INTERNATIONAL COURT OF JUSTICE

OBLIGATIONS CONCERNING NEGOTIATIONS RELATING TO CESSATION OF THE NUCLEAR ARMS RACE AND TO NUCLEAR DISARMAMENT
(Marshall Islands *v.* United Kingdom)

STATEMENT OF OBSERVATIONS

OF

THE MARSHALL ISLANDS

RE

PRELIMINARY OBJECTIONS RAISED BY THE UNITED KINGDOM

15 October 2015

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INTRODUCTION

1. On 24 April 2014 the Republic of the Marshall Islands (or, "RMI") filed an Application on the failure of the United Kingdom (or, "UK") to honor its obligations towards the Marshall Islands under the 1968 Treaty on the Non-Proliferation of Nuclear Weapons and under customary international law. The case was entered into the General List as the *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*. By its Order of 16 June 2014 the Court fixed 16 March 2015 and 16 December 2015 as the time-limits for the filing of the Memorial and the Counter-Memorial of the Marshall Islands and the United Kingdom respectively. On 15 June 2015 the United Kingdom filed Preliminary Objections to RMI's Application and requested the Court "…to adjudge and declare that the claim brought by the Marshall Islands is inadmissible and/or the Court lacks jurisdiction to address the claim" (para. 114 of the UK's Preliminary Objections). By its Order of 19 June 2015 the Court fixed 15 October 2015 for the filing of the RMI's Statement regarding the UK's Preliminary Objections. This written Statement is filed pursuant to the said Order and within the time limit fixed by the Court.

2. The United Kingdom raises five objections listed in para. 6 in the First Chapter of its Preliminary Objections and repeated, in summarized form, in the concluding Chapter thereof. With respect to the first four objections the United Kingdom claims that the Court would not have jurisdiction, while with respect to the first (that there exists no dispute between the Parties) and the fourth (related to the absence of certain third Parties) the United Kingdom claims in the alternative that the Marshall Islands' claims are not admissible. The fifth objection raised by the United Kingdom seems to be of a *sui generis* nature and is based on the assumption that the Court does indeed have jurisdiction and that the claims presented by the Marshall Islands are, indeed, admissible, but that the Court should nevertheless and "in any event" decline to exercise its jurisdiction.

3. Although some of the objections raised by the United Kingdom may have implications for the merits of this case, the Marshall Islands will in the present written Statement discuss each one of the objections raised. It reserves its right, however, to request at the Oral Proceedings scheduled for March 2016 that the Court declare that those particular objections do not possess, in the circumstances of the case, an exclusively preliminary character within the meaning of Article 79 of the Rules of Court, and refer their adjudication to the merits stage of these proceedings.

4. This Written Statement consists of six Chapters, the first five dealing with the various Objections raised, while the sixth Chapter contains the RMI's Submissions and the conclusion that the Court should reject all of the Objections.

I - THE EXISTENCE OF A DISPUTE

5. In its Preliminary Objections of 15 June 2015, the United Kingdom objects that the Court does not have jurisdiction to hear the present case as there is no justiciable dispute between the Parties. In making this contention, it relies on three main arguments.

6. In the first place, the United Kingdom submits that there exists a principle of customary international law that the State intending to institute proceedings must give notice to the other State,[1] with the consequence that no legal dispute can exist when the State submitting the dispute has given no notice thereof to the other State. It argues that this principle is set out in Article 43 of the ILC Articles on State Responsibility and that its existence finds confirmation in the legal instruments governing the activity of other international courts and tribunals.

7. Secondly, the United Kingdom contends that the Court's case law endorses the requirement of the prior notification of claims as a pre-condition to the existence of a justiciable dispute.[2] To support its contention, it relies on the Court's recent judgments in the *Georgia v. Russia* and *Belgium v. Senegal* cases.

8. Finally, the Respondent submits that the Marshall Islands failed to give evidence of the existence of a dispute between the Parties at the date of the filing of its Application.[3] In particular, the Marshall Islands did not notify its claims to the Respondent and this, in the United Kingdom's view, is sufficient to render the claimed dispute non-justiciable.[4]

9. Each of these arguments will be examined in turn. It will be shown that they simply have no merit: a) there exists no general principle imposing on a State that intends to institute proceedings the obligation to notify the other State of its intention; b) the existence of a general requirement of prior notice of claims or of an intention to initiate proceedings does not find support in the case law of the Court, which, to the contrary, shows that, depending on the circumstances of the case, the Court has been flexible in determining the existence of a legal dispute; and c) there is sufficient evidence that a dispute over the United Kingdom's compliance with its 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 existed at the time the Application was filed.

a) No duty upon the RMI to notify the UK before submitting its Application

10. The United Kingdom impliedly concedes that on the day of the filing of the Marshall Islands' Application against it, the United Kingdom in fact disputed (and still

[1] UK Preliminary Objections, p. 14, para. 29.
[2] UK Preliminary Objections, p. 18, para. 38.
[3] UK Preliminary Objections, p. 22, para. 46.
[4] UK Preliminary Objections, p. 24, para. 53.

disputes) the claims of the Marshall Islands, in their entirety. Thus, in order to deny the existence of a dispute between the Parties, the United Kingdom relies on the alleged existence of a requirement of prior notice. In its view, such requirement is of general application as it is provided by a customary principle. The Respondent does not entirely clarify what, in its view, is the precise content of this principle. Without drawing a clear distinction, sometimes it refers to a requirement of prior notice of the intention to initiate proceedings,[5] sometimes to a broader requirement of prior notice of claims.[6] Be that as it may, it is submitted that the United Kingdom has failed to demonstrate the existence of such a customary principle. Nor does the existence of such a strict requirement find support in the case law of this Court.

11. The United Kingdom attempts to demonstrate the existence of a general principle of prior notification of the intention to institute proceedings by relying on Article 43 of the ILC Articles on State Responsibility.[7] However, a cursory reading of this text is sufficient to show that this provision does not address at all the question of the requirements for submitting a dispute to an international tribunal. Nor does the ILC commentary make even the slightest reference to such question.[8] While the United Kingdom's attempt to conflate two distinct matters for the sake of its own argument is apparent, its attempt is doomed to fail. The ILC has always been careful to specify that it is not the function of the Articles to set the requirements for submitting a dispute to an international court or tribunal. It observed:

> "The present articles are not concerned with questions of the jurisdiction of international courts and tribunals, or in general with the conditions for the admissibility of cases brought before such courts or tribunals".[9]

12. Notice under Article 43 is not a requirement for responsibility to arise. As the ILC emphasized, "the general obligation of reparation arises automatically upon commission of an internationally wrongful act and is not, as such, contingent upon a demand or protest by any State".[10] Failure by an injured State to notify its claims under Article 43 may have certain consequences under the law of State responsibility.[11] However, contrary to what the UK appears to suggest, these consequences are hardly relevant for the only question which is at stake here, namely whether the prior notification of a claim is a requirement for submitting a dispute to

[5] UK Preliminary Objections, p. 14, para. 29.
[6] UK Preliminary Objections, p. 18, para. 38.
[7] Article 43 provides as follows: "1. An injured State which invokes the responsibility of another State shall give notice of its claim to that State. 2. The injured State may specify in particular: (a) the conduct that the responsible State should take in order to cease the wrongful act, if it is continuing; (b) what form reparation should take in accordance with the provisions of Part Two".
[8] *Yearbook of the International Law Commission, 2001*, vol. II, Part Two, p. 119 ff.
[9] *Yearbook of the International Law Commission, 2001*, vol. II, Part Two, p. 120.
[10] *Yearbook of the International Law Commission, 2001*, vol. II, Part Two, p. 91.
[11] *Yearbook of the International Law Commission, 2001*, vol. II, Part Two, p. 119 ("the failure of an injured State which has notice of a breach to respond may have legal consequences, including even the eventual loss of the right to invoke responsibility by waiver or acquiescence").

the International Court of Justice. Article 43 simply does not address this issue. Significantly, this provision does not exclude that notification of a claim can be made by submitting an application against the wrongdoing State to an international tribunal.

13. As the United Kingdom is bound to admit,[12] the Court has never referred to Article 43 or to the rule set out therein for the purposes of determining the existence of a dispute. The Respondent refers to a statement in the Court's Judgment in *Certain Phosphate Lands in Nauru* but it is apparent that that statement is irrelevant for the purpose of the question at issue here, as it concerned the different question of whether Nauru's Application had been rendered inadmissible by the passage of time.[13] In other words, at issue in *Certain Phosphate Lands* was whether correspondence between the parties was sufficient to rebut an allegation that Nauru's claims were inadmissible because too much time had passed without Nauru raising the claims. That is not at issue here.

14. In its attempt to demonstrate the existence of a general and strict requirement of prior notification of the intention to institute proceedings, the United Kingdom also refers to Articles 283 and 286 of the UN Convention on the Law of the Sea ("UNCLOS"), as well as to other instruments containing similar provisions. Quoting a statement of the UNCLOS Annex VII Tribunal in its judgment in *Mauritius v. United Kingdom*, it argued that Article 283 UNCLOS "encapsulates a salutary principle of general application" to the effect "that a State should 'not be taken entirely by surprise by the initiation of compulsory proceedings'".[14]

15. The United Kingdom's attempt to infer from Article 283 UNCLOS and from similar provisions a principle of general application is untenable and does not find any support in the case law of international courts and tribunals. In the award in *Mauritius v. United Kingdom* there is not the slightest hint of the possible existence of such a general principle. The Tribunal was careful to indicate Article 283 as the only basis for the requirement of a prior exchange of views.[15] Contrary to what is argued by the United Kingdom, Article 283 contains a rule that is particular to UNCLOS. Moreover, if it were a general rule, then it would have been superfluous to spell it out in UNCLOS. Rather than encapsulating a general principle, it establishes an exception to the general rule. As aptly noted by Judge Treves, "Article 283 constitutes an exception to general international law, which, as stated by the ICJ in its judgment in *Land and Maritime Boundary between Cameroon and Nigeria*[16], does not require that

[12] UK Preliminary Objections, p. 18, para. 38.
[13] See the quotation reproduced in UK Preliminary Objections, p. 15, para. 31 (*Certain Phosphate Lands in Nauru, (Nauru v. Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, pp. 254-255, para. 36).
[14] UK Preliminary Objections, pp. 17-18, para. 37.
[15] *Mauritius v. United Kingdom*, Award of 18 March 2015, para. 382 (http://www.pca-cpa.org/showpage.asp?pageid= 1429).
[16] *Cameroon v. Nigeria: Equatorial Guinea intervening, I.C.J. Reports 1998*, p. 275 ff., paragraph 56

diplomatic exchanges be exhausted or *even initiated prior to the submission of a case to a court or tribunal*".[17]

16. As alluded to by Judge Treves, the International Court of Justice has consistently denied the existence of a general requirement of prior notice of the intention to institute proceedings. In *Land and Maritime Boundary between Cameroon and Nigeria* the Court stated that "[t]here is no specific obligation in international law for States to inform other States parties to the Statute that they intend to subscribe or have subscribed to the Optional Clause" and that "Cameroon was not bound to inform Nigeria of its intention to bring proceedings before the Court".[18] The latter statement, which is sufficient to reject the United Kingdom's contention, reflects the Court's established position, according to which

> "[…] the manifestation of the existence of the dispute in a specific manner, as for instance by diplomatic negotiations, is not required. It would no doubt be desirable that a State should not proceed to take as serious a step as summoning another State to appear before the Court without having previously, within reasonable limits, endeavoured to make it quite clear that a difference of views is in question which has not been capable of being otherwise overcome. But in view of the wording of the article [article 60 of the Statute], the Court considers 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*".[19]

17. Finally, mention can be made to the view expressed by Rosenne on this issue:

> "Neither general international law nor the Statute requires a potential applicant to inform the potential respondent of its intention to institute proceedings."[20]

b) No support for the UK's position in recent case law of the Court

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[17] *M/V "Louisa" (Saint Vincent and the Grenadines v. Kingdom of Spain), Provisional Measures, Order of 23 December 2010, ITLOS Reports 2008-2010*, p. 89 (dissenting opinion of Judge Treves) (emphasis added).
[18] *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, I. C.J. Reports 1998*, p. 297, para. 39.
[19] *Interpretation of Judgments Nos 7 and 8 (Factory of Chorzow), Judgment No. 11, 1927, P.C.I.J., Series A, No. 13*, pp. 10-11.); also *Continental Shelf (Tunisia v. Libyan Arab Jamahiriya), Judgment of 10 December 1985, I.C.J. Reports 1985*, p. 218, para. 46 (emphasis added).
[20] S Rosenne, *The Law and Practice*, 2006 p.1154.

