DISSENTING OPINION OF JUDGE CRAWFORD

Jurisdiction of the Court under Article 36 (2) of Statute — Existence of a dispute — Awareness or objective awareness not a legal requirement — No prior negotiations or notice necessary before seising the Court — Dispute in principle to exist at the time of Application — Flexible approach — Finding of dispute may be based on post-Application conduct or evidence — Mavrommatis *principle — Existence of multilateral dispute — Existence of dispute between Marshall Islands and the United Kingdom.*

Monetary Gold *objection — Issue for the merits.*

I. Introduction

1. This is the first time that the International Court of Justice (or its predecessor) has rejected a case outright on the ground that there was no dispute at the time the Application was lodged. In determining whether there was then a dispute, the Judgment imposes a new requirement of "objective awareness", which I shall use as a shorthand for the rather awkward phrase "aware, or could not have been unaware" (Judgment, para. 41). But a requirement of objective awareness is not to be found in the case law of the Court. The established test for a dispute does not require a high formal threshold to be met, nor an analysis of that indefinite object, the state of mind of a State. It simply requires, as the Permanent Court put it early on, a "conflict of legal views or of interests" (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11). A more recent formulation is that one party's claim must be "positively opposed by the other" (*South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328; see Judgment, para. 37).

2. In this opinion, I first discuss the case law on the meaning of "dispute" within Article 36 (2) of the Court's Statute. The key point is that the test for a dispute has always been a minimum one, not a demanding threshold. The Court has been flexible about the ways in which it can be satisfied, and has referred to post-Application conduct for various purposes of jurisdiction and admissibility. In the case of what I will term a "multilateral dispute", such flexibility is particularly called for. I will then

explain why, applying this test, a dispute existed here between the Marshall Islands and the United Kingdom at the time the Application was lodged.

II. The Threshold for a "Dispute" and the Objective Awareness Requirement

3. The case law of the Court and its predecessor clearly shows that the threshold for establishing a dispute is a low one. In *Certain German Interests in Polish Upper Silesia*, the Permanent Court held that "a difference of opinion does exist as soon as one of the Governments concerned points out that the attitude adopted by the other conflicts with its own views . . . this condition could at any time be fulfilled by means of unilateral action on the part of the applicant Party" (*Certain German Interests in Polish Upper Silesia, Jurisdiction, Judgment No. 6, 1925, P.C.I.J., Series A, No. 6*, p. 14). Similarly, in the *Factory at Chorzów* case, the Court stated

> "that it cannot require that the dispute should have manifested itself in a formal way; according to the Court's view, it should be sufficient if the two Governments have in fact shown themselves as holding opposite views in regard to the meaning or scope of a judgment of the Court" (*Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów), Judgment No. 11, 1927, P.C.I.J., Series A, No. 13*, p. 11).

In East Timor, this Court reasoned simply, "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." (*East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 100.) In none of these cases was there any analysis of whether the Respondent was aware of the Applicant's claim before it was filed. The rationale behind requiring a legal dispute is to ensure that the Court has something to determine: it protects the Court's judicial function which, in a contentious case, is to determine such disputes.

4. The Court now adopts a requirement of objective awareness, but for no persuasive reason. It relies heavily on a judgment which had not been delivered at the time of oral argument in this case: *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections*, Judgment of 17 March 2016. But that decision is not authority for the objective awareness requirement: the Court simply observed that, as a matter of fact, Colombia knew of the existence of the dispute. It said:

> "The Court notes that, although Nicaragua did not send its formal diplomatic Note to Colombia in protest at the latter's alleged viola-

> tions of its maritime rights at sea until 13 September 2014, almost ten months after the filing of the Application, in the specific circumstances of the present case, the evidence clearly indicates that, at the time when the Application was filed, Colombia was aware that its enactment of Decree 1946 and its conduct in the maritime areas declared by the 2012 Judgment to belong to Nicaragua were positively opposed by Nicaragua. Given the public statements made by the highest representatives of the Parties . . . Colombia could not have misunderstood the position of Nicaragua over such differences." (*Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, pp. 32-33, para. 73.)

