INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

OBLIGATIONS CONCERNING NEGOTIATIONS RELATING TO CESSATION OF THE NUCLEAR ARMS RACE AND TO NUCLEAR DISARMAMENT

(MARSHALL ISLANDS *v.* INDIA)

JURISDICTION AND ADMISSIBILITY

JUDGMENT OF 5 OCTOBER 2016

2016

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

OBLIGATIONS RELATIVES À DES NÉGOCIATIONS CONCERNANT LA CESSATION DE LA COURSE AUX ARMES NUCLÉAIRES ET LE DÉSARMEMENT NUCLÉAIRE

(ÎLES MARSHALL c. INDE)

COMPÉTENCE ET RECEVABILITÉ

ARRÊT DU 5 OCTOBRE 2016

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JUDGMENT

Present: *President* ABRAHAM; *Vice-President* YUSUF; *Judges* OWADA, TOMKA, BENNOUNA, CANÇADO TRINDADE, GREENWOOD, XUE, DONOGHUE, GAJA, SEBUTINDE, BHANDARI, ROBINSON, CRAWFORD, GEVORGIAN; *Judge* ad hoc BEDJAOUI; *Registrar* COUVREUR.

In the case regarding obligations concerning negotiations relating to cessation of the nuclear arms race and to nuclear disarmament,

between

the Republic of the Marshall Islands,

represented by

H.E. Mr. Tony A. deBrum, Minister for Foreign Affairs of the Republic of the Marshall Islands,
Mr. Phon van den Biesen, Attorney at Law, van den Biesen Kloostra Advocaten, Amsterdam,

as Co-Agents;

Ms Deborah Barker-Manase, Chargé d'affaires a.i. and Deputy Permanent Representative of the Republic of the Marshall Islands to the United Nations, New York,

as Member of the delegation;

Ms Laurie B. Ashton, Attorney, Seattle,
Mr. Nicholas Grief, Professor of Law, University of Kent, member of the English Bar,
Mr. Luigi Condorelli, Professor of International Law, University of Florence, Honorary Professor of International Law, University of Geneva,

Mr. Paolo Palchetti, Professor of International Law, University of Macerata,

Mr. John Burroughs, New York,
Ms Christine Chinkin, Emerita Professor of International Law, London School of Economics, member of the English Bar,
Mr. Roger S. Clark, Board of Governors Professor, Rutgers Law School, New Jersey,

as Counsel and Advocates;

Mr. David Krieger, Santa Barbara,
Mr. Peter Weiss, New York,
Mr. Lynn Sarko, Attorney, Seattle,

as Counsel;

Ms Amanda Richter, member of the English Bar,
Ms Sophie Elizabeth Bones, LL.B., LL.M.,
Mr. J. Dylan van Houcke, LL.B., LL.M., Ph.D. Candidate, Birkbeck, University of London,
Mr. Loris Marotti, Ph.D. Candidate, University of Macerata,
Mr. Lucas Lima, Ph.D. Candidate, University of Macerata,
Mr. Rob van Riet, London,
Ms Alison E. Chase, Attorney, Santa Barbara,

as Assistants;

Mr. Nick Ritchie, Lecturer in International Security, University of York,

as Technical Adviser,

and

the Republic of India,
represented by

Ms Neeru Chadha, Former Additional Secretary and Legal Adviser, Ministry of External Affairs of the Republic of India,

as Agent;

Mr. Amandeep Singh Gill, Joint Secretary, Ministry of External Affairs of the Republic of India,

as Co-Agent;

Mr. Harish Salve, Senior Advocate, Supreme Court of India, Barrister, Blackstone Chambers, London,
Mr. Alain Pellet, Emeritus Professor, University Paris Ouest, Nanterre-La Défense, Former Chairman, International Law Commission, member of the Institut de droit international,

as Counsel and Advocates;

H.E. Mr. J. S. Mukul, Ambassador of the Republic of India to the Kingdom of the Netherlands,
Mr. Vishnu Dutt Sharma, Director and Head (Legal and Treaties), Ministry of External Affairs of the Republic of India,
Ms Kajal Bhat, First Secretary (Legal), Embassy of the Republic of India (Netherlands),

as Advisers;

Ms Chetna Nayantara Rai,

Mr. Benjamin Samson,
as Junior Counsel,

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

1. On 24 April 2014, the Government of the Republic of the Marshall Islands (hereinafter the "Marshall Islands" or the "Applicant") filed in the Registry of the Court an Application instituting proceedings against the Republic of India (hereinafter "India" or the "Respondent"), in which it claimed that:

> "13. India has not fulfilled its obligation under customary international law to pursue in good faith negotiations to cease the nuclear arms race at an early date, and instead is taking actions to improve and expand its nuclear forces and to maintain them for the indefinite future.
>
> 14. Similarly, India has not fulfilled its obligation under customary international law to pursue in good faith negotiations leading to nuclear disarmament in all its aspects under strict and effective international control, in particular by engaging a course of conduct, the quantitative build-up and qualitative improvement of its nuclear forces, contrary to the objective of nuclear disarmament."

In its Application, the Marshall Islands seeks to found the jurisdiction of the Court on the declarations made, pursuant to Article 36, paragraph 2, of the Statute of the Court, by India on 15 September 1974 (deposited with the Secretary-General of the United Nations on 18 September 1974), and by the Marshall Islands on 15 March 2013 (deposited with the Secretary-General on 24 April 2013).