18. According to the United Kingdom, the recent case law of the Court endorses the rigid requirement of the prior notification of the claims as a precondition to the existence of any dispute. In order to demonstrate its contention, the Respondent relies exclusively on two Judgments, namely those rendered in the *Georgia v. Russia* and *Belgium v. Senegal* cases.[21] However, as will be shown, in neither of these two judgments did the Court recognize the existence of a rigid general requirement that States notify respondents of their claims before commencing proceedings in Court. Moreover, by focusing exclusively on these two judgments and by omitting consideration of the context of the underlying disputes, the United Kingdom offered a very selective account of the tests used by the Court to determine the existence of a dispute. A broader and more careful examination of the Court's case law is sufficient to show that, by giving relevance to the specific context and circumstances of each case, the Court has generally adopted a very flexible approach to this issue.

19. In *Belgium v. Senegal* the only issue addressed by the Court in this regard was whether Belgium had raised any claim in respect to breaches of obligations under customary international law. It was only because there was no claim by Belgium in respect of such breaches – and not because the claim had not been notified to Senegal – that the Court found that at the time of the filing of the application there was no dispute between the parties with respect to breaches of obligations under customary international law.[22] Contrary to the view expressed by the United Kingdom, the judgment does not say anything about the existence of a general requirement of prior notification of claims. Moreover, the situation in the present case can clearly be distinguished from that in *Belgium v. Senegal* as the Marshall Islands made its claims as regards the Respondent's breaches of its obligations under the NPT and customary international law before the filing of its Application.[23]

20. In *Georgia v. Russia* the Court undertook quite a detailed analysis of the documents submitted by the Parties in order to establish the existence of a dispute. The Court's approach must be put into context. The situation underlying the case was one that had given rise to several disputes between the Parties over a range of matters.[24] Since the Court's jurisdiction could only be based on Article 22 of the International Convention on the Elimination of Racial Discrimination ("CERD"), the Court had to establish the existence of a dispute within the terms of that provision. Moreover, unlike the NPT or customary international law, CERD contains express language specifically requiring affirmative procedural steps by parties prior to vesting the Court with jurisdiction over a CERD dispute. While these elements explain why the Court made a thorough assessment of the many documents and statements referred to by the Parties, the

[21] UK Preliminary Objections, p. 18, para. 38.
[22] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012*, p. 422, paras 54-55.
[23] See *infra,* paras. 32-36.
[24] *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*, p. 75, para. 32.

stated test applied in this case for determining the existence of a dispute was the usual one, namely that of determining that claims made by Georgia with regard to the interpretation and application of CERD had been positively opposed by the Russian Federation.[25] Nowhere in the judgment is there a reference to a general requirement of prior notification of the claims.

21. Not only has the Court never – not even in its more recent judgments – recognized the existence of a general requirement of prior notification of claims, but a perusal of the Court's case law also reveals that the Court has always avoided setting too rigid parameters to determine the existence of a dispute: "The matter is one of substance, not of form".[26] The absence of any formalism in the Court's approach must be borne in mind when considering two issues that appear to be relevant for the purposes of the present case.

22. The first issue concerns the possibility that a dispute "crystallizes" as a consequence of the claim made by a State against the consistent course of conduct of another State. The United Kingdom appears to deny this possibility. It argues that the State to which the claim is directed must be aware of the claim and must be given the opportunity to respond to it.[27] However, there is nothing in the Court's case law that supports the contention that these conditions must invariably be present. To the contrary, the Court appears to have established the existence of a dispute by simply considering the claims made by one State against the consistent course of conduct of another State.

23. In *South West Africa* the Court stated that, in order to establish the existence of a dispute, what must be shown is "that the claim of one party is positively opposed by the other".[28] This statement does not exclude in any way the possibility that a dispute arises simply as a result of the claim made by a State against the course of conduct of another State. This finds confirmation in the view expressed by Judge Morelli in his opinion attached to the same judgment. Judge Morelli underlined that a dispute can be said to exist also in the situation "where there is in the first place a course of conduct by one of the parties to achieve its own interest, which the other party meets by a protest".[29] Referring to the case submitted to the Court, he added:

> "It is possible to think that in the present case there does exist one of the constituents of a dispute, which consists in the course of conduct in fact pursued by South Africa in the exercise of the Mandate over South West

[25] Ibid.
[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. 84, para. 30.
[27] UK Preliminary Objections, p. 21, para. 44.
[28] *South West Africa (Ethiopia v. South Africa ; Liberia v. South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328 (and most recently *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012*, p. 442, para. 46.
[29] Ibid., p. 567 (dissenting opinion of Judge Morelli).

> Africa. It therefore becomes necessary to see whether in addition to that element there was present the other element making it possible to say that there does exist a dispute. That is to say, whether there was present an opposing attitude on the part of Ethiopia and Liberia or on the part of one or other of these two States. Such an attitude could consist only in a manifestation of will: either in a prior claim designed to secure a course of conduct by South Africa different from that in fact pursued; *or in a subsequent protest against that course of conduct*."[30]

Judge Fitzmaurice shared the same view:

> "[…] as Judge Morelli said, it does not matter whether the claim comes first, the rejection (in terms or by conduct) coming afterwards, or whether the conduct comes first, followed by a complaint, protest, or claim that is not acceded to."[31]

24. In *Land and Maritime Boundary between Cameroon and Nigeria* the Court stated that

> "[…]a disagreement on a point of law or fact, a conflict of legal views or interests, or the positive opposition of the claim of one party by the other need not necessarily be stated *expressis verbis*. In 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."[32]

25. While the Court did not say so expressly, it is clear from this statement that the attitude of a party can be inferred from its consistent course of conduct, with the effect that a dispute crystallizes when another State makes a complaint or a protest against that course of conduct.

26. The second issue concerns the question of whether the existence of the dispute as defined in the Application may also be evidenced by the positions of the parties before the Court. The United Kingdom appears to deny such possibility and it refers to the Court's judgment in *Belgium v. Senegal* to support its view.[33] However, the Court has never taken a rigid stance on this issue.

27. In its Order of 28 May 2009 in *Belgium v Senegal* the Court stated:

> "at this stage of the proceedings, the Court must begin by establishing whether, *prima facie*, such a dispute existed on the date the Application was

[30] Ibid., p. 568 (emphasis added).
[31] *Northern Cameroons (Cameroon v. United Kingdom), I.C.J. Reports 1963*, p. 110 (Separate opinion of Judge Fitzmaurice).
[32] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 315, paras. 89 ff.,
[33] UK Preliminary Objections, p. 13, para. 28.

> filed, since, as a general rule, it is on that date, according to the Court's jurisprudence, that its jurisdiction must be considered."[34]

28. Subsequently, in its judgment in *Georgia v. Russia*, it observed that "[t]he dispute must in principle exist at the time the Application is submitted to the Court".[35] The same statement was included in its Judgment in *Belgium v. Senegal*.[36]

29. While the dispute – at least "as a general rule" or "in principle" – must exist at the time the application is submitted, there is no bar to consideration of conduct or views of the parties after the filing of the application, as part of the assessment of whether a dispute existed on the filing date. Indeed, the Court has frequently taken into account the exchange of views between the parties during judicial proceedings.[37] This was the approach taken by the Court in its Judgment in *Land and Maritime Boundary between Cameroon and Nigeria*:

> "Nigeria is entitled not to advance arguments that it considers are for the merits at the present stage of the proceedings; in the circumstances however, the Court finds itself in a situation in which it cannot decline to examine the submission of Cameroon on the ground that there is no dispute between the two States. Because of Nigeria's position, the exact scope of this dispute cannot be determined at present; a dispute nevertheless exists between the two Parties, at least as regards the legal bases of the boundary. It is for the Court to pass upon this dispute."[38]

c) There exists a dispute in the present case

30. Contrary to what is argued by the United Kingdom, there is no doubt that, at the time of the filing of the Application, there existed a dispute between the Marshall Islands and the United Kingdom over the United Kingdom's compliance with its obligation – under both Article VI of the NPT and customary international law – to pursue in good faith, and bring to a conclusion, negotiations leading to nuclear disarmament in all its

[34] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009*, p. 148, para.46.
[35] *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.
[36] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012*, p. 442, para. 46.
[37] See, among others, *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, *I.C.J. Reports 1998*, pp. 316-7, para. 93; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), I.C.J. Reports 1996 (II)*, pp. 614- 615, para. 29; *Certain Property (Liechtenstein v. Germany)*, *I.C.J. Reports 2005*, p. 19, para. 25. See also, with regard to the determination of the object of the dispute, *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Judgment, 24 September 2015, para. 26.
[38] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 317, para. 93.

aspects under strict and effective international control. The existence of this dispute is evidenced by the opposing attitudes of the Parties with respect to the question of the United Kingdom's compliance with this obligation. In particular, while the United Kingdom has repeatedly held the view that its conduct is fully consistent with its obligations under NPT Article VI and customary international law, the Marshall Islands has claimed that the United Kingdom, as well as every State possessing nuclear weapons, has failed to comply with that obligation.

31. The following paragraphs will examine (i) the position of the Marshall Islands and (ii) that of the United Kingdom, in order to show the opposing attitudes of the Parties with respect to the question which constitutes the subject-matter of the present dispute. It is submitted that (iii) the material presented by the Marshall Islands amply evidences the existence of a dispute between the Parties at the time of the filing of the Application.

i) The Marshall Islands' claims

32. In recent years the Marshall Islands has repeatedly expressed its concern with regard to the fulfilment by all States possessing nuclear weapons of their obligation to pursue in good faith negotiations leading to nuclear disarmament. In particular, in several public statements it has urged all States possessing nuclear weapons to address their responsibilities in moving towards an effective and secure disarmament. The Memorial reports the statement to that effect made by the Minister of Foreign Affairs of the Marshall Islands in 2013 at the occasion of the UN High Level Meeting on Nuclear Disarmament.[39] A similar statement was made by the Marshall Islands at the 2010 NPT Review Conference.[40] On that occasion the Marshall Islands also emphasized that "[w]e have no tolerance for anything less than strict adherence by Parties to their legal obligations under the NPT".[41]

33. The United Kingdom attempts to downplay the relevance of these statements.[42] However, their importance cannot be denied: they are clear indications – made at the highest level and addressed to all States possessing nuclear weapons – of the legal mandate for States possessing nuclear weapon to fulfil their obligations to pursue in good faith negotiations leading to nuclear disarmament. They show the position of the Marshall Islands on this matter. They also help to put into context the initiatives later undertaken by the Applicant.

