INTERNATIONAL COURT OF JUSTICE

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

(*MARSHALL ISLANDS v PAKISTAN*)

COUNTER-MEMORIAL OF PAKISTAN

(JURISDICTION AND ADMISSIBILITY)

1 DECEMBER 2015

Counter-Memorial
Table of Contents

1. PART 1 - INTRODUCTION AND SUMMARY

1.1 In its Order of 10 July 2014, the International Court of Justice (hereafter the "**ICJ**" or "**Court**"), through its President, decided that the written proceedings in this case should first be directed to questions of the jurisdiction of the Court to entertain the Republic of the Marshall Islands' Application of 24 April 2014 against the Islamic Republic of Pakistan (hereafter the "**Application**") and to questions of the admissibility of that Application. The President directed the Republic of the Marshall Islands (hereafter the "**RMI**") to file with the Court by 12 January 2015 a Memorial addressing those issues, and directed that the Islamic Republic of Pakistan (hereafter "**Pakistan**") file a Counter-Memorial on the same issues by 17 July 2015. The latter time limit was extended to 1 December 2015 by the President's Order of 9 July 2015. This Counter-Memorial is submitted in accordance with the Rules of Court and the Orders of 10 July 2014 and 9 July 2015.

1.2 In accordance with Article 49 of the Rules of Court, Pakistan responds in this Counter-Memorial to the questions of jurisdiction and admissibility which Pakistan has determined to be presented by the RMI's Application and Memorial of 12 January 2015 (hereafter the "**Memorial**"). Pakistan reserves its rights (including under Article 79 of the Rules of Court) to object to any other question of jurisdiction or admissibility arising in the course of subsequent pleadings or proceedings.

1.3 Pakistan submits that the Court must decline to entertain the RMI's claims as formulated in the Application, on the following grounds:

(1) The RMI's Application involves issues of national security of Pakistan which are essentially issues of exclusive domestic jurisdiction of Pakistan and no other forum including ICJ is competent to discuss them;

(2) The RMI lacks standing before this Court with regard to the claims as formulated in the Application;

(3) The RMI's case is brought in bad faith;

(4) The RMI's claims against Pakistan are manifestly without legal merit or substance;

(5) The RMI's Memorial does not conform to the Rules of Court and ICJ Practice Directions;

(6) The RMI has not discharged the applicable burden of proof;

(7) The RMI's claims do not come within the scope of the Parties' consent to the Court's jurisdiction;

(8) The RMI's Application is inadmissible; and

(9) Entertaining the RMI's claims would compromise the sound administration of justice and judicial propriety and integrity.

1.4 Each of these grounds, in isolation, supports Pakistan's submission that the Court should adjudge and declare that it lacks jurisdiction to entertain the RMI's claims, or that the Application is inadmissible. Taken together, Pakistan's submissions are overwhelmingly persuasive.

1.5 First and foremost, Pakistan's nuclear programme is a matter of Pakistan's national security exclusively within its domestic jurisdiction. It is not to be called into question by any court, let

alone by a State not having treaty relations with Pakistan. As a sovereign state, Pakistan is free to take any measure to protect its territorial integrity and national security. International law does not enable this Court, or any other UN body, to intervene in matters which are essentially within the domestic jurisdiction of any state.

1.6 Second, it is apparent that the RMI has engaged in strategic forum shopping in order to advance its claims in multiple forums and achieve its objective of global nuclear disarmament. The RMI has instituted parallel proceedings in the courts of the United States of America (hereafter the "**U.S.**") seeking declaratory and injunctive relief against the U.S. The RMI is seeking similar relief and pronouncements from the ICJ in order to apply pressure on the Nuclear Weapon States (hereafter "**NWS**") that are party to the 1968 Treaty on the Non-Proliferation of Nuclear Weapons (hereafter "**NPT**")[1] and other States believed to be in possession of nuclear weapons but that are not parties to these proceedings.

1.7 Third, the RMI has brought this Application in breach of its obligations of good faith, which are enshrined in the UN Charter and form an integral part of international law. The RMI's conduct in instituting proceedings against Pakistan in the absence of a dispute (legal or otherwise) between the RMI and Pakistan, demonstrates that the RMI is acting unreasonably, without a sense of responsibility and capriciously. Its conduct constitutes an *abus de droit*.

1.8 Fourth, the RMI's case against Pakistan is manifestly without legal merit or substance. Even if the scant facts advanced by the RMI were accepted by the Court, they involve no concrete or imminent harm on the part of the RMI and they do not give rise to any violation of rights or obligations deriving from contemporary international law in relation to the RMI. At the date of the RMI's Application, there existed no dispute (legal or otherwise) between the RMI and Pakistan, as is confirmed by the complete lack of a diplomatic record.

1.9 Fifth, the RMI's Memorial does not, by the RMI's own admission, conform to the Rules of Court and ICJ Practice Directions—another state of affairs that is, to Pakistan's knowledge, unprecedented in prior proceedings before this Court.

1.10 Sixth, the RMI having instituted these proceedings bears the burden in proving the requisite elements of fact and law on which a decision in its favour might be given at the jurisdiction and admissibility stage of the proceedings. The RMI has failed to meet this burden.

1.11 Seventh, it is a fundamental principle of international law that the RMI and Pakistan must have consented to the Court's jurisdiction in order for the Court to have jurisdiction over the RMI's claims as formulated in the Application. This is decidedly not the case – reservations made by both Parties expressly exclude the Court's jurisdiction in this case. Of particular note are the RMI's reservation precluding proceedings where any party has accepted the Court's compulsory jurisdiction only in relation to or for the purpose of the dispute referred to the Court and Pakistan's domestic and multilateral treaty reservations, which are directly applicable to the present case. The RMI's Application constitutes an impermissible attempt to circumvent each of the applicable reservations and must be rejected by the Court.

1.12 Eighth, the RMI's Application is inadmissible upon multiple grounds. Of primary import is the absence of a dispute (legal or otherwise) between the RMI and Pakistan, existing at the time of the filing of the Application. This deficiency presents an insurmountable obstacle for the RMI. However, there are additional persuasive grounds for declaring the RMI's Application inadmissible, including the RMI's failure to bring indispensable parties before the Court in a case such as this which centres around a multilateral treaty binding on NWS and other States

[1] 729 U.N.T.S. 161, signed on 1 July 1968, entry into force 5 March 1971.

but to which Pakistan is not a party, and the fact that the judicial process is inherently incapable of resolving questions of nuclear disarmament involving multiple States, let alone through an order of specific performance or other injunctive relief imposed on one State alone. The RMI's prayer for declaratory relief is a veiled request for an advisory opinion. The Court already addressed the legality of nuclear weapons exhaustively in its Advisory Opinion of 8 July 1996 in the case concerning *Legality of the Threat or Use of Nuclear Weapons* (hereafter the "**1996 Advisory Opinion**").[2]

1.13 Ninth, the RMI's Application would, if adjudicated upon, compromise the sound administration of justice and judicial propriety and integrity. The RMI's case is *prima facie* devoid of any argument or evidence to support its claims and does not meet the basic threshold test of justiciability. The RMI's asserted injuries are speculative and not redressable.

1.14 Tenth, the RMI's Application would, if adjudicated upon, constitute an abuse of the Court's process to the detriment of Pakistan's sovereign rights and in contravention of the Rules and procedures of the Court.

1.15 Pakistan's Counter-Memorial sets out these grounds of objection in further persuasive detail. The conclusion that the Court must reach is incontrovertible: the RMI's claims are inadmissible and the Court lacks jurisdiction in the present case.

[2] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *I.C.J. Reports 1996*, p. 226.

2. PART 2 - STATEMENT OF FACTS RELEVANT TO JURISDICTION AND ADMISSIBILITY

2.1 Pakistan sets out below, in further detail, the bases upon which it contests the Court's jurisdiction and the admissibility of the RMI's Application. The facts set out below are pertinent to Pakistan's objections.

Pakistan's Stance on Disarmament

2.2 Pakistan has consistently supported general, complete and verifiable disarmament, at appropriate multilateral fora, based on the principles of universality and non-discrimination under an effective international control regime. Such disarmament should keep in view the respect for fundamental principles of sovereignty, right of self-defense, equal and undiminished security for all, including Pakistan. Further, Pakistan adheres to maintenance of international peace and security in line with the primary purpose of the United Nations.[3]

The Court's Advisory Opinion in *Legality of the Threat or Use of Nuclear Weapons*

2.3 In the 1996 Advisory Opinion, the Court observed that Article VI of the NPT involves "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."[4] The Court concluded 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 control."[5]

The 1996 Advisory Opinion states nowhere that the obligation in Article VI of the NPT constitutes a general obligation, let alone that it is opposable *erga omnes*. Yet the RMI's Application contends that the Court's "conclusion in the Advisory Opinion was tantamount to declaring that the obligation in Article VI is an obligation *erga omnes*" and that "[e]very State has a legal interest in its timely performance … ."[6] The RMI's claim that it has standing in this case is founded on the baseless contention that the RMI's claims concern obligations *erga omnes*. The RMI has not presented even *prima facie* evidence of the existence of such obligations. It is merely relying on non-binding resolutions of the UN General Assembly and the Court's non-binding 1996 Advisory Opinion, which, a number of individual ICJ Judges[7] acknowledged at the time, stopped short of describing the obligation to negotiate as having *erga omnes* status.

The RMI before the UN General Assembly

2.4 At the UN General Assembly sessions on Draft 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,"* Pakistan has voted in favour of the said resolutions from 1997 till 2015. Several NWS have voted against these resolutions. Surprisingly, the RMI abstained from voting from on these resolutions in 2002 and 2003, as well as consistently from 2005 till 2012 (see Exhibits 2-10).

---

[3] Statement made by Prime Minister Nawaz Sharif on 26th September 2013 at the High-Level Meeting of the General Assembly on Nuclear Disarmament in New York. Available at: http://www.pakun.org/statements/First_Committee/2013/09262013-01.php

[4] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 264.

[5] Ibid., p. 267, para. 105 sub 2 F.

[6] Application, para. 35.

[7] See *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at pp. 317-318 (Dissenting Opinion of Vice-President Schwebel);Ibid., pp. 279-281(Declaration of Judge Vereshchetin); Ibid., p. 414 (Dissenting Opinion of Judge Shahabuddeen); Ibid., pp. 277-278 (Declaration of Judge Shi).

2.5 The positions taken by the RMI in relation to the UN General Assembly Resolutions referred to above are entirely inconsistent with the message that it now seeks to convey in its Application, i.e., that it is wholly committed to nuclear disarmament and that this case engages the "RMI as a member of the international community."[8]

2.6 The draft resolutions on "Follow-up to the Advisory Opinion of the International Court of Justice on the *Legality of the Threat or Use of Nuclear Weapons*" have not resulted in the UN General Assembly (or other authorised body) submitting a request for advisory opinion to the Court based on its advisory jurisdiction. The RMI is now seeking to place similar issues before the Court through the Court's compulsory jurisdiction in contentious cases.

The RMI's declaration submitting to the compulsory jurisdiction of the Court

2.7 There are presently 72 States, including India, Pakistan, the RMI and the United Kingdom, which have accepted the compulsory jurisdiction of this Court in one way or another. The pertinent reservations made by both Parties to the present case are covered in greater detail in Part 7 of this Counter-Memorial.

2.8 The declarations made by India and the United Kingdom both contain, *inter alia*, reservations in respect of any dispute where the submission of any party to that dispute to the Court's jurisdiction is founded on a declaration deposited or ratified less than twelve months prior to the filing of the application bringing the dispute before the Court.

2.9 The RMI submitted to the compulsory jurisdiction of the Court by declaration dated 24 April 2013 (hereafter the "**2013 Declaration**"). The 2013 Declaration includes a reservation excluding from the Court's compulsory jurisdiction "any dispute in respect of which any other Party to the dispute has accepted the compulsory jurisdiction of the International Court of Justice only in relation to or for the purpose of the dispute."[9] On 24 April 2014, exactly 12 months after submitting its declaration, the RMI instituted proceedings before this Court against nine States described by the RMI as States possessing nuclear weapons, including India, the United Kingdom and Pakistan, invoking the Court's compulsory jurisdiction against the latter three.

Parallel proceedings in the U.S. and The Hague

2.10 On the same day on which the RMI's Application was submitted to this Court, the RMI also instituted parallel proceedings (which have been referred to as a "companion case" to the present proceedings[10]) seeking declaratory and injunctive relief against the U.S. in the U.S. Federal District Court for the Northern District of California,[11] alleging that the U.S. has breached its obligations under Article VI of the NPT by failing to pursue negotiations in good faith on nuclear disarmament and the cessation of the arms race and seeking an injunction requiring the U.S. to comply with its obligations "within one year of the date of this Judgment, including by calling for and convening negotiations for nuclear disarmament in all its aspects[12]

2.11 On 3 February 2015, the U.S. Federal District Court in California dismissed the RMI's claims and entered judgment for the U.S. because, *inter alia*, the injury claimed by the RMI could not

[8] Memorial, para. 8.

[9] See http://www.icj-cij.org/jurisdiction/?p1=5&p2=1&p3=3&code=PK.

[10] See http://www.lcnp.org/RMI/.

[11] See http://www.wagingpeace.org/pacific-nation-challenges-nine-nuclear-armed-states-in-lawsuits-before-the-world-court/.

[12] The case was styled *The Republic of the Marshall Islands v The United States of America et al.*, docket no. C 14-01885 JSW.

"be redressed by compelling the specific performance by only one nation to the Treaty,"[13] i.e., the NPT. On 2 April 2015, the RMI lodged an appeal against the District Court's ruling.

The RMI, nuclear testing and the U.S.

2.12 In its Application, the RMI sets out the facts which it believes give rise to a "particular awareness of the dire consequences of nuclear weapons," namely, that "[t]he Marshall Islands was the location of repeated nuclear weapons testing from 1946 to 1958, during the time that the international community had placed it under the trusteeship of the United States."[14]

2.13 The RMI and its citizens have brought numerous unsuccessful lawsuits against the U.S. in relation to nuclear weapons testing.[15]

2.14 In a letter from the RMI to the UN, dated 22 June 1995, submitted as part of the written phase of the advisory proceedings in the case concerning *Legality of the Threat or Use of Nuclear Weapons*, the RMI set out the basis for its grievances. This included the following statements:

> "The post World War II era ushered in a new 'administration' when the Marshall Islands became a part of the United Nations Trust Territory of the Pacific Islands administered by the United States of America.
>
> It was during the last administration that the two of the northwest most atolls in the Marshall Islands were used as a testing ground for at least sixty six nuclear bombs.
>
> …
>
> Given its extensive first hand experience with adverse impacts of nuclear weapons, Marshall Islands decision to ratify the Nuclear Non-Proliferation Treaty this year is understandable. The objective of the treaty of "the cessation of the manufacture of nuclear weapons, the liquidation of all of their existing stockpiles, and the elimination from national arsenals of nuclear weapons" is wholly consistent with the Marshall Islands' foreign policy of peaceful co-existence as well as with the overarching goal of the international community to achieve global peace."[16]

2.15 Between 1991 and 2003, according to the U.S., the Marshall Islands Nuclear Claims Tribunal awarded over US$2 billion to the RMI for personal injury, property loss, and class action claims arising from the testing that was carried out.[17]

2.16 In 1979, the RMI became a self-governing State. In 1983, some 30 years after the U.S. first commenced nuclear testing on the Marshall Islands, the RMI entered into a Compact of Free Association (hereafter the "**CFA**") with the U.S. On 30 April 2003, the terms of the CFA were amended by agreement. Under the Military Use and Operating Rights Agreement, a subsidiary government-to-government agreement of the CFA, the U.S. Department of Defence received permission to use parts of the lagoon and several islands on Kwajalein Atoll. The agreement

[13] *Republic of the Marshall Islands v. United States*, 2015 U.S. Dist. LEXIS 12785 (N.D. Cal. 2015), p. 5.

[14] Application, paras 8 and 9.

[15] See, .e.g., *People of Bikini v. United States*, 77 Fed. Cl. 744, 781-87 (2007), *aff'd*, 554 F.3d 996 (Fed. Cir. 2009), *certiorari denied*, 559 U.S. 1048 (2010), and *cert. denied sub nom. John v. United States*, 559 U.S. 1048 (2010).

[16] *Legality of the Threat or Use of Nuclear Weapons Advisory Opinion*, *I.C.J. Reports 1996*, p. 226, Exhibit 28, letter dated 22 June 1995 from the Permanent Representative of the Marshall Islands to the United Nations, together with Written Statement of the Government of the Marshall Islands.

[17] See http://www.newsweek.com/marshall-islands-nuclear-lawsuit-reopens-old-wounds-262491.

allows the U.S. continued use of the U.S. Army Kwajalein Atoll missile test range until 2066 (with an option until 2086)[18] for which the RMI is substantially compensated.

2.17 The RMI government policy, which permits the U.S. to carry out such testing on the Marshall Islands, is entirely at odds with the position that the RMI adopts in the Application.

2.18 There is no suggestion in the Application that Pakistan was involved in the weapons testing carried out in the Marshall Islands during this period (or subsequently), or indeed that the RMI has suffered any damage caused by Pakistan either directly or indirectly, by weapons testing or otherwise.

No prior communications or negotiations between the RMI and Pakistan

2.19 The RMI had never approached Pakistan, either formally or informally, in connection with its claims until filing its Application in the ICJ Registry on 24 April 2014. The RMI's Application and Memorial do not include any references to diplomatic exchanges between the RMI and Pakistan prior to 24 April 2014. This is no surprise, as there have not been any. Indeed, the Application constitutes the first document directed at Pakistan in which the RMI claims that Pakistan has violated certain international obligations alleged to be owed to the RMI.

2.20 The RMI had never resorted to any of the means set forth in Article 33 of the UN Charter in order to settle any alleged dispute with Pakistan, including through diplomatic negotiations conducted in good faith, before instituting the present proceedings. In fact, there is no evidence of a dispute, let alone a legal one, between the RMI and Pakistan prior to 24 April 2014, the date that is relevant for determining the Court's jurisdiction and the admissibility of the RMI's Application.

[18] See http://www.state.gov/r/pa/ei/bgn/26551.htm. See also Bechtel, *Kwajalein Test Range, Marshall Islands: Keeping the range on cutting edge*, 2014 available at: http://www.bechtel.com/projects/kwajalein-test-range/ which states that Kwajalein in the Marshall Islands is home to the Ronald Reagan Ballistic Missile Defense Test Site, which was "designed primarily for ballistic missile defense testing and space surveillance operations."

3. PART 3 – THE RMI'S CASE AGAINST PAKISTAN IS BROUGHT IN BAD FAITH

3.1 The principle of good faith is a vital part of international law which underpins the conduct of States, both as between each other and in respect of proceedings brought before the Court.

3.2 The Court has applied this principle in a number of past cases, including:

(1) In the *Land and Maritime Boundary between Cameroon and Nigeria* case, where the Court highlighted that the principle of good faith is an established principle of international law and that it was reflected in Article 2, paragraph 2, of the UN Charter;[19]

(2) In the *Nuclear Tests* cases, where the Court observed that the principle of good faith is "one of the basic principles governing the creation and performance of legal obligations … *Trust and confidence are inherent in international co-operation.*"[20] (emphasis added); and

(3) In the *Rights of Nationals of the United States of America in Morrocco* case,[21] where the Court referred to the necessity of exercising a power in good faith. The Court observed that a legal power that is exercised unreasonably and in bad faith must constitute an *abus de droit*.

3.3 As one commentator has observed:

> "the essence of the doctrine is that although a State may have a strict right to act in a particular way, it must not exercise this right in such a manner as to constitute an abuse of it; it must exercise its rights in good faith and with a *sense of responsibility*; it must have bona fide reasons for what it does, and *not act arbitrarily and capriciously*."[22] (Emphasis added)

3.4 In instituting these proceedings under the Statute of the Court, which according to Article 92 of the UN Charter is annexed to the Charter and forms an integral part of the Charter, the RMI has acted, and continues to act, in bad faith towards Pakistan, and indeed the Court. Specifically:

(1) The RMI is not acting with a sense of responsibility; otherwise, it would have, as a minimum, pursued some form of negotiation or consultation with Pakistan in respect of the alleged dispute before instituting these proceedings;

(2) Pakistan, or indeed the Court, can have no trust or confidence in the RMI. The RMI has failed to initiate <u>any</u> form of direct communication with Pakistan on the issues that are allegedly in dispute. The scant evidence that the RMI seeks to rely upon in support of its claims bears no direct relationship to, or connection with, Pakistan and is wholly inconsistent with the position that the RMI adopted in relation to nuclear disarmament

---

[19] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Judgment, I.C.J. Reports 1998*, p. 275, at p. 296; Article 2, para. 2, of the UN Charter reads: "[a]ll members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter."

[20] *Nuclear Tests (Australia v France) (New Zealand v France)*, *I.C.J. Reports 1974*, pp. 235 and 457.

[21] *Rights of Nationals of the United States of America in Morocco*, *I.C.J. Reports 1952*, p. 212.

[22] GERALD FITZTMAURICE, "THE LAW AND PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE, 1951-1954; GENERAL PRINCIPLES OF LAW," 27 BRITISH YEAR BOOK OF INTERNATIONAL LAW (1950), p. 1, at pp. 12-13. See also MARK E. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES (Martinus Nijhoff Publishers, 2009), p. 367 ("Good faith furthermore covers the narrower doctrine of the abuse of rights according to which parties shall abstain from acts calculated to frustrate the object and purpose and thus impede the proper execution of the treaty.").

sessions of the UN General Assembly discussing the "Follow-up to the advisory opinion of the International Court of Justice on the *Legality of the Threat or Use of Nuclear Weapons*";

(3) The RMI seeks to enforce obligations to negotiate in good faith upon Pakistan – an obligation that the RMI itself has failed to discharge vis-à-vis Pakistan and the negotiation of the issues that are allegedly in dispute. The RMI's statement that "Pakistan was made aware"[23] of the RMI's grievances against Pakistan through statements made in multilateral settings makes a mockery of Article 33 of the UN Charter;

(4) The RMI obtains a commercial benefit in permitting ballistic missile defence testing to be carried out on the Marshall Islands to the present day, which *prima facie* demonstrates its duplicity and bad faith in bringing these proceedings;

(5) The RMI is acting capriciously – as noted above, the position taken by the RMI during sessions of the UN General Assembly on the "Follow-up to the advisory opinion of the International Court of Justice on the *Legality of the Threat or Use of Nuclear Weapons"* is wholly inconsistent with other public statements made by the RMI, which it seeks to rely upon to advance its claims before the Court;

(6) The RMI is engaging in forum and respondent shopping in order to extract legal pronouncements of a general nature from courts of law in order to apply pressure on the NWS; and

(7) By invoking the Court's compulsory jurisdiction under Article 36, paragraph 2, of the Statute of the Court in a situation where the RMI's claims against Pakistan are manifestly without legal merit or substance and there is no trace of a dispute (legal or otherwise) between the RMI and Pakistan, the RMI is abusing the Court's processes.

3.5 The RMI's Application is made in bad faith, in contravention of international law and its treaty obligations under the UN Charter, including the Statute of the Court. For this reason, the RMI's case must be dismissed in its entirety.

[23] Memorial, para. 47.

4. PART 4 – THE RMI'S CLAIMS AGAINST PAKISTAN ARE MANIFESTLY WITHOUT LEGAL MERIT OR SUBSTANCE

4.1 Pakistan submits that the RMI's claims against Pakistan are manifestly without legal merit or substance.

4.2 In the *Oil Platforms* case, the Court was called upon to decide whether the 1955 Treaty of Amity, Economic Relations and Consular Rights between Iran and the U.S. gave rise to any of the claims made by Iran. In her separate opinion, Judge Higgins made the following observation:

> "The only way in which, in the present case, it can be determined whether the claims of Iran are sufficiently plausibly based upon the 1955 Treaty is to accept *pro tem* the facts as alleged by Iran to be true and in that light to interpret Articles I, IV and X for jurisdictional purposes – that is to say, *to see if on the basis of Iran's claims of fact there could occur a violation of one or more of them*."[24] (Emphasis added)

4.3 As Judge Higgins noted, jurisdiction could not be founded on an "impressionistic" or "plausibility" basis. Rather the test is whether, on the basis of the facts asserted by the applicant, there could be a violation of rights or obligations by the respondent.

4.4 It emerges from the Application and Memorial that the RMI's claims are based upon:

(1) multilateral treaties to which Pakistan is not a party;

(2) non-binding General Assembly resolutions; and

(3) a non-binding Advisory Opinion of the Court.

4.5 As to (1), although the RMI seeks to present its claims as founded in customary international law, the obligations which it identifies are said to be "rooted" and "enshrined" in Article VI of the NPT,[25] a treaty provision to which the 22-page Application refers at least 15 times. Pakistan is not a party to the NPT. As to (2) and (3), due to their non-binding status, these cannot give rise to obligations binding on Pakistan. None of the above-referenced sources invoked by the RMI is opposable to Pakistan.

4.6 Even if Pakistan (and the Court) were to accept the facts as alleged by the RMI to be true, these do not give rise to any breach by Pakistan and, as explained below, the RMI's asserted injuries and claims are not redressable. As a result, the RMI's case against Pakistan is inadmissible and manifestly without any legal merit or substance and the Court must decline jurisdiction.

[24] *Oil Platforms (Iran v United States), Preliminary Objection*, *Judgment*, *I.C.J. Reports 1996*, p. 803, at p. 847, para. 33 (Separate Opinion of Judge Higgins).

[25] See Application, paras. 2, 36 and 54.

5. PART 5 - THE RMI'S MEMORIAL DOES NOT CONFORM TO THE RULES OF COURT AND THE ICJ PRACTICE DIRECTIONS

5.1 The RMI states in its Memorial that "at the present time it will not submit a Memorial that conforms to Article 49, para. 1 of the Rules of Court."[26] In other words, the RMI's Memorial does not conform to the Rules of Court which govern this proceeding. Pakistan has been unable to find a similar admission by an applicant in a prior proceeding before this Court.

5.2 According to Article 49, paragraph 1, of the Rules of Court, "[a] Memorial shall contain a statement of the relevant facts, a statement of law, and the submissions." Moreover, the President's Order of 10 July 2014, fixing time-limits for filing of the Memorial of the RMI and the Counter-Memorial of Pakistan reminded the Parties that "it is necessary for the Court to be informed of all the contentions and evidence on facts and law on which the Parties rely in the matters of its jurisdiction and the admissibility of the Application."[27] In addition, ICJ Practice Direction III, while urging the parties to keep written pleadings as concise as possible, reminds the parties that such pleadings are to be made "in a manner compatible with the *full presentation* of their positions" (emphasis added). The RMI's Memorial clearly falls short on all fronts.

5.3 The RMI cannot arrogate to itself the power to vary the rules of procedure governing this proceeding.[28] By instituting proceedings before this Court, the RMI accepted to act in conformity with all of the rules and procedures applicable before this Court and not to frustrate the proceedings. The RMI's conduct in this regard is prejudicial to Pakistan and must be rejected by the Court.

5.4 The RMI's purported justification for not acting in conformity with the Rules of Court, namely, that "the Applicant cannot be expected to go beyond what the Respondent has raised in its letter" (i.e., Pakistan's Note Verbale to the Court of 9 July 2014) and that "it is not for the Applicant to divine [*sic*] what, if any, possible additional objections of the Respondent there may be,"[29] is invalid. The President's Order of 10 July 2014 fixed time-limits for the filing of the Memorial and Counter-Memorial, and thus fixed the order in which these would be filed (i.e., consecutive and not simultaneous pleadings). Thus, the Court through its President decided that the first pleading to be filed would be a Memorial by the Applicant dealing exclusively with the issues of jurisdiction and admissibility, to be followed several months later by a Counter-Memorial, filed by the Respondent and confined to the same issues. Through those two pleadings, and only those pleadings, the Court was "to be informed of *all the contentions and evidence on facts and law* on which the Parties rely in the matters of its jurisdiction and the admissibility of the Application."[30]

5.5 The President's Order of 10 July 2014 called for the Parties to file written pleadings addressing the matters of the Court's jurisdiction and the admissibility of the Application "taking into account the views expressed by the Parties."[31] As the text of the Order makes clear, the quoted words are a reference to the meeting between the President of the Court and the representatives of the Parties held in The Hague on 9 July 2014 and Pakistan's Note Verbale dated 9 July 2014. Therefore, the President's Order indicates that Pakistan's Note Verbale, which preceded the

[26] Memorial, para. 14.

[27] See *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. Pakistan), Order of 10 July 2014, I.C.J. Reports 2014*, p. 471.

[28] See Memorial, para, 14 ("the RMI reserves the right to supplement the present Memorial in writing … .").

[29] Ibid..

[30] *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. Pakistan), Order of 10 July 2014, I.C.J. Reports 2014*, p. 471, at p. 472 (emphasis added).

[31] Ibid..

Order, does not constitute a form of a pleading through which the Court expects "to be informed of all the contentions and evidence on facts and law on which the Parties rely in the matters of its jurisdiction and the admissibility of the Application." Consequently, the RMI's attempt to treat Pakistan's Note Verbale as a jurisdictional pleading that "the Applicant cannot be expected to go beyond"[32] must be rejected by the Court, and the RMI must not be allowed to reverse the burden of proof and to treat Pakistan's Note Verbale as Pakistan's Counter-Memorial.

[32] Memorial, para. 14.

6. PART 6 - BURDEN OF PROOF

CHAPTER 1 THE RMI HAS THE BURDEN OF PROVING THAT THE COURT HAS JURISDICTION AND THAT ITS APPLICATION IS ADMISSIBLE

6.1 The RMI's Memorial contains the following remarkable statement:

> "The RMI wishes to underline that it is, indeed, restricting its observations to the issues effectively raised by Pakistan since the Applicant cannot be expected to go beyond what the Respondent has raised in its letter."[33]

6.2 The above statement represents a fundamental misstatement of the burden of proof in ICJ proceedings and of the practice of the Court. As Rosenne has pointed out, "in application of the principle *actori incumbit probatio* the Court will formally require the party putting forward a claim to establish the elements of fact and of law on which the decision in its favour might be given."[34] As the Court has affirmed, "[u]ltimately … it is the litigant seeking to establish a fact who bears the burden of proving it … ."[35]

6.3 In this preliminary phase of the proceedings, in order to obtain a decision of the Court upholding the Court's jurisdiction and the admissibility of the Application, the Applicant must prove (a) that the Court has jurisdiction over its claims as formulated in the Application; and (b) that the Application is admissible. The relevant point in time is the date of the filing of the Application.

6.4 It bears reminding that it was the RMI, and not Pakistan, which instituted proceedings before this Court in reliance upon Article 36, paragraph 2, of the Statute of the Court. It would violate fundamental notions of due process and fair trial if the RMI were allowed to create a procedural advantage by treating Pakistan's Note Verbale of 9 July 2014 as Pakistan's substantive pleading with respect to questions of the Court's jurisdiction and the admissibility of the Application, which would have the consequence of reversing the sequence in which the Court has ordered that the pleadings be filed and, hence, the burden of proof.

6.5 As the RMI should be aware, where the Court orders the Parties to address exclusively questions of the Court's jurisdiction and of the admissibility of the Application, by way of consecutive filing of written pleadings, it is unusual for the Court to later find that a second round of written pleadings is necessary.[36] Pakistan objects to a second round of written pleadings, which in any event is not warranted for reasons of procedural economy.[37] The RMI has had ample opportunity through its Application and Memorial to present, in full, its position on the questions of jurisdiction and admissibility, and it will be able to present its position further orally during a hearing dedicated to these questions.

---

[33] Ibid..

[34] SHABTAI ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920-1996, Vol. III, at 1083 (Martinus Nijhoff Publishers, 3rd ed., 1997).

[35] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.)*, Judgment, Jurisdiction and Admissibility, *I.C.J. Reports 1984*, p. 392, at p. 437, para. 101.

[36] In this regard, the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* constitutes an exception to the rule.

[37] In this context, see Memorial, para. 14.

CHAPTER 2 THE RMI HAS FAILED TO DISCHARGE ITS BURDEN OF PROOF IN ITS APPLICATION AND MEMORIAL

6.6 As regards the standard of proof applicable to a jurisdictional phase, Rosenne comments that "the Court's aim is always to ascertain whether an intention on the part of the parties exists to confer jurisdiction upon it."[38] As the Court itself has observed:

> "The Court will therefore … have to consider whether the force of the arguments militating in favour of jurisdiction is preponderant, and to 'ascertain whether an intention on the part of the Parties exists to confer jurisdiction upon it.'"[39]

6.7 There is no proof of such an intention on the part of Pakistan and the RMI has failed to demonstrate that the force of the arguments militating in favour of jurisdiction is preponderant. In fact, the RMI makes a mockery of the burden of proof applicable in cases before international courts and tribunals. In stating bluntly that "it will not submit a Memorial that conforms to Article 49, para. 1 of the Rules of Court" and by deciding not "to go beyond what the Respondent has raised in its [Note Verbale of 9 July 2014],"[40] the RMI has failed to establish "all the contentions and evidence on fact and law" to which the Court may have regard in reaching its decision on jurisdiction and admissibility.

6.8 The Court has explained that whatever the basis of consent to its jurisdiction, "the attitude of the respondent State 'must be capable of being regarded as an 'unequivocal indication' of the desire of that State to accept the Court's jurisdiction in a 'voluntary and indisputable' manner."[41] Such an indication is completely lacking in this case.

6.9 Most important, the RMI has not presented even *prima facie* evidence of (a) the existence of obligations *erga omnes* which it seeks to enforce against Pakistan; or (b) the very standing of the RMI on behalf of the international community (or otherwise) in these proceedings.[42] Further, it has adduced no evidence of the existence of a dispute (legal or otherwise) between the Parties on the date of the filing of the Application.

6.10 It does not suffice to state in the Application that "each Declaration [accepting the Court's compulsory jurisdiction] [is] without pertinent reservation"[43] and the Memorial offers only a cursory discussion of the applicable reservations. As demonstrated in this Counter-Memorial, the force of the arguments militating against jurisdiction is preponderant in this case.

---

[38] SHABTAI ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920-2005, Vol. III, at 867 (Martinus Nijhoff Publishers, 3rd ed., 1997).

[39] *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, Jurisdiction and Admissibility, Judgment, *I.C.J. Reports 1988*, p. 69, at p. 76, para. 16.

[40] Memorial, para. 14.

[41] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France),* Judgment, *I.C.J. Reports 2008*, p. 177, at p. 204, para. 62.

[42] According to the RMI's Memorial, "[i]ts essential contention is that each State has *locus standi* to seek to enforce the customary international law obligation on all others (and especially those, like Pakistan, possessing nuclear weapons) 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,'" which the RMI maintains is an obligation *erga omnes* in the timely performance of which "every State has a legal interest." Memorial, para. 31.

[43] Application, para. 60.

CHAPTER 3 PAKISTAN'S NOTE VERBALE DOES NOT AFFECT THE RMI'S BURDEN OF PROOF

6.11 The practice of the Court includes ample evidence of instances in which a respondent State indicated, through a Note Verbale or similar communication addressed to the Court or its Registrar shortly after the filing of an application, that the respondent State was of the view that the document purporting to institute proceedings fell outside the scope of the Court's jurisdiction or that the application was inadmissible and that, as a consequence, the Court should not entertain the application and refrain from entering the case on the General List.[44] As the President's Order of 10 July 2014 makes clear, the Court considered Pakistan's Note Verbale of 9 July 2014 as being part of "the views expressed by the Parties," and not as a substantive pleading regarding the questions of the Court's jurisdiction and the admissibility of the Application. Hence, Pakistan's Note Verbale leaves unaffected the RMI's burden to prove, by a preponderance of evidence, that the Court has jurisdiction over its claims and that its Application is admissible, a burden which the RMI was required to discharge in its Memorial in order for its claims to be entertained by the Court.

[44] SHABTAI ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920-1996, Vol. III, at 893-894 (Martinus Nijhoff Publishers, 3rd ed., 1997).

7. PART 7 - THE RMI'S CLAIMS DO NOT COME WITHIN THE SCOPE OF THE PARTIES' CONSENT TO THE COURT'S JURISDICTION

Introduction

7.1 Pakistan and the RMI have accepted the compulsory jurisdiction of this Court by way of declarations made pursuant to Article 36, paragraph 2, of the Statute of the Court. These were made on 12 September 1960[45] (hereafter the "**1960 Declaration**") and 15 March 2013[46] (hereafter the "**2013 Declaration**"), respectively.

7.2 The RMI's Application seeks to base this Court's jurisdiction solely on Article 36, paragraph 2, of the Statute of the Court, and therefore relies upon the 1960 and 2013 Declarations. Jurisdiction in this case cannot rest on any other ground. Therefore, there is no reason or justification to look beyond Article 36, paragraph 2, in order to establish jurisdiction in this case.

7.3 In this regard, the Parties' Declarations accepting the Court's compulsory jurisdiction, including reservations contained therein, determine the scope of the Court's jurisdiction in this case. In order to proceed with its claims, the RMI must show that it comes within the scope of both the 1960 and 2013 Declarations. The RMI has failed to prove that this is the case.

7.4 In summary, for the reasons set out below, the Court does not have jurisdiction to entertain the RMI's claims against Pakistan, because:

(1) There is a lack of an unequivocal indication of Pakistan's desire to accept the Court's jurisdiction in a voluntary and indisputable manner;

(2) The RMI's 2013 Declaration expressly excludes the RMI's claims from the scope of this Court's compulsory jurisdiction in this case;

(3) The domestic jurisdiction reservation to Pakistan's 1960 Declaration expressly excludes the RMI's claims from the scope of Pakistan's acceptance of this Court's compulsory jurisdiction as they involve issues of national security in Pakistan's domestic jurisdiction, for which the ICJ is not the competent forum; and

(4) The multilateral treaty reservation to Pakistan's 1960 Declaration expressly excludes the RMI's claims from the scope of Pakistan's acceptance of this Court's compulsory jurisdiction.

CHAPTER 1 THE COURT HAS JURISDICTION OVER THE RMI'S CLAIMS ONLY IF PAKISTAN HAD EXPRESSLY CONSENTED TO THAT JURISDICTION

Section 1

There is a lack of an unequivocal indication of Pakistan's desire to accept the Court's jurisdiction in a voluntary and indisputable manner

7.5 It is a well-recognised principle of international law that the jurisdiction of this Court is based on the consent of the States parties to a case before the Court. In one of the first cases to come before the Permanent Court of International Justice, that court stated that it is:

[45] Pakistan's declaration was signed by Said Hasan, Permanent Representative of Pakistan to the UN, on 12 September 1960.

[46] The RMI's declaration was signed by Tony A. deBrum, Minister in Assistance to the President and Acting Minister of Foreign Affairs, on 15 March 2013

> "well established in international law *that no State can, without its consent, be compelled to submit its disputes with other States* either to mediation or to arbitration, or to any other kind of pacific settlement." [47] (Emphasis added)

7.6 Similarly, the Permanent Court stated in the *Chorzow Factory* case that:

> "the Court's jurisdiction is always a limited one existing only in so far as States have accepted it … The Court's aim is always to ascertain whether an intention on the part of the parties exists to confer jurisdiction upon it."[48]

7.7 In this Court's first judgment, it confirmed that this fundamental principle applies to this Court's jurisdiction:

> ". . . the rule holds good that the jurisdiction of the International Court of Justice, as of the Permanent Court of International Justice before it, depends on the consent of the States parties to a dispute." [49]

7.8 This principle was affirmed by the Court in 1949, when it stated that a claim "cannot, in the present state of the law as to international jurisdiction, be submitted to a tribunal, except with the consent of the States concerned."[50] Again, in 1950, the Court reaffirmed this rule, stating that the "consent of States parties to a dispute is the basis of the Court's jurisdiction in contentious cases."[51] In 1984, the Court expressly restated that it is "the basic principle that the jurisdiction of the Court to deal with and judge a dispute depends on the consent of the parties thereto."[52]

7.9 States may consent to the jurisdiction of the Court in one of two ways:

(a) **Consent *ad hoc***: by entering into a special agreement to submit the dispute to the Court (Article 36, paragraph 1, of the Statute of the Court); or

(b) **Advance consent:**

(i) by virtue of a jurisdictional clause in a treaty or convention agreeing to the jurisdiction of the Court (Article 36, paragraph 1, of the Statute of the Court); or

(ii) by virtue of unilateral declarations of acceptance of the Court's compulsory jurisdiction (Article 36, paragraph 2, of the Statute of the Court).

7.10 With respect to unilateral declarations of acceptance, States may accept the compulsory jurisdiction of the Court with or without reservation. Where reservations have been made, as is the case here, these form an integral part of the declaration accepting the Court's jurisdiction. Declarations are made on condition of reciprocity – accordingly, a declarant is bound to accept jurisdiction regarding a dispute with another declarant, but only to the extent that the two declarations coincide.

---

[47] *Status of Eastern Carelia*, Advisory Opinion, P.C.I.J., Series B, No. 5, at p. 27I.

[48] *Factory at Chorzów (Jurisdiction)*, Judgment No. 8 1927, P.C.I.J., Series A, No. 9, at p.32.

[49] *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Judgment, Preliminary Objection, *I.C.J. Reports 1947-1948*, p. 15, sep. op., p. 31.

[50] *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, *I.C.J. Reports 1949*, p. 174, at p. 178.

[51] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion (First Phase), *I.C.J. Reports 1950*, p. 65, at p. 71.

[52] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya),* Application by Italy for Permission to Intervene*, I.C.J. Reports 1984,* p. 3, at p. 22.

7.11 The Court has recognized that, given the unique nature of these unilateral declarations, the "régime relating to the interpretation of declarations made under Article 36 of the Statute is not identical with that established for the interpretation of treaties by the Vienna Convention on the Law of Treaties."[53] In particular, the Court has explained that, irrespective of the basis of consent to its jurisdiction, "the attitude of the respondent State 'must be capable of being regarded as an 'unequivocal indication' of the desire of that State to accept the Court's jurisdiction in a 'voluntary and indisputable' manner."[54]

7.12 In this case, the RMI's claims do not come within the scope of the Parties' declarations, and the Court does not, therefore, have jurisdiction over those claims.

Section 2

The multilateral treaty that lies at the heart of the RMI's claims is not opposable to Pakistan and falls outside the Court's jurisdiction in this case

7.13 For the reasons set out below, the Court does not have jurisdiction to entertain the RMI's claims as formulated in the Application:

(a) Pakistan is not a party to the NPT

7.14 It is a fundamental principle of international law that a treaty only binds the parties to that treaty ("*pacta tertiis nec nocent nec prosunt*").[55] This principle is enshrined in Article 34 of the Vienna Convention on the Law of Treaties (hereafter the "**VCLT**") which states that "a treaty does not create either obligations or rights for a third State without its consent."[56]

7.15 Pakistan is not a party to the NPT.[57] Yet the obligations which the RMI seeks to assert against Pakistan are, to use the RMI's words, "rooted" and "enshrined" in the NPT[58] and the Application contains more than 20 references to the NPT, including at least 15 references to Article VI of the NPT. Further, the order of specific performance sought by the RMI is closely based upon Article VI of the NPT – by way of illustration, the following passage sets out the order or injunctive relief sought by the RMI, with underlined passages reflecting the obligations which arise under Article VI of the NPT, that only apply to States parties to that treaty:

> "to order Pakistan 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."[59]

7.16 Absent Pakistan's consent, the NPT cannot confer any rights, nor impose any obligations, on Pakistan. The NPT is not opposable to Pakistan. Accordingly, the RMI's claims against Pakistan, and thus the Court's jurisdiction to entertain those claims, cannot be founded upon the NPT either directly or indirectly.

---

[53] *Fisheries Jurisdiction (Spain v. Canada),* Judgment, *I.C.J Reports 1998*, p. 432, at p. 453, para. 46.

[54] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, *I.C.J. Reports 2008*, p. 177, at p. 204, para. 62.

[55] See ARNOLD MCNAIR, THE LAW OF TREATIES (Oxford: Clarendon, 1961).

[56] See also MARK E. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES (Martinus Nijhoff Publishers, 2009), p. 466 *et seq*.

[57] See Memorial, para. 58 (acknowledging that "Pakistan is not a party to that treaty.").

[58] Application, paras. 2, 36 and 54.

[59] Ibid, p. 24.

(b) The RMI cannot prove its claims without reliance on the NPT

7.17 Proviso "c" in Pakistan's 1960 Declaration (hereafter the "**Multilateral Treaty Reservation**") provides that Pakistan's acceptance of the Court's compulsory jurisdiction shall not extend to:

> "disputes arising under a multilateral treaty, unless (i) all parties to the treaty affected by the decision are also parties to the case before the Court, or (ii) the Government of Pakistan specially agree to jurisdiction…"[60]

7.18 Pakistan has not specially agreed to jurisdiction here. As a result, in a situation where the RMI's claims undeniably are centred around a multilateral treaty (in particular, the NPT), the Court may exercise jurisdiction over the RMI's claims consistent with the Multilateral Treaty Reservation only if all multilateral treaty parties affected by a prospective decision of the Court are also parties to the case. This point will be elaborated upon in Chapter 4 of this Part. Here, all of the States likely to be affected by adjudication of the RMI's claims are not before the Court. Therefore, in accordance with Pakistan's Multilateral Treaty Reservation, the RMI's claims do not come within the scope of Pakistan's consent to the Court's compulsory jurisdiction.

7.19 The Multilateral Treaty Reservation by its terms is not confined to multilateral treaties to which Pakistan is a party. The reservation in the 1960 Declaration simply refers to "a multilateral treaty." As Pakistan has not specially agreed to jurisdiction in respect of the RMI's claims (as per the Multilateral Treaty Reservation) and the RMI's claims unquestionably involve multilateral treaties such as the NPT and the UN Charter, without which the RMI cannot prove its claims, the Court can only exercise jurisdiction over the RMI's claims if all multilateral treaty parties affected by a prospective decision of the Court on the issues raised by the RMI's Application are party to these proceedings.

7.20 The Application refers to nine States, five of which are a party to the NPT.[61] The RMI has sought to advance its claims against all nine States. Only one NWS party to the NPT, namely, the United Kingdom, has accepted the compulsory jurisdiction of the Court, subject to certain pertinent reservations. It is patently the case that not all multilateral treaty parties that will be affected by a decision of this Court in respect of the NPT are a party to the present proceedings. Under these circumstances, the RMI's Application falls directly within the scope of Pakistan's Multilateral Treaty Reservation and gives rise to all of the concerns that underlie that reservation.

7.21 If the Court were to adjudicate the RMI's claims, the Court's decision would have the potential to cause prejudice to:

(1) Pakistan, by binding Pakistan to a decision of the Court without similarly binding the States parties to the NPT, upon which the RMI relies in making its claims against Pakistan;

(2) Pakistan, by determining Pakistan's rights and duties in the absence of directly relevant facts and documents that may be in the sole possession of absent States; and

(3) other affected States, including especially NPT parties, by determining, in their absence, the lawfulness of possessing nuclear weapons, including their inherent sovereign right to engage in self-defence.

7.22 The Court must, therefore, decline jurisdiction over the RMI's claims.

[60] See http://www.icj-cij.org/jurisdiction/?p1=5&p2=1&p3=3&code=PK.

[61] Application, paras. 17 and 19.

(c) The RMI's claims styled as violations of customary international law or of obligations *erga omnes* merely restate the RMI's treaty-based claims and cannot, in any event, be determined without reference to those treaties, in particular the NPT

7.23 In its Application, the RMI asserts that the obligation expressed in Article VI of the NPT is "an obligation *erga omnes*,"[62] "owed to the international community as a whole."[63] Per the *Monetary Gold* principle, the Court will not adjudicate the rights and obligations of a State without its consent. This fundamental principle applies in every case, whether it concerns obligations *erga singulum* or obligations *erga omnes*.

7.24 The *Monetary Gold* principle was explained by the Court in the *Nicaragua* case as follows:

> "There is no doubt that in appropriate circumstances the Court will decline, as it did in the case concerning Monetary Gold Removed from Rome in 1943 to exercise the jurisdiction conferred upon it when the legal interests of a State not party to the proceedings 'would not only be affected by a decision, but would form the very subject- matter of the decision.'
>
> Where however claims of a legal nature are made by an Applicant against a Respondent in proceedings before the Court, and made the subject of submissions, the Court has in principle merely to decide upon those submissions, with binding force for the parties only, and no other State, in accordance with Article 59 of the Statute."[64]

7.25 As a result, where (for example) State A, together with States B, C, D and E, are said to be under an obligation *erga omnes* resulting from the prior unlawful conduct of State B, State C cannot bring an action against State A alone for breach of that obligation, if the decision sought would also require a decision on the breaches of State B.

7.26 The position might be otherwise if: (i) the obligation in question in relation to State B had already been determined; or (ii) the decision sought would give rise to no more than some adverse implication against State B. But neither of these situations arises here.

7.27 This is because the Court must first decide whether the RMI can seek to enforce the alleged customary international law obligations "rooted" and "enshrined"[65] in Article VI of the NPT against the NWS that are party to the NPT and are not participating in these proceedings, before it can decide whether Pakistan (which is not a party to the NPT) has violated its alleged international obligations arising under customary international law and "rooted" and "enshrined" in Article VI of the NPT.

7.28 The RMI asserts, without proof, that the obligation "rooted" and "enshrined" in Article VI of the NPT is an obligation *erga omnes* existing separately from the treaty provision. The RMI's assertion that the same obligation arises under separate sources, where one source of those obligations requires a party to opt-in, and the other does not, is untenable. The RMI is effectively asking the Court to disregard sovereign rights of a State vis-à-vis signing and ratifying a treaty (and thereby agreeing to be bound by the obligations therein).

---

[62] See ibid., Part III **("Article VI of the NPT: An Obligation *Erga Omnes*").**

[63] Application, para. 35.

[64] *Military and Paramilitary Activities in and against Nicaragua (Nicaraqgua v. U.S.)*, Jurisdiction of the Court and Admissibility of the Application, Judgment, *I.C.J. Reports 1984*, p. 392, at p. 431.

[65] Application, paras. 2, 36 and 54.

7.29 Further, the RMI appears to maintain that it is entitled to claim on its own behalf as well as on behalf of "the whole of the international community."[66] That is, the RMI is asserting that the customary international law obligations "rooted" and "enshrined" in Article VI of the NPT give rise to obligations *erga omnes* and, therefore, that it is an appropriate party to enforce those obligations in a case against Pakistan before this Court.

7.30 It is recalled that in Paragraph 2F of the *dispositif* of the 1996 Advisory Opinion, the Court concluded as follows:

> "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."[67]

7.31 In its Application, the RMI acknowledges that the Court's conclusion was "[l]argely based on its analysis of Article VI of the 1968 Treaty on the Non-Proliferation of Nuclear Weapons."[68] According to Judge Weeramantry, Paragraph 2F of the *dispositif* "is strictly outside the terms of reference of the question"[69] referred for the Court's Opinion. In his dissenting opinion, Vice-President Schwebel pointed out that "[i]f this obligation is that only of 'Each of the Parties to the Treaty' as Article VI of the Non-Proliferation Treaty states, this is another anodyne asseveration of the obvious, like those contained in operative paragraphs 2A, 2B, 2C and 2D."[70] More importantly, Judge Schwebel explained that:

> *"[I]f it [paragraph 2F] applies to States not party to the NPT it would be a dubious holding*. *It would not be a conclusion that was advanced in any quarter in these proceedings*; it would have been subjected to no demonstration of authority, to no test of advocacy; and *it would not be a conclusion that could easily be reconciled with the fundamentals of international law. In any event, since paragraph 2F is not responsive to the question put to the Court by the General Assembly, it is to be treated as* dictum."[71] (Emphasis added)

7.32 Therefore, the RMI's assertion that Paragraph 2F of the *dispositif* "is tantamount to declaring that the obligation in Article VI [of the NPT] is an obligation *erga omnes*"[72] cannot be correct and cannot constitute even a *prima facie* basis for its claims against Pakistan and its standing in this case.

7.33 Notwithstanding that there exists no obligation *erga omnes* and thus no standing of the RMI in respect of the claims as formulated in the Application, there are limits on the scope of the Court's jurisdiction where one or more indispensable third States are not a party to the proceedings. As a result, the fact remains that the Court cannot proceed to determine the RMI's claims in the absence of the NPT parties and other affected States as parties to these proceedings.

---

[66] Ibid., para. 35. See also Memorial, paras. 8 ("This case involves obligations of an erga omnes character, engaging RMI as a member of the international community") and 31.

[67] *I.C.J. Reports 1996*, p. 226, at p. 267, para. 105 sub 2(F).

[68] Application, para. 1.

[69] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, *I.C.J. Reports 1996*, p. 226, at p. 437 (Dissenting Opinion of Judge Weeramantry).

[70] *Legality of the Threat or Use of Nuclear Weapons, Advisory* Opinion, *I.C.J. Reports 1996*, p. 226, at p. 329 (Dissenting Opinion of Vice-President Schwebel).

[71] Ibid., p. 329.

[72] Application, para. 35.