2. In accordance with Article 40, paragraph 2, of the Statute, the Registrar immediately communicated the Application to the Government of India; and, under paragraph 3 of that Article, he notified all other States entitled to appear before the Court of the Application.

3. Since the Court included upon the Bench no judge of the nationality of the Marshall Islands, the latter exercised its right under Article 31, paragraph 2, of the Statute to choose a judge *ad hoc* to sit in the case: it chose Mr. Mohammed Bedjaoui.

4. By a letter dated 6 June 2014, the Ambassador of India to the Kingdom of the Netherlands indicated, *inter alia*, that "India . . . considers that the International Court of Justice does not have jurisdiction in the alleged dispute". By a letter of 10 June 2014, referring to a meeting due to take place on 11 June 2014 between the President of the Court and the Agents of the Parties to discuss questions of procedure in the case, pursuant to Article 31 of the Rules of Court, the Ambassador stated that India "w[ould] not be able to participate in the [said] meeting". Consequently, on 11 June 2014, the President met only the representatives of the Marshall Islands.

5. By an Order of 16 June 2014, the Court held, pursuant to Article 79, paragraph 2, of its Rules, that, in the circumstances of the case, it was necessary first of all to resolve the question of its jurisdiction, and that this question should accordingly be separately determined before any proceedings on the merits; to

that end, it decided that the written pleadings should first be addressed to the said question, and fixed 16 December 2014 and 16 June 2015 as the respective time-limits for the filing of a Memorial by the Marshall Islands and a Counter-Memorial by India. The Memorial of the Marshall Islands was filed within the time-limit thus prescribed.

6. By a letter dated 1 April 2015, the Government of the United Kingdom of Great Britain and Northern Ireland, referring to Article 53, paragraph 1, of the Rules of Court, asked to be furnished with copies of the pleadings and documents annexed in the case. Having ascertained the views of the Parties pursuant to that same provision, the Court decided to grant this request. By letters dated 28 April 2015, the Registrar duly communicated that decision to the Government of the United Kingdom and to the Parties.

7. By an Order dated 19 May 2015, the Court, at India's request and in the absence of any objection from the Marshall Islands, extended to 16 September 2015 the time-limit for the filing of the Counter-Memorial. That pleading was filed within the time-limit thus extended.

8. Pursuant to Article 53, paragraph 2, of the Rules of Court, the Court, after ascertaining the views of the Parties, decided that copies of the pleadings and documents annexed would be made accessible to the public on the opening of the oral proceedings.

9. Public hearings on the questions of the jurisdiction of the Court and the admissibility of the Application were held from Monday 7 to Wednesday 16 March 2016, at which the Court heard the oral arguments and replies of:

For the Marshall Islands:	H.E. Mr. Tony deBrum, Mr. Phon van den Biesen, Mr. Nicholas Grief, Mr. Luigi Condorelli, Ms Laurie B. Ashton, Mr. John Burroughs, Mr. Paolo Palchetti, Mr. Roger S. Clark, Ms Christine Chinkin.
For India:	Ms Neeru Chadha, Mr. Amandeep Singh Gill, Mr. Harish Salve, Mr. Alain Pellet.

10. At the hearings, a Member of the Court put questions to the Parties, to which replies were given in writing, in accordance with Article 61, paragraph 4, of the Rules of Court. Pursuant to Article 72 of the Rules of Court, each of the Parties submitted comments on the replies received from the other.

*

11. In the Application, the following claims were made by the Marshall Islands:

> "On the basis of the foregoing statement of facts and law, the Republic of the Marshall Islands requests the Court
>
> *to adjudge and declare*
>
> *(a)* that India has violated and continues to violate its international obli-

gations under customary international law, by failing to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control, in particular by engaging a course of conduct, the quantitative build-up and qualitative improvement of its nuclear forces, contrary to the objective of nuclear disarmament;

(b) that India has violated and continues to violate its international obligations under customary international law with respect to cessation of the nuclear arms race at an early date, by taking actions to quantitatively build up its nuclear forces, to qualitatively improve them, and to maintain them for the indefinite future;

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

(d) that India has failed and continues to fail to perform in good faith its obligations under customary international law by effectively preventing the great majority of non-nuclear-weapon States from fulfilling their part of the obligations under customary international law and Article VI of the NPT with respect to nuclear disarmament and cessation of the nuclear arms race at an early date.

In addition, the Republic of the Marshall Islands requests the Court

to order

India to take all steps necessary to comply with its obligations under customary international law with respect to cessation of the nuclear arms race at an early date and nuclear disarmament within one year of the Judgment, including the pursuit, by initiation if necessary, of negotiations in good faith aimed at the conclusion of a convention on nuclear disarmament in all its aspects under strict and effective international control."

12. In the written proceedings, the following submissions were presented by the Parties:

On behalf of the Government of the Marshall Islands,

in the Memorial on the question of the jurisdiction of the Court:

"In accordance with the Order of the Court of 16 June 2014, this Memorial is restricted to questions of jurisdiction raised by India. As for the merits of the case, the Applicant maintains its Submissions, including the Remedies requested, as set out in the Application of 24 April 2014. For further stages of the procedure the Applicant reserves its right to clarify, modify and/or amend these Submissions.

On the basis of the foregoing statements of facts and law, the Republic of the Marshall Islands requests the Court to adjudge and declare that it has jurisdiction with respect to the present case."

On behalf of the Government of India,

in the Counter-Memorial on the question of the jurisdiction of the Court:

"In view of the above and all the arguments it would develop or supple-

ment during the Hearings, the Republic of India requests the Court to adjudge and declare that it has no jurisdiction with respect to the present case."