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[39] Memorial, p. 43, para. 98.
[40] Statement of Amb. Phillip Muller at the 2010 NPT Review Conference, 6 May 2010, http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/npt/revcon2010/statements/6May_MarshallIslands.pdf ("[we] urge nuclear weapons states to intensify efforts to address their responsibilities in moving towards an effective and secure disarmament)
[41] Ibid.
[42] UK Preliminary Objections, p. 22, para. 47.

34. On 13 February 2014, at the Second Conference on the Humanitarian Impact of Nuclear Weapons, the Marshall Islands expressly and publicly stated that in its view the States possessing nuclear arsenals were failing to fulfil their obligations to pursue in good faith negotiations leading to nuclear disarmament. The text of this statement is reported in Annex 72 of the Memorial. This statement illustrates with extreme clarity the content of the claim of the RMI. The contested conduct was clearly stated – the failure by these States to engage in negotiations leading to nuclear disarmament. The legal basis of the claim was also clearly identified – the legal obligation resting upon each and every State under Article VI of the Non-Proliferation Treaty and customary international law. While the statement does not specifically name the United Kingdom, the claim was unequivocally directed against all States possessing nuclear arsenals, including, obviously, the United Kingdom.

35. The statement of 13 February 2014 provides clear evidence of the existence of a claim of the Marshall Islands relating to the subject matter of the present dispute. It is indisputable that a claim can be contained in a statement made at an international conference. The Court has frequently relied on statements in multilateral fora to determine the existence of a dispute.[43] Moreover, given the content of the obligation at stake – an obligation to negotiate which is addressed to all States – and the nature of the obligation – an obligation *erga omnes* aimed at protecting a common interest of all States, indeed of all humanity – it is quite obvious why the Marshall Islands preferred to raise its claim in a multilateral conference convened to discuss the impact of nuclear weapons rather than in a bilateral context.

36. The United Kingdom does not appear to dispute that the statement of 13 February 2014 contains all the elements of a claim. Its objection mainly concerns the failure by the Applicant to notify the Respondent of this claim.[44] However, as has been shown, the Marshall Islands was not under a duty to notify the United Kingdom of its claims, nor is prior notice a requirement for the existence of a dispute.

ii) The United Kingdom's opposition

37. Throughout its Preliminary Objections, the United Kingdom attempts to convey the impression that not only was it caught by surprise by the Application of the Marshall Islands but, more broadly, it was surprised by the contention that its conduct was not in compliance with its obligations under Article VI and customary international law. In fact, this contention is not new. In recent years, the Government of the United Kingdom has repeatedly been asked to state its view as to the consistency of its

[43] *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. 118.
[44] UK Preliminary Objections, p. 23, para. 48.

conduct with the obligation to pursue in good faith negotiations leading to nuclear disarmament. In statements made at the highest political level, it has consistently rejected any allegations of non-compliance with this obligation.

38. In December 2005 Rabinder Singh QC and Professor Christine Chinkin of Matrix Chambers provided a legal opinion for a non-governmental organization on whether a Trident replacement would breach customary international law and Article VI of the NPT.[45] They argued that the replacement of Trident was likely to constitute a breach of Article VI of the NPT and customary international law. During a parliamentary debate that took place on 27 February 2006 the Secretary of State for Defence, Dr John Reid, was asked to express his views on this opinion. He stated:

> "I am content that the current nuclear deterrent meets the Government's legal obligations. The Government will ensure that any decisions taken on a replacement for our current nuclear deterrent system will also be fully consistent with our international legal obligations, including those under the Nuclear Non- Proliferation Treaty."[46]

39. On 19 October 2010, during a parliamentary debate, the Prime Minister, David Cameron, was asked to state the Government's position on whether the replacement of the Trident nuclear system was to be regarded as illegal under the terms of the NPT. He replied: "Our proposals are within the spirit and the letter of the non-proliferation treaty".[47] In a letter dated 27 September 2013, the Ministry of Defence took the view that "[t]he renewal of our nuclear deterrent is fully consistent with our obligations under this treaty [i.e. the NPT]".[48] In a Research Paper of the House of Commons, entitled "The Trident Successor Programme: An Update", it is stated:

> "Successive Governments have insisted that replacing Trident is compatible with the UK's obligations under the NPT, arguing that the treaty contains no prohibition on updating existing weapons systems and gives no explicit timeframe for nuclear disarmament".[49]

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[45] 'The Maintenance and Possible Replacement of the Trident Nuclear Missile System', Joint Opinion of Rabinder Singh QC and Professor Christine Chinkin of Matrix Chambers, 19 December 2005, (http://www.acronym.org.uk/docs/0512/doc06.htm).
[46] HC Deb 27 February 2006, c1-2w (http://www.publications.parliament.uk/pa/cm200506/cmhansrd/vo060227/text/60227w01.htm#60227w01.html_spnew3)
[47] HC Deb 16 October 2010, cl 814 (http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm101019/debtext/101019-0001.htm)
[48] Letter sent by the Minister for State for the Armed Forces, Andrew Robathan, 27 September 2013 (https://www.gov.uk/government/publications/mod-response-about-the-uks-nuclear-deterrent)
[49] *The Trident Successor Programme: An Update*, Commons Briefing papers SN06526, 10 March 2015, p. 14 (http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN06526#fullreport)

40. The United Kingdom has also consistently maintained that the "step by step" approach to the disarmament is the best, indeed only, way forward, rejecting demands for the commencement of multilateral negotiations.[50] This stance too amounts to a claim that the United Kingdom is in compliance with Article VI.

41. This brief overview of a few statements and other official documents is sufficient to evidence that a) the Government of the United Kingdom has long been aware that its conduct is alleged to be in breach of its obligations under Article VI of the NPT and customary international law; b) it has nonetheless continued to engage in that course of conduct; and c) it has defended its conduct by consistently denying any allegations that it could be in breach of its obligations under the NPT and customary international law. Significantly, this course of conduct has not changed as a consequence of the Application filed by the Marshall Islands in this case. A cursory reading of a few statements in the Preliminary Objections is sufficient to confirm this.[51] It is against this backdrop that the clear existence of a dispute between the Marshall Islands and the United Kingdom must be assessed.

iii) The existence of a dispute

42. The Marshall Islands submits that the conditions for the existence of a dispute can be said to be met when a State makes a complaint or protest against the course of conduct in fact pursued by another State. As has been shown, this view is consistent with the general criteria used by the Court for determining the existence of a dispute. The possibility of relying on the conduct of one party and the complaint or protest of the other party in order to demonstrate the existence of a dispute is particularly justified when the State engaging in the relevant conduct has made it abundantly clear that it regards its conduct as lawful under a specific set of rules and the other State's complaint is aimed precisely at opposing that claim. In this circumstance, the existence of a disagreement on a point of law is clear from the outset. There is no need for a response to the complaint in order to demonstrate the existence of a dispute.

43. In its statement of 13 February 2014, the Marshall Islands unambiguously referred to the failure of all the States possessing nuclear arsenals to fulfil their obligations to pursue in good faith negotiations leading to nuclear disarmament. Taking into account the conduct in fact pursued by the United Kingdom and the position taken by the Marshall Islands in respect of such conduct, it is submitted that a clear dispute between the Parties has been in existence at least since the date of this statement. That dispute continues to exist today as can be inferred from the view expressed by the

[50] See, e.g., Joint Statement of France, United Kingdom, and United States, UN High-Level Meeting on Nuclear Disarmament, 26 September 2013, http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/HLM/26Sep_UKUSFrance.pdf; Memorial, para. 78.
[51] UK Preliminary Objections, pp. 2-3, paras. 4-5.

United Kingdom in its Preliminary Objections on the merit of the Marshall Islands' complaints.

44. While, for the reasons now stated, the conduct of the Respondent and the complaint of the Applicant provide sufficient evidence of the existence of a dispute, it is submitted that a dispute can be said to exist even if one applies the very rigid test suggested by the United Kingdom. According to this test, the State whose conduct is complained of must be aware of the claim of the other Party so as to be given the opportunity to respond to such claim.[52] The UK claims that it was not at the Conference in Nayarit when the statement was made, but does not claim that it was unaware of the statement prior the filing of the Application.[53] Indeed, the Respondent cannot claim that it was not aware of the statement simply because it was not present. Whether the United Kingdom could (or should) have been aware of this statement must be assessed by taking into account the specific context in which that statement was made.

45. The Conferences on the Humanitarian Impact of Nuclear Weapons are, by now, among the most important multilateral fora for the discussion of the risks associated with nuclear weapons. While it is true that the United Kingdom did not send a governmental representative to the Second Conference in Nayarit, the importance attached by the Respondent to this multilateral initiative is demonstrated by the fact that, a few months later, the United Kingdom actively participated in the Third Conference in Vienna.[54] Almost 150 States attended the Conference in Nayarit. All the documents of the Conference, including the statements by States, were publicly available. They can still be easily downloaded from the web.[55]

46. In the light of all these elements, it must be concluded that the United Kingdom must reasonably be considered to have been aware of the statement made by the Marshall Islands. To require more exacting evidence would be tantamount to recognizing a requirement of prior notification of claims. As has been shown, no such requirement exists under general international law or in the Court's case law.

47. Moreover, in the present case the existence of a dispute between the Parties can also be confirmed by taking into account the position held by the United Kingdom with regard to the merits of the claims made by the Marshall Islands in its Nayarit statement and subsequently in its Application and Memorial. While the Marshall Islands submits that there is sufficient evidence showing that a dispute between the Parties already existed at the time of the filing of the Application, it is further submitted that in the light of the specific circumstances of the present case the Court

[52] UK Preliminary Objections, p. 21, para. 44.
[53] UK Preliminary Objections, p. 23, para. 48.
[54] See the UK intervention at the Vienna Conference, 8-9 December 2014 (http://www.bmeia.gv.at/fileadmin/user_upload/Zentrale/Aussenpolitik/Abruestung/HINW14/Statements/HINW14_Statement_UK.pdf).
[55] http://reachingcriticalwill.org/disarmament-fora/hinw/nayarit-2014/statements

would be justified in referring to the exchanges between the Parties during the present proceedings in order to confirm the existence of this dispute.

48. For the reasons set out above, the Marshall Islands concludes that there is no doubt that a legal dispute existed at the time it submitted its Application.

II – THE OPTIONAL CLAUSE DECLARATIONS

a) Introduction

49. The RMI agrees that the UK Declaration must be interpreted "as it stands" with regard to the words actually used,[56] and submits that any UK intention with regard to its Declaration *must be* reflected in the wording of the actual Declaration.[57]

50. The UK "advances two submissions" in arguing that the parties' Optional Clause Declarations preclude jurisdiction here. Neither has merit and the UK's bald accusations that the RMI claims are "disingenuous" or of "questionable character" are baseless.[58]

b) Only in relation to or for the purpose of the dispute

51. The Foreign Minister of the Marshall Islands, Minister Tony de Brum, avows to this Court as undersigned Co-Agent, that the RMI Declaration was not deposited - and was never intended to be - "only in relation to or for the purpose of the [present] dispute" with the UK. Separate from this avowal and fundamentally, the word "only" in the reservation is decisive in this matter. And while the UK admits that its position is based on "circumstantial"[59] indicia, the position is wrong both legally and factually.

