the Court. It is generally recognised that there are no matters 'specially provided for in the Charter of the United Nations...' relating to compulsory jurisdiction. The words were inserted during the drafting of the present Statue in the expectation that the Charter would contain some provision for compulsory jurisdiction. In the event, no such provision was made.

41. This view of the issue is accepted by the preponderance of authorities including the following:

(a) Sir Hersch Lauterpacht (ed.), *Oppenheim 's International Law* vol. 11 (London, 7th ed., 1948), pp. 58-65 and 112-13;

(b) Sir Gerald Fitzmaurice, *British Year Book of International Law,* vol. 29 *(1952),* (pp. 31-2 and 44);

(c) Hans Kelsen, *The Law of the United Nations* (London, 1951), pp. 516-17;

(d) R.P. Anand, *Compulsory Jurisdiction of the International Court of Justice,* London, 1961, pp. 131-134.

(e) Goodrich, Hambro and Simons, *Charter of the United Nations* (New York and London, 3rd ed., 1969), p. 282.

(f) B.S. Murty, in Max Sorensen (ed.), *Manual of Public International Law* (London, 1968), p. 702

(g) Shabtai Rosenne, The Law and Practice of the International Court (1920-1996), vol. 11, Jurisdiction, The Hague/Boston/London, 1997, pp. 659 and 692-695.

42. This view of the legal position is confirmed by many other sources, including Whiteman, *Digest of International Law*, vol. 12 (released in August 1971), pp. 1286-87.

43. In the *Corfu Channel* Case (Competence) seven members of the Court, in a Separate Opinion, rejected an argument of the United Kingdom based upon the reference to the United Nations Charter [Article 36, (3)] and declared very clearly that it appeared impossible to them "to accept an interpretation according to which this article, without explicitly saying so, has introduced more or less surreptitiously, a new case of compulsory jurisdiction" *(I.C.J. Reports*, 1947-1948, pp. 32)

44. These authorities provide a clear and reliable exposition of the correct legal position. None of these authorities receives consideration in the Pakistan Memorial.

G. The Bases of Jurisdiction Proposed by Pakistan: Article 1 of the Agreement on Bilateral Relations, 1972 in relation to the United Nations Charter

45. The Memorial next invokes a fanciful basis of jurisdiction consisting essentially of the argument that Article 1 of the Agreement on Bilateral Relations, 1972 constitutes a treaty or convention in force for the purposes of Article 36 (1) of the Statue of the Court, together with the assertion that Article 1 of the Agreement involves a compromissory clause. The Government of Pakistan expresses the argument as follows:

"B(2). Notwithstanding the above submissions, Article 1 of the Simla Agreement, read with Article 1; Article 2 paras. 3 and 4; Article 33; Article 36(3); and Article 92 of the UN Charter, as well as Article 36(1) of the Statute of the Court, further affirms the jurisdiction of the International Court of Justice in the instant case."

46. The Agreement on Bilateral Relations between India and Pakistan, 1972 provides in Article 1 thereof as follows:

"1. The Government of Pakistan and the Government of India are resolved that the two countries put an end to the conflict and confrontation that have hitherto marred their relations and work for the promotion of a friendly and harmonious relationship and the establishment of durable peace in the sub-continent, so that both countries may henceforth devote their resources and energies to the pressing task of advancing the welfare of their peoples."

In order to achieve this objective, the Governments of Pakistan and the Government of India have agreed as follows:

i) That the principles and purposes of the Charter of the United Nations *shall govern the relations between the two countries: (emphasis added).*

ii) That the two countries are resolved to settle their differences by peaceful means through bilateral negotiations or by *any other peaceful means mutually agreed upon between them.* Pending the final settlement of any of the problems between the two countries, neither side shall unilaterally alter the situation and both shall prevent the organisation, assistance or encouragement of any acts detrimental to the maintenance of peaceful and harmonious relations." *(emphasis added).*

47. The fact is that the Agreement on Bilateral Relations does not contain a compromissory clause and is not concerned with the judicial settlement of disputes. This is clear on the face of the instrument. Moreover, the Agreement does not appear in the chronological list of instruments notified to the Registry which is published in the *Yearbook* of the Court. *(Yearbook 1996-199* 7, p. 126 at p. 140).