CHAPTER 2 JURISDICTION IS EXCLUDED BY VIRTUE OF THE RMI'S RESERVATIONS

7.34 As set out above, the reciprocal nature of declarations is a fundamental principle in establishing the scope of the Court's compulsory jurisdiction to entertain claims.

7.35 Pakistan submits that the Court's jurisdiction to entertain the RMI's claims is excluded, first, by virtue of the RMI's own reservations included in the 2013 Declaration. This is evidenced by the following facts:

(1) The UK's declaration under Article 36, paragraph 2, of the ICJ Statute includes a reservation which provides that the Court has jurisdiction over all disputes arising after 1 January 1984, except for:

> "any dispute in respect of which any other Party to the dispute has accepted the compulsory jurisdiction of the International Court of Justice only in relation to or for the purpose of the dispute; or where the acceptance of the Court's compulsory jurisdiction on behalf of any other Party to the dispute was deposited or ratified less than twelve months prior to the filing of the application bringing the dispute before the Court."

(2) India's Optional Clause declaration includes an almost identical reservation, worded as follows:

> "disputes with regard to which any other party to a dispute has accepted the compulsory jurisdiction of the International Court of Justice exclusively for or in relation to the purposes of such dispute; or where the acceptance of the Court's compulsory jurisdiction on behalf of a party to the dispute was deposited or ratified less than 12 months prior to the filing of the application bringing the dispute before the Court."

(3) The RMI's 2013 Declaration contains a similar reservation, worded as follows:

> "any dispute in respect of which any other Party to the dispute has accepted the compulsory jurisdiction of the International Court of Justice only in relation to or for the purpose of the dispute."

7.36 As the timing of the cases targeting India, Pakistan and the United Kingdom demonstrates, the RMI submitted to the compulsory jurisdiction of the Court with the specific intent of commencing the proceedings against India, Pakistan and the United Kingdom as soon as it was able to do so. The RMI's declaration was deposited on 24 April 2013. As a result, the declarations made by India and the United Kingdom precluded the RMI from commencing proceedings against them for a 12-month period, starting from the date the RMI's declaration was deposited. The RMI's Application was filed on 24 April 2014, the 365th day after the RMI submitted its acceptance of the Court's compulsory jurisdiction.

7.37 It is clear, therefore, that the RMI submitted to the compulsory jurisdiction of this Court for the sole purpose of bringing proceedings against India, Pakistan and the United Kingdom. As a result, the reservation made by the RMI applies and the Court's jurisdiction is precluded by reason of the RMI's own reservation on which Pakistan may rely on the basis of reciprocity.

7.38 The jurisprudence of the Court provides that the principle of reciprocity cannot be invoked by a State in order to excuse departure from the terms of a State's own declaration, whatever its scope, limitation or conditions. The principle of reciprocity also permits the respondent to rely upon reservations in the applicant's declaration. This principle was acknowledged in the *Interhandel* case, in which the Court stated:

> "Reciprocity enables the State which has made the wider acceptance of the jurisdiction of the Court to rely upon the reservations to the acceptance laid down by the other party. There the effect of reciprocity ends."[73]

7.39 By adopting and depositing the 2013 Declaration for the purpose of instituting the proceedings in question, the reservation included in the 2013 Declaration is applicable in this case and the Court must decline jurisdiction on this basis.

CHAPTER 3 JURISDICTION IS EXCLUDED BY VIRTUE OF PAKISTAN'S DOMESTIC JURISDICTION RESERVATION

7.40 As set out above, the 1960 Declaration excludes disputes "relating to questions which by international law fall exclusively within the domestic jurisdiction of Pakistan."

7.41 Pakistan's national defence policy serves to ensure its territorial integrity, sovereignty, and security. This national defence policy is rooted in Pakistan's constitution, which at Article 245 of Part XII, Chapter 2, provides as follows:

> "The Armed Forces shall, under the directions of the Federal Government, defend Pakistan against external aggression or threat of war, and, subject to law, act in aid of civil power when called upon to do so.
>
> The validity of any direction issued by the Federal Government under clause (1) shall not be called in question in any court."[74]

7.42 Pursuant to Article 245 of Pakistan's Constitution, Pakistan's nuclear programme forms an integral part of its national defence – that is, the defence of Pakistan against external aggression or threat of war.

7.43 In the *Nuclear Tests* cases concerning the legality of atmospheric nuclear tests conducted by France in the South Pacific region, France's Declaration accepting the compulsory jurisdiction of this Court was considered. The Declaration contained a reservation regarding "disputes concerning activities connected with national defence." Although ultimately the Court was not required to address this issue, statements made by Judges de Castro, Forster and Gros are of relevance to the present case and Pakistan's strategic defence policy, which falls within its domestic jurisdiction and is beyond the purview of any court:

(1) Judge de Castro considered that the French "reservation certainly seems to apply to nuclear tests."[75]

(2) Judge Forster spoke of the "absolute sovereignty which France, like any other State, possesses in the domain of its national defence."[76]

---

[73] *Interhandel Case (Switzerland v United States), I.C.J. Reports 1959*, p. 6, at p. 23.

[74] See http://www.pakistani.org/pakistan/constitution/.

[75] *Nuclear Tests (Australia v France) (New Zealand v France)*, Dissenting Opinion of Judge de Castro, *I.C.J. Reports 1974*, p. 376.

[76] *Nuclear Tests (Australia v France) (New Zealand v France)*, Dissenting Opinion of Judge Forster, *I.C.J. Reports 1974*, p. 275.

(3) Judge Gros observed that Australia's and New Zealand's claims "to impose a certain national defence policy on another State is an intervention in that State's internal affairs in a domain where such intervention is particularly inadmissible."[77]

7.44 An eminent commentator of these cases noted that "a term such as 'national defence' allows a very wide margin of appreciation and a court should be exceedingly cautious to avoid imposing its own interpretation on whether a particular act is in the national defence of the State concerned."[78]

7.45 Pakistan's nuclear programme is a matter of Pakistan's defence policy, which falls within Pakistan's domestic jurisdiction. It is not to be called into question by any court, let alone a State not having relevant treaty relations with Pakistan.[79]

7.46 Further, the RMI's requested relief constitutes an untenable request far beyond the purview of the Court in that it essentially asks the Court to impede upon Pakistan's rights under Article 2, paragraph 7, of the UN Charter. That provision states that "nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter." What the UN (including its principal judicial organ) cannot do, no individual State can do.

7.47 Consequently, the jurisdiction of the Court is excluded by virtue of the domestic jurisdiction reservation (proviso "b") to the 1960 Declaration.

CHAPTER 4 JURISDICTION IS EXCLUDED BY VIRTUE OF PAKISTAN'S MULTILATERAL TREATY RESERVATION

7.49 In its Memorial,[80] the RMI acknowledges that "[i]t is true that the obligation to engage in good faith in negotiations leading to nuclear disarmament is also contained in Article VI of the NPT." The Application states that the customary international law obligations invoked by the RMI are "rooted" and "enshrined" in that treaty provision[81] and are "based on the very widespread and representative participation of States in the NPT."[82] In light of these statements by the RMI, its position that "the dispute between the Marshall Islands and Pakistan is not a dispute 'arising under' the NPT, because Pakistan is not a party to that treaty"[83] is untenable. As stated above, the 22-page Application contains more than 20 references to the NPT, including at least 15 references to Article VI of the NPT.

7.50 It is undisputed between the Parties that Pakistan has not signed or ratified the NPT or the 1996 Comprehensive Nuclear-Test-Ban Treaty.[84]

---

[77] *Nuclear Tests (Australia v France) (New Zealand v France)*, Dissenting Opinion of Judge Gros, *I.C.J. Reports 1974*, p. 283.

[78] Oscar Schachter, General Course at the Hague Academy, 178 COLLECTED COURSES OF THE HAGUE ACADEMY (1982-V).

[79] In dismissing the RMI's claims against the U.S., the U.S. Federal District Court observed in its ruling of 3 February 2015: "Requiring the Court to delve into and then monitor United States policies and decisions with regard to its nuclear programs and arsenal is an untenable request far beyond the purview of the federal courts." *Republic of the Marshall Islands v. United States*, 2015 U.S. Dist. LEXIS 12785 (N.D. Cal. 2015), Order, at 9,

[80] Memorial, para. 58.

[81] Application, paras. 2, 36 and 54.

[82] Ibid., para. 42.

[83] Memorial, para. 58.

[84] Application, para. 6 (describing Pakistan as "a State possessing nuclear weapons not party to the NPT"); Memorial, para. 58 (acknowledging that "Pakistan is not a party to that treaty," i.e., the NPT); Application, para. 24 (acknowledging that "Pakistan has not signed or ratified the treaty," i.e., the 1996 Comprehensive Nuclear-Test-Ban Treaty).

7.51 The RMI also acknowledges that Pakistan, along with India and the United Kingdom, has recognised the Court's compulsory jurisdiction "on its own terms and conditions"[85] -- that is, subject to the relevant declarations and reservations. Pakistan's 1960 Declaration expressly excludes the jurisdiction of the Court in respect of:

> *"c*. Disputes arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties to the case before the Court, or (2) the Government of Pakistan specially agree to jurisdiction…*"*

7.52 There are recognised grounds for States to make such a reservation. Article 59 of the Statute of the Court provides that only parties to a case are bound by decisions of the Court. It is well recognised that the effect of Article 59 is that parties involved in a multilateral treaty dispute that are not before the Court will not be bound by a decision of the Court. As the majority of States have not accepted the Court's compulsory jurisdiction in any respect, many States involved in a multilateral treaty dispute cannot be compelled to come before the Court in such proceedings. Therefore, in cases where all affected treaty parties are not part of the proceedings, and cannot be brought by the RMI before the Court, Pakistan itself should not be subject to having its rights and obligations adjudicated by the Court. This is the effect of Pakistan's Multilateral Treaty Reservation.

7.53 The reasons for including a multilateral treaty reservation in a declaration are well founded, for three specific reasons:

(1) Pakistan does not wish to have legal rights and obligations under multilateral treaties to which it is a party adjudicated with respect to a multilateral treaty dispute unless *all* the treaty parties involved in the multilateral dispute will also be participating in the dispute, and the same applies to multilateral treaties to which the declarant is not a party but which are relied upon to establish the existence of a customary norm alleged to have been violated by Pakistan;

(2) adjudication of bilateral aspects of a multilateral treaty dispute is manifestly unjust insofar as absent States have sole possession of facts and/or documents directly relevant to the rights and obligations of the parties to the adjudication *inter se;* and

(3) adjudication of bilateral aspects of a multilateral treaty dispute will inevitably affect the legal rights and practical interests of the absent States.

Section 1

The RMI's Application is centred around the NPT, a multilateral treaty

7.54 The RMI asserts that its "Application is not an attempt to re-open the question of the legality of nuclear weapons. Rather, the focus of this Application is the failure to fulfil the obligations of customary international law."[86] However, the RMI is unable to particularise its claims against Pakistan without relying upon or referring to Article VI of the NPT, to which Pakistan is not a party. By way of example, in its Application, the RMI asserts that "[t]he obligations *enshrined* in Article VI of the NPT are not merely treaty obligations; they also exist separately under customary international law."[87] (Emphasis added). Elsewhere, it states that "[t]he customary

[85] Memorial, para. 4.
[86] Application, para. 2.
[87] Ibid., para. 36. See also ibid., para. 2.

international law obligation of cessation of the nuclear arms race at an early date is *rooted* in Article VI of the NPT."[88] (Emphasis added). There is a symbiotic relationship between the RMI's reliance on Article VI of the NPT and its claims against Pakistan as formulated in the RMI's Application.

7.55 As the large number of references in the Application to the NPT, including Article VI thereof, demonstrate, the NPT is core to the RMI's Application and the RMI's claims against Pakistan; accordingly, the alleged existence of customary international law obligations, which the RMI seeks to enforce against Pakistan in this proceeding, would require the Court to adjudicate a dispute which involves or concerns: (i) a multilateral treaty (NPT) not binding on Pakistan; (ii) a non-binding Advisory Opinion of this Court (which itself concerns the NPT and of which the key conclusion invoked by the RMI is "[l]argely based on its analysis of Article VI" of the NPT[89]); and (iii) non-binding General Assembly resolutions (again, which concern the NPT).

Section 2

The Multilateral Treaty Reservation to Pakistan's 1960 Declaration is not restricted to multilateral treaties to which Pakistan is a party

7.56 Pakistan is not a party to the NPT and is hence not bound by it. Pakistan's Multilateral Treaty Reservation included in its 1960 Declaration applies to "disputes arising under a multilateral treaty." Thus, by its plain language, the reservation does not merely cover multilateral treaties to which Pakistan is a party – it concerns any proceeding instituted against Pakistan where the claims rely on *any* multilateral treaty.

7.57 In the *Fisheries* case, the Court, in interpreting Optional Clause reservations explained that "[e]very declaration must be interpreted as it stands, having regard to the words actually used."[90] It is Pakistan's submission that, had it wished to restrict its reservation to disputes arising under a multilateral treaty *to which Pakistan is a party*, it would have expressly stated so in the 1960 Declaration.

Section 3

All parties to the relevant treaties are not party to the present proceeding

7.58 In accordance with Pakistan's 1960 Declaration, the Court will not have jurisdiction to decide this case unless "*all parties to the treaty affected by the decision* are also parties to the case before the Court" (emphasis added). As the Application and Memorial make clear, this case centres around the NPT and therefore affects all the parties to that treaty. In respect of the NPT alone, this case will affect all 190 States that are party to that treaty. This includes five NWS, four of which are not participating in proceedings before this Court.

Section 4

The RMI's Application constitutes an impermissible attempt to circumvent the applicable Multilateral Treaty Reservation

7.59 The Multilateral Treaty Reservation does not merely prevent the Court from adjudicating upon the RMI's claims by applying or interpreting the NPT as referred to and relied upon by the RMI, it also prevents the Court from applying or interpreting the alleged customary

[88] Ibid., para. 54.
[89] Ibid., para. 1.
[90] *Fisheries Jurisdiction (Spain v. Canada),* Judgment, *I.C.J. Reports 1998*, p. 432, at p. 454/26, para. 47. See also *Anglo-Iranian Oil Co. (United Kingdom v. Iran)*, Preliminary Objection, Judgment, *I.C.J. Reports 1952*, p. 93, at pp. 104 and 105; *Certain Norwegian Loans (France v. Norway)*, Judgment, *I.C.J. Reports 1957*, p. 9, at p. 27.

international law obligations, which according to the RMI are "rooted" and "enshrined" in Article VI of the NPT.[91]

7.60 Therefore, Pakistan's Multilateral Treaty Reservation bars adjudication of the RMI's claims - all of the claims advanced by the RMI in its Application are excluded from the Court's jurisdiction.

7.61 In his dissenting opinion in the *Nicaragua* case, Judge Oda recognised that a multilateral treaty reservation is "a means of drawing the boundaries of jurisdiction so as to exclude certain disputes: there is no justification for supposing that … [the same claims] can nevertheless be brought under the Court's authority because (inevitably) it can also be analysed in terms of general international law."[92]

Section 5

The intent and effect of the Multilateral Treaty Reservation

7.62 The intent and effect of Pakistan's Multilateral Treaty Reservation can be summarised as follows:

(a) To preclude jurisdiction when treaty parties that would be affected by the Court's decision are not before the Court

7.63 Pakistan's Multilateral Treaty Reservation was specially drafted to protect Pakistan and other States from inherently prejudicial effects of partial adjudication of complex multi-party disputes.

7.64 As the RMI's Application and Memorial make clear, the matter that the RMI is seeking to bring before the Court wholly concerns multilateral treaties and settings.

7.65 Pakistan's Multilateral Treaty Reservation concerns "all parties to the treaty affected by the decision" – that is, all signatories to the multilateral treaty in question.

(b) The exclusion from international adjudication of matters affecting the interests of absent third parties has been a consistent practice of Pakistan before and after adoption of the Multilateral Treaty Reservation

7.66 The multilateral treaty reservation evolved from a long-standing practice with respect to international arbitration generally and was formulated in response to specific concerns as to how bilateral aspects of multilateral disputes might come before this Court. Pakistan's Multilateral Treaty Reservation serves several important interests:

(1) First, it ensures that all treaty parties involved in a multilateral dispute will be bound by the judgment of the Court – the position otherwise would be manifestly unjust.

(2) Second, fundamental considerations of justice require that both the facts relating to the issues raised by the application and the legal positions of all interested and affected parties be fully presented to the Court, before a binding legal decision is issued by the Court.

(3) Third, Pakistan does not believe that absent States, as a practical or legal matter, will not be affected by decisions of the Court when the very subject-matter of the proceeding affects or concerns them. Article 59 of the Court's

[91] Application, paras. 2, 36 and 54.

[92] *Military and Paramilitary Activities in and against Nicaragua*, *Merits, Judgment*, *I.C.J. Reports 1986*, p. 14, at p. 218, para 13 (Dissenting Opinion of Judge Oda).

Statute provides that a "decision of the Court has no binding force except between the parties and in respect of that particular case." However, this does little more than deny *res judicata* effects of the Court's decisions to States that are not parties to a case. The decisions of this Court may well establish authoritative and definitive interpretations of a multilateral treaty which could apply to treaty-parties not party to the proceedings before the Court (and also possibly non-parties who are affected by the decision).

(c) To protect Pakistan and third States from the inherently prejudicial effects of partial adjudication of complex, multiparty disputes

7.67 Pakistan contends that, in the absence of other States believed to be in possession of nuclear weapons, the Court is not in a position to make the factual findings on which the outcome of the case depends. In this regard, the Court observed in the *Nicaragua* case:

> *"*As to the facts of the case, in principle the Court is not bound to confine its consideration to the material formally submitted to it by the parties... . Nevertheless, the Court cannot by its own enquiries entirely make up for the absence of one of the Parties; that absence, in a case of this kind involving extensive questions of fact, must necessarily limit the extent to which the Court is informed of the facts. *It would furthermore be an over-simplification to conclude that the only detrimental consequence of the absence of a party is the lack of opportunity to submit argument and evidence in support of its own case. The absent party also forfeits the opportunity to counter the factual allegations of its opponent."*[93] (Emphasis added)

7.68 Because of the complex matters in issue and the necessary participation of other States believed to be in possession of nuclear weapons, in their adjudication, the Court should avoid ruling on the RMI's Application without participation by the aforementioned States.

(d) To avoid adjudication of disputes where the Court's decision could not contribute to the resolution of the dispute with which it is concerned

7.69 Given the complete absence of the States most directly concerned with the issues raised by the Application, the Court cannot resolve the issues raised simply by deciding the RMI's case against Pakistan. Further, the Court cannot assist other organs of the UN without a full canvassing of the central issues based on adequate access to the relevant factual matrix. Such a thorough examination is not possible here, because other States believed to be in possession of nuclear weapons are not parties to the proceedings before the Court.

Section 6

The Court's practices vis-à-vis indispensable parties in multilateral treaty disputes

7.70 These fundamental considerations underlying the Multilateral Treaty Reservation are similar to some of the considerations underlying the intervention rules of this Court and the Court's own "indispensable party" practice. The concerns of Pakistan with respect to partial adjudication of multilateral disputes, however, go considerably beyond the Court's intervention and "indispensable party" standards. In particular, neither the intervention rules nor the indispensable party standards address the concerns of Pakistan (which are directly relevant here)

[93] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v,. U.S.), Merits, Judgment*, *I.C.J. Reports 1986*, p. 14, at p. 25.

that it not be the only party bound by a decision of the Court in what, in essence, amounts to a multilateral treaty dispute concerning nuclear disarmament.

7.71 Article 63 of the Statute of the Court provides for intervention as of right by parties to a convention when construction of that convention is in issue. Article 63 recognizes that every party to a convention will be affected by its construction and "necessarily has an interest in the matter."[94] As Judge Oda has explained, "there is little doubt that, in a case where the construction of a particular convention is in dispute, the construction placed on it by the Court in a previous case will tend to prevail" in a subsequent case brought under the same convention.[95] The Statute of the Court therefore makes clear that any party to a multilateral treaty likely to be construed by the Court has a legal interest that may be affected by the Court's decision.

7.72 Article 63 thus permits a third State that believes its interests will be affected by a decision of the Court construing a multilateral convention to which it is a party to intervene and protect its rights. The third State cannot, however, be compelled to appear in the proceeding.[96] Thus, Pakistan, when confronted with an Application that presents claims arising under, or obligations "rooted" and "enshrined" in, multilateral treaties and involving multilateral disputes, has no means of bringing before the Court all the other parties to those disputes.

7.73 Pakistan cannot ensure that its own rights and obligations will be adjudicated in light of directly related rights and obligations of the absent States, or in the light of facts or documents that may be directly relevant to its rights and obligations, but which are in the sole possession of absent States. Most importantly, Pakistan confronts the possibility of a legal determination of its rights and interests when the legal rights and interests of other parties - including the obligations of the applicant State vis-à-vis the absent States - will not be determined. These are the interests that the Multilateral Treaty Reservation was designed to protect. These interests go far beyond the protections afforded by the Court's intervention rules.

7.74 For similar reasons, the multilateral treaty reservation is broader than the Court's indispensable party practice. In the *Monetary Gold* case,[97] the Court held that, because of the consensual nature of its jurisdiction, it could not adjudicate claims where the rights of absent States formed the "very subject-matter of the dispute." Of note, as set out above, on 3 February 2015, the U.S. Federal District Court in California dismissed the "companion case" brought by the RMI in the U.S. because, *inter alia*, the injury claimed by the RMI could not "be redressed by compelling the specific performance by only *one nation* to the Treaty."[98] (Emphasis added)

7.75 The Court's practice in this regard protects the interests of absent States -- one of the concerns underlying the Multilateral Treaty Reservation. But even though an absent State's interests may

---

[94] GERALD FITZMAURICE, "THE LAW AND PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE, 1951-4; QUESTIONS OF JURISDICTION, COMPETENCE AND PROCEDURE," 34 BRITISH YEAR BOOK OF INTERNATIONAL LAW (1958), p. 125. The relationship between Articles 62 and 63, and the conclusion that any State would be legally affected by a decision construing a convention to which it is a party, led Judge Hudson to conclude that all treaty parties would be "affected by" a decision construing the treaty, and therefore that the multilateral treaty reservation requires the presence of all treaty parties before the Court can exercise jurisdiction.

[95] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya) (Application to Intervene), Judgment*, *I.CJ. Reports 1981*, p. 3, at p. 30 (Separate Opinion of Judge Oda).

[96] *Monetary gold removed from Rome in 1943 (Italy v. France and ors.)*, *Judgment*, *1.C.J. Reports 1954,* p. 19, at p. 32 (hereafter "*Monetary Gold*"); *Continental Shelf (Libyan Arab Jamahiriya/Malta), Application to Intervene, Judgment, I.C.J. Reports 1984*, p. 3, at p. 25. Nor can it be assured that other parties to a multilateral dispute would ever appear before the Court since the majority of States have not accepted the Court's compulsory jurisdiction in any respect, and therefore could not be brought before the Court even in an unrelated proceeding to adjudicate their rights and duties in the dispute.

[97] *Monetary Gold*, p. 19, at p. 32.

[98] *Republic of the Marshall Islands v. United States*, 2015 U.S. Dist. LEXIS 12785 (N.D. Cal. 2015), Order, at 8-9.

not form the "very subject-matter of the dispute" and thus preclude adjudication under the standards of *Monetary Gold,*[99] the State's absence may bring into play the other, more fundamental concerns underlying the multilateral treaty reservation.

7.76 The absent State, for example, may:

(1) have legal interests directly related to those in issue in the case;

(2) be privy to facts and documents directly relevant to the case;

(3) although, *ex hypothesi*, a party to the dispute, not be legally bound by a decision of the Court.

7.77 Conversely, and potentially equally important, the RMI filing a claim against Pakistan will not have its rights and obligations vis-à-vis any absent States determined.

7.78 As is clear from the RMI's Application and Memorial, the RMI is asserting rights, and is seeking to have the Court adjudicate essentially the same claims, against nine States. In short, of the three or more States party to a multilateral dispute, only Pakistan cannot be made bound by the Court's decision. This is precisely the situation foreseen by the drafters of the Multilateral Treaty Reservation. Pakistan did not consent to adjudication of claims under such circumstances.

Section 7

Indispensable third party States and affected parties are not parties to these proceedings

7.79 In respect of indispensable third party States and affected parties, the following points are relevant to the Court's jurisdiction:

(a) Because States parties to the NPT and other States that would be "affected" by the Court's decision are not participating, the Court is without jurisdiction over the RMI's Application

7.80 The RMI's Application, together with its Memorial submitted in this case, makes clear that other States would be affected by the Court's decision in this case. With respect to all nine States said to possess nuclear weapons, this is indisputable on the face of the RMI's Application. Indeed, the ultimate objective of the Application evidently is to attract judicial statements of a general nature, including in relation to customary law obligations and obligations *erga omnes*.

[99] As is demonstrated elsewhere, the "very subject-matter" of the RMI's Application in fact is the interests of absent States, and the Application is, in accordance with *Monetary Gold*, inadmissible. It bears emphasis, however, that the multilateral treaty reservation is broader by its terms than either the "indispensable party rule" of *Monetary Gold* or the Court's general intervention standards under Article 62. The plain language of the reservation precludes the Court's jurisdiction whenever a treaty party will be "affected" by the Court's decision. The effects contemplated by the reservation are not limited to effects on legal rights and obligations of the absent State. The reservation applies if the effect is a practical one; for example, if the Court were to decide in a case between two States that one of them could not provide aid to a third State, that third State would suffer the practical consequences. In this respect, the reservation differs from Article 62 of the Court's Statute, which applies only when a State has at stake "interests of a legal nature." (See *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Application to Intervene, Judgment, I.C.J. Reports 1981*, p.. 3, at p. 19).
Moreover, the Court's decision in *Monetary Gold* makes clear that the Article 62 intervention standards for an affected legal interest are less stringent than the indispensable party rule. In *Monetary Gold* the Court declined to resolve a dispute between Italy and the United Kingdom because resolution of that dispute would have required it to "adjudicate upon the international responsibility of Albania," which was not a party to the case. The Court did not go forward, even though it was argued that Albania might have intervened, because Albania's legal interest "would not only be affected by a decision, but would form the very subject-matter of the decision" (*Monetary Gold*, at p. 32). Because the multilateral treaty reservation applies when the intervention standards have not been met, the reservation also applies, *a fortiori*, regardless of whether a State is "indispensable" for purposes of *Monetary Gold*.

7.81 Further, other States in a practical sense would be affected by adjudication of the RMI's claims in the present case. Notwithstanding that India, Pakistan, Israel and the Democratic People's Republic of Korea are not party to the NPT, the People's Republic of China, the U.S., the Russian Federation, the French Republic and the United Kingdom are all parties to a multilateral treaty on which the RMI's Application relies and in which the alleged customary international law obligations are "rooted"[100] and "enshrined" according to the RMI.[101] In respect of the RMI's Application, each of these nine States is an "indispensable nation" and therefore, the absence of five States parties to the NPT in this case further precludes the Court's jurisdiction over the RMI's claims.

7.82 The RMI's own statements make clear that other States would be affected by a decision of this Court in the present case. The Court's lack of jurisdiction over the RMI's Application under Pakistan's Multilateral Treaty Reservation is therefore clear.

7.83 If, contrary to Pakistan's factual position that it is not a party to the NPT and does not recognise any alleged customary international law obligation "rooted" and "enshrined" in Article VI of the NPT, the Court decides otherwise, such an obligation would undoubtedly impact all of the parties as well as non-parties to the NPT.

7.84 The parties to the NPT engaged in joint action directed to a common purpose -- to prevent the spread of nuclear weapons and weapons technology, to promote cooperation in the peaceful uses of nuclear energy and to further the goal of achieving nuclear disarmament and general and complete disarmament. The Court cannot, therefore, adjudicate this case in the absence of the NWS and other States parties to the NPT.

(b) NWS and States parties to the NPT will be affected by a decision of the Court on the RMI's claims

7.85 Pakistan's 1960 Declaration excludes the jurisdiction of the Court with regard to "disputes arising under a multilateral treaty, unless (i) all parties to the treaty affected by the decision are also parties to the case before the Court." In the present context, the main treaty provision that the RMI relies upon is Article VI of the NPT and therefore any determination of the RMI's claims, which are effectively inseparable from Article VI of the NPT, affect both NWS and States parties to the NPT.

(c) Grant of the relief requested by the RMI would directly interfere with the interests of other States, including NWS and States parties to the NPT

7.86 The RMI's Application is seeking to enforce Article VI of the NPT against Pakistan, which is not a party to that treaty. However, any decision of the Court regarding the RMI's claims will directly affect all the NWS not participating in the proceedings and other States parties to the NPT as well as other States believed to be in possession of nuclear weapons. Such an outcome would be manifestly unjust to the States which did not participate in the proceedings before the Court.

(d) The relief requested by the RMI could not be redressed by compelling only one State to negotiate

7.87 As a general rule, a State cannot invoke the Court's jurisdiction against another State as the basis for the adjudication of a dispute which it has with a third State not consenting to the Court's jurisdiction. In the event that the legal interests of a third State are put in issue in

[100] Application, para. 54.
[101] Ibid., paras. 2 and 36.

proceedings to which it is not a party, the Court shall not decide on the matter, and the Court is therefore prevented from deciding the case, even as between the parties to the litigation. Consequently, unless the third State concerned has consented to the Court's adjudication of the matter, the Court cannot determine the rights and obligations of that State or indeed those of the respondent State.

7.88 Both the Permanent Court and this Court consider this to be a fundamental principle of adjudication under international law. In *Status of Eastern Carelia*, the Permanent Court observed:

> "It is well established in international law that no State can, *without its consent*, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of specific settlement."[102] (Emphasis added)

7.89 In the present context, even if Pakistan consented to the exercise of jurisdiction by this Court, the Court could not proceed to adjudicate a claim against it unless the other States alleged by the RMI jointly to have committed the breach were also a party to the proceedings before this Court. This is because the RMI's claims directly affect all the parties to the NPT and those States believed to be in possession of nuclear weapons which are not party to the NPT but would be affected by the Court's decision. Pakistan contends that the Court cannot be called upon to adjudicate the rights and obligations of States parties to the NPT and other affected States, without their consent and participation, as this would be contrary to the *Monetary Gold* principle.

7.90 The application of the principle of consent was expressly recognized by the Central American Court of Justice in the *Costa Rica*[103] case:

> *"*To judge the validity or invalidity of the acts of a contracting party not subject to the jurisdiction of the Court; to make findings respecting its conduct and render a decision which would completely and definitely embrace it -- a party that had no share in the litigation, or legal occasion to be heard -- is not the mission of the Court, which, conscious of its high duty, desires to confine itself within the scope of its particular powers.*"*

7.91 In the present case, the RMI's claims against Pakistan, although presented as customary international law obligations, are "rooted" and "enshrined" in the NPT according to the RMI. Thus, by its Application, the RMI in fact seeks the adjudication of a dispute concerning the NPT, a multilateral treaty, although only one of the parties to that treaty is before the Court, albeit in a different proceeding.

Section 8

The RMI's claims against Pakistan do not exclusively rely on customary international law

7.92 The RMI is unable to specify the obligations which it seeks to enforce against Pakistan without referring to the NPT[104] -- the "customary international law" claims against Pakistan do no more than paraphrase provisions of the NPT. Examples include the following:

---

[102] *Status of Eastern Carelia*, P.C.I.J., Series B, No. 5, 1923, p.27. See also *Mavrommatis Palestine Concessions*, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2, p.16, *Rights of Minorities in Upper Silesia*, P.C.I.J., Series A, No. 15, 1928, p.22 and *Factory at Chorzow*, Merits, P.C.I.J., Series A, No. 17, 1928, pp.37-8.

[103] *Costa Rica v Nicaragua* (1916) at page 228, text in 11 *American Journal of International Law* 181 (1917).

[104] As noted above, the Application includes more than 20 references to the NPT.

(1) In paragraph 1 of the Application, the RMI states that the Court's 1996 Advisory Opinion, on which the RMI relies in support of its claims against Pakistan, was "[l]argely based on its analysis of Article VI of the [NPT];"

(2) In paragraph 2 of the Application, the RMI acknowledges that "the focus of this Application is the failure to fulfil the obligations of customary international law with respect to cessation of the nuclear arms race at an early date and nuclear disarmament enshrined in Article VI of the NPT…;"

(3) In paragraph 6 of the Application, the RMI states that Pakistan is a "State possessing nuclear weapons not party to the NPT. The underlying claims … are that Pakistan is: (i) in continuing breach of its obligations under customary international law, including specifically its obligation to pursue in good faith negotiations leading to nuclear disarmament in all its aspects under strict and effective international control." As the wording of the relief requested by the RMI demonstrates, the RMI's customary international law obligations are in fact a restatement of obligations arising under Article VI of the NPT;[105]

(4) In paragraph 9 of the Application, the RMI further asserts that in "striving to reach agreement on such commitments in the struggle against climate change (…) the RMI has concluded that it is no longer acceptable simply to be a Party to the NPT while total nuclear disarmament pursuant to Article VI [of the NPT] and customary international law remains at best a distant prospect."

(5) In paragraph 10 of the Application, the RMI states that "[o]ne of the reasons why … it became a Party to the NPT is that this Treaty is the key instrument of the international community for ridding the world of nuclear weapons," a further acknowledgment that the alleged customary international law obligations that the RMI now seeks to enforce against Pakistan are "rooted" and "enshrined" in the NPT;

(6) In paragraph 12 of the Application, the RMI states that "[m]ore than four decades after the NPT entered into force, Pakistan has not joined the Treaty as a non-nuclear weapon state." The relevance of this statement in the context of obligations purportedly arising out of the NPT is unclear; and

(7) In paragraph 58 of its Memorial, the RMI acknowledges that "[i]t is true that the obligation to engage in good faith in negotiations leading to nuclear disarmament is also contained in Article VI of the NPT." Notwithstanding this acknowledgment, the RMI maintains that "the dispute between the Marshall Islands and Pakistan is not a dispute 'arising under' the NPT, because Pakistan is not a party to that treaty."

Section 9

The RMI's customary international law claims merely restate its treaty-based claims

7.93 The RMI admits in its Application and Memorial that its claims concerning breach of customary international law are based upon, or "rooted" and "enshrined"[106] in:

[105] See Application, p. 24.
[106] Ibid, paras. 2, 36 and 54.

(a) Article VI of the NPT

7.94 Upon inspection, the RMI's customary international law claims against Pakistan do no more than paraphrase its allegations based expressly on Article VI of the NPT,[107] which provides as follows:

> *"*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.*"*

(b) Non-binding resolutions of the UN General Assembly

7.95 The RMI has sought to bolster its position that the relevant customary international law obligations exist separately from the NPT by citing certain resolutions of the UN General Assembly. In fact, the General Assembly resolutions to which the RMI refers simply refer back to the wording of the NPT.

7.96 In any event, resolutions of the UN General Assembly have no binding force and cannot be relied on by the RMI as enforceable obligations as against another State. This was confirmed by Vice-President Schwebel in his dissenting opinion appended to the 1996 Advisory Opinion, in which he observed that:

> "[i]n its Opinion, the Court concludes that the succession of resolutions of the General Assembly on nuclear weapons 'still fall short of establishing the existence of an *opinio juris* on the illegality of the use of such weapons' … The General Assembly has no authority to enact international law. *None of the General Assembly's resolutions on nuclear weapons are declaratory of existing international law.*"[108] (Emphasis added)

7.97 Thus, the UN General Assembly resolutions adduced in the Application for the proposition that there exists customary international law obligations "rooted" and "enshrined" in Article VI of the NPT do not in fact establish that proposition but, rather, underscore the NPT as the source of law on such matters.

(c) The Court's non-binding 1996 Advisory Opinion

7.98 This Court has affirmed that its advisory opinions are not legally binding. In its Advisory Opinion in the *Peace Treaties* case, the Court pointed out that "the Court's reply is only of an advisory character: as such, it has no binding force."[109] Further, in the *UNESCO* case,[110] the Court restated this point. It described any binding effect of an advisory opinion as going beyond the scope attributed by the Court to an advisory opinion.

Section 10

This Court cannot determine the validity of the RMI's customary international law claims without interpreting and applying the NPT, to which Pakistan is not a party

7.99 In this regard, the following points are relevant:

(a) The principle of *res inter alios acta*

---

[107] As noted above, the Application includes at least 15 references to Article VI of the NPT.

[108] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, *I.C.J. Reports 1996*, p. 226, at pp. 318-319 (Dissenting Opinion of Vice-President Schwebel).

[109] *Peace Treaties Case (First Phase), I.C.J. Reports 1950*, p. 71.

[110] *UNESCO,* Advisory Opinion, *I.C.J Reports 1956*, p. 84.

7.100 Article 34 of the VCLT states that "[a] treaty does not create either obligations or rights for a third state without its consent."[111] In the case concerning *Certain German Interests in Polish Upper Silesia*, the Permanent Court observed that "a treaty only creates law as between states which are parties to it; in case of doubt, no rights can be deduced from it in favour of third States."[112] Under Article 2 of the VCLT, a third State is "a State not a party to the treaty."[113] Therefore, in the present context, Pakistan cannot be forced to accept the obligations set out, or "rooted" and "enshrined,"[114] in Article VI of the NPT without its consent.

(b) The question of how custom could form cannot be determined without also determining the practice and *opinio juris* of the NWS and other States parties under the NPT

7.101 In its Application, the RMI asserts that the obligation expressed in Article VI of the NPT is "an obligation *erga omnes*," and is "owed to the international community as a whole."[115]

7.102 Customary law is not a written source. A rule of customary law (for example, the rule requiring States to respect immunity of a visiting Head of State) is said to have two elements. First, there must be widespread and consistent State practice. Second, there has to be what is called "*opinio juris*," usually translated as "a belief in legal obligation."[116]

7.103 In the *North Sea Continental Shelf* cases, the Court observed:

> "Not only must the acts concerned be a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule requiring it. … The States concerned must feel that they are conforming to what amounts to a legal obligation."[117]

The Court went on to state:

> "Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved."[118]

7.104 In its Application, the RMI asserts that the "obligations enshrined in Article VI of the NPT are not merely treaty obligations; they also exist separately under customary international law."[119] Further, the RMI maintains that "the obligation of cessation of the nuclear arms race at an early date set forth in Article VI, it stands on its own as a customary international law obligation

111 See https://treaties.un.org/pages/CTCTreaties.aspx?id=23&subid=A&lang=en. See also MARK E. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES (Martinus Nijhoff Publishers, 2009),pp. 467-473 (noting that "[t]he ILC itself saw in it a rule of customary international law.").

112 *Certain German Interest in Polish Upper Silesia,* (Merits) P.C.I.J. Series A No. 7 (1926), p. 29.

113 See https://treaties.un.org/pages/CTCTreaties.aspx?id=23&subid=A&lang=en.

114 Application, paras. 2, 36 and 54.

115 Ibid., para. 35.

116 *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands), Judgment, I.C.J. Reports 1969*, p. 3, at p. 44.

117 Ibid., p. 44.

118 Ibid., p. 43.

119 Application, para. 36.

based on the very widespread and representative participation of States in the NPT and is inherent in the customary international law obligation of nuclear disarmament."[120]

7.105 The RMI alleges that Pakistan has breached customary international law[121] without adducing even *prima facie* evidence of such law. The RMI's allegations based on "general and customary" international law are no more than restatements of the RMI's assertions that Pakistan has violated the provisions of Article VI of the NPT.

7.106 The Court will not be able to consider the RMI's "customary international law" claims without interpreting, construing, and applying the multilateral treaties lying at the source of the RMI's principal claims, in particular the NPT. Since the Multilateral Treaty Reservation specifies that Pakistan has not consented, under the circumstances of the present case, to adjudication of claims that require construction of multilateral treaties, the RMI's ostensibly "customary and general international law claims" are also excluded from the scope of Pakistan's consent to the Court's compulsory jurisdiction.

7.107 In the *North Sea Continental Shelf* cases, this Court recognized that a norm-creating provision of a multilateral treaty can embody customary international law, when such a provision:

> *"*has constituted the foundation of, or has generated a rule which, while only conventional or contractual in its origin, has since passed into the general corpus of international law, and is now accepted as such by the *opinio juris*, so as to become binding even for countries which have never, and do not, become parties to the [treaty in question]. [This] constitutes indeed one of the recognized methods by which new rules of customary international law may be formed."[122]

For example, the Court has recognized that the UN Charter is a multilateral treaty of the character that creates customary international law.[123] However, in his dissenting opinion to the 1996 Advisory Opinion, Vice-President Schwebel pointed out that there exists no emergent *opinio juris* or *jus cogens* norm in respect of the threat or use of nuclear weapons:

> "As the Court's Opinion recounts, a number of treaties in addition to the NPT limit the acquisition, manufacture, and possession of nuclear weapons; prohibit their deployment or use in specified areas; and regulate their testing. The negotiation and conclusion of these treaties only makes sense in the light of the fact that the international community has not comprehensively outlawed the possession, threat or use of nuclear weapons in all circumstances, whether by treaty or through customary international law. Why conclude these treaties if their essence is already international law, indeed, as some argue, *jus cogens*?"[124]

7.108 Judge Shahabuddeen stated as follows in his dissenting opinion appended to the 1996 Advisory Opinion:

> "The commencement of the nuclear age represents a legal benchmark for the case in hand. One argument was that, at that point in time, the use of nuclear weapons was not prohibited under international law, but that a prohibitory rule later emerged, the necessary *opinio juris* developing under the twin influences of the

---

[120] Ibid., para. 42.

[121] Ibid., para. 14.

[122] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 4, at p. 42.

[123] *Reparation for Injuries Suffered in the Service of the United Nations,* Advisory Opinion*, I.C.J. Reports 1949,* p. 174, at pp. 180-185.

124 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p. 226, at p. 317 (Dissenting Opinion of Vice-President Schwebel).

> general prohibition of the use of force laid down in Article 2, paragraph 4, of the Charter and of growing appreciation of and sensitivity to the power of nuclear weapons. In view of the position taken by the proponents of the legality of the use of nuclear weapons ('proponents of legality') over the past five decades, it will be difficult to establish that the necessary *opinio juris* later crystallized, if none existed earlier. That argument was not followed by most of the proponents of the illegality of the use of nuclear."[125]

7.109 Further, Article 38, paragraph 1, of the Statute of the Court directs the Court in applying international law to look first to "international conventions, whether general or particular, establishing rules expressly recognized by the contesting States." Sir Hersch Lauterpacht has explained why the Statute requires the Court to apply conventional law before any other source:

> *"*The order in which the sources of international law are enumerated in the Statute of the International Court of Justice is, essentially, in accordance both with correct legal principles and with the character of international law as a body of rules based on consent to a degree higher than is law within the State. *The rights and duties of States are determined, in the first instance, by their agreement as expressed in treaties - just as in the case of individuals their rights are specifically determined by any contract which is binding upon them.* When a controversy arises between two or more States with regard to a matter regulated by a treaty, it is natural that the parties should invoke and that the adjudicating agency should apply, in the first instance, the provisions of the treaty in question. *Like a contract between individuals, a treaty between States constitutes the law between them*.[126] (Emphasis added)

In addition, Lauterpacht emphasised that it is only when there are no provisions of a treaty applicable to the situation that international customary law is, next in hierarchical order, properly resorted to. These conclusions are virtually axiomatic and have been given effect by the Court.[127]

7.110 In summary, just as the RMI's claims allegedly based on customary international law cannot be determined without recourse to the NPT as the principal source of that law, they also cannot be determined without reference to the "particular international law" established by multilateral conventions in force among the States parties. Since the Multilateral Treaty Reservation bars adjudication of claims based on those treaties, it bars all of the RMI's claims.

---

125 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p. 226, at p. 379 (Dissenting Opinion of Judge Shahabuddeen).

126 H LAUTERPACHT, "SOURCES OF INTERNATIONAL LAW", IN E. LAUTERPACHT (ED.), INTERNATIONAL LAW, BEING THE COLLECTED PAPERS OF H LAUTERPACHT, VOL. 1, para. 51, at pp. 86-87 (1970).

127 See W. W. BISHOP, INTERNATIONAL LAW, CASES AND MATERIALS (Little Brown, 2nd ed., 1962) P. 31.

PART 8 - THE INADMISSIBILITY OF THE RMI'S APPLICATION

Introduction

8.1 Pakistan submits that the RMI's Application is inadmissible for the following reasons:[128]

(1) The RMI's Application involves issues of national security of Pakistan which are essentially issues of exclusive domestic jurisdiction of Pakistan and no other forum including ICJ is competent to discuss them;

(2) The RMI has no *jus standi* in connection with the claims as formulated in the Application;

(3) The RMI's Application constitutes an impermissible attempt to re-open the 1996 advisory proceedings and to obtain what would, in effect, amount to an advisory opinion;

(4) The RMI has failed to bring indispensable parties before this Court;

(5) The judicial process is inherently incapable of resolving questions of nuclear disarmament involving multiple States;

(6) The Court cannot grant the relief requested by the RMI because it has held that good faith is not in itself a source of obligation.

CHAPTER 1 NO DISPUTE EXISTED BETWEEN THE RMI AND PAKISTAN AT THE TIME THE APPLICATION WAS SUBMITTED TO THE COURT

8.2 As set out in Article 38 of the Statute of the Court, the Court's function is to decide *disputes* between States.[129]

Section 1

The Court's jurisprudence on the concept of "dispute"

8.3 In the *Mavrommatis Palestine Concessions* case, the Court provided the following broad definition of "dispute:"

> "A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons."[130]

8.4 In order for the Court to exercise its judicial function, it must therefore confirm the existence of a dispute between the States parties to a case before the Court at the time the Application was submitted to the Court.[131] The accepted jurisprudence of the Court regarding the meaning and existence of a "dispute" may be summarised as follows:

---

[128] In asserting the inadmissibility of the Application, it is not the intention of Pakistan to confine itself to, or to urge upon the Court, a particular characterization of the concept of "inadmissibility", recognizing that the issues present mixed questions of jurisdiction (competence) and admissibility. Pakistan notes in this regard that the Court has itself not sought to draw precise distinctions in this area at the expense of its examination of the substance of the questions before it (*Nottebohm, Preliminary Objection, Judgment, I.C.J. Reports 1953*, p.111, at p.121; *Northern Cameroons, Judgment, I.C.J. Reports 1963*, p. 15, at p. 28; *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, p. 253, jt. diss. op. of Judges Onyeama, Dillard, Jiménez de Aréchaga and Waldock, at p. 363).

[129] According to Article 34 of the Statute, "[o]nly States may be parties in cases before the Court."

[130] *Mavrommatis Palestine Concessions (Greece v. Great Britain)*, Judgment of 30 August 1924, 1924 P.C.I.J. (Ser. A) No. 2, p. 11.

[131] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Phase)*, Advisory Opinion, *I.C.J. Reports 1950*, p. 74.

(1) It is not sufficient for one party to assert that there is a dispute. Rather, whether there is a dispute in a given case is a matter for "objective determination" by the Court;[132]

(2) "It must be shown that the claim of one party is positively opposed by the other;"[133]

(3) "The Court's determination must turn on an examination of the facts. The matter is one of substance, not of form;"[134]

(4) "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."[135]

(5) "While the existence of a dispute and the undertaking of negotiations are distinct as a matter of principle, the negotiations may help demonstrate the existence of the dispute and delineate its subject-matter."[136]

(6) "While it is not necessary that a State must expressly refer to a specific treaty in its exchanges with the other State to enable it later to invoke that instrument before the Court,"[137] "the exchanges must refer to the subject-matter of the treaty with sufficient clarity to enable the State against which a claim is made to identify that there is, or may be, a dispute with regard to that subject matter."[138]

8.5 Taking account of the above, Pakistan submits that there is no dispute between the RMI and Pakistan because:

(1) no dispute existed between the RMI and Pakistan at the time the Application was submitted to the Court;

(2) the alleged dispute is not legal in nature;

(3) the RMI has failed to set out any claims with sufficient clarity for Pakistan to properly understand the alleged dispute;

(4) in reality, no positively opposed claims exist between the RMI and Pakistan;

(5) the claims advanced by the RMI are artificially constructed, and speculative in nature; and

(6) the RMI and Pakistan are not the proper parties in relation to the claims advanced by the RMI.

---

[132] Ibid.,.

[133] *South West Africa, Preliminary Objections,* Judgment, *I.C.J. Reports 1962*, p 328.

[134] *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.

[135] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria)*, Preliminary Objections, Judgment, *I.C.J. Reports 1998*, p. 315.

[136] *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. 83.

[137] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v U.S.),* Jurisdiction and Admissibility, Judgment*, I.C.J. Reports 1984*, p. 392, at pp. 428-429.

[138] *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.

Section 2

No dispute existed between the Parties at the time the Application was submitted to the Court

8.6 As the RMI acknowledges in its Memorial, "as the Court put it, the 'dispute must in principle exist at the time the Application is submitted to the Court.'"[139] It is not sufficient for the RMI to assert that there is a dispute between the RMI and Pakistan. The RMI's Application and Memorial do not contain evidence of the existence of any dispute (legal or otherwise) between the RMI and Pakistan at the time the Application was submitted to the Court. For this reason, the RMI's Application must be dismissed as inadmissible.

Section 3

The alleged dispute is not legal in nature

8.7 Article 36, paragraph 2, of the Statute of the Court, which constitutes the sole basis of jurisdiction invoked by the Application, limits the Court's compulsory jurisdiction to "legal disputes." Similarly, Pakistan's 1960 Declaration recognising the jurisdiction of the Court as compulsory is expressly confined to "legal disputes."[140]

8.8 In this context, the Court is referred to the Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States which provides some clarification on the meaning of this expression:

> "The expression 'legal dispute' has been used to make clear that while conflicts of rights are within the jurisdiction of the Centre, mere conflicts of interests are not. The dispute must concern the existence or scope of a legal right or obligation, or the nature or extent of the reparation to be made for breach of a legal obligation." [141]

8.9 The RMI's Application and Memorial do not contain evidence of the existence of a legal dispute between the RMI and Pakistan at the time the Application was submitted to the Court.

Section 4

The RMI has failed to set out any claims with sufficient clarity for Pakistan to properly understand the alleged dispute

8.10 By choosing not to comply with Article 49 of the Rules of Court,[142] the RMI has failed to identify its legal claims with sufficient clarity for Pakistan to understand the alleged dispute.

8.11 In its Memorial, the RMI merely states that "it is apparent that there is a legal dispute between Pakistan and the RMI as to the content and implications of the obligation as set out in the Application; whether the obligation is customary in nature and therefore applies to Pakistan; and

---

[139] Memorial, para. 53 (citing *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; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012*, p. 442, para. 46).

[140] See Memorial, para. 42 (referring to "a legal dispute, as is required by Article 36(2) of the Statute and by the terms of Pakistan's Declaration Recognizing the Jurisdiction of the Court as Compulsory.").

[141] Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965 (Adopted by Resolution No 214, Board of Governors of the International Bank for Reconstruction and Development on 10 September 1964), 1 ICSID Rep. 23 (1993), p. 28.

[142] See Memorial, para. 14 (stating that the RMI "will not submit a Memorial that conforms to Article 49, para. 1 of the Rules of Court.").

whether the obligation is owed *erga omnes* by Pakistan."[143] Further, the RMI boldly asserts that "[t]he statements and conduct of the parties reflect the existence of a legal dispute between Pakistan and the RMI over whether Pakistan is complying with its obligations 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."[144] Pakistan understands this formulation to refer to Article VI of the NPT, to which it is not a party, and to the Court's concluding paragraph in its 1996 Advisory Opinion, which is non-binding. There can be no dispute between the Parties over these non-binding instruments.

8.12 The "statements and conduct" to which the RMI refers appear to consist of the following:

(1) A brief statement made by the RMI's Minister of Foreign Affairs at the UN High Level Meeting on Nuclear Disarmament on 26 September 2013;

(2) A further brief statement made by the RMI at the Second Conference on the Humanitarian Impact of Nuclear Weapons on 13 February 2014.[145]

8.13 Neither of these statements (a) was specifically directed at Pakistan; (b) makes reference to Pakistan; or (c) identifies the subject-matter of any legal dispute that the RMI might have with Pakistan. The RMI's claims against Pakistan are wholly unparticularised and relate to speculative injuries. Pakistan submits that something more is required by way of identification of the issues in dispute between the parties than the broad, wide-ranging and aspirational statements that the RMI seeks to rely upon.

8.14 Had the RMI been able to identify any statements or conduct as between the RMI and Pakistan which evidenced the existence of a legal dispute, it surely would have done so. It seems that the sole basis for the RMI's claim is Pakistan's purported failure to immediately commence and conclude multilateral negotiations on nuclear disarmament, an obligation which the RMI claims is "rooted" and "enshrined" in Article VI of the NPT, to which Pakistan is not a party.[146]

8.15 Further, the "statements and conduct" which the RMI seeks to rely upon to establish the existence of a dispute must be considered in the context of other actions taken by the RMI before the international community, especially the contradicting positions it has taken at various UN General Assembly sessions, described above.