52. As a preliminary matter, the RMI notes that the UK agrees that in the foregoing reservation the word "only" modifies "in relation to" and "for the purpose of".[60] But nothing in the RMI Declaration restricts its acceptance of compulsory jurisdiction to only the present dispute.

53. While the RMI Declaration in no way limits its acceptance of the Court's jurisdiction to *only* the instant case, the pendency before this Court of the RMI proceedings against India and Pakistan, as a separate matter, also demonstrates that the RMI's acceptance of the compulsory jurisdiction of this Court is not only for its present dispute with the UK. Additionally, the RMI has not denounced, modified or limited its Declaration since it was deposited.

54. Moreover, as a factual matter, if the Court were to look beyond the RMI Declaration, which it need not do, ample evidence exists that the RMI has publically anticipated climate change litigation before this Court for many years, including as reflected in

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[56] *See* UK Preliminary Objections, para. 77.
[57] *See Aerial Incident of 10 August 1999 (Pakistan/India), ICJ Reports (2000)*, pp. 12, 31 (para. 44)
[58] *See* UK Preliminary Objections, paras. 60, 62.
[59] *Id.*, para. 60.
[60] *See* UK Preliminary Objections, para. 8, heading (3) on p. 33, and para. 79.

press articles quoting the RMI's Co-Agent, Minister de Brum.[61] Specifically, among the statements made by Minister de Brum on behalf of the RMI, and reported by the press, is the following 5 April 2013 statement concerning actions with regard to climate change:

> "We will leave no stone unturned in our search for justice in this manner. If that means approaching the ICJ—the International Court of Justice—that will be an option that's left on the table". [62]

This statement was made before the RMI's Declaration was deposited with the UN Secretary-General.

55. Indeed, the statement just quoted was entirely consistent with the RMI's much earlier inclusion of the International Court of Justice among its legal options for combating the existential threat that climate change poses to its citizens and even to its very existence. As early as 12 June 2010 NBC reported on this under the heading "If seas swallow island state, is it still a nation?":

> "The Marshallese government took a first step to confront these issues by asking for advice from the Center for Climate Change Law at New York's Columbia University".

and

> "…some countries are looking at some kind of legal measures," said Dessima Williams, Grenada's U.N. ambassador and chair of a group of small island-nations. Those measures might include appeals to the International Court of Justice or other forums for compensation, a difficult route at best".[63]

56. Also in 2010, the UN Non-Governmental Liaison Service reported on the RMI Mission to the UN convening, together with the Center for Climate Change Law of Columbia University, a conference in New York titled "Threatened Island Nations: *Legal Implications of Rising Seas and Changing Climate."*, which was to take place from 23-25 May 2011 in New York. The report says:

> "Earlier this year, the RMI government began collaborating with Michael Gerrard, Director of Columbia University's Center for Climate Change Law, "to explore creative approaches to the legal issues facing low-lying island

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[62] *See e.g.*, Pacific RISA – Managing Climate Risk in the Pacific, Hawaii Conference on Pacific Islands Climate Change Featured in ClimateWire, 9 April 2013, available at http://www.pacificrisa.org/2013/04/09/hawaii-conference-on-pacific-islands-climate-change-featured-in-climatewire/.

[63] http://www.nbcnews.com/id/40534684/ns/us_news-environment/t/if-seas-swallow-island-state-it-still-nation/#.Vhg1AP1dGcw

> nations as climate change causes sea levels to rise." In July, the Center put out a call for papers that will feed into the May conference. Seventy-seven international proposals have been submitted and are currently being evaluated".[64]

57. In 2012 this process continued and for quite some time also the option of an Advisory Opinion of the Court was on the table.[65] On 6 February 2012 Radio New Zealand International reported:

> "Palau and the Marshall Islands are among those driving the world's first climate change case to be presented to the court".[66]

58. Thus, the RMI's acceptance of the Court's jurisdiction as compulsory had a longer history which was not related to the current proceedings and certainly does not fall within the terms of the exclusionary language ("only in relation to or for the purpose of the dispute") used in the UK's Declaration.

59. At base, no facts and no law cited by the UK support its argument with respect to this reservation. Rather than citing any opinion of any court, the UK quotes a truncated version of its own argument in the *Legality of Use of Force (Yugoslavia v. United Kingdom)* case.[67] But the application of the UK argument in that case sharply contrast with its present dispute with the RMI, for at least three reasons. First, as the omitted portion of the UK argument in that case made clear, "counsel for the FRY *expressly stated* at the Provisional Measures stage that *the purpose of* the FRY was to accept the jurisdiction of the Court *for the present dispute*".[68] This is not the case for the RMI Declaration.

60. Secondly, the very narrow temporal limit in the FRY Declaration reservation was an "attempt to accept the jurisdiction of the Court with regard to the military actions by the United Kingdom and other Respondents while excluding from the jurisdiction of the Court the FRY actions to which that was a response". In other words, with regard to the claimed military action by the UK, the FRY accepted the Court's jurisdiction *only with regard to* the UK conduct, but *not* with regard to any precipitating FRY conduct. Again, this is not the case for the RMI Declaration. Further, while the FRY limited its Declaration for a very particular reason – in order not to have its own

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[64] https://unngls.org/index.php/un-ngls_news_archives/2010/730-threatened-island-nations-legal-implications-of-rising-seas-and-a-changing-climate

[65] see for example: http://blogs.law.columbia.edu/climatechange/2012/09/26/bangladesh-argues-for-icj-hearing-on-climate-change-damages/

[66] http://www.radionz.co.nz/international/pacific-news/202370/climate-change-legal-expert-says-case-compelling-for-international-court-ruling

[67] *See* UK Preliminary Objections, para. 81.

[68] *See Legality of Use of Force (Yugoslavia v. United Kingdom)*, Preliminary Objections of the United Kingdom of 20 June 2000, at para. 4.27 (emphasis added).

actions scrutinized - this is not the case with the RMI. Its time-limit is a very practical one – limited to the date at which the UN accepted it as a sovereign member.

61. Thirdly and finally, the FRY Application was filed three days after the deposit of the FRY Declaration. As the ICJ held, this timing by the FRY "manifestly" violated the separate twelve-month reservation in the UK Declaration.[69] This is not the case for the RMI Application. The RMI's acceptance of compulsory jurisdiction was not deposited less than twelve months prior to the filing of its Application. In any event, the timing of the filing of the Application says nothing about whether the RMI's consent to jurisdiction is "only" for the purpose of this case.

c) Less than 12 months

62. The UK raises and then abandons the notion that the RMI Application is excluded under the UK reservation that excludes from jurisdiction "any dispute . . . 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".[70] As the UK abandonment of this notion implies, this exclusion in the UK's Declaration does not deprive the Court of jurisdiction in this case. And although the UK rests its jurisdictional objection specifically on other bases, the RMI now responds briefly to the "less than twelve months" notion.

63. The UK's exclusion aims to bar only cases where an acceptance of compulsory jurisdiction was made "less than" twelve months prior to an Application. The RMI's Application was filed 24 April 2014, so the question is whether the RMI's acceptance of compulsory jurisdiction was deposited or ratified less than 12 months prior to 24 April 2014. Clearly it was not - it was deposited on 24 April 2013.

64. The reason for what the UK has called its "12-month anti-ambush clause" is explained in the following extract from Hansard. In the light of the Court's judgment in the *Right of Passage* case, in which it held that the Statute does not prescribe any interval between the deposit by a State of its Declaration of Acceptance and the filing of an Application by that State,[71] the UK Foreign Secretary, Selwyn Lloyd, told Parliament:

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[69] *Legality of Use of Force (Yugoslavia v. United Kingdom)*, *Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999*, p. 826 at para 25.

[70] *See* UK Preliminary Objections, paras. 61-62.

[71] *Case Concerning Right of Passage over Indian Territory (Preliminary Objections), Judgment of November 26th, 1957: I.C.J. Reports I957*, pp. 125, 146-147: "A State accepting the jurisdiction of the Court must expect that an Application may be filed against it before the Court by a new declarant State on the same day on which that State deposits with the Secretary-General its Declaration of Acceptance. For it is on that very day that the consensual bond, which is the basis of the Optional Clause, comes into being between the States concerned… the Statute does not prescribe any interval between the
deposit by a State of its Declaration of Acceptance and the filing of an Application by that State".

> "I am advised that when our standing acceptance [of compulsory jurisdiction] was originally deposited, it was only intended to compel us to appear before the Court at the instance of countries which had likewise deposited a standing acceptance of the Court's compulsory jurisdiction. Accordingly, one of our new reservations, which was intended to meet this point, specifically excludes disputes in which the other party has accepted the compulsory jurisdiction of the Court only for the purposes of that particular dispute. *It also excludes, for basically similar reasons, any case where the other party to the dispute has entered a standing acceptance of the Court's compulsory jurisdiction only a comparatively short time before bringing the matter before the Court, namely, if the acceptance was made less than twelve months before the matter is brought before the Court*".[72]

65. That extract from Hansard shows that the UK exclusion precludes cases where a party has accepted compulsory jurisdiction "only a comparatively short time before bringing the matter before the Court, namely, if the acceptance was made less than twelve months before the matter is brought before the Court".

66. On any "natural and reasonable"[73] interpretation in light of the *Right of Passage* judgment, the filing of the RMI's Application on 24 April 2014 given the deposit of its Declaration of Acceptance on 24 April 2013[74] does not engage the UK's "12-month anti-ambush clause".

67. Perhaps for the foregoing reasons, or perhaps for others, the UK waives this argument when it states that it "rest[s]" its objections to jurisdiction and admissibility on other arguments, *not* on the technicality that the "less than twelve" months exclusion would bar this case.[75] It was right to do so and it was also right not to include this issue in its final Submissions. There has been no ambush here.

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[72] Hansard, HC Debates, 1957, Vol. 577, Cols. 469-568 (italics added).
[73] *Anglo-Iranian Oil Co. case (jurisdiction), Judgment of July 22nd, 1952: I.C.J. Reports 1952*, pp. 93, 104.
[74] Reference: C.N.261.2013.TREATIES-I.4 (Depositary Notification), available at https://treaties.un.org/doc/Publication/CN/2013/CN.261.2013-Eng.pdf.
[75] *See* UK Preliminary Objections, para. 62.

III - OBJECTION *RATIONE TEMPORIS*

68. The UK denies that it had any legal dispute whatsoever with the RMI on 24 April 2014 concerning the meaning and scope of NPT Article VI or under customary international law regarding nuclear disarmament obligations, the RMI's sovereign rights thereunder, and, in particular, the RMI's allegation that the UK is in breach of those obligations. Paradoxically, however, the UK argues that if there is any such legal dispute, it is with regard to facts and situations that pre-date the RMI's acquisition of any legal rights and obligations under NPT Article VI or customary international law, and thus pre-date any legal duty that the UK owed to the RMI with respect to the same. The UK's argument in this regard is in error, as the RMI explains in this section.