5. At no point did the Court say that awareness was a legal requirement. Rather it repeated that it must objectively determine whether there is a dispute based on "an examination of the facts. The matter is one of substance, not of form" (*ibid.*, p. 27, para. 50). It is instructive to compare this short statement of law on the requirement of a dispute with the lengthy statement in the present case (Judgment, paras. 36-43), which effectively transforms a non-formalistic requirement into a formalistic one through the use of the term "awareness".

6. While the term "awareness" has sometimes been used in other cases in deciding whether there was a dispute, it has never been stated as a legal requirement, only as a description of the factual situation (see, e.g., *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, pp. 109-110, para. 87; *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 253, para. 30). Awareness is relevant as a matter of fact in determining whether a dispute exists. But that does not mean that it is a necessary legal component without which a dispute cannot exist.

III. The Court's Flexible Approach to the "Dispute" Requirement: in Principle

7. In its earlier case law, the Court has shown flexibility in deciding on the existence and scope of a dispute. *Mavrommatis* marks the beginning of this tradition, holding that "[t]he Court, whose jurisdiction is international, is not bound to attach to matters of form the same degree of importance which they might possess in municipal law" (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 34). I pause to note that this generalized reference to municipal law is hardly accurate today. While approaches to civil jurisdiction and civil

process of course vary, they are undoubtedly less formalistic than they were 90 years ago[1]. But the Court appears to be proceeding in the opposite direction.

8. The flexibility principle was best expressed in its modern form in *Croatia* v. *Serbia*:

> "However, it is to be recalled that the Court, like its predecessor, has also shown realism and flexibility in certain situations in which the conditions governing the Court's jurisdiction were not fully satisfied when proceedings were initiated but were subsequently satisfied, before the Court ruled on its jurisdiction." (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 438, para. 81, hereinafter "*Croatia* v. *Serbia*".)

This has led the Court to adopt a broad discretion, applied in *Mavrommatis Palestine Concessions* and in many cases since, which allows it to overlook defects in the Application when to insist on them would lead to circularity of procedure. This was formulated in *Croatia* v. *Serbia* in the following terms:

> "What matters is that, at the latest by the date when the Court decides on its jurisdiction, the applicant must be entitled, if it so wishes, to bring fresh proceedings in which the initially unmet condition would be fulfilled. In such a situation, it is not in the interests of the sound administration of justice to compel the applicant to begin the proceedings anew — or to initiate fresh proceedings — and it is preferable, except in special circumstances, to conclude that the condition has, from that point on, been fulfilled." (*Ibid.*, p. 441, para. 85.)

9. Accordingly, the Court applied the *Mavrommatis* principle (as I will call it) and decided to proceed to the merits, even though the Respondent, Serbia, was not a member of the United Nations, and thus Article 35 (1) of the Court's Statute was not satisfied at the time Croatia filed its Application. This condition was subsequently met by Serbia's admission to the United Nations. The decision is all the more remarkable in that it applies the *Mavrommatis* principle to a situation where, because of a subsequent Serbian reservation to Article IX of the Genocide Convention, it was likely no longer open to the applicant State to recommence proceedings. It was enough that, at some time in the interim, the applicant could have re-filed its application (see the separate opinion of Judge Abraham, *ibid.*, pp. 539-542, paras. 49-55). Evidently the decision puts the emphasis on the "sound administration of justice", prioritizing substance over form (*ibid.*, p. 442, para. 87).

[1] See, e.g., J. A. Jolowicz, *On Civil Procedure* (Cambridge University Press, 2000), esp. Chaps. 2, 17.

10. The Court in the present case discards this tradition of flexibility. As well as insisting on a stringent requirement of "awareness", it departs from past holdings that "the Court must *in principle* decide the question of jurisdiction on the basis of the conditions that existed at the time of the institution of the proceedings" (*Croatia* v. *Serbia*, p. 438, para. 80 (emphasis added)); see also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 613, para. 26); *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). The words "in principle" allow for some nuance in the application of the rule. By contrast, the approach of the majority would give no meaning to them.

