DECLARATION OF VICE-PRESIDENT YUSUF

*Existence of a dispute — Matter for objective determination — Positively opposed juridical views required — Subjective criterion of "awareness" not a condition — "Awareness" has no basis in jurisprudence of Court — It also undermines sound administration of justice — Court could have reached same conclusions without using "*awareness*" criterion — Incipient dispute must exist prior to application to the Court — Dispute can crystallize during proceedings — At issue is India's compliance with obligation to negotiate nuclear disarmament — Both Parties supported negotiations on disarmament — Both voted in favour of relevant United Nations resolutions — No evidence of positively opposed views.*

1. I agree with the conclusions of the Court on the inexistence of a dispute between the Marshall Islands and India on the subject-matter of the Application of the former. I disagree, however, with some aspects of the reasoning in the Judgment. I disagree, in particular, with the introduction of the subjective criterion of "awareness" in the assessment by the Court of the existence of a dispute. This is a clear departure from the consistent jurisprudence of the Court on this matter. I am also in disagreement with the one-size-fits-all approach taken to the three distinct cases argued before the Court by the Parties *(Marshall Islands* v. *India*, *Marshall Islands* v. *United Kingdom, Marshall Islands* v. *Pakistan)*.

2. It is correctly stated in the Judgment that: "[w]hether a dispute exists is a matter for objective determination by the Court which must turn on an examination of the facts", and, for that purpose, "the Court takes into account in particular any statements or documents exchanged between the parties, as well as any exchanges made in multilateral settings" (para. 36). However, as has been shown in my dissenting opinion on *Marshall Islands* v. *United Kingdom*, and as will be demonstrated in this declaration, the policy approaches of the respondent States to the negotiation and conclusion of an international instrument on nuclear disarmament are quite different from each other and the positions they have taken in multilateral forums on the subject-matter of the dispute are far from being identical. The existence of a dispute between each one of them and the applicant State has therefore to be determined in light of those distinctive facts.

3. The jurisdiction of the Court is to be exercised in contentious cases only in respect of legal disputes submitted to it by States. This case was submitted to the Court on the basis of Article 36, paragraph 2, of the Statute. This provision does not define what is meant by a "legal dis-

pute"; it therefore falls to the Court not only to define it, but also to determine its existence or inexistence in a case such as this one before proceeding to the merits.

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

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

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

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

7. Notwithstanding this jurisprudence of the Court, it is stated in paragraph 38 of the Judgment that: "a dispute exists when it is demonstrated, on the basis of the evidence, that the respondent was aware, or could not have been unaware, that its views were 'positively opposed' by the applicant". The Judgment claims that this requirement is reflected "in previous decisions of the Court in which the existence of a dispute was under consideration", and invokes as authority for this statement two judgments, namely the Judgments on preliminary objections in the cases of *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia)* and the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation) (ibid.)*.

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

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

10. It is indeed the first time that such a subjective condition is introduced into the assessment by the Court of the existence of a dispute. As pointed out above, the Court's jurisprudence has always viewed the existence of a dispute as an objective matter. The Court has underlined on many occasions that the determination of the existence of a dispute is a "matter . . . of substance, not of form" (*ibid.*, p. 84, para. 30).

11. The function of the Court is to determine objectively the existence of a conflict of legal views on the basis of evidence placed before it and not to delve into the consciousness, perception and other mental processes of States (provided they do possess such cerebral qualities) in order to find out about their state of awareness.

12. The introduction of an "awareness" test into the determination of the existence of a dispute does not only go against the consistent jurisprudence of the Court; it also undermines judicial economy and the sound administration of justice by inviting submissions of second applications on the same dispute. If a formalistic requirement such as "awareness" is to be demanded as a condition for the existence of a dispute, the applicant State may be able to fulfil such a condition at any time by instituting fresh proceedings before the Court. The respondent State would, of course, be aware of the existence of the dispute in the context of these new proceedings. It is to avoid exactly this kind of situation that the Permanent Court of International Justice observed in the *Polish Upper Silesia* case that: "the Court cannot allow itself to be hampered by a mere defect of form, the removal of which depends solely on the Party concerned" (*Certain German Interests in Polish Upper Silesia, Jurisdiction, Judgment No. 6, 1925, P.C.I.J., Series A, No. 6*, p. 14).