8.16 In fact, the flip-flopping positions taken by the RMI at the said General Assembly sessions reveals that the RMI is not genuinely interested in achieving nuclear disarmament.

8.17 In the circumstances, any objective determination by the Court regarding the existence of a dispute between the RMI and Pakistan must surely lead to the conclusion that no dispute (legal or otherwise) exists between the Parties.

Section 5

No positively opposed claims exist between the RMI and Pakistan

8.18 As the Court stated in the *South West Africa* cases, "[i]t must be shown that the claim of one party is positively opposed to the other."[147]

---

[143] Memorial, para 50.
[144] Ibid,, para. 44.
[145] Ibid., para. 45.
[146] Application, paras. 2, 36 and 54.
[147] *South West Africa (Ethiopia v. South Africa) (Liberia v. South Africa), Preliminary Objections, Judgment*, *I.C.J. Reports 1962*, p. 319, at p. 328.

8.19 There is no dispute between the RMI and Pakistan because in reality no positively opposed claims exist. This is evident from the lack of prior communications or consultations between the RMI and Pakistan and from the lack of relevant evidence accompanying the RMI's Application and Memorial.

8.20 In the *Fisheries Jurisdiction* case, it was stated by Judge Oda that "it is arguable whether a 'legal' dispute may be submitted unilaterally to the Court only after diplomatic negotiations between the disputing parties have been exhausted, or at least initiated, but I shall refrain from entering into that discussion. However, I submit that it could have been questioned, even at this jurisdictional stage … ." [148] The RMI has not even initiated diplomatic negotiations with Pakistan, let alone pursued them in good faith and exhausted them.

8.21 There is no record of diplomatic exchanges between the RMI and Pakistan concerning the issues which the Application is seeking the Court to adjudicate. As one commentator has noted, "the existence of a dispute presupposes a certain degree of communication between the parties. The matter must have been taken up with the other party, which must have opposed the claimant's position if only indirectly."[149] In the current circumstances, there has been no communication whatsoever between the Parties on the relevant issues.

8.22 In the *Mavrommatis Palestine Concessions* case, the Court noted that "negotiations do not of necessity always presuppose a more or less lengthy series of notes and despatches; it may suffice that a discussion should have been commenced, and this discussion may have been very short."[150] However, the Court also recognised that "before a dispute can be made the subject of an action at law, its subject matter should have been clearly defined by means of diplomatic negotiations."[151] Although Pakistan accepts that the matter is one of substance rather than form, in every case in which the Court has found a dispute to exist, it has been possible for the Court to point to *some* negotiation or communication between the parties on the issues in dispute. The RMI cannot do the same here.

8.23 By way of further guidance, in the ICSID case of *Maffezini v Spain*, the Tribunal made the following observation:

> "There tends to be a natural sequence of events that leads to a dispute. It begins with the expression of a disagreement and the statement of a difference of views. In time these events acquire a precise legal meaning through the formulation of legal claims, their discussion and eventual rejection or lack of response by the other party. … It has also been rightly commented that the existence of the dispute presupposes *a minimum of communications between the parties*, one party taking up the matter with the other, with the latter opposing the Claimant's position directly or indirectly."[152] (Emphasis added)

---

[148] *Fisheries Jurisdiction (Spain v. Canada), Judgment*, *I.C.J. Reports 1998*, p. 432, at p. 484, para 20 (Separate Opinion of Judge Oda).

[149] Christoph Schreuer, "What is a Legal Dispute?" in I. BUFFARD ET AL. (EDS), INTERNATIONAL LAW BETWEEN UNIVERSALISM AND FRAGMENTATION, FESTSCHRIFT IN HONOUR OF GERHARD HAFNER (Leiden/Boston: Martinus Nijhoff Publishers, 2008), p. 961.

[150] *Mavrommatis Palestine Concessions (Greece v. Great Britain)*, Judgment of 30 August 1924, 1924 P.C.I.J. (Ser. A) No. 2, p. 13.

[151] Ibid., p. 15.

[152] *Maffezini v. Spain*, Decision on Jurisdiction of 25 January 2000, ICSID, 40 ILM 1129, para. 96.

8.24 In the recent case between Georgia and the Russian Federation, the Court was called upon to consider whether there was a dispute between the parties, having regard to the general meaning of the word.[153]

8.25 The Court, recalling established case law on the matter, noted as follows:

> "While the existence of a dispute and the undertaking of negotiations are distinct as a matter of principle, the negotiations may help demonstrate the existence of the dispute and delineate its subject matter.
>
> While it is not necessary that a State must expressly refer to a specific treaty in its exchanges with the other State to enable it later to invoke that instrument before the Court, the exchanges must refer to the subject-matter of the treaty with sufficient clarity to enable the State against which a claim is made to identify that there is, or may be, a dispute with regard to that subject-matter. An express specification would remove any doubt about the State's understanding of the subject-matter in issue and put the other on notice." [154]

8.26 In its Application, the RMI fails to point to any express specification, instead relying heavily upon a statement made by the Court in its judgment concerning preliminary objections in the case concerning *Land and Maritime Boundary between Cameroon and Nigeria*, that "positive opposition of the claim of one party by the other need not necessarily be stated *expressis verbis*."[155] The Court went on to state in that case that "[i]n the determination of the existence of a dispute, as in other matters, the position or the attitude of a party can be established by inference, whatever the professed view of that party."[156] But it still concerns inference "from the attitude taken by the other party *in respect of such claim*."[157] This presupposes that there was a claim by one party that could be positively opposed by the other party.

8.27 Given the RMI's heavy reliance on the Court's statements in the case between Cameroon and Nigeria, it is worth considering the facts of that case in further detail.

8.28 In the case between Cameroon and Nigeria, the Court was required to characterise the absence of any explicit challenge from Nigeria as to boundary disputes between Cameroon and Nigeria. Cameroon sought to rely upon the occurrence of certain boundary incidents as evidence of a dispute (i.e., incidents which, as the Court pointed out, might not be characterised as explicit challenges to the boundary, because not every boundary incident implies a challenge to the boundary, or because certain incidents took place in areas where boundary demarcation may have been absent or imprecise). Even though the Court recognised that positive opposition of a claim need not be stated *expressis verbis*, the incidents and incursions to which Cameroon referred did not of themselves satisfy the Court of the existence of a dispute between the parties. By contrast with that case, the RMI is unable to point to any direct contact, act or incident by Pakistan which gives rise to a dispute as between the RMI and Pakistan.

8.29 The Court then turned its focus to Nigeria's reply regarding Cameroon's concerns – rather than expressly stating that it disagreed with Cameroon's position in relation to the geographical co-ordinates of the boundary, Nigeria responded that the land boundary was not described by

---

[153] See *Case concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)*, *I.C.J. Reports 2008*.
[154] Ibid, pp. 83-85.
[155] Application, para. 43.
[156] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria)*, *Judgment, Preliminary Objections*, *I.C.J. Reports 1998,* p. 275, at p. 315.
[157] Memorial, para. 43 (emphasis added).

reference to geographical co-ordinates and that the course of the boundary was accepted by Nigeria and Cameroon. The Court noted that Nigeria had "constantly been reserved in the manner in which it presented its own position" and "although Nigeria knew about Cameroon's … concerns, it has repeated … the statement that there is no dispute …".[158] The Court also referred to "the fact that the two States have attempted … to solve some of the boundary issues dividing them during bilateral contracts" and that "the Court has not been persuaded that Nigeria has been prejudiced as a result of Cameroon's having instituted proceedings before the Court instead of pursuing negotiations which, moreover, were deadlocked when the Application was filed."[159]

8.30 The facts of the case between Cameroon and Nigeria are entirely different from the present case – there have been no negotiations or consultations between the RMI and Pakistan at all (let alone negotiations that the Court might describe as being deadlocked).

8.31 In fact, in cases where the parties have questioned the very existence of a dispute, one party has always been able to point to some correspondence, communication or negotiation as between the parties in dispute in support of the argument that a dispute exists. The RMI cannot do so here.

8.32 Pakistan submits that it cannot be the case that a dispute can have arisen (let alone crystallised) where there has been a complete absence of any communications, negotiations, discussions or interactions as between the relevant parties. It is unsurprising that the RMI is in fact unable to provide evidence of *any* form of communication between the RMI and Pakistan in relation to the alleged dispute.

8.33 To allow a State to gain access to the Court through a fabricated dispute, or one that the applicant merely asserts, would open the flood-gates and cause the demise of the Optional Clause system.

Section 6

The claims advanced by the RMI are artificially constructed, and speculative in nature

8.34 Pakistan submits that it is also necessary for the RMI to show that the alleged dispute is capable of judicial settlement, since it is not the function of the Court to decide a hypothetical or abstract claim based on speculative injury (even if it may be construed as a dispute).

8.35 As one commentator has pointed out, "[i]n order to amount to a dispute capable of judicial settlement, the disagreement between the parties must have some practical relevance to their relationship and must not be purely hypothetical. It is not the task of international adjudication to clarify legal questions *in abstracto*. The dispute must relate to clearly identified issues between the parties and must be more than academic."[160]

8.36 The Court took the same position in the *Northern Cameroons* case, in which it observed that:

> "the function of the Court is to state the law, but it may pronounce judgment only in connection with concrete cases where there exists at the time of the adjudication an actual controversy involving a conflict of legal interests between the parties. The Court's judgement must have some practical consequence in the

[158] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections, Judgment*, *I.C.J. Reports 1998*, p. 275, at pp. 315-316.
[159] Ibid., pp. 303-304.
[160] Christoph Schreuer, "What is a Legal Dispute?" in I. BUFFARD ET AL. (EDS), INTERNATIONAL LAW BETWEEN UNIVERSALISM AND FRAGMENTATION, FESTSCHRIFT IN HONOUR OF GERHARD HAFNER (Leiden/Boston: Martinus Nijhoff Publishers, 2008), p. 970.

sense that it can affect exiting legal rights or obligations of the parties, thus removing uncertainty from their legal relations. No judgment on the merits in this case could satisfy these essentials of the judicial function."[161]

8.37 The RMI has not particularized a concrete and imminent harm or injury which is fairly traceable to the challenged action or inaction of Pakistan and that would be redressed by a favourable decision, including through the declaratory and injunctive relief requested by the RMI. In its judgment of 3 February 2015 dismissing the RMI's claims against the U.S., the U.S. Federal District Court concluded that the RMI's "generalized and speculative fear of the possibility of future use of nuclear weapons does not constitute a concrete harm unique to Plaintiff required to establish injury in fact."[162] In the present context, the damage from nuclear fall-out to which the RMI's Application and Memorial refer relies on a speculative chain of possibilities and the alleged harm is wholly speculative vis-à-vis Pakistan.[163] The RMI's "struggles against climate change"[164] and its contention that "[t]he *potential* use of nuclear weapons does bear on the interests of the Marshall Islands because it subjects the Marshall Islands to substantial and unacceptable *risks*"[165] are an insufficient basis for establishing jurisdiction in this case and for adjudicating the RMI's claims against Pakistan and granting the relief requested by the RMI. In sum, the RMI's claims against Pakistan are not capable of judicial settlement or redress.

Section 7

The RMI and Pakistan are not the proper parties to the claims advanced by the RMI

8.38 The RMI asserts that it is in dispute with Pakistan, a dispute which it asks this Court to resolve. But the RMI has failed to adduce any evidence, let alone conclusive evidence, pointing to the existence of a dispute *between the RMI and Pakistan* at the time the Application was submitted to the Court.

8.39 In fact, the RMI's Application appears not to concern a dispute between the RMI and Pakistan at all; instead it appears to be more characteristic of a request for enforcement of obligations "rooted"[166] and "enshrined"[167] in Article VI of the NPT, to which Pakistan is not a party, advanced under the guise of an inter-State dispute and of an attempt to re-visit the 1996 advisory proceedings with a view to attracting judicial statements of a general nature that the Court was not willing to make in its 1996 Advisory Opinion.

8.40 Both the Application and the Memorial of the RMI on their face implicate third States whom the RMI asserts are "nuclear-weapon States" or "known to possess nuclear weapons."[168] The adjudication of the alleged customary international law obligation that the RMI asserts is "rooted" and "enshrined"[169] in Article VI of the NPT would necessarily involve the determination of the attendant international responsibility of those third States, and the order

---

[161] *Northern Cameroons (Cameroon v. United Kingdom),* Judgment, Preliminary Objection*, I.C.J. Reports 1963,* p. 33.

[162] *Republic of the Marshall Islands v. United States*, 2015 U.S. Dist. LEXIS 12785 (N.D. Cal. 2015), Order, at 8.

[163] See Memorial, para. 45 (referring to "*potentially* dire consequences of nuclear weapons" (emphasis added)) and paras 8-9 (including eight uses of the word "would").

[164] Memorial, para. 9. The RMI is also inconsistent in describing the potential damage resulting from nuclear warfare, referring to "a drop in temperature on the Earth's surface," while it has described rising sea levels caused by an increase in the Earth's temperature as its greatest threat. See ibid., para. 8.

[165] Memorial, para. 41 (emphasis added).

[166] Application, paras. 36 and 54.

[167] Ibid., para. 2.

[168] Application, para. 19. The Application refers to the U.S., Russia, the UK, France, China, India, Pakistan, Israel and the Democratic People's Republic of Korea. Ibid., paras. 17 and 19.

[169] Application, paras. 2, 36 and 54.

requested by the RMI at the end of its Application involves unilateral action that cannot possibly accomplish the desired result without the consent and participation of those third States. The "companion case" before the U.S. courts, which targets the U.S. in connection with that State's obligations under the NPT, is further evidence of the fact that Pakistan is not the proper respondent in this case.

8.41 Moreover, the adjudication of the RMI's claims against Pakistan would necessarily involve the adjudication of the rights and obligations of those third States which are both parties and non-parties to the NPT. In this regard, the RMI's Application asks the Court to adjudicate and declare that Pakistan is in violation of its alleged international customary international law obligations "rooted" and "enshrined" in Article VI of the NPT.[170]

8.42 In addition to Pakistan, and as set out above, the RMI's Application concerns NWS that are absent from the present proceedings.[171] As stated by the Court in the *Nicaragua* case, if there are claims concerning legal obligations:

> "made by an Applicant against a Respondent in proceedings before the Court, and made the subject of submissions, the Court has in principle merely to decide on those submissions, with binding force for the parties only, and no other state, in accordance with Article 59 of the Statute".[172]

8.43 However, per the *Monetary Gold* case, where the very subject-matter of the case concerns the legal interests of a third State not before the Court, the Court cannot exercise jurisdiction. In such circumstances, the principle that the Court should merely decide on the submissions as between the parties before it does not apply.

8.44 In that case, part of the monetary gold removed from Rome in 1943 was claimed by both Albania and Italy. In its judgment, the Court observed as follows:

> "The Court is not merely called upon to say whether the gold should be delivered to Italy or to the United Kingdom. It is requested to determine first certain legal questions upon the solution of which depends the delivery of the gold. In order, therefore, to determine whether Italy is entitled to receive the gold, it is necessary to determine whether Albania has committed any international wrong against Italy, and whether she is under an obligation to pay compensation to her; and, if so, to determine also the amount of compensation."[173]

The Court then concluded:

> "*In the present case, Albania's legal interests would not only be affected by a decision, but would form the very subject-matter of the decision*. In such a case, the Statute cannot be regarded, by implication, as authorizing proceedings to be continued in the absence of Albania."[174](Emphasis added)

8.45 As Albania was not a party to those proceedings, the Court declined to decide the dispute, while observing:

---

[170] Application, paras. 2, 36 and 54.
[171] Ibid., paras. 17 and 20.
[172] *Military and Paramilitary Activities in and against Nicaragua*, Jurisdiction and Admissibility, Judgment, *I.C.J. Reports 1984,* p. 392, at para. 88.
[173] *Monetary gold removed from Rome in 1943 (Italy v France and ors)*, Preliminary Question, Judgment, *I.C.J. Reports 1954*, p. 19, at pp. 31-32.
[174] Ibid., p. 32.

> "Where, as in the present case, the vital issue to be settled concerns the international responsibility of a third State, *the Court cannot, without the consent of that third State, give a decision on that issue binding upon any State, either the third State, or any of the parties before it.*
>
> Even if the ultimate matter for the Court to decide was the priority, as between the United Kingdom and Italy, of the claims to the gold, that question could not be decided, because it depended on the Court's ruling on a preliminary issue, arising solely between Italy and Albania."[175] (Emphasis added)

8.46 In other words, where the interests of a third State not before the Court constitute the very subject-matter of the dispute with which the Court is seised, for the Court to assume jurisdiction would prejudice the legal interests of the respondent and the relevant third State(s). This is particularly so in circumstances in which the acts of the third State constitute the dominant part of the factual dimension of the dispute in question.

8.47 In such circumstances, the respondent may not have available to it all the necessary factual material with which to defend its interests. There may also be a risk of abuse of the legal process to the extent that a *de minimis* respondent may be impugned in the absence of the principal antagonist but nevertheless stand in jeopardy of allegations levelled non-specifically at unnamed respondents. It would, in such circumstances, be inappropriate for the Court to assume jurisdiction. The applicant's case must in such circumstances be considered inadmissible. The interests here addressed are the interests of the respondent and of the integrity of the judicial process, not the interests of the absent third State(s).

8.48 If the Court had the competence to adjudicate obligations concerning, or "rooted" and "enshrined"[176] in, the NPT, a full and complete resolution of the matter presented to the Court in the Application cannot be achieved without the participation of all the parties to the NPT and other affected States in the proceedings before the Court. The Court cannot reach a determination with respect to the RMI's claimed relief in this regard without determining the rights and obligations of those other States. The RMI, having itself acknowledged that the alleged international customary law obligations are "rooted" and "enshrined" in Article VI of the NPT, and having referred to the NPT more than 20 times in its Application, cannot now claim that the effect of such alleged obligation can be established and imposed on these third States without their consent or participation in the current proceedings.

CHAPTER 2 THE RMI HAS NO *JUS STANDI* IN CONNECTION WITH THE CLAIMS AS FORMULATED IN THE APPLICATION

8.49 According to the RMI's Memorial, the RMI's "essential contention is that each State has *locus standi* to seek to enforce the customary international law obligation on all others (and especially those, like Pakistan, possessing nuclear weapons) 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,'" [177] the quote deriving from the Court's 1996 Advisory Opinion (which itself derives from Article VI of the NPT). Thus, the "essential contention" of the RMI is that it has standing before this Court to claim "that the customary obligation to conduct negotiations is an obligation *erga omnes*" and that this obligation has been violated by

[175] Ibid., p. 33.
[176] Application, paras. 2, 36 and 54.
[177] Memorial, para. 31.

Pakistan.[178] As this Chapter of the Counter-Memorial will demonstrate, the RMI lacks *jus standi* in connection with the claims as formulated in the Application for more than one reason.

Section 1

The RMI has no right to an adjudication of the claims as formulated in the Application

8.50 First, the RMI has no standing to claim in its own right in this case, because it has failed to (i) identify the existence of a legal dispute between the RMI and Pakistan at the time of the filing of the Application and (ii) submit even *prima facie* evidence of any concrete or imminent harm fairly traceable to the challenged action or inaction of Pakistan that would be redressed by a favourable decision by this Court.

8.51 Second, given that the Court has not been presented with even *prima facie* evidence of the existence of an obligation *erga omnes* to conduct negotiations and the 1996 Advisory Opinion provides no support for the RMI's "essential contention" that "the customary obligation to conduct negotiations is an obligation *erga omnes*" and that, "[a]s such, every State [including the RMI] has a legal interest in its timely performance,"[179] the RMI cannot claim a legal interest in the timely performance of a non-existing obligation and hence has no right to an adjudication of its claims as formulated in the Application.

Section 2

The RMI does not have standing based on *actio popularis* because the relief requested by the RMI does not concern obligations *erga omnes*

8.52 The Memorial contains a bold assertion that "each State has *locus standi*" to seek to enforce the obligations alleged to have been breached by Pakistan, in particular "Pakistan's central 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."[180] No doubt, the RMI made this assertion because it is faced with the fact that it is not in privity with Pakistan through any relevant treaty and thus cannot rely on conventional law in support of the claims as formulated in the Application.

8.53 The RMI cannot bring these proceedings as a kind of *actio popularis* unless it can show that an entitlement to do so arises from the *erga omnes* character of the obligations which it asserts. The RMI points to no other basis upon which it could rely. This Court has rejected the contention that, in accepting the Court's jurisdiction under Article 36, paragraph 2, of the Statute of the Court, a State acquires the legal right to bring a claim on any subject of its choosing against any other State which has also accepted the Court's jurisdiction.[181]

8.54 In its Memorial, "the RMI contends that the customary obligation to conduct negotiations is an obligation *erga omnes*" and "[a]s such, every State has a legal interest in its timely performance."[182] As noted above, this is presented as "[i]ts essential contention."[183] In bringing these proceedings, the RMI appears to be claiming that it has a right to act on behalf of the international community.[184] Pakistan denies that such a right exists in the current context.

---

[178] Ibid., para 31.
[179] Ibid., para 31.
[180] Ibid., paras. 11 and 31.
[181] *South West Africa* cases, *I.C.J. Reports 1966*, p. 42.
[182] Memorial, para. 31. See also Application, para. 35.
[183] Memorial, para. 31.
[184] See Application, paras. 33-35; Memorial, paras. 8 and 31.

8.55 There is no *prima facie* evidence of such a right. As the RMI concedes, "[i]t is true that this Court may have to elaborate on the nature of the obligations that are owed *erga omnes*."[185] Thus, the RMI admits that the Court never stated that the obligations of which it complains in this case are owed *erga omnes*. The RMI's Application refers to the Court's observation, contained in its Advisory Opinion of 8 July 1996 in *Legality of the Threat or Use of Nuclear Weapons*, that "fulfilling the obligation in Article VI … remains without any doubt an objective of vital importance to the whole of the international community today." [186] The RMI contends that this observation "was tantamount to declaring that the obligation in Article VI of the NPT is an obligation *erga omnes*."[187] There is no support whatsoever for the RMI's contention. To the contrary, President Bedjaoui's Declaration to which the RMI refers[188] confirms that the Court did not conclude what the RMI is contending. President Bedjaoui's Declaration reads, in pertinent part:

> "As the Court has acknowledged, the obligation to negotiate in good faith for nuclear disarmament concerns the 182 or so States parties to the Non-Proliferation Treaty. *I think one can go beyond that conclusion* and assert that there is in fact a twofold *general obligation*, opposable *erga omnes*, to negotiate in good faith and to achieve the desired result."[189] (Emphasis added)

8.56 In other words, to state that the Court had in mind a general obligation, opposable *erga omnes*, to negotiate in good faith and to achieve the desired result, goes beyond the Court's conclusion in its 1996 Advisory Opinion. The RMI's whole case against Pakistan, which has not signed or ratified the NPT, appears to rest on the Declaration of President Bedjaoui appended to the 1996 Advisory Opinion and the assertion that what the Court said with regard to States parties to the NPT applies to non-parties with equal force. President Bedjaoui's Declaration proves that the opposite is the case.

8.57 There is no principle of general international law which gives the RMI the right to bring this case. To have a right to bring a claim to the Court for decision, a State must be able to show that it has a legal interest in the subject-matter. The absence of just such an interest led to the failure of Belgium's claim in the *Barcelona Traction* case[190] as well as to the failure of the applications brought by Ethiopia and Liberia in the *South West Africa* cases.[191] Even judges who dissented in the *South West Africa* cases accepted that it was necessary for the applicants to show a right to bring the application in the first place.[192]

8.58 Even where a broad view of matters of this kind has been admitted, it has been said that "[t]here is no generally established 'actio popularis' in international law."[193] Even if it were assumed that the customary obligation to conduct negotiations gives rise to obligations *erga*

---

[185] Memorial, para. 34.

[186] *Legality of the Threat or Use of Nuclear Weapons*, *Advisory Opinion*, I.*C.J. Reports 1996*, p. 226, para. 103.

[187] Application, para 35.

[188] Application, Part III, footnote 67.

[189] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, *I.C.J. Reports 1996*, p. 226, at p. 273, para 23 (Declaration of President Bedjaoui).

[190] *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Judgment (Second Phase), *I.C.J. Reports 1970*, p. 50.

[191] *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa),* Judgment (Second Phase) *I.C.J. Reports 1966*, p. 51.

[192] See, e.g., *I.C.J. Reports 1966*, pp. 387-8 (Judge Jessup); p. 443 (Judge Padilla Nervo); p. 478 (Judge Forster). For a review of the general subject of legal interest, see K. M'Baye, "L'interet pour agir devant la cour internationale de justice," 209 *Hague Recueil* (1988, II), pp.227-341.

[193] *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, Separate Opinion of Judge Jessup, *I.C.J. Reports 1966*, pp. 387-378.

omnes, Pakistan contends that the RMI cannot establish a right to advance claims in the nature of an *actio popularis*.

8.59 The Court's observations in the *Barcelona Traction* case[194] are not to the contrary. What the Court there said was that "an essential distinction should be drawn between the obligations of a State towards the international community as a whole [obligations *erga omnes*] and those arising vis-à-vis another State in the field of diplomatic protection." In that case, the Court was concerned only with obligations in the latter category. It did, however, make the comment that in relation to obligations in the first category, being obligations *erga omnes*, "[some of the corresponding rights of protection have entered into the body of general international law …; others are conferred by international instruments of a universal or quasi-universal character"[195] (emphasis added). The Court did not say that every obligation *erga omnes* would support proceedings in the nature of an *actio popularis*. The matters to which reference was specifically made are essentially different from the alleged customary international law obligations "rooted" and "enshrined"[196] in Article VI of the NPT which the RMI seeks to enforce in the present proceeding.

8.60 It is true that in their dissenting opinions in the *South West Africa* cases, Judges Jessup and Tanaka adopted a wider view than did the Court of the right of a State to bring a matter before it. Both judges relied on the special nature of particular treaties to provide a State's entitlement to bring a matter to the Court.[197] But there is no treaty conferring such a right in the present case.

8.61 This Court must not allow any State to bring a claim on behalf of itself, let alone the international community, that it maintains rests on obligations *erga omnes* without providing *prima facie* evidence of the *erga omnes* nature of such obligations. Yet that is exactly what the RMI is attempting to do in this case in an effort to establish jurisdiction over Pakistan and attract judicial statements of a general nature that can be used against other States that are not before the Court. To allow adjudication of such claims would open the flood-gates and would enable States to hale into court whomever they wish, in contravention of the consensual nature of this Court's jurisdiction. The result would be chaotic and self-serving. It would bring about the end of the Optional Clause system.

8.62 The alleged customary international law obligations "rooted" and "enshrined" in Article VI of the NPT would likely give rise to consequential obligations for third States only where there has been a collective decision by the international community to that effect. In the present context, there exists no such collective decision specifically to enforce Article VI of the NPT. Therefore, allowing individual States a *locus standi* in the absence of a collective decision of the international community would lead to action of a highly subjective character, and contrary to the spirit of the UN Charter and the Statute of the Court. Therefore, the RMI cannot rely on an alleged customary international law obligation "rooted" and "enshrined" in Article VI of the NPT to bring the present proceedings.

---

[194] *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Judgment (Second Phase), *I.C.J. Reports 1970* p. 32, para 33.

[195] Ibid. p. 32, para 34.

[196] See Application, paras. 2, 36 and 54.

[197] See *I.C.J. Reports 1962*, p.425 (Separate Opinion of Judge Jessup); *I.C.J. Reports 1966*, p. 386 (Dissenting Opinion of Judge Jessup); *I.C.J. Reports 1966*, p. 252 (Dissenting Opinion of Judge Tanaka.).

8.63 Finally, as relied on by the RMI, there is nothing in Articles 42 or 48 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts which supports the RMI's position on standing.[198]

CHAPTER 3 THE RMI'S APPLICATION IS AN IMPERMISSIBLE ATTEMPT TO RE-OPEN THE QUESTION OF THE LEGALITY OF NUCLEAR WEAPONS AND TO OBTAIN WHAT WOULD, IN EFFECT, AMOUNT TO AN ADVISORY OPINION

8.64 The RMI's assertion that the "Application is not an attempt to re-open the question of the legality of nuclear weapons"[199] must be rejected as false and self-serving.

8.65 The initial request for an advisory opinion on the legality of nuclear weapons was submitted to the Court by the World Health Organisation on 3 September 1993. This request was rejected by the Court on the basis that the request did not relate to a question arising within the scope of the activities of that organisation as required by Article 96, paragraph 2, of the UN Charter. Another request was then submitted by the UN General Assembly, which was accepted by the Court and resulted in the Court's 1996 Advisory Opinion.

8.66 In its Advisory Opinion, the Court observed that it draws its competence in respect of advisory opinions from Article 65, paragraph 1, of the Statute of the Court, while Article 96, paragraph 1, of the UN Charter provides that "[t]he General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question."

8.67 Twenty-two countries participated in the 1995-1996 advisory proceedings relating to the General Assembly's request, including the RMI. Pakistan was not a participant.

8.68 Of note, oral statements made by the RMI before this Court in 1995 referred to the nuclear testing carried out by the U.S. in the Marshall Islands between 1946 and 1958. The RMI stated that "[c]ompensation for injuries and deaths due to the nuclear testing programme has been provided pursuant to international agreements," and referenced agreements entered into between the U.S. and the RMI (including the CFA).[200]

Section 1

The Statute of the Court does not provide a basis for revisiting or appealing from the Court's advisory opinions

8.69 It is undisputed that the Court's advisory opinions lack binding effect. Further, there is nothing in the Statute of the Court giving the Court jurisdiction "in the event of a legal question arising as to the meaning or scope of an Advisory Opinion. If such a matter should arise and the Court's interpretation of an Advisory Opinion is required, that can only be obtained through a new request for an Advisory Opinion."[201]

8.70 An advisory opinion rendered in the exercise of the Court's advisory jurisdiction cannot be appealed or revisited via contentious proceedings that primarily rely on the statements made, and conclusions reached, by the Court and individual Members of the Court in the earlier advisory proceedings. There is no mechanism for revision or interpretation of advisory

[198] Memorial. Para. 39.

[199] Application, para. 2.

[200] *Legality of the Threat or Use of Nuclear Weapons,* Oral Statements, ref: CR 1995/32, at p. 20.

[201] SHABTAI ROSENNE (WITH ASSISTANCE OF YAEL RONEN), THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920-2005, Vol. II, at 1001 (Martinus Nijhoff Publishers, 4rd ed., 2006).

opinions, let alone appeal, under the Statute of the Court, and certainly not in the manner attempted by the RMI in the present proceeding.

8.71 This Court has already exhaustively addressed the question of the legality of the threat or use of nuclear weapons in the exercise of its advisory jurisdiction, after hearing a large number of States and intergovernmental organisations, including the RMI.

8.72 As the Application filed in this case makes clear, the RMI is asking the Court to exercise its contentious jurisdiction over Pakistan in order to attract statements that the RMI acknowledges were not made by the Court's majority at the time of the issuance of the 1996 Advisory Opinion[202] or that amount to statements reflecting a prior conclusion by the Court that the RMI admits is "[l]argely based on its analysis of Article VI of the" NPT.[203] The conclusion is inescapable: the RMI is seeking to re-submit the question of the legality of nuclear weapons addressed in the 1996 Advisory Opinion through the Optional Clause and to obtain what would, in effect, amount to an advisory opinion. The RMI's prayer for declaratory relief is no more than a request for an advisory opinion. This is impermissible and, for this reason (amongst others), the RMI's Application is inadmissible and the Court should decline to entertain the RMI's claims as formulated in the Application.

CHAPTER 4 THE RMI'S APPLICATION IS INADMISSIBLE BECAUSE THE RMI HAS FAILED TO BRING INDISPENSABLE PARTIES BEFORE THIS COURT

Section 1

Adjudication of the RMI's claims would necessarily implicate the rights and obligations of other States

8.73 The RMI's Application includes the following statement:

> "the Marshall Islands has a particular awareness of the dire consequences of nuclear weapons. The Marshall Islands was the location of repeated nuclear testing from 1946 to 1958, during the time that the international community had placed it under the trusteeship of the United States ("U.S."). During those 12 years, 67 nuclear weapons of varying explosive power were detonated [by the U.S.] in the Marshall Islands at varying distances from human population."[204]

8.74 Under the terms of the CFA referred to above (see para. 2.16), the U.S. has full authority and responsibility for security and defence matters in or relating to the RMI.

8.75 For all practical purposes, the RMI acknowledges and understands that Pakistan is not a party to the NPT.[205] By seeking a judgment against Pakistan on the basis of alleged international customary law obligations "rooted" and "enshrined" in Article VI of the NPT, the RMI in fact is seeking to obtain a judgment for use against NWS that are party to the NPT. It is recalled that the RMI brought a "companion case" against the U.S. in the U.S. Federal District Court in California at the time of the filing of the Application.

8.76 Given the close connection between the RMI and the U.S. in the context of the use of nuclear weapons and nuclear testing and in connection with parallel proceedings before the U.S. courts,

[202] See Application, para. 35; Memorial, para. 34.
[203] Application, para. 1.
[204] Ibid., para. 8.
[205] Memorial, para. 58 ("Pakistan is not a party to that treaty.").

Pakistan considers the U.S. to be an indispensable party to this case. To achieve the RMI's objectives in bringing these claims - i.e., good faith negotiations leading to nuclear disarmament - the NWS are all necessary parties.

8.77 Furthermore, as the U.S. is in effective control of the RMI's national security, the U.S. has a legal interest in the outcome of this case. It follows that the U.S.'s legal interests would not just be affected by a decision in this case -- questions of U.S. sovereignty and national security would form "the very subject-matter" of the proceedings, like that of Albania in the *Monetary Gold* case. The conclusion is unavoidable: the Court cannot decide whether the obligations set out in Article VI of the NPT and/or alleged customary international law obligations "rooted" and "enshrined" in Article VI of the NPT have been violated, with consequences for third parties, unless other affected third States are a party to these proceedings.

8.78 The RMI's Application contravenes the principle of consent which bars the adjudication of the legal obligations of States parties under the NPT and other States without their agreement. Pakistan contends that the *Monetary Gold* principle is directly applicable to the case brought by the RMI, because the Court cannot decide this case without deciding whether the NWS that are party to the NPT are in breach of their obligations under Article VI of the NPT, which the RMI seeks to enforce against Pakistan under the guise of customary international law obligations.

8.79 It is true that the Court's jurisdiction does not always depend on the consent of every State whose interests may be affected by the decision. The *Monetary Gold* case recognised that there is a distinction to be drawn between legal interests which form "the very subject-matter of the decision" and legal interests which are likely to be no more than consequentially affected by the decision.[206]

8.80 A finding of the NPT parties' legal obligations under Article VI of the NPT and/or customary international law obligations as alleged by the RMI in its Application is a precondition for determining the RMI's claims against Pakistan. In the circumstances, Pakistan is simply the wrong party for the RMI to sue. The real cause of action is against the NWS that are party to the NPT. In the context of the RMI's claims, Pakistan's position is merely consequential.

Section 2

State responsibility: Pakistan is not the wrongdoing State

8.81 In relation to the RMI's claims, Pakistan is in the position of a third State. Pakistan is not the State against which the State alleged to have been injured may legitimately proceed. Pakistan is simply a third State which the RMI is using to assert its rights and interests against other States, especially the NWS that are party to the NPT.

8.82 If the true relationship between the RMI and Pakistan is not that of "injured" and "wrongdoer" State, respectively, but that of "injured" and third State, the RMI's case against Pakistan depends on establishing that a primary wrong has been committed by other third States and that the wrong has been the subject of a collective decision binding States, including Pakistan. In order to decide the RMI's claims, the Court cannot attribute any consequential responsibility to Pakistan, without first establishing that these other States are in breach of their obligations under Article VI of the NPT. These findings are the prerequisites for any finding of Pakistani responsibility.

8.83 Moreover, the RMI insists that its only interest in the present case is to achieve nuclear disarmament. Apart from the fact that the RMI lacks standing in relation to the claims as

[206] *Monetary gold removed from Rome in 1943 (Italy v France and ors)*, Judgement, *I.C.J. Reports 1954*, p. 19, at p. 32.

formulated in the Application the Court cannot determine that the alleged customary international law obligations "rooted" and "enshrined" in Article VI of the NPT have been violated in a case in which NWS that are party to the NPT, as well as other NWS not party to the NPT, are not a party to the proceedings before the Court.

Section 3

The Court cannot adjudicate the rights and obligations of third States without their consent or participation

8.84 As explained above, it is a well-established rule that the Court cannot determine the rights and obligations of States without their express consent or participation in the proceedings before the Court. This rule derives from the principle of the sovereign equality and independence of States, and lies at the root of this Court's jurisdiction in any contentious proceedings.[207] It is also closely related to the considerations that led Pakistan to include the Multilateral Treaty Reservation in the 1960 Declaration.

8.85 Pakistan contends that the interests of third States not before the Court would be as seriously damaged by the adjudication of the rights and obligations of a party before the Court that resulted in affecting such third States as by the adjudication of a derivative responsibility, as in the *Monetary Gold* case. The rights of those third States cannot be determined by the Court without their consent or participation in the present proceedings.

8.86 The participation of those third States is required for the full development of the facts to determine the rights and obligations of the Parties now before the Court. Further, it is very likely that facts which are relevant to the Application may not be in the possession or control of the Parties before the Court. The issues raised by the Application cannot be fully determined in these circumstances. In conclusion, the Court cannot make determinations on the basis of incomplete evidence.

Section 4

The injury claimed by the RMI could not be redressed by compelling the specific performance by only one State

8.87 Pakistan is neither "an interested party" nor a party "directly concerned" with obligations "rooted" and "enshrined" in Article VI of the NPT (whether portrayed as customary international law obligations or otherwise). Pakistan could not implement judgment for the RMI by fulfilling the responsibilities that would arise therefrom without the participation of all NWS. The RMI's objectives will not be achieved by an Order of the Court compelling Pakistan's specific performance of obligations "rooted" and "enshrined" in Article VI of the NPT. Pakistan's ability to "bring to an effective conclusion negotiations leading to nuclear disarmament" is extremely limited in the absence of cooperation from the NWS.

8.88 Pakistan submits that a judgment in the RMI's favour, and against Pakistan, would not benefit the RMI in any legally relevant way and would confer no direct benefit on the RMI. As set out in this Counter-Memorial, the judgment which the RMI seeks is in fact targeted at the NWS that are party to the NPT.

8.89 It is implicit in the RMI's case that it, in effect, requires Pakistan to accept the terms of the NPT, despite not being a party to the NPT.

[207] *Aegean Sea Continental Shelf,* Judgment, *I.C.J. Reports 1978*, p. 3, at p. 48 (Separate Opinion of Vice-President Nagendra Singh).

8.90 Given that not all NWS are participating in the proceedings before the Court, not all NWS would be bound by the judgment of the Court and would presumably continue possessing and developing nuclear weapons. Such a non-consensual approach is bound to create asymmetry of nuclear interests in the international system.

8.91 The relief requested by the RMI does not account for the participation of all of the nuclear and non-nuclear States that are parties to the NPT but are not parties to the present case. If the Court were to order the specific performance by Pakistan that has been requested by the RMI without also ordering other States necessary to enter into negotiations with, but which are outside the Court's jurisdiction, the Court essentially would be ordering Pakistan to do something which it cannot do on its own. The Court lacks the authority to command Pakistan to take action necessary to perform the NPT, a treaty between the RMI and other States, and it cannot compel the 190 States parties to the NPT to convene negotiations relating to nuclear disarmament. This certainly cannot be redressed through a judicial order that forces Pakistan, alone, to the negotiating table. By their very nature, negotiations are a multi-lateral phenomenon.[208] In the context of multilateral disarmament negotiations, all of the sovereign States involved have to balance their national security concerns against their desire for disarmament.

8.92 Even if the Court could compel Pakistan to initiate or participate in specific negotiations relating to cessation of the nuclear arms race and to nuclear disarmament, Pakistan cannot achieve the objectives of, and obligations set forth in, a multilateral treaty to which it is not a party through unilateral action. It is pure conjecture whether a Court order directing Pakistan to convene negotiations on nuclear disarmament would induce any NWS or non-nuclear-weapon State to attend such negotiations, let alone whether other States would participate on the premises the RMI demands. None of the States parties to the NPT is a party to the present proceeding and therefore none is bound by any resulting declaratory or injunctive relief.

Section 5

The question of other States' consent is of exclusively preliminary character

8.93 Pakistan submits that the Court should refrain from deciding the substance of the RMI's claims since the Application is clearly inadmissible.

8.94 What the Court must first decide is whether the absence of indispensable third States constitutes an impediment for the Court to accept the RMI's claims as admissible or not. This matter is of a genuinely preliminary character and must be decided at this stage of the proceedings. Hence, before any questions concerning the merits of the RMI's claims can be considered, the Court must deal with the question of the necessary presence of indispensable third States in these proceedings at the current stage.

CHAPTER 5 THE JUDICIAL PROCESS IS INHERENTLY INCAPABLE OF RESOLVING QUESTIONS OF NUCLEAR DISARMAMENT INVOLVING MULTIPLE STATES

Section 1

The situation alleged in the RMI's Application cannot be judicially managed or resolved

[208] In dismissing the RMI's claims against the U.S., the U.S. Federal District Court found that "[p]laintiff's request that such efforts [to pursue negotiations on effective measures relating to cessation of the nuclear arms race] be effectuated within one year is arbitrary and fails to take into consideration the activities and willingness of other nations which are also signatories to the [NPT]." *Republic of the Marshall Islands v. United States*, 2015 U.S. Dist. LEXIS 12785 (N.D. Cal. 2015), Order, at 11,

8.95 Pakistan submits that no manageable standards exist for resolving the RMI's claims as formulated in the Application. The Court could not adjudicate that Pakistan had breached its international law obligations without considering evidence in the hands of non-participating third States and rendering a policy determination about, *inter alia*, the appropriate balancing of national security and disarmament concerns.

8.96 The issues raised in the RMI's Application are complex and cannot be unilaterally and/or jointly solved by either Pakistan or the RMI. In the circumstances, Pakistan contends that the subject-matter of these proceedings makes the case unsuitable for adjudication by the Court.

8.97 In the view of Pakistan, the issues concerning nuclear disarmament raised by the RMI's Application are suitable for settlement only through multilateral negotiations at the appropriate disarmament fora.[209] Given the complex international geo-political issues and national security concerns of the NWS, Pakistan submits that the Court should defer the issues in dispute to appropriate multilateral fora. These issues cannot be resolved by adjudication in bilateral judicial proceedings between two States.[210] The primary issue in this case – the pursuit of negotiations in good faith on effective measures to arrive at comprehensive nuclear disarmament – depends on multiple complex factors which, in the absence of all the NWS, the Court, without their consent, has neither the ability nor the power to adjudicate. In the absence of the consent and participation of the aforementioned NWS, the Court cannot make any declarations concerning the RMI's claims against Pakistan, or direct any consequential action by Pakistan to achieve comprehensive nuclear disarmament.

8.98 As there are international political mechanisms in place to address the RMI's claims, this Court is not the appropriate forum for the resolution of the RMI's claims implicating multiple States. The underlying issues in this case concern the international and geo-political relations of many States, of which Pakistan is but one. In the absence of a collective and simultaneous decision taken by all the NWS, fulfilment of the alleged customary international law obligations "rooted" and "enshrined" in Article VI of the NPT cannot lead to nuclear disarmament. This was acknowledged by the Court in its 1996 Advisory Opinion, wherein it stated that "any realistic search for general and complete disarmament, especially nuclear disarmament, necessities the cooperation of all States."[211] These considerations further support Pakistan's contention that it is not appropriate for the Court to entertain the questions which the RMI asks the Court to adjudicate in a bilateral context.

Section 2

Granting the relief sought against Pakistan would, in the absence of NWS willing to negotiate, be devoid of practical legal effect

8.99 The effectiveness of any judgment of the Court does not depend solely on its binding nature under Article 94 of the UN Charter and Article 59 of the Statute of the Court. A judgment must also be capable of being executed by the parties in a manner that ensures that its purpose is achieved. A decision on a question of law can only guide the conduct of the parties if the parties have a clear and workable understanding of what practical measures are thereby required of them. In the vast majority of cases, those measures are both self-evident and inherent in the

[209] See Memorial, para. 34 (referring to "an issue … which has been on the agenda of the United Nations since its inception – the abolition of nuclear weapons.").

[210] Of note, in dismissing the RMI's claims against the U.S., the U.S. Federal District Court emphasised the multilateral nature of the NPT and observed that "[t]he Treaty does not create, and the Court may not enforce, a bilateral obligation between the United States and the Marshall Islands." *Republic of the Marshall Islands v. United States*, 2015 U.S. Dist. LEXIS 12785 (N.D. Cal. 2015), Order, at 9.

[211] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *I.C.J. Reports 1996*, p. 226, at p. 264, para.100.

judgment itself, for example, the release of persons held hostage (*United States Diplomatic and Consular Staff*) or the payment of a certain sum in damages or as reparation (*Corfu Channel* and *Ahmadou Sadio Diallo*). The more complex and uncertain the circumstances to which the judgment is directed, or the more critical the interests involved or the consequences of error, the greater the possibility of failure regardless of the good faith of the parties.

8.100 The Court has recognized that giving such practical guidance to the parties lies outside the proper scope of the judicial function.[212] Such guidance is, however, critical to the effective control of situations of armed conflict such as that alleged to exist in the *Nicaragua* case,[213] as well as in the present case.

8.101 The RMI's Application is seeking relief from the Court that involves and affects all the NWS; however, it must be noted that they have their own motivations that are beyond the control of any State. Granting to the RMI the relief sought against Pakistan would not (and could not) have any effect on the NWS which are not participating in the proceedings before the Court but whose presence is required in any negotiations toward nuclear disarmament. By seeking to portray the matter as one arising solely between the RMI and Pakistan, the RMI gives a seriously misleading impression concerning the true nature of nuclear disarmament and the extraordinary steps each of the NWS would need to take to fulfil the alleged international customary law obligations "rooted" and "enshrined" in Article VI of the NPT.

8.102 As provided in Article 59 of the Statute of the Court, any judgment of the Court is binding only upon the States parties to the case before it, and only in respect of that case. Third party States, whose interests could be affected by any judgment in these proceedings, would not be bound by the Court's judgment. Therefore, without the participation of all the NWS, the Court's intervention would have no material impact on the NWS which did not participate in the proceedings before the Court.

8.103 Pakistan submits that, in essence, the case which the RMI has brought before this Court is non-justiciable. In principle, a case is justiciable only if the jurisdiction of the Court has a basis in law and the merits of the case can be decided in accordance with law. A case is non-justiciable if, for any reason, it cannot be decided according to law. The line between justiciable and non-justiciable cases can be difficult to draw, but it is accepted nonetheless that such a line must be drawn.[214]

8.104 The present case is not a justiciable one because the resolution of the claims as formulated in the RMI's Application requires the participation of all States affected by the issues raised by the Application. In the absence of other States believed to be in possession of nuclear weapons, the Court is not in a position to make the factual findings which the RMI's claims would require; and the Court cannot, in the circumstances, make any real contribution to the resolution of the fundamental matters at the heart of the case.

8.105 It is essential for the proper discharge of the Court's judicial function that the judgments which it gives serve real objectives and are capable of practical legal effect. It is not a part of the judicial function to give decisions which are "devoid of object or purpose."[215] The Court would exceed its judicial function if it were to decide this case, as its decision could not bring about a

[212] *Haya de la Torre Case (Colombia v. Peru), Judgment*, *I.C.J. Reports 1951*, p. 71, para 79.

[213] See Derek Bowett, *United Nations Forces: A Legal Study of United Nations Practice* (1964) for a comprehensive exposition of the myriad factors involved.

[214] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.)*, *Merits, Judgment, I.C.J. Reports 1986*, p. 14, at p. 168 (Separate Opinion of Judge Lachs); p. 240 (Dissenting Opinion of Judge Oda).

[215] See *Western Sahara*, *I.C.J Reports 1975*, p. 37; *Northern Cameroons*, *I.C.J. Reports 1963*, p. 38.

resolution of the underlying issues around which the case could be said to centre. The exercise of contentious jurisdiction in this case would be an exercise in futility. The Court has in the past indicated that it would decline "to allow the continuance of proceedings which it knows are bound to be fruitless."[216]

8.106 The RMI in this case is asking the Court to indicate declaratory and injunctive relief which, if the RMI is successful, would in effect require Pakistan to fulfil Article VI of the NPT despite it being a non-party to the NPT. However, as explained above, such relief would be devoid of practical effect: it would neither bind the other States believed to be in possession of nuclear weapons nor improve the position of the people of the RMI or the international community at large.

8.107 Examination of the relief which the RMI currently seeks shows that it would be without practical object and would tend to promote, rather than diminish, international disagreement vis-à-vis nuclear disarmament. In the *Nuclear Test* case it was stated that "while judicial settlement may provide a path to international harmony in circumstances of conflict, it is none the less true that the needless continuance of litigation is an obstacle to such harmony."[217] Fulfilment of the obligations that the RMI is seeking to enforce in the present case can only be achieved by consensual participation and cooperation of all the States concerned.

8.108 As stated above, even with a judgment in its favour, the RMI could not achieve the desired result. This could only be achieved if all the NWS were parties to the present proceedings and would agree to engage in negotiations with Pakistan.

8.109 In the absence of all the NWS, the Court simply cannot give any judgment against Pakistan which would settle or help to settle the issue of nuclear disarmament; nor does it make sense for the Court to oblige Pakistan, a non-party to the NPT, to fulfil the alleged customary international law obligations "rooted" and "enshrined" in Article VI without other NWS States joining Pakistan to achieve the same result. For this reason alone, it would be contrary to judicial propriety for the Court to decide this case.

8.110 The Court's judgments must be capable of effective legal application for there to be a binding effect upon States addressed or affected by it. Thus, Judge Fitzmaurice stated in the *Northern Cameroons* case:

> "Evidently a judgment of the Court, even if not capable of effective legal application, could have other uses. It could afford a moral satisfaction. It could act as an assurance to the public opinion of one or other of the parties that something had been done or at least attempted. There might also be political uses to which it could be put. Are these objects of a kind which a judgment of the Court ought to serve? The answer must, I think, be in the negative, if they are the only objects which would be served - that is, if the judgment neither would or could have any effective sphere of legal application."[218]

8.111 A similar situation arose in the *Free Zones of Upper Savoy and the District of Gex* case, in which the Permanent Court of International Justice declined to give judgment on tariff exemptions, because no judgment on the matter could have taken effect without the subsequent approval of the parties before the Court. As a result, the Court said:

---

[216] *Nuclear Tests (Australia v France) (New Zealand v France)*, *I.C.J. Reports 1974*, p. 271.
[217] Ibid., p. 271.
[218] *Northern Cameroons (Cameroon v. United Kingdom)*, *Preliminary Objections, Judgment*, *I.C.J. Reports 1963*, p. 15, at p. 107 (Separate Opinion of Judge Sir Gerald Fitzmaurice).

> "After mature consideration, the Court maintains its opinion that it would be incompatible with the Statute, and with its position as a Court of Justice to give a judgment which would be dependent for its validity on the subsequent approval of the Parties."[219]

8.112 In the present case, the full force and effect of any judgment against Pakistan would depend on the subsequent approval of such a judgment by the other States believed to be in possession of nuclear weapons, but which are not participating in the current proceedings or otherwise before the Court.

8.113 The Court should, as a matter of judicial propriety, decline to decide this case on the ground that if Pakistan were to comply with a judgment against it, it would be compelled to fulfil obligations set out in the NPT notwithstanding the fact that (i) Pakistan, in the exercise of its sovereignty, decided not to sign and ratify the NPT; and (ii) the NWS likely would not engage with Pakistan in spite of Pakistan agreeing to voluntarily enforce Article VI of the NPT or acting in conformity with the order of specific performance that the RMI has requested.

Section 3

Disputes relating to national defence and security are non-justiciable by their very nature

8.114 As set out in Part 7 above, in the *Nuclear Tests* cases, Judges de Castro, Forster and Gros considered that the meaning of national defence (which would include nuclear testing) should be interpreted broadly.

8.115 The RMI's claims go to the very heart of Pakistan's sovereignty and amount to interference into Pakistan's domestic affairs, over which it has exclusive competence.

8.116 As Pakistan's nuclear programme is a matter of national defense and security for Pakistan, the RMI's claims as concerning Pakistan's nuclear programme are non-justiciable in that they contravene the UN Charter. As set out above, this instrument provides that "nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the *domestic jurisdiction of any state* or shall require the Members to submit such matters to settlement under the present Charter" (emphasis added). Consequently, the RMI's claims are inadmissible.

Section 4

Judgment for the RMI would deny Pakistan's ability to protect its long-asserted sovereign rights

8.117 Issuing the relief requested by the RMI would directly implicate Pakistan's power to make and execute treaties, Pakistan's authority over the conduct of foreign policy, and Pakistan's authority over national defence and security.