11. None of the cases dealing with the question of a dispute has treated the date of the application as fatal. Rather, the Court has relaxed the rule, referring to evidence before the date of the application and to the position of the parties during the proceedings without distinction, or relying only on the position of the parties during the proceedings, even though pre-application evidence was available (see *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 99, para. 22; *Certain Property (Liechtenstein* v. *Germany), Preliminary Objections, Judgment, I.C.J. Reports 2005*, p. 19, para. 25). While the Court here rejects the Marshall Islands' reliance on *Certain Property* with the explanation that the "dispute was clearly referenced by bilateral exchanges between the parties prior to the date of the application" (Judgment, para. 54), the Court in that case was clear that the conclusion that there was a dispute was reached solely on the basis of the statements made "in the present proceedings", and that the position of Germany in a letter and in bilateral consultations was only of "evidentiary value *in support* of the proposition that Liechtenstein's claims were positively opposed by Germany and that this was recognized by the latter" (*Certain Property (Liechtenstein* v. *Germany), Preliminary Objections, Judgment, I.C.J. Reports 2005*, p. 19, para. 25, emphasis added). In *Land and Maritime Boundary between Cameroon and Nigeria*, the Court held there was a *broader* dispute between the parties by reference to Nigeria's equivocation with respect to the Cameroonian claim (pre- and post-application) and in particular its answer to a question asked by a judge at the oral hearing (*Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 316-317, paras. 91, 93). The Judgment here also fails to explain its departure from *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia)*. While the Court in that case was focused on whether the dispute fell within the scope of the compromissory clause, it could not get to this question before first determining that there was such a dispute, which it did so solely on the basis of post-application conduct: "by reason of the rejection by Yugoslavia of the complaints formulated against it by Bosnia and Herzegovina, 'there is a legal dispute' between

them." (*Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, pp. 614-615, paras. 28-29; see Judgment, para. 54).

12. Commentators on the Statute endorse the flexible view. According to Rosenne, the Court's jurisdiction must normally be assessed as at the date of the filing of the Application instituting the proceedings, but he and Kolb both agree that the *Mavrommatis* principle applies to the question whether a dispute exists as at the critical date.

> "The Court will not allow itself to be hampered by a mere defect of form the removal of which depends solely on the party concerned, for example where proceedings are instituted shortly before the entry into force of the title of jurisdiction for the parties concerned, so that a new application in identical terms could be filed after the relevant date had come." (Shabtai Rosenne, *The Law and Practice of the International Court: 1920-2005* (4th ed., 2006), pp. 510-511.)

Similarly, Kolb says:

> "before the parties seise the Court, there must at least be the beginnings of a dispute. The definitive dispute can, however, crystallize later, in the course of the proceedings. And it can equally well be modified or evolve as the case progresses.
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> . . . . . .
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> It is certainly right to say that the institution of proceedings does not automatically create a dispute. If it did, the distinct requirement that a dispute exists would be devoid of all justification and value.
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> . . . . . .
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> [T]he *Mavrommatis* principle discussed above also applies . . . It remains necessary to consider whether the conditions for bringing a case are satisfied at the moment the case is brought to the Court, although 'it would always have been possible for the applicant to re-submit his application in the same terms after.'. . . It is however, unnecessary to oblige the claimant to start again the case by a new application, for want of a dispute at the initial critical date. This would be an excessively formalistic exercise, with no significant effects except to increase the administrative burden on the Court and the parties." (Robert Kolb, *The International Court of Justice* (2013), p. 315.)

13. Since 1922, there have been three occasions on which the absence of a dispute has resulted in the Court or its predecessor determining that

it could not hear part of a claim. In each, there had been prior correspondence or statements but the applicant later sought to add other issues or claims. In such a case, it was open for the Court to focus on what the parties had previously treated as the gist of the dispute. The absence of any discussion of the additional claim, in a context in which the parties were conducting bilateral discussions on a closely related matter, showed that there was in truth no dispute over the additional claim.