48. The argument also involves the claim that various Articles of the Charter, including Articles 92 and 93, have the effect of creating an obligation to accept the jurisdiction of the Court. No authority is offered in support of this bald suggestion. Moreover, if Pakistan were correct in its supposition, the system of compulsory jurisdiction would be otiose [See also B. Simma (ed.), *The Charter of the United Nations: A Commentary* (1995), p. 544 or S. Rosenne, *op. cit.*, pp. 692-695].

49.The true intent and effect of Article 92 is well explained by Goodrich, Hambro and Simons: "the Statute enjoys the same primacy over other international agreements accorded to the Charter itself in Article 103". It was also noted that because of Article 92, "the entire text of the Statute is treated as being equal in status to the provisions of the Charter" (p. 552).

50. In view of the above, Pakistan's contention that there is "an implied" obligation to submit legal disputes as a general rule to the International Court of Justice, is firmly denied (see p. 10 of Pakistan's Memorial). For the same reasons, the Government of India also rejects the contention of Pakistan that "the spirit and underlying obligations of the UN Charter, in any case, raise the presumption of a residual jurisdiction of the International Court of Justice in the case of legal disputes, in circumstances when one party has refused to resort to any of the other peaceful means of settlement enumerated in Article 33 of the Charter." (Memorial, p. 11).

H. The Validity of the Reservation of India concerning Commonwealth Members

51. In a series of palpably weak arguments the Government of Pakistan seeks to question the validity of the Indian reservation contained in the Declaration made in accordance with Article 36(2) of the Statute (**Annex-F**). The reservation relates to 'disputes with the government of any State which is or has been a Member of the Commonwealth of Nations.'

52. The Commonwealth reservation has appeared in successive Indian Declarations of 1940, 1956, 1959, and 1974. The reservation was not challenged by Pakistan during the proceedings relating to *Pakistan Prisoners of War* in 1973. There is no basis whatsoever for impugning the validity of such a reservation. Indeed, the *travaux preparatoires* of the Statute provide an unequivocal indication that the acceptance of compulsory jurisdiction could be upon conditions and, further, that the conditions could involve the selection of States in relation to which jurisdiction was accepted: (see Thirlway, *Netherlands Yearbook of International Law, vol. XV (1984), p. 97 at* pp. 103-4). Thus, in the Report of the Third Committee to the League Assembly in 1920, the effect of Article 36 as finally adopted was as follows:

It gives power to choose compulsory jurisdiction either in all the questions enumerated in the Article or only in certain of these questions. Further, it makes it possible to specify the States (or members of the League of Nations) in relation to which each Government is willing to agree to a more extended jurisdiction. (footnote omitted).

53. Thus it comes as no surprise that the literature does not raise the issue of the validity of the Commonwealth reservation. The following sources examine the reservation but do not make the slightest suggestion that it is of questionable validity:

Sir Hersch Lauterpacht, (ed.) of *Oppenheim 's International Law,* vol. 11, (London, 7th ed., 1948), p. 60.

Professor R.P. Anand, *Studies in International Adjudication* (Delhi, 1969), pp. 43-5.

Professor J.G. Merrills, *British Year Book of International Law,* vol. 50 (1979), pp. 103-4, at p. 37.

Professor Renata Szafarz, *The Compulsory Jurisdiction of the International Court of Justice* (Dordrecht, 1993), pp. 45, 50, 56-7.

Professor J.G. Merrills, *British Year Book of International Laws* vol. 64 (1993) p. 197 at pp. 221-2.

Dr. Shabtai Rosenne, *The Law and Practice of the International Court, 1920-1996,* vol. 11: Jurisdiction, The Hague, 1997, p. 802.

Professor Charles Rousseau, *Droit International Public,* Vol. V, Paris, 1983, pp. 455-456.

Judge Settle Camera, in Bedjaoui (ed.) *International Law: Achievements and Prospects,* Dordrecht, 1991, p. 536.

Professor L.A. Shearer, *Starke 's International Law,* 11th ed., London, 1994, p. 454.

Professor Malcolm N. Shaw, *International Law,* 4th ed., Cambridge, 1997, p. 762.

54. There is no sound principle of legal policy which could be invoked to call in question the validity of the Commonwealth reservation. There are currently eight declarations in the Optional Clause, which include the Commonwealth reservation. The States concerned are: Barbados, Canada, Gambia, India, Kenya, Malta, Mauritius, and the United Kingdom.