8.118 If the RMI's requested relief were granted, Pakistan would be deprived of the ability to protect and enjoy its sovereign rights and maintain its national security. In this regard, the artificiality of the RMI's case against Pakistan is manifest. If the RMI's claims were granted, Pakistan would effectively lose its sovereign ability to make decisions in respect of its treaty-making and its national security. This would run counter to the statements concerning the situation where the very survival of a State is at stake made by this Court in its 1996 Advisory Opinion.[220]

---

[219] *Free Zones of Upper Savoy and the District of Gex*, P.C.I.J., Series A/B, No.46, 1932, p. 161.

[220] See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, p. 226, at p. 266, para. 105 sub (2)(E).

CHAPTER 6 THIS COURT CANNOT GRANT THE RELIEF REQUESTED BY THE RMI BECAUSE IT HAS HELD THAT GOOD FAITH IS NOT IN ITSELF A SOURCE OF OBLIGATION

8.119 The relief requested by the RMI is centred around an alleged breach of a good faith obligation said to be owed by Pakistan to the RMI. The "Remedies" section of the Application refers to the principle of good faith as though it forms in itself a source of obligation the violation of which may give rise to declaratory relief and an order of specific performance.

8.120 The Court has held that that "the principle of good faith is not in itself a source of obligation where none would otherwise exist."[221] Notwithstanding this unequivocal statement, the RMI's Application and Memorial invoke this principle as an independent source of obligation that the RMI alleges has been violated by Pakistan and justifies an order of specific performance. Indeed, according to the RMI's Memorial,[222] "[i]ts essential contention is that each State has *locus standi* to seek to enforce the customary international law obligation on all others (and especially those, like Pakistan, possessing nuclear weapons) 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 "that the customary obligation to conduct negotiations is an obligation *erga omnes.*"

8.121 In this regard, the latest edition of *Oppenheim's International Law* notes:

> "the ICJ's emphasis on the principle of good faith being one of the basic principles governing the creation and performance of legal obligations but not in itself a source of obligation where none would otherwise exist (*Border and Transborder Armed Actions* Case, ICJ Rep (1988), p. 105). So the better statement probably is that the principle of good faith is 'not in itself a source of obligation where none would otherwise exist.'"[223]

8.122 In support of its good faith claims, the RMI refers to Article 2, paragraph 2, of the UN Charter.[224] However, the Multilateral Treaty Reservation included in Pakistan's Declaration shields Pakistan against claims arising under a multilateral treaty such as the UN Charter.

8.123 In any event, applying the good faith standard to Pakistan's disarmament negotiations would require the Court to make numerous policy judgments about what constitutes "the pursuit … of [multilateral disarmament] negotiations" among sovereign States, what constitutes a good faith effort to conclude "a convention on nuclear disarmament in all its aspects," and, conversely, what policy positions or negotiation strategies might demonstrate a lack of good faith on the part of Pakistan.

8.124 Determining whether Pakistan is currently in breach of its good faith obligations would require the Court to question the propriety of long-term negotiation strategies and choices that have already been made and may take time to bear fruit. Judicial intervention into these sensitive areas could have unanticipated consequences for any negotiations now and in the future.

8.125 For the reasons set out above, the Application is inadmissible.

---

[221] *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, *Judgment*, *I.C.J. Reports 1988*, p. 69, at p. 105, para 94.
[222] Memorial, para. 31.
[223] ROBERT JENNINGS AND ARTHUR WATTS, OPPENHEIM'S INTERNATIONAL LAW, (9th Edition, Harlow 1992), Vol. 1, at 38.
[224] See Application, para. 46.

9. PART 9 – ENTERTAINING THE RMI'S CLAIMS WOULD COMPROMISE THE SOUND ADMINISTRATION OF JUSTICE AND JUDICIAL PROPRIETY AND INTEGRITY

9.1 Even if the Court were to conclude, contrary to Pakistan's submission, that it has jurisdiction to entertain the RMI's claims and that the Application is admissible, the Court's jurisprudence makes it clear that in certain circumstances the exercise of jurisdiction should be declined. To do otherwise would compromise the administration of justice and the Court's judicial propriety and integrity.

9.2 In the *Northern Cameroons* case, the Court made the following observation:

> "It is the act of the Applicant which seises the Court but even if the Court, when seised, finds that it has jurisdiction, *the Court is not compelled in every case to exercise that jurisdiction*. There are inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore. There may thus be an incompatibility between the desires of an applicant, or, indeed, of both parties to a case, on the one hand, and on the other hand the duty of the Court to maintain its judicial character. *The Court itself*, and not the parties, *must be the guardian of the Court's judicial integrity*."[225] (Emphasis added)

9.3 The general principles of the administration of justice require any allegations set out by the applicant to be sufficiently well-founded so as not to fall short of a basic threshold of justiciability. Thus, the party seeking to establish a fact bears the burden of proving it. As one commentator has noted, "a party having the burden of proof must not only bring evidence in support of his allegations, but must also convince the Tribunal of their proof, lest they be disregarded for want, or insufficiency, of proof."[226]

9.4 It is a question of a preliminary character for the Court to ascertain whether the RMI's Application sets out the background facts and claims in sufficient detail and particularity as to provide Pakistan with enough information to understand and respond to such allegations, and for the Court to adjudicate upon them.

9.5 Pursuant to the Rules of Court:

(1) The applicant is obliged to set out and specify "the precise nature of the claim" (Article 38, paragraph 2); and

(2) The applicant's Memorial must particularise the allegations in sufficient detail to allow the respondent to understand the claim(s) being made and to address the allegations in its Counter-Memorial (Article 49, paragraph 1).

9.6 Moreover, according to the President's Order of 10 July 2014 issued in this case, "it is necessary for the Court to be informed of all the contentions and evidence on facts and law on which the Parties rely in the matters of its jurisdiction and the admissibility of the Application."[227]

9.7 Of note:

---

[225] *Northern Cameroons (Cameroon v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 15, at p. 29.

[226] BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS (Cambridge: Grotius Publications, 1987), pp. 329-331.

[227] *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. Pakistan), Order of 10 July 2014, I.C.J. Reports 2014*, p. 471, at 472.

(1) The RMI has made no specific allegations against Pakistan of wrongdoing or indeed actual or imminent harm either in the Application or on previous occasions;

(2) The RMI's case regarding alleged customary international law obligations "rooted" and "enshrined" in Article VI of the NPT is not made; it rests solely upon treaty obligations arising under a treaty to which Pakistan is not a party and various other non-binding sources;

9.8 In the circumstances, the Court must consider whether the case advanced by the RMI, in the absence of any argument or evidence to support the RMI's claims as formulated in the Application, is capable of sustaining the allegations levelled against Pakistan. Pakistan submits that it is not. On this basis, the RMI's case does not meet the most basic threshold test of justiciability and is, therefore, inadmissible.

10. PART 10 - SUBMISSIONS

10.1 The Government of the Islamic Republic of Pakistan respectfully submits that the Court should adjudge and declare, for each and all of the foregoing reasons, that the claims set forth in the RMI's Application of 24 April 2014 (1) are not within the jurisdiction of the Court and (2) are inadmissible.

1 December 2015

Moazzam Ahmad Khan
Co-Agent of the Islamic Republic of Pakistan before the International Court of Justice.

INTERNATIONAL COURT OF JUSTICE

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

(MARSHALL ISLANDS v PAKISTAN)

Exhibits to

COUNTER-MEMORIAL OF PAKISTAN

(JURISDICTION AND ADMISSIBILITY)

1 DECEMBER 2015

INTERNATIONAL COURT OF JUSTICE

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

(*MARSHALL ISLANDS V PAKISTAN*)

INDEX OF EXHIBITS TO COUNTER-MEMORIAL OF PAKISTAN

(JURISDICTION AND ADMISSIBILITY)

Exhibit Number	Name
1.	Statement by H.E. Mr. Muhammad Nawaz Sharif, Prime Minister of the Islamic Republic of Pakistan at the High-Level Meeting of the General Assembly on Nuclear Disarmament, New York (September 26,2013)
2.	Voting Record on UNGA Resolution 57/85 "Follow-up to the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons" (2002)
3.	Voting Record on UNGA Resolution 58/46 "Follow-up to the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons" (2003)
4.	Voting Record on UNGA Resolution 60/76 "Follow-up to the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons" (2005)
5.	Voting Record on UNGA Resolution 61/83 "Follow-up to the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons" (2006)
6.	Voting Record on UNGA Resolution 62/39 "Follow-up to the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons" (2007)

7.	Voting Record on UNGA Resolution 64/55 "Follow-up to the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons" (2009)
8.	Voting Record on UNGA Resolution 65/76 "Follow-up to the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons" (2010)
9.	Voting Record on UNGA Resolution 66/46 "Follow-up to the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons" (2011)
10.	Voting Record on UNGA Resolution 67/33 "Follow-up to the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons" (2012)
11.	*Republic of the Marshall Islands v. United States*, 2015 U.S. Dist. LEXIS 12785 (N.D. Cal. 2015), Order granting motion to dismiss.
12.	*Republic of the Marshall Islands v. United States*, 2015 U.S. Dist. LEXIS 12785 (N.D. Cal. 2015), Brief for the Defendants -Appellees
13.	Article 245 of the Constitution of Pakistan
14.	Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965 (Adopted by Resolution No 214, Board of Governors of the International Bank for Reconstruction and Development on 10 September 1964), 1 ICSID Rep. 23 (1993)
15.	C. Schreuer, "What is a Legal Dispute?" in I. Buffard et al. (eds), International Law between Universalism and Fragmentation, Festschrift in Honour of Gerhard Hafner (Leiden/Boston: Martinus Nijhoff Publishers, 2008)
16.	*Maffezini v. Spain*, Decision on Jurisdiction of 25 January 2000, 40 ILM 1129

EXHIBIT NUMBER 1

Statement BY H.E. Mr. Muhammad Nawaz Sharif, Prime Minister of the Islamic Republic of Pakistan at the High-Level Meeting of the General Assembly on Nuclear Disarmament, New York (September 26, 2013)

Printer Friendly

Statement by H.E. Mr. Muhammad Nawaz Sharif, Prime Minister of the Islamic Republic of Pakistan at the High-Level Meeting of the General Assembly on Nuclear Disarmament, New York (September 26,2013)

Mr. President,

Mr. Secretary General,

Excellencies,

Ladies and Gentlemen,

I thank the Non-Aligned Movement for its initiative to organize this extraordinary meeting.

Pakistan associates itself with the statement made by H.E. Dr. Hassan Rouhani, President of the Islamic Republic of Iran, on behalf of the Movement.

Today, global efforts to regulate reduce and prevent the spread of armaments, particularly nuclear weapons, are facing serious challenges.

Thirty five years ago, this august Assembly reached consensus on the mandate and machinery to pursue the disarmament agenda.

With the passage of time, regrettably this consensus has eroded; and the goals set have become elusive.

This meeting is therefore very timely for exploring common ground.

It provides us a unique platform to revive and restore our collective agreement; and in fact build a new consensus on disarmament and non-proliferation.

Mr. President,

Pakistan is committed to the goal of general and complete disarmament, which is global, non-discriminatory and verifiable.

Our approach towards nuclear disarmament is determined by the guiding principles of the First Special Session of the General Assembly on Disarmament, which upholds the right of each state to security and undiminished security at the lowest level of armaments and military force.

This means security for all; not security of a privileged few.

It was on my watch as Prime Minister in 1998 that Pakistan conducted nuclear tests.

I can tell this Assembly that this decision was taken after much thought and deliberation.

We were compelled to do so in response to the developments in our neighbourhood.

It was an existential choice we made for strategic stability in our region.

Our nuclear policy is guided by the principles of restraint and responsibility.

We do not want an arms race in South Asia, because consequences of conflict with nuclear weapons will be horrendous.

Pakistan would continue to adhere to its policy of the Credible Minimum Deterrence, without entering into an arms race.

At the same time, we are fully alive to the evolving security dynamics and would maintain deterrence to reinforce strategic stability in South Asia.

Earlier this month, I chaired a meeting of the National Command Authority (NCA) which reaffirmed our constructive strategic posture.

Regrettably, nuclear policies dictated by politics and profits in the recent past are altering the strategic balance in our region.

I take this opportunity to call upon the international community to reverse nuclear discrimination, with serious implications for Pakistan's national security and in fact the global non-proliferation regime.

On the proposed Fissile Material Treaty, our stance is determined by national security and strategic equilibrium in South Asia.

We advocate a comprehensive strategic restraint regime that establishes nuclear restraint, balance in conventional forces and a mechanism for conflict resolution.

Pakistan is an active, mainstream partner in the global non-proliferation efforts.

We have contributed constructively to the Nuclear Security Summit process, which is a laudable initiative.

I call for Pakistan's inclusion in all export control regimes, including Nuclear Suppliers Group.

As Prime Minister, I feel that energy deficit is one of the most serious crises facing Pakistan.

We require energy from all sources – conventional and alternate.

Pakistan qualifies to have full access to civil nuclear technology for peaceful purposes.

We have the expertise, manpower and infrastructure to produce civil nuclear energy.

As we revive our national economy, we look forward to international cooperation and assistance in nuclear energy under IAEA safeguards.

Mr. President,

The strains on the global non-proliferation regime have become more acute in recent years.

The pursuit of policies based on discrimination and double standards has damaged the integrity of treaties and norms of non-proliferation.

The multilateral disarmament machinery must be strengthened and revitalized.

For that we need collective political will.

There is a need to construct a new consensus on nuclear disarmament and non-proliferation.

Such a consensus should be based on equity, balance, restraint and cooperation among states.

I call on the General Assembly to convene a Special Session to build a new consensus on disarmament, non-proliferation and promotion of cooperation in the peaceful uses of nuclear energy.

Pakistan is ready to make its contribution to this global consensus-building exercise.

I thank you, Mr. President.

EXHIBIT NUMBER 2

Voting Record on UNGA Resolution 57/85 "Follow-up to the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons" (2002)

GENERAL ASSEMBLY

SER. NO: 432 — 57TH — DATE: 22 NOV 02

PLENARY MEETING:57 — TIME: 11:34 AM

ITEM: 66 — RECORDED VOTE — ADOPTED — VOTE: 26

SYMBOL: A/57/510

DR BB AS A WHOLE IN A/57/510 — RESOLUTION 57/85

YES: 117
NO: 30
ABSTAIN: 24

SUBJECT: FOLLOW-UP TO THE ADVISORY OPINION OF THE INTERNATIONAL COURT OF ...

Y AFGHANISTAN	Y DJIBOUTI	Y LIBYAN AJ	Y SAMOA
N ALBANIA	Y DOMINICA	A LIECHTENSTEIN	Y SAN MARINO
Y ALGERIA	Y DOMINICAN REP	N LITHUANIA	Y S TOME PRINCIPE
N ANDORRA	Y ECUADOR	N LUXEMBOURG	Y SAUDI ARABIA
Y ANGOLA	Y EGYPT	Y MADAGASCAR	Y SENEGAL
ANTIGUA-BARBUDA	Y EL SALVADOR	Y MALAWI	Y SEYCHELLES
Y ARGENTINA	EQUAT GUINEA	Y MALAYSIA	Y SIERRA LEONE
A ARMENIA	Y ERITREA	Y MALDIVES	Y SINGAPORE
A AUSTRALIA	A ESTONIA	Y MALI	N SLOVAKIA
A AUSTRIA	Y ETHIOPIA	Y MALTA	N SLOVENIA
A AZERBAIJAN	Y FIJI	MARSHALL ISLANDS	Y SOLOMON ISLANDS
Y BAHAMAS	A FINLAND	Y MAURITANIA	SOMALIA
Y BAHRAIN	N FRANCE	Y MAURITIUS	Y SOUTH AFRICA
Y BANGLADESH	Y GABON	Y MEXICO	N SPAIN
Y BARBADOS	Y GAMBIA	N MICRONESIA (FS)	Y SRI LANKA
A BELARUS	A GEORGIA	N MONACO	Y SUDAN
N BELGIUM	N GERMANY	Y MONGOLIA	SURINAME
Y BELIZE	Y GHANA	Y MOROCCO	Y SWAZILAND
BENIN	N GREECE	Y MOZAMBIQUE	Y SWEDEN
Y BHUTAN	Y GRENADA	Y MYANMAR	A SWITZERLAND
Y BOLIVIA	Y GUATEMALA	Y NAMIBIA	Y SYRIAN AR
A BOSNIA/HERZEG	Y GUINEA	Y NAURU	A TAJIKISTAN
Y BOTSWANA	GUINEA-BISSAU	Y NEPAL	Y THAILAND
Y BRAZIL	Y GUYANA	N NETHERLANDS	A TFYR MACEDONIA
Y BRUNEI DAR-SALAM	Y HAITI	Y NEW ZEALAND	TIMOR-LESTE
N BULGARIA	Y HONDURAS	Y NICARAGUA	Y TOGO
Y BURKINA FASO	N HUNGARY	NIGER	Y TONGA
Y BURUNDI	N ICELAND	Y NIGERIA	Y TRINIDAD-TOBAGO
Y CAMBODIA	Y INDIA	N NORWAY	Y TUNISIA
Y CAMEROON	Y INDONESIA	Y OMAN	N TURKEY
A CANADA	Y IRAN (ISL R)	Y PAKISTAN	A TURKMENISTAN
Y CAPE VERDE	IRAQ	PALAU	TUVALU
CENTRAL AFR REP	Y IRELAND	Y PANAMA	Y UGANDA
CHAD	N ISRAEL	Y PAPUA N GUINEA	Y UKRAINE
Y CHILE	N ITALY	Y PARAGUAY	Y UA EMIRATES
Y CHINA	Y JAMAICA	Y PERU	N UNITED KINGDOM
Y COLOMBIA	A JAPAN	Y PHILIPPINES	Y UR TANZANIA
Y COMOROS	Y JORDAN	N POLAND	N UNITED STATES
Y CONGO	A KAZAKHSTAN	N PORTUGAL	Y URUGUAY
Y COSTA RICA	Y KENYA	Y QATAR	A UZBEKISTAN
Y COTE D'IVOIRE	KIRIBATI	A REP OF KOREA	VANUATU
A CROATIA	Y KUWAIT	A REP OF MOLDOVA	Y VENEZUELA
Y CUBA	A KYRGYZSTAN	N ROMANIA	Y VIET NAM
A CYPRUS	Y LAO PDR	N RUSSIAN FED	Y YEMEN
N CZECH REPUBLIC	N LATVIA	Y RWANDA	A YUGOSLAVIA
Y DPR OF KOREA	Y LEBANON	ST KITTS-NEVIS	Y ZAMBIA
DEM REP OF CONGO	Y LESOTHO	Y SAINT LUCIA	ZIMBABWE
N DENMARK	LIBERIA	Y ST VINCENT-GREN	

EXHIBIT NUMBER 3

Voting Record on UNGA Resolution 58/46 "Follow-up to the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons"(2003)

GENERAL ASSEMBLY
58TH SESSION

SER. NO: 278 — DATE: 28 OCT 03

FIRST COMMITTEE — MEETING #17 — TIME: 10:20 AM

ITEM: 73(Y) — RECORDED VOTE — ADOPTED — VOTE: 2

SYMBOL: A/C.1/58/L.31*

AS A WHOLE — RESOLUTION L.31* AS A WHOLE

YES: 104
NO: 29
ABSTAIN: 20

SUBJECT: FOLLOW-UP TO THE ADV OPINION OF ICJON THE LEGALITY OF USE OF NUC WEAP

AFGHANISTAN	Y DJIBOUTI	Y LIBYAN AJ	Y SAMOA
N ALBANIA	DOMINICA	A LIECHTENSTEIN	Y SAN MARINO
Y ALGERIA	Y DOMINICAN REP	N LITHUANIA	SAO TOME PRINCIP
A ANDORRA	Y ECUADOR	N LUXEMBOURG	Y SAUDI ARABIA
Y ANGOLA	Y EGYPT	Y MADAGASCAR	Y SENEGAL
ANTIGUA-BARBUDA	Y EL SALVADOR	MALAWI	A SERBIAMONTENEGRO
Y ARGENTINA	EQUAT GUINEA	Y MALAYSIA	SEYCHELLES
A ARMENIA	Y ERITREA	Y MALDIVES	Y SIERRA LEONE
N AUSTRALIA	A ESTONIA	Y MALI	Y SINGAPORE
A AUSTRIA	Y ETHIOPIA	Y MALTA	N SLOVAKIA
A AZERBAIJAN	FIJI	MARSHALL ISLANDS	N SLOVENIA
Y BAHAMAS	A FINLAND	Y MAURITANIA	Y SOLOMON ISLANDS
BAHRAIN	N FRANCE	Y MAURITIUS	Y SOMALIA
Y BANGLADESH	GABON	Y MEXICO	Y SOUTH AFRICA
BARBADOS	GAMBIA	MICRONESIA (FS)	N SPAIN
A BELARUS	A GEORGIA	N MONACO	Y SRI LANKA
N BELGIUM	N GERMANY	MONGOLIA	Y SUDAN
Y BELIZE	GHANA	Y MOROCCO	Y SURINAME
Y BENIN	N GREECE	Y MOZAMBIQUE	SWAZILAND
Y BHUTAN	Y GRENADA	Y MYANMAR	Y SWEDEN
Y BOLIVIA	Y GUATEMALA	Y NAMIBIA	A SWITZERLAND
A BOSNIA/HERZEG	Y GUINEA	NAURU	Y SYRIAN AR
Y BOTSWANA	GUINEA-BISSAU	Y NEPAL	TAJIKISTAN
Y BRAZIL	Y GUYANA	N NETHERLANDS	Y THAILAND
Y BRUNEI DAR-SALAM	Y HAITI	Y NEW ZEALAND	A THEFYR MACEDONIA
N BULGARIA	HONDURAS	Y NICARAGUA	Y TIMOR-LESTE
Y BURKINA FASO	N HUNGARY	Y NIGER	Y TOGO
Y BURUNDI	N ICELAND	Y NIGERIA	Y TONGA
Y CAMBODIA	Y INDIA	N NORWAY	Y TRINIDAD-TOBAGO
Y CAMEROON	Y INDONESIA	Y OMAN	Y TUNISIA
A CANADA	Y IRAN (ISLAMIC R)	Y PAKISTAN	N TURKEY
Y CAPE VERDE	IRAQ	PALAU	TURKMENISTAN
CENTRAL AFR REP	Y IRELAND	Y PANAMA	TUVALU
CHAD	N ISRAEL	Y PAPUA N GUINEA	UGANDA
Y CHILE	N ITALY	Y PARAGUAY	Y UKRAINE
Y CHINA	Y JAMAICA	Y PERU	Y U A EMIRATES
Y COLOMBIA	A JAPAN	Y PHILIPPINES	N UNITED KINGDOM
COMOROS	Y JORDAN	N POLAND	Y U R TANZANIA
Y CONGO	A KAZAKHSTAN	N PORTUGAL	N UNITED STATES
Y COSTA RICA	KENYA	Y QATAR	Y URUGUAY
Y COTE D'IVOIRE	KIRIBATI	A REP OF KOREA	UZBEKISTAN
A CROATIA	Y KUWAIT	A REP OF MOLDOVA	VANUATU
Y CUBA	KYRGYZSTAN	N ROMANIA	Y VENEZUELA
A CYPRUS	Y LAO PDR	N RUSSIAN FED	Y VIET NAM
N CZECH REPUBLIC	N LATVIA	RWANDA	Y YEMEN
Y DEM PR OF KOREA	Y LEBANON	ST KITTS-NEVIS	Y ZAMBIA
Y DEM REP OF CONGO	Y LESOTHO	SAINT LUCIA	Y ZIMBABWE
N DENMARK	LIBERIA	Y ST VINCENT-GREN	

EXHIBIT NUMBER 4

Voting Record on UNGA Resolution 60/76 "Follow-up to the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons" (2005)

GENERAL ASSEMBLY

SER. NO: 761 — 60 — DATE: 8 DEC 05

PLENARY MEETING:61 — TIME: 12:56 PM

ITEM: 97 — RECORDED VOTE — ADOPTED — VOTE: 25

SYMBOL: A/60/463

DR XXII AS A WHOLE — RESOLUTION 60/76

YES: 126
NO: 29
ABSTAIN: 24

SUBJECT: FOLLOW-UP TO THE ADVISORY OPINION OF THE...

Y AFGHANISTAN	Y DJIBOUTI	Y LIBYAN AJ	Y SAMOA
N ALBANIA	Y DOMINICA	A LIECHTENSTEIN	Y SAN MARINO
Y ALGERIA	Y DOMINICAN REP	N LITHUANIA	Y S TOME PRINCIPE
A ANDORRA	Y ECUADOR	N LUXEMBOURG	Y SAUDI ARABIA
ANGOLA	Y EGYPT	Y MADAGASCAR	Y SENEGAL
Y ANTIGUA-BARBUDA	Y EL SALVADOR	Y MALAWI	A SERBIAMONTENEGRO
Y ARGENTINA	EQUAT GUINEA	Y MALAYSIA	SEYCHELLES
A ARMENIA	Y ERITREA	Y MALDIVES	Y SIERRA LEONE
A AUSTRALIA	A ESTONIA	Y MALI	Y SINGAPORE
A AUSTRIA	Y ETHIOPIA	Y MALTA	N SLOVAKIA
A AZERBAIJAN	Y FIJI	A MARSHALL ISLANDS	N SLOVENIA
Y BAHAMAS	A FINLAND	Y MAURITANIA	Y SOLOMON ISLANDS
Y BAHRAIN	N FRANCE	Y MAURITIUS	Y SOMALIA
Y BANGLADESH	Y GABON	Y MEXICO	Y SOUTH AFRICA
Y BARBADOS	GAMBIA	A MICRONESIA (FS)	N SPAIN
A BELARUS	N GEORGIA	N MONACO	Y SRI LANKA
N BELGIUM	Y GERMANY	Y MONGOLIA	Y SUDAN
Y BELIZE	Y GHANA	Y MOROCCO	Y SURINAME
BENIN	N GREECE	Y MOZAMBIQUE	SWAZILAND
Y BHUTAN	Y GRENADA	Y MYANMAR	Y SWEDEN
Y BOLIVIA	Y GUATEMALA	Y NAMIBIA	A SWITZERLAND
A BOSNIA/HERZEG	Y GUINEA	NAURU	Y SYRIAN AR
Y BOTSWANA	Y GUINEA-BISSAU	Y NEPAL	Y TAJIKISTAN
Y BRAZIL	Y GUYANA	N NETHERLANDS	Y THAILAND
Y BRUNEI DAR-SALAM	Y HAITI	Y NEW ZEALAND	A TFYR MACEDONIA
N BULGARIA	Y HONDURAS	Y NICARAGUA	Y TIMOR-LESTE
Y BURKINA FASO	N HUNGARY	Y NIGER	Y TOGO
Y BURUNDI	N ICELAND	Y NIGERIA	Y TONGA
Y CAMBODIA	Y INDIA	N NORWAY	Y TRINIDAD-TOBAGO
Y CAMEROON	Y INDONESIA	Y OMAN	Y TUNISIA
A CANADA	Y IRAN (ISL R)	Y PAKISTAN	N TURKEY
Y CAPE VERDE	Y IRAQ	N PALAU	Y TURKMENISTAN
Y CENTRAL AFR REP	Y IRELAND	Y PANAMA	Y TUVALU
CHAD	N ISRAEL	Y PAPUA N GUINEA	Y UGANDA
Y CHILE	N ITALY	Y PARAGUAY	Y UKRAINE
Y CHINA	Y JAMAICA	Y PERU	Y UA EMIRATES
Y COLOMBIA	A JAPAN	Y PHILIPPINES	N UNITED KINGDOM
COMOROS	Y JORDAN	N POLAND	Y UR TANZANIA
Y CONGO	A KAZAKHSTAN	N PORTUGAL	N UNITED STATES
Y COSTA RICA	Y KENYA	Y QATAR	Y URUGUAY
Y COTE D'IVOIRE	KIRIBATI	A REP OF KOREA	A UZBEKISTAN
A CROATIA	Y KUWAIT	A REP OF MOLDOVA	Y VANUATU
Y CUBA	A KYRGYZSTAN	N ROMANIA	Y VENEZUELA
A CYPRUS	Y LAO PDR	N RUSSIAN FED	Y VIET NAM
N CZECH REPUBLIC	N LATVIA	RWANDA	Y YEMEN
Y DPR OF KOREA	Y LEBANON	ST KITTS-NEVIS	Y ZAMBIA
Y DEM REP OF CONGO	Y LESOTHO	Y SAINT LUCIA	Y ZIMBABWE
N DENMARK	Y LIBERIA	Y ST VINCENT-GREN	

EXHIBIT NUMBER 5

Voting Record on UNGA Resolution 61/83 "Follow-up to the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons" (2006)

SER. NO: 773

GENERAL ASSEMBLY
61ST
PLENARY MEETING:67
RECORDED VOTE ADOPTED

DATE: 6 DEC 0
TIME: 4:39 PM
VOTE: 34

ITEM: 90
SYMBOL: A/61/394
DR XXV AS A WHOLE

RESOLUTION 61/83

YES: 125
NO: 27
ABSTAIN: 29

SUBJECT: FW UP ICJ ADVISORY OPINION SPACE

Y AFGHANISTAN
N ALBANIA
Y ALGERIA
A ANDORRA
Y ANGOLA
Y ANTIGUA-BARBUDA
Y ARGENTINA
A ARMENIA
A AUSTRALIA
Y AUSTRIA
A AZERBAIJAN
Y BAHAMAS
Y BAHRAIN
Y BANGLADESH
Y BARBADOS
A BELARUS
N BELGIUM
Y BELIZE
Y BENIN
Y BHUTAN
Y BOLIVIA
A BOSNIA/HERZEG
BOTSWANA
Y BRAZIL
Y BRUNEI DAR-SALAM
N BULGARIA
Y BURKINA FASO
Y BURUNDI
Y CAMBODIA
Y CAMEROON
A CANADA
Y CAPE VERDE
Y CENTRAL AFR REP
Y CHAD
Y CHILE
Y CHINA
Y COLOMBIA
Y COMOROS
Y CONGO
Y COSTA RICA
Y COTE D'IVOIRE
A CROATIA
Y CUBA
A CYPRUS
N CZECH REPUBLIC
Y DPR OF KOREA
DEM REP OF CONGO
N DENMARK
Y DJIBOUTI
Y DOMINICA
Y DOMINICAN REP
Y ECUADOR
Y EGYPT
Y EL SALVADOR
EQUAT GUINEA
Y ERITREA
A ESTONIA
Y ETHIOPIA
Y FIJI
A FINLAND
N FRANCE
Y GABON
GAMBIA
A GEORGIA
N GERMANY
Y GHANA
N GREECE
Y GRENADA
Y GUATEMALA
Y GUINEA
GUINEA-BISSAU
Y GUYANA
Y HAITI
Y HONDURAS
N HUNGARY
N ICELAND
Y INDIA
Y INDONESIA
Y IRAN (ISL R)
Y IRAQ
Y IRELAND
N ISRAEL
N ITALY
Y JAMAICA
A JAPAN
Y JORDAN
A KAZAKHSTAN
Y KENYA
KIRIBATI
Y KUWAIT
A KYRGYZSTAN
Y LAO PDR
N LATVIA
Y LEBANON
Y LESOTHO
Y LIBERIA
Y LIBYAN AJ
A LIECHTENSTEIN
N LITHUANIA
N LUXEMBOURG
MADAGASCAR
Y MALAWI
Y MALAYSIA
Y MALDIVES
Y MALI
Y MALTA
A MARSHALL ISLANDS
Y MAURITANIA
Y MAURITIUS
Y MEXICO
A MICRONESIA (FS)
A MOLDOVA
MONACO
Y MONGOLIA
A MONTENEGRO
Y MOROCCO
Y MOZAMBIQUE
Y MYANMAR
Y NAMIBIA
A NAURU
Y NEPAL
N NETHERLANDS
Y NEW ZEALAND
Y NICARAGUA
Y NIGER
Y NIGERIA
N NORWAY
Y OMAN
Y PAKISTAN
N PALAU
Y PANAMA
Y PAPUA N GUINEA
Y PARAGUAY
Y PERU
Y PHILIPPINES
N POLAND
N PORTUGAL
Y QATAR
A REP OF KOREA
A ROMANIA
N RUSSIAN FED
Y RWANDA
Y ST KITTS-NEVIS
Y SAINT LUCIA
Y ST VINCENT-GREN
Y SAMOA
Y SAN MARINO
Y S TOME PRINCIPE
Y SAUDI ARABIA
Y SENEGAL
A SERBIA
SEYCHELLES
Y SIERRA LEONE
Y SINGAPORE
N SLOVAKIA
N SLOVENIA
Y SOLOMON ISLANDS
SOMALIA
Y SOUTH AFRICA
N SPAIN
Y SRI LANKA
Y SUDAN
Y SURINAME
Y SWAZILAND
Y SWEDEN
A SWITZERLAND
Y SYRIAN AR
A TAJIKISTAN
Y THAILAND
A TFYR MACEDONIA
Y TIMOR-LESTE
Y TOGO
Y TONGA
Y TRINIDAD-TOBAGO
Y TUNISIA
N TURKEY
Y TURKMENISTAN
TUVALU
Y UGANDA
A UKRAINE
Y UA EMIRATES
N UNITED KINGDOM
Y UR TANZANIA
N UNITED STATES
Y URUGUAY
A UZBEKISTAN
Y VANUATU
Y VENEZUELA
Y VIET NAM
Y YEMEN
Y ZAMBIA
Y ZIMBABWE

EXHIBIT NUMBER 6

Voting Record on UNGA Resolution 62/39 "Follow-up to the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons" (2007)

SER. NO: 838

GENERAL ASSEMBLY
62ND
PLENARY MEETING:61

DATE: 5 DEC 07
TIME: 4:18 PM

ITEM: 98 (W)
SYMBOL: A/62/391
DR XVIII

RECORDED VOTE ADOPTED

RESOLUTION 62/39

VOTE: 21

YES: 127
NO: 27
ABSTAIN: 27

SUBJECT: FW-UP TO THE ADVISORY OPINION OF THE ICJ ON THE LEGALITY...

Y AFGHANISTAN	Y DJIBOUTI	Y LIBYAN AJ	Y ST VINCENT-GREN
N ALBANIA	Y DOMINICA	A LIECHTENSTEIN	Y SAMOA
Y ALGERIA	Y DOMINICAN REP	N LITHUANIA	Y SAN MARINO
A ANDORRA	Y ECUADOR	N LUXEMBOURG	Y S TOME PRINCIPE
ANGOLA	Y EGYPT	Y MADAGASCAR	Y SAUDI ARABIA
Y ANTIGUA-BARBUDA	Y EL SALVADOR	Y MALAWI	Y SENEGAL
Y ARGENTINA	Y EQUAT GUINEA	Y MALAYSIA	A SERBIA
A ARMENIA	Y ERITREA	Y MALDIVES	SEYCHELLES
A AUSTRALIA	A ESTONIA	Y MALI	Y SIERRA LEONE
Y AUSTRIA	Y ETHIOPIA	Y MALTA	Y SINGAPORE
A AZERBAIJAN	Y FIJI	A MARSHALL ISLANDS	N SLOVAKIA
Y BAHAMAS	A FINLAND	Y MAURITANIA	N SLOVENIA
Y BAHRAIN	N FRANCE	Y MAURITIUS	Y SOLOMON ISLANDS
Y BANGLADESH	Y GABON	Y MEXICO	Y SOMALIA
Y BARBADOS	Y GAMBIA	A MICRONESIA (FS)	Y SOUTH AFRICA
A BELARUS	N GEORGIA	A MOLDOVA	N SPAIN
N BELGIUM	N GERMANY	MONACO	Y SRI LANKA
Y BELIZE	Y GHANA	Y MONGOLIA	Y SUDAN
Y BENIN	N GREECE	A MONTENEGRO	Y SURINAME
Y BHUTAN	Y GRENADA	Y MOROCCO	Y SWAZILAND
Y BOLIVIA	Y GUATEMALA	Y MOZAMBIQUE	Y SWEDEN
A BOSNIA/HERZEG	Y GUINEA	Y MYANMAR	A SWITZERLAND
Y BOTSWANA	Y GUINEA-BISSAU	Y NAMIBIA	Y SYRIAN AR
Y BRAZIL	Y GUYANA	NAURU	A TAJIKISTAN
Y BRUNEI DAR-SALAM	Y HAITI	Y NEPAL	Y THAILAND
Y BULGARIA	Y HONDURAS	N NETHERLANDS	A TFYR MACEDONIA
Y BURKINA FASO	N HUNGARY	Y NEW ZEALAND	TIMOR-LESTE
Y BURUNDI	N ICELAND	Y NICARAGUA	Y TOGO
Y CAMBODIA	Y INDIA	Y NIGER	Y TONGA
Y CAMEROON	Y INDONESIA	Y NIGERIA	Y TRINIDAD-TOBAGO
A CANADA	Y IRAN (ISL R)	N NORWAY	Y TUNISIA
Y CAPE VERDE	Y IRAQ	Y OMAN	N TURKEY
Y CENTRAL AFR REP	Y IRELAND	Y PAKISTAN	Y TURKMENISTAN
CHAD	N ISRAEL	N PALAU	TUVALU
Y CHILE	N ITALY	Y PANAMA	UGANDA
Y CHINA	Y JAMAICA	Y PAPUA N GUINEA	A UKRAINE
Y COLOMBIA	A JAPAN	Y PARAGUAY	Y UA EMIRATES
Y COMOROS	Y JORDAN	Y PERU	N UNITED KINGDOM
Y CONGO	A KAZAKHSTAN	Y PHILIPPINES	Y UR TANZANIA
Y COSTA RICA	Y KENYA	N POLAND	N UNITED STATES
Y COTE D'IVOIRE	KIRIBATI	N PORTUGAL	Y URUGUAY
A CROATIA	Y KUWAIT	Y QATAR	A UZBEKISTAN
Y CUBA	A KYRGYZSTAN	A REP OF KOREA	VANUATU
A CYPRUS	Y LAO PDR	A ROMANIA	Y VENEZUELA
N CZECH REPUBLIC	N LATVIA	N RUSSIAN FED	Y VIET NAM
Y DPR OF KOREA	Y LEBANON	Y RWANDA	Y YEMEN
DEM REP OF CONGO	Y LESOTHO	Y ST KITTS-NEVIS	Y ZAMBIA
N DENMARK	Y LIBERIA	Y SAINT LUCIA	Y ZIMBABWE

EXHIBIT NUMBER 7

Voting Record on UNGA Resolution 64/55 "Follow-up to the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons" (2009)

GENERAL ASSEMBLY

SER. NO: 138 — 64TH — DATE: 2 DEC 09

PLENARY MEETING:55 — TIME: 4:50 PM

ITEM: 96 — RECORDED VOTE — ADOPTED — VOTE: 27

SYMBOL: A/64/391

DR XXVII — RESOLUTION 64/55

YES: 124
NO: 31
ABSTAIN: 21

SUBJECT: FOLLOW UP TO THE ADVISORY OPINION OF ICJ

Y AFGHANISTAN	Y DJIBOUTI	Y LIBYAN AJ	Y ST VINCENT-GREN
N ALBANIA	Y DOMINICA	A LIECHTENSTEIN	Y SAMOA
Y ALGERIA	Y DOMINICAN REP	N LITHUANIA	Y SAN MARINO
A ANDORRA	Y ECUADOR	N LUXEMBOURG	S TOME PRINCIPE
Y ANGOLA	Y EGYPT	Y MADAGASCAR	Y SAUDI ARABIA
Y ANTIGUA-BARBUDA	Y EL SALVADOR	Y MALAWI	Y SENEGAL
Y ARGENTINA	Y EQUAT GUINEA	Y MALAYSIA	Y SERBIA
A ARMENIA	Y ERITREA	Y MALDIVES	SEYCHELLES
A AUSTRALIA	N ESTONIA	Y MALI	SIERRA LEONE
Y AUSTRIA	ETHIOPIA	Y MALTA	Y SINGAPORE
A AZERBAIJAN	Y FIJI	A MARSHALL ISLANDS	N SLOVAKIA
Y BAHAMAS	A FINLAND	Y MAURITANIA	N SLOVENIA
Y BAHRAIN	N FRANCE	Y MAURITIUS	Y SOLOMON ISLANDS
Y BANGLADESH	GABON	Y MEXICO	Y SOMALIA
Y BARBADOS	Y GAMBIA	A MICRONESIA (FS)	Y SOUTH AFRICA
A BELARUS	N GEORGIA	MONACO	N SPAIN
N BELGIUM	N GERMANY	Y MONGOLIA	Y SRI LANKA
Y BELIZE	Y GHANA	N MONTENEGRO	Y SUDAN
Y BENIN	N GREECE	Y MOROCCO	Y SURINAME
Y BHUTAN	Y GRENADA	Y MOZAMBIQUE	Y SWAZILAND
Y BOLIVIA	Y GUATEMALA	Y MYANMAR	Y SWEDEN
Y BOSNIA/HERZEG	Y GUINEA	Y NAMIBIA	Y SWITZERLAND
Y BOTSWANA	Y GUINEA-BISSAU	NAURU	Y SYRIAN AR
Y BRAZIL	Y GUYANA	Y NEPAL	A TAJIKISTAN
Y BRUNEI DAR-SALAM	Y HAITI	N NETHERLANDS	Y THAILAND
N BULGARIA	Y HONDURAS	Y NEW ZEALAND	N TFYR MACEDONIA
Y BURKINA FASO	N HUNGARY	Y NICARAGUA	TIMOR-LESTE
Y BURUNDI	N ICELAND	Y NIGER	Y TOGO
Y CAMBODIA	Y INDIA	Y NIGERIA	TONGA
Y CAMEROON	Y INDONESIA	N NORWAY	Y TRINIDAD-TOBAGO
A CANADA	Y IRAN (ISL R)	Y OMAN	Y TUNISIA
Y CAPE VERDE	Y IRAQ	Y PAKISTAN	N TURKEY
CENTRAL AFR REP	Y IRELAND	N PALAU	Y TURKMENISTAN
CHAD	N ISRAEL	Y PANAMA	TUVALU
Y CHILE	N ITALY	Y PAPUA N GUINEA	Y UGANDA
Y CHINA	Y JAMAICA	Y PARAGUAY	A UKRAINE
Y COLOMBIA	A JAPAN	Y PERU	Y UA EMIRATES
COMOROS	Y JORDAN	Y PHILIPPINES	N UNITED KINGDOM
Y CONGO	A KAZAKHSTAN	N POLAND	Y UR TANZANIA
Y COSTA RICA	Y KENYA	N PORTUGAL	N UNITED STATES
Y COTE D'IVOIRE	KIRIBATI	Y QATAR	Y URUGUAY
A CROATIA	Y KUWAIT	A REP OF KOREA	A UZBEKISTAN
Y CUBA	A KYRGYZSTAN	A REP OF MOLDOVA	VANUATU
A CYPRUS	Y LAO PDR	A ROMANIA	Y VENEZUELA
N CZECH REPUBLIC	N LATVIA	N RUSSIAN FED	Y VIET NAM
Y DPR OF KOREA	Y LEBANON	RWANDA	Y YEMEN
Y DEM REP OF CONGO	Y LESOTHO	Y ST KITTS-NEVIS	Y ZAMBIA
N DENMARK	Y LIBERIA	Y SAINT LUCIA	Y ZIMBABWE

□

EXHIBIT NUMBER 8

Voting Record on UNGA Resolution 65/76 "Follow-up to the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons" (2010)

GENERAL ASSEMBLY

SER. NO: 237 — 65TH — DATE: 8 DEC 10

PLENARY MEETING:60 — TIME: 4:37 PM

ITEM: 97 — RECORDED VOTE — ADOPTED — VOTE: 33

SYMBOL: A/65/410

DRAFT RESOLUTION XXXII — RESOLUTION 65/76

YES: 133
NO: 28
ABSTAIN: 23

SUBJECT: FOLLOW-UP TO THE ADVISORY...

Y AFGHANISTAN	Y DJIBOUTI	Y LIBYAN AJ	Y ST VINCENT-GREN
N ALBANIA	DOMINICA	A LIECHTENSTEIN	Y SAMOA
Y ALGERIA	Y DOMINICAN REP	N LITHUANIA	Y SAN MARINO
A ANDORRA	Y ECUADOR	N LUXEMBOURG	Y S TOME PRINCIPE
Y ANGOLA	Y EGYPT	Y MADAGASCAR	Y SAUDI ARABIA
Y ANTIGUA-BARBUDA	Y EL SALVADOR	Y MALAWI	Y SENEGAL
Y ARGENTINA	EQUAT GUINEA	Y MALAYSIA	Y SERBIA
A ARMENIA	Y ERITREA	Y MALDIVES	Y SEYCHELLES
A AUSTRALIA	N ESTONIA	Y MALI	Y SIERRA LEONE
Y AUSTRIA	Y ETHIOPIA	Y MALTA	Y SINGAPORE
A AZERBAIJAN	Y FIJI	A MARSHALL ISLANDS	N SLOVAKIA
Y BAHAMAS	A FINLAND	Y MAURITANIA	N SLOVENIA
Y BAHRAIN	N FRANCE	Y MAURITIUS	Y SOLOMON ISLANDS
Y BANGLADESH	Y GABON	Y MEXICO	Y SOMALIA
Y BARBADOS	Y GAMBIA	A MICRONESIA (FS)	Y SOUTH AFRICA
A BELARUS	N GEORGIA	MONACO	N SPAIN
N BELGIUM	N GERMANY	Y MONGOLIA	Y SRI LANKA
Y BELIZE	Y GHANA	N MONTENEGRO	Y SUDAN
A BENIN	N GREECE	Y MOROCCO	Y SURINAME
Y BHUTAN	Y GRENADA	Y MOZAMBIQUE	Y SWAZILAND
Y BOLIVIA	Y GUATEMALA	Y MYANMAR	Y SWEDEN
Y BOSNIA/HERZEG	Y GUINEA	Y NAMIBIA	Y SWITZERLAND
Y BOTSWANA	Y GUINEA-BISSAU	NAURU	Y SYRIAN AR
Y BRAZIL	Y GUYANA	Y NEPAL	Y TAJIKISTAN
Y BRUNEI DAR-SALAM	Y HAITI	N NETHERLANDS	Y THAILAND
N BULGARIA	Y HONDURAS	Y NEW ZEALAND	A TFYR MACEDONIA
Y BURKINA FASO	N HUNGARY	Y NICARAGUA	Y TIMOR-LESTE
BURUNDI	A ICELAND	Y NIGER	Y TOGO
Y CAMBODIA	Y INDIA	Y NIGERIA	Y TONGA
Y CAMEROON	Y INDONESIA	A NORWAY	Y TRINIDAD-TOBAGO
A CANADA	Y IRAN (ISL R)	Y OMAN	Y TUNISIA
Y CAPE VERDE	Y IRAQ	Y PAKISTAN	N TURKEY
Y CENTRAL AFR REP	Y IRELAND	N PALAU	Y TURKMENISTAN
CHAD	N ISRAEL	Y PANAMA	Y TUVALU
Y CHILE	N ITALY	Y PAPUA N GUINEA	UGANDA
Y CHINA	Y JAMAICA	Y PARAGUAY	A UKRAINE
Y COLOMBIA	A JAPAN	Y PERU	Y UA EMIRATES
Y COMOROS	Y JORDAN	Y PHILIPPINES	N UNITED KINGDOM
Y CONGO	Y KAZAKHSTAN	N POLAND	Y UR TANZANIA
Y COSTA RICA	Y KENYA	N PORTUGAL	N UNITED STATES
Y COTE D'IVOIRE	KIRIBATI	Y QATAR	Y URUGUAY
A CROATIA	Y KUWAIT	A REP OF KOREA	A UZBEKISTAN
Y CUBA	A KYRGYZSTAN	A REP OF MOLDOVA	Y VANUATU
A CYPRUS	Y LAO PDR	A ROMANIA	Y VENEZUELA
N CZECH REPUBLIC	N LATVIA	N RUSSIAN FED	Y VIET NAM
Y DPR OF KOREA	Y LEBANON	Y RWANDA	Y YEMEN
Y DEM REP OF CONGO	Y LESOTHO	Y ST KITTS-NEVIS	Y ZAMBIA
N DENMARK	Y LIBERIA	Y SAINT LUCIA	Y ZIMBABWE

□

EXHIBIT NUMBER 9

Voting Record on UNGA Resolution 66/46 "Follow-up to the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons" (2011)

SER. NO: 328

GENERAL ASSEMBLY
66TH
PLENARY MEETING:71
RECORDED VOTE ADOPTED

DATE: 2 DEC 11
TIME: 11:30 AM
VOTE: 33

ITEM: 98
SYMBOL: A/66/412
DRAFT RESOLUTION XIX

RESOLUTION 66/46

YES: 130
NO: 26
ABSTAIN: 23

SUBJECT: FOLLOW-UP TO THE ADVISORY OPINION..