13. In the oral proceedings, the following submissions were presented by the Parties:

On behalf of the Government of the Marshall Islands,

at the hearing of 14 March 2016:

"The Marshall Islands respectfully requests the Court:

(a) to reject the objections to its jurisdiction of the Marshall Islands' claims, as submitted by the Republic of India in its Counter-Memorial of 16 September 2015;

(b) to adjudge and declare that the Court has jurisdiction over the claims of the Marshall Islands submitted in its Application of 24 April 2014."

On behalf of the Government of India,

at the hearing of 16 March 2016:

"The Republic of India respectfully urges the Court to adjudge and declare that:

(a) it lacks jurisdiction over the claims brought against India by the Marshall Islands in its Application dated 24 April 2014;

(b) the claims brought against India by the Marshall Islands are inadmissible."

* * *

I. Introduction

A. Historical Background

14. Since the creation of the United Nations, and in line with its purposes under Article 1 of the Charter, the issue of disarmament has been central to the Organization's concerns. In this regard, the Charter gives three separate bodies a role in international disarmament efforts: the General Assembly (Art. 11, para. 1), the Security Council (Art. 26) and the Military Staff Committee (Art. 47, para. 1). The General Assembly has been active in the field of international disarmament generally and nuclear disarmament in particular. With respect to international disarmament generally, the General Assembly created the first United Nations Disarmament Commission under the Security Council in 1952 (resolution 502 (VI) of 11 January 1952). In 1978, it held a Special Session on disarmament, at which it established the current United Nations disarmament mechanisms consisting of: the First Committee of the General Assembly, the mandate of which was redefined to deal exclusively with questions of disarmament and related international security questions; a new Disarmament Commission as a subsidiary organ of the General

Assembly, composed of all Member States of the United Nations (replacing the United Nations Disarmament Commission created in 1952); and a Committee on Disarmament devoted to negotiations (resolution S-10/2 of 30 June 1978, paras. 117, 118 and 120). The latter was redesignated the Conference on Disarmament with effect from 1984 (General Assembly resolution 37/99 K, Part II, of 13 December 1982; Report of the Committee on Disarmament to the United Nations General Assembly, 1 September 1983, doc. CD/421, para. 21) and now consists of 65 members.

With respect to nuclear disarmament efforts in particular, it may be recalled that, in its very first resolution, unanimously adopted on 24 January 1946, the General Assembly established a Commission to deal with "the problems raised by the discovery of atomic energy" (resolution 1 (I) of 24 January 1946; this Commission was dissolved in 1952 when the first United Nations Disarmament Commission, mentioned above, was established). As early as 1954, the General Assembly also called for a convention on nuclear disarmament (resolution 808 (IX) A of 4 November 1954) and has repeated this call in many subsequent resolutions. In addition, the mechanisms set out above, created by the General Assembly in view of general international disarmament efforts, have also dealt specifically with questions of nuclear disarmament.

15. By resolution 21 of 2 April 1947, the United Nations Security Council placed a group of Pacific Islands, including those making up the present-day Marshall Islands, under the trusteeship system established by the United Nations Charter, and designated the United States of America as the Administering Authority. From 1946 to 1958, while under this trusteeship, the Marshall Islands was the location of repeated nuclear weapons testing. By resolution 683 of 22 December 1990, the Security Council terminated the Trusteeship Agreement concerning the Marshall Islands. By General Assembly resolution 46/3 of 17 September 1991, the Marshall Islands was admitted to membership in the United Nations.

16. The Respondent gained independence on 15 August 1947. At that time, it was already a Member of the United Nations (India was one of the few founding Members of the United Nations which were not yet sovereign when they joined the Organization; it became a Member on 30 October 1945). India conducted a first nuclear test in 1974 and possesses nuclear weapons.

17. Following extensive negotiations in the 1960s, in which both nuclear-weapon States and non-nuclear-weapon States participated, the Treaty on the Non-Proliferation of Nuclear Weapons (hereinafter "NPT") was opened for signature on 1 July 1968. It entered into force on 5 March 1970 and was extended indefinitely in 1995. Review conferences have been held every five years since its entry into force, pursuant to Arti-

cle VIII, paragraph 3, of the NPT. One hundred and ninety-one States have become parties to the NPT; on 10 January 2003, the Democratic People's Republic of Korea announced its withdrawal. The Marshall Islands acceded to the NPT on 30 January 1995; India has not become a party to it.

18. The NPT seeks to limit the proliferation of nuclear weapons and provides certain rights and obligations for parties designated as "nuclear-weapon State Part[ies]" and "non-nuclear-weapon State Part[ies]" (including, *inter alia*, the right of all States to develop and use nuclear energy for peaceful purposes, the obligation of nuclear-weapon States parties not to transfer nuclear weapons to any recipient, and the obligation of non-nuclear-weapon States parties not to receive such a transfer). The Preamble to the NPT also declares the intention of the parties "to achieve at the earliest possible date the cessation of the nuclear arms race and to undertake effective measures in the direction of nuclear disarmament". In this connection, Article VI of the NPT provides:

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

For the purposes of the NPT, a "nuclear-weapon State is one which has manufactured and exploded a nuclear weapon or other nuclear explosive device prior to 1 January 1967" (Art. IX.3). There are five nuclear-weapon States under the NPT: China, France, the Russian Federation, the United Kingdom and the United States of America. In addition to India — which, as noted above (see para. 17), is not party to the NPT — certain other States possess, or are believed to possess, nuclear weapons.