55. The Government of Pakistan seeks to impugn the validity of the reservation on five distinct grounds.

First Argument: The reservation would be contrary to the Provisions of the Charter

56. The Memorial (pages 13 and 18) contends that the reservation is contrary to various provisions of the Charter. The argument runs as follows:

"C(1) India and Pakistan, as members of the United Nations, are bound by Articles 92 and 93 of the UN Charter. Article 92 provides that, "the International Court of Justice shall be the principal judicial organ of the United Nations" and hence necessarily open to all its members, on the basis of the principle of sovereign equality and on an equal footing. Article 93 of the UN Charter provides that "All members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice". This implies that all members are entitled to rely on the provisions for Jurisdiction and other matters set out in the Statute on a

nondiscriminatory and equal basis. This concept is further reinforced by Article 35 paragraph 1 of the Statute of the Court which provides "The Court shall be *open to the States parties to the present Statute".* A unilateral reservation of the nature of the Indian 'Commonwealth reservation' which is specifically designed to exclude one or more parties from the operation of the compulsory procedure for settlement is contrary to the above provisions and the basic norms of the United Nations System. By virtue of Article 103 of the Charter the grundnorms (sic) underlying the Charter system must prevail. The reservation being in conflict with the principle of sovereignty equality and the express provisions referred to above has no legal effect."

57. It would take too much time to catalogue all the legal solecisms contained in this one passage. The principal flaws in the argument are as follows:

58. First, the Statute of the Court forms 'an integral part of the Charter'. It must follow that a reservation which is accepted as valid for the purposes of the Statute is compatible with the provisions of the Charter.

59. Secondly, the fact that a State is a party to the Statute of the Court does not create a basis of jurisdiction: if that were so, then the Optional Clause system would not be necessary.

60. Thirdly, Article 103 of the Charter refers to the relationship between the Charter *and other international agreements.* It is inapplicable to the issue at hand. The only standard of legality available is the Statute of the Court, which forms 'an integral part of the Charter'.

Second Argument: The reservation would be contrary to Articles 36, 37 and 38 of the Statute of the Court

61. The second argument in the Memorial (at page 14) is formulated as follows:

"C(3) By virtue of their membership of the United Nations and being parties to the Statute, the contents of Articles 36, 37, and 38 of the Statute are binding legal obligations on both parties, as also other relevant Articles of the Court's Statute. The implication of this is that no unilateral act, such as the 'Commonwealth Members' reservation can violate the obligations set out in these Articles or reserve to the party making it the liberty (sic) to cross the limits set in the said Articles since they are provisions of a multilateral convention equally binding on all parties to that convention. Thus India cannot by its unilateral reservation in its declaration under Article 3 6(2), render the Statute inapplicable to Pakistan in so far as the compulsory jurisdiction arrangements are concerned. As a party to the Statute, Pakistan is entitled to the compulsory jurisdiction arrangements against any other state that has made a Declaration under Article 36(2) (including India) whether or not Pakistan is or has been a member of the Commonwealth. Article 36(2) of the Statute relates to *all* parties to the Statute and hence cannot be wholly excluded *a priori* in relation to particular parties by unilateral reservations appended to declarations under Article 36(2). It can only be made on condition of reciprocity on their part".

62. The practice of reservations has long been accepted by the Court and its predecessor, and the logic of the argument, such as it is, would apply to all reservations. The argument simply ignores the fundamental principle that jurisdiction is based on the consent of States.

Third Argument: The reservation would be contrary to Article 36(3) of the Statute

63. The third argument in the Memorial (at page 16) is (in material part) as follows:

"D(1) Declarations under Article 36(2) of the Statute can be made unconditionally or under specified conditions. The permissible conditions have exhaustively been set out in Article 36(3) as (I) On condition of reciprocity on the part of several or certain states or (ii) for a certain time. The reservation of the Government of India excluding all disputes with "Any State which is or has been a member of the Commonwealth of Nations" is in excess of the conditions permitted under Article 36(3) of the Statute which is a binding obligation between India and Pakistan and indeed between all Commonwealth members. This condition, being *ultra vires* of Article 36(3), has no legal effect. However, to the extent that the Declaration of the Government of India is in accordance with Article 36(3), it stands and confers compulsory jurisdiction on the Court."

64. This contention is impressive only for its novelty. None of the commentators on the jurisdiction of the Court, such as Rosenne, have suggested that the reservation is invalid on this, or any other, ground. Article 36(3) was envisaged from the beginning as allowing a choice of partners. The Government of Pakistan apparently fails to appreciate the ramifications of the concept of reciprocity.