69. The essence of the UK's submission is that 'the "source" or "real cause" of the alleged dispute arose well before 17 September 1991 and that the Court accordingly lacks jurisdiction *ratione temporis* in respect of the entire dispute.'[76] The UK's submission is based on the RMI's Optional Clause Declaration which restricts the Court's jurisdiction to "disputes arising after 17 September 1991, with regard to situations or facts subsequent to the same date."[77]

70. In this section of the RMI's response, three crucial dates must be clearly distinguished:

(i) 17 September 1991, the date on which the RMI became a member of the UN and the "critical date" under its *ratione temporis* reservation to jurisdiction;[78]

(ii) 30 January 1995, the date on which the RMI became a party to the NPT and the treaty relationship thereunder with the UK was established; and

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[76] UK Preliminary Objections, para. 75.

[77] 17 September 1991 is when the Marshall Islands became a member of the United Nations. It should be noted that the UK's early Optional Clause Declarations used the date on which the UK became a member of the UN (24 October 1945) as the critical date under its *ratione temporis* reservation. *See e.g.* K. R. Simmonds, 'The United Kingdom and the Optional Clause', *International and Comparative Law Quarterly*, vol. 18, 1969, p. 769.

[78] The UN trusteeship arrangement for the RMI was not terminated by the UN Security Council until 22 December 1990. *See* Security Council Resolution 683 (1990), available at http://dag.un.org/handle/11176/57905. *See also* Security Council Resolution 704 (1991), whereby the Security Council recommended to the General Assembly that the RMI be admitted to membership of the UN, available at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/704(1991). The President of the Security Council stated that Resolution 704 "marks the final steps in the process leading to the full integration of the Republic of the Marshall Islands into the international community, a process that was given an impetus when the Security Council adopted Resolution 683 (1990) on 22 December 1990, by which the Council declared that the trusteeship arrangement for the Marshall Islands had come to an end".

(iii) 8 July 1996, the date of this Court's Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, clarifying the meaning and scope of NPT Article VI, and recognizing that the obligations with respect to nuclear disarmament negotiations constitute customary international law.[79]

71. Integral to the UK's submission is its claim that any dispute 'turns on the alleged continuous conduct of the United Kingdom stretching from the entry into force of the NPT on 5 March 1970 until the present';[80] that 'the Marshall Islands' claim against the UK alleges a continuous breach by the UK in the nature of a bad faith pattern of conduct going back at least to the 1970s and 1980s';[81] and, with reference to *Phosphates in Morocco* and *Certain Property (Liechtenstein v. Germany)*, that 'the Marshall Islands cannot establish that the United Kingdom's recent conduct departs from a previous position that it had adopted, nor that it represents a new situation arising after 17 September 1991…'[82]

72. The Marshall Islands' claim is not based on a course of conduct stretching back to 1970. The facts outlined in Section II of the Application are by way of historical background, charting the development of the UK's nuclear weapons programme from the 1950s onwards and its approach to nuclear disarmament since the 1970s, and leading up to the subsequent facts and situations that are materially relevant to the RMI's rights under NPT Article VI and customary international law. As the Permanent Court explained in the *Electricity Company of Sofia and Bulgaria* case, "a dispute may presuppose the existence of some prior situation or fact, but it does not follow that the dispute arises in regard to that situation or fact."[83]

73. The RMI's legal dispute with the UK is not even based on a course of conduct stretching back to 17 September 1991. On the contrary, in the light of the Permanent Court's judgment in the case concerning the *Electricity Company of Sofia and Bulgaria*[84] and the present Court's Merits judgment in the *Right of Passage* case,[85] it is clear that the facts or situations which are the "source" or "real cause" of the dispute between the RMI and the UK did not arise and could not have arisen before the RMI had legal rights and obligations under NPT Article VI and customary international law, and the UK correspondingly had obligations to the RMI with respect to the same, which clearly arose after 17 September 1991.

74. In *Right of Passage*, the Court enunciated the fundamental test according to which a distinction must be made "between the situations or facts which constitute the source

[79] *I.C.J. Reports 1996*, p. 226.
[80] UK Preliminary Objections, para. 64.
[81] *Id.*, para. 65.
[82] *Id.*, para. 72.
[83] *P.C.I.J., Series A/B, No. 77*, at 82.
[84] *Id.*
[85] *Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960: ICJ Reports 1960*, p. 6.

of the rights claimed by one of the Parties and the situations or facts which are the source of the dispute".[86] In the present case there is no doubt that the rights under NPT Article VI that the RMI claims *vis-a-vis* the United Kingdom only arose with the RMI's accession to the NPT, and the rights under customary international law that the RMI claims *vis-à-vis* the United Kingdom only arose with the existence of the customary rule in question. It is self-evident that any facts or situations that may have given rise to a dispute relating to such rights could only arise after those rights had come into existence. In other words, the RMI's accession to the NPT and the emergence of the customary rule brought about "a new situation"[87] in the relationship between itself and the UK, and it is in relation to this new situation that the present dispute arose.

75. Although the UK has been a party to the NPT since that Treaty's entry into force on 5 March 1970, it had no legal relationship with the RMI under the Treaty before the latter's accession to it. Accordingly, the UK had no obligation to the RMI thereunder before 30 January 1995 when the Marshall Islands became a party to the Treaty. And, of course, the RMI had no rights or obligations under the NPT until 30 January 1995.

76. In other words, only that conduct which post-dates the RMI's accession to the NPT in January 1995 can be the "source" or "real cause" of the legal dispute between the RMI and the UK concerning the meaning and scope of NPT Article VI and the RMI's claim that the UK is in breach of Article VI. Similarly, only that conduct which post-dates the existence of the customary international law obligation to pursue in good faith negotiations for nuclear disarmament can be the "source" or "real cause" of the legal dispute between the RMI and the UK concerning the meaning, scope and breach of the obligation to pursue in good faith negotiations leading to nuclear disarmament under customary international law.

77. This is supported by the Court's judgment in *Belgium v. Senegal*.[88] In reply to Senegal's admissibility objection, the Court accepted that Belgium was entitled to invoke only those breaches of the Convention against Torture occurring after the date on which Belgium became a party to the Convention:
"The Court considers that Belgium has been entitled, with effect from 25 July 1999, the date when it became party to the Convention, to request the Court to rule on Senegal's compliance with its obligation under Article 7, paragraph 1."[89]

78. Indeed, for the purpose of the present proceedings there is another significant date, namely 8 July 1996 when the Court delivered its Advisory Opinion on the *Legality of*

[86] *Id.*, p. 35.
[87] *(Certain Property (Liechtenstein v. Germany), Preliminary Objections, Judgment, I.C.J. Reports 2005*, pp. 6, 25, para. 49)
[88] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, ICJ Reports 2012*, p. 422.
[89] *Id.*, para. 104.

the Threat or Use of Nuclear Weapons.[90] In that Advisory Opinion, the Court clarified the way in which Article VI is to be construed and emphasised that it imposes legal obligations of conduct and result which must be complied with.

79. Relying upon the Advisory Opinion in both its Application instituting these proceedings[91] against the UK and in its Memorial,[92] the RMI has emphasised that as far as NPT Article VI is concerned, its focus is "particularly" directed at the UK's failure to do what the Court unanimously called for based on its analysis of the two-fold obligation in Article VI;[93] namely, "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".[94]

80. Similarly, the facts or situations which are the "source" or "real cause" of the dispute between the RMI and the UK concerning the obligations arising under customary international law cannot be prior to the existence of the customary rule in question, which was recognized on 8 July 1996, when the Court delivered its Advisory Opinion in which it concluded, unanimously: "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."[95]

81. In both its Application and its Memorial, the RMI has made it very clear that as far as the existence and implications of the customary international law obligation are concerned, the Advisory Opinion is determinative.[96]

82. In respect of both the dispute concerning Article VI of the NPT, to which the RMI acceded on 30 January 1995, and the dispute concerning the customary international law obligation recognized in the Advisory Opinion delivered on 8 July 1996, therefore, the facts or situations which are the "source" or "real cause" of those disputes occurred well after the critical date of 17 September 1991 when the RMI became a Member of the United Nations.

83. Accordingly, the UK's reliance on *Phosphates in Morocco*, *Certain Property (Liechtenstein v. Germany)* and *Legality of Use of Force* is misplaced.

84. In *Phosphates in Morocco*, the Permanent Court based its decision on the fact that the origin of the dispute with Italy was an instantaneous single act—a 1920 legislative

[90] *I.C.J. Reports 1996*, p. 226.
[91] *See e.g.* paras. 2, 84, 85 and 101 of the Application.
[92] *See e.g.* paras. 2, 13, 140, 141, 185 and 188 of the Memorial.
[93] Advisory Opinion, *supra*, n. 90, para. 100.
[94] *Id.*, para. 105, point 2F.
[95] *Id.*
[96] *See e.g.* paras. 87-89 of the Application and paras. 196-198 of the Memorial.

measure—outside the applicable time period. A legal position taken with respect to that single act could not be considered separately from the legislation.[97]

85. In the present case, however, the facts and situations which constitute the real cause of the present dispute are inextricably linked to the RMI's accession to the NPT on 30 January 1995 and the Advisory Opinion of 8 July 1996, and are not related to any act of the UK prior to 17 September 1991 or prior to the time when the UK began to owe obligations to the RMI under the NPT.

86. In *Certain Property (Liechtenstein v. Germany)*, the Court found that the dispute was inextricably linked to the Settlement Convention of 1952, and that the decisions of the German courts in the *Pieter van Laer Painting* case in the 1990s could not be separated from, *inter alia*, that Convention. Accordingly, those decisions could not be regarded as the source or real cause of the dispute.[98]

87. In the present case, however, while the claims under the NPT are inextricably linked to the NPT which came into force on 5 March 1970 and to which the UK has been a party since that date, the key date for the purpose of determining the "source" or "real cause" of the legal dispute between the RMI and the UK concerning the UK's conduct relative to Article VI can be no earlier than 30 January 1995 when the RMI acceded to the Treaty.

88. In order to support its contention that the real cause of the dispute is to be found in facts or events prior to 17 September 1991, the United Kingdom is attempting to redefine the subject-matter of the present dispute. It argues that the Court is being asked to rule upon the lawfulness of conduct which started before the critical date but has continued after that date. The strategy is clear: by emphasizing the existence of continuing conduct, the United Kingdom is attempting to persuade the Court that the facts which constitute the real cause of the dispute occurred prior to the critical date of 17 September 1991.

89. However, the subject-matter of the present dispute is not whether the United Kingdom, by the conduct it pursued prior to the critical date, has committed a continuing wrongful act. The RMI has not asked the Court to determine that the conduct of the United Kingdom prior to that date constituted a breach of its obligations towards the RMI under Article VI or under customary international law. Indeed, the RMI would not be entitled to make such a request as there was no legal relationship between the parties on those issues until (i), for Article VI, the RMI's accession to the NPT on 30 January 1995; and (ii), for customary international law,

[97] *Phosphates in Morocco, Judgment, Preliminary Objections, P.C.I.J. Series A/B, No. 74*, at pp. 25-26.
[98] *Certain Property (Liechtenstein v. Germany), Preliminary Objections, Judgment, ICJ Reports 2005*, p. 6, at para. 51.

the RMI's existence as a sovereign State[99] followed by the Court's Advisory Opinion recognizing that the obligation with respect to nuclear disarmament negotiations constitutes customary international law.

90. On the contrary, the subject matter of the present dispute is whether, at the time the Application was submitted, the conduct of the UK can be considered to have been in breach of its obligations towards the RMI under Article VI and customary international law. In order to rule upon such a dispute, the Court is entitled to take into account the acts and conduct of the United Kingdom starting from the time when a legal relationship was established between the parties in relation to those issues.