19. By resolution 49/75 K of 15 December 1994, the General Assembly requested the International Court of Justice to give an advisory opinion on whether the threat or use of nuclear weapons is permitted in any circumstance under international law. In the reasoning of its Advisory Opinion of 8 July 1996, the Court appreciated "the full importance of the recognition by Article VI of the [NPT] of an obligation to negotiate in good faith a nuclear disarmament" (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 263, para. 99). It added that this obligation went "beyond . . . a mere obligation of conduct" and was an "obligation to achieve a precise result — nuclear disarmament in all its aspects — by adopting a particular course of conduct, namely, the pursuit of negotiations on the matter in good faith" (*ibid.*, p. 264, para. 99). The Court stated that "[t]his twofold obligation to pursue and to conclude negotiations formally concerns [all]

States parties to the [NPT], or, in other words, the vast majority of the international community", adding that "any realistic search for general and complete disarmament, especially nuclear disarmament, necessitates the co-operation of all States" (*I.C.J. Reports 1996 (I)*, p. 264, para. 100). In the conclusions of the Advisory Opinion, the Court unanimously declared that "[t]here exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control" (*ibid.*, p. 267, para. 105 (2) F).

20. In its resolution 51/45 M of 10 December 1996, the General Assembly "[u]nderline[d] the unanimous conclusion of the Court that there exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control" and

> "[c]all[ed] upon all States to fulfil that obligation immediately by commencing multilateral negotiations in 1997 leading to an early conclusion of a nuclear-weapons convention prohibiting the development, production, testing, deployment, stockpiling, transfer, threat or use of nuclear weapons and providing for their elimination".

The General Assembly has passed a similar resolution on the follow-up to the Court's Advisory Opinion every year since then. It has also passed numerous other resolutions encouraging nuclear disarmament.

B. Proceedings Brought before the Court

21. On 24 April 2014, the Marshall Islands filed, in addition to the present Application (see paragraph 1 above), separate applications against the eight other States which, according to the Marshall Islands, possess nuclear weapons (China, the Democratic People's Republic of Korea, France, Israel, Pakistan, the Russian Federation, the United Kingdom of Great Britain and Northern Ireland and the United States of America), also alleging a failure to fulfil obligations concerning negotiations relating to the cessation of the nuclear arms race at an early date and to nuclear disarmament. The cases against India, Pakistan and the United Kingdom of Great Britain and Northern Ireland were entered in the Court's General List, as the Applicant had invoked these States' declarations recognizing the compulsory jurisdiction of the Court (pursuant to Article 36, paragraph 2, of the Statute of the Court) as a basis for jurisdiction. In the applications against China, the Democratic People's Republic of Korea, France, Israel, the Russian Federation and the United States of America, the Marshall Islands invited these States to accept the jurisdiction of the Court, as contemplated in Article 38, paragraph 5, of the Rules of Court, for the purposes of the case. None of these States has

done so. Accordingly, these applications were not entered in the Court's General List.

22. In its letter dated 6 June 2014 (see paragraph 4 above), its Counter-Memorial and at the hearings, India raised several objections to the jurisdiction of the Court or the admissibility of the Application in the present case.

First, it argued that the Applicant has failed to show that there was, at the time of the filing of the Application, a legal dispute between the Parties with respect to an alleged failure to pursue negotiations in good faith towards the cessation of the nuclear arms race at an early date and nuclear disarmament.

Secondly, India maintained that the Court should declare that it lacks jurisdiction in this case, on account of the absence from the proceedings of "indispensable parties", in particular the other States possessing nuclear weapons.

Thirdly, India submitted that the Court's jurisdiction is precluded by a number of reservations in its declaration under Article 36, paragraph 2, of the Statute of the Court.

Finally, India asserted that, even if the Court were to find that it had jurisdiction, it should decline to exercise this jurisdiction on the basis that a Judgment on the merits in the present case would serve no legitimate purpose and have no practical consequence.

23. In its Memorial and its final submissions presented during the oral proceedings, the Marshall Islands requested the Court to reject the objections of India in their entirety and to find that it has jurisdiction in the present case (see paragraphs 12 and 13 above).

24. The Court will first consider the objection based on the absence of a dispute.

* * *

II. The Objection Based on the Absence of a Dispute

25. The Marshall Islands contends that there exists a legal dispute between itself and India regarding the latter's compliance with what the Applicant maintains is a customary law obligation to pursue in good faith, and to bring to a conclusion, negotiations leading to nuclear disarmament in all its aspects under strict and effective international control, as well as a customary law obligation concerning the cessation of the nuclear arms race at an early date.

26. The Marshall Islands argues that the statements and conduct of the Parties before and after the filing of the Application demonstrate the existence of such a dispute. It recalls that, prior to seising the Court on 24 April 2014, it had called on nuclear-weapon States to abide by their

obligation to negotiate towards nuclear disarmament. The Marshall Islands refers in particular to two statements. The first one was made on 26 September at the High-Level Meeting of the General Assembly on Nuclear Disarmament, when its Minister for Foreign Affairs "urge[d] all nuclear weapons states to intensify efforts to address their responsibilities in moving towards an effective and secure disarmament". The second one was made by its representative at Nayarit, Mexico, on 13 February 2014, in the context of the Second Conference on the Humanitarian Impact of Nuclear Weapons. This second statement, which the Marshall Islands regards as clearly demonstrating the content of its claim against all States possessing nuclear arsenals, reads as follows:

> "[T]he Marshall Islands is convinced that multilateral negotiations on achieving and sustaining a world free of nuclear weapons are long overdue. Indeed we believe that States possessing nuclear arsenals are failing to fulfil their legal obligations in this regard. Immediate commencement and conclusion of such negotiations is required by legal obligation of nuclear disarmament resting upon each and every State under Article VI of the Non-Proliferation Treaty and customary international law."