14. In *Electricity Company of Sofia*, the Permanent Court considered that the claim by Belgium against a Bulgarian tax was inadmissible (*Electricity Company of Sofia and Bulgaria [Belgium* v. *Bulgaria], Preliminary Objection, 1939, P.C.I.J., Series A/B, No. 77*, p. 83). In that case, there had been a letter sent by Belgium to Bulgaria on 24 June 1937 clearly notifying it of the other matters that were ultimately brought to the Court but ignoring the tax claim. In that context, it was open to the Court to determine that there was no dispute on the additional issue.

15. In *Belgium* v. *Senegal*, the Court determined that there was no dispute as to whether Senegal had breached a customary international law obligation to bring criminal proceedings against Mr. Habré for crimes of humanity allegedly committed by him, including torture, war crimes and genocide. The Court concluded that "[i]n the light of the diplomatic exchanges between the Parties . . . the Court considers that such a dispute did not exist on that date". (*Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II)*, p. 444, para. 54.) In particular, it noted that those exchanges did not refer to any customary international law obligation, but only to the treaty obligation under the Convention against Torture. Moreover, in a Note Verbale sent two months before filing its Application, Belgium did not mention any customary international law obligation, even though the Note Verbale otherwise set out clearly the dispute between the parties "regarding the application and interpretation of the obligations resulting from the relevant provisions of the [Convention against Torture]" (*ibid.*, p. 445, para. 54). Belgium had thus used the diplomatic channel to define the subject-matter and scope of its dispute with Senegal. In this context, it was open for the Court to infer that there was no dispute on the additional issue. Moreover, there was no need for the Court to apply a flexible approach, since it had already determined that it had jurisdiction over the treaty dispute as to the obligation to charge or extradite Mr. Habré, a matter closely related to the alleged customary international law obligation.

16. More recently, in *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea*, the Court held that there was no dis-

pute over Nicaragua's claim that Colombia had violated Article 2 (4) of the United Nations Charter and the customary international law obligation prohibiting the use or threat of use of force. The Court there had relied on statements made by the highest representatives of the Parties to support its conclusion that a closely related dispute existed over Colombia's alleged breaches of Nicaragua's maritime rights (*Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, pp. 31-33, paras. 69, 73). As to the use of force, the Court stressed that Nicaraguan officials had expressly said that there was no issue, stating just eight days before the application was filed that the two countries "have not had any conflicts in those waters" (*ibid.*, p. 33, para. 76). Taking into account the conduct of the parties, it was open for the Court to conclude that no such dispute existed. As in *Belgium* v. *Senegal*, the Court may also have been influenced by the fact that the substance of the dispute as to the maritime rights of Nicaragua in the Caribbean Sea would be dealt with, so that it was not necessary to apply the *Mavrommatis* principle to find that a dispute had subsequently come into existence.

17. The United Kingdom itself accepted that some flexibility must be shown in certain types of cases. It said it did not

> "contend that there is an immutable, inflexible rule of international law applicable in any and all cases that requires the prior written notification of a claim as a precondition for the crystallization of a dispute . . . It is possible to conceive of cases in which the acute urgency of the matter, the nature and severity of the conduct that is the subject-matter of the claim, the character of the breach that is alleged, and a manifest appreciation of notice derived from the circumstances in issue of the opposing views of the parties, may suffice to crystallize a dispute." (CR 2016/3, p. 28, para. 47 (Bethlehem)).

It gave the example of a provisional measures application in a death penalty case. This makes good sense. Egregious conduct can create a dispute *ipso facto*, without the need for a letter before action or other communication.

18. Moreover, as the Court says here (but does not seem to apply), there is no requirement for formal notification. This was confirmed by the Court in *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea*, where it rejected Colombia's argument based on the failure of Nicaragua to notify it through diplomatic channels (*Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 32, para. 72).

19. The Court here relies on the series of cases discussed above to bolster its conclusion and also relies on *Georgia* v. *Russian Federation*. Although this case is in line with the recent rise of formalism, it cannot be seen in the same terms as the Optional Clause cases. It involved a set of specific issues in relation to the Convention for the Elimination of Racial Discrimination (CERD), notably its compromissory clause, Article 22, which provides:

> "Any dispute between two or more States parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement."