Y AFGHANISTAN
N ALBANIA
Y ALGERIA
A ANDORRA
Y ANGOLA
Y ANTIGUA-BARBUDA
Y ARGENTINA
A ARMENIA
A AUSTRALIA
Y AUSTRIA
Y AZERBAIJAN
Y BAHAMAS
Y BAHRAIN
Y BANGLADESH
Y BARBADOS
A BELARUS
N BELGIUM
Y BELIZE
Y BENIN
Y BHUTAN
Y BOLIVIA
Y BOSNIA/HERZEG
Y BOTSWANA
Y BRAZIL
Y BRUNEI DAR-SALAM
N BULGARIA
Y BURKINA FASO
BURUNDI
Y CAMBODIA
CAMEROON
A CANADA
Y CAPE VERDE
CENTRAL AFR REP
Y CHAD
Y CHILE
Y CHINA
Y COLOMBIA
Y COMOROS
Y CONGO
Y COSTA RICA
Y COTE D'IVOIRE
A CROATIA
Y CUBA
A CYPRUS
N CZECH REPUBLIC
Y DPR OF KOREA
DEM REP OF CONGO
N DENMARK
Y DJIBOUTI
DOMINICA
Y DOMINICAN REP
Y ECUADOR
Y EGYPT
Y EL SALVADOR
EQUAT GUINEA
Y ERITREA
N ESTONIA
Y ETHIOPIA
Y FIJI
A FINLAND
N FRANCE
GABON
GAMBIA
A GEORGIA
N GERMANY
Y GHANA
N GREECE
Y GRENADA
Y GUATEMALA
Y GUINEA
Y GUINEA-BISSAU
Y GUYANA
Y HAITI
Y HONDURAS
N HUNGARY
A ICELAND
Y INDIA
Y INDONESIA
Y IRAN (ISL R)
Y IRAQ
Y IRELAND
N ISRAEL
N ITALY
Y JAMAICA
A JAPAN
Y JORDAN
Y KAZAKHSTAN
Y KENYA
KIRIBATI
Y KUWAIT
A KYRGYZSTAN
Y LAO PDR
N LATVIA
Y LEBANON
Y LESOTHO
Y LIBERIA
Y LIBYA
A LIECHTENSTEIN
N LITHUANIA
N LUXEMBOURG
Y MADAGASCAR
Y MALAWI
Y MALAYSIA
Y MALDIVES
Y MALI
Y MALTA
A MARSHALL ISLANDS
Y MAURITANIA
Y MAURITIUS
Y MEXICO
A MICRONESIA (FS)
MONACO
Y MONGOLIA
A MONTENEGRO
Y MOROCCO
Y MOZAMBIQUE
Y MYANMAR
Y NAMIBIA
NAURU
Y NEPAL
N NETHERLANDS
Y NEW ZEALAND
Y NICARAGUA
Y NIGER
Y NIGERIA
A NORWAY
Y OMAN
Y PAKISTAN
N PALAU
Y PANAMA
Y PAPUA N GUINEA
Y PARAGUAY
Y PERU
Y PHILIPPINES
N POLAND
N PORTUGAL
Y QATAR
A REP OF KOREA
A REP OF MOLDOVA
A ROMANIA
N RUSSIAN FED
RWANDA
Y ST KITTS-NEVIS
Y SAINT LUCIA
Y ST VINCENT-GREN
Y SAMOA
Y SAN MARINO
Y S TOME PRINCIPE
Y SAUDI ARABIA
Y SENEGAL
Y SERBIA
Y SEYCHELLES
Y SIERRA LEONE
Y SINGAPORE
N SLOVAKIA
N SLOVENIA
Y SOLOMON ISLANDS
SOMALIA
Y SOUTH AFRICA
SOUTH SUDAN
N SPAIN
Y SRI LANKA
Y SUDAN
Y SURINAME
Y SWAZILAND
Y SWEDEN
Y SWITZERLAND
Y SYRIAN AR
A TAJIKISTAN
Y THAILAND
A TFYR MACEDONIA
Y TIMOR-LESTE
Y TOGO
Y TONGA
Y TRINIDAD-TOBAGO
Y TUNISIA
N TURKEY
Y TURKMENISTAN
Y TUVALU
Y UGANDA
Y UKRAINE
Y UA EMIRATES
N UNITED KINGDOM
Y UR TANZANIA
N UNITED STATES
Y URUGUAY
A UZBEKISTAN
Y VANUATU
Y VENEZUELA
Y VIET NAM
Y YEMEN
Y ZAMBIA
Y ZIMBABWE

□

EXHIBIT NUMBER 10

Voting Record on UNGA Resolution 67/33 "Follow-up to the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons" (2012)

First CTTEE 7 Nov. 2012

Vote Name: **A/C.1/67/L.9**

Subject: **Follow-up to the advisory opinion of the ICJ on the Legality of the Threat or Use of NWs (Item 94 aa)**

Item#: 94 aa
Vote#: 1

YES	NO	ABSTAIN
123	~~23~~ 24	~~25~~ 24

Date - Time: **07 November 2012 - 10:40 AM**

Y AFGHANISTAN
A ALBANIA
Y ALGERIA
A ANDORRA
Y ANGOLA
Y ANTIGUA-BARBUDA
Y ARGENTINA
A ARMENIA
A AUSTRALIA
Y AUSTRIA
Y AZERBAIJAN
Y BAHAMAS
Y BAHRAIN
Y BANGLADESH
Y BARBADOS
A BELARUS
N BELGIUM
Y BELIZE
Y BENIN
Y BHUTAN
Y BOLIVIA
Y BOSNIA-HERZEGOV
Y BOTSWANA
Y BRAZIL
Y BRUNEI DAR SAL
N BULGARIA
Y BURKINA FASO
Y BURUNDI
Y CAMBODIA
CAMEROON
A CANADA
CAPE VERDE
CENTRAL AFR REP
CHAD
Y CHILE
Y CHINA
Y COLOMBIA
Y COMOROS
Y CONGO
Y COSTA RICA
Y COTE D'IVOIRE
A CROATIA
Y CUBA
A CYPRUS
N CZECH REPUBLIC
Y DEM PR OF KOR
DEM REP CONGO
N DENMARK
Y DJIBOUTI
DOMINICA
Y DOMINICAN REPUB
Y ECUADOR
Y EGYPT
Y EL SALVADOR
EQUAT GUINEA
Y ERITREA
N ESTONIA
Y ETHIOPIA
Y FIJI
A FINLAND
N FRANCE
Y GABON
GAMBIA
GEORGIA
N GERMANY
Y GHANA
N GREECE
Y GRENADA
Y GUATEMALA
Y GUINEA
GUINEA-BISSAU
Y GUYANA
Y HAITI
Y HONDURAS
N HUNGARY
A ICELAND
Y INDIA
Y INDONESIA
Y IRAN (ISLAM REP
Y IRAQ
Y IRELAND
N ISRAEL
N ITALY
Y JAMAICA
A JAPAN
Y JORDAN
Y KAZAKHSTAN
Y KENYA
KIRIBATI
Y KUWAIT
A KYRGYZSTAN
Y LAO PDR
N LATVIA
Y LEBANON
Y LESOTHO
Y LIBERIA
Y LIBYA
A LIECHTENSTEIN
N LITHUANIA
N LUXEMBOURG
Y MADAGASCAR
MALAWI
Y MALAYSIA
Y MALDIVES
Y MALI
Y MALTA
A MARSHALL ISLAND
Y MAURITANIA
Y MAURITIUS
Y MEXICO
A MICRONESIA (FS)
MONACO
Y MONGOLIA
A MONTENEGRO
Y MOROCCO
MOZAMBIQUE
Y MYANMAR
Y NAMIBIA
NAURU
Y NEPAL
N NETHERLANDS
Y NEW ZEALAND
Y NICARAGUA
Y NIGER
Y NIGERIA
A NORWAY
Y OMAN
Y PAKISTAN
PALAU
Y PANAMA
Y PAPUA N GUINEA
Y PARAGUAY
Y PERU
Y PHILIPPINES
N POLAND
N PORTUGAL
Y QATAR
A REP OF KOREA
A REP OF MOLDOVA
A ROMANIA
N RUSSIAN FED
RWANDA
SAINT KITTS-NEV
Y SAINT LUCIA
Y SAINT VINCENT-G
Y SAMOA
Y SAN MARINO
SAO TOME PRINCI
Y SAUDI ARABIA
SENEGAL
Y SERBIA
SEYCHELLES
Y SIERRA LEONE
Y SINGAPORE
N SLOVAKIA
N SLOVENIA
Y SOLOMON ISLANDS
SOMALIA
Y SOUTH AFRICA
Y SOUTH SUDAN
N SPAIN
Y SRI LANKA
Y SUDAN
Y SURINAME
Y SWAZILAND
Y SWEDEN
Y SWITZERLAND
Y SYRIAN AR
A TAJIKISTAN
Y THAILAND
A THEFYR MACEDONI
Y TIMOR-LESTE
Y TOGO
Y TONGA
Y TRINIDAD-TOBAGO
Y TUNISIA
N TURKEY
Y TURKMENISTAN
Y TUVALU
Y UGANDA
A UKRAINE
Y UNITED ARAB EMI
N UNITED KINGDOM
Y UNITED R TANZ
N UNITED STATES
Y URUGUAY
A UZBEKISTAN
Y VANUATU
Y VENEZUELA
Y VIET NAM
Y YEMEN
Y ZAMBIA
Y ZIMBABWE

EXHIBIT NUMBER 11

Republic of the Marshall Islands v. United States, 2015 U.S. Dist. LEXIS 12785 (N.D. Cal. 2015), Order granting motion to dismiss

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

THE REPUBLIC OF THE MARSHALL ISLANDS,

Plaintiff,

v.

THE UNITED STATES OF AMERICA, ET AL.,

Defendants.
/

No. C 14-01885 JSW

ORDER GRANTING MOTION TO DISMISS

The Republic of the Marshall Islands ("Plaintiff") filed a complaint alleging breach of the Treaty on the Non-Proliferation of Nuclear Weapons ("Treaty") against the United States of America, the President, the Department of Defense and its Secretary, the Department of Energy and its Secretary, and the National Nuclear Security Administration (collectively, "Defendants"). Plaintiff contends Defendants are in violation of their obligations under the Treaty to pursue negotiations in good faith on effective measures relating to the cessation of the nuclear arms race. Defendants move for dismissal on several independent bases. The Court GRANTS Defendants' motion to dismiss.

BACKGROUND

Plaintiff alleges that the United States has breached its obligations under Article VI of the Treaty by allegedly failing to pursue negotiations in good faith on effective measures for nuclear disarmament.

Article VI of the Treaty 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 in general and complete disarmament under strict and effective international control.

According to the Report accompanying the Senate's resolution of advice and consent to ratification, the Treaty's "fundamental purpose is to slow the spread of nuclear weapons by prohibiting the nuclear weapon states which are party to the treaty from transferring nuclear weapons to others, and by barring the nonnuclear-weapon countries from receiving, manufacturing, or otherwise acquiring nuclear weapons." S. Ex. Rep. 91-1 at 1 (1969).

Plaintiff alleges that Defendants have failed to comply with their obligations under Article VI of the Treaty and have filed this action seeking (1) declaratory judgment pursuant to 28 U.S.C. Section 2201 with respect to (a) the interpretation of the Treaty and (b) whether the United States is in breach of the Treaty; and (2) an injunction directing the United States to take all necessary steps to comply with its obligations under Article VI of the Treaty within one year of the judgment in this matter, "including by calling for and convening negotiations for nuclear disarmament in all its aspects." (Compl. at ¶ 23.)

Defendants move to dismiss the complaint in its entirety on several bases. First, Defendants contend that Plaintiff lacks standing to pursue its claims. Second, Defendants argue that the request for this Court to direct international negotiations on nuclear disarmament is barred by the political question doctrine. Defendants also maintain that the Treaty fails to provide a private right of action in the federal courts, is improperly venued before this district, and is barred by Plaintiff's delay in filing.

The Court shall address additional facts in the remainder of this Order.

ANALYSIS

Defendants move to dismiss the complaint for several independent reasons. The Court shall address each in turn.

A. Standing.

Defendants move to dismiss on the basis that Plaintiff lacks standing under Article III of the United States Constitution. The Court evaluates the motion to dismiss for lack of standing pursuant to Federal Rule of Civil Procedure 12(b)(1). *See White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). A motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) may be "facial or factual." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). In this case, Defendants raise a facial challenge to Plaintiff's standing and, therefore, the Court "must accept as true all material allegations in the complaint, and must construe the complaint in" Plaintiff's favor. *See Chandler v. State Farm Mut. Auto Ins. Co.*, 598 F.3d 1115, 1121-22 (9th Cir. 2010); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) ("At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion dismiss, [courts] presume that general allegations embrace those specific facts that are necessary to support the claim.") (internal citation and quotations omitted).

The constitutional separation of powers doctrine, as embodied in Article III of the Constitution, requires that Plaintiff set out a claim for which it has standing to seek redress in the federal courts. Traditionally, to satisfy the Constitution's standing requirements, a plaintiff must show: (1) an "injury in fact" characterized as (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) that the injury appears fairly traceable to the challenged action of the defendant; and (3) that the injury will likely, as opposed to merely speculatively, be redressed by a favorable decision. *Lujan*, 504 U.S. at 560-61; *see also Clapper v. Amnesty International*, 133 S. Ct. 1138, 1147 (2013) ("[W]e have repeatedly reiterated that threatened injury must be *certainly impending* to constitute injury in fact, and that allegations of *possible* future injury are not sufficient.") (internal quotations, citations and brackets omitted, emphasis in original).

Plaintiff here alleges two injuries to support its claim of standing. First, Plaintiff asserts that the conduct by Defendants "leaves Plaintiff Nation exposed to the dangers of existing nuclear arsenals and the real probability that additional States will develop nuclear arms." (Compl. at ¶ 92.) Such a generalized and speculative fear of the possibility of future use of nuclear weapons does not constitute a concrete harm unique to Plaintiff required to establish injury in fact. *See Pauling v. McElroy*, 278 F.2d 252, 254 (D.C. Cir. 1960) (holding that plaintiffs lacked standing where they sought to enjoin nuclear testing because the alleged injury was shared with "all mankind" and "in common with people generally."); *see also Johnson v. Weinberger*, 851 F.2d 233, 235 (9th Cir. 1988).

Plaintiff also asserts injury in the deprivation of their benefit of the bargain encompassed by the terms of the Treaty. (Compl. at ¶ 92.) Plaintiff contends that, as a signatory nation, it has standing to enforce the Treaty's provisions. *See Jamaica v. United States*, 770 F. Supp. 627, 630 n.6 (M.D. Fla. 1991) ("As a contracting party to the treaty, Jamaica has standing to assert its claim that the treaty has been violated."). Plaintiff contends that it has standing to sue for breach and its injury would be redressed by the United States adherence to its Treaty obligations. Plaintiff argues that the Treaty creates rights and duties and the breach of the duties is a violation of the individual rights of the signatories conferred by virtue of the Treaty's terms. *See Zivotofsky ex rel. Ari Z. v. Sec'y of State*, 444 F3d. 614, 617 (D.C. Cir. 2006) ("Congress may create a statutory right or entitlement the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute.").

Even assuming that breaches of a contract confer standing on parties to the contract, and that international agreements should be considered contracts, Plaintiff fails to account for the fact that the Court cannot mandate specific performance as a remedy or grant redress for its alleged injury. *See, e.g., Canadian Lumber Trade Alliance v. United States*, 30 C.I.T. 391, 418-420 (Ct. Int'l Trade 2006). Even if the Court could mandate specific performance on the part of the Defendants, the relief Plaintiff seeks is not attainable. *See, e.g., Gonzales v. Gorsuch*, 688 F.2d 1263, 1267 (9th Cir. 1982) (holding that plaintiff lacked standing where the relief sought

would not redress the injuries alleged). The Court finds that the requested relief – that the United States negotiate in good faith on effective measures relating to nuclear disarmament – is insufficient to establish standing because the Court is unable to fashion any meaningful decree. *See id.* (citing *Greater Tampa Chamber of Commerce v., Goldschmidt*, 627 F.2d 258, 263-64 (D.C. Cir. 1980) (invalidation of international executive agreement will not redress injury because act of foreign sovereign necessary for relief)). Here, the requested relief does not account for the participation of all of the nuclear and non-nuclear states that are parties to the Treaty but are not parties to this suit. The Treaty does not create, and the Court may not enforce, a bilateral obligation between the United States and the Marshall Islands. The injury Plaintiff claims cannot be redressed by compelling the specific performance by only one nation to the Treaty.

Furthermore, the Court finds that the claim for relief raises a fundamentally non-justiciable political question which is constitutionally committed to the political branches of government. Requiring the Court to delve into and then monitor United States policies and decisions with regard to its nuclear programs and arsenal is an untenable request far beyond the purview of the federal courts. Having no judicially manageable standards by which to adjudicate the United States' alleged breach of the international agreement, the Court finds the political question better suited to the vagaries of the political branches of government and diplomatic channels.

B. Political Question.

Even assuming that Plaintiff could establish standing to sue, the Court finds that the question presented raises a fundamentally non-justiciable political question. The political question inquiry "proceeds from the age-old observation of Chief Justice Marshall that '[q]uestions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.'" *Alperin v. Vatican Bank*, 410 F.3d 532, 544 (9th Cir. 2005) (quoting *Marbury v. Madison*, 1 Cranch 137, 5 U.S. 137, 170 (1803)). The nonjusticiability of a political question is primarily a function of the separation of powers." *Baker v. Carr*, 369 U.S. 186, 210 (1962). The doctrine "excludes from judicial review those

controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986).

The political question doctrine provides that a federal court having jurisdiction over a dispute should nevertheless decline to adjudicate it on the ground that the cases raises questions which should properly be addressed by the political branches of government. *See Baker*, 369 U.S. at 210. The most appropriate case for applicability of the political question doctrine concerns the conduct of foreign affairs. *Id.* at 211. However, not every case involving foreign affairs or foreign relations raises a political question. In determining whether a particular matter raises political questions which the Court must decline to address, the Court must examine the following factors; "(1) a demonstrable constitutional commitment of the issue to a coordinate political department; (2) the lack of judicially discoverable and manageable standards for resolving it; (3) the impossibility of making a decision without first making a policy determination of the type clearly outside judicial discretion; (4) the court's inability to resolve the issue without expressing lack of respect to the coordinate branches of government; (5) an unusual need for unquestioning adherence to a political decision already made; or (6) the potential for embarrassment from multifarious pronouncements by various departments on one question." *Zivkowich v. Vatican Bank*, 242 F. Supp. 2d 659, 665 (N.D. Cal. 2002) (citing *Baker*, 369 U.S. at 217). If any one of these factors is "'inextricable from the case,' the court should dismiss the case as nonjusticiable because it involves a political question." *Id.*

Here, the Court finds that Plaintiff's claims relate to "the foreign affairs function, which rests with the exclusive province of the Executive Branch under Article II, section 2 of the United States Constitution." *Earth Island Institute v. Christopher*, 6 F.3d 648, 652 (9th Cir. 1993). Plaintiff seeks to have this Court interpret the Treaty to enforce an obligation for the Executive to initiate discussions with foreign nations. This request would violate "the separation of powers, and this court cannot enforce it." *Id.* In *Earth Justice*, the Ninth Circuit addressed the request by plaintiff to enforce a statute that required the Secretary of State to initiate discussions with foreign countries over the protection of sea turtles. The court held that

the question presented was not justiciable and rejected the contention that the "lawsuit merely asks the district court to review and interpret congressional legislation." *Id.* at 653.[1] Similarly, here, the Court is not empowered by the Constitution to require the Executive to initiate discussions with foreign nations over the reduction in its nuclear armaments or programs. The authority to negotiate with foreign nations is expressly committed to the Executive, a coordinate political department. *See Zivkowich*, 242 F. Supp. 2d at 665.

Further, the Court finds that it lacks any judicially discoverable and manageable standards for resolving the dispute raised by Plaintiff in this matter. Plaintiff requests that this Court issue an injunction directing the Executive to take "all steps necessary to comply with its obligations under Article VI of the Treaty within one year of the Judgment, including by calling for and convening negotiations for nuclear disarmament in all its aspects." (Compl. at ¶ 23.) What constitutes good faith efforts to pursue negotiations on effective measures relating to cessation of the nuclear arms race are determinations for the political branches to make, using the panoply of resources and expertise it has accumulated in the area of international security as well as diplomatic and military affairs. Plaintiff's request that such efforts be effectuated within one year is arbitrary and fails to take into consideration the activities and willingness of other nations which are also signatories to the Treaty. The Court finds that it lacks the standards necessary to fashion the type of injunctive relief Plaintiff seeks. Accordingly, the Court finds it

[1] Contrary to Plaintiff's contention, the Court finds this precedential holding binding, regardless whether the Ninth Circuit also addressed the constitutionality of the statute at stake in the case.

must dismiss this case as nonjusticiable because it involves a political question. *See Zivkowich*, 242 F. Supp. 2d at 665.[2]

C. Venue and Laches.

In their motion to dismiss, Defendants argue that venue is improper in this district. However, at oral argument, the parties agreed that the Court has the authority to decide the threshold jurisdictional issues of standing and justiciability, thus mooting the venue challenge. Accordingly, as the Court has determined that the case must be dismissed for lack of standing and under the political questions rubric, the Court does not reach the issue of venue. In addition, the Court finds it unnecessary to address the additional claims that the case is barred by laches.

[2] The Court finds that the issue of whether the Treaty is self-executing or provides a private right of action is irrelevant to the enforcement by a state-party that is a signatory to the Treaty. However, because the Court finds the case before it is non-justiciable as a matter of law, and the Treaty itself is silent as to the proper enforcement mechanism and does not contemplate the participation of the federal courts, the Court finds that enforcement shall depend upon the interest and honor of the parties to the Treaty. Indeed, the Treaty is "primarily a compact between independent nations," and as such, [i]t ordinarily depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it." *Medellin v. Texas*, 552 U.S. 491, 505 (2008) (quoting *Head Money Cases*, 112 U.,S. 580, 598 (1884)). "If these [interests] fail, its infraction becomes the subject of international negotiations and reclamations . . . . It is obvious that with all this the judicial courts have nothing to do and can give no redress." *Id.*

CONCLUSION

For the foregoing reasons, the Court GRANTS Defendants' motion to dismiss. A separate judgment shall issue and the Clerk is directed to close the file.

IT IS SO ORDERED.

Dated: February 3, 2015

JEFFREY S. WHITE
UNITED STATES DISTRICT JUDGE

EXHIBIT NUMBER 12

Republic of the Marshall Islands v. United States, 2015 U.S. Dist. LEXIS 12785 (N.D. Cal. 2015), Brief for the Defendants –Appellees

No. 15-15636

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPUBLIC OF THE MARSHALL ISLANDS, a nonnuclear weapon State party to the Treaty on the Non Proliferation of Nuclear Weapons,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA; BARACK OBAMA, The President of the United States of America; DEPARTMENT OF DEFENSE; ASHTON CARTER, Secretary, Department of Defense; DEPARTMENT OF ENERGY; ERNEST MONIZ, Secretary, Department of Energy; NATIONAL NUCLEAR SECURITY ADMINISTRATION,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE DEFENDANTS-APPELLEES

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

MELINDA HAAG
United States Attorney

DOUGLAS N. LETTER
(202) 514-3602
SUSHMA SONI
(202) 514-4331
Attorneys, Appellate Staff
Civil Division, Room 7218
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Cases: **Page(s)**

Treaty:

Statutes:

Legislative Materials:

Other Authorities:

INTRODUCTION

For over two centuries, the Supreme Court has recognized that when sovereign nations disagree over the substance of their treaty obligations and their compliance with treaty provisions, those disputes become subject to international negotiations and other measures between the parties. The federal judiciary has nothing to do with such disputes, and can give no redress. *Head Money Cases*, 112 U.S. 580, 598 (1884). The Republic of the Marshall Islands, a fellow Party to the Treaty on the Non-Proliferation of Nuclear Weapons (Treaty or Non-Proliferation Treaty) and the plaintiff in this case, asks this Court to reject two centuries of precedent and resolve its treaty dispute with the United States in federal court.

Like the district court, this Court should deny plaintiff's request. Plaintiff characterizes this Court's task as a routine exercise in treaty interpretation within the Article III powers of the Court. However, plaintiff asks this Court to evaluate whether the United States has complied with its obligation under the Treaty to pursue negotiations in good faith on nuclear disarmament, to declare the United States in breach, and to compel

the President to call for and convene negotiations with other sovereign nations leading to nuclear disarmament and the cessation of the nuclear "arms race" within one year. Such relief would be unprecedented, and raises obvious justiciability problems.

The federal courts have consistently held that their Article III authority does not include the authority to command the United States to enter into international negotiations, even negotiations assertedly required by a treaty. *Botiller v. Dominguez*, 130 U.S. 238, 247 (1889). The Constitution assigns to the President alone the power and responsibility "to speak or listen as a representative of the nation" in foreign affairs. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936). Thus, even if plaintiff, as a foreign sovereign state, had standing to sue in U.S. courts, its challenge to the exercise of the President's foreign affairs responsibilities would lie outside the competence of the federal courts. Plaintiff must therefore pursue its goal of nuclear disarmament and an end to the claimed nuclear "arms race" by means other than judicial decree in a U.S. court.

JURISDICTIONAL STATEMENT

Plaintiffs invoked the jurisdiction of the district court under Article III of the U.S. Constitution and 28 U.S.C. 1331. Excerpts of Record (ER) 53 (Compl.). On February 3, 2015, the district court entered judgment in favor of the federal defendants. *See* ER 4 (Judgment); ER 5-13 (Order). Plaintiffs filed a timely notice of appeal on April 2, 2015. ER 20-21 (Notice). This Court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

Plaintiff alleges that the United States has breached its obligations under Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons by failing to pursue negotiations in good faith on nuclear disarmament and the cessation of the arms race. At issue here are

1. Whether plaintiff, as a foreign sovereign state, has standing to bring this suit.

2. Whether plaintiff's claims, which involve issues of foreign policy and national security, are justiciable.

3. Whether Article VI is self-executing and is thus doemestically enforceable.

4. Whether plaintiff has a valid claim for declaratory relief.

STATEMENT OF THE CASE

Over 180 States, including plaintiff and the United States, are parties to the Treaty on the Non-Proliferation of Nuclear Weapons. Plaintiff brought suit for declaratory and injunctive relief against the United States, alleging that the United States breached its obligations under Article VI of the Treaty by failing to pursue negotiations in good faith on nuclear disarmament and the cessation of the arms race. After briefing and oral argument, the district court dismissed plaintiff's claims and entered judgment for the United States. The district court held that plaintiff did not have standing to sue because plaintiff had not identified a concrete harm that would be redressed by a favorable decision. Even if plaintiff did have standing, the court reasoned, plaintiff's claim raises a nonjusticiable political question that is textually committed for resolution to the Executive Branch, and that the court lacks manageable standards to resolve.

STATEMENT OF FACTS

A. THE TREATY ON THE NON-PROLIFERATION OF NUCLEAR WEAPONS.

1. The United States and the Soviet Union led international negotiations on the Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161, which entered into force on March 5, 1970. Article VI provides that "[e]ach 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." The Treaty does not include a dispute resolution clause or any other explicit mechanism for the Parties to address alleged violations. Nevertheless, because the Treaty is a legally binding instrument under international law, breaches of the Treaty may give rise to international legal remedies.

2. The Senate gave its advice and consent to ratification of the Treaty in 1969, and the President ratified the Treaty for the United States in that same year. During the course of the pre-ratification debate on the Treaty in

the U.S. Senate, the Chairman of the Senate Committee on Foreign Relations made clear that the Treaty would not give rise to any domestically enforceable obligations in U.S. courts. *See* 115 Cong. Rec. 6198, 6199 (1969) (statement of Sen. Fulbright); *id*. at 6204 ("A treaty may create certain obligations in the mind of a foreign country, but domestically it does not."); *accord* 136 Cong. Rec. 12723 (1990) (statement by Senator Boschwitz, sponsor of the resolution to reaffirm the objectives of Treaty, that "[t]he [Non-Proliferation Treaty] is not self-executing"). After ratification, Congress did not pass any legislation establishing any domestically enforceable rights, a point that plaintiff implicitly concedes by bringing this lawsuit under the Treaty itself.

3. Pursuant to 22 U.S.C. 2574(a), the Secretary of State has "primary responsibility" for the United States' participation in all international negotiations on arms control, nonproliferation, and disarmament, including negotiations involving the Non-Proliferation Treaty. The Secretary is also responsible for preparation of an annual report to Congress "on the status of United States policy and actions with respect to

arms control, nonproliferation, and disarmament." 22 U.S.C. 2593a(a). The 2015 report states that "[a]ll U.S. activities during the reporting period were consistent with the obligations set forth in the [Non-Proliferation Treaty]." U.S. Dep't of State, *2015 Report on Adherence to and Compliance With Arms Control, Nonproliferation, and Disarmament Agreements and Commitments*, pt. I (June 5, 2015), http://www.state.gov/t/avc/rls/rpt/2015/243224.htm.

B. FACTS AND PRIOR PROCEEDINGS IN THIS CASE.

1. Plaintiff is a non-nuclear-weapon State that acceded to the Treaty in 1995, ER 50-51 (Compl. ¶13), after attaining independence.[1] In April 2014, plaintiff brought this suit for declaratory and injunctive relief against the United States, the President, and several departments, agencies and officials, alleging that the United States breached its obligation under Article VI of the Treaty by failing "to pursue negotiations in good faith" on effective measures relating to (i) cessation of the nuclear arms race "at an

[1] Plaintiff and its citizens have brought numerous unsuccessful suits against the United States with respect to nuclear weapons testing. *See, e.g.*, *People of Bikini v. United States*, 77 Fed. Cl. 744, 781-87 (2007), *aff'd*, 554 F.3d 996 (Fed. Cir. 2009), *cert. denied*, 559 U.S. 1048 (2010), and *cert. denied sub nom. John v. United States*, 559 U.S. 1048 (2010).

early date;" and (ii) nuclear disarmament. ER 61 (Compl. ¶62); ER 65 (Compl. ¶72). Plaintiff claimed that this alleged breach caused increased proliferation of nuclear weapons and increased risks associated with that proliferation, leaving plaintiff "exposed to the dangers of existing nuclear arsenals and the real probability that additional States will develop nuclear arms;" and denied plaintiff the benefit of its bargain as a Treaty party. ER 71-72 (Compl. ¶¶88-93).

Plaintiff sought (1) a declaration of the United States' Article VI obligations; (2) a declaration that the United States "is in continuing breach" of those obligations; (3) an injunction requiring the United States to comply with its obligations "within one year of the date of this Judgment, including by ***calling for and convening*** negotiations for nuclear disarmament in all its aspects;" (4) attorneys' fees and costs; and (5) "such other, further, and different relief" as may be deemed proper. ER 72-76 (Compl.) (emphasis in original).

The United States moved to dismiss plaintiff's suit on the grounds that (1) plaintiff lacked standing, (2) the political question doctrine barred

the declaratory and injunctive relief sought, (3) Article VI is not self-executing, and is thus not domestically enforceable, and accordingly cannot provide plaintiff with a cause of action, (4) venue is improper under 28 U.S.C. 1391(e)(1), and (5) the statute of limitations, laches, and the public interest preclude the relief requested.

2. The district court granted the government's motion to dismiss. ER 5-13 (Order). The district court examined the two injuries asserted by plaintiff, and concluded that they did not satisfy constitutional standards for an "injury in fact" that is (1) "concrete and particularized" and "actual or imminent, not conjectural or hypothetical," (2) "fairly traceable to the challenged action of the defendant," and (3) redressable by a favorable decision. ER 7 (Order) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

The district court concluded that plaintiff's "generalized and speculative fear of the possibility of future use of nuclear weapons does not constitute a concrete harm unique to Plaintiff required to establish injury in fact." ER 8 (Order). The district court further found that plaintiff's failure

to obtain the result it allegedly bargained for in the Treaty—the United States' negotiation of effective measures leading to nuclear disarmament and cessation of the nuclear arms race—could not be redressed by compelling specific performance by only one Treaty party. ER 8-9 (Order). The court emphasized the multilateral nature of the Treaty, adding that "[t]he Treaty does not create, and the Court may not enforce, a bilateral obligation between the United States and the Marshall Islands." ER 9 (Order).

The district court concluded that even if plaintiff had standing, its claim implicated two of the six factors in *Baker v. Carr*, 369 U.S. 186, 217 (1962), which bear on whether a claim raises a nonjusticiable political question. ER 9-12 (Order). The court found that plaintiff's request "to have this Court interpret the Treaty to enforce an obligation for the Executive to initiate discussions with foreign nations" implicates "the foreign affairs function," which is constitutionally committed to the Executive Branch (*Baker* factor (1)). ER 10 (Order). "Requiring the Court to delve into and then monitor United States policies and decisions with regard to its nuclear

programs and arsenal is an untenable request far beyond the purview of the federal courts." ER 9 (Order).

The district court also found that it lacked any "judicially discoverable and manageable standards" to fashion the injunctive relief plaintiff sought (*Baker* factor (2)). ER 11 (Order). The court reasoned that "[w]hat constitutes good faith efforts to pursue negotiations on effective measures relating to cessation of the nuclear arms race are determinations for the political branches to make, using the panoply of resources and expertise it has accumulated in the area of international security as well as diplomatic and military affairs." ER 11 (Order). The court also found that "[p]laintiff's request that such efforts be effectuated within one year is arbitrary and fails to take into consideration the activities and willingness of other nations which are also signatories to the Treaty." ER 11 (Order).

The district court found the issue of whether the Treaty provides a private right of action to be "irrelevant" to whether it can be enforced by a Treaty party. The court added, however, that because "the Treaty itself is silent as to the proper enforcement mechanism and does not contemplate

the participation of the federal courts, the Court finds that enforcement shall depend upon the interest and honor of the parties to the Treaty." ER 12 n.2 (Order).

Given these rulings, the district court found no need to reach the government's arguments about venue, statute of limitations, and laches. ER 12 (Order).

SUMMARY OF ARGUMENT

Plaintiff, a sovereign State and fellow party to the Treaty on the Non-Proliferation of Nuclear Weapons, brought suit against the United States, the President, and several departments, agencies and officials, alleging that the United States is in continuing breach of its Treaty obligation to pursue negotiations in good faith on nuclear disarmament and the cessation of the arms race. As relief, plaintiff seeks, *inter alia*, a declaration that the United States has breached the Treaty, and an order compelling the United States to call for and convene negotiations on nuclear disarmament within one year. Although plaintiff portrays the judiciary's task in this case as a

routine exercise of treaty interpretation, the relief sought is unprecedented and obviously inappropriate.

Plaintiff's claims raise insurmountable justiciability barriers that the opening brief does not overcome. On its face, plaintiff's asserted injury of an "increased risk of grave danger from increased vertical proliferation of nuclear weapons" (Pl.'s Br. 11) and "the real probability that additional States will develop nuclear arms" (ER 72 (Compl. ¶92)) is neither "concrete" and "particularized," nor "certainly impending," and relies on a "speculative chain of possibilities." *Clapper v. Amnesty Int'l*, 133 S. Ct. 1138, 1147, 1150 (2013). Further, neither an Article III court nor the United States itself can compel the over 180 States party to the Treaty to "convene negotiations." This certainly cannot be redressed through a judicial order that forces the United States, alone, to the negotiating table. "Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998).

Plaintiff's claims also raise political questions outside the proper constitutional role of the federal judiciary. Plaintiff wants a court to review, and ultimately override, the strategic choices that the Executive Branch has made on the timing and pace of disarmament negotiations, in light of the available real-world foreign policy options. But the President alone has the constitutional power to negotiate these matters on behalf of the United States. While plaintiff may disagree with the President's choices, "[t]he courts can afford no redress." *Whitney v. Robertson*, 124 U.S. 190, 194 (1888). And the Supreme Court has made clear that the courts cannot compel the President to take action in the way that plaintiff envisions here. *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 499-501 (1866); *Franklin v. Massachusetts*, 505 U.S. 788, 802-03 (1992) (plurality op.).

Either plaintiff's lack of standing or the fact that its claims raise political questions is sufficient to preclude review. *No GWEN All. of Lane Cty., Inc. v. Aldridge*, 855 F.2d 1380, 1382 (9th Cir. 1988). But if this Court disagrees on these points, plaintiff's suit nonetheless fails because the Treaty is not self-executing, and is thus not domestically enforceable by the

judiciary. Accordingly, the Treaty cannot supply plaintiff with a cause of action in U.S. courts. Proper concern for the constitutional allocation of power over foreign affairs and national security, and for the President and the Senate's intent in ratifying the Treaty, requires this Court to decline to recognize this obviously improper suit.

STANDARD OF REVIEW

This Court reviews de novo the district court's dismissal for lack of subject matter jurisdiction. *Saldana v. Occidental Petroleum Corp.*, 774 F.3d 544, 551 (9th Cir. 2014) (political question doctrine); *see also Novak v. United States*, 795 F.3d 1012, 1017 (9th Cir. 2015) (standing).

ARGUMENT

I. PLAINTIFF DOES NOT HAVE ARTICLE III STANDING.

A. Plaintiff Must Satisfy The Three Elements Of Standing.

To establish standing to sue in federal court, "[t]he plaintiff must have suffered or be imminently threatened with a concrete and particularized 'injury in fact' that is fairly traceable to the challenged action of the defendant and likely to be redressed by a favorable judicial decision." *Lexmark, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377,

1386 (2014) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). The elements of standing "are not mere pleading requirements but rather an indispensable part of the plaintiff's case." *Lujan*, 504 U.S. at 561.[2]

Even in the rare instances in which a foreign state may bring suit in federal court, that state's ability to sue "has been conditioned on the requirement that the foreign nation satisfy the usual standing requirements imposed on individuals or domestic corporations." *Estados Unidos Mexicanos v. DeCoster*, 229 F.3d 332, 336 (1st Cir. 2000).

Plaintiff cites several cases for the proposition that foreign nations have standing to enforce all treaties to which they are a party. Br. 34-35. To the extent these cases involved court enforcement of self-executing extradition treaties, they are easily distinguishable, as courts have an indisputably critical role in adjudicating the potential removal of foreign nationals in furtherance of another State's domestic law criminal

[2] *See also Consejo de Desarrollo Economico de Mexicali, AC v. United States*, 438 F. Supp. 2d 1194, 1201 (D. Nev. 2006) (finding no injury-in-fact to nonprofit organizations where relevant 1944 Treaty between United States and Mexico did not allow individuals to sue under the Treaty and organization therefore "[could not] assert rights under the Treaty").

proceeding. *E.g., Jamaica v. United States*, 770 F. Supp. 627 (M.D. Fla. 1991) (alleged violation of extradition treaty between Jamaica and the United States).

B. Fear Of The Future Use Of Nuclear Weapons Is Not A "Concrete And Particularized" Injury That Is "Certainly Impending."

Plaintiff attempts to recast the Treaty as a contract, under which an alleged breach can be litigated and remedied by the contracting parties as in any domestic commercial dispute. *But see* Restatement (Third) of Foreign Relations Law § 111 cmt. h (1987) (cautioning against interpreting international agreements by using analogies from domestic contract law). To that end, plaintiff asserts two injuries resulting from the United States' alleged contractual breach: (1) the "increased risk of grave danger from increased vertical proliferation of nuclear weapons" and the possibility "that additional States will develop nuclear arms;" and (2) the denial of plaintiff's bargained-for right to the participation of the United States in nuclear disarmament negotiations. Pl.'s Br. 2, 11, 35-36; ER 71-72 (Compl. ¶92).

1. Even if we assume, as did the district court, that "international agreements should be considered contracts" whose breach "confer[s] standing on parties to the contract," "[s]uch a generalized and speculative fear of the possibility of future use of nuclear weapons"—by an unknown State, which may or may not be a Party to the Treaty, on some unspecified date—"does not constitute a concrete harm unique to Plaintiff required to establish injury in fact." ER 8 (Order). At most, an "attenuated chain of inferences," involving "the unfettered choices made by independent actors not before the court," connects the United States' alleged vertical proliferation to the plaintiff's apprehension about the potential increased risk of nuclear war at some unknown (and unknowable) future date. *See generally Clapper v. Amnesty Int'l*, 133 S. Ct. 1138, 1150 n.5 (2013).[3] This asserted injury is neither "concrete and particularized," nor "actual or imminent." *Lujan*, 504 U.S. at 560.

[3] Amicus Physicians for Social Responsibility provides a list of incidents that, in its view, "almost" resulted in nuclear war. Most occurred well before the Treaty entered into force; the most recent one took place 20 years ago, in 1995. Amicus Physicians for Social Responsibility Br. 8-15.

The district court's conclusion follows directly from the decisions of the Supreme Court and this Court. "[W]e have often found a lack of standing in cases in which the Judiciary has been requested to review actions of the political branches in the fields of intelligence gathering and foreign affairs." *Clapper*, 133 S. Ct. at 1147. Rejecting similar assertions of injury in a challenge to the implementation of the United States' strategic defense policy, this Court stated that "[i]nferences concerning the uncertain and indefinite effects of the nation's strategic defense policy are, at best, speculative." *Johnson v. Weinberger*, 851 F.2d 233, 235 (9th Cir. 1988). That is precisely why "[s]uch challenges are 'most appropriately addressed [to] * * * the representative branches [of federal government].'" *Id*. at 236 (second, third, fourth alterations in original).

2. Plaintiff contends that Article III does not require identification of a harm "unique to plaintiff," and that therefore, the widespread nature of the asserted risk posed by vertical proliferation should not defeat standing for a Treaty party. Pl.'s Br. 38, 42 (citing, *inter alia*, *Newdow v. Lefevre*, 598

F.3d 638 (9th Cir. 2010), *cert. denied*, 562 U.S. 1271 (2011); *FEC v. Akins*, 524 U.S. 11 (1998)).

The cases plaintiff cites are easily distinguished. This Court has confirmed that First Amendment and Establishment Clause challenges, such as *Newdow*, "present unique standing considerations" such that "the inquiry tilts dramatically toward a finding of standing." *Libertarian Party of Los Angeles Cty. v. Bowen*, 709 F.3d 867, 870 (9th Cir. 2013); *see also Vasquez v. Los Angeles Cty.*, 487 F.3d 1246, 1250 (9th Cir.), *cert. denied*, 552 U.S. 1062 (2007). In *FEC v. Akins*, the plaintiffs brought suit under the Federal Election Campaign Act, which broadly authorizes suit by "[a]ny person who believes a violation of this Act * * * has occurred." 524 U.S. at 19 (alterations in original). *See also Public Citizen v. U.S. DOJ*, 491 U.S. 440, 449-50 (1989) (assessing standing under Federal Advisory Committee Act).

Massachusetts v. EPA, 549 U.S. 497 (2007) is likewise inapposite. In that case, the Supreme Court emphasized that Massachusetts' stake in protecting its "quasi-sovereign interests" entitled it to "special solicitude in our standing analysis." *Id*. at 520; *but see Canadian Lumber Trade All. v.*

United States, 517 F.3d 1319, 1337 (Fed. Cir. 2008) (rejecting argument that Canada, which did not surrender any sovereign prerogatives in negotiating trade treaty, was likewise entitled to "special solicitude" in the standing analysis).

None of these cases addresses the situation presented here, where the alleged harm is arguably shared not merely by a large group, but by all mankind. *See Pauling v. McElroy*, 278 F.2d 252, 254 (D.C. Cir. 1960) (per curiam) (plaintiffs, including Marshall Islands residents, lacked standing based on alleged injury that was shared with "all mankind" and "in common with people generally"), *cert. denied*, 364 U.S. 835 (1960).

In any event, plaintiff misses the point. The problem is not merely that the alleged harm is widely-shared, but also that it is abstract, lacking the "concrete specificity" that prevents a plaintiff "from obtaining what would, in effect, amount to an advisory opinion." *FEC v. Akins*, 524 U.S. at 24. "Often the fact that an interest is abstract and the fact that it is widely shared go hand in hand." *Id.*; *see also Novak v. United States*, 795 F.3d 1012, 1018 (9th Cir. 2015).

3. Plaintiff protests that it met its burden at the pleading stage simply by asserting that the United States' breach of Article VI caused increased nuclear proliferation and "measurable increased risks," and by supporting its assertions with an expert declaration and references to the opinions of other experts and pre-ratification statements about the Treaty in the Congressional Record. Pl.'s Br. 38-39 (citing, *inter alia*, 115 Cong. Rec. at 6204 (statement of Sen. Javits)). Cursory review of the plaintiff's Weston declaration (ER 77-83 (Weston Decl.)) reveals that this document, like the statements of public officials and the academic papers referenced in the complaint and the opening brief, consists of "sweeping legal conclusions cast in the form of factual allegations," *Pauling*, 278 F.2d at 254.

Moreover, these supporting materials do not render plaintiff's alleged injury less speculative. Senator Javits' statement in 1969 that vertical proliferation presents a grave threat to mankind's survival does not make the use of nuclear weapons "actual or imminent" (*Lujan*, 504 U.S. at 560) almost fifty years later. Although two amici assert that the United States is engaged in modernizing its nuclear arsenal, *see* Amicus W. States

Legal Found. Br. 6; Amicus Nuclear Watch N.M. Br. 20-25, the modernization of nuclear weapons does not make their use more "certainly impending" (*Clapper*, 133 S. Ct. at 1147), or even more likely. That plaintiff believes it contractually bargained for a reduction in the risk of nuclear warfare (Pl.'s Br. 38, 40-41) does not overcome this obvious flaw in plaintiff's suit. *See generally United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 688 (1973) ("pleadings must be something more than an ingenious academic exercise in the conceivable").

C. Plaintiff's Asserted Injuries Are Not Redressable.

The district court further found that plaintiff's asserted injuries would not be redressed by a favorable decision. The court held that it could not order "the United States [to] negotiate in good faith on effective measures relating to nuclear disarmament," and even if it could, the requested relief "does not account for the participation of all of the nuclear and non-nuclear states that are parties to the Treaty but are not parties to this suit." ER 8-9 (Order). The court pointed out that "[t]he Treaty does not create, and the Court may not enforce, a bilateral obligation between

the United States and the Marshall Islands," and "[t]he injury Plaintiff claims cannot be redressed by compelling the specific performance by only one nation to the Treaty." ER 9 (Order).

1. The district court's conclusion that the relief plaintiff seeks would not redress its injuries is correct. *See* ER 8-9 (Order) (citing *Gonzales v. Gorsuch*, 688 F.2d 1263, 1267 (9th Cir. 1982); *Greater Tampa Chamber of Commerce v. Goldschmidt*, 627 F.2d 258, 263-64 (D.C. Cir. 1980)). Even if the district court could compel the United States to initiate or participate in specific negotiations on nuclear disarmament and the cessation of the arms race, the United States cannot achieve the objectives of a multilateral treaty through unilateral action. It is pure conjecture whether a court order directing the United States to convene negotiations on nuclear disarmament would induce any other nuclear-weapon state or non-nuclear-weapon state to attend such negotiations, let alone whether other States would participate on the premises plaintiff demands.

Although plaintiff disputes that it would be "speculative" that other nations would participate in negotiations, the complaint asserts that, as a

group, the five nuclear-weapon States under the Treaty have refused to negotiate pursuant to Article VI. *See* ER 66, 68 (Compl.); Pl.'s Br. 6 (stating that three other countries, in addition to the United States, voted against U.N. General Assembly resolution establishing nuclear disarmament working group).

None of the other Treaty States Parties is a party to this suit and therefore none is bound by any resulting court order. "[T]here is no standing if, following a favorable decision, whether the injury would be redressed would still depend on 'the unfettered choices made by independent actors not before the courts.'" *Novak*, 795 F.3d at 1020; *see also Allen v. Wright*, 468 U.S. 737, 750 (1984). Thus, in *Greater Tampa Chamber of Commerce*, the D.C. Circuit held that the plaintiffs' injury was not redressable where the relief sought—invalidation of an air travel agreement between the United States and the United Kingdom—would not affect plaintiffs' circumstances because, *inter alia*, the United Kingdom would still "completely control[] landing rights within its boundaries." 627 F.2d at 263.

Plaintiff counters that in *Greater Tampa Chamber of Commerce*, the parties identified the United Kingdom as a party whose absence precluded redress, whereas here, the United States has never identified any party whose absence precludes complete relief. Pl.'s Br. 49; *see also* Pl.'s Br. 3, 11-12. Plaintiff argues that the United States should have filed a motion under Federal Rule of Civil Procedure 19 to require joinder of the absent nations, which the district court could then have decided following discovery and a fact-specific inquiry. Pl.'s Br. 47-48.

Plaintiff's suggestion is absurd. "Rule 19 cannot be applied in a vacuum." *Republic of the Philippines v. Pimentel*, 553 U.S. 851, 868 (2008). The other Treaty Parties are sovereign nations that are immune from suit in federal court unless an exception to the Foreign Sovereign Immunities Act applies. No such exception would apply here. Under the circumstances, an attempt to join them under Rule 19 would have been frivolous. *Id*. at 867 ("A case may not proceed when a required-entity sovereign is not amenable to suit.").

2. Plaintiff attempts to circumvent the redressability problem by framing its injury as the violation of its procedural right to have the United States engage in good-faith negotiations. Pl.'s Br. 44. Where the injury alleged is procedural in nature, plaintiff reasons, "normal standards for redressability and immediacy" are not required "if there is some possibility that the requested relief will prompt the injury-causing party to reconsider." Pl.'s Br. 11, 44 (quoting *Massachusetts v. EPA*, 549 U.S. at 517-18).

But plaintiff does not identify a provision in the Treaty that confers anything remotely akin to a procedural right as described in *Lujan* and *Massachusetts v. EPA*. As the district court pointed out, the Non-Proliferation Treaty is a multi-lateral treaty, whose text does not speak to negotiations among any subset of Parties. In contrast, the statute at issue in *Massachusetts v. EPA* expressly provided that plaintiff with a "procedural right to challenge the rejection of [the plaintiff's] rulemaking petition as arbitrary and capricious." 549 U.S. at 520 (Clean Air Act); *accord Salmon*

Spawning & Recovery All. v. Gutierrez, 545 F.3d 1220 (9th Cir. 2008) (Endangered Species Act and Administrative Procedure Act (APA)).

In any event, "deprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing." *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009); *see also Sturgeon v. Masica*, 768 F.3d 1066, 1075 (9th Cir. 2014) ("[p]articipation in agency proceedings is alone insufficient to satisfy judicial standing requirements"), *cert. granted*, 2015 WL 1509604 (U.S. Oct. 1, 2015). Thus, plaintiff must show that the "procedure" of negotiation "[is] designed to protect some threatened concrete interest of his that is the ultimate basis of his standing." *Salmon Spawning & Recovery All.*, 545 F.3d at 1225.

Plaintiff's procedural injury argument therefore fails for the reasons already discussed: Plaintiff cannot demonstrate that this alleged right to the United States' participation in negotiations would, if exercised, protect the plaintiff's concrete interest in nuclear disarmament and the cessation of the nuclear arms race. *See generally Salmon Spawning & Recovery All.*, 545

F.3d at 1226. The problem is not, as plaintiff states (Pl.'s Br. 3, 11, 43, 45-47), that the effect of the United States' participation may be only incremental. It is that the effect is entirely speculative in light of the number of other States on whom any agreement regarding nuclear disarmament will ultimately depend—five nuclear-weapon States parties, as well as the other Parties to the Non-Proliferation Treaty and the States not party to the Treaty that possess nuclear weapons.

II. THE POLITICAL QUESTION DOCTRINE RENDERS PLAINTIFF'S CLAIMS NON-JUSTICIABLE.

A. *Baker v. Carr* Supplies The Standard For Determining Whether A Claim Raises A Political Question.

The district court concluded that even if plaintiff had standing to sue, its claim for relief raises "a fundamentally non-justiciable political question." ER 9 (Order). To determine whether a particular claim raises a political question, courts generally consider whether the claim involves

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack

> of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. 186, 217 (1962) (the *Baker* factors). The justiciability inquiry involves a "case-by-case analysis" in which the various *Baker* tests "often collaps[e] into one another." *Alperin v. Vatican Bank*, 410 F.3d 532, 544-45 (9th Cir. 2005), *cert. denied sub nom. Order of Friars Minor v. Alperin*, 546 U.S. 1137 (2006), and *Instituto per le Opere di Religione v. Alperin*, 546 U.S. 1137 (2006). "To find a political question, we need only conclude that one factor is present, not all." *Schneider v. Kissinger*, 412 F.3d 190, 194 (D.C. Cir. 2005), *cert. denied*, 547 U.S. 1069 (2006).

B. Plaintiff's Claims Involve Issues Textually Committed To The Political Branches.

1. Courts have consistently held that the propriety of the political branches' exercise of constitutionally enumerated powers over the "the conduct of foreign relations * * * is not open to judicial inquiry." *United States v. Pink*, 315 U.S. 203, 222-23 (1942); *see Mingtai Fire & Marine Ins. Co. v.*

UPS, 177 F.3d 1142, 1144 (9th Cir.), *cert. denied*, 528 U.S. 951 (1999).

Executive decisions on foreign policy

> are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither the aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948).

2. The district court examined plaintiff's claims and concluded that "[r]equiring the Court to delve into and then monitor United States policies and decisions with regard to its nuclear programs and arsenal is an untenable request far beyond the purview of the federal courts." ER 9 (Order). That decision was correct. Plaintiff seeks, among other things, an order declaring that the United States has breached Article VI of the Treaty; and an order directing the United States to convene negotiations on nuclear disarmament within one year. *See* ER 74-75 (Compl.); Pl.'s Br. 3, 29. But issuing such orders would directly implicate the power to make and execute treaties, authority over the conduct of foreign policy, and authority

over national defense and security, all of which are textually committed to the political branches rather than the judiciary.

Although plaintiff denies that its claims would require the court to delve into and monitor the United States' policies (Pl.'s Br. 28-29), it is difficult to see how the court could otherwise assess the United States' compliance with Article VI and award effective relief. A determination of plaintiff's claims would require this Court to second-guess decisions made at the highest levels of the Executive Branch, by the President and the Secretaries of State, Defense, and Energy, about the United States' interpretation of the Treaty as well as its strategy and tactics for pursuing treaty implementation. Because "courts are unschooled in 'the delicacies of diplomatic negotiation [and] the inevitable bargaining for the best solution of an international conflict,' the Constitution entrusts resolution of sensitive foreign policy issues to the political branches of government." *Aktepe v. United States*, 105 F.3d 1400, 1403 (11th Cir. 1997) (brackets in original), *cert. denied*, 522 U.S. 1045 (1998).

The district court's application of the political question doctrine is consistent with this Court's analysis in prior cases involving concerns about foreign affairs and national security. *E.g., Saldana v. Occidental Petroleum Corp.*, 774 F.3d 544, 552-55 (9th Cir. 2014) (claims against oil company for funding military brigade involved in human rights abuses were inextricably bound to inherently political question of the propriety of the United States' funding of the brigade); *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 982-84 (9th Cir. 2007) (challenge to company's sale of bulldozers to Israel, which were used to demolish homes in Palestinian Territories, would necessarily implicate the propriety of the United States' selection and financing of the purchase); *Alperin v. Vatican Bank*, 410 F.3d at 559-62 (claims that foreign bank assisted pro-Nazi Ustasha regime's war objectives and profited from slave labor were political questions).

Applying the same analysis, the Fifth Circuit dismissed as nonjusticiable a class action against oil production companies, in which the plaintiffs alleged that national oil companies and subsidiaries conspired with Organization of Petroleum Exporting Countries member nations to fix

prices for crude oil and refined petroleum products. The court reasoned that "[b]y adjudicating this case, the panel would be reexamining critical foreign policy decisions, including the Executive Branch's longstanding approach of managing relations with foreign oil-producing states through diplomacy rather than private litigation." *Spectrum Stores Inc. v. Citgo Petroleum Corp.*, 632 F.3d 938, 951 (5th Cir. 2011).[4]

The district court also correctly recognized that because the Constitution empowers the Executive Branch to negotiate with foreign nations, the judiciary cannot "require the Executive to initiate discussions with foreign nations over the reduction in its nuclear armaments or programs." ER 11 (Order). That conclusion is consistent with the conclusion that this Court reached in a separation-of-powers decision on which the district court relied, *Earth Island Institute v. Christopher*, 6 F.3d 648 (9th Cir. 1993). There, this Court declined the appellants' request to order the Secretary of State to initiate treaty negotiations that were required by

[4] *Accord El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 839-45 (D.C. Cir. 2010) (en banc), *cert. denied*, 562 U.S. 1178 (2011); *Schneider*, 412 F.3d at 194-98.

federal law. This Court held that such an order was not justiciable "in any federal court," because, *inter alia*, the appellants' claims related to the foreign affairs function, which rests within the exclusive province of the Executive Branch. *Id*. at 652-53. Plaintiff attempts to distinguish *Earth Island* on the factual grounds that (1) in that case, the President had claimed in his signing statement that the relevant law was unconstitutional, and (2) treaties, unlike laws, enjoy a presumption of constitutionality. Pl.'s Br. 22-23. These arguments are irrelevant, since plaintiff makes no constitutional claims.