The Applicant maintains that, by this public statement, made in the context of an international conference in which India participated, the latter "was made aware that the [Marshall Islands] believed that its failure to seriously engage in multilateral negotiations amounted to a breach of its international obligations under customary international law". In its view, this statement, as well as the overall position it has taken over recent years on the issue of nuclear disarmament, is clear evidence that the Marshall Islands had raised a dispute "with each and every one of the States possessing nuclear weapons, including with India".

27. The Marshall Islands adds that India explicitly denies that it is bound by the obligations cited by the Marshall Islands in the current proceedings. In this connection, the Marshall Islands submits that, according to the Court's established case law, while the "dispute must in principle exist at the time the Application is submitted", it may also be evidenced by the positions of the parties before the Court (e.g., *Certain Property (Liechtenstein* v. *Germany), Preliminary Objections, Judgment, I.C.J. Reports 2005*, p. 19, para. 25; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 317, para. 93; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, pp. 614-615, para. 29). The Marshall Islands considers that, by expressing such disagreement with the Applicant before the Court, India has confirmed the existence of a legal dispute between the two States.

28. The Marshall Islands further contends that India, by its conduct, has opposed the claims made against it. In particular, the Applicant maintains that, while the Respondent has "frequently" reaffirmed in public statements its commitment to nuclear disarmament, it has in fact engaged in a course of conduct consisting of the "quantitative build-up" and the "qualitative improvement" of its nuclear arsenal.

29. The Marshall Islands rejects the existence of any rule or principle of international law that requires an attempt to initiate negotiations or their exhaustion before seising the Court. It argues that Article 43, paragraph 1, of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts (hereinafter "ILC Articles on State Responsibility"), according to which "[a]n injured State which invokes the responsibility of another State shall give notice of its claim to that State", does not establish a condition for admissibility or jurisdiction with respect to cases brought before an international court or tribunal. In support of that argument, the Marshall Islands invokes the ILC's Commentary to Article 44, which indicates that the ILC Articles on State Responsibility "are not concerned with questions of the jurisdiction of international courts and tribunals, or in general with the conditions for the admissibility of cases". It further adds that "there is nothing to prevent the notice of claim by the injured State being given not prior to seising the Court, but precisely by seising it".

*

30. India, for its part, contends that the Applicant has failed to show that, at the time of the filing of the Application, there was a legal dispute between the Parties with respect to an alleged failure to pursue negotiations in good faith towards nuclear disarmament. In fact, according to the Respondent, such a dispute does not exist at present. India asserts that it has been a "strong supporter" of nuclear disarmament and that the Applicant never sought to engage in bilateral exchanges with a view to settling the alleged dispute before seising the Court. India argues that, since its accession to independence, it has always actively championed global nuclear disarmament. It recalls that the resolutions adopted by the General Assembly on India's own initiative, or with its support, give expression to its desire to work with other Member States of the United Nations to achieve the goal of nuclear disarmament. Furthermore, it claims to be the only State possessing nuclear weapons to have consistently voted in favour of the series of General Assembly resolutions entitled "Follow-up to the advisory opinion of the International Court of Justice on the legality of the threat or use of nuclear weapons", which call upon all States to commence multilateral negotiations leading to nuclear disarmament. India notes in this regard that "[i]t is revealing that for ten years (2003-2012) prior to the [Marshall Islands] contemplating this recourse to the ICJ . . . the [Marshall Islands] voted against the resolution or abstained nine times and voted in favour only once". India

observes that only more recently have both States voted in favour of relevant General Assembly resolutions. This was the case, for example, with resolution 68/32 of 5 December 2013, entitled "Follow-up to the 2013 High-Level Meeting of the General Assembly on Nuclear Disarmament".

31. India further avers that the statement made on behalf of the Marshall Islands at the Second Conference on the Humanitarian Impact of Nuclear Weapons held in Nayarit on 13 February 2014 (see paragraph 26 above) does not provide a sufficient basis for establishing that there was an opposition of views between the Parties prior to the filing of the Application. In this respect, India notes that the statements made by the two Parties at that conference show that their positions on the issue of nuclear disarmament converged. In particular, India expressed its support for nuclear disarmament and reiterated its commitment to the complete elimination of nuclear weapons in a "time-bound, universal, non-discriminatory, phased and verifiable manner". In India's view, this statement is consistent with the line of conduct it has followed since it became independent.

32. In addition, India asserts that the Marshall Islands never brought its claim to the attention of the Respondent, or invoked India's responsibility, before it filed its Application, and that it did not seek to enter into prior bilateral negotiations with any of the nine States against which it sought to bring proceedings before the Court. While India acknowledges that the exhaustion of prior negotiations is not a prerequisite for seising the Court, it argues that before filing its Application, the Marshall Islands should at least have initiated negotiations or consultations in order to define the subject-matter of the dispute, and that its failure to do so is evidence of the absence of any dispute. India relies on the Judgment in the case of *Mavrommatis Palestine Concessions* in this regard (*Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 15), as well as on Article 43 of the ILC Articles on State Responsibility. In addition, India does not accept that a State can give notice of its claim through the institution of proceedings before the Court.