65. The Court explained in the *Interhandel* case *(I.C.J. Reports 1959)* the meaning of the condition of reciprocity incorporated in Article 36(3) of the Statute thus:

"Reciprocity in the case of Declarations accepting the compulsory jurisdiction of the Court enables a Party to invoke a reservation to that acceptance which it has not expressed in its own Declaration but which the other Party has expressed in its Declaration. . . Reciprocity enables a state which has made a wider acceptance of the jurisdiction of the Court to rely upon the reservations to the acceptance laid down by the other Party." *(I.C.J. Reports 1959, Judgment, p. 23;* see also *Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Preliminary Objections), I.C.J Reports* 1998, pp. 298-299).

66. Thus, the principle of reciprocity would allow Pakistan to invoke the reservation, if she were a Respondent State faced by a State whose declaration included it.

67. Pakistan argued that the Court should ignore the ‘invalid’ reservation and still hold jurisdiction on the basis of its Declaration under Article 36(2) of the Statute. However this argument is unacceptable because a reservation made cannot be isolated from other reservations as well as the Declaration itself. Together they constitute an integral whole reflecting the intention of the Party within whose limits the jurisdiction of the Court is accepted. As the Court said in the *Fisheries Jurisdiction* case *(Spain v. Canada):*

"All elements in a Declaration under Article 36, paragraph 2, of the Statute which, read together, comprise the acceptance by the declarant State of the Court’s jurisdiction, are to be interpreted as a unity..." *(I.C.J. Reports 1998, Jurisdiction,* para. 44).

68. In fact, this point was elaborated earlier by Judge Lauterpacht in the *Norwegian Loans* case. While expressing the view that a certain reservation made by a Party was not valid, he pointed out that such a reservation cannot be separated from the rest of the Declaration to maintain the jurisdiction of the Court. He noted that the declarant State regarded the impugned reservation as one of the crucial limitations - perhaps the crucial limitation - of the obligations undertaken by the acceptance of the optional clause of Article 36 of the Statute.

As such, he observed, "to ignore that clause and to maintain the binding force of the declaration as a whole would be to ignore an essential and deliberate condition of the acceptance as a whole". *(Norwegian Loans* case, *I.C.J Reports 1957,* pp. 57-58. He took a similar view in the *Interhandel* case, *I.C.J. Reports, 1957).* Shabtai Rosenne also noted that: "... if the transaction of making a declaration is taken as a whole, each declaration must stand or fall as it is. To read a declaration as if incompatible reservation simply did not exist would thwart the intention of the State making the declaration, acting unilaterally". (Shabtai Rosenne, *The Law and Practice of the International Court, 1920-1996,* vol. 11, *Jurisdiction,* 1997, fn. 91, p. 77O). Pakistan cannot therefore selectively question one of India's reservations and still hold India to its Declaration for the purpose of establishing the jurisdiction of the Court.

Fourth Argument: The Government of India would be Estopped from Invoking the Reservation against Pakistan

69. The fourth argument advanced by Pakistan in this connection is that (Memorials p. 17):

"Assuming, but not conceding, that the exclusion of disputes with members of the Commonwealth, in India's declaration, can limit the operation of Article 36(2) and (3) of the Statute, such effect cannot be held against Pakistan by virtue of the obligation undertaken by the Government of India under Article 1 para (3) of the Agreement on bilateral relations of 2 July 1972 whereby the parties have agreed to settle their differences by negotiations or "by any other peaceful means mutually agreed upon between them". As the compulsory procedure for settlement under Article 36(2) constitutes a "peaceful means agreed upon between them", a unilateral 'reservation' cannot be invoked by India to defeat this peaceful means of settlement in the case of Pakistan, whatever may be its effect against other Commonwealth members. Article 1 para (ii) of the Simla Accord creates an estoppel against the Government of India from invoking this "reservation" against the Government of Pakistan."

70. This argument lacks substance. The principle of estoppel cannot be used to modify the relationship between international agreements, when the nature of that relationship is clear. As explained above, the Agreement on Bilateral Relations does not contain a compromissory clause. Pakistan does not invoke any conduct on the part of India which adopts the contrary view. There is thus no basis for invoking estoppel in any event. [For the essential elements of estoppel, see D.W. Bowett, "Estoppel before International Tribunals and its Relation to Acquiescence", *British Year Book of International Law,* vol. 33 (1957), pp. l76-2O2, at p. 202; For application of the principle estoppel by the Court, see *Land and Maritime Boundary between Cameroon and Nigeria (I.C.J. Reports 1998),* p. 303]:

71. The principle of estoppel, preclusion and acquiescence invoked by Pakistan (Memorial, p. 1 8) are completely irrelevant to the questions at issue.

