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 Pakistan'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 Republic of the Marshall Islands and Pakistan 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 to the three distinct cases argued before the Court by the Parties *(Marshall Islands* v. *India, Marshall Islands* v. *Pakistan, Marshall Islands* v. *United Kingdom)*.

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.)

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).

6. 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.)*.

7. 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.

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

9. 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).

10. 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.

11. 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" (*Jurisdiction, Judgment No. 6, 1925, P.C.I.J., Series A, No. 6*, p. 14).

12. 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." (*Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, pp. 428-429, para. 83.)

13. 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.

14. 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.

15. 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.

16. Thus, the conclusions of the Judgment on the absence of a dispute between the Republic of the Marshall Islands and Pakistan should have been based on an analysis of the facts in the case file regarding the positions of the Parties on the subject-matter of the alleged dispute. In particular, account should have been taken of the articulation of those positions in multilateral settings (see para. 36), since there were no bilateral exchanges between the Marshall Islands and Pakistan prior to the filing of the Application by the former. As the Court had done in *Georgia* v. *Russian Federation*, it should have reviewed the documents and

statements relied upon by the Parties, including statements in multilateral settings and voting record in the United Nations General Assembly, 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).

17. 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.

18. 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).

19. In its Memorial, the Republic of the Marshall Islands describes its dispute with Pakistan as concerning "Pakistan'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. 42). This framing of the subject-matter of the dispute was reiterated by the Republic of the Marshall Islands in oral proceedings (CR 2016/2, pp. 25-26, paras. 4-5 (Condorelli)).

20. Although the Republic of the Marshall Islands argued at various points in its pleadings that the quantitative build-up and qualitative improvement of Pakistan's nuclear arsenal was "contrary to the objective of nuclear disarmament" (MMI, para. 48), the Republic of 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 Pakistan. In that statement, the Republic of 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".

21. The subject-matter of the dispute may therefore be considered to relate in this case to the alleged non-compliance of Pakistan with a customary law obligation to pursue in good faith and to bring to a conclusion negotiations on nuclear disarmament. 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 Pakistan, 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.

22. 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.

23. 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 Republic of the Marshall Islands and Pakistan in the present case prior to the filing of the Application. As discussed in my dissenting opinion in *Marshall Islands* v. *United Kingdom*, the Nayarit statement by the Republic of the Marshall Islands may be considered as a protest meant to contest the attitude of all 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 Republic of the Marshall Islands and Pakistan, it must be shown that Pakistan 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 voting record and statements mentioned above shows that Pakistan 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 Republic of the Marshall Islands.

24. Pakistan has consistently voted in favour of United Nations General Assembly resolutions that call upon States immediately to commence

multilateral negotiations leading to an early conclusion of a comprehensive nuclear weapons convention providing for disarmament. It has done so both in the context of the string of resolutions that follow up on the Advisory Opinion of the Court on the *Legality of the Threat or Use of Nuclear Weapons* as well as those that follow up on the 2013 United Nations General Assembly High-Level Meeting on Nuclear Disarmament.

25. Pakistan has also voted in favour of the United Nations General Assembly resolutions entitled "Convention on the Prohibition of the Use of Nuclear Weapons", which calls upon States to negotiate a comprehensive treaty on nuclear disarmament, and has participated in the meetings of the Open Ended Working Group (OEWG) established by the United Nations General Assembly with the aim of taking forward proposals for multilateral nuclear disarmament negotiations.

26. In addition to voting in favour of resolutions urging the immediate commencement of negotiations, representatives of Pakistan have also made statements at multilateral forums calling upon States holding nuclear arsenals to commence disarmament negotiations. The Representative of Pakistan, for example, stated in the First Committee Thematic Debate on Nuclear Weapons on 18 October 2013 that "the international community should immediately start negotiations on a Convention for the elimination of nuclear weapons within a specified time frame" (Statement by Ambassador Zamir Akram, Permanent Representative of Pakistan to the United Nations, Geneva, at the First Thematic Debate on Nuclear Weapons (Sixty-Eighth Session of the UNGA), New York, 18 October 2013).

27. Moreover, Pakistan, as a member of the Non-Aligned Movement (NAM), 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 multilateral 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.)

28. In a statement to the United Nations Conference on Disarmament, the Representative of Pakistan declared on 22 May 2012 that:

> "In terms of importance, no other issue can claim primacy over Nuclear Disarmament, Pakistan, along with the 118 members of the Non-Aligned Movement, believes that the CD must get on with its obligation of negotiating a convention on nuclear disarmament, without further delay, if it has to justify the purpose of its creation." (Statement by Ambassador Zamir Akram, Permanent Representative of Pakistan to the United Nations and other international organizations on nuclear disarmament at the conference of disarmament, Geneva, 22 May 2012.)

29. Thus, the positions taken by Pakistan in multilateral forums, its voting record on United Nations General Assembly resolutions, and the statements of its representatives do not indicate a course of conduct or an attitude in positive opposition to that of the Republic of the Marshall Islands, but rather a convergence of views on the commencement and conclusion of multilateral negotiations aimed at nuclear disarmament.

30. Based on the evidence in the record, it is therefore my view that positively opposed views were not held by Pakistan and the Republic of the Marshall Islands with respect to the obligation to pursue and conclude negotiations on nuclear disarmament, assuming that such an obligation exists in customary international law, prior to the submission of the application by the Republic of the Marshall Islands.

(*Signed*) Abdulqawi A. YUSUF.