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33. Under Article 38 of the Statute, the function of the Court is to decide in accordance with international law disputes that States submit to it. Under Article 36, paragraph 2, of the Statute, the Court has jurisdiction in all "legal disputes" that may arise between States parties to the Statute having made a declaration in accordance with that provision. The existence of a dispute between the Parties is thus a condition of the Court's jurisdiction.

34. According to the established case law of the Court, a dispute is "a disagreement on a point of law or fact, a conflict of legal views or of interests" between parties (*Mavrommatis Palestine Concessions, Judgment*

No. 2, 1924, P.C.I.J., Series A, No. 2, p. 11). In order for a dispute to exist, "[i]t must be shown that the claim of one party is positively opposed by the other" (*South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328). The two sides must "'hold clearly opposite views concerning the question of the performance or non-performance of certain' international obligations" (*Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 26, para. 50, citing *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 74).

35. The Court's determination of the existence of a dispute is a matter of substance, and not a question of form or procedure (cf. *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 84, para. 30; *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów) [Germany* v. *Poland], Judgment No. 11, 1927, P.C.I.J., Series A, No. 13*, pp. 10-11). Prior negotiations are not required where the Court has been seised on the basis of declarations made pursuant to Article 36, paragraph 2, of its Statute, unless one of the relevant declarations so provides (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 322, para. 109). Moreover, "although a formal diplomatic protest may be an important step to bring a claim of one party to the attention of the other, such a formal protest is not a necessary condition" for the existence of a dispute (*Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 32, para. 72). Similarly, notice of an intention to file a case is not required as a condition for the seisin of the Court (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 297, para. 39).

36. Whether a dispute exists is a matter for objective determination by the Court which must turn on an examination of the facts (*Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 26, para. 50). For that purpose, the Court takes into account in particular any statements or documents exchanged between the parties (*Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II)*, pp. 443-445, paras. 50-55), as well as any exchanges made in multilateral settings (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 94, para. 51, p. 95, para. 53). In so doing, it pays special attention to "the author of the statement or

document, their intended or actual addressee, and their content" (*I.C.J. Reports 2011 (I)*, p. 100, para. 63).

37. The conduct of the parties may also be relevant, especially when there have been no diplomatic exchanges (*Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, pp. 32-33, paras. 71 and 73). As the Court has affirmed,

> "a disagreement on a point of law or fact, a conflict of legal views or interests, or the positive opposition of the claim of one party by the other need not necessarily be stated expressis verbis . . . [T]he position or the attitude of a party can be established by inference, whatever the professed view of that party." (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 315, para. 89.)

In particular, the Court has previously held that "the existence of a dispute may be inferred from the failure of a State to respond to a claim in circumstances where a response is called for" (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 84, para. 30, citing *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 315, para. 89).

38. The evidence must show that the parties "hold clearly opposite views" with respect to the issue brought before the Court (see paragraph 34 above). As reflected in previous decisions of the Court in which the existence of a dispute was under consideration, a dispute exists when it is demonstrated, on the basis of the evidence, that the respondent was aware, or could not have been unaware, that its views were "positively opposed" by the applicant (*Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 32, para. 73; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 99, para. 61, pp. 109-110, para. 87, p. 117, para. 104).

39. In principle, the date for determining the existence of a dispute is the date on which the application is submitted to the Court (*Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 27 para. 52; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 85, para. 30). Indeed, when it is stated in Article 38, paragraph 1, of the Court's Statute that the Court's function is "to decide in accordance with

international law such disputes as are submitted to it", this relates to disputes existing at the time of their submission.

40. Conduct subsequent to the application (or the application itself) may be relevant for various purposes, in particular to confirm the existence of a dispute (*East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 100, para. 22 and p. 104, para. 32), to clarify its subject-matter (*Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile), Preliminary Objection, Judgment, I.C.J. Reports 2015 (II)*, p. 602, para. 26) or to determine whether the dispute has disappeared as of the time when the Court makes its decision (*Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, pp. 270-271, para. 55; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 476, para. 58).

However, neither the application nor the parties' subsequent conduct and statements made during the judicial proceedings can enable the Court to find that the condition of the existence of a dispute has been fulfilled in the same proceedings (*Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II)*, pp. 444-445, paras. 53-55). If the Court had jurisdiction with regard to disputes resulting from exchanges in the proceedings before it, a respondent would be deprived of the opportunity to react before the institution of proceedings to the claim made against its own conduct. Furthermore, the rule that the dispute must in principle exist prior to the filing of the application would be subverted.

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41. The Court notes that the Marshall Islands, by virtue of the suffering which its people endured as a result of it being used as a site for extensive nuclear testing programs, has special reasons for concern about nuclear disarmament (see paragraph 15 above). But that fact does not remove the need to establish that the conditions for the Court's jurisdiction are met. While it is a legal matter for the Court to determine whether it has jurisdiction, it remains for the Applicant to demonstrate the facts underlying its case that a dispute exists (*Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 75, para. 16).