Fifth Argument: Applicability of the Vienna Convention on the Law of Treaties, 1969

72. Pakistan also questioned the Commonwealth Reservation as violative of Article 19(b) of the Vienna Convention on the Law of Treaties, 1969.

73. This contention of Pakistan is erroneous and must be rejected. The Court on several occasions made it clear that reservations made under Article 36(2) cannot be treated as treaty obligations. The reservations are *sui generis* by their very nature and in interpreting and

examining their validity, principles of the Vienna Convention on the Law of Treaties are not applicable. The Court has stated this emphatically in the following manner in the *Fisheries Jurisdiction* case *(Spain v. Canada,):*

"46... The regime 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 *(ibid.)., [Land and Maritime Boundary between Cameroon and Nigeria, I.C.J Reports* 1998, p. 293, para. 30] 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."

47. In the event the Court has in earlier cases elaborated the appropriate rules for the interpretation of declarations and reservations. 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). Therefore, declarations and reservations are to be read as a whole. Moreover, "the Court cannot base itself on a purely grammatical interpretation of the text. It must seek the interpretation which is in harmony with a natural and reasonable way of reading the text". *(Anglo-Iranian Oil Co., Preliminary Objection, Judgment, I.C.J. Reports 1952,* p. 104;) *(Fisheries Jurisdiction* case *(Spain v Canada),* Judgment, 4 December 1998, p. 22).

74. Further, the Court was also unwilling in the *Anglo-Iranian Oil Company* case to countenance an interpretation that would have created a basic inconsistency between the effect of the declaration and the underlying intention of the declaring state at the relevant time. The judgment in that case noted that the "Declaration is not a treaty text resulting from negotiations" but rather "the result of unilateral drafting". *(Judgment, I.C.J. Reports, 1952,* p. 105).

75. The approach of the Court in this regard was analyzed by Fitzmaurice when he wrote that:

"[The] Court, while in general applying ordinary principles of treaty interpretation, seems to have felt that the voluntary and unilateral character of these declarations put them in a special position, in which it was necessary to have particular regard to the known, apparent or probable intentions of the State making the declaration, particularly with reference to any conditions or limitations which that State had placed on the extent of the obligation it was assuming..." (Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice,* vol. 11 (Cambridge, Grotius Publications Ltd., 1986), p. 503).

76. Similarly, Rosenne writes that, because a declaration is "the expression of a unilateral act of policy" and is "stamped by the particular quality of the declaration as a unilateral act, the product of unilateral drafting", "the Court will seek out the underlying intention of the State making the declaration". (Shabtai Rosenne, *The Law and Practice of the International Court* (Dordrecht, Martinus Nijhoff Publishers, second edition., 1985), p. 406; see also James Crawford, "The Legal Effect of Automatic Reservations to the Jurisdiction of the International Court", *British Year Book of International Law,* vol. 50 (1979), p. 77; Jimenez De Arechaga, "International Law in the Past Third of a Century" *in Académie de Droit International, Recueil des Cours,* vol. 159 (1978), p. 154).

77. In view of the above, it is quite clear that the argument advanced by Pakistan that the Commonwealth reservation of India is a treaty obligation and that it is violative of Article 19 of the Vienna Convention on the Law of Treaties has no legal basis. It is a reservation made out of the free will of India and hence constitutes a fundamental basis for interpreting the intention of India as a declarant state within the meaning of Article 36(2) of the Statute. The Government of India reaffirms that the Commonwealth reservation is a crucial and inseparable element of its Declaration accepting the jurisdiction of the Court under Article 36(2).

78. . In sum, India, once again, submits that Pakistan is not entitled to invoke the jurisdiction of this Court in the present case without a special and express consent from India in view of the fact that Pakistan is and has been a Commonwealth country.

I. The "Multilateral Convention Reservation" of India

79. Pakistan argues (at pages 19-21 of the Memorial) that the multilateral reservation invoked by India does not oust the compulsory jurisdiction of the Court.