91. In this respect, there are no parallels between the dispute brought by Serbia in the *Legality of Use of Force* case and the dispute that the RMI has submitted to the Court in the present case.

92. In *Legality of Use of Force*, noting that the bombings in question had begun on 24 March 1999, the Court held that the legal dispute between the FRY and the NATO States had arisen before the critical date of 25 April 1999 and that the FRY could not rely on each individual air attack, including the bombings conducted after that date, as giving rise to a separate dispute.[100]

93. In the present case, however, contrary to what is asserted by the UK, the legal dispute between the RMI and the UK concerns the meaning and scope of NPT Article VI and the obligation under customary international law, and whether the UK is in breach of the rights of the RMI with respect thereto, which rights were respectively acquired when the RMI acceded to the NPT in 1995 (as regards NPT Article VI) and when the Court delivered its Advisory Opinion in 1996 recognizing the customary rule. The legal dispute which the RMI has submitted to the Court is not about whether the UK is in breach of "a continuing obligation of the United Kingdom dating back to 5 March 1970".[101] How could it be, when the UK had no legal obligations to the RMI under the NPT until 30 January 1995?

94. As the Court explained in *Legality of Use of Force*:

> "Whereas the fact that the bombings have continued after 25 April 1999 and that the dispute concerning them has persisted since that date is not such as to alter the date on which the dispute arose; whereas each individual air attack could not have given rise to a separate subsequent dispute; and whereas, at this stage of the proceedings, Yugoslavia has not established that new disputes, distinct from the initial one, have arisen *between the Parties* since 25 April

[99] *See supra*, n. 78.
[100] *Legality of Use of Force (Yugoslavia v. Belgium), Provisional Measures, Order of 2 June 1999, ICJ Reports 1999*, p. 124, at para. 29.
[101] UK Preliminary Objections, para. 74.

1999 in respect of subsequent situations or facts attributable to [the Respondent]. . .”[102]

95. That Yugoslavia already had a dispute with the Respondents before the critical date was pivotal to the Court’s finding that a continuation of that same dispute with subsequent air attacks could not save the dispute from the *ratione temporis* reservation. Here, in sharp contrast, the RMI had **no dispute** with the UK about Article VI prior to its accession to the NPT in 1995, and seeks no declaratory judgment or order with respect to UK conduct in relation to Article VI prior to the RMI’s accession. Similarly, the RMI had **no dispute** with the UK about the customary international law obligation until the Court in its Advisory Opinion unanimously recognized the existence of that obligation. And the RMI seeks no declaratory judgment or order with respect to UK conduct in relation to that customary law obligation prior to that time. The reasoning of the *Legality of Use of Force* case thus presents no bar to the RMI’s claims.

96. In conclusion, therefore, while the legal dispute **does** relate to continuing obligations of the United Kingdom *to the RMI*, and to the continuing breach by the UK of those obligations *to the RMI* (not, as the UK says in its Preliminary Objections, “to a continuing obligation”), the facts or situations which are its “source” or “real cause” occurred well after the critical date in this case, 17 September 1991, when the RMI joined the UN.

[102] *Legality of Use of Force, Provisional Measures (Yugoslavia v. Belgium), Order of 2 June 1999, I.C.J. Reports 1999*, pp. 134-35, para. 29 (emphasis added).

IV – ABSENT THIRD PARTIES

a) Introductory remarks

97. In its Preliminary Objections the United Kingdom alleges that the Court does not have jurisdiction to hear the present case and/or that the claims submitted by the Marshall Islands in its Application are inadmissible since these claims '… directly and unavoidably engage the interests of States which are not before the Court'[103]. In making this contention, it relies on the principle enunciated by the Court in its judgment in the *Monetary Gold* case.[104]

98. In this section it will be demonstrated that this objection is groundless and that, as a consequence, it must be rejected. Before doing this, three preliminary remarks are warranted in order to rebut certain observations made by the United Kingdom in connection with this objection. They relate, respectively, to a) the alleged motivations that led the Marshall Islands to submit the present dispute; b) the object of the Marshall Islands' Application; and c) the United Kingdom's contention that the "very subject matter" threshold enunciated in the *Monetary Gold* case "should be, and has been, relaxed".[105]

b) The Marshall Islands' motivations

99. According to the United Kingdom, the real motivation behind the present dispute is to be found in the Marshall Islands' failure to obtain reparation from the United States with respect to radiation-related health issues among Marshall Islanders. Relying on a press report referring to the alleged views of an official and a former politician of the Marshall Islands,[106] the United Kingdom argues that it is "not far from the mark to suggest that the United Kingdom is the litigation foil for the Marshall Islands' frustration with the United States".[107]

100. There is no need for the Marshall Islands to engage with the merits of the United Kingdom's allegation in order to show the Court that it is groundless. Whatever alleged or possibly truly existing frustration allegedly felt by representatives of the Marshall Island and allegedly cited in a press-clipping may exist, the relevant reasons for the purposes of this litigation are stated by the Marshall Islands in the Application with which the Marshall Islands initiated, and continues to conduct, this current litigation against the United Kingdom. In any case, it suffices here to observe that it is

[103] UK Preliminary Objections, p. 36, para.83.
[104] UK Preliminary Objections, p. 36 ff.
[105] UK Preliminary Objections, p. 45, para. 102.
[106] UK Preliminary Objections, p. 37, para. 85.
[107] UK Preliminary Objections, p. 38, para. 88.

completely irrelevant for the purposes of applying the *Monetary Gold*-principle. Indeed, the United Kingdom did not even attempt to elaborate on the legal implications that the Court should draw from its reference to the alleged motivation behind the Marshall Islands' Application. This is hardly surprising. As the Court has had occasion to recall:

> "The purpose of recourse to the Court is the peaceful settlement of such disputes; the Court's judgment is a legal pronouncement, and it cannot concern itself with the political motivation which may lead a State at a particular time, or in particular circumstances, to choose judicial settlement."[108]

c) The real object of the Application

101. The United Kingdom attempts to convey the idea that the object of the Marshall Islands' Application is not the individual conduct of the Respondent but the conduct of all States possessing nuclear weapons. This attempt relies on a number of contentions aimed at suggesting that the position of the United Kingdom cannot – for the purposes of the Judgment and Relief sought by the Marshall Islands – be distinguished from the position of all States possessing nuclear weapons. In short it argues that a) it "cannot conduct, still less conclude, nuclear disarmament negotiations by itself";[109] b) since nuclear disarmament can only be fulfilled by States possessing nuclear weapons, the Marshall Islands' claims in the present case are based on the relationship between the United Kingdom and all other States possessing nuclear weapons;[110] and c) as evidenced by the fact that the Marshall Islands filed Applications against all States possessing nuclear weapons, the Applicant is in fact seeking from the Court "an order which requires the nuclear-weapon States to negotiate and conclude negotiations *inter se*".[111]

102. Contrary to what the United Kingdom argues, the Marshall Islands' Application in the present case is directed specifically against the United Kingdom. By the terms of its Application, the Applicant is challenging solely the conduct of the Respondent, claiming that that conduct is in breach of the United Kingdom's obligation to the Marshall Islands under NPT Article VI and customary international law. It is simply not true, contrary to what the United Kingdom pretends, that the fulfilment of this obligation requires the participation of all States possessing nuclear weapons. There is no doubt that a State cannot conduct and conclude negotiations by itself. However, if that State is under an obligation to pursue in good faith, and bring to a conclusion,

[108] *Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 92, para. 52. See also, with regard to the distinction between the goal pursued by the applicant State and the object of the dispute submitted by it, *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Judgment, 24 September 2015, para. 32.
[109] UK Preliminary Objections, p. 40, para. 92.
[110] UK Preliminary Objections, p. 40, para. 93.
[111] UK Preliminary Objections, p. 42, para. 97.

negotiations leading to nuclear disarmament in all its aspects under strict and effective international control – as is indisputably the case for the United Kingdom – there is no reason to bar a claim seeking judicial settlement of whether the United Kingdom is complying with that obligation. What is required from the United Kingdom is, at least, a genuine effort to pursue such negotiations in good faith. This genuine effort can and must be made irrespective of the attitude of the other States possessing nuclear weapons. There are multiple forums in which the United Kingdom can pursue negotiations on complete nuclear disarmament, and the large majority of the international community supports the commencement of such negotiations.[112]

103. Nor can it be argued that the object of the Application relates only to the relationship between the United Kingdom and all other States possessing nuclear weapons. The obligation to pursue in good faith, and bring to a conclusion, negotiations leading to nuclear disarmament is owed by the United Kingdom to all NPT Parties – and, under customary international law, to all States – including, obviously, the Marshall Islands.[113] The Marshall Islands' claims are based exclusively on this legal relationship between itself and the United Kingdom.

104. Finally, it is simply not the case that, by its Application against the United Kingdom, the Marshall Islands is seeking an order against all States possessing nuclear weapons. Again, the issue before the Court is whether the United Kingdom has breached *its* obligation to the Marshall Islands under the NPT and customary international law as a result of its *own* conduct. Nothing in the Application can be interpreted as requesting the Court to pronounce on whether the other States possessing nuclear weapons, either before or not before the Court, have also breached their obligations or to order such States to negotiate and conclude negotiations *inter se*.

105. By contending that the conduct of the United Kingdom cannot be evaluated apart from that of the other States possessing nuclear weapons and that therefore the real object of the Application is the lawfulness of the conduct of all States possessing nuclear weapons, the Respondent is submitting an artificial argument aimed solely at supporting its efforts to demonstrate that the conditions for the application of the *Monetary Gold* principle are met. It will be shown later that this principle does not apply to the present dispute. It suffices here to observe that the premise on which the United Kingdom attempts to build its argument is clearly incorrect. The obligation *erga omnes* to pursue in good faith negotiations leading to nuclear disarmament applies to the United Kingdom, as it applies to each and every NPT Party or, under customary international law, to each and every State, irrespective of the attitudes of the other States in respect to the same obligation. In other words, the fact that other States may have breached the obligation to negotiate does not and cannot exclude the possibility for the Court to assess independently whether the United Kingdom is complying with the same obligation. There is no reason to believe that this obligation

[112] *See infra*, para. 126.
[113] *See also infra*, para. 128.

is of such a nature that it cannot be invoked against a single State or a number of individual States. Nor does the fact that there are other States that may have breached their obligation to negotiate nuclear disarmament exclude the possibility of seeking remedies against one State or of bringing the question of that State's compliance with this obligation before an international tribunal. As has been observed, "…should the presence of all responsible States be required, the need for the existence of a jurisdictional link between the claimant State and all the respondent States would be likely to lead to the consequence that all the latter States would enjoy immunity from judicial scrutiny".[114]

d) The *Monetary Gold* principle in the Court's case law

106. According to the United Kingdom, "the jurisprudence of the Court indicates that the strict application of the 'very subject matter' threshold enunciated in the *Monetary Gold* case should be, and has been, relaxed".[115] Far from reflecting a correct reading of the Court's case law, this assertion appears to be a rather weak attempt to convince the Court to depart from its established case law.

107. To support its contention, the United Kingdom first refers to the dissenting opinions attached by certain judges to the judgment in *Nauru* and then it suggests that the Court's findings in *East Timor* must be a reversal of its early position in *Nauru*. This contention has no merit. The situation in *East Timor* was clearly distinguishable from that in *Nauru*. Moreover, in its subsequent case law the Court has continued to rely on the findings in *Nauru*. The United Kingdom also refers to the Court's case law relating to the protection of the interests of third States in maritime delimitation disputes. However, this case law is not relevant for the purposes of determining the scope of the *Monetary Gold* principle in relation to disputes concerning the responsibility of a State.