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

14. Thus, in those circumstances where an applicant State may be entitled to bring fresh proceedings to fulfil an initially unmet formal condition, it is not in the interests of the sound administration of justice to compel it to do so (see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 442, para. 87). The introduction of a test of "awareness" constitutes an open invitation to the applicant State to institute such proceedings before the Court, having made the respondent State aware of its opposing views.

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

16. The Court could have come to the same conclusions reached in the present Judgment by applying the criteria traditionally used by it in the determination of the existence of a dispute. On the basis of the evidence placed before it in this case, the Court could have concluded that the Parties did not hold positively opposed views prior to the submission of the Application by the Marshall Islands. There was no need to introduce a new criterion of "awareness" in order to justify those conclusions. Indeed, as indicated in paragraph 52 of the Judgment: "the question whether there is a dispute in a particular contentious case turns on the evidence of opposition of views". Nothing more, nothing less, as stated by the Court on so many occasions in the past.

17. Thus, the conclusions of the Judgment on the absence of a dispute between the Marshall Islands and India should have been based on an analysis of the facts presented to the Court regarding the positions of the Parties on the subject-matter of the alleged dispute. They should have in particular referred to the articulation of those positions in multilateral settings (see para. 36), since there were no bilateral exchanges between the Marshall Islands and India prior to the filing of the Application by the

former. In the same vein as in *Georgia* v. *Russian Federation*, the Court should have reviewed the documents and statements relied upon by the Parties, including statements in multilateral settings, to demonstrate the existence or non-existence of a dispute between them (see *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)*, pp. 100-120, paras. 63-113).

18. In this context, two categories of documents and statements invoked by the Marshall Islands and India with regard to the subject-matter of the dispute are of particular relevance: *(a)* the resolutions adopted by the United Nations General Assembly calling upon States to pursue multilateral negotiations on nuclear disarmament and the voting patterns of the Marshall Islands and India on such resolutions; and *(b)* statements made by the Parties on the subject-matter of the alleged dispute in multilateral forums, including United Nations organs dealing with disarmament issues, as well as other international forums.

19. However, before turning to the examination of those documents and statements, a few observations need to be made on the subject-matter of the dispute and the date at which the dispute must have existed, both of which are important factors in the objective determination of the existence or absence of a dispute between the Parties.

20. It is for the Court itself to determine on an objective basis the subject-matter of the dispute between the Parties, that is, to "isolate the real issue in the case and to identify the object of the claim" (*Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 262, para. 29; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 466, para. 30). However, in doing so, the Court examines the positions of both Parties, while giving particular attention to the manner in which the subject-matter of the dispute is framed by the applicant State (*Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 448, para. 30; see also *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II)*, p. 848, para. 38).

21. In its Memorial, the Marshall Islands describes its dispute with India as concerning "India's compliance or non-compliance with its obligation under customary international law 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" (Memorial of the Marshall Islands (MMI), para. 13). This framing of the subject-matter of the dispute was reiterated by the Marshall Islands in oral proceedings (CR 2016/1, p. 32, para. 9 (Condorelli)).

22. Although the Marshall Islands argued at various points in its pleadings that the quantitative build-up and qualitative improvement of

India's nuclear arsenal was "contrary to the objective of nuclear disarmament" (MMI, para. 19), the Marshall Islands relies mainly on the statement made by its Foreign Minister at the Second Conference on the Humanitarian Impact of Nuclear Weapons held in Nayarit, Mexico, as evidence of the existence of a dispute with India. In that statement, the Marshall Islands, after accusing the States possessing nuclear weapons of failing to fulfil their legal obligations on pursuing nuclear disarmament through multilateral negotiations, declared that "the immediate commencement and conclusion of such negotiations is required by legal obligation of nuclear disarmament resting upon each and every State under Article VI of the Non-Proliferation Treaty and customary international law".

23. The subject-matter of the dispute may therefore be considered to relate in this case to the alleged non-compliance of India with a customary law obligation to pursue in good faith and to bring to a conclusion negotiations on nuclear disarmament[1]. While the issue of non-compliance with such an obligation, assuming of course that it exists, belongs to the merits of the case, what is at issue at this point is the existence of positively opposed viewpoints on the pursuit in good faith of negotiations on nuclear disarmament. In other words, for the purpose of determining the existence of a dispute between the Marshall Islands and India, the Court has to ascertain on the basis of the facts placed before it whether there is a disagreement between the Parties on the immediate commencement and conclusion of multilateral negotiations on nuclear disarmament.