80. It may be recalled that this is a reservation which both India and Pakistan made in their Declarations. Four other states also maintain a similar reservation in their Declaration:

El Salvador, Malta, Philippines and the United States. As both India and Pakistan maintain this reservation, Pakistan cannot suggest to the Court to assume jurisdiction ignoring that reservation. Comments made on the intersecting roles of treaty and customary international law obligations, as well as references made to Articles 40, 59, 62 and 63 of the Statute are outside the main point at issue in terms of this reservation. The Government of India submits that because of this reservation, it is entitled to request the Court to not to exercise jurisdiction to settle any question involving the interpretation of Article 2(4) of the Charter as Pakistan did not join all the parties to the UN Charter to the present case.

81. Several authorities who refer to this reservation made no reference to any question of invalidity. (See Oppenheim, *International Law 3* vol. 11 (London, 7th ed., 1948), p. 63; B.S. Murty, in Sorensen (ed.), *Manual of Public International Law* (London, 1968), p. 709; O'Connell, *International Law*, vol. 11 (London, 1970), p. 1085; J.G. Merrills, *British Yearbook of International Law 3* vol. LXV, (1979), p. 107; J.G. Merrills, *British Yearbook of International Law,* vol. LXIV, (1993), p. 23O-2; Bengt Broms, *The United Nations* (Helsinki, 1990), p. 780, f.n. 14; Shabtai Rosenne, *The Law and Practice of the International Court, 1920-1996, vol. 11, (The Hague, 1997), pp. 803-4).*

82. The version of the reservation filed by United States along with its Declaration was interpreted and applied by the Court in the *Nicaragua* case (Merits), *(IC.J. Reports, 1986,* pp. 29-38): The Court did not seek to question the validity of the reservation. However, there is a serious difference between the then U.S. reservation and the present Indian reservation. While the reservation made by the United States excluded from its acceptance of jurisdiction "disputes arising under a multilateral treaty unless (1) all parties to the treaty *affected by the decision* are also parties to the case before the Court" (emphasis added), Paragraph 7 of the Indian optional Declaration is more general and excludes from the Court's jurisdiction "any dispute arising from the interpretation or the application of a multilateral treaty, unless at the same time *all the parties to the treaties* are also joined to the case before the Court" (emphasis added). This difference in the drafting of both Declarations has no bearing on their respective

validity, but it makes a major difference as to the stage of the proceedings when the Court must take it into consideration: in the *Nicaragua* case, the Court, without questioning its validity, declared "that the objection based on the multilateral treaty reservation of the United States Declaration of Acceptance [did] not possess, in the circumstances of the case, an exclusively preliminary character" *(I.C.J Reports* 1984, p. 425). But it did so solely because of the "ambiguities" of the phrase "all parties to the treaty affected by the decision" which was "at the center of the present doubts", while it expressly noted that "certain other declarations of acceptance, *such as those of India,* El Salvador and the Philippines, refer clearly to "all parties" to the treaties" *(id,* p. 424) and, therefore, did not raise the same doubts as to their scope. In contrast to the United States reservation, the reservation of India refers to an objective condition that requires to be fulfilled and has nothing to do with arguments on merits, as Pakistan has attempted to allege.

83. Further, reference made to the Agreement between India and Pakistan on Prevention of Air space Violations of 6 April 1991 (**Annex-G**) has no effect on the right of India to invoke multilateral treaty reservation as the issue raised for this purpose is one of violation of Article 2(4) of the UN Charter. Besides, that agreement does not have any compromissory clause to obligate India to submit the case to the jurisdiction of the Court.

CONCLUDING SUBMISSIONS

For the reasons advanced in this Counter-Memorial, India requests the Court

- to adjudge and declare that it lacks jurisdiction over the claims brought against India by the Islamic Republic of Pakistan.

List of Annexures

Annexure ‘A’ - The General Act for the Pacific Settlement of International Disputes: Geneva, 26 September 1928

Annexure ‘B’ - Communication from the Government of India to the UN Secretary General (18 September 1974) with reference to the General Act for the Pacific Settlement of International Disputes, 1928

Annexure ‘C’ - The Indian Independence (International Arrangements) Order, 1947

Annexure ‘D’ - Communication from the Government of India to the Registrar of the International Court of Justice on the Pakistani Prisoners of War Case, 4 June 1973

Annexure ‘E’ - Agreement Between the Government of India and the Government of the Islamic Republic of Pakistan on Bilateral Relations (Simla Agreement): Simla, 2 July 1972

Annexure ‘F’ - Indian Declaration made under Article 36 (2) of the Statute of the International Court of Justice, 15 September 1974

Annexure ‘G’ - Agreement between India and Pakistan on Prevention of Air Space Violations and for Permitting Over Flight and Landings by Military Aircraft, 6 April 1991

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