3. In response, plaintiff argues that the treaty power does not override the judiciary's Article III obligation to decide legal disputes under existing treaties. Pl.'s Br. 1-2, 11-12, 15-20. Plaintiff insists that the political question doctrine only applies to those treaty cases concerning the Executive Branch's right to abrogate a treaty, and that "even then, the court 'may determine whether or not an abrogation has been declared and may interpret the effect of an abrogation by the executive branch.'" Pl.'s Br. 16 (quoting *United States v. Decker*, 600 F.2d 733, 737 n.6 (9th Cir.), *cert. denied*,

444 U.S. 855 (1979)). And plaintiff points to decisions in, *inter alia*, *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006), *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221 (1986), and *Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012), as examples of cases against the United States in which the Supreme Court construed international treaties. Pl.'s Br. 18-20, 32; *see also* Pl.'s Br. 32 n.11.

In fact, both *Zivotofsky* and *Japan Whaling* involved the vindication by private individuals of statutory rights addressing private interests, not treaty rights. *See, e.g.*, *Zivotofsky*, 132 S. Ct. at 1427-30 (political question doctrine did not bar review of plaintiffs' suit to enforce specific statutory right under the Foreign Relations Authorization Act, which directed Secretary of State to record Israel as the birthplace of U.S. citizens born in Jerusalem); *Japan Whaling Ass'n*, 478 U.S. at 229-30 (same, for consideration of whether Secretary of Commerce's refusal to certify that a nation's fishing practices violated an international whaling convention, violated amendments to the Fishermen's Protective Act). *Japan Whaling* actually reaffirmed that "[t]he political question doctrine excludes from judicial

review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Id*. at 230.

In any event, the issue here is not whether the federal courts can interpret treaties that bear on civil disputes between private parties, or on criminal appeals. *See, e.g., Sanchez-Llamas*, 548 U.S. 331 (criminal defendants argued that Vienna Convention on Consular Relations implicitly authorized remedy of evidence suppression where state officials failed to notify consular officers of defendants' detention); *Decker*, 600 F.2d 733 (criminal defendants, prosecuted for violation of federal regulations, argued that United States' convention with Canada for protection of river system did not authorize United States to selectively approve regulations issued by commission established pursuant to the convention).[5] Of course they can.

[5] This Court has subsequently read *Decker* as "merely" stressing that the *Baker* factors "should not be applied indiscriminately and without considering that a refusal to decide" for prudential reasons "could have the effect of allowing persons to suffer criminal penalties for refusing to obey

Continued on next page.

The issue is whether federal courts should consider a suit by a foreign government to enforce its purported international law treaty rights against the United States. And plaintiff points to no case permitting such a suit. *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801), on which plaintiff relies (Pl.'s Br. 18), involved an *in rem* admiralty action against a French vessel that was captured for adjudication as a prize of war. France itself was not a party to that suit; the "claimant" to whom the vessel was ultimately restored was the ship's commander. Instead of permitting foreign states to enforce treaties against the United States, courts have consistently held that the judiciary's authority under Article III does not include the authority to command the United States to take action necessary to perform a treaty with another sovereign.

Thus, the Supreme Court held in *Botiller v. Dominguez* that it "ha[d] no power to set itself up as the instrumentality for enforcing the provisions of a treaty with a foreign nation which the government of the United

---

an invalid regulation." *Hopson v. Kreps*, 622 F.2d 1375, 1379-80 (9th Cir. 1980).

States, as a sovereign power, chooses to disregard." 130 U.S. 238, 247 (1889) (ejectment action involving Mexican land grant); *accord Ex parte Republic of Peru*, 318 U.S. 578, 588-89 (1943) (seizure of foreign vessel); *Chae Chan Ping v. United States*, 130 U.S. 581, 602 (1889) (exclusion law that violated treaty with China); *United States v. Ferreira*, 54 U.S. 40, 48 (1851) (failure to provide claims tribunal required by treaty with Spain); *see generally Holmes v. Laird*, 459 F.2d 1211, 1220 (D.C. Cir.) (citing cases), *cert. denied*, 409 U.S. 869 (1972); *Z & F Assets Realization Corp. v. Hull*, 114 F.2d 464, 471 (D.C. Cir. 1940), *aff'd on other grounds*, 311 U.S. 470 (1941); *Kwan v. United States*, 84 F. Supp. 2d 613, 623 (E.D. Pa. 2000), *aff'd*, 272 F.3d 1360 (Fed. Cir. 2001); *Canadian Transp. Co. v. United States*, 430 F. Supp. 1168, 1172 n.3 (D.D.C. 1977), *aff'd in part, rev'd in part*, 663 F.2d 1081 (D.C. Cir. 1980).

In each of these cases, the courts reaffirmed that the foreign state's recourse was "to the political department of our government, which is alone competent to act upon the subject." *Chae Chan Ping*, 130 U.S. at 609. As the Second Circuit pointed out, "it would not do for the courts to

declare that an act is a breach of a treaty and results in this or that remedy," since "[t]he remedy accorded might not content the foreign power or might bring about a conflict between the executive and judicial branches of our own government." *George E. Warren Corp. v. United States*, 94 F.2d 597, 599 (2d Cir.), *cert. denied*, 304 U.S. 572 (1938).

C. No Manageable Standards Exist For Resolving Plaintiff's Claims.

The district court likewise correctly concluded that it lacked judicially manageable standards "by which to adjudicate the United States' alleged breach of the" Treaty (*Baker* factor (2)).[6] ER 9 (Order). "What constitutes good faith efforts to pursue negotiations on effective measures relating to * * * cessation of the nuclear arms race are determinations for the political branches to make, using the panoply of resources and expertise it has

[6] Plaintiff construes the district court's determination as also reflecting the "impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion" (*Baker* factor (3)). Br. 29-30. Resolving this case would inevitably require a court to make such an initial policy determination, since a court could not conclude that the United States had breached its Article VI obligations without rendering a policy determination about, *inter alia*, the appropriate balancing of national security and disarmament concerns.

accumulated in the area of international security as well as diplomatic and military affairs." ER 11 (Order).

Federal law provides no standard by which to measure the United States' compliance with its Article VI obligation to "pursue negotiations in good faith on effective measures relating to" cessation of the nuclear arms race and nuclear disarmament. Applying the "good faith" standard to the United States' disarmament negotiations would require a court to make numerous policy judgments about what constitutes "pursuing negotiations," what constitutes a "good faith" effort to realize "effective measures" relating to the cessation of the nuclear arms race and nuclear disarmament, and, conversely, what policy positions or negotiation strategies might demonstrate a lack of good faith.

Plaintiff argues that to determine whether the United States has negotiated in good faith under Article VI, courts should borrow the standards from international adjudications of disputes involving maritime boundaries and hydroelectric projects, as well as federal cases construing, *inter alia*, the Indian Gaming Regulatory Act and the National Labor

Relations Act. Pl.'s Br. 10, 24-27, 33; *see also* Amicus United Electrical, Radio & Mach. Workers Br. 3-17 (arguing federal and state labor law provide manageable standard). From those cases, plaintiff extrapolates that in order to negotiate in good faith for purposes of Article VI, the United States must (1) attend negotiations, (2) make proposals and be willing to compromise, and (3) not take steps contrary to its commitment. Pl.'s Br. 26-27.

The cases on which plaintiff relies are inapposite. The Indian Gaming Regulatory Act, for instance, imposes a "good faith" standard on states in their negotiations with Indian tribes over gaming compacts, and specifies that certain conduct constitutes bad faith. *See Rincon Band of Luiseno Mission Indians v. Schwarzenegger*, 602 F.3d 1019, 1029 (9th Cir. 2010), *cert. denied sub nom. Brown v. Rincon Band of Luiseno Mission Indians*, 131 S. Ct. 3055 (2011). The labor cases construe "good faith" as part of an employer's express statutory duty to bargain over terms and conditions of employment. No similar statutory framework applies here because the

President and the Senate did not make the Treaty self-executing. *See infra* pp. 46-54.

The international decisions cited by plaintiff are neither precedential nor persuasive in the instant case. Not surprisingly, the standards that plaintiff derives from these irrelevant domestic and international cases do not accommodate the more nuanced consideration of what would constitute good faith in the context of multilateral disarmament negotiations among sovereign nations, all of whom must balance their national security concerns against their desire for disarmament and an end to the arms race. *See generally El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 845 (D.C. Cir. 2010) (en banc), *cert. denied*, 562 U.S. 1178 (2011) (political question doctrine barred adjudication of whether military attack on plant was mistaken because the court "could not decide this question without first fashioning out of whole cloth some standard for when military action is justified").[7]

[7] Amicus Global Justice Center urges that the steps outlined in the 2010 Review Conference Report supply the appropriate standard for

Continued on next page.

D. The Prudential *Baker* Factors Further Weigh Against Adjudication.

"[F]or the sake of completeness," plaintiff also argues that the final three *Baker* factors do not bar this case. Pl.'s Br. 30-34. Because the district court did not address these factors, this Court need not consider them. Should this Court wish to do so, however, all three of these prudential factors weigh heavily against adjudication of plaintiff's claims. *See generally Saldana*, 774 F.3d at 552 (finding that under *Baker* factors (4), (5), and (6), plaintiffs' claims are "inextricably bound to an inherently political question—the propriety of the United States' decision" to fund foreign brigade that committed human rights abuses).

It is difficult to conceive how a court could adjudicate a claim that the United States had breached a multilateral disarmament and nonproliferation treaty, without embarrassing the Executive Branch and expressing a lack of respect for its exercise of constitutional authority to

---

determining "good faith," but does not state how many of the specific actions a Party must take to be considered in compliance. Amicus Global Justice Ctr. Br. 5-7. In any event, nothing in the Report suggests that the Conference intended the document to constitute a measure of compliance with the terms of the Treaty itself.

interpret and implement the treaty (*Baker* factors (4), (6)). A court order declaring the United States in violation of Article VI would squarely contradict, and interfere with, the United States' position that it is "in compliance with all of its obligations under arms control, nonproliferation, and disarmament agreements and commitments." *See* U.S. Dep't of State, *2015 Report on Adherence to and Compliance With Arms Control, Nonproliferation, and Disarmament Agreements and Commitments*, pt. I (June 5, 2015), http://www.state.gov/t/avc/rls/rpt/2015/243224.htm. In a state law preemption case, the Supreme Court invalidated a state law regulating the state government's business with Burma because the differences between the state law and governing federal statutes "compromise the very capacity of the President to speak for the Nation with one voice in dealing with other governments." *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 381 (2000).

In addition, determining whether the United States is currently in breach of its treaty obligations would require a court to question the propriety of long-term negotiation strategies and choices that have already

been made and may take time to bear fruit (*Baker* factor (5)). Judicial intervention into these sensitive political decisions could have unanticipated consequences for ongoing negotiations of which plaintiff and the court are necessarily unaware.

III. ARTICLE VI OF THE TREATY IS NOT SELF-EXECUTING AND THUS IS NOT ENFORCEABLE IN U.S. COURT.

"In addition to constitutional standing, a plaintiff must have a valid cause of action for the court to proceed to the merits of its claim." *Gunpowder Riverkeeper v. FERC*, __F.3d__, 2015 WL 4450952, at *3 (D.C. Cir. July 21, 2015). Even if plaintiff's claims were justiciable, the Treaty, while certainly an *international* legal obligation, is non-self-executing as a matter of U.S. law. It accordingly is not domestically enforceable in U.S. court and therefore cannot supply plaintiff with a cause of action. Although the district court did not rest dismissal on this ground, this Court may affirm on any basis supported by the record. *Saldana*, 774 F.3d at 551; *see generally Trudeau v. FTC*, 456 F.3d 178, 187 (D.C. Cir. 2006) (erroneous dismissal pursuant to Rule 12(b)(1) can be affirmed "if dismissal were otherwise proper based on failure to state a claim" under Rule 12(b)(6)).

A. Only Self-Executing Treaties Can Be Enforced In U.S. Courts.

The United States does not dispute that the Treaty constitutes a binding *international* legal obligation for States Parties. "But not all international law obligations automatically constitute binding federal law enforceable in United States courts." *Medellín v. Texas*, 552 U.S. 491, 504 (2008).

The question of whether a treaty or treaty provision is non-self-executing is not a matter of international law; it is a matter of U.S. law. To determine whether a treaty or treaty provision is self-executing, and thus enforceable in U.S. court, courts may examine the intent of the President and the Senate, the text of the treaty, its negotiation and drafting history, and the post-ratification understanding of States Parties. *Medellín*, 552 U.S. at 507, 526; *see* Restatement (Third) of Foreign Relations Law § 111 cmt. h (giving primacy to the intent of the President and Senate: "[T]he intention of the United States determines whether an agreement is to be self-executing in the United States or should await implementation by legislation or appropriate executive or administrative action.").

B. The Treaty's Text And Its Ratification History Confirm That The Treaty Is Not Self-Executing.

1. Plaintiff fails to identify any evidence in the ratification history that the President and the Senate contemplated domestic judicial enforcement of the Treaty. The limited evidence in the Congressional Record confirms that Senator Fulbright, the Chairman of the Senate Foreign Relations Committee, affirmatively represented to the Senate that the Treaty was *not* self-executing. *See* 115 Cong. Rec. 6198, 6199-6200, 6204-6205 (1969) (statement of Sen. Fulbright). Indeed, Senator Fulbright relied on the language of the Supreme Court's holding in the *Head Money Cases*, 112 U.S. 580, 598 (1884), in stating that violations of the Treaty must be resolved through diplomacy rather than resort to the federal courts. *See* 115 Cong. Rec. at 6204. In 1990, the sponsor of a concurrent resolution reaffirming support for the objectives of the Treaty likewise stated that '[t]he [Non-Proliferation Treaty] is not self-executing." 136 Cong. Rec. 12723 (1990).

2. The text of the Non-Proliferation Treaty generally, and of Article VI in particular, supports the Senate's understanding and contains no

language identifying the treaty as self-executing. Indeed, the Treaty contains no language that contemplates any domestic enforcement of the Treaty's provisions.

In addition, Article VI uses the phrase "undertakes to pursue negotiations" to set out the obligations of States Parties. "This is not the kind of promissory language that will create a judicially-enforceable right." *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 374 (7th Cir. 1985) (per curiam) (holding that Articles 55 and 56 of U.N. Charter are phrased in "broad generalities" and are therefore not self-executing). Indeed, the Supreme Court held that similar language in Article 94 of the U.N. Charter confirmed that "further action * * * was contemplated" and that Article 94 of the Charter thus did not create rights enforceable in U.S. courts. *Medellín*, 552 U.S. at 509 n.5 (construing "undertakes to comply").

The post entry-into-force history of the implementation of the Treaty similarly demonstrates that the States Parties did not intend Article VI to be enforced in any domestic court. In the 2010 Review Conference, the Conference specifically stated that "concerns over compliance with any

obligation under the Treaty by any State party should be pursued by diplomatic means." 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Final Document, pt. I, p. 3 ¶7, http://www.state.gov/t/isn/npt/2010revcon/index.htm (follow link under "Reports"). Not surprisingly, plaintiff does not identify any other State Party that has opened its courts to suits such as this one, and we are aware of none.

In short, there is no indication that the States Parties to the Treaty anticipated that the parties would enforce the treaty against each other in domestic courts. "[W]here a treaty does not provide a particular remedy, either expressly or implicitly, it is not for the federal courts to impose one * * * through lawmaking of their own." *Medellín*, 552 U.S. at 513-14 (quoting *Sanchez-Llamas*, 548 U.S. at 347).

C. Under Supreme Court Precedent, Violations Of International Legal Obligation In Treaties Are The Subject Of Diplomatic Measures, Not Judicial Decree.

Because the Treaty is not self-executing, and Congress did not enact implementing legislation, the Treaty "depends for the enforcement of its

provisions on the interest and honor of the governments which are parties to it," with treaty disputes to be determined by "international negotiations and reclamations * * * * It is obvious that with all this the judicial courts have nothing to do and can give no redress." *Medellín*, 552 U.S. at 505 (ellipsis in original) (quoting *Head Money Cases*, 112 U.S. at 598). "No American court has wavered from this view in the subsequent century" after the *Head Money Cases*. *Committee of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 936 (D.C. Cir. 1988).

Plaintiff argues that the Supreme Court's statement in *Medellín* that this is "ordinarily" the case "leaves room for other outcomes." Pl.'s Br. 54. However, those "other outcomes" involve treaties that are, in fact, determined to be self-executing or are otherwise implemented through domestic legislation—in which case, Congress *may* choose to provide a cause of action. This possibility is irrelevant given the absence of any indication that the President and the Senate, or the States Parties, intended the Treaty to be domestically enforceable.

Plaintiff relies on *Pfizer, Inc. v. India*, 434 U.S. 308 (1978), to argue that foreign nations can bring suit in federal court on any civil claim that domestic parties can bring. Br. 56. However, foreign nations can do so only to the extent that specific federal statutes—like the federal antitrust laws at issue in *Pfizer*—provide a cause of action. While Congress has authorized suit against the United States by "[c]itizens or subjects of any foreign government" that provides reciprocal rights in the foreign sovereign's own courts, 28 U.S.C. 2502, no federal statute provides a similar cause of action broadly for foreign nations like the plaintiff in this case.

D. The Administrative Procedure Act Does Not Provide A Cause Of Action Here.

Plaintiff identifies the APA as the applicable waiver of the United States' immunity from suit here (Br. 56), but does not point to the APA as an alternate basis for this cause of action. Even if plaintiff had done so, the APA cannot supply the basis for challenging the United States' compliance with its Article VI obligations under the Non-Proliferation Treaty. While the judicial review provisions of the APA provide "a limited cause of action for parties adversely affected by agency action," *Trudeau v. FTC*, 456

F.3d 178, 185 (D.C. Cir. 2006), "the APA does not grant judicial review of agencies' compliance with a legal norm that is not otherwise an operative part of domestic law." *Committee of U.S. Citizens Living in Nicaragua*, 859 F.2d at 943.

E. The Tucker Act Likewise Does Not Provide A Cause of Action For Plaintiff Here.

Plaintiff likewise cannot look to the Tucker Act, 28 U.S.C. 1491(a), which waives sovereign immunity for actions based upon "any express or implied contract with the United States," for its cause of action. While the district courts and the Court of Federal Claims share concurrent jurisdiction over civil actions against the United States "founded upon any express or implied contract with the United States," 28 U.S.C. 1346(a)(2), the Federal Circuit has exclusive jurisdiction over Tucker Act appeals, 28 U.S.C. 1295(a)(2).

In addition, the Tucker Act does not authorize the award of equitable relief, including specific performance, except in limited circumstances not at issue here. *Massie v. United States*, 226 F.3d 1318, 1321 (Fed. Cir. 2000) (holding that Court of Federal Claims had no authority to order specific

performance of settlement agreement). As the Supreme Court observed, if Congress had intended to waive sovereign immunity for specific performance, "some provision would have been made for carrying into execution decrees for specific performance" against the government. *United States v. Jones*, 131 U.S. 1, 18 (1889). Plaintiff cites several cases for the proposition that specific performance is available in this case (Pl.'s Br. 50-52), none of which actually involves either specific performance or a contract dispute. *E.g., Zivotofsky*, 132 S. Ct. 1421 (2012) (suit challenging State Department action under Foreign Relations Authorization Act); *Uzbekistan v. United States*, 25 Ct. Int'l Trade 1084 (2001) (suit challenging Commerce Department countervailing duty order); *Sri Lanka v. United States*, 18 Ct. Int'l Trade 603 (1994) (same).

IV. PLAINTIFF'S CLAIM FOR DECLARATORY RELIEF IS NON-JUSTICIABLE AND FAILS TO STATE A CAUSE OF ACTION.

Finally, plaintiff argues that the district court erred by entering judgment without separately addressing the justiciability of plaintiff's requests for declaratory relief in counts I and II of the complaint. Br. 3, 12, 52-54; *see generally* ER 72-75 (Compl. count I) (seeking declaration that the

Treaty obligates the United States to pursue negotiations in good faith on nuclear disarmament and cessation of the nuclear arms race at an early date); ER 73-75 (Compl. count II) (seeking declaration that the United States is in continuing breach of those obligations). Thus, plaintiff reasons, this Court should reverse the dismissal as to counts I and II. Pl.'s Br. 54. Plaintiff is mistaken.

The Declaratory Judgment Act gives a federal court the discretion to declare the rights of any interested party "[i]n a case of actual controversy within its jurisdiction." 28 U.S.C. 2201(a). The threshold inquiry of whether a controversy exists "is 'identical to Article III's constitutional case or controversy requirement.'" *Principal Life Ins. Co. v. Robinson*, 394 F.3d 665, 669 (9th Cir. 2005). Moreover, the Act "does not create new substantive rights, but merely expands the remedies available in federal courts." *Shell Gulf of Mexico Inc. v. Center for Biological Diversity, Inc.*, 771 F.3d 632, 635 (9th Cir. 2014); *see also Schilling v. Rogers*, 363 U.S. 666, 677 (1960) (Declaratory Judgment Act "is not an independent source of federal jurisdiction; the availability of such relief presupposes the existence of a

judicially remediable right") (citation omitted); *Ali v. Rumsfeld*, 649 F.3d 762, 778 (D.C. Cir. 2011) (Declaratory Judgment Act does not provide a cause of action). Accordingly, if a plaintiff's claims are nonjusticiable or the plaintiff has no cause of action, then declaratory relief is unavailable.

As we have shown, *supra* pp. 15-46, the district court correctly concluded that plaintiff's claims are nonjusticiable because plaintiff lacks Article III standing and its claims present a political question. There is no meaningful difference between plaintiff's declaratory and injunctive claims with respect to the requirements of Article III. *See generally Gator.com Corp. v. L.L. Bean, Inc.*, 398 F.3d 1125, 1129 (9th Cir. 2005) (en banc) ("The limitations that Article III imposes upon federal court jurisdiction are not relaxed in the declaratory judgment context.").

Indeed, in cases in which a plaintiff has sought both declaratory and injunctive relief, this Court has consistently disposed of those claims with a single Article III analysis. *See, e.g., Munns v. Kerry*, 782 F.3d 402, 411 (9th Cir. 2015) (conducting single analysis to hold that plaintiffs "do[] not have standing to seek prospective declaratory and injunctive relief"); *Corrie*, 503

F.3d at 979-83 (conducting single political question analysis for claims for declaratory and injunctive relief).

Moreover, as we have also shown, *supra* pp. 46-54, the Treaty does not supply plaintiff with a cause of action. Absent a constitutional controversy or a cause of action, plaintiff's request for declaratory relief is no more than a request for an advisory opinion that plaintiff asserts "would provide a legal basis for [plaintiff's] potential withdrawal" from the Treaty under Article X, Pl.'s Br. 54.[8]

[8] The district court did not address the United States' alternate arguments of (1) improper venue in the Northern District of California; (2) time bar under 28 U.S.C. 2401(a); and (3) laches. Although plaintiff preemptively challenges these defenses on appeal (Pl.'s Br. 56-58), all three issues would require factual findings that the district court should make in the first instance. If this Court reverses the district court judgment, it should remand to the district court for further proceedings on these issues.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.[9]

Respectfully submitted,

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

MELINDA HAAG
United States Attorney

DOUGLAS N. LETTER
(202) 514-3602

/s/ Sushma Soni
SUSHMA SONI
(202) 514-4331
Attorneys, Appellate Staff
Civil Division, Room 7218
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

OCTOBER 2015

[9] The Department of Justice acknowledges the assistance of Andrew J. Hunter, a third-year law student, in the preparation of this brief.

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Palatino Linotype, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 10,540 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

/s/ Sushma Soni
SUSHMA SONI

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, counsel for the Defendants-Appellees are not aware of any related cases.

CERTIFICATE OF SERVICE

I hereby certify that on October 28, 2015, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system, and served counsel via the appellate CM/ECF system.

/s/ Sushma Soni
SUSHMA SONI

EXHIBIT NUMBER 13

Article 245 of the Constitution of Pakistan

The Constitution of Pakistan on pakistani.org
Go to: ---Part XII: Chapter 2: Armed Forces - [Articles 243-245]

Part XII: Miscellaneous

Chapter 2: Armed Forces.

644[

243. Command of Armed Forces.-

(1) The Federal Government shall have control and command of the Armed Forces.

(2) Without prejudice to the generality of the foregoing provision, the Supreme Command of the Armed Forces shall vest in the President.

(3) The President shall subject to law, have power-

(a) to raise and maintain the Military, Naval and Air Forces of Pakistan; and the Reserves of such Forces; and

(b) to grant Commissions in such Forces.

(3) The President shall, on advice of the Prime Minister, appoint-

(a) the Chairman, Joint Chiefs of Staff Committee;

(b) the Chief of the Army Staff;

(c) the Chief of the Naval Staff; and

(d) the Chief of the Air Staff,

and shall also determine their salaries and allowances.

] 644

244 Oath of Armed Forces.

Every member of the Armed Forces shall make oath in the form set out in the Third Schedule.

245 Functions of Armed Forces.

651[(1)] 651 The Armed Forces shall, under the directions of the Federal Government, defend Pakistan against external aggression or threat of war, and, subject to law, act in aid of civil power when called upon to do so.

652[

(2) The validity of any direction issued by the Federal Government under clause (1) shall not be called in question in any court.

(3) A High Court shall not exercise any jurisdiction under Article 199 in relation to any area in

which the Armed Forces of Pakistan are, for the time being, acting in aid of civil power in pursuance of Article 245:

Provided that this clause shall not be deemed to affect the jurisdiction of the High Court in respect of any proceeding pending immediately before the day on which the Armed Forces start acting in aid of civil power.

(4) Any proceeding in relation to an area referred to in clause (3) instituted on or after the day the Armed Forces start acting in aid of civil power and pending in any High Court shall remain suspended for the period during which the Armed Forces are so acting.

] 652

Notes

644 Substituted by Constitution (Eighteenth Amendment) Act, 2010, Section 90 (with effect from April 19, 2010) for :

243 Command of Armed Forces.

(1) The Federal Government shall have control and command of the Armed Forces.

645[

(1A) Without prejudice to the generality of the foregoing provision, the Supreme Command of the Armed Forces shall vest in the President.

] 645

(2) The President shall, subject to law, have power-

(a) to raise and maintain the Military, Naval and Air Forces of Pakistan; and the Reserves of such Forces; 646[and] 646

(b) to grant Commissions in such Forces 647[.] 647

648[] 648

649[

(3) The President shall, 650[in consultation with the Prime Minister] 650, appoint-

(a) the Chairman, Joint Chiefs of Staff Committee;

(b) the Chief of the Army Staff;

(c) the Chief of the Naval Staff; and

(d) the Chief of the Air Staff,

and shall also determine their salaries and allowances."

] 649

645 Inserted by Revival of Constitution of 1973 Order, 1985 (President's Order No. 14 of 1985), Art 2, Sch. item 50 (with effect from March 2, 1985).
646 Inserted by Legal Framework Order, 2002 (Chief Executive's Order No. 24 of 2002), Article 3(1), Sch. item 23(1)(a) (with effect from August 21, 2002).
647 Substituted by Legal Framework Order, 2002 (Chief Executive's Order No. 24 of 2002), Article 3(1), Sch. item 23(1)(b) (with effect from August 21, 2002) for "; and".
648 The following was omitted by Legal Framework Order, 2002 (Chief Executive's Order No. 24 of 2002), Article 3(1), Sch. item 23(1)(b) (with effect from August 21, 2002) : :

> (c) to appoint the Chairman, Joint Chiefs of Staff Committee, the Chief of the Army Staff, the Chief of the Naval Staff and the Chief of the Air Staff, and determine their salaries and allowances.

649 Inserted by Legal Framework Order, 2002 (Chief Executive's Order No. 24 of 2002), Article 3(1), Sch. item 23(2) (with effect from August 21, 2002).
650 Substituted by Constitution (Seventeenth Amendment) Act, 2003 (3 of 2003), Article 8 (with effect from December 31, 2003) for "in his discretion".
651 Renumbered by Constitution (Seventh Amendment) Act, 1977 (23 of 1977), Section 4 (with effect from April 21, 1977)
652 Inserted by Constitution (Seventh Amendment) Act, 1977 (23 of 1977), Section 4 (with effect from April 21, 1977).

The Constitution of Pakistan on pakistani.org
Go to: ---Part XII: Chapter 2: Armed Forces - [Articles 243-245]

EXHIBIT NUMBER 14

Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965 (Adopted by Resolution No. 214, Board of Governors of the International Bank for Reconstruction and Development on 10 September 1964), 1 ICSID Rep. 23 (1993)

REPORT OF THE EXECUTIVE DIRECTORS ON THE CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES

International Bank for Reconstruction and Development
March 18, 1965

REPORT OF THE EXECUTIVE DIRECTORS ON THE CONVENTION

Table of Contents

Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States

I

1. Resolution No. 214, adopted by the Board of Governors of the International Bank for Reconstruction and Development on September 10, 1964, provides as follows:

"RESOLVED:

(a) The report of the Executive Directors on "Settlement of Investment Disputes," dated August 6, 1964, is hereby approved.

(b) The Executive Directors are requested to formulate a convention establishing facilities and procedures which would be available on a voluntary basis for the settlement of investment disputes between contracting States and Nationals of other contracting States through conciliation and arbitration.

(c) In formulating such a convention, the Executive Directors shall take into account the views of member governments and shall keep in mind the desirability of arriving at a text which could be accepted by the largest possible number of governments.

(d) The Executive Directors shall submit the text of such a convention to member governments with such recommendations as they shall deem appropriate."

2. The Executive Directors of the Bank, acting pursuant to the foregoing Resolution, have formulated a Convention on the Settlement of Investment Disputes between States and Nationals of Other States and, on March 18, 1965, approved the submission of the text of the Convention, as attached hereto, to member governments of the Bank. This action by the Executive Directors does not, of course, imply that the governments represented by the individual Executive Directors are committed to take action on the Convention.

3. The action by the Executive Directors was preceded by extensive preparatory work, details of which are given in paragraphs 6-8 below. The Executive Directors are satisfied that the Convention in the form attached hereto represents a broad consensus of the views of those governments which accept the principle of establishing by inter-gov-

ernmental agreement facilities and procedures for the settlement of investment disputes which States and foreign investors wish to submit to conciliation or arbitration. They are also satisfied that the Convention constitutes a suitable framework for such facilities and procedures. Accordingly, the text of the Convention is submitted to member governments for consideration with a view to signature and ratification, acceptance or approval.

4. The Executive Directors invite attention to the provision of Article 68(2) pursuant to which the Convention will enter into force as between the Contracting States 30 days after deposit with the Bank, the depositary of the Convention, of the twentieth instrument of ratification, acceptance or approval.

5. The attached text of the Convention in the English, French and Spanish languages has been deposited in the archives of the Bank, as depositary, and is open for signature.

II

6. The question of the desirability and practicability of establishing institutional facilities, sponsored by the Bank, for the settlement through conciliation and arbitration of investment disputes between States and foreign investors was first placed before the Board of Governors of the Bank at its Seventeenth Annual Meeting, held in Washington, D.C. in September 1962. At that Meeting the Board of Governors, by Resolution No. 174, adopted on September 18, 1962, requested the Executive Directors to study the question.

7. After a series of informal discussions on the basis of working papers prepared by the staff of the Bank, the Executive Directors decided that the Bank should convene consultative meetings of legal experts designated by member governments to consider the subject in greater detail. The consultative meetings were held on a regional basis in Addis Ababa (December 16-20, 1963), Santiago de Chile (February 3-7, 1964), Geneva (February 17-21, 1964) and Bangkok (April 27-May 1, 1964), with the administrative assistance of the United Nations Economic Commissions and the European Office of the United Nations, and took as the basis for discussion a Preliminary Draft of a Convention on Settlement of Investment Disputes between States and Nationals of Other States prepared by the staff of the Bank in the light of the discussions of the Executive Directors and the views of governments. The meetings were attended by legal experts from 86 countries.

8. In the light of the preparatory work and of the views expressed at the consultative meetings, the Executive Directors reported to the Board of Governors at its Nineteenth Annual Meeting in Tokyo, in September 1964, that it would be desirable to establish the institutional facilities envisaged, and to do so within the framework of an inter-gov-

ernmental agreement. The Board of Governors adopted the Resolution set forth in paragraph 1 of this Report, whereupon the Executive Directors undertook the formulation of the present Convention. With a view to arriving at a text which could be accepted by the largest possible number of governments, the Bank invited its members to designate representatives to a Legal Committee which would assist the Executive Directors in their task. This Committee met in Washington from November 23 through December 11, 1964, and the Executive Directors gratefully acknowledge the valuable advice they received from the representatives of the 61 member countries who served on the Committee.

III

9. In submitting the attached Convention to governments, the Executive Directors are prompted by the desire to strengthen the partnership between countries in the cause of economic development. The creation of an institution designed to facilitate the settlement of disputes between States and foreign investors can be a major step toward promoting an atmosphere of mutual confidence and thus stimulating a larger flow of private international capital into those countries which wish to attract it.

10. The Executive Directors recognize that investment disputes are as a rule settled through administrative, judicial or arbitral procedures available under the laws of the country in which the investment concerned is made. However, experience shows that disputes may arise which the parties wish to settle by other methods; and investment agreements entered into in recent years show that both States and investors frequently consider that it is in their mutual interest to agree to resort to international methods of settlement.

11. The present Convention would offer international methods of settlement designed to take account of the special characteristics of the disputes covered, as well as of the parties to whom it would apply. It would provide facilities for conciliation and arbitration by specially qualified persons of independent judgment carried out according to rules known and accepted in advance by the parties concerned. In particular, it would ensure that once a government or investor had given consent to conciliation or arbitration under the auspices of the Centre, such consent could not be unilaterally withdrawn.

12. The Executive Directors believe that private capital will continue to flow to countries offering a favorable climate for attractive and sound investments, even if such countries did not become parties to the Convention or, having joined, did not make use of the facilities of the Centre. On the other hand, adherence to the Convention by a country would provide additional inducement and stimulate a larger flow of private international investment into its territories, which is the primary purpose of the Convention.

13. While the broad objective of the Convention is to encourage a larger flow of private international investment, the provisions of the Convention maintain a careful balance between the interests of investors and those of host States. Moreover, the Convention permits the institution of proceedings by host States as well as by investors and the Executive Directors have constantly had in mind that the provisions of the Convention should be equally adapted to the requirements of both cases.

14. The provisions of the attached Convention are for the most part self-explanatory. Brief comment on a few principal features may, however, be useful to member governments in their consideration of the Convention.

IV
The International Centre for Settlement of Investment Disputes

General

15. The Convention establishes the International Centre for Settlement of Investment Disputes as an autonomous international institution (Articles 18-24). The purpose of the Centre is "to provide facilities for conciliation and arbitration of investment disputes * * *" (Article 1(2)). The Centre will not itself engage in conciliation or arbitration activities. This will be the task of Conciliation Commissions and Arbitral Tribunals constituted in accordance with the provisions of the Convention.

16. As sponsor of the establishment of the institution the Bank will provide the Centre with premises for its seat (Article 2) and, pursuant to arrangements between the two institutions, with other administrative facilities and services (Article 6(d)).

17. With respect to the financing of the Centre (Article 17), the Executive Directors have decided that the Bank should be prepared to provide the Centre with office accommodation free of charge as long as the Centre has its seat at the Bank's headquarters and to underwrite, within reasonable limits, the basic overhead expenditure of the Centre for a period of years to be determined after the Centre is established.

18. Simplicity and economy consistent with the efficient discharge of the functions of the Centre characterize its structure. The organs of the Centre are the Administrative Council (Articles 4-8) and the Secretariat (Article 9-11). The Administrative Council will be composed of one representative of each Contracting State, serving without remuneration from the Centre. Each member of the Council casts one vote and matters before the Council are decided by a majority of the votes cast unless a different majority is required by the Convention. The President

of the Bank will serve *ex officio* as the Council's Chairman but will have no vote. The Secretariat will consist of a Secretary-General, one or more Deputy Secretaries-General and staff. In the interest of flexibility the Convention provides for the possibility of there being more than one Deputy Secretary-General, but the Executive Directors do not now foresee a need for more than one or two full time high officials of the Centre. Article 10, which requires that the Secretary-General and any Deputy Secretary-General be elected by the Administrative Council by a majority of two-thirds of its members, on the nomination of the Chairman, limits their terms of office to a period not exceeding six years and permits their re-election. The Executive Directors believe that the initial election, which will take place shortly after the Convention will have come into force, should be for a short term so as not to deprive the States which ratify the Convention after its entry into force of the possibility of participating in the selection of the high officials of the Centre. Article 10 also limits the extent to which these officials may engage in activities other than their official functions.

Functions of the Administrative Council

19. The principal functions of the Administrative Council are the election of the Secretary-General and any Deputy Secretary-General, the adoption of the budget of the Centre and the adoption of administrative and financial regulations, rules governing the institution of proceedings and rules of procedure for conciliation and arbitration proceedings. Action on all these matters requires a majority of two-thirds of the members of the Council.

Functions of the Secretary-General

20. The Convention requires the Secretary-General to perform a variety of administrative functions as legal representative, registrar and principal officer of the Centre (Articles 7(1), 11, 16(3), 25(4), 28, 36, 49(1), 50(1), 51(1), 52(1), 54(2), 59, 60(1), 63(b) and 65). In addition, the Secretary-General is given the power to refuse registration of a request for conciliation proceedings or arbitration proceedings, and thereby to prevent the institution of such proceedings, if on the basis of the information furnished by the applicant he finds that the dispute is *manifestly* outside the jurisdiction of the Centre (Article 28(3) and 36(3)). The Secretary-General is given this limited power to "screen" requests for conciliation or arbitration proceedings with a view to avoiding the embarrassment to a party (particularly a State) which might result from the institution of proceedings against it in a dispute which it had not consented to submit to the Centre, as well as the possibility that the machinery of the Centre would be set in motion in cases which for other reasons were obviously outside the jurisdiction of the

Centre e.g., because either the applicant or the other party was not eligible to be a party in proceedings under the Convention.

The Panels

21. Article 3 requires the Centre to maintain a Panel of Conciliators and a Panel of Arbitrators, while Articles 12-16 outline the manner and terms of designation of Panel members. In particular, Article 14(1) seeks to ensure that Panel members will possess a high degree of competence and be capable of exercising independent judgment. In keeping with the essentially flexible character of the proceedings, the Convention permits the parties to appoint conciliators and arbitrators from outside the Panels but requires (Articles 31(2) and 40(2)) that such appointees possess the qualities stated in Article 14(1). The Chairman, when called upon to appoint a conciliator or arbitrator pursuant to Article 30 or 38, is restricted in his choice to Panel members.

V
Jurisdiction of the Centre

22. The term "jurisdiction of the Centre" is used in the Convention as a convenient expression to mean the limits within which the provisions of the Convention will apply and the facilities of the Centre will be available for conciliation and arbitration proceedings. The jurisdiction of the Centre is dealt with in Chapter II of the Convention (Articles 25-27).

Consent

23. Consent of the parties is the cornerstone of the jurisdiction of the Centre. Consent to jurisdiction must be in writing and once given cannot be withdrawn unilaterally (Article 25(1)).

24. Consent of the parties must exist when the Centre is seized (Articles 28(3) and 36(3)) but the Convention does not otherwise specify the time at which consent should be given. Consent may be given, for example, in a clause included in an investment agreement, providing for the submission to the Centre of future disputes arising out of that agreement, or in a *compromis* regarding a dispute which has already arisen. Nor does the Convention require that the consent of both parties be expressed in a single instrument. Thus, a host State might in its investment promotion legislation offer to submit disputes arising out of certain classes of investments to the jurisdiction of the Centre, and the investor might give his consent by accepting the offer in writing.

25. While consent of the parties is an essential prerequisite for the jurisdiction of the Centre, consent alone will not suffice to bring a dispute within its jurisdiction. In keeping with the purpose of the Con-

vention, the jurisdiction of the Centre is further limited by reference to the nature of the dispute and the parties thereto.

Nature of the Dispute

26. Article 25(1) requires that the dispute must be a "legal dispute arising directly out of an investment." The expression "legal dispute" has been used to make clear that while conflicts of rights are within the jurisdiction of the Centre, mere conflicts of interests are not. The dispute must concern the existence or scope of a legal right or obligation, or the nature or extent of the reparation to be made for breach of a legal obligation.

27. No attempt was made to define the term "investment" given the essential requirement of consent by the parties, and the mechanism through which Contracting States can make known in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre (Article 25(4)).

Parties to the Dispute

28. For a dispute to be within the jurisdiction of the Centre one of the parties must be a Contracting State (or a constituent subdivision or agency of a Contracting State) and the other party must be a "national of another Contracting State." The latter term as defined in paragraph (2) of Article 25 covers both natural persons and juridical persons.

29. It should be noted that under clause (a) of Article 25(2) a natural person who was a national of the State party to the dispute would not be eligible to be a party in proceedings under the auspices of the Centre, even if at the same time he had the nationality of another State. This ineligibility is absolute and cannot be cured even if the State party to the dispute had given its consent.

30. Clause (b) of Article 25(2), which deals with juridical persons, is more flexible. A juridical person which had the nationality of the State party to the dispute would be eligible to be a party to proceedings under the auspices of the Centre if that State had agreed to treat it as a national of another Contracting State because of foreign control.

Notifications by Contracting States

31. While no conciliation or arbitration proceedings could be brought against a Contracting State without its consent and while no Contracting State is under any obligation to give its consent to such proceedings, it was nevertheless felt that adherence to the Convention might be interpreted as holding out an expectation that Contracting States would give favorable consideration to requests by investors for the submission of a dispute to the Centre. It was pointed out in that connection that there might be classes of investment disputes which

governments would consider unsuitable for submission to the Centre or which, under their own law, they were not permitted to submit to the Centre. In order to avoid any risk of misunderstanding on this score, Article 25(4) expressly permits Contracting States to make known to the Centre in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre. The provision makes clear that a statement by a Contracting State that it would consider submitting a certain class of dispute to the Centre would serve for purposes of information only and would not constitute the consent required to give the Centre jurisdiction. Of course, a statement excluding certain classes of disputes from consideration would not constitute a reservation to the Convention.

Arbitration as Exclusive Remedy

32. It may be presumed that when a State and an investor agree to have recourse to arbitration, and do not reserve the right to have recourse to other remedies or require the prior exhaustion of other remedies, the intention of the parties is to have recourse to arbitration to the exclusion of any other remedy. This rule of interpretation is embodied in the first sentence of Article 26. In order to make clear that it was not intended thereby to modify the rules of international law regarding the exhaustion of local remedies, the second sentence explicitly recognizes the right of a State to require the prior exhaustion of local remedies.

Claims by the Investor's State

33. When a host State consents to the submission of a dispute with an investor to the Centre, thereby giving the investor direct access to an international jurisdiction, the investor should not be in a position to ask his State to espouse his case and that State should not be permitted to do so. Accordingly, Article 27 expressly prohibits a Contracting State from giving diplomatic protection, or bringing an international claim, in respect of a dispute which one of its nationals and another Contracting State have consented to submit, or have submitted, to arbitration under the Convention, unless the State party to the dispute fails to honor the award rendered in that dispute.

VI
Proceedings under the Convention

Institution of Proceedings

34. Proceedings are instituted by means of a request addressed to the Secretary-General (Articles 28 and 36). After registration of the request the Conciliation Commission or Arbitral Tribunal, as the case

may be, will be constituted. Reference is made to paragraph 20 above on the power of the Secretary-General to refuse registration.

Constitution of Conciliation Commissions and Arbitral Tribunals

35. Although the Convention leaves the parties a large measure of freedom as regards the constitution of Commissions and Tribunals, it assures that a lack of agreement between the parties on these matters or the unwillingness of a party to cooperate will not frustrate proceedings (Articles 29-30 and 37-38, respectively).

36. Mention has already been made of the fact that the parties are free to appoint conciliators and arbitrators from outside the Panels (see paragraph 21 above). While the Convention does not restrict the appointment of conciliators with reference to nationality, Article 39 lays down the rule that the majority of the members of an Arbitral Tribunal should not be nationals of the State party to the dispute or of the State whose national is a party to the dispute. This rule is likely to have the effect of excluding persons having these nationalities from serving on a Tribunal composed of not more than three members. However, the rule will not apply where each and every arbitrator on the Tribunal has been appointed by agreement of the parties.

Conciliation Proceedings; Powers and Functions of Arbitral Tribunals

37. In general, the provisions of Articles 32-35 dealing with conciliation proceedings and of Articles 41-49, dealing with the powers and functions of Arbitral Tribunals and awards rendered by such Tribunals, are self-explanatory. The differences between the two sets of provisions reflect the basic distinction between the process of conciliation which seeks to bring the parties to agreement and that of arbitration which aims at a binding determination of the dispute by the Tribunal.

38. Article 41 reiterates the well-established principle that international tribunals are to be the judges of their own competence and Article 32 applies the same principle to Conciliation Commissions. It is to be noted in this connection that the power of the Secretary-General to refuse registration of a request for conciliation or arbitration (see paragraph 20 above) is so narrowly defined as not to encroach on the prerogative of Commissions and Tribunals to determine their own competence and, on the other hand, that registration of a request by the Secretary-General does not, of course, preclude a Commission or Tribunal from finding that the dispute is outside the jurisdiction of the Centre.

39. In keeping with the consensual character of proceedings under the Convention, the parties to conciliation or arbitration proceedings

may agree on the rules of procedure which will apply in those proceedings. However, if or to the extent that they have not so agreed the Conciliation Rules and Arbitration Rules adopted by the Administrative Council will apply (Articles 33 and 44).

40. Under the Convention an Arbitral Tribunal is required to apply the law agreed by the parties. Failing such agreement, the Tribunal must apply the law of the State party to the dispute (unless that law calls for the application of some other law), as well as such rules of international law as may be applicable. The term "international law" as used in this context should be understood in the sense given to it by Article 38(1) of the Statute of the International Court of Justice, allowance being made for the fact that Article 38 was designed to apply to inter-State disputes.[1]

Recognition and Enforcement of Arbitral Awards

41. Article 53 declares that the parties are bound by the award and that it shall not be subject to appeal or to any other remedy except those provided for in the Convention. The remedies provided for are revision (Article 51) and annulment (Article 52). In addition, a party may ask a Tribunal which omitted to decide any question submitted to it, to supplement its award (Article 49(2)) and may request interpretation of the award (Article 50).

42. Subject to any stay of enforcement in connection with any of the above proceedings in accordance with the provisions of the Convention, the parties are obliged to abide by and comply with the award and Article 54 requires every Contracting State to recognize the award as binding and to enforce the pecuniary obligations imposed by the award as if it were a final decision of a domestic court. Because of the different legal techniques followed in common law and civil law jurisdictions and the different judicial systems found in unitary and federal or other non-unitary States, Article 54 does not prescribe any particular method to be followed in its domestic implementation, but requires each Contracting State to meet the requirements of the Article in accordance with its own legal system.

43. The doctrine of sovereign immunity may prevent the forced execution in a State of judgments obtained against foreign States or

[1] Article 38(1) of the Statute of the International Court of Justice reads as follows:
"1. The Court, whose function it is to decide in accordance with international law such disputes as are submitted to it, shall apply:
   a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
   b. international custom, as evidence of a general practice accepted as law;
   c. the general principles of law recognized by civilized nations;
   d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

against the State in which execution is sought. Article 54 requires Contracting States to equate an award rendered pursuant to the Convention with a final judgment of its own courts. It does not require them to go beyond that and to undertake forced execution of awards rendered pursuant to the Convention in cases in which final judgments could not be executed. In order to leave no doubt on this point Article 55 provides that nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution.

VII
Place of Proceedings

44. In dealing with proceedings away from the Centre, Article 63 provides that proceedings may be held, if the parties so agree, at the seat of the Permanent Court of Arbitration or of any other appropriate institution with which the Centre may enter into arrangements for that purpose. These arrangements are likely to vary with the type of institution and to range from merely making premises available for the proceedings to the provision of complete secretariat services.

VIII
Disputes Between Contracting States

45. Article 64 confers on the International Court of Justice jurisdiction over disputes between Contracting States regarding the interpretation or application of the Convention which are not settled by negotiation and which the parties do not agree to settle by other methods. While the provision is couched in general terms, it must be read in the context of the Convention as a whole. Specifically, the provision does not confer jurisdiction on the Court to review the decision of a Conciliation Commission or Arbitral Tribunal as to its competence with respect to any dispute before it. Nor does it empower a State to institute proceedings before the Court in respect of a dispute which one of its nationals and another Contracting State have consented to submit or have submitted to arbitration, since such proceedings would contravene the provisions of Article 27, unless the other Contracting State had failed to abide by and comply with the award rendered in that dispute.

IX
Entry into Force

46. The Convention is open for signature on behalf of States members of the Bank. It will also be open for signature on behalf of any other State which is a party to the Statute of the International Court of Justice and which the Administrative Council, by a vote of two-thirds of its

members, shall have invited to sign. No time limit has been prescribed for signature. Signature is required both of States joining before the Convention enters into force and those joining thereafter (Article 67). The Convention is subject to ratification, acceptance or approval by the signatory States in accordance with their constitutional procedures (Article 68). As already stated, the Convention will enter into force upon the deposit of the twentieth instrument of ratification, acceptance or approval.

EXHIBIT NUMBER 15

C. Schreuer, "What is a Legal Dispute?" in I. Buffard et al. (eds), International Law between Universalism and Fragmentation, Festschrift in Honour of Gerhard Hafner (Leiden/Boston: Martinus Nijhoff Publishers, 2008)

46

What is a Legal Dispute?

Christoph Schreuer[*]

I. Do You Really Know It When You See It?

It may seem inappropriate to write about disputes in a volume dedicated to Gerhard Hafner. He is the most peaceable and good natured person one could possibly imagine. If international politics were run by people of his disposition, the world would be a much better place. Alas, this is not the case and Gerhard Hafner is fully aware of this reality. Indeed his work reflects the importance of methods for the peaceful settlement of international disputes.[1]

Provisions on the peaceful settlement of disputes, by definition, presuppose the existence of disputes for their application. Article 33 of the UN Charter is an obvious example.[2] The definition of a dispute may appear superfluous at first sight. Everyone knows the meaning of a dispute and one may presume that one will recognize a dispute when one sees it. However, in actual practice the existence of a dispute may be in doubt and may itself be disputed. At times, the existence of a dispute is denied in order to contest the jurisdiction of an international court or tribunal.

The existing definitions have done little to clarify questions that arise in this context. Black's Law Dictionary circumscribes 'dispute' as 'a conflict or controversy, esp. one that has given rise to a particular lawsuit'.[3]

The Permanent Court of International Justice (PCIJ) and the International Court of Justice (ICJ) have addressed the issue of the existence of a dispute in several cases. In

* The author wishes to express his gratitude to Ursula Kriebaum and to Clara Reiner for valuable comments on an earlier version of this paper.

1 G. Hafner, 'The Physiognomy of Disputes and the Appropriate Means to Resolve Them', in United Nations (ed.), *International Law as a Language for International Relations. Proceedings of the United Nations Congress on Public International Law* 559 (1995); G. Hafner, 'Some Legal Aspects of International Disputes', 104 *The Journal of International Law and Diplomacy* 65 (2005).

2 1945 Charter of the United Nations, art. 33(1): 'The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.'

3 B. A. Garner (ed.), *Black's Law Dictionary* (1999).

I. Buffard/J. Crawford/A. Pellet/S. Wittich (eds.), *International Law between Universalism and Fragmentation.* Festschrift *in Honour of Gerhard Hafner*, 959-980, © 2008 Koninklijke Brill NV. Printed in the Netherlands.

the *Mavrommatis Palestine Concessions* case, the Permanent Court gave the following broad definition:

> 'A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons.'[4]

In another case, the ICJ referred to

> 'a situation in which the two sides held clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations.'[5]

The Tribunal in *Texaco* v. *Libya* referred to a 'present divergence of interests and opposition of legal views'.[6]

ICSID tribunals have adopted similar descriptions of 'disputes', often relying on the PCIJ's and ICJ's definitions.[7]

Gerhard Hafner has described these definitions as too wide and too narrow at the same time.[8] A look at judicial practice proves him right. Whether a dispute in the technical sense exists is rather more complex than these definitions would suggest. Practice also demonstrates that, far from being a purely academic issue, the existence *vel non* of a dispute can be decisive to determine a court's or tribunal's jurisdiction.

The present contribution seeks to shed some light on the concept of disputes, particularly legal disputes, by reference to the practice of the International Court and investment tribunals. Taking the PCIJ's definition in *Mavrommatis* as a starting point, it addresses the following issues:

— Under what circumstances does 'a disagreement' or 'conflict' become a dispute? Does the communication between the parties need to reach a certain level of intensity to qualify as a dispute?

---

4 Mavrommatis Palestine Concessions (Greece *v*. Great Britain), Judgment of 30 August 1924, 1924 *PCIJ* (Ser. A) No. 2, at 11.

5 Interpretation of the Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion of 30 March 1950 (first phase), 1950 *ICJ Rep*. 65, at 74.