That clause stipulates a requirement of prior negotiation and/or other procedures (including arbitration) before the "dispute" can be submitted to the Court. Evidently the dispute must have existed, and have been the subject of negotiation, before that time. Moreover, in *Georgia* v. *Russian Federation* there could be no doubt that a longstanding dispute existed between the parties. Rather, the doubt was whether that dispute really concerned racial discrimination, however broadly defined, or whether Article 22 was being used as a device to bring a wider set of issues before the Court.

IV. Multilateral Disputes

20. In the present case, the Marshall Islands does not suggest that there were any of the normal indicators of a bilateral dispute, most obviously because there had not been any correspondence between the States or any bilateral discussion on the subject. Rather it argues that a dispute had arisen through statements made in multilateral fora.

21. *South West Africa* (preliminary objections) is crucial in this regard. There, the Court held that:

> "diplomacy by conference or parliamentary diplomacy has come to be recognized in the past four or five decades as one of the established modes of international negotiation. In cases where the disputed questions are of common interest to a group of States on one side or the other in an organized body, parliamentary or conference diplomacy has often been found to be the most practical form of negotiation. The number of parties to one side or the other of a dispute is of no

> importance; it depends upon the nature of the question at issue. If it is one of mutual interest to many States, whether in an organized body or not, there is no reason why each of them should go through the formality and pretence of direct negotiation with the common adversary State after they have already fully participated in the collective negotiations with the same State in opposition." (*South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 346.)

That case involved a requirement for prior negotiation in the relevant compromissory clause. But the passage cited is also authority for the broader point that disputes can crystallize in multilateral fora involving a plurality of States. The Court in 1962 was sharply divided between those holding that a dispute in a multilateral framework is simply an aggregate of disputes, each to be assessed in its own right, and a broader view that some disputes can be genuinely multilateral. In the present Judgment, the Court does not deny that a dispute between two States may be demonstrated by multilateral exchanges, but it states that they must demonstrate that the claim of one party is opposed by the other (Judgment, paras. 39, 48). No doubt any multilateral dispute must ultimately be fitted within the bilateral mode of dispute settlement. But this does not require the Court to treat the underlying relations as bilateral *ab initio*.

22. It is now established — contrary to the inferences commonly drawn from the merits phase of *South West Africa* — that States can be parties to disputes about obligations in the performance of which they have no specific material interests. This much is clear from Article 48 of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts (ILC Articles). It is the case here, notwithstanding the Marshall Islands' historic connection as the location of nuclear weapons testing by the United States, and the resulting concerns of its Government and people about nuclear issues. The importance of the *South West Africa* cases lies in the recognition that a multilateral disagreement can crystallize for adjacent purposes as a series of individual disputes coming within the Statute.

23. Finally, I should say a word about Article 43 of the ILC Articles, on which the Respondent rather insistently relied. It is true, as the Court notes (Judgment, para. 45) and as the ILC's Commentary confirms, that Article 43 does not address the jurisdiction of courts or the admissibility of disputes. It nonetheless deals with an analogical question: notice in relation to a claim of responsibility of a State. But, as the Marshall Islands argued, there is nothing in the Commentary that prevents such notice

being given by filing an application. Article 43 is not a pre-notification requirement, it is a notification requirement.

24. The ILC Commentary relies in part on *Certain Phosphate Lands* to support the idea that there is flexibility in how notification may occur (*Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, I.C.J. Reports 1992*, p. 240). According to paragraph (4) of the Commentary on Article 43, "it is not the function of the articles to specify in detail the form which an invocation of responsibility should take"[2]. Nothing in *Certain Phosphate Lands* supports the proposition that a dispute must be notified (or that the respondent must be objectively aware of it) before it can be said to exist. Australia did not contest that the dispute existed, rather it queried whether the dispute had been submitted within a reasonable time, and sought to infer that Nauru's rehabilitation claim had been waived. In that context, it was relevant that Nauru had taken steps (limited and informal) to bring the matter again to Australia's attention.