108. In *Nicaragua v United States*, the Court stated that "[t]he circumstances of the *Monetary Gold* case probably represent the limit of the power of the Court to refuse to exercise its jurisdiction".[116] In *Nauru* the Court clarified the scope of application of the *Monetary Gold* principle by excluding from that scope a set of circumstances that are clearly relevant for the purposes of the present case. The criterion enunciated by the Court in *Nauru*, to which we shall revert later, has been constantly confirmed and relied upon by the Court in its case law.[117] This case law does not support the

[114] G. Gaja, 'The Protection of the General Interests in the International Community. General Course on Public International Law', *Recueil des cours*, vol. 364 (2014), p. 118.
[115] UK Preliminary Objections, p. 45, para. 102.
[116] *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.
[117] See, e.g., *East Timor (Portugal v Australia), Preliminary Objections, Judgment, 30 June 1995, I.C.J. Reports 1995*, pp. 104-105; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005*, p. 238, para. 203; *Application of*

contention that the Court has relaxed the criteria for determining whether the interests of third States constitute the very subject-matter of a dispute. To the contrary, in its very recent judgment in *Croatia v Serbia*, the Court narrowed the operation of the *Monetary Gold* principle by excluding its application when the affected third party is a State which no longer exists.[118]

e) The *Monetary Gold* principle does not apply to the present case

109. In *Monetary Gold*, the Court established that it cannot exercise its jurisdiction when a third State may be said to have a legitimate interest in a dispute before the Court *and* such legal interest "would not only be affected by a decision, but would form the very subject-matter of the decision".[119] In *Monetary Gold*, the Court refrained from exercising its jurisdiction since it could not possibly have decided the main dispute between Italy and the United Kingdom without pronouncing on an indispensable preliminary question concerning the international responsibility of a State, Albania, which was not a party to the proceedings. Equally, in *East Timor* the Court held that it could not

> "exercise the jurisdiction it has by virtue of the declarations made by the Parties under Article 36, paragraph 2, of its Statute because, in order to decide the claims of Portugal, it would have to rule, as a prerequisite, on the lawfulness of Indonesia's conduct in the absence of that State's consent".[120]

110. In *Nauru* the Court delimited the scope of the *Monetary Gold* principle by recognizing that it only applies when the assessment of the responsibility of a third State is a *prerequisite* for the determination of the responsibility of the Respondent State. The Court first observed:

> "The Court does not consider that any reason has been shown why a claim brought against only one of the three States should be declared inadmissible *in limine litis* merely because that claim raises questions of the administration of the Territory, which was shared with two other States. It cannot be denied that Australia had obligations under the Trusteeship Agreement, in its capacity as one of the three States forming the Administering Authority, and there is

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the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece), Judgment of 5 December 2011, I.C.J. Reports 2011, p. 661, para. 43; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, 3 February 2015*, para. 116.

[118] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, 3 February 2015*, para. 116.

[119] *Monetary Gold Removed from Rome in 1943 (Italy v. France; United Kingdom and United States of America), Preliminary Question, Judgment, 15 June 1954, I.C.J. Reports 1954*, p. 32.

[120] *Case concerning East Timor (Portugal v. Australia), Judgment of 30 June 1995, I.C.J. Reports 1995*, p. 105, para. 35.

> nothing in the character of that Agreement which debars the Court from considering a claim of a breach of those obligations by Australia."[121]

The Court then distinguished the situation in *Nauru* from that in *Monetary Gold* by stating:

> "In the present case, the determination of the responsibility of New Zealand or the United Kingdom is not a prerequisite for the determination of the responsibility of Australia, the only object of Nauru's claim."[122]

The Court also added:

> "In the present case, a finding by the Court regarding the existence or the content of the responsibility attributed to Australia by Nauru might well have implications for the legal situation of the two other States concerned, but no finding in respect of that legal situation will be needed as a basis for the Court's decision on Nauru's claims against Australia."[123]

111. The United Kingdom attempts to distance the Court's finding in *Nauru*. It submits that, while in *Nauru* the object of the Applicant's claims was only based on the conduct of Australia, the object of the Marshall Islands' claims relates to the conduct of all States possessing nuclear weapons.[124] As has already been shown, this argument has no merit. By the terms of its Application, the Applicant is challenging solely the conduct of the Respondent, and not that of all States possessing nuclear weapons. Indeed, the Marshall Islands' position is even stronger than Nauru's in *Certain Phosphate Lands*. There, Australia, New Zealand and the United Kingdom were jointly responsible for the administration of Nauru.[125] In the present proceedings, there does not exist a similar or comparable legal relationship linking together the United Kingdom and the other States possessing nuclear weapons.

112. Against this background it becomes clear that, in order to determine whether the *Monetary Gold* principle applies to the present case, the key question is whether the determination of the responsibility of a third State, be it a State possessing nuclear weapons or not, is a *prerequisite* for the determination of the responsibility of the United Kingdom. The question needs only to be formulated properly in this way to show that the United Kingdom's objection cannot be upheld.

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[121] *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, pp. 258-259, para. 48
[122] Ibid., p. 261, para. 55.
[123] Ibid., pp. 261-262, para. 55.
[124] UK Preliminary Objections, p. 41, para. 94.
[125] *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 258, para. 47.

113. No finding in respect of the legal situation of the other States possessing nuclear weapons is required for the Court to assess whether the Respondent is violating its obligations to the Marshall Islands under Article VI of the NPT and under customary international law. None of the conduct listed in paragraph 98 of the Respondent's Preliminary Objections requires a prior determination of the responsibility of another State.[126] Thus, for instance, the United Kingdom refers to joint statements made with other nuclear-weapon States. However, *Nauru* clearly supports the view that the *Monetary Gold* principle does not apply when the conduct complained of can be attributed simultaneously to the respondent State and to third States. In such cases it can be said that a finding of the Court might perhaps have implications for the other States but it cannot be said that it requires, as a preliminary matter, the determination of the responsibility of these States. The United Kingdom also refers to agreements concluded with other nuclear-weapon States. Here again, in order to determine whether the United Kingdom, by entering into agreements with these States, has breached its obligation to the Marshall Islands under Article VI of the NPT and under customary international law, the Court does not need to pronounce, as a prerequisite, on the lawfulness of the conduct of the other Parties. In this respect, the situation differs from that in *East Timor*, since in that case, in order to address the claim of Portugal, the Court had to pronounce on the lawfulness of Indonesia's entry into and continued presence in East Timor.[127] The same conclusion applies *a fortiori* to all conduct where the link between the position of the United Kingdom and that of third States is more tenuous, if not artificially established for the purposes of the Respondent's argument.

114. For all the reasons stated in this section, the Marshall Islands asks the Court to find that the *Monetary Gold* principle does not apply to the present dispute and, accordingly, that the Respondent's objection must be rejected.

[126] UK Preliminary Objections, pp. 43-44, para. 98.
[127] *Case concerning East Timor (Portugal v. Australia), Judgment of 30 June 1995, I.C.J. Reports 1995*, p. 105, para. 34.

V – THE RELIEF SOUGHT BY THE RMI – OUTSIDE THE JUDICIAL FUNCTION OF THE COURT?

115. The United Kingdom's fifth Preliminary Objection is that the Court may and should decline to exercise jurisdiction in this case because the RMI's claims are outside the judicial function of the Court.[128] The first part of the following response considers some legal aspects of the UK argument; the second deals with the practical consequences of the relief sought by the RMI.

a) Legal Aspects

116. This argument appears to be, in large part, an attempt to put, in slightly different terms, the United Kingdom's argument about the absence of other States from the proceedings, addressed above.[129] In the absence of such parties, the argument now suggests, a judgment would not be capable of "effective application".[130] The Marshall Islands notes, however, that this version of the argument seems to involve a contention that the Court should exercise some sort of discretion not to allow the case to proceed, even if the case is otherwise within the jurisdiction of the Court and meets its standards of admissibility.[131] It is an argument that the Court *should not* rather than that it *cannot* hear the case. The Court has never held that it has such discretion in contentious cases.

117. Certainly, the Court has, on occasion, declined to proceed further where, as it said in the *Northern Cameroons Case*,[132] it would not be in a position to "render a judgment that is capable of effective application." In that case, there was no longer an Agreement on which Cameroon could base its case. Cameroon had not sought damages for any past breach of the then-terminated Agreement and "[a]ny judgment which the Court might pronounce would be without object."[133] This is far from the

[128] UK Preliminary Objections, Part III(D).
[129] *See supra*, pp. 35-42.
[130] UK Preliminary Objections, para. 104. The United Kingdom does not appear to dispute the competence of the Court in the abstract to afford the type of relief (declarations and an order) requested by the Marshall Islands. The argument seems to be that, in this particular instance, the relief would not be effective and thus that the Court should abstain from deciding the case. As to the Court's remedial power in general, and power to make declarations and orders, it is sufficient at this stage to refer to the recent discussion of Reparation in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007, I.C.J. Reports 2007*, p. 43 at pp. 232-37 and operative paras. 5-8, and in *Whaling in the Antarctic (Australia v. Japan: New Zealand Intervening),* Judgment of 31 March 2014, *I.C.J. Reports 2014*, at para. 245 and operative para. 7.
[131] UK Preliminary Objections, paras. 104 and 112.
[132] *Case Concerning the Northern Cameroons (Cameroon v. United Kingdom), Preliminary Objections, Judgment of 2 December 1963, I.C.J. Reports 1963*, p. 15 at p. 33. The Court was especially concerned, in its words, with "the duty to safeguard the judicial function". *Id.* at p. 38.
[133] *Id.* at p. 38.

situation here. The NPT is emphatically still in force. The relief that is requested by the Marshall Islands is eminently capable of "effective application", as will be explained further in the second part of the response on this issue.

118. The United Kingdom asserts that "the Court may, in an appropriate case, make a declaratory judgment. In deciding whether or not it is appropriate to do so, the Court will consider whether its judgment will have any continuing applicability or 'forward reach'."[134] The declarations requested by the Marshall Islands will indeed have "forward reach", determining what the United Kingdom must do (prospectively), and refrain from doing (prospectively), to comply with Article VI and customary international law.

119. The United Kingdom also asserts that "it is not the function of the Court merely to provide a basis for political action. When the Court adjudicates on the merits of a dispute, one or other or both parties should, as a matter of fact, be in a position to take some retroactive or prospective action or avoidance of action which would constitute compliance with the Court's judgment."[135] The issue is whether the effect of a judgment would be "merely to provide a basis for political action". That is not the case here, where the NPT and customary international law alike provide a basis for *legal* action.

120. The United Kingdom suggests[136] that "[t]he seeds of this principle of effective application are evident in the opinion of the Permanent Court in the *Interpretation of the Greco-Bulgarian Agreement of December 9th 1927*[137] case." The Marshall Islands has sought in vain to find in the Court's Opinion the "seeds" to which the United Kingdom refers, especially anything capable of application to the present proceedings. The *Greco-Bulgarian* proceedings were not contentious proceedings but a request for an Advisory Opinion made by the Council of the League of Nations. Accordingly, the Court's advisory jurisdiction was limited to the questions as formulated by the League Council.