24. As the Court has pointed out on several occasions, such disagreement must, in principle, have existed at the time of the institution of proceedings before 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; *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II)*, p. 442, para. 46; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 84, para. 30). The seisin of the Court cannot by itself bring into being a dispute between the Parties. There must be as a minimum the start or the onset of a dispute prior to the filing of an application, the continuation or crystallization of which may become more evident in the course of the proceedings.

[1] The Republic of the Marshall Islands confirmed during the oral proceedings that this was indeed the subject-matter of the dispute:

> "To be fair, Mr. President, in a further development of its position, India distances itself from its accusatory tone and summarized the task before this Court in this case as '*la determination de l'existence d'une violation — ou non — de l'obligation de mener de bonne foi des négociations en vue de la conclusion d'un traité sur le disarmament nucléaire*'. This demonstrates that, in effect, India is fully aware of the precise subject-matter of this case and there is — after all — no confusion possible on India's part regarding what this case is about." (CR 2016/6, p. 10, para. 9 (van den Biesen).)

25. As explained in the following paragraphs, and in contrast to the *Marshall Islands* v. *United Kingdom* case, it does not appear that there was an incipient dispute between the Marshall Islands and India in the present case prior to the filing of the application. As discussed in my dissenting opinion in the *Marshall Islands* v. *United Kingdom* case, the Nayarit statement by the Marshall Islands may be considered as a protest meant to contest the attitude of the nuclear-weapons States towards the immediate commencement of negotiations on a comprehensive convention for the elimination of nuclear weapons. However, for there to exist at least the beginning of a dispute between the Marshall Islands and India, it must be shown that India had a course of conduct which was positively opposed to the commencement and conclusion of such negotiations prior to the institution of proceedings. A review of the two categories of documents and statements mentioned above shows that India has systematically supported the immediate commencement and conclusion of multilateral negotiations aimed at the elimination of nuclear weapons both before and after the submission of the Application by the Marshall Islands.

26. As regards the United Nations General Assembly resolutions, India has consistently voted in favour of three strands of the United Nations General Assembly resolutions that call upon States to negotiate a comprehensive nuclear disarmament treaty. The first of these are resolutions passed in response to the Advisory Opinion of the International Court of Justice, which, after underlining the unanimous conclusion of the International Court of Justice that there exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament, call upon all States

> "immediately to fulfil that obligation by commencing multilateral negotiations leading to an early conclusion of a nuclear weapons convention prohibiting the development, production, testing, deployment, stockpiling, transfer, threat or use of nuclear weapons and providing for their elimination".

Since the delivery of the Court's Opinion in July 1996, India has voted in favour of all twenty follow-up resolutions adopted by the United Nations General Assembly.

27. The second strand of resolutions are a follow-up to the 2013 United Nations General Assembly High-Level Meeting on Nuclear Disarmament, which, *inter alia*, call for the "urgent compliance with the legal obligations and the fulfilment of the commitments undertaken on nuclear disarmament" and the

> "urgent commencement of negotiations in the Conference on Disarmament for the early conclusion of a comprehensive convention on nuclear weapons to prohibit their possession, development, production, acquisition, testing, stockpiling, transfer, use or threat of use and to provide for their destruction".

India has voted in favour of all three follow-up resolutions passed since that high-level meeting. In a similar vein, India voted for two resolutions, passed in 2013 and 2014, entitled "Taking forward multilateral nuclear disarmament negotiations", which re-affirmed the "urgency of securing substantive progress in multilateral nuclear disarmament negotiations"[2].

28. Thirdly, India's stance regarding negotiation of nuclear disarmament is confirmed by the fact that it is part of a group of States that have annually tabled a resolution at the United Nations General Assembly since 1987, entitled "Convention on the Prohibition of the Use of Nuclear Weapons"[3]. This resolution calls upon States parties to the Conference on Disarmament "to commence negotiations in order to reach agreement on an international convention prohibiting the use or threat of use of nuclear weapons under any circumstances".