42. As noted above at paragraph 32, India relies on the fact that the Marshall Islands did not commence negotiations or give notice to it of the claim that is the subject of the Application to support its contention that there is no dispute between the Parties. India refers to Article 43 of the ILC Articles on State Responsibility, which requires an injured State to "give notice of its claim" to the allegedly responsible State. Article 48, paragraph 3, applies that requirement *mutatis mutandis* to a State other than an injured State which invokes responsibility. However, the Court notes that the ILC's commentary specifies that the Articles "are not concerned with questions of the jurisdiction of international courts and

tribunals, or in general with the conditions for the admissibility of cases brought before such courts or tribunals" (see ILC Commentary on the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission, United Nations doc. A/56/10, 2001, paragraph 1 of the Commentary on Article 44, pp. 120-121). Moreover, the Court has rejected the view that notice or prior negotiations are required where it has been seised on the basis of declarations made pursuant to Article 36, paragraph 2, of the Statute, unless one of those declarations so provides. The Court's jurisprudence treats the question of the existence of a dispute as a jurisdictional one that turns on whether there is, in substance, a dispute, not on what form that dispute takes or whether the respondent has been notified (see paragraph 35 above).

43. The Marshall Islands seeks to demonstrate that it had a dispute with India in essentially three ways. First, it refers to its own statements, as formulated in multilateral fora. Secondly, it argues that the very filing of the Application, as well as the positions expressed by the Parties in the current proceedings, show the existence of a dispute between the Parties. Thirdly, it relies on India's conduct both before and after the filing of the Application. In reply to the Respondent's argument that it abstained or voted against a number of General Assembly resolutions on nuclear disarmament supported by India, the Marshall Islands submits that it has voted in favour of such resolutions since 2013 and that it is fully committed to using its voice in the General Assembly to achieve nuclear disarmament.

44. The Marshall Islands does not refer to any bilateral diplomatic exchanges or official communications between it and India, or to any bilateral consultations or negotiations that have taken place, concerning the breach of India's obligations alleged in the Application. This is so despite the fact that there have been bilateral meetings and exchanges on other matters between the two States in recent years.

45. The Marshall Islands refers to two statements made in multilateral fora before the date of the filing of its Application which, in its view, suffice to establish the existence of a dispute. As the Court has already explained, the opposition of the Parties' views could also be demonstrated by exchanges made in multilateral settings (see paragraph 36 above). In such a setting, however, the Court must give particular attention, *inter alia*, to the content of a party's statement and to the identity of the intended addressees, in order to determine whether that statement, together with any reaction thereto, show that the parties before it held "clearly opposite views" (see paragraphs 34 and 36 above). The question in this case is therefore whether the statements invoked by the Marshall Islands are sufficient to demonstrate the existence of such opposition.

46. The Marshall Islands relies on the statement made at the High-Level Meeting of the General Assembly on Nuclear Disarmament, on 26 September 2013 by its Minister for Foreign Affairs, "urg[ing] all nuclear weapons states to intensify efforts to address their responsibilities in moving towards an effective and secure disarmament". However, this statement is formulated in hortatory terms and cannot be understood as an allegation that India (or any other nuclear power) was in breach of any of its legal obligations. It does not mention the obligation to negotiate, nor does it say that the nuclear-weapon States are failing to meet their obligations in this regard. It suggests that they are making "efforts" to address their responsibilities, and calls for an intensification of those efforts, rather than deploring a failure to act. Moreover, a statement can give rise to a dispute only if it refers to the subject-matter of a claim "with sufficient clarity to enable the State against which [that] claim is made to identify that there is, or may be, a dispute with regard to that subject-matter" (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 85, para. 30). While the Court reached that conclusion in the context of a compromissory clause, the same reasoning applies to a dispute over a customary international law obligation regardless of the underlying jurisdictional basis alleged, since the Court made clear that it was dealing with the requirements of a dispute in general (*ibid.*, p. 84, para. 29). The 2013 statement relied upon by the Marshall Islands does not meet these requirements.

47. The statement made by the Marshall Islands at the Nayarit conference on 13 February 2014 (see paragraph 26 above) goes further than the 2013 statement, in that it contains a sentence asserting that "States possessing nuclear arsenals are failing to fulfil their legal obligations" under Article VI of the NPT and customary international law. India was present at the Nayarit conference. However, the subject of the conference was not specifically the question of negotiations with a view to nuclear disarmament, but the broader question of the humanitarian impact of nuclear weapons, and while this statement contains a general criticism of the conduct of all nuclear-weapon States, it does not specify the conduct of India that gave rise to the alleged breach. Such a specification would have been particularly necessary if, as the Marshall Islands contends, the Nayarit statement was aimed at invoking the international responsibility of the Respondent on the grounds of a course of conduct which had remained unchanged for many years. Given its very general content and the context in which it was made, that statement did not call for a specific reaction by India. Accordingly, no opposition of views can be inferred from the absence of any such reaction. The Nayarit statement is insufficient to bring into existence, between the Marshall Islands and India, a specific dispute as to the existence or scope of the asserted customary interna-

tional law obligations to pursue in good faith, and to bring to a conclusion, negotiations leading to nuclear disarmament in all its aspects under strict and effective international control, as well as to cease the nuclear arms race at an early date, or as to India's compliance with any such obligations.

48. In all the circumstances, on the basis of those statements — whether taken individually or together — it cannot be said that India was aware, or could not have been unaware, that the Marshall Islands was making an allegation that India was in breach of its obligations.

49. Secondly, the Marshall Islands argues that the very filing of the Application could suffice to establish the existence of a dispute: "there is nothing to prevent the notice of claim by the injured State being given not prior to seising the Court, but precisely by seising it". It also points to other statements made in the course of the proceedings by both Parties as evidence of their opposition of views.