6 Texaco Overseas Petroleum Company and California Asiatic Oil Company *v*. Libyan Arab Republic, Preliminary Award of 27 November 1975, 53 *ILR* 389, at 416 (1979).

7 Maffezini *v*. Spain, Decision on Jurisdiction of 25 January 2000, 40 *ILM* 1129, at paras. 93, 94 (2001); Tokios Tokelės *v*. Ukraine, Decision on Jurisdiction of 29 April 2004, at paras. 106, 107; Lucchetti *v*. Peru, Award of 7 February 2005, at para. 48; Impregilo *v*. Pakistan, Decision on Jurisdiction of 22 April 2005, at paras. 302, 303; AES *v*. Argentina, Decision on Jurisdiction of 26 April 2005, at para. 43; El Paso Energy Intl. Co. *v*. Argentina, Decision on Jurisdiction of 27 April 2006, at para. 61; Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. *v*. Argentina, Decision on Jurisdiction of 16 May 2006, at para. 29; M.C.I. *v*. Ecuador, Award of 31 July 2007, at para. 63.

8 G. Hafner, 'The Physiognomy of Disputes and the Appropriate Means to Resolve Them', *supra* note 1, at 560.

— Who determines whether the dispute is 'on a point of law or fact or a conflict of legal views'? What if a party describes the dispute as political and hence as non-legal?

— How does the court or tribunal determine whether the dispute represents a conflict 'of interests between' the parties? How does it deal with the argument that the issue before it is hypothetical and not sufficiently concrete to be susceptible of judicial resolution?

In addition to definitional issues, certain jurisdictional arguments are closely related to the existence of a dispute:

— One party may argue that the dispute, if indeed there is one, is with a third party to which the claimant should turn.

— The existence of a dispute may be uncontested but it may be disputed whether it has arisen before a date critical for the jurisdiction of a court or tribunal.

II. The Process of Communication Leading to a Dispute

The existence of a dispute presupposes a certain degree of communication between the parties. The matter must have been taken up with the other party, which must have opposed the claimant's position if only indirectly. Practice demonstrates that the threshold required in terms of communication between the parties for the existence of a dispute is fairly low. In certain situations a dispute may exist even in the absence of active opposition by one party to the claim of the other party.

A. Intensity of Communication

In a number of cases the question arose as to whether the communications between the parties, before the initiation of proceedings, had reached an intensity that deserved the designation as a dispute.[9] In the *Interpretation of Peace Treaties* case the ICJ was confronted with the question as to whether the diplomatic exchanges between Bulgaria, Hungary and Romania on the one hand, and certain Allied and Associated Powers signatories to the Peace Treaties on the other, amounted to a dispute. The Court gave an affirmative response on the basis of a finding that the two sides had expressed clearly opposing views concerning their treaty obligations. The Court said:

> 'Whether there exists an international dispute is a matter for objective determination. The mere denial of the existence of a dispute does not prove its non-existence. In the

---

9 *See also* Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion of 26 April 1988, 1988 *ICJ Rep*. 12, at para. 35.

> diplomatic correspondence submitted to the Court, the United Kingdom, acting in association with Australia, Canada and New Zealand, and the United States of America charged Bulgaria, Hungary and Romania with having violated, in various ways, the provisions of the articles dealing with human rights and fundamental freedoms in the Peace Treaties and called upon the three Governments to take remedial measures to carry out their obligations under the Treaties. The three Governments, on the other hand, denied the charges. There has thus arisen a situation in which the two sides hold clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations. Confronted with such a situation, the Court must conclude that international disputes have arisen.'[10]

In the *South West Africa* cases, the ICJ found that it had to address the preliminary question as to the existence of a dispute since its competence under the Mandate and under Articles 36 and 37 of its Statute depended on a positive finding on this issue. After quoting the well-known definition from *Mavrommatis* it said:

> 'In other words it is not sufficient for one party to a contentious case to assert that a dispute exists with the other party. 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 nonexistence. 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. Tested by this criterion there can be no doubt about the existence of a dispute between the Parties before the Court, since it is clearly constituted by their opposing attitudes relating to the performance of the obligations of the Mandate by the Respondent as Mandatory.'[11]

In the *Certain Property* case, there had been bilateral consultations between Germany and Liechtenstein. Germany argued that 'a discussion of divergent legal opinions should not be considered as evidence of the existence of a dispute in the sense of the Court's Statute "before it reaches a certain threshold"'.[12] After quoting from the *South West Africa* cases and briefly describing the divergences between the parties, the Court said:

> 'The Court thus finds that in the present proceedings complaints of fact and law formulated by Liechtenstein against Germany are denied by the latter. In conformity with well-established jurisprudence (...), the Court concludes that '[b]y virtue of this denial, there is a legal dispute' between Liechtenstein and Germany.'[13]

These cases indicate that the threshold for the existence of a dispute in terms of prior communication between the parties is fairly low. The exchanges between the parties

---

[10] Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, *supra* note 5, at 74.

[11] South West Africa (Ethiopia *v.* South Africa; Liberlia *v.* South Africa), Preliminary Objections, Judgment of 21 December 1962, 1962 *ICJ Rep.* 319, at 328.

[12] Certain Property (Liechtenstein *v.* Germany), Preliminary Objections, Judgment of 10 February 2005, 2005 *ICJ Rep.* 6, at para. 23.

[13] *Ibid.*, para. 25.

do not require a high degree of intensity or acrimony. The formulation of opposing positions by the parties is sufficient.

B. Absence of Opposition

If a dispute and hence the jurisdiction of international courts and tribunals depends on the formulation of opposing positions, what if the respondent simply acknowledges the position of the claimant yet fails to provide a remedy? The mere admission of liability cannot be a valid defence in legal proceedings and will not deprive the court or tribunal of its jurisdiction. Under these circumstances, the absence of an overt disagreement between the parties will not negate the existence of a dispute.

Sir Robert Jennings has described this dilemma in the following terms with respect to the ICJ:

> '[C]an the Court, in its contentious jurisdiction, pass upon a question of law or fact, even if that point is not strictly *disputed* between the parties? For it is not difficult, certainly in municipal law, to imagine cases in which there is no real legal dispute between two persons; yet a court might have undoubted competence. If a debtor freely acknowledges the sum and due day of a debt but simply does nothing about it, the creditor can surely sue and get the court to enforce payment of the debt, even if there is no true 'legal dispute' or even dispute about fact, before the Court. [...] Even in a case which follows normal procedures there is often agreement between the parties on certain points of law or fact, often quite important ones. It has never been suggested that this absence of dispute removes the point from the Court's competence.'[14]

The *Headquarters Agreement* case[15] concerned the Headquarters Agreement between the United Nations and the United States. The United Nations, noting the existence of a dispute, invoked the Agreement's Article 21 that provides for arbitration. The United States took the position that it 'had not yet concluded that a dispute existed'.[16] The General Assembly requested an advisory opinion from the ICJ on the question as to whether the United States was under an obligation to enter into arbitration under Article 21 of the Agreement.[17] One of the questions before the Court was whether there was, in fact, a dispute triggering the obligation to go to arbitration. The United Nations had on several occasions asserted the incompatibility of certain US legislation with the Headquarters Agreement. But the United States had never formally contested that

---

[14] R. Jennings, 'Reflections on the Term "Dispute"', in R. St. J. Macdonald (ed.), *Essays in Honour of Wang Tieya* 401, at 404 (1993).

[15] Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, *supra* note 9.

[16] *Ibid.*, 29, para. 39.

[17] *Ibid.*, 13.

position. The Court found that the lack of refutation of the UN position by the United States did not negate the existence of a dispute. The Court said:

> '37. The United States has never expressly contradicted the view expounded by the Secretary-General and endorsed by the General Assembly regarding the sense of the Headquarters Agreement. Certain United States authorities have even expressed the same view, but the United States has nevertheless taken measures against the PLO Mission to the United Nations. It has indicated that those measures were being taken 'irrespective of any obligations the United States may have under the [Headquarters] Agreement' [...].
>
> 38. In the view of the Court, where one party to a treaty protests against the behaviour or a decision of another party, and claims that such behaviour or decision constitutes a breach of the treaty, the mere fact that the party accused does not advance any argument to justify its conduct under international law does not prevent the opposing attitudes of the parties from giving rise to a dispute concerning the interpretation or application of the treaty.'[18]

In *AGIP* v. *Congo*,[19] the Government had expropriated the Claimant's assets without compensation in violation of a prior agreement. Before the ICSID Tribunal, the Government declared that there was no longer any dispute since it had recognised the principle of compensation.[20] The Tribunal found that the declarations made by the Government were so lacking in precision that the continuing existence of the dispute was not in doubt. It noted that the Claimant had not, in fact, received any compensation. In addition, the claim was directed not only at compensation for the nationalisation but also at damages for losses resulting from the Government's violations of its contractual obligations.[21]

C. Failure to Respond

Failure to respond to the demands of the other party will not exclude the existence of a dispute. Silence of a party in the face of legal arguments and claims for reparation by the other party cannot be taken as expressing agreement and hence the absence of a dispute. In the *Headquarters Agreement* case, the ICJ, referring to the *Teheran Hostages* case,[22] noted the lack of appearance of Iran in that case. It saw no obstacle

---

18 *Ibid.*, 28.

19 AGIP *v.* Congo, Award of 30 November 1979, 1 *ICSID Rep.* 306 (1993).

20 *Ibid.*, 307, 317.

21 *Ibid.*, 317, 326.

22 United States Diplomatic and Consular Staff in Tehran (United States of America *v.* Iran), Judgment of 24 May 1980, 1980 *ICJ Rep.* 3, at 24.

to the existence of a dispute and hence to its jurisdiction in the lack of response to the claims of the United States on the part of Iran. The Court said:

> 'Iran, which did not appear in the proceedings before the Court, had acted in such a way as, in the view of the United States, to commit breaches of the Conventions, but, so far as the Court was informed, Iran had at no time claimed to justify its actions by advancing an alternative interpretation of the Conventions, on the basis of which such actions would not constitute such a breach. The Court saw no need to enquire into the attitude of Iran in order to establish the existence of a 'dispute'; in order to determine whether it had jurisdiction […].'[23]

Investment tribunals have similarly noted the lack of response by a party to the demands of the other.[24] This did not affect the existence of a dispute between them.

It follows that normally a dispute will be characterized by a certain amount of communication demonstrating opposing demands and denials. This is obviously what the PCIJ had in mind in *Mavrommatis* when it referred to a 'conflict of legal views or of interests between two persons'. But an acknowledgement of the other side's position unaccompanied by a remedy or even a simple failure to respond will not exclude the existence of a dispute. The decisive criterion for the existence of a dispute is not an explicit denial of the other party's position but a failure to accede to its demands.

III. The Legal Nature of the Dispute

If dispute settlement is to be achieved by judicial means, such as the ICJ or investment arbitration, the use of these means is conditioned on the existence of a *legal* dispute. Article 36(3) of the UN Charter states that legal disputes should, as a general rule, be referred to the ICJ.[25] Article 36(2) of the ICJ's Statute refers to legal disputes when providing for submission by States under the so-called optional clause. Article 38(1) of the Statute states that the ICJ's function is to decide the disputes submitted to it in accordance with international law.[26] The ICSID Convention in Article 25(1) refers to legal disputes that may be resolved by conciliation or arbitration.[27]

---

[23] Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, *supra* note 9, at 28, para. 38.

[24] Tradex *v.* Albania, Decision on Jurisdiction of 24 December 1996, 5 *ICSID Rep.* 60, at 61 (2002); AAPL *v.* Sri Lanka, Award of 27 June 1990, 4 *ICSID Rep.* 251 (1997).

[25] 1945 Charter of the United Nations, art. 36(3): 'In making recommendations under this Article the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court.'

[26] 1945 Statute of the International Court of Justice, art. 38(1): 'The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: […].'

[27] 1965 Convention on the Settlement of Investment Disputes between States and Nationals of other States (1965 ICSID Convention), 575 *UNTS* 159, 4 *ILM* 524 (1965), art. 25(1): 'The

Even where the existence of a dispute is admitted, its legal nature may be contested. Some respondents have argued that the nature of the dispute at issue was not legal and that hence the court or tribunal lacked jurisdiction.

The legal nature of disputes is sometimes described in terms of factual situations and the consequences engendered by them. Examples are the use of force, application of a treaty, expropriation or breach of an agreement. But fact patterns alone do not determine the legal or non-legal character of a dispute. Rather, it is the type of claim that is put forward and the prescription that is invoked that decides whether a dispute is legal or not. Thus, it is entirely possible to react to a breach of an agreement by relying on moral standards by invoking concepts of justice or by pointing to the lack of political wisdom of such a course of action. The dispute will only qualify as legal if legal rules contained, for example, in treaties or legislation are relied upon and if legal remedies such as restitution or damages are sought. Consequently, it is largely in the hands of the claimant to present the dispute in legal terms.

The ICJ has looked unfavourably upon the argument that disputes before it were of a political rather than legal nature and were hence outside its jurisdiction. It has stated repeatedly, both in contentious proceedings and in proceedings leading to advisory opinions, that it will not abdicate its function, merely because a case before it has political implications.

In the *Teheran Hostages* case,[28] Iran advanced the argument that the question before the ICJ represented only a marginal and secondary aspect of an overall situation containing much more fundamental and complex elements. The Court should examine the whole political dossier of the relations between Iran and the United States over the last 25 years.[29] The Court rejected this argument. After noting that the seizure of the US Embassy and Consulate and the detention of internationally protected persons as hostages cannot be considered as something marginal or secondary, it said:

> 'legal disputes between sovereign States by their very nature are likely to occur in political contexts, and often form only one element in a wider and longstanding political dispute between the States concerned. Yet never has the view been put forward before that, because a legal dispute submitted to the Court is only one aspect of a political dispute, the Court should decline to resolve for the parties the legal questions at issue between them. Nor can any basis for such a view of the Court's functions or jurisdiction be found in the Charter or the Statute of the Court; if the Court were, contrary to its settled jurisprudence, to adopt such a view, it would impose a far-reaching and unwarranted restriction upon the role of the Court in the peaceful solution of international disputes.'[30]

---

jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment [...].'

28 United States Diplomatic and Consular Staff in Tehran, *supra* note 22.

29 *Ibid.*, 19, para. 35.

30 *Ibid.*, 20, para. 37.

In the *Nicaragua* case,[31] the United States objected to the claim not because the dispute was political but because the matter was essentially one for the Security Council since it involved a complaint involving the use of force.[32] This argument also did not find favour with the ICJ:

> '[T]he Court is of the view that the fact that a matter is before the Security Council should not prevent it being dealt with by the Court and that both proceedings could be pursued *pari passu*. [...] The Council has functions of a political nature assigned to it, whereas the Court exercises purely judicial functions. Both organs can therefore perform their separate but complementary functions with respect to the same events.
>
> 96. It must also be remembered that, as the *Corfu Channel* case *(I.C.J. Reports* 1949, p. 4*)* shows, the Court has never shied away from a case brought before it merely because it had political implications or because it involved serious elements of the use of force.'[33]

The ICJ restated its dismissal of a 'political questions doctrine' in 2004 in an advisory opinion. In the *Israeli Wall* case,[34] it rejected the view that it had no jurisdiction because of the political character of a question put before it. The fact that a legal question also has political aspects was not sufficient to deprive it of its character as a legal question. The Court summarized its own practice in the following terms:

> '[T]he Court cannot accept the view, which has also been advanced in the present proceedings, that it has no jurisdiction because of the 'political' character of the question posed. As is clear from its long standing jurisprudence on this point, the Court considers that the fact that a legal question also has political aspects,
>
> > "as, in the nature of things, is the case with so many questions which arise in international life, does not suffice to deprive it of its character as a "legal question" and to deprive the Court of a competence expressly conferred on it by its Statute' (*Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J, Reports 1973*, p. 172, para. 14). Whatever its political aspects, the Court cannot refuse to admit the legal character of a question which invites it to discharge an essentially judicial task, namely, an assessment of the legality of the possible conduct of States with regard to the obligations imposed upon them by international law (cf. *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, 1948, I.C.J. Reports 1947 1948*, pp. 61 62; *Competence of the General Assembly for*

---

31 Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua *v.* United States of America), Jurisdiction and Admissibility, Judgment of 26 November 1984, 1984 *ICJ Rep.* 293.

32 *Ibid.*, 431-436, paras. 89-98.

33 *Ibid.*, paras. 93, 95, 96; *see also* Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua *v.* United States of America), Merits, Judgment of 27 June 1986, 1986 *ICJ Rep.* 14, at 26-28, paras. 32-35.

34 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004, 2004 *ICJ Rep.* 136.

> *the Admission of a State to the United Nations, Advisory Opinion, I.C.J. Reports 1950*, pp. 6 7; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 155)." (*Legality of the Threat or Use of Nuclear Weapons, I.C.J. Reports 1996 (I)*, p. 234, para. 13.)

In its Opinion concerning the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, the Court indeed emphasized that,

> "in situations in which political considerations are prominent it may be particularly necessary for an international organization to obtain an advisory opinion from the Court as to the legal principles applicable with respect to the matter under debate …". (*I.C.J. Reports 1980*, p. 87, para. 33).

Moreover, the Court has affirmed in its Opinion on the *Legality of the Threat or Use of Nuclear Weapons* that

> "the political nature of the motives which may be said to have inspired the request and the political implications that the opinion given might have are of no relevance in the establishment of its jurisdiction to give such an opinion" (*I.C.J. Reports 1996 (I)*, p. 234, para. 13).

The Court is of the view that there is no element in the present proceedings which could lead it to conclude otherwise.'[35]

The ICSID Convention specifically refers to a 'legal dispute' when circumscribing the competence of tribunals.[36] The legal character of disputes gave rise to some debate in the Convention's drafting.[37] The Report of the Executive Directors offers the following clarification:

> '26. […] The expression 'legal dispute' has been used to make clear that while conflicts of rights are within the jurisdiction of the Centre, mere conflicts of interests are not. The dispute must concern the existence or scope of a legal right or obligation, or the nature or extent of the reparation to be made for breach of a legal obligation.'[38]

Investment tribunals were also confronted with the argument that disputes before them, or certain aspects of these disputes, were not legal in nature and hence outside

---

35 *Ibid.*, 155, para. 41.

36 1965 ICSID Convention, art. 25(1): 'The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.'

37 C. Schreuer, *The ICSID Convention: A Commentary*, art. 25, at paras. 39, 40 (2001).

38 Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (18 March 1965), adopted by Resolution No. 214 of the Board of Governors of the International Bank for Reconstruction and Development on 10 September 1964, 1 *ICSID Rep.* 23, at 28 (1993).

their jurisdiction. *CSOB* v. *Slovakia* arose from arrangements for the privatization and consolidation of the Claimant, a former State bank, after the separation of the Czech and Slovak Republics.[39] Under these arrangements, Slovakia had assumed a guarantee for a loan but then defaulted on this obligation. Before the Tribunal, Slovakia, while not questioning the legal nature of the dispute, stressed its political nature and its close link with the dissolution of the former Czech and Slovak Federal Republic. The Tribunal pointed out that the claim was based on an agreement between the parties to the dispute. It said:

> 'While it is true that investment disputes to which a State is a party frequently have political elements or involve governmental actions, such disputes do not lose their legal character as long as they concern legal rights or obligations or the consequences of their breach.'[40]

In *Continental Casualty* v. *Argentina*[41] the Claimant had invested in the insurance business in Argentina. It claimed that Argentina had enacted a series of decrees and resolutions that destroyed the legal security of the assets held by the investor. Argentina submitted that in order to meet the requirement of a legal dispute the claim must concern rights, obligations and legal titles, not some undesirable consequences whose proximate cause is not the host State's conduct in respect of its investment.[42] The Tribunal found that the Claimant had made legal claims. It said:

> '67. In this case, the Claimant invokes specific legal acts and provisions as the foundation of its claim: it indicates that certain measures by Argentina have affected its legal rights stemming from contracts, legislation and the BIT. The Claimant further indicates specific provisions of the BIT granting various types of legal protection to its investments in Argentina, that in its view have been breached by those measures.'[43]

In *Suez* v. *Argentina*,[44] the Claimants had invested in water distribution and waste water services in Argentina. When the Argentine economy experienced a severe crisis, the government enacted measures that resulted in a significant depreciation of the Argentine Peso. Claiming that these measures injured their investments in violation of the commitments made to them, the Claimants sought to obtain adjustments in the tariffs as well as modifications in their operating conditions.[45] Argentina argued that there was no legal dispute but rather a business or commercial dispute. The dispute

---

39 CSOB *v*. Slovakia, Decision on Jurisdiction of 24 May 1999, 5 *ICSID Rep*. 335 (2002).

40 *Ibid*., paras. 60, 61.

41 Continental Casualty *v*. Argentina, Decision on Jurisdiction of 22 February 2006.

42 *Ibid*., para. 37.

43 *Ibid*., para. 67.

44 Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. *v*. The Argentine Republic, *supra* note 7.

45 *Ibid*., para. 24.

over the effects of the devaluation measures was one over policy and fairness and hence not legal in nature. The Tribunal rejected this objection and said:

> 'A legal dispute, in the ordinary meaning of the term, is a disagreement about legal rights or obligations. [...] In the present case, the Claimants clearly base their case on legal rights which they allege have been granted to them under the bilateral investment treaties that Argentina has concluded with France and Spain. In their written pleadings and oral arguments, the Claimants have consistently presented their case in legal terms. [...] [T]he dispute as presented by the Claimants is legal in nature.'[46]

Other ICSID tribunals have similarly held that the decisive factor in determining the legal nature of the dispute was the assertion of legal rights and the articulation of the claims in terms of law.[47]

It follows from the practice, as set out above, that the legal nature of a dispute depends not on the factual circumstances of a case but on the position taken by the claimant. If the claimant presents its claim in terms of rights and legal remedies, the argument that the dispute is not legal will be to no avail.

IV. Hypothetical Disputes

In order to amount to a dispute capable of judicial settlement, the disagreement between the parties must have some practical relevance to their relationship and must not be purely theoretical. It is not the task of international adjudication to clarify legal questions *in abstracto*.[48] The dispute must relate to clearly identified issues between the parties and must be more than academic. This is not to say that a specific action must have been taken by one side or that the dispute must have escalated to a certain level of confrontation, but merely that it must be of immediate interest to the parties. Actual or concrete damage is not required before such a party may bring legal action. But the dispute must go beyond general grievances and must be susceptible of being stated in terms of a concrete claim.

---

[46] *Ibid.*, paras. 34, 37.

[47] Lanco *v.* Argentina, Decision on Jurisdiction of 8 December 1998, at para. 47; Gas Natural SDG, S.A. *v.* Argentina, Decision on Jurisdiction of 17 June 2005, at paras. 20-23; Camuzzi *v.* Argentina, Decision on Jurisdiction of 11 May 2005, at para. 55; AES Corp. *v.* Argentina, *supra* note 7, at paras. 40-47; Sempra Energy Intl. *v.* Argentina, Decision on Jurisdiction of 11 May 2005, at paras. 67, 68; Bayindir *v.* Pakistan, Decision on Jurisdiction of 14 November 2005, at paras. 125, 126; El Paso Energy Intl. Co. *v.* Argentina, *supra* note 7, at paras. 47-62; Jan de Nul et al. *v.* Egypt, Decision on Jurisdiction of 16 June 2006, at para. 74; National Grid PCL *v.* Argentina, Decision on Jurisdiction of 20 June 2006, at paras. 142, 143, 160; Pan American and BP Argentina Exploration Company *v.* Argentina, Preliminary Objections, Judgment of 27 July 2006, at paras. 71-91; Saipem *v.* Bangladesh, Decision on Jurisdiction and Recommendation on Provisional Measures of 21 March 2007, at paras. 93-97.

[48] *See also* AES Corp. *v.* Argentina, *supra* note 7, at para. 43.

In the *Headquarters Agreement* case,[49] the United States had passed legislation designed to lead to the closure of the PLO Mission to the United Nations, but had not actually taken action to close the Mission. The United States took the position that there was no dispute, since the legislation had not yet been implemented. Also, pending litigation in the domestic courts, no other action to close the Mission would be taken.[50] The ICJ refused to accept, under these circumstances, that there was no dispute. It said:

> 'The Court cannot accept such an argument. While the existence of a dispute does presuppose a claim arising out of the behaviour of or a decision by one of the parties, it in no way requires that any contested decision must already have been carried into effect. What is more, a dispute may arise even if the party in question gives an assurance that no measure of execution will be taken until ordered by decision of the domestic courts. [...] [T]he Court is obliged to find that the opposing attitudes of the United Nations and the United States show the existence of a dispute between the two parties to the Headquarters Agreement.'[51]

In the *Arrest Warrant* Case,[52] the ICJ ruled that Belgium had violated international law by allowing a Belgian judge to issue and circulate an arrest warrant against the incumbent Foreign Minister of the Congo. No actual arrest had ever taken place under the arrest warrant. The Court did not accept the distinction between actual arrest and the circulation of a document that may lead to an arrest. It found that the mere issue of the warrant violated immunity, which the Foreign Minister enjoyed.[53]

In *Enron* v. *Argentina*,[54] some provinces of Argentina had assessed taxes that the Claimants described as exorbitant and sufficient to wipe out the entire value of their investment. Argentina argued that the claim was hypothetical since the taxes had been assessed but not collected. Claimants pointed out that the taxes had not been collected only because the Supreme Court ordered a temporary injunction. The Tribunal refused to accept, under these circumstances, that the dispute was merely hypothetical. It said:

> 'The Tribunal is mindful of the fact that once the taxes have been assessed and the payment ordered there is a liability of the investor irrespective of the actual collection of those amounts. This means that a claim seeking protection under the Treaty is not hypothetical but relates to a very specific dispute between the parties.'[55]

---

49 Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, *supra* note 9.

50 *Ibid.*, 29-30, paras. 39-43.

51 *Ibid.*, paras. 42-43.

52 Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo *v.* Belgium), Judgment of 14 February 2002, 2002 *ICJ Rep.* 3.

53 *Ibid.*, 29-30, paras. 70-71.

54 Enron *v.* Argentina, Decision on Jurisdiction of 14 January 2004, 11 *ICSID Rep.* 273 (2007).

55 *Ibid.*, para. 74. *See also* Continental Casualty *v.* Argentina, *supra* note 41, at para. 92.

In some cases, the allegedly hypothetical nature of the claims is related to the *quantum* of damages. In *Pan American* v. *Argentina*,[56] the Respondent complained that the damages claimed were hypothetical, conjectural and speculative.[57] The Tribunal found that a certain degree of uncertainty about the *quantum* of damages was inevitable at the jurisdictional stage. This did not affect its jurisdiction, provided the Claimants were able to demonstrate *prima facie* that some damage had occurred. The Tribunal said:

> '177. It is, [...] in the nature of disputes such as the present one that some of the damage is concrete and specific in that it has occurred already, while some, which may occur later, is not yet specified but is more or less foreseeable under the circumstances. As shown in *Enron I* [...], the threshold of certainty in that respect is relatively low.
>
> 178. This fact is easily explained. Many investment disputes arise from situations with continuing adverse effects on the claimants and these will have to be taken into account by the arbitral tribunal called upon to deal with those disputes, at least regarding damage that was uncertain at the jurisdictional phase but crystallised at the merits stage. This is one of the reasons why the present Tribunal, at this point, dismisses the present objection, all the more so because the Claimants, *prima facie*, have demonstrated their assertion that some damage *has* occurred. The final amount of damages will of course have to be determined during the proceedings on the merits if the Respondent is held liable. At that stage, a final assessment will have to be made, and damage that remains contingent or hypothetical at that moment will have to be ruled out.'[58]

In other cases, tribunals rejected arguments by respondents to the effect that they had recognized their liability to pay compensation but had not yet managed to calculate the amounts due.[59] Also, in a number of decisions, tribunals rejected the argument that pending negotiations between the parties made their claims premature or hypothetical.[60]

These cases demonstrate that disputes will not be found hypothetical and unfit for judicial resolution because actual damage has not yet occurred. A dispute may well be the result of preliminary steps that are likely to lead to subsequent prejudicial action. Also, difficulties in quantifying damages or uncertainties about the outcome of negotiations do not negate the existence of a dispute.

---

56 Pan American and BP Argentina Exploration Company *v.* Argentina, *supra* note 47.

57 *Ibid.*, paras. 162-168.

58 *Ibid.*, paras. 177, 178.

59 AGIP *v.* Congo, *supra* note 19, at 317; Siemens *v.* Argentina, Decision on Jurisdiction of 3 August 2004, paras. 152, 158-161.

60 AES Corp. *v.* Argentina, *supra* note 7, at paras. 62-71; Camuzzi *v.* Argentina, *supra* note 47, at paras. 92, 94, 97; Sempra Energy Intl. *v.* Argentina, *supra* note 47, at para. 108; Continental Casualty *v.* Argentina, *supra* note 41, at para. 93.

V. The Proper Parties to the Dispute

In a number of cases before the ICJ, respondents have argued that, even if a dispute existed, they were not the proper party. In the *Northern Cameroons* case, the United Kingdom objected that no dispute existed between itself and Cameroon and that, if any dispute did exist, it was between Cameroon and the United Nations. The ICJ rejected this contention and said:

> 'The Court is not concerned with the question whether or not any dispute in relation to the same subject-matter existed between the Republic of Cameroon and the United Nations or the General Assembly. In the view of the Court it is sufficient to say that, [...] the opposing views of the Parties as to the interpretation and application of relevant Articles of the Trusteeship Agreement, reveal the existence of a dispute [...] between the Republic of Cameroon and the United Kingdom at the date of the Application'[61]

In the *East Timor* case, Australia contended that no dispute existed between itself and Portugal. Rather, Australia was being sued in place of Indonesia.[62] The Court, after repeating the definition given by the PCIJ in *Mavrommatis*, rejected this argument and said:

> '[I]t is not relevant whether the "real dispute" is between Portugal and Indonesia rather than Portugal and Australia. Portugal has, rightly or wrongly, formulated complaints of fact and law against Australia which the latter has denied. By virtue of this denial, there is a legal dispute.'[63]

The Court found that on the record, it was clear that Portugal and Australia were in disagreement on points of law and fact. Therefore, it upheld its jurisdiction.

In the *Certain Property* case, Germany argued that the only dispute was one between Liechtenstein and the successor States of the former Czechoslovakia. Liechtenstein argued that the dispute that it had with the Czech Republic did not negate the existence of a separate dispute between itself and Germany, based on Germany's unlawful conduct in relation to Liechtenstein.[64] The ICJ found that complaints of fact and law had been formulated by Liechtenstein against Germany and denied by the latter. It followed that a legal dispute existed between these two countries.[65]

In *Wena* v. *Egypt*, the Claimant had been deprived of its investment by actions of Egyptian Hotel Company (EHC), a State controlled entity. Before the Tribunal, Egypt

---

61 Case concerning the Northern Cameroons (Cameroon *v*. United Kingdom), Preliminary Objections, Judgment of 2 December 1963, 1963 *ICJ Rep*. 15, at 27.

62 East Timor (Portugal *v*. Australia), Judgment of 30 June 1995, 1995 *ICJ Rep*. 90, at 99, para. 21.

63 *Ibid*., para. 22.

64 Certain Property, *supra* note 12, at 17-18, paras. 21, 22.

65 *Ibid*., para. 25.

contended that Wena's dispute was with EHC and that no dispute existed between Egypt and the Claimant. The Tribunal rejected this contention. It said:

> 'Wena has raised allegations against Egypt – of assisting in, or at least failing to prevent, the expropriation of Wena's assets – which, if proven, clearly satisfy the requirement of a "legal dispute" under Article 25(1) of the ICSID Convention. In addition, Wena has presented at least some evidence that suggests Egypt's possible culpability.'[66]

What matters for the establishment of a dispute for purposes of jurisdiction is the formulation of claims by one side that are opposed by the other side. Therefore, at the stage of jurisdiction, an international court or tribunal will be disinclined to entertain arguments as to the true parties to the conflict underlying the case. Whether these claims should be directed at another person will be decided at the merits stage of proceedings.

VI. The Time of the Dispute

The jurisdiction of international courts and tribunals is often subject to limitations *ratione temporis*. Typically, jurisdiction will extend only to events that occurred after a certain date – most often the effective date of the instrument expressing consent to jurisdiction. The relevant events may be actions leading to the dispute but may also be the dispute itself. Therefore, the existence of a dispute at a particular date may be of importance for a court or tribunal's jurisdiction.

The ICJ and its predecessor have addressed inter-temporal issues of jurisdiction in a series of decisions.[67] Three of these cases concerned declarations of States under the optional clause of Article 36(2) of the Court's Statute.[68] The fourth case concerned jurisdiction under the European Convention for the Peaceful Settlement of Disputes.[69] What these cases have in common is that the acceptances of the Court's jurisdiction excluded disputes relating to facts or situations prior to a certain date.[70]

In all four cases the disputes arose after the critical dates. But the decisive issue was not the date when the dispute arose but the date of the facts or situations in relation

---

66 Wena Hotels *v*. Egypt, Decision on Jurisdiction of 29 June 1999, 41 *ILM* 881, at 891 (2002).

67 Phosphates in Morocco (Italy *v*. France), Preliminary Objections, Judgment of 14 June 1938, 1938 *PCIJ* (Ser. A/B) No. 74; Electricity Company of Sofia and Bulgaria (Belgium *v*. Bulgaria), Preliminary Objections, Judgment of 4 April 1939, 1939 *PCIJ* (Ser. A/B) No. 77; Right of Passage over Indian Territory (Portugal *v*. India), Merits, Judgment of 12 April 1960, 1960 *ICJ Rep*. 6; Certain Property, *supra* note 12.

68 Phosphates in Morocco, Electricity Company of Sofia and Bulgaria, Right of Passage over Indian Territory, all *supra* note 67.

69 Certain Property, *supra* note 12.

70 A detailed overview of the earlier cases can be found in the case concerning Certain Property, *supra* note 12, at 22-25, paras. 40-45.

to which the dispute arose. In the *Phosphates in Morocco* case and in the *Certain Property* case, the facts for which the dispute arose were found to have predated the critical date. The objections *ratione temporis* were consequently upheld.[71] In the *Electricity Company* and in the *Right of Passage* cases, the disputes were found to have had their source in facts or situations subsequent to the critical date. The objections *ratione temporis* were consequently rejected.[72] It follows that in these cases before the International Court, the exact date of the dispute was not decisive. Rather, the date of the events leading to the dispute determined jurisdiction.

By contrast, investment tribunals in a number of cases have had to decide whether a particular dispute was in existence at a critical date. Many bilateral investment treaties (BITs) limit consent to arbitration to disputes arising after their entry into force.[73] For instance, the Argentina-Spain BIT provides:

> 'This agreement shall apply also to capital investments made before its entry into force by investors of one Party in accordance with the laws of the other Party in the territory of the latter. However, this agreement shall not apply to disputes or claims originating before its entry into force.'

Under a provision of this kind, the time at which the dispute arises will be of decisive importance for the applicability of the consent to arbitration. The time of the dispute is not identical with the time of the events leading to the dispute. By definition, the incriminated acts must have occurred some time before the dispute. Therefore, the exclusion of disputes occurring before a certain date should not be read as excluding jurisdiction over events occurring before that date.[74] A dispute requires not only that the events have developed to a degree where a difference of legal positions can become apparent but also communication between the parties that demonstrates that difference.

In *Maffezini* v. *Spain*,[75] the Respondent challenged ICSID's jurisdiction alleging that the dispute originated before the entry into force of the Argentina-Spain BIT. The Claimant relied on facts and events that antedated the BIT's entry into force but argued that a 'dispute' arises only when it is formally presented as such. This, according to Claimant,

---

71 Phosphates in Morocco, *supra* note 67, at 25; Certain Property, *supra* note 12, at 25-27.

72 Electricity Company of Sofia and Bulgaria, *supra* note 67, at 82; Right of Passage over Indian Territory, *supra* note 67, at 35.

73 The Tribunal in Salini *v.* Jordan, Decision on Jurisdiction of 29 November 2004, at para. 170 found that the phrase 'any dispute which may arise' did not cover disputes that had arisen before the BIT's entry into force. *See also* Impregilo *v.* Pakistan, *supra* note 7, at paras. 297-304.

74 For a case that fails to make this distinction *see* M.C.I. *v.* Ecuador, *supra* note 7.

75 Maffezini *v.* Spain, *supra* note 7.

had occurred only after the BIT's entry into force.[76] The Tribunal, after quoting the definitions by the International Court of Justice,[77] distinguished between the events giving rise to the dispute and the dispute itself. After noting that the events on which the parties disagreed began years before the BIT's entry into force it said:

> 'But this does not mean that a legal dispute as defined by the International Court of Justice can be said to have existed at the time.'[78]

The Tribunal described the development towards a dispute in the following terms:

> '[T]here tends to be a natural sequence of events that leads to a dispute. It begins with the expression of a disagreement and the statement of a difference of views. In time these events acquire a precise legal meaning through the formulation of legal claims, their discussion and eventual rejection or lack of response by the other party. The conflict of legal views and interests will only be present in the latter stage, even though the underlying facts predate them. It has also been rightly commented that the existence of the dispute presupposes a minimum of communications between the parties, one party taking up the matter with the other, with the latter opposing the Claimant's position directly or indirectly. This sequence of events has to be taken into account in establishing the critical date for determining when under the BIT a dispute qualifies as one covered by the consent necessary to establish ICSID's jurisdiction.'[79]

On that basis, the Tribunal reached the conclusion that the dispute in its technical and legal sense had begun to take shape after the BIT's entry into force:

> 'At that point the conflict of legal views and interests came to be clearly established leading not long thereafter to the presentation of various claims that eventually came to this Tribunal.'[80]

It followed that ICSID had jurisdiction and that the Tribunal was competent to consider the dispute.

In *Lucchetti* v. *Peru*,[81] the BIT between Chile and Peru also provided that it would not apply to disputes that arose prior to its entry into force. A series of administrative measures by local authorities had denied or withdrawn construction and operating licenses from the investors. The investors had successfully challenged the earlier administrative acts through court proceedings that took place entirely before the BIT's entry into force. A few days after the BIT's entry into force, the municipality issued

---

76 *Ibid.*, paras. 92, 93.

77 East Timor, *supra* note 62, at para. 22, with reference to earlier decisions of both the PCIJ and the ICJ.

78 Maffezini *v.* Spain, *supra* note 7, at para. 95.

79 *Ibid.*, para. 96 (footnote omitted).

80 *Ibid.*, para. 98.

81 Lucchetti *v.* Peru, *supra* note 7.

further adverse decrees. The Tribunal found that the dispute had arisen already before the BIT's entry into force and declined jurisdiction.[82]

In *Jan de Nul* v. *Egypt*,[83] the BIT between the BLEU[84] and Egypt also provided that it would not apply to disputes that had arisen prior to its entry into force. A dispute already existed when in 2002 the BIT replaced an earlier BIT of 1977. At that time, the dispute was pending before the Administrative Court of Ismaïlia, which eventually rendered an adverse decision in 2003, approximately one year after the new BIT's entry into force. The Tribunal accepted the Claimants' contention that the dispute before it was different from the dispute that had been brought to the Egyptian court:

> '[W]hile the dispute which gave rise to the proceedings before the Egyptian courts and authorities related to questions of contract interpretation and of Egyptian law, the dispute before this ICSID Tribunal deals with alleged violations of the two BITs [...]'[85]

This conclusion was confirmed by the fact that the court decision was a major element of the complaint. The Tribunal said:

> 'The intervention of a new actor, the Ismaïlia Court, appears here as a decisive factor to determine whether the dispute is a new dispute. As the Claimants' case is directly based on the alleged wrongdoing of the Ismaïlia Court, the Tribunal considers that the original dispute has (re)crystallized into a new dispute when the Ismaïlia Court rendered its decision.'[86]

It followed that the Tribunal had jurisdiction over the claim.

Helnan v. *Egypt*[87] concerned a clause in the BIT between Denmark and Egypt that excluded its applicability to divergences or disputes that had arisen prior to its entry into force. The Tribunal distinguished between divergences and disputes in the following terms:

> 'Although, the terms "*divergence*" and "*dispute*" both require the existence of a disagreement between the parties on specific points and their respective knowledge of such disagreement, there is an important distinction to make between them as they do not imply the same degree of animosity. Indeed, in the case of a divergence, the parties hold different views but without necessarily pursuing the difference in an active manner. On the other hand, in case of a dispute, the difference of views forms the subject of an active exchange between the parties under circumstances which

---

82 *Ibid.*, paras. 48-59. An application for the annulment of the Award was not successful: Industria Nacional de Alimentos (Lucchetti) *v.* Peru, Decision on Annulment of 5 September 2007.

83 Jan de Nul & Dredging International *v.* Egypt, *supra* note 47.

84 Belgo-Luxembourg Economic Union.

85 Jan de Nul & Dredging International *v.* Egypt, *supra* note 47, at para. 117.

86 *Ibid.*, para. 128.

87 Helnan International Hotels A/S *v.* The Arab Republic of Egypt, Decision on Jurisdiction of 17 October 2006.

> indicate that the parties wish to resolve the difference, be it before a third party or otherwise. Consequently, different views of parties in respect of certain facts and situations become a "*divergence*" when they are mutually aware of their disagreement. It crystallises as a "*dispute*" as soon as one of the parties decides to have it solved, whether or not by a third party.'[88]

On that basis, the Tribunal found that, even though a divergence had existed before the BIT's entry into force, the divergence was of a nature different from the dispute that had arisen subsequently. It followed that the Tribunal had jurisdiction over the dispute.[89]

The cases involving inter-temporal issues differ from the cases discussed earlier in one important respect: whereas in other contexts the existence of a dispute will lead to a finding of jurisdiction, here it is the non-existence of a dispute before a certain date that supports jurisdiction. Whether this situation influences the way tribunals establish the existence of a dispute and whether they will apply a higher threshold to this test as a consequence is an interesting question. The cases involved are too fact-specific and the available sample is too small to draw any reliable conclusions.

VII. Conclusion

Arguments attempting to deny the existence of a dispute have hardly ever succeeded. Therefore, an objection to jurisdiction based on the denial of a dispute between the parties is not a promising strategy.

Very little is required in the way of the expression of opposing positions by the parties to establish a dispute. In particular, the denial of the existence of a dispute by one party will be to no avail. A dispute may exist even if one party does not oppose the other party's position but fails to provide a remedy.

The existence of a legal dispute is determined by the type of claim put forward and by the nature of the arguments supporting it. A dispute will be legal if the claim is based on treaties, legislation and other sources of law and if remedies such as restitution or damages are sought. It is in the hands of the claimant to present its claim in legal terms. Attempts by respondents to characterize disputes as political rather than legal have not succeeded. What matters are not the political circumstances but the assertion of legal rights.

A dispute must relate to clearly identified issues and must have specific consequences in order to serve as a basis for jurisdiction. A disagreement on a theoretical question is not sufficient. This does not mean that actual damage must have occurred, but merely that the issue must have some practical relevance.

The argument that the dispute is really with a third party to which the claimant should turn is unlikely to succeed. Jurisdiction will not be defeated by the fact that

---

88 *Ibid.*, para. 52 (emphasis in original).

89 *Ibid.*, paras. 53-57.

a claimant has a related dispute with another party. What matters is the existence of legal claims against the party named in the application.

The question as to whether a dispute existed at a certain point in time for purposes of jurisdiction has received diverse responses. Interestingly, in these cases it is the non-existence of a dispute before a certain date that supports jurisdiction.

EXHIBIT NUMBER 16

Maffezini v. Spain, Decision on Jurisdiction of 25 January 2000, 40 ILM 1129

(English Translation from Spanish Original)

INTERNATIONAL CENTRE FOR SETTLEMENT
OF INVESTMENT DISPUTES
WASHINGTON, D.C.

IN THE PROCEEDING BETWEEN

EMILIO AGUSTÍN MAFFEZINI
(CLAIMANT)

and

THE KINGDOM OF SPAIN
(RESPONDENT)

CASE NO. ARB/97/7

DECISION OF THE TRIBUNAL ON OBJECTIONS TO JURISDICTION

Members of the Tribunal

Professor Francisco Orrego Vicuña, President
Judge Thomas Buergenthal, Arbitrator
Mr. Maurice Wolf, Arbitrator

Secretary of the Tribunal

Mr. Gonzalo Flores

Representing the Claimant

Dr. Raúl Emilio Vinuesa
Dra. María Cristina Brea
Dra. Silvina González Napolitano
Dra. Gisela Makowski
Estudio Vinuesa y Asociados
Buenos Aires
Argentina

Representing the Respondent

Mr. Rafael Andrés León Cavero
Abogado del Estado
Subdirección General de los Servicios Contenciosos del Ministerio de Justicia
Madrid
Spain

Date of decision: January 25, 2000

A. Procedure

1. On July 18, 1997, the International Centre for Settlement of Investment Disputes (ICSID or the Centre) received from Mr. Emilio Agustín Maffezini, a national of the Argentine Republic (Argentina), a Request for Arbitration against the Kingdom of Spain (Spain). The request concerns a dispute arising from treatment allegedly received by Mr. Maffezini from Spanish entities, in connection with his investment in an enterprise for the production and distribution of chemical products in the Spanish region of Galicia. In his request the Claimant invokes the provisions of the 1991 "Agreement for the Reciprocal Promotion and Protection of Investments between the Kingdom of Spain and the Argentine Republic" (the Argentine-Spain Bilateral Investment Treaty or BIT).[1] The request also invokes, by way of a most-favored-nation (MFN) clause in the Argentine-Spain BIT, the provisions of a 1991 bilateral investment treaty between the Republic of Chile (Chile) and Spain.[2]

2. On August 8, 1997, the Centre, in accordance with Rule 5 of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (Institution Rules), acknowledged receipt of the request and on the same day transmitted a copy to the Kingdom of Spain and to the Spanish Embassy in Washington, D.C. At the same time, the Centre asked Mr. Maffezini to provide (i) specific information concerning the issues in dispute and the character of the underlying investment; (ii) information as to the complete terms of Spain's consent to submit the dispute to arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention); (iii) information as to the basis of his claim that the MFN clause in the Argentine-Spain BIT would allow him to invoke Spain's consent contained in the Chile-Spain BIT; and (iv) documentation concerning the entry into force of the bilateral investment treaties invoked in the request. Mr. Maffezini provided this information in two letters of September 10 and September 29, 1997.

---

[1] Agreement between Argentina and Spain of October 3, 1991. Hereinafter cited as the Argentine-Spain BIT.

[2] Agreement between Chile and Spain of October 2, 1991. Hereinafter cited as the Chile-Spain BIT.

3. On October 30, 1997, the Secretary-General of the Centre registered the request, pursuant to Article 36(3) of the ICSID Convention. On this same date, the Secretary-General, in accordance with Institution Rule 7, notified the parties of the registration of the request and invited them to proceed to constitute an Arbitral Tribunal as soon as possible.

4. On December 22, 1997, the Claimant proposed to the Respondent that the Arbitral Tribunal consist of a sole arbitrator, to be appointed by agreement of the parties. The Claimant further proposed that, if the parties fail to agree in the name of the sole arbitrator by January 31, 1998, the sole arbitrator shall be appointed by ICSID's Secretary-General.

5. On March 5, 1998, Spain having failed to respond to the Claimant's proposal and more that 60 days having elapsed since the registration of the request, the Claimant informed the Secretary-General that he was choosing the formula set forth in Article 37(2)(b) of the ICSID Convention. The Tribunal, therefore, would consist of three arbitrators, one appointed by Mr. Maffezini, one appointed by Spain, and the third, presiding arbitrator, appointed by agreement of the parties.

6. On March 18, 1998, the Centre received a communication from the Spanish Ministry of Economy and Finance, whereby Spain anticipated having objections to the jurisdiction of the Centre and to the competence of the Tribunal, providing the Centre with a summary of the grounds on which such objections were based. The Centre promptly informed the Respondent that a copy of this communication, as well as copies of the request for arbitration and its accompanying documentation, of the notice of registration and of the correspondence exchanged between the parties and the Centre would be transmitted, in due course, to each of the Members of the Tribunal, noting that the question of jurisdiction was one for the Tribunal to decide.

7. On April 24, 1998, Mr. Maffezini appointed Professor Thomas Buergenthal, a national of the United States of America, as an arbitrator. On May 4, 1998, Spain appointed Mr. Maurice Wolf, also a national of the United States of America, as an arbitrator. The parties, however, failed to agree on the appointment of the third, presiding, arbitrator. In these circumstances, by means of a further communication of May 14, 1998, the Claimant requested that the third, presiding, arbitrator in the proceeding

be appointed by the Chairman of ICSID's Administrative Council in accordance with Article 38 of the ICSID Convention.[3]

8. Having consulted with the parties, the Chairman of ICSID's Administrative Council appointed Professor Francisco Orrego Vicuña, a Chilean national, as the President of the Arbitral Tribunal. On June 24, 1998, ICSID's Legal Adviser, on behalf of the Centre's Secretary-General, and in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules), notified the parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. On the same date, pursuant to ICSID Administrative and Financial Regulation 25, the parties were informed that Mr. Gonzalo Flores, Counsel, ICSID, would serve as Secretary of the Arbitral Tribunal.

9. On July 3, 1998, the Respondent filed an application for provisional measures, requiring the Claimant to post a guaranty in the amount of the costs expected to be incurred by Spain in defending against this action. By further filing of August 7, 1998, the Claimant requested the Tribunal to dismiss such application.

10. After consulting with the parties, the Tribunal scheduled a first session for August 21, 1998. On August 20, 1998, counsel for the Respondent hand-delivered a document containing Spain's objections to the jurisdiction of the Centre. A copy of Spain's filing was distributed by the Centre to the Members of the Tribunal on that same date. A copy of Spain's filing was later handed by the Secretary of the Tribunal to the Claimant's representative in the course of the Tribunal's first session with the parties.

11. The first session of the Tribunal with the parties was held, as scheduled, on August 21, 1998, at the seat of ICSID in Washington, D.C. At the session the parties expressed their agreement that the Tribunal had been properly constituted in accordance with the relevant provisions of the

[3] Under Article 38 of the ICSID Convention, if the Tribunal is not yet constituted within 90 days after the notice of registration of the request has been dispatched, the Chairman of ICSID's Administrative Council shall, at the request of either party, and after consulting both parties as far as possible, appoint the arbitrator or arbitrators not yet appointed and designate an arbitrator to be the President of the Tribunal.

ICSID Convention and the Arbitration Rules and that they did not have any objections in this respect.

12. During the course of the first session the parties agreed on a number of procedural matters reflected in written minutes signed by the President and the Secretary of the Tribunal. The Respondent, represented at the session by Mr. Rafael Andrés León Cavero, drew the Tribunal's attention to its objections to the jurisdiction of the Centre. The Tribunal, after briefly ascertaining the views of the parties on this matter, fixed the following time limits for the written phase of the proceedings: the Claimant would file a memorial, with all of his arguments on the question of jurisdiction and on the merits within 90 days from the date of the first session; the Respondent would then file a counter-memorial, with all of its arguments on the question of jurisdiction and on the merits within 90 days from its reception of the Claimant's memorial. The Tribunal left open the possibility of requiring the submission of a reply and a rejoinder to the parties. The Tribunal also left open the possibility of holding a hearing on the issue of jurisdiction.

13. In accordance with the above-described schedule, the Claimant submitted to the Centre his memorial on the merits and on the question of jurisdiction on November 19, 1998. On April 9, 1999, after a request for an extension of the time limit for the filing of its counter-memorial was granted by the Tribunal, the Respondent submitted its written pleadings on the merits and on the question of jurisdiction.

14. On May 14, 1999, the Tribunal invited the parties to submit any further observations they may had on the question of jurisdiction, calling for a hearing on jurisdiction to be held on July 7, 1999, at the seat of the Centre in Washington, D.C. The parties filed their final observations on the question of jurisdiction on June 3, 1999 (the Claimant) and June 18, 1999 (the Respondent). Due to consecutive requests filed first by counsel for the Respondent, and later by counsel for the Claimant, the hearing on jurisdiction was postponed until August 9, 1999.

15. At the August 9, 1999 hearing, Dr. Raúl Emilio Vinuesa addressed the Tribunal on behalf of the Claimant, referring to the arguments put forward in his written pleadings. Mr. Rafael Andrés León Cavero addressed the Tribunal on behalf of the Kingdom of Spain. The Tribunal then posed questions to the representatives of the parties, as provided in Rule 32(3) of the Arbitration Rules.

16. Having heard the views of the parties, the Tribunal rendered, on August 26, 1999, Procedural Order No 1, deciding that, in accordance with Article 41(2) of the ICSID Convention and Rule 41(3) of the Arbitration Rules, it would deal with the question of jurisdiction as a preliminary matter, therefore suspending the proceedings on the merits.

17. On October 28, 1999, the Tribunal issued Procedural Order No. 2, addressing Spain's request for provisional measures. The Tribunal, pointing out that the recommendation of provisional measures seeking to protect mere expectations of success on the side of the Respondent would amount to a pre-judgement of the Claimant's case, unanimously dismissed Spain's request.