V. The Present Case

25. Turning to the present case, I share the Court's view that a dispute cannot be created simply by the filing of an application (see Judgment, paras. 43, 54), because otherwise the requirement that a dispute exist would be completely nullified. Rather, the question is whether enough of the dispute was in existence prior to the Application here and whether the Court has enough flexibility to recognize it as a dispute.

26. To put it at its lowest, there was an incipient dispute between the Marshall Islands and the nuclear-weapon States at the time of Nayarit. This was not an accidental development, but the expression of a real underlying disagreement of a legal character as to the trajectory of Article VI and a corresponding legal obligation at customary international law (if one exists). The Marshall Islands is a very small State, with compelling individual interests vis-à-vis several of the nuclear-weapon States. But by the time of Nayarit, by stages, tentatively, but in time, the Marshall Islands had associated itself with one side of that multilateral disagreement, revealing sufficiently for present purposes a claim in positive opposition to the conduct and claims of the nuclear-weapons States, including the respondent State.

[2] The ILC rejected the Special Rapporteur's proposal that notification be in writing.

27. The Court here says the Nayarit statement was insufficient because (i) it did not name the opposing States, (ii) it did not specify the conduct that had given rise to the alleged breach by the Respondent, and (iii) it was delivered in a context not strictly relating to nuclear disarmament, since the title of the Conference was the "Humanitarian Impact of Nuclear Weapons", such that nothing can be inferred from the lack of reply by the United Kingdom (Judgment, paras. 48, 50, 57). These arguments impose too high a threshold for determining the existence of a dispute. There is no doubt that the United Kingdom is one of the "States possessing nuclear weapons": the United Kingdom publicly acknowledges that it has such weapons. Moreover, in a context in which the very scope of Article VI of the NPT and a corresponding customary international law obligation is the subject-matter of a disagreement articulated by a group of States, the Marshall Islands should not be required at this stage to particularize further the specific steps the United Kingdom should take or have taken. Finally, the Conference title itself included the words "Nuclear Weapons"; and one of its purposes was to discuss nuclear disarmament in order to prevent the devastating humanitarian impacts that nuclear weapons could cause. This is an appropriate multilateral context, and it does not dilute the force of what the Marshall Islands said, which was not limited to a single forgettable sentence:

> "As stated by representatives of our Government during the High-Level Meeting on Nuclear Disarmament, the United Nations must stop the spread of nuclear weapons, while securing peace in a world without nuclear weapons. We urgently renew our call to all States possessing nuclear weapons to intensify efforts to address their responsibilities in moving towards an effective and secure disarmament.
>
> It has been almost 68 years since the General Assembly in its very first resolution established a mechanism for the elimination from national arsenals of nuclear weapons and other weapons adaptable to mass destruction. It has been more than 45 years since the conclusion of the Treaty on Non-Proliferation of Nuclear Weapons. Yet today, we still fear the day where we are forced to relive the horrors. We do not want other people to suffer the same consequences we did!
>
> Mr. Chairman, the Marshall Islands is convinced that multilateral negotiations on achieving and sustaining a world free of nuclear weapons are long overdue. Indeed we believe that States possessing nuclear arsenals are failing to fulfil their legal obligations in this regard. Immediate commencement and conclusion of such negotiations is required by legal obligation of nuclear disarmament resting upon each and every State under Article VI of the Non Proliferation Treaty and customary international law. It also would achieve the

> objective of nuclear disarmament long and consistently set by the United Nations, and fulfil our responsibilities to present and future generations while honouring the past ones."

28. Although the United Kingdom was not present at that Conference, the Court does not treat this as a significant factor. Both India and Pakistan *were* present, but the Court nonetheless concludes that neither State was objectively aware of the existence of a dispute with the Marshall Islands.