121. The Court was asked to pronounce on the existence of a dispute between the two States; if the answer to the first question were to be in the affirmative, a follow-up question was asked. Since the answer to the first question was negative, the Court did not address the second question and, moreover, explicitly refused to do so in spite of a specific request from Greece and Bulgaria.[138] The Court refused since honouring their request would have opened up an advisory procedure to States.[139] This is far from the situation in the present – contentious – proceedings.

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[134] UK Preliminary Objections, para 106, point (e).
[135] UK Preliminary Objections, para. 106, point (g).
[136] UK Preliminary Objections, para. 105.
[137] PCIJ, Series A/B. No. 45, p. 68.
[138] *Id*. at p. 87.
[139] *Id.*

122. Similarly, the United Kingdom's reliance on the *Nuclear Test Cases*[140] fails to advance its argument. The majority of the Court (over a powerful dissent) held that since France had promised, outside the Court, to cease its atmospheric testing, and could be expected to comply with its promise, the cases were moot. There was no longer any "dispute". The Court's reasoning was that the French statements had "caused the dispute to disappear"[141] and thus, "the dispute having disappeared, the claim … no longer has any object."[142] There is no disappearing dispute in the present case. Moreover, nothing in the *Nuclear Tests* judgments supports the United Kingdom's apparent belief that the Court has some residual discretion to refuse to rule in a contentious proceeding. To the contrary, the Court said:

> "This is not to say that the Court may select from the cases submitted to it those it feels suitable for judgment while refusing to give judgment in others. Article 38 of the Court's Statute provides that its function is 'to decide in accordance with international law such disputes as are submitted to it'; but not only Article 38 itself but other provisions of the Statute and Rules also make it clear that the Court can exercise its jurisdiction in contentious proceedings only when a dispute genuinely exists between the parties. In refraining from further action in this case the Court is therefore merely acting in accordance with the proper interpretation of its judicial functions."[143]

123. In sum, the cases that the United Kingdom relies upon are irrelevant to the present proceedings and do not support the existence of a discretionary power to avoid judging that the United Kingdom tries to extract from them. Indeed, if the *Greco-Bulgarian* proceedings contained the seeds of a general discretionary power, the Court did not nurture those seeds in its subsequent cases. On the contrary, it denied the existence of such a power.

b) Practical Consequences of Relief

124. The United Kingdom contends that the relief requested by the RMI "would have no practical consequence and would therefore not be within the proper judicial function of the Court."[144] On the contrary, the relief sought by the RMI would require significant changes in UK conduct. This is demonstrated below with respect to the

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[140] *Nuclear Tests (Australia v. France) Judgment of 20 December 1974, I.C.J. Reports 1974*, p. 253, at para. 59; *Nuclear Tests (New Zealand v. France), Judgment of 20 December 1974, I.C.J. Reports 1974*, p. 457, at para. 62.
[141] *Australia v. France*, p. 271, para. 55; *New Zealand v. France*, p. 476, para. 58.
[142] *Australia v. France*, p. 271, para. 56; *New Zealand v. France*, p. 476, para. 59.
[143] *Australia v. France*, p. 271, para. 57, *New Zealand v. France*, p. 477, para. 60. See also Joint Dissenting Opinion of Judges Onyeama, Dillard, Jiménez de Aréchaga and Waldock, *Australia v. France*, p. 312 at 322, *New Zealand v. France*, p. 494 at 505 ("[The Court] has not the discretionary power of choosing those contentious cases it will decide and those it will not.")
[144] UK Preliminary Objections, para. 109.

RMI's first submission, but the point applies equally to the other submissions and to the requested order.

125. The first submission "requests the Court **to adjudge and declare** a) that the United Kingdom has violated and continues to violate its international obligations under the NPT, more specifically under Article VI of the Treaty, by failing to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control."[145] As set out in its Memorial, the RMI's contention is that the violation arises in part out of the United Kingdom's opposition to the commencement of multilateral negotiations on complete nuclear disarmament.[146] A finding that UK conduct in this respect is not in compliance with Article VI of the NPT would require the United Kingdom to change its conduct to come into conformity with that article. As the Court has observed, a decision by the Court that an action is not in conformity with an international legal obligation "entails a legal consequence, namely that of putting an end to the illegal situation."[147] Similarly, Article 30 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts[148] provides:

> "The State responsible for the internationally wrongful act is under an obligation: (a) to cease that act, if it is continuing; …."

The Court has said that "it cannot concern itself with the choice among various practical steps which a State may take to comply with a judgment."[149] However, in view of the UK's argument, the RMI discusses below the ongoing opportunities for the United Kingdom to act in accordance with its obligation to pursue negotiations in good faith, in order to demonstrate that a finding would plainly have "forward reach" and be capable of "effective application".[150]

126. "Pursuit" of negotiations requires, to begin with, a genuine effort to bring them about. As noted in the RMI's Memorial,[151] the ordinary meaning of "pursue" includes:

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[145] Memorial, para. 239(a).
[146] *See id.* at para. 210.
[147] *Haya de la Torre Case (Colombia v. Peru), Judgment of June 13, 1951, I.C.J. Reports 1951*, p. 71, at 82.
[148] UNGA Resolution A/RES/56/83, 28 January 2002, Annex.
[149] *Northern Cameroons, supra* n. 132, at 37, referring to *Haya de la Torre Case*. *See Haya de la Torre Case, supra* n. 147, at 79, 83. *Cf. Case Concerning Right of Passage over Indian Territory, Merits, supra* n. 85, at 37 ("[T]he day-to-day exercise of the right of passage as formulated by Portugal, with correlative obligation upon India, may give rise to delicate questions of application, but that is not, in the view of the Court sufficient ground for holding that the right is not susceptible of judicial determination with reference to Article 38 (I) of the Statute.").
[150] *Northern Cameroons, supra* n. 131 , at 33, 37.
[151] Para. 212.

> "To seek to reach or attain"; "To try to obtain or accomplish, to work to bring about, to strive for (a circumstance, event, condition, etc.); to seek after, aim at."[152]

In a second meaning of the word, once negotiations are commenced, they are "pursued." International forums offer multiple occasions for the United Kingdom to make a genuine effort to bring about – rather than oppose, as it has to date – negotiations on complete nuclear disarmament. Resolutions calling for the commencement of negotiations on complete nuclear disarmament are offered every year at the General Assembly.[153] A UN High-Level Conference on nuclear disarmament will be held by 2018.[154] In the Conference on Disarmament, every year proposals are made that the body take up as part of its program negotiations on complete nuclear disarmament.[155] The next quinquennial NPT Review Conference will be held in 2020, on the fiftieth anniversary of the NPT's entry into force.[156]

127. The finding as to the first submission requested by the RMI would have a practical consequence of requiring the United Kingdom generally to support the commencement of negotiations on nuclear disarmament. While such a finding may not require a particular action such as voting for a particular General Assembly resolution, its overall thrust would be perfectly clear. Further, it would require the United Kingdom to actively participate in good faith in negotiations once underway.

128. Contrary to what the United Kingdom assumes, the nuclear-armed States are not the only players contemplated by the Article VI and customary international law obligations regarding the good-faith pursuit and conclusion of negotiations on nuclear disarmament. Moreover, as the humanitarian conferences of recent years have vividly demonstrated, all States have a vital stake in the successful elimination of nuclear

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[152] OED Online, *available at* http://www.oed.com/view/Entry/155076?redirectedFrom=pursue#eid [accessed on 19 August 2015].
[153] *See* RMI's Memorial at paras. 133, 135, 136.
[154] *See id.* at para. 135.
[155] The proposals are typically made in the form of governmental positions stated in the Conference on Disarmament paralleling General Assembly resolutions such as UNGA Resolution A/RES/69/58, cited in the Memorial, para. 135. In 2015, however, a proposal relating to complete nuclear disarmament was included in a "Draft Programme of work for the 2015 session," submitted by the Mexican presidency of the Conference on Disarmament, 10 February 2015, CD/2014, http://daccess-ods.un.org/TMP/9189333.319664.html (accessed on 11 October 2015). The United Kingdom does not support such proposals. *See* The Rt Hon. Baroness Anelay, Minister of State at the Foreign and Commonwealth Office, Address to the Conference on Disarmament, 3 March 2015, http://www.unog.ch/80256EDD006B8954/(httpAssets)/DFEE253392200C7DC1257DFD005ACEEC/$file/1344+UK.pdf (accessed on 11 October 2015). As the statement reflects, the UK's longstanding position is that the priority should be negotiation of a Fissile Materials Cut-off Treaty (FMCT). Re an FMCT, see RMI's Memorial, para. 160 and n. 257.
[156] Regarding the 2010 Review Conference, see RMI's Memorial, para. 127 and notes 201-202. The 2015 NPT Review Conference was unable to adopt a Final Document. *See* United Nations Meetings Coverage, "Consensus Eludes Nuclear Non-Proliferation Treaty Review Conference as Positions Harden on Ways to Free Middle East of Mass Destruction Weapons," 22 May 2015, http://www.un.org/press/en/2015/dc3561.doc.htm (accessed on 11 October 2015).

weapons and are increasingly empowered to act accordingly.[157] Non-nuclear weapon States are certainly ready to participate in negotiations and have shown this on multiple occasions.

129. It is also not the case, contrary to the UK's assertion,[158] that the participation of all States possessing nuclear arsenals in negotiations is required. Negotiations could commence with the participation of some nuclear-armed States, or even just one, and others could join in at a later stage. Also, among other possibilities, a nuclear disarmament treaty could provide that it would enter into force only when certain States had ratified it,[159] or make some obligations of initial participants contingent on certain non-participants eventually joining. It bears repetition as well that the United Kingdom could fulfil the obligation of "pursuit" of negotiations in the sense of seeking to bring them about regardless of the positions of other nuclear-armed States.

130. In conclusion, the RMI's first submission seeks forward-looking, legally and practically meaningful declaratory relief. That is also true of the other submissions. Findings are a common form of relief and, in and of themselves, are often considered a sufficient remedy.[160] The specifics of the findings are a question for the merits. The requested declaratory relief is perfectly justiciable. The same conclusion applies to the requested order; its specifics can be debated in proceedings on the merits. The UK's objection that the RMI's claims fall outside the Court's judicial function is without any substance and should be rejected.

[157] This is evidenced by the Humanitarian Pledge put forward by Austria. As of 7 October 2015, the Pledge has been endorsed or supported by 119 countries. The Pledge states in part: "We call on all states parties to the NPT to renew their commitment to the urgent and full implementation of existing obligations under Article VI, and to this end, to identify and pursue effective measures to fill the legal gap for the prohibition and elimination of nuclear weapons …." *See* www.hinw14vienna.at (accessed on 9 October 2015).
[158] UK Preliminary Objections, para. 110.
[159] Article XIV of the Comprehensive Nuclear-Test-Ban Treaty requires ratifications by 44 states listed in Annex 2 for the treaty to enter into force. *See* http://ctbto.org/fileadmin/content/treaty/treaty_text.pdf (accessed on 11 October 2015).
[160] *See, e.g., Application of the Convention on the Prevention and Punishment of the Crime of Genocide, supra* n. 130.

VI - SUBMISSIONS

131. In consideration of the foregoing, the Republic of the Marshall Islands requests the Court:

- to reject and dismiss the Preliminary Objections of the United Kingdom; and
- to adjudge and declare:
  (i) that the Court has jurisdiction in respect of the claims presented by the Marshall Islands; and
  (ii) that the Marshall Islands' claims are admissible.

15 October 2015

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