In view of the consistent pattern of voting in India in favour of a series of resolutions which call for the same type of action, there is no doubt that such a voting record has an evidentiary value with regard to the course of conduct of India on the matter at issue in this case: the immediate commencement of negotiations and conclusion of a general convention on nuclear disarmament.

29. Furthermore, India, as a member of the Non-Aligned Movement, has consistently subscribed to statements made by this group of States that express willingness to engage in multilateral negotiations leading to nuclear disarmament. Thus, in August 2012, at the Sixteenth Summit Conference of the Non-Aligned Movement, the Heads of State or Government

> "*reiterated* deep concern over the slow pace of progress towards nuclear disarmament and the lack of progress by the Nuclear-Weapons States (NWS) to accomplish the total elimination of their nuclear arsenals in accordance with their relevant multilateral legal obligations . . . and *emphasized*, in this regard, the urgent need to commence negotiations on comprehensive and complete nuclear disarmament without delay" (Sixteenth Summit of Heads of State or Government of the Non-Aligned Movement, August 2012, para. 151).

Similarly, at the Sixteenth Ministerial Conference of the Non-Aligned Movement:

> "The Ministers . . . *reiterated* deep concern over the slow pace of progress towards nuclear disarmament and the lack of progress by the Nuclear-Weapons States (NWS) to accomplish the total elimination of their nuclear arsenals in accordance with their relevant multi-

[2] UN docs. A/RES/68/46 and A/RES/69/41.
[3] See UN doc. A/C.1/42/L.28.

> lateral legal obligations . . . and *emphasized*, in this regard, the urgent need to commence negotiations on comprehensive and complete nuclear disarmament without delay." (Sixteenth Ministerial Conference and Commemorative Meeting of the Non-Aligned Movement, Final Document, May 2011, para. 136.)

30. In addition to its voting record on United Nations General Assembly and Non-Aligned Movement resolutions, India's consistent support for the commencement and conclusion of negotiations leading to nuclear disarmament is substantiated by the statements of its Head of State and Ministers in multilateral forums or official documents. For example, at the First High-Level Meeting on Nuclear Disarmament in 2013, the Minister of External Affairs of India stated that:

> "We believe that the goal of nuclear disarmament can be achieved through a step-by-step process underwritten by a universal commitment and an agreed multilateral framework that is global and non-discriminatory. There is need for a meaningful dialogue among all States possessing nuclear weapons to build trust and confidence and for reducing the salience of nuclear weapons in international affairs and security doctrines
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> [T]he Non-Aligned Movement, of which India is a proud founding member, has proposed today the early commencement of negotiations in the (Conference on Disarmament, or 'CD') on nuclear disarmament. We support this call."

31. At the Nayarit conference, where the Marshall Islands made its statement addressed to the nuclear powers calling on them to fulfil their obligation to pursue in good faith and conclude negotiations on nuclear disarmament, India's representative also stated that:

> "Its main objective is to seek the negotiation in the Conference on Disarmament of a Convention on the Prohibition of Use of Nuclear Weapons, which will be an important step in the progressive delegitimization of nuclear weapons, paving the way for their elimination. We hope delegations gathered here will extend support for negotiation of such a Convention."

32. Thus, it is my view that there is no evidence in the record that positively opposed views were held by India and the Marshall Islands, prior to the submission of the application of the Marshall Islands, on the obligation to pursue and conclude negotiations on nuclear disarmament, assuming that such an obligation exists in customary international law. The record shows instead that both States have been advocating in various multilateral forums, including at the Nayarit conference, but most of all at the United Nations General Assembly (at least since 2013 in the

case of the Marshall Islands), the necessity for all States, including nuclear weapons States, to pursue in good faith and to conclude negotiations on nuclear disarmament. Rather than positive opposition or conflict of legal views on the subject-matter of the alleged dispute, the evidence appears to point towards a convergence of views between the Parties on the negotiation and conclusion of a comprehensive convention on nuclear disarmament. The Judgment should have therefore based its conclusion on this absence of conflict of legal views, instead of resorting to a new subjective requirement of "awareness" in the determination of the existence or non-existence of a dispute.

(Signed) Abdulqawi A. YUSUF.