18. The Tribunal has considered thoroughly the parties' written submissions on the question of jurisdiction and the oral arguments delivered in the course of the August 9, 1999 hearing on jurisdiction. As mentioned above, the consideration of the merits has been postponed until the issue of the Centre's jurisdiction and Tribunal's competence is decided by the Tribunal. Having considered the basic facts of the dispute, the ICSID Convention and the 1991 Argentine-Spain BIT, as well as the written and oral arguments of the parties' representatives, the Tribunal has reached the following decision on the question of jurisdiction.

B. Considerations

Exhaustion of Domestic Remedies

19. The Kingdom of Spain first challenges the jurisdiction of the Centre and the competence of the Tribunal on the ground that the Claimant failed to comply with the requirements of Article X of the Bilateral Investment Treaty between Argentina and Spain. Article X of this Treaty reads as follows:

> "Article X
> Settlement of Disputes Between a Contracting Party
> and an Investor of the other Contracting Party
>
> 1. Disputes which arise within the terms of this Agreement concerning an investment between an investor of one Contracting Party and the other Contracting Party shall, if possible, be settled amicably by the parties to the dispute.

2. If the dispute cannot thus be settled within six months following the date on which the dispute has been raised by either party, it shall be submitted to the competent tribunal of the Contracting Party in whose territory the investment was made.

3. The dispute may be submitted to international arbitration in any of the following circumstances:

a) at the request of one of the parties to the dispute, if no decision has been rendered on the merits of the claim after the expiration of a period of eighteen months from the date on which the proceedings referred to in paragraph 2 of this Article have been initiated, or if such decision has been rendered, but the dispute between the parties continues;
b) if both parties to the dispute agree thereto.

4. In the cases foreseen in paragraph 3, the disputes between the parties shall be submitted, unless the parties otherwise agree, either to international arbitration under the March 18, 1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States or to an ad hoc arbitral tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).

If after a period of three months following the submission of the dispute to arbitration by either party, there is no agreement to one of the above alternative procedures, the dispute shall be submitted to arbitration under the March 18, 1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, provided that both Contracting Parties have become parties to the said Convention. Otherwise, the dispute shall be submitted to the above mentioned ad hoc tribunal.

5. The Arbitral Tribunal shall decide the dispute in accordance with the provisions of this Agreement, the terms of other Agreements concluded between the parties, the law of the Contracting Party in whose territory the investment was made, including its rules on conflict of laws, and general principles of international law.

.

> 6. The Arbitral Award shall be binding on both parties to the dispute and each Contracting Party shall execute them in accordance with its laws."

20. Respondent makes two interrelated arguments based on Article X. The first is that Article X(3)(a) requires the exhaustion of certain domestic remedies in Spain and that Claimant failed to comply with this requirement. The second contention is that Claimant did not submit the case to Spanish courts before referring it to international arbitration as required by Article X(2) of the BIT.

21. The Tribunal will first address the contention that Article X(3)(a) requires the exhaustion of domestic remedies. The starting point for its analysis of Respondent's submission is Article 26 of the ICSID Convention. It permits the Contracting States to condition their consent to ICSID arbitration on the prior exhaustion of domestic remedies. Article 26 reads as follows:

> "Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention."

22. The language of Article 26 makes clear that unless a Contracting State has conditioned its consent to ICSID arbitration on the prior exhaustion of domestic remedies, no such requirement will be applicable. Article 26 thus reverses the traditional international law rule, which implies the exhaustion requirement unless it is expressly or implicitly waived.

23. In determining whether Spain conditioned its acceptance of the Centre's jurisdiction and the Tribunal's competence on the prior exhaustion of domestic remedies, the Tribunal notes that in ratifying the ICSID Convention, Spain did not attach any such condition to its acceptance of Article 26. But since Spain was free to do so in the BIT, the Tribunal must now examine whether Article X of that treaty requires the prior exhaustion of domestic remedies. Although Article X does not condition the reference to ICSID arbitration *expressis verbis* on the prior exhaustion of domestic remedies, it does speak of proceedings in domestic courts. It must be deter-

mined, therefore, whether that language can be interpreted to require the exhaustion of domestic remedies and, if so, what the scope of that requirement is.

24. Paragraph 2 of Article X provides that, if a dispute arises between an investor and one of the Contracting Parties to the BIT, and if that dispute cannot be resolved amicably within a period of six months, it shall be submitted to the competent tribunals of the Contracting Party in whose territory the investment was made. Paragraph 3 of Article X then stipulates that the dispute may be submitted to an international arbitral tribunal in any of the following circumstances:

> a) at the request of one of the parties to the dispute, if no decision has been rendered on the merits of the claim after the expiration of a period of eighteen months from the date on which the proceedings referred to in paragraph 2 of this Article have been initiated, or, if such decision has been rendered, but the dispute between the parties continues;
>
> b) if both parties to the dispute agree thereto.

25. The Respondent reads Article X(3)(a) to mean that, if a domestic court has rendered a decision on the merits on the issues in dispute within the prescribed period of eighteen months, the case can no longer be referred to international arbitration, irrespective of the holding of the court. This conclusion follows, in Respondent's view, because once the decision has been rendered, the dispute cannot be said to continue. Hence, if Claimant had referred the case to the Spanish courts and if those courts had passed on the merits of the case within the eighteen-month period, the dispute could no longer be submitted to the Centre under Article X. It follows, in Respondent's view, that Claimant's failure to give Spanish courts the opportunity to resolve the issues in dispute requires the Tribunal to rule that it is not competent to hear the instant case.

26. Claimant admits that the dispute was not referred to a Spanish court prior to its submission to the Centre. He contends, however, that an analysis of the here relevant provisions of Article X indicates that a dispute does not have to be referred to a domestic court before it is submitted to international arbitration as long as the dispute continues and the eighteen-

month period has expired. In Claimant's view this conclusion follows from the fact that Article X(3)(a) permits the reference of a case to international arbitration whether or not a domestic court decision has been rendered and regardless of its outcome.

27. Like all other provisions of the BIT and in the absence of other specified applicable rules of interpretation, Article X must be interpreted in the manner prescribed by Article 31 of the Vienna Convention on the Law of Treaties. It provides that a treaty is to be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Applying this principle, it is to be noted that Article X(3)(a) does not say that a case may not be referred to arbitration if a domestic court has rendered a decision on the merits of the dispute within a period of eighteen months. It provides merely that if such a decision has been rendered and if the dispute continues, the case may be referred to arbitration.

28. The Tribunal notes, in this connection, that Article X(3)(a) does not require the exhaustion of domestic remedies as that concept is understood under international law.[4] It speaks merely of a decision on the merits, which Respondent admits does not even have to be a final or non-appealable decision under Spanish law, and thus fails to require the exhaustion of all available domestic remedies.

29. But even if Article X(3)(a) were to be characterized as a provision requiring the exhaustion of domestic remedies, that requirement would not have the effect, contrary to Respondent's arguments, of preventing the subsequent reference of the case to international arbitration under the BIT. This is so because, where a treaty guarantees certain rights and provides for the exhaustion of domestic remedies before a dispute concerning these guarantees may be referred to an international tribunal, the parties to the dispute retain the right to take the case to that tribunal as long as they have exhausted the available remedies, and this regardless of the outcome of the domestic proceeding. They retain that remedy because the international tribunal rather than the domestic court has the final say on the meaning

[4] C. Schreuer, "Commentary on the ICSID Convention. Article 25", *Foreign Investment Law Journal, ICSID Review*, Vol. 12, 1997, 59, at 201.

and scope of the international obligations—in this case the BIT—that are in dispute.[5]

30. Here it is to be noted that the requirements of the exhaustion of domestic remedies differs depending on whether the appeal to an international tribunal contends that the domestic tribunal was guilty of a denial of justice, or whether the claim seeks the vindication of rights guaranteed in a treaty, for example, which empowers the tribunal to interpret and apply the treaty. In the former case, the right to appeal to an international tribunal, if it exists at all, can only be based on a denial of justice by the domestic courts. In such a case, if there was no denial of justice, the case will have to be rejected, whether or not the domestic court committed errors of law or fact in rendering its judgement. This is not true in a case where, as here, the parties have a treaty right to obtain a final determination from the international tribunal on the scope of their rights under the treaty, provided they have first exhausted all available domestic remedies.

31. The foregoing analysis is relevant in determining the soundness of Respondent's interpretation of Article X(3)(a) and its contention that pursuant to this provision a dispute cannot be deemed to continue if the domestic court has rendered a decision on the merits which addressed all issues raised by the parties. Leaving aside for a moment the wording of paragraph 3(a), Respondent's argument is based on the assumption that a case may be referred to international arbitration under the BIT only if there was a denial of justice by the domestic court. This proposition, if accepted, would have the effect of denying the party to a dispute the right to challenge the domestic court's interpretation of the BIT. Respondent's interpretation can be reconciled neither with the language nor object and purpose of the dispute resolution provisions of BITs in general and the instant BIT in particular. This is so because these clauses are designed to give foreign investors the right to have their disputes under a BIT decided either exclusively or ultimately by international arbitration.[6]

---

[5] See International Law Commission, Draft Articles on State Responsibility, Art. 22 and related Commentary, *1977 Yearbook of the International Law Commission,* Vol. II, Part 2, 1978, at 30 et seq. For the 1996 Draft and its referral to the 1977 Draft on this point, see *International Legal Materials*, Vol. 37, 1998, 444. See also C. F. Amerasinghe: *Local remedies in international law,* 1990, at 45-51.

[6] Schreuer, loc. cit., supra note 4, at 199-202.

32. Moreover, the wording of paragraph 3(a) does not support Respondent's submission on this subject. It contains no guidelines for deciding whether or under what circumstances a dispute may be deemed to continue. In the Tribunal's view, the absence of such objective criteria leaves each party free to decide for itself whether the dispute continues, that is, whether its claim has been vindicated by the domestic court, and to refer the case to international arbitration if it is not satisfied with the domestic court judgment. Had the Contracting Parties to the BIT wished to establish a different procedure, they would have done so.

33. The Tribunal considers that Article X(3)(a) serves two important functions, which are not affected by the above interpretation. First, it permits either party to a dispute to seek redress from the appropriate domestic court. Second, it ensures that a party accessing the domestic court will not be prevented and will not be able to prevent the case from going to international arbitration after the expiration of the eighteen-month period. This is so whether or not the domestic court has rendered a decision and regardless of the decision it may have rendered.

34. Turning to the second part of Respondent's argument, it must now be asked whether a party to a dispute, which has not referred the case to a domestic court, as required by Article X(2), must be deemed to have waived or forfeited the right to submit the matter to international arbitration. Here it is to be noted that paragraph 2 provides that the dispute "shall be submitted" (*será sometida*) to the competent tribunals of the State Party where the investment was made, and that paragraph 3(a) then declares that the dispute "may be submitted" (*podrá ser sometida*) to an international arbitral tribunal at the request of a party to the dispute in the following circumstances: if the domestic court has not rendered a decision on the merits of the case within a period of eighteen months or if, notwithstanding the existence of such a decision, the dispute continues.

35. This language suggests that the Contracting Parties to the BIT—Argentina and Spain—wanted to give their respective courts the opportunity, within the specified period of eighteen months, to resolve the dispute before it could be taken to international arbitration. Claimant contends, however, that this could not have been the intended meaning of Article X(2), if only because at the end of that period either party would still be free to take the case to international arbitration, regardless of the outcome of the domestic court proceedings.

36. Had this been the Claimant's sole argument on the issue, the Tribunal would have had to conclude that because the Claimant failed to submit the instant case to Spanish courts as required by Article X(2) of the BIT, the Centre lacked jurisdiction and the Tribunal lacked competence to hear the case. This is so because Claimant's submission on this point overlooks two important considerations. First, while it is true that the parties would be free to seek international arbitration after the expiration of the eighteen-month period, regardless of the outcome of the domestic court proceeding, they are likely to do so only if they were dissatisfied with the domestic court decision. Moreover, they would certainly not do so if they were convinced that the international tribunal would reach the same decision. In that sense the courts of the Contracting Parties are given an opportunity to vindicate the international obligations guaranteed in the BIT. Given the language of the treaty, this is a role which the Contracting Parties can be presumed to have wished to retain for their courts, albeit within a prescribed time limit. Second, Claimant's interpretation of Article X(2) would deprive this provision of any meaning, a result that would not be compatible with generally accepted principles of treaty interpretation, particularly those of the Vienna Convention on the Law of Treaties.

37. As noted above, had the Claimant's contention regarding Article X(2) stood alone, the Tribunal would have had to reject it. However, in view of the fact that Claimant argues in the alternative that he has the right to rely on the most favored nation clause contained in the BIT, dismissal of the application to the Tribunal without due consideration of this other argument would be premature. The Tribunal will accordingly now address the Claimant's alternative argument.

Most Favored Nation Clause

38. The argument based on the most favored nation clause raises a number of legal issues with which international tribunals are confronted from time to time. As is true of many treaties of this kind, Article IV of the BIT between Argentina and Spain, after guaranteeing a fair and equitable treatment for investors, provides the following in paragraph 2:

> "In all matters subject to this Agreement, this treatment shall not be less favorable than that extended by each Party to the investments made in its territory by investors of a third country."

39. As noted above, the Argentine-Spain BIT provides domestic courts with the opportunity to deal with a dispute for a period of eighteen months before it may be submitted to arbitration. However, Article 10(2) of the Chile-Spain Bilateral Investment Treaty, imposes no such condition. It provides merely that the investor can opt for arbitration after the six-month period allowed for negotiations has expired.

40. Claimant contends, consequently, that Chilean investors in Spain are treated more favorably than Argentine investors in Spain. He argues, accordingly, that the most favored nation clause in the Argentine-Spain BIT gives him the option to submit the dispute to arbitration without prior referral to domestic courts. Claimant submits, in this connection, that although the Argentine-Spain BIT provides for exceptions to the most favored nation treatment, none of these apply to the dispute settlement provisions at issue in the instant case.

41. The Kingdom of Spain rejects these contentions. In its view, the treaties made by Spain with third countries are in respect of Argentina *res inter alios acta* and, consequently, cannot be invoked by the Claimant. Respondent further argues that under the principle *ejusdem generis* the most favored nation clause can only operate in respect of the same matter and cannot be extended to matters different from those envisaged by the basic treaty. In Spain's view, this means that the reference in the most favored nation clause of the Argentine-Spain BIT to "matters" can only be understood to refer to substantive matters or material aspects of the treatment granted to investors and not to procedural or jurisdictional questions.

42. In this respect, Spain has also argued that since it is the purpose of the most favored nation clause to avoid discrimination, such discrimination can only take place in connection with material economic treatment and not with regard to procedural matters. Only if it could be established that resort to domestic tribunals would produce objective disadvantages for the investor would it be possible to argue material effects on the treatment owed. It follows, in the same line of argument, that it would have to be proved that the submission of the dispute to Spanish jurisdiction is less advantageous to the investor than its submission to ICSID arbitration.

43. The arguments outlined above are familiar to international lawyers and scholars. Indeed, many of the issues mentioned have been addressed in

the *Anglo-Iranian Oil Company Case (Jurisdiction)*,[7] in the *Case concerning the rights of nationals of the United States of America in Morocco* [8]and in the *Ambatielos Case (merits: obligation to arbitrate)*,[9] as well as in the proceedings of the *Ambatielos case* before a Commission of Arbitration.[10]

44. In addressing these issues, it must first be determined which is the basic treaty that governs the rights of the beneficiary of the most favored nation clause. This question was extensively discussed in the *Anglo-Iranian Oil Company Case*, where the International Court of Justice determined that the basic treaty upon which the Claimant could rely was that "containing the most-favored-nation clause".[11] The Court then held that:

> "It is this treaty which establishes the juridical link between the United Kingdom and a third-party treaty and confers upon that State the rights enjoyed by the third party. A third party treaty, independent of and isolated from the basic treaty, cannot produce any legal effect as between the United Kingdom and Iran: it is *res inter alios acta*".[12]

45. This discussion has practical consequences for the application of the most favored nation clause. For if, as the Tribunal believes, the right approach is to consider that the subject matter to which the clause applies is indeed established by the basic treaty, it follows that if these matters are more favorably treated in a third-party treaty then, by operation of the clause, that treatment is extended to the beneficiary under the basic treaty.

---

[7] International Court of Justice, *Reports*, 1952, p. 93. See also Sir Gerald Fitzmaurice: *The Law and Procedure of the International Court of Justice, 1951-1954: Points of Substantive Law. Part II*, p. 84.

[8] International Court of Justice, *Reports*, 1952, p. 176.

[9] International Court of Justice, *Reports*, 1953, p. 10. See also generally, *International Law Reports*, 1953, p. 547.

[10] Award of the Commission of Arbitration established for the Ambatielos claim between Greece and the United Kingdom, dated March 6, 1956, United Nations: *Reports of International Arbitral Awards,* Vol. XII, 1963, p. 91.

[11] International Court of Justice, *Reports*, 1952, at 109.

[12] Ibid., at 109. For a discussion of this and other decisions relating to the most favored nation clause, the writings of authors and the work of the International Law Commission on the subject, see *Yearbook of the International Law Commission*, Vol. II, 1970, p. 199; Vol. II, 1973, p. 97; Vol. II, Part One, 1978, p. 1; Vol. II, Part Two, 1978, p. 7.

If the third-party treaty refers to a matter not dealt with in the basic treaty, that matter is *res inter alios acta* in respect of the beneficiary of the clause.[13]

46. The second major issue concerns the question whether the provisions on dispute settlement contained in a third-party treaty can be considered to be reasonably related to the fair and equitable treatment to which the most favored nation clause applies under basic treaties on commerce, navigation or investments and, hence, whether they can be regarded as a subject matter covered by the clause. This is the issue directly related to the *ejusdem generis* rule.

47. The question was indirectly but not conclusively touched upon in the *Case concerning the rights of nationals of the United States of America in Morocco*. Here, the International Court of Justice was confronted with the question of whether the clause contained in a treaty of commerce could be understood to cover consular jurisdiction as expressed in a third-party treaty. However, the Court did not need to answer the question posed because its main finding was that the treaties from which the United States purported to derive such jurisdictional rights had ceased to operate between Morocco and the third states involved.[14]

48. The issue came into sharp focus in the *Ambatielos case*. Greece contended before the International Court of Justice that her subject—Ambatielos—had not been treated in the English courts according to the standards applied to British subjects and foreigners who enjoyed a most favored nation treatment under treaties in force. Such most favored nation treatment was relied upon as the basis of the claim and the request that the dispute be submitted to arbitration. The Court did not deal with the matter of the most favored nation clause, but this task would be undertaken by the Commission of Arbitration.

49. The Commission of Arbitration, to which the dispute was eventually submitted, subsequently confirmed the relevance of the *ejusdem generis* rule. It affirmed that "the most-favored-nation clause can only attract

---

[13] It was on this basis that the International Court of Justice ruled against the extension of principles of international law envisaged in treaties between Iran and third parties to the United Kingdom, as these principles were unrelated to the basic treaty containing the clause, Judgment cit., supra note 11.

[14] International Court of Justice, *Reports,* 1952, p. 191.

matters belonging to the same category of subject as that to which the clause itself relates ".[15] However, the scope of the rule was defined in broad terms:

> "It is true that the 'administration of justice', when viewed in isolation, is a subject-matter other than 'commerce and navigation', but this is not necessarily so when it is viewed in connection with the protection of the rights of traders. Protection of the rights of traders naturally finds a place among the matters dealt with by treaties of commerce and navigation.
>
> Therefore it cannot be said that the administration of justice, in so far as it is concerned with the protection of these rights, must necessarily be excluded from the field of application of the most-favored-nation clause, when the latter includes 'all matters relating to commerce and navigation'. The question can only be determined in accordance with the intention of the Contracting Parties as deduced from a reasonable interpretation of the Treaty".[16]

50. The Commission accepted the extension of the clause to questions concerning the administration of justice and found it to be compatible with the *ejusdem generis* rule. It concluded that the protection of the rights of persons engaged in commerce and navigation by means of dispute settlement provisions embraces the overall treatment of traders covered by the clause. On the merits of the question, the Commission determined, however, that the third-party treaties relied upon by Greece did not provide for any "privileges, favours or immunities" more extensive than those resulting from the basic treaty and that "accordingly the most-favored-nation clause contained in Article X has no bearing on the present dispute...".[17]

51. It is in the light of this background that the operation of the most favored nation clause in bilateral investment treaties must now be considered by this Tribunal. In the case *Asian Agricultural Products Limited v. Republic of Sri Lanka*,[18] an ICSID Tribunal had the occasion to examine

---

[15] United Nations, *Reports of International Arbitral Awards,* 1963, p. 107.

[16] Ibid.

[17] Ibid., at 109, 110.

the operation of the most favored nation treatment agreed to between Sri Lanka and the United Kingdom in light of the argument that a Sri Lanka-Switzerland treaty contained more favorable provisions on which the investor sought to rely. The provisions discussed, however, were not related to dispute settlement but only to the liability standards under the treaties in question. As in the *Ambatielos* decision rendered by the Commission of Arbitration, the ICSID Tribunal held that "...it is not proven that the Sri Lanka/Switzerland Treaty contains rules more favourable than those provided for under the Sri Lanka/UK Treaty, and hence, Article 3 of the latter Treaty cannot be justifiably invoked in the present case".[19]

52. A number of bilateral investment treaties have provided expressly that the most favored nation treatment extends to the provisions on settlement of disputes. This is particularly the case of investment treaties concluded by the United Kingdom. Thus, Article 3(3) of the Agreement between the United Kingdom and Albania, stipulates: "For the avoidance of doubt it is confirmed that the treatment provided for in paragraphs (1) and (2) above shall apply to the provisions of Articles 1 to 11 of this Agreement".[20] Among the enumerated provisions are the clauses on dispute settlement and the consent to submit to conciliation or arbitration under ICSID. Here it is beyond doubt that the parties intended the most favored nation clause to include dispute settlement in its scope, thereby meeting the test proposed by the *Ambatielos* Commission of Arbitration. Furthermore, the parties included this model clause in the Agreement with the express purpose of "the avoidance of doubt".

53. In other treaties the most favored nation clause speaks of "all rights contained in the present Agreement"[21] or, as the basic Argentine-Spain BIT does, "all matters subject to this Agreement". These treaties do not provide expressly that dispute settlement as such is covered by the clause. Hence, like in the *Ambatielos* Commission of Arbitration it must be estab-

---

[18] *Asian Agricultural Products Limited v. Republic of Sri Lanka*, ICSID Case NoARB/87/3, Award of June 27, 1990, *ICSID Reports,* Vol. 4, p. 246.

[19] Ibid., at 272.

[20] Agreement between the United Kingdom and Albania, March 30, 1994. Twelve other agreements made by the United Kingdom, which the Tribunal has examined, contain the same model clause.

[21] Agreement between Chile and the Belgian-Luxembourg Economic Union, July 15, 1992, Article 3 (3).

lished whether the omission was intended by the parties or can reasonably be inferred from the practice followed by the parties in their treatment of foreign investors and their own investors.

54. Notwithstanding the fact that the basic treaty containing the clause does not refer expressly to dispute settlement as covered by the most favored nation clause, the Tribunal considers that there are good reasons to conclude that today dispute settlement arrangements are inextricably related to the protection of foreign investors, as they are also related to the protection of rights of traders under treaties of commerce. Consular jurisdiction in the past, like other forms of extraterritorial jurisdiction, were considered essential for the protection of rights of traders and, hence, were regarded not merely as procedural devices but as arrangements designed to better protect the rights of such persons abroad.[22] It follows that such arrangements, even if not strictly a part of the material aspect of the trade and investment policy pursued by treaties of commerce and navigation, were essential for the adequate protection of the rights they sought to guarantee.

55. International arbitration and other dispute settlement arrangements have replaced these older and frequently abusive practices of the past. These modern developments are essential, however, to the protection of the rights envisaged under the pertinent treaties; they are also closely linked to the material aspects of the treatment accorded. Traders and investors, like their States of nationality, have traditionally felt that their rights and interests are better protected by recourse to international arbitration than by submission of disputes to domestic courts, while the host governments have traditionally felt that the protection of domestic courts is to be preferred. The drafting history of the ICSID Convention provides ample

[22] See, for example, *Magno Santovincenzo* v. *James F. Egan*, United States Supreme Court, Decision of November 23, 1931, *U.S. Reports*, Vol. 284, p. 30, where it was held that "...the provisions of Article V of the Treaty were of special importance, as they provided for extraterritorial jurisdiction of the United States in relation to the adjudication of disputes. It would thwart the major purpose of the Treaty to exclude from the important protection of these provisions citizens of the United States who might be domiciled in Persia". For this and other domestic decisions concerning the most favored nation clause see International Law Commission, Decisions of national courts relating to the most-favoured-nation clause, Digest prepared by the Secretariat, Doc. A/CN.4/269, *Yearbook of the International Law Commission*, Vol. II, 1973, p. 117.

evidence of the conflicting views of those favoring arbitration and those supporting policies akin to different versions of the Calvo Clause.[23]

56. From the above considerations it can be concluded that if a third-party treaty contains provisions for the settlement of disputes that are more favorable to the protection of the investor's rights and interests than those in the basic treaty, such provisions may be extended to the beneficiary of the most favored nation clause as they are fully compatible with the *ejusdem generis* principle. Of course, the third-party treaty has to relate to the same subject matter as the basic treaty, be it the protection of foreign investments or the promotion of trade, since the dispute settlement provisions will operate in the context of these matters; otherwise there would be a contravention of that principle. This operation of the most favored nation clause does, however, have some important limits arising from public policy considerations that will be discussed further below.

57. The negotiations leading to the Argentine-Spain BIT evidence similar policy conflicts between the capital exporting country and the host country, that is, Spain and Argentina respectively, except that in the present case the roles were later reversed, with Argentina becoming the capital exporter and Spain the host country. The Claimant has convincingly explained that at the time of the negotiations of the Agreement, Argentina still sought to require some form of prior exhaustion of local remedies, while Spain supported the policy of a direct right of submission to arbitration, which was reflected in the numerous agreements it negotiated with other countries at that time. The eventual role the treaty envisaged for domestic courts, involving the submission of the dispute to these courts for a period of time, not amounting to the traditional exhaustion of local remedies requirement as explained above, coupled with ICSID arbitration, was an obvious compromise reached by the parties. Argentina later abandoned its prior policy, and like Spain and Chile, accepted treaty clauses providing for the direct submission of disputes to arbitration following a period of negotiations.

58. The Tribunal has also examined in detail the practice followed by Spain in respect of bilateral investment treaties with other countries. These treaties indicate that Spain's preferred practice is to allow for arbitration,

---

[23] See generally ICSID: *Analysis of Documents Concerning the Origin and the Formulation of the Convention,* 1970.

following a six-months effort to reach a friendly settlement, which is what the Chile-Spain BIT provides. In most cases there is a choice of arbitration under ICSID, but other options are available as well. This is the situation, for example, with regard to the treaties concluded by Spain with Algeria,[24] Chile,[25] Colombia,[26] Cuba,[27] Czechoslovakia,[28] Dominican Republic,[29] Egypt,[30] El Salvador,[31] Honduras,[32] Hungary,[33] Indonesia (twelve-month direct settlement effort),[34] Kazajstan,[35] Republic of Korea,[36] Lithuania,[37] Malaysia,[38] Nicaragua,[39] Pakistan,[40] Peru,[41] Philippines,[42] Poland[43] and Tunisia.[44]

59. Spain's treaty practice also shows that in a few cases a six-month or nine-month effort at a direct settlement is followed by arbitration between the Contracting Parties, but not involving the choice of the investor. This is, for example, the case of the treaties with Bolivia,[45] Morocco[46] and the USSR.[47] Only one other treaty, namely that with Uruguay,[48] follows the

[24] Agreement of December 23, 1994.
[25] Agreement of October 2, 1991.
[26] Agreement of July 9, 1995.
[27] Agreement of May 27, 1994.
[28] Agreement of December 12, 1990.
[29] Agreement of March 16, 1995.
[30] Agreement of November 3, 1992.
[31] Agreement of February 14, 1995.
[32] Agreement of March 18, 1994.
[33] Agreement of November 9, 1989.
[34] Agreement of May 30, 1995.
[35] Agreement of March 23, 1994.
[36] Agreement of January 17, 1994.
[37] Agreement of July 6, 1994.
[38] Agreement of April 4, 1995.
[39] Agreement of March 16, 1994.
[40] Agreement of September 15, 1994.
[41] Agreement of November 17, 1994.
[42] Agreement of October 19, 1993.
[43] Agreement of July 30, 1992.
[44] Agreement of May 28, 1991.
[45] Agreement of April 24, 1990.
[46] Agreement of January 15, 1992.
[47] Agreement of November 28, 1991.
[48] Agreement of April 7, 1992.

model of the Argentine-Spain BIT, probably because of the similarity of policies pursued by the two River Plate nations.

60. The Tribunal also notes that of all the Spanish treaties it has been able to examine, the only one that speaks of "all matters subject to this Agreement" in its most favored nation clause, is the one with Argentina. All other treaties, including those with Uruguay and Chile, omit this reference and merely provide that "this treatment" shall be subject to the clause, which is of course a narrower formulation.

61. The Spanish treaty practice is also relevant in connection with another aspect of the clause. Most treaties concluded by Spain have a model clause to the effect that "...Each Party shall guarantee in its territory fair and equitable treatment for the investments made by investors of the other Party...This treatment shall not be less favourable than that extended by each Party to the investments made in its territory by its own investors...".[49] While this clause applies to national treatment of foreign investors, it may also be understood to embrace the treatment required by a Government for its investors abroad, as evidenced by the treaties made to ensure their protection. Hence, if a Government seeks to obtain a dispute settlement method for its investors abroad, which is more favorable than that granted under the basic treaty to foreign investors in its territory, the clause may be construed so as to require a similar treatment of the latter.

62. Notwithstanding the fact that the application of the most favored nation clause to dispute settlement arrangements in the context of investment treaties might result in the harmonization and enlargement of the scope of such arrangements, there are some important limits that ought to be kept in mind. As a matter of principle, the beneficiary of the clause should not be able to override public policy considerations that the contracting parties might have envisaged as fundamental conditions for their acceptance of the agreement in question, particularly if the beneficiary is a private investor, as will often be the case. The scope of the clause might thus be narrower than it appears at first sight.

63. Here it is possible to envisage a number of situations not present in the instant case. First, if one contracting party has conditioned its consent

[49] See, for example, the Algeria-Spain Agreement of December 23, 1994, Article 4.

to arbitration on the exhaustion of local remedies, which the ICSID Convention allows, this requirement could not be bypassed by invoking the most favored nation clause in relation to a third-party agreement that does not contain this element since the stipulated condition reflects a fundamental rule of international law.[50] Second, if the parties have agreed to a dispute settlement arrangement which includes the so-called fork in the road, that is, a choice between submission to domestic courts or to international arbitration, and where the choice once made becomes final and irreversible,[51] this stipulation cannot be bypassed by invoking the clause. This conclusion is compelled by the consideration that it would upset the finality of arrangements that many countries deem important as a matter of public policy. Third, if the agreement provides for a particular arbitration forum, such as ICSID, for example, this option cannot be changed by invoking the clause, in order to refer the dispute to a different system of arbitration. Finally, if the parties have agreed to a highly institutionalized system of arbitration that incorporates precise rules of procedure, which is the case, for example, with regard to the North America Free Trade Agreement and similar arrangements, it is clear that neither of these mechanisms could be altered by the operation of the clause because these very specific provisions reflect the precise will of the contracting parties. Other elements of public policy limiting the operation of the clause will no doubt be identified by the parties or tribunals. It is clear, in any event, that a distinction has to be made between the legitimate extension of rights and benefits by means of the operation of the clause, on the one hand, and disruptive treaty-shopping that would play havoc with the policy objectives of underlying specific treaty provisions, on the other hand.

64. In light of the above considerations, the Tribunal is satisfied that the Claimant has convincingly demonstrated that the most favored nation clause included in the Argentine-Spain BIT embraces the dispute settlement provisions of this treaty. Therefore, relying on the more favorable arrangements contained in the Chile-Spain BIT and the legal policy adopted by Spain with regard to the treatment of its own investors abroad, the Tribunal concludes that Claimant had the right to submit the instant dispute to arbitration without first accessing the Spanish courts. In the

---

[50] *The Mavrommatis Palestine Concessions* (Greece v. U.K.), Permanent Court of International Justice, 1924, Series A. No. 2, 12; *Interhandel Case* (Switzerland v. United States of America), International Court of Justice, *Reports 1959,* 27.

[51] See, for example, the Chile-Spain BIT of October 2, 1991, Article 10(2).

Tribunal's view, the requirement for the prior resort to domestic courts spelled out in the Argentine-Spain BIT does not reflect a fundamental question of public policy considered in the context of the treaty, the negotiations relating to it, the other legal arrangements or the subsequent practice of the parties. Accordingly, the Tribunal affirms the jurisdiction of the Centre and its own competence in this case in respect of this aspect of the challenge made by the Kingdom of Spain.

The Claimant's Standing

65. The Respondent has also challenged the jurisdiction of the Centre and the Tribunal's competence on a different ground, namely, that the Claimant lacks standing to file this request for arbitration because he is not an investor within the meaning of Article 25(1) of the ICSID Convention. Respondent points out that under Article 25(1), the Centre has jurisdiction only over disputes arising directly out of an investment "between a Contracting State and a national of another Contracting State." Although Claimant is an Argentine national, his claim against the Kingdom of Spain is based, in Respondent's view, on injuries allegedly suffered by EAMSA, a Spanish juridical entity established and largely owned by Claimant. As a Spanish company, EAMSA has a juridical personality separate and distinct from its shareholders. Respondent argues that as long as the company continues to exist *qua* company, a shareholder in Claimant's position has no standing to seek to lift the corporate veil and sue in his personal capacity for damages sustained by the company. According to this view, the Claimant would have only very limited grounds upon which to sue for eventual wrongdoings that might affect him personally, but in any event such acts could not be attributed to the Kingdom of Spain.

66. Claimant emphasizes that he is not bringing this case on behalf of EAMSA. He contends, instead, that he has filed this action in his personal capacity as a foreign (Argentine) investor in the Spanish company (EAMSA) to protect his investment in that company. In support of his arguments, Claimant points, *inter alia*, to Articles I(2) and II(2) of the BIT and argues that these provisions define "investments" broadly in the sense that they cover all types of property and rights to property, including investments made or acquired in the host country.

67. The Tribunal notes that Article 25 of the Convention must be read together with two provisions of the BIT, which are of particular relevance

in analyzing the above contentions of the parties. The first of these is Article I(2) of the BIT, which reads, in part, as follows:

> "The term 'investment' means every kind of asset, such as goods and rights of whatever nature, acquired or made in accordance with the laws of the Contracting Party in whose territory the investment is made, and shall include, in particular though not exclusively, the following: shares in stock or any other form of participation in a company."

The other provision is Article II(2), which stipulates:

> "The present Agreement shall apply to capital investments in the territory of one Contracting Party, made in accordance with its legislation prior to the entry into force of the Agreement. However this Agreement shall not apply to disputes or claims originating before its entry into force."

68. These provisions indicate that capital investments are covered by the BIT. They also provide that individuals having the nationality of one of the Contracting Parties, who invest in corporations or similar legal entities created in the territory of the other Contracting Party, are as a general proposition entitled to claim the protection of that treaty. These provisions complement and are consistent with the requirements of Article 25 of the Convention. Claimants' assertions as to his standing to file this case are fully compatible with these stipulations.

69. The foregoing conclusion does not mean that Claimant has in fact proved that he has made out a valid claim for damages sustained by him in his personal capacity. He will have to do that in the proceedings on the merits in order to win his case. At this stage of the proceedings, however, it is enough for him to demonstrate that, if true, his allegations would give him standing to bring this case in his personal capacity.

70. In the Tribunal's view, Claimant has sustained that burden. He is an Argentine investor in a Spanish company, who brings this action ostensibly to protect his investment in that company and for losses incurred by him due to injurious acts he attributes to Respondent. If proved, these facts would entitle Claimant to invoke the protection of the BIT in his personal capacity. (Convention, Art. 25; BIT, Arts. I(2) and II(2)). Accordingly,

Claimant can be said to have made out a *prima facie* case that he has standing to file this case.

SODIGA's Status in the Kingdom of Spain

71. The Tribunal now turns to the Respondent's contention that the instant dispute is not between the Kingdom of Spain and the Claimant, as alleged by the Claimant, but between the Claimant and the private corporation "Sociedad para el Desarrollo Industrial de Galicia" (SODIGA), with which the Claimant made various contractual dealings.

72. The issue here can be summarized as follows. The Claimant argues that the actions and omissions affecting his investment are attributable to an entity owned and operated by the Kingdom of Spain. SODIGA, the Claimant argues, is not only owned by several State entities, but it is also under the control of the State and operated as an arm of the State for the purposes of the economic development of the region of Galicia. Accordingly, as a State entity, its wrongful acts or omission may be attributed to the State.

73. The Respondent maintains, however, that SODIGA is a private commercial corporation established under the commercial laws of Spain and that, consequently, its activities are those of a private entity. Ownership of part of the shares of SODIGA by State entities, the Respondent argues, does not alter the private commercial character of the corporation nor does it transform SODIGA into a State agency. Its acts or omissions cannot, therefore, be attributed to the State.

74. Under the ICSID Convention, the Centre's jurisdiction extends only to legal disputes arising directly out of an investment between a Contracting State and a national of another Contracting State.[52] Just as the Centre has no jurisdiction to arbitrate disputes between two States, it also lacks jurisdiction to arbitrate disputes between two private entities. Its main jurisdictional feature is to decide disputes between a private investor and a State.[53] However, neither the term "national of another Contracting State" nor the term "Contracting State" are defined in the Convention.

---

[52] ICSID Convention, Article 25(1).

[53] Aron Broches: "The Convention on the Settlement of Investment Disputes: Some Observations on Jurisdiction", *Columbia Journal of International Law*, Vol. 5, 1966, 263, at 265.

Some elements outlined in the Convention in respect of the standing of a constituent subdivision or agency of a Contracting State or the modalities of consent in their respect,[54] neither help in this case.[55] The Convention contains no criteria dealing with the attribution to the State of acts or omissions undertaken by such State entities, subdivisions or agencies. The Argentine-Spanish BIT does not assist either in this determination. While it speaks of actions of State authorities ("*autoridades de una Parte*"), it does not define the phrase.[56]

75. Accordingly, the Tribunal has to answer the following two questions: first, whether or not SODIGA is a State entity for the purpose of determining the jurisdiction of the Centre and the competence of the Tribunal, and second, whether the actions and omissions complained of by the Claimant are imputable to the State. While the first issue is one that can be decided at the jurisdictional stage of these proceedings, the second issue bears on the merits of the dispute and can be finally resolved only at that stage.

76. Since neither the Convention nor the Argentine-Spanish BIT establish guiding principles for deciding the here relevant issues, the Tribunal may look to the applicable rules of international law in deciding whether a particular entity is a state body. These standards have evolved and been applied in the context of the law of State responsibility. Here, the test that has been developed looks to various factors, such as ownership, control, the nature, purposes and objectives of the entity whose actions are under scrutiny, and to the character of the actions taken.[57]

77. The question whether or not SODIGA is a State entity must be examined first from a formal or structural point of view. Here a finding that the entity is owned by the State, directly or indirectly, gives rise to a rebuttable presumption that it is a State entity. The same result will obtain if an entity is controlled by the State, directly or indirectly. A similar

---

[54] ICSID Convention, Article 25(1) and 25(3). See C. Schreuer: "Commentary on the ICSID Convention. Article 25", *Foreign Investment Law Journal—ICSID Review*, Vol. 11, 1996, 318, at 380-391; Schreuer, loc. cit., supra note 4, at 140-150.

[55] SODIGA is not a party to this case and no designation has been made or consent has been given by Spain to this effect.

[56] Argentine-Spain BIT, Article V.

[57] Ian Brownlie: *System of the Law of Nations. State Responsibility. Part I*, 1983, 132 et seq.

presumption arises if an entity's purpose or objectives is the carrying out of functions which are governmental in nature or which are otherwise normally reserved to the State, or which by their nature are not usually carried out by private businesses or individuals.

78. The relevance of these standards is clearer when there is a direct State operation and control, such as by a section or division of a Ministry, but less so when the State chooses to act through a private sector mechanism, such as a corporation (*sociedad anonima*) or some other corporate structure. In any event, a State will not necessarily escape responsibility for wrongful acts or omissions by hiding behind a private corporate veil.[58] Paragraph 2 of Article 7 of the International Law Commission's *Draft Articles on State Responsibility*, supports this position:

> "2. The conduct of an organ of an entity which is not part of the formal structure of the State or of a territorial governmental entity, but which is empowered by the internal law of that State to exercise elements of the governmental authority, shall be considered as an act of the State under international law, provided the organ was acting in such capacity in the case in question."[59]

79. Because of the many forms that State enterprises may take and thus shape the manners of State action, the structural test by itself may not always be a conclusive determination whether an entity is an organ of the State or whether its acts may be attributed to the State. An additional test has been developed, a functional test, which looks to the functions of or role to be performed by the entity.[60] Although, as noted above, neither the ICSID Convention nor the Argentine-Spain BIT define a Contracting State, the drafting history of the Convention does cover an analogous situation: whether mixed economy companies or government-owned corporations may be considered under the definition of a "national of a Contracting State". While recognizing, of course, that definitions of different terms are not usually interchangeable and that, in this case, a "Contracting State" is different from a "national of a Contracting State",

---

[58] See generally Brownlie, op. cit, supra note 57, at 135-137.

[59] International Law Commission: "Draft Articles on State Responsibility", 1996, *International Legal Materials*, Vol. 37, 1998, 444.

[60] Brownlie, op. cit., supra note 57, at 136.

there are sufficient similarities which would allow us to utilize jurisprudence developed for one definition in the context of the other. Thus, a determination as to the character of state-owned enterprises in the context of whether it is a "national of a Contracting State", may also be relevant in determining whether a state enterprise may be subsumed within the definition of the term "Contracting Party". In this connection, it is relevant to note, as explained by a leading authority on the Convention, that it would seem that "a mixed economy company or government-owned corporation should not be disqualified as a 'national of another Contracting State' unless it is acting as an agent for the government or is discharging an essentially governmental function".[61]

80. This functional test has been applied, in respect of the definition of a national of a Contracting State, in the recent decision of an ICSID Tribunal on objections to jurisdiction in the case of *Ceskoslovenska Obchodni Banka, A. S.* v. *the Slovak Republic*.[62] Here it was held that the fact of State ownership of the shares of the corporate entity was not enough to decide the crucial issue of whether the Claimant had standing under the Convention as a national of a Contracting State as long as the activities themselves were "essentially commercial rather than governmental in nature".[63] By the same token, a private corporation operating for profit while discharging essentially governmental functions delegated to it by the State could, under the functional test, be considered as an organ of the State and thus engage the State's international responsibility for wrongful acts.

81. It is difficult to determine, *a priori*, whether these various tests and standards need necessarily be cumulative. It is likely that there are circumstances when they need not be. Of course, when all or most of the tests result in a finding of State action, the result, while still merely a presumption, comes closer to being conclusive.

---

[61] Aron Broches: "The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States", *Recueil des Cours de l'Academie de Droit International,* 1972, at 355.

[62] *Ceskoslovenska Obchodni Banka, A. S.* v. *the Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction, May 24, 1999, *ICSID Review—Foreign Investment Law Journal,* Vol. 14, 1999, at 250.

[63] Ibid., par. 20.

82. The Tribunal is also of the view that a domestic determination, be it legal, judicial or administrative, as to the juridical structure of an entity undertaking functions which may be classified as governmental, while it is to be given considerable weight, is not necessarily binding on an international arbitral tribunal. Whether an entity is to be regarded as an organ of the State and whether this might ultimately engage its responsibility, is a question of fact and law to be determined under the applicable principles of international law.[64]

83. In the light of these considerations, the Tribunal notes, first, that SODIGA was created by a decree issued by the Ministry of Industry (*Ministerio de Industria*) which authorized the National Institute for Industry (*Instituto Nacional de Industria*), a national State agency, to establish SODIGA. The characterization of the Ministry and the Institute as State entities is not disputed in this case. Furthermore, in spite of the fact that the government chose to create SODIGA in the form of a private commercial corporation, it did so by providing that the Instituto Nacional de Industria would own no less than 51% of the capital. In fact, as of December 31, 1990, the percentage of governmentally owned capital of SODIGA had increased to over 88%, including the stock holdings of the Xunta de Galicia, also a state entity in charge of the executive power in the Autonomous Community of Galicia,[65] several savings and loans associations (*cajas de ahorros*), other regional development agencies and the Banco Exterior de España.

84. However, the intent of the State to create still another a corporate entity, particularly one which is intended to operate in the private sector, even if State owned, is not sufficient to raise the presumption of an entity being an organ of the State. More is required in terms of the functional test discussed above.

85. In this instance, however, it is clear from the background leading to the establishment of SODIGA that the intent of the Government of Spain was to create an entity to carry out governmental functions. In fact, the proposal to create SODIGA originated in the *Ministerio de Industria*; its

---

[64] Brownlie, op. cit., supra note 57, at 136. See also International Law Commission, Draft Articles cit., supra note 59, Article 4.

[65] The Xunta is defined as the collegiate body of the Government of Galicia. See http://galicia97.vieiros.com

creation was vetted and approved by the Ministry of Finance (*Ministerio de Hacienda*); and its creation was discussed and approved at a meeting of the Council of Ministers (*Consejo de Ministros*), one of the highest policy organs of the Government of Spain.[66] The participation of these government bodies in the creation of SODIGA points to the fact that it was established to carry out governmental functions in the field of regional development.

86. This intention is evidenced, for example, in the preamble to the decree. It declares that one of the purposes for SODIGA's creation is the promotion of regional industrial development of the Autonomous Region of Galicia. (". . . *[S]e considera urgente la constitucion de una Sociedad que, con la finalidad especifica de impulsar el desarrollo industrial de Galicia,. . .*"). Furthermore, it can be seen that it was the intent of the Government of Spain to utilize SODIGA as an instrument of State action. Among its functions was the undertaking of studies for the introduction of new industries into Galicia, seeking and soliciting such new industries, investing in new enterprises, processing loan applications with official sources of financing, providing guarantees for such loans, and providing technical assistance. Moreover, either through the *Instituto Nacional de Industria* or directly, SODIGA was charged with providing subsidies and offering other inducements for the development of industries. Many of these objectives and functions are by their very nature typically governmental tasks, not usually carried out by private entities, and, therefore, cannot normally be considered to have a commercial nature.

87. While it is possible that the Spanish State could have out-sourced such development activities to a private, non-governmental, corporate entity, this was not the case here. But, as explained above, even if it had been the case, under the functional test this would not have necessarily delinked the Spanish State from the entity as its functions would have been delegated by the State and they could still be government functions in the light of international law.

88. Many countries besides Spain have created regional development agencies. These agencies have been created around the world and operate as governmental entities, whether in the form of direct State agencies, terri-

[66] Decreto 2182/1972, *Boletin Oficial del Estado*, No. 197, August 17, 1972, p. 1536.

torial or regional agencies or, as in the case of SODIGA, as corporations. It is relevant to note, in this connection, that the World Bank has established an office, the Foreign Investment Advisory Service (FIAS), one of whose functions is to provide technical assistance and consulting services to governments to assist with the creation and operation of industrial and other development organizations.

89. In view of the fact that SODIGA meets both the structural test of State creation and capital ownership and the functional test of performing activities of a public nature, the Tribunal concludes that the Claimant has made out a *prima facie* case that SODIGA is a State entity acting on behalf of the Kingdom of Spain. Whether SODIGA is responsible for the specific acts and omissions complained of, whether they are wrongful, whether all these acts or omissions always were governmental rather than commercial in character, and, hence, whether they can be attributed to the Spanish State, are questions to be decided during the proceedings on the merits of the case.

Time of the Dispute

90. A last challenge of the Respondent to the jurisdiction of the Centre and the competence of the Tribunal rests on the argument that the alleged dispute originates in its view before the entry into force of the BIT between Argentina and Spain. This argument is in turn connected with the issue of the existence of a dispute and whether it qualifies as a legal dispute, but these other aspects belong also to the merits of the claim.

91. Article II(2) of the Argentine-Spain BIT provides in part: "However, this agreement shall not apply to disputes or claims originating before its entry into force."

92. The Argentine-Spain BIT entered into force on September 28, 1992, and because of the Claimant's argument about the relevance of the most-favored-nation clause in respect of the Chile-Spain BIT, the Kingdom of Spain also argues that the latter treaty only entered into force on March 29, 1994. Accordingly, Spain submits that for the Centre to have jurisdiction the dispute should originate after this last date or, in any event, after the date of entry into force of the Argentine-Spain BIT. Considering that the Claimant relies on facts and events that took place as early as 1989 and

throughout 1990, 1991, and the first part of 1992, Spain contends that the BIT does not apply to the dispute.

93. The Claimant rejects this view on the ground that a "dispute" arises when it is formally presented as such, and this happened only after both the Argentine-Spain and the Chile-Spain BIT had entered into force. He contends, moreover, that before the dispute can be deemed to have arisen, there may have been disagreements and differences of opinion between the parties, but these events do not amount to a dispute as this concept is understood in international and domestic law.

94. These differing views of the parties as to the meaning of a dispute and when it becomes identified or recognized as such, are quite common in ICSID and other arbitral or judicial proceedings.[67] The International Court of Justice has defined a dispute on various occasions by declaring that it is "a disagreement on a point of law or fact, a conflict of legal views or interests between parties."[68] It has been rightly commented in this respect that the "dispute must relate to clearly identified issues between the parties and must not be merely academic...The dispute must go beyond general grievances and must be susceptible of being stated in terms of a concrete claim".[69]

95. In the present case it is quite clear, as the Kingdom of Spain has argued, that the events on which the parties disagreed began as early as 1989. Issues such as budget estimates, requirements of environmental impact assessment, disinvestment, and other, were indeed discussed during the period 1989-1992. But this does not mean that a legal dispute as defined by the International Court of Justice can be said to have existed at the time.

96. The Tribunal notes in this respect that there tends to be a natural sequence of events that leads to a dispute. It begins with the expression of a disagreement and the statement of a difference of views. In time these

---

[67] *AGIP* v. *Congo*, ICSID Case ARB/77/1, Award of November 30, 1979, *ICSID Reports,* Vol. 1, 306.

[68] International Court of Justice: *Case concerning East Timor, ICJ Reports 1995,* 90, para. 22, with reference to earlier decisions of both the Permanent Court of International Justice and the International Court of Justice.

[69] C. Schreuer, loc. cit., (1996), supra note 54, at 337.

events acquire a precise legal meaning through the formulation of legal claims, their discussion and eventual rejection or lack of response by the other party. The conflict of legal views and interests will only be present in the latter stage, even though the underlying facts predate them. It has also been rightly commented that the existence of the dispute presupposes a minimum of communications between the parties, one party taking up the matter with the other, with the latter opposing the Claimant's position directly or indirectly.[70] This sequence of events has to be taken into account in establishing the critical date for determining when under the BIT a dispute qualifies as one covered by the consent necessary to establish ICSID's jurisdiction.

97. It should also be noted that the Kingdom of Spain has correctly argued that there is a difference between a dispute and a claim in terms of Article II(2) of the Argentine-Spain BIT. While a dispute may have emerged, it does not necessarily have to coincide with the presentation of a formal claim. The critical date will in fact separate, not the dispute from the claim, but the dispute from prior events that do not entail a conflict of legal views and interests. It follows that if the dispute arises after the critical date it will qualify for its transformation into a claim, while if the dispute has arisen before such date it will be excluded by the terms of the BIT.

98. The Tribunal is satisfied that in this case the dispute in its technical and legal sense began to take shape in 1994, particularly in the context of the disinvestment proposals discussed between the parties. At that point, the conflict of legal views and interests came to be clearly established, leading not long thereafter to the presentation of various claims that eventually came to this Tribunal. That is to say, this dispute came into being after both the Argentine-Spain and the Chile-Spain BITs had entered into force, although the critical date here is the date of entry into force of the former, since this is the basic treaty relevant in this case. It is on this basis that the Tribunal comes to the conclusion that the Centre has jurisdiction and that the Tribunal is competent to consider the dispute between the parties in accordance with the provisions of Article II(2)of the Argentine-Spain BIT.

---

[70] Ibid., at 337, with particular reference to *AALP* v. *Sri Lanka*, ICSID Case NoARB/87/3, Award of June 27, 1990, *ICSID Reports,* Vol. 4, 251.

C. Decision

99. For the foregoing reasons, the Tribunal unanimously decides that the present dispute is within the jurisdiction of the Centre and the competence of the Tribunal. The Tribunal has, accordingly, made the necessary Order for the continuation of the procedure pursuant to Arbitration Rule 41(4).

[signature]
Francisco Orrego Vicuña
President of the Tribunal

[signature]
Thomas Buergenthal
Arbitrator

[signature]
Maurice Wolf
Arbitrator