29. Moreover, the Nayarit statement must also be seen in the context of an earlier statement made by the Marshall Islands at the NPT Review Conference in 2010, at which the United Kingdom was present:

> "It should be our collective goal as the United Nations to stop the spread of nuclear weapons and to pursue the peace and security of a world without them.
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> . . . . . .
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> We are alarmed that, although almost all NPT members are achieving obligations, there are a small few who appear to be determined to violate the rules which bind them, and whose actions thus far appear evasive, particularly in testing or assembling nuclear weapons. We have no tolerance for anything less than strict adherence by Parties to their legal obligations under the NPT — we urge, and expect, an appropriate international response . . . we urge nuclear weapon States to intensify efforts to address their responsibilities in moving towards an effective and secure disarmament."

30. It is not necessary — and indeed would be inappropriate at this stage — to go into the substance of the conflict over Article VI of the NPT. However, the fact of that conflict is public knowledge, to which the Court need not be blind. Thus, for instance, the "New Agenda" Coalition, which currently comprises Brazil, Egypt, Ireland, Mexico, New Zealand and South Africa, has, at least since 2013, condemned the failure by all State parties, particularly the nuclear-weapon States, to comply with the 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. A 2014 Working Paper stated that it was "not acceptable" that the nuclear-weapon States

> "have refused to engage in or support meaningful discussions about the humanitarian impact of nuclear weapons, the follow-up process to the High-Level Meeting of the General Assembly on nuclear dis-

armament, or the Open-Ended Working Group on taking forward nuclear disarmament negotiations"[3].

The statement of the Marshall Islands should be viewed in the context of this broader multilateral disagreement.

31. For these reasons, in my view there was, as at the date of the Application in the present case, a dispute between the Marshall Islands and the respondent State as to the latter's compliance with Article VI of the NPT. That being so, it is unnecessary to consider whether any deficiency in that regard can and should be remedied in the exercise of the Mavrommatis discretion, recognized in *Croatia* v. *Serbia*.

VI. The *Monetary Gold* Principle

32. Finally, I should say something about what was perhaps the most plausible of the other objections to jurisdiction and admissibility made by the Respondent. This is the proposition that the Court lacks competence in a contentious case between State A and State B to determine that an extant third State, State C, is in breach of its legal obligations; if the case cannot be decided in consequence, because State C has not consented to jurisdiction, State A's claim is inadmissible. That proposition, originating in *Monetary Gold*, is now well-established (*Monetary Gold Removed from Rome in 1943 (Italy* v. *France; United Kingdom and United States of America), Preliminary Question, I.C.J. Reports 1954*, p. 32; see also: *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 431, para. 88; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application for Permission to Intervene, Judgment, I.C.J. Reports 1990*, pp. 114-116, paras. 54-56; *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, pp. 259-262, paras. 50-55; *East Timor (Portugal* v. *Australia) Judgment, I.C.J. Reports 1995*, pp. 104-105, paras. 34-35). The case law has however set firm limits to the *Monetary Gold* principle. It applies only where a determination of the legal position of a third State is a necessary prerequisite to the determination of the case before the Court (see: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015 (I)*, pp. 57-58, para. 116). An inference or

[3] Preparatory Committee for the 2015 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, 2 April 2014, available at: http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/npt/prepcom14/documents/WP18.pdf, last visited, 14 September 2016.

implication as to the legal position of that third State is not enough: its position is protected by Article 59 of the Statute (*Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, pp. 260-262, paras. 54-55).

33. The *Monetary Gold* ground of inadmissibility is particularly sensitive to the precise basis of the Applicant's claim. The decision of a given case may or may not rest on a prior determination of the legal position of a third State depending on how the case is put. In the present case, *Monetary Gold* may well impose limits on the consequences that can be drawn from the Respondent's conduct, if indeed it is held to involve a breach of international law. But precisely what those limits are will depend on the ground of decision. It is true, for example, that the Court cannot order third States to enter into negotiations, and that one cannot negotiate alone. But a third State could breach an obligation to negotiate by its own conduct and the Court could determine as much. Everything depends on what the precise scope and application of Article VI of the NPT, or any parallel customary international law obligation, entail. This is at the heart of the dispute in the present case. But these are all issues for the merits.

(Signed) James CRAWFORD.