50. The Marshall Islands relies on three cases in support of its contention that the statements made by the Parties during the proceedings may serve to evidence the existence of a dispute (see paragraph 27 above). However, these cases do not support this contention. In the case concerning *Certain Property*, the existence of a dispute was clearly referenced by bilateral exchanges between the parties prior to the date of the application (*Certain Property (Liechtenstein* v. *Germany), Preliminary Objections, Judgment, I.C.J. Reports 2005*, p. 19, para. 25). The reference to subsequent materials in the *Cameroon* v. *Nigeria* case related to the scope of the dispute, not to its existence (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 317, para. 93). Moreover, while it is true that the Court did not explicitly reference any evidence before the filing of the application demonstrating the existence of a dispute in its Judgment in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia)*, in the particular context of that case, which involved an ongoing armed conflict, the prior conduct of the parties was sufficient to establish the existence of a dispute (*Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 614, paras. 27-29). Instead, the issues the Court focused on were not the date when the dispute arose but the proper subject-matter of that dispute, whether it fell within the scope of the relevant compromissory clause, and whether it "persist[ed]" at the date of the Court's decision. As stated above, although statements made or claims advanced in or even subsequently to the application may be relevant for various purposes — notably in clarifying the scope of the dispute submitted — they cannot create a dispute *de novo*, one that does not already exist (see paragraph 40 above).

51. Thirdly, the Marshall Islands argues that, irrespective of verbal support for negotiations on nuclear disarmament on the part of India, its

actual conduct in maintaining and upgrading its nuclear arsenal, and in failing to co-operate with certain diplomatic initiatives, allows the Court to infer the existence of a dispute as to the scope of and compliance with its obligations, even if such a dispute had not, prior to the Application, been articulated in legal terms by the Marshall Islands.

52. The Court recalls that the question whether there is a dispute in a particular contentious case turns on the evidence of opposition of views (see paragraphs 34, 36 and 37 above). In this regard, the conduct of a respondent can contribute to a finding by the Court that the views of the parties are in opposition (see paragraph 37 above). However, as the Court has previously concluded (see paragraphs 46-48 above), in the present case neither of the statements that were made in a multilateral context by the Marshall Islands offered any particulars regarding India's conduct. On the basis of such statements, it cannot be said that India was aware, or could not have been unaware, that the Marshall Islands was making an allegation that India was in breach of its obligations. In this context, the conduct of India does not provide a basis for finding a dispute between the two States before the Court.

53. Finally, regarding India's argument based on the Parties' voting records on General Assembly resolutions on nuclear disarmament (see paragraph 30 above), the Court notes that considerable care is required before inferring from votes cast on resolutions before political organs such as the General Assembly conclusions as to the existence or not of a legal dispute on some issue covered by a resolution. The wording of a resolution, and votes or patterns of voting on resolutions of the same subject-matter, may constitute relevant evidence of the existence of a dispute in some circumstances, particularly where statements were made by way of explanation of vote. However, some resolutions contain a large number of different propositions; a State's vote on such resolutions cannot by itself be taken as indicative of the position of that State on each and every proposition within that resolution, let alone of the existence of a legal dispute between that State and another State regarding one of those propositions.

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54. The Court therefore concludes that the first objection made by India must be upheld. It follows that the Court does not have jurisdiction under Article 36, paragraph 2, of its Statute.

55. Consequently, it is not necessary for the Court to deal with the other objections raised by India. The questions of the existence of and extent of customary international law obligations in the field of nuclear disarmament, and India's compliance with such obligations, pertain to the merits. But the Court has found that no dispute existed between the

Parties prior to the filing of the Application, and consequently it lacks jurisdiction to consider these questions.

* * *

56. For these reasons,

THE COURT,

(1) By nine votes to seven,

Upholds the objection to jurisdiction raised by India, based on the absence of a dispute between the Parties;

IN FAVOUR: *President* Abraham; *Vice-President* Yusuf; Judges Owada, Greenwood, Xue, Donoghue, Gaja, Bhandari, Gevorgian;

AGAINST: *Judges* Tomka, Bennouna, Cançado Trindade, Sebutinde, Robinson, Crawford; *Judge* ad hoc Bedjaoui;

(2) By ten votes to six,

Finds that it cannot proceed to the merits of the case.

IN FAVOUR: *President* Abraham; *Vice-President* Yusuf; *Judges* Owada, Tomka, Greenwood, Xue, Donoghue, Gaja, Bhandari, Gevorgian;

AGAINST: *Judges* Bennouna, Cançado Trindade, Sebutinde, Robinson, Crawford; *Judge* ad hoc Bedjaoui.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this fifth day of October, two thousand and sixteen, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of the Marshall Islands and the Government of the Republic of India, respectively.

(Signed) Ronny ABRAHAM,
President.

(Signed) Philippe COUVREUR,
Registrar.

President ABRAHAM and Vice-President YUSUF append declarations to the Judgment of the Court; Judges OWADA and TOMKA append separate opinions to the Judgment of the Court; Judges BENNOUNA and CANÇADO TRINDADE append dissenting opinions to the Judgment of the Court; Judges XUE, DONOGHUE and GAJA append declarations to the Judgment of the Court; Judges SEBUTINDE and BHANDARI append separate opinions

to the Judgment of the Court; Judges ROBINSON and CRAWFORD append dissenting opinions to the Judgment of the Court; Judge *ad hoc* BEDJAOUI appends a dissenting opinion to the Judgment of the Court.

(Initialled) R.A.
(Initialled) Ph.C.