SEPARATE OPINION OF JUDGE SCHWEBEL

I have voted for the Order of the Court, which is in accordance with the pertinent provisions of the Rules of Court and, I believe, predominant practice in pursuance of those provisions. Since some doubt has been expressed about the consistency of the last recital of the Order with the practice of the Court, however, it may be useful to set out my understanding of why that sparse and somewhat divergent practice is not inconsistent with the intent and terms of the Rules and with the provisions of this Order.

There appears to be no difference in the Court about the tenor of the terms of the Rules, i.e., of the provisions of Article 79. Paragraph 1 of Article 79 provides:

> "*Any* objection by the respondent to the jurisdiction of the Court ... the decision upon which is requested before *any* further proceedings on the merits, shall be made in writing within the time-limit fixed for the delivery of the Counter-Memorial ..." (Emphasis added.)

Paragraph 3 provides:

> "Upon receipt by the Registry of a preliminary objection, the proceedings on the merits *shall* be suspended and the Court ... shall fix the time-limit within which the other party may present a written statement of its observations and submissions ..." (Emphasis added.)

It follows that not only some but "any" — that is to say, "no matter which", "all", "every" (*Webster's New International Dictionary of the English Language*, 2nd ed., unabridged, 1945, p. 121) — objection by the respondent to the jurisdiction of the Court, the decision upon which objection is requested before "any" further proceedings on the merits, shall be dealt with as prescribed by Article 79. "Any" further proceedings on the merits must be understood to be just that: that is, all such proceedings, whether they be the Memorial (if the preliminary objection is filed before the Memorial has been filed), or subsequent pleadings, written or oral. The sole qualifications to this rule are that the objection shall be made "in writing" and "within the time-limit fixed for the delivery of the Counter-Memorial". The outer time-limit so fixed clearly embraces the period of time between the filing of the Application and the filing of the applicant's Memorial on the merits as well as the time between the filing of the Memorial and the delivery of the Counter-Memorial. Upon receipt

by the Registry of a preliminary objection, the proceedings on the merits "shall" — i.e., must — be suspended; this is a mandatory provision to which the Court gives automatic effect.

That this interpretation of the rule is the correct interpretation is supported by the published references to the *travaux préparatoires* of Article 79 found in an authoritative article by Judge Jiménez de Aréchaga, then President of the Court. He recounts that, while it was decided not to require that a party should file a preliminary objection as soon as it receives the Application because "it was felt that a Respondent had a right to wait for the full development of the Applicant's case in the Memorial before being obliged to file its objection", the purpose of omitting such a requirement was to protect "the right of defense of the Respondent". He accordingly imports that, if the respondent were to choose to file its preliminary objection before the applicant were to file its Memorial, that would be a permissible procedure; any burden of so proceeding would be assumed by it (Eduardo Jiménez de Aréchaga, "The Amendments to the Rules of Procedure of the International Court of Justice", *American Journal of International Law*, 1973, Vol. 67, p. 19).

The evolution of thinking in the Court from as early as 1922 to the adoption of the Rules currently in force on the question of whether or not a preliminary objection by a respondent may be filed before the presentation of the applicant's Memorial is well set out in the separate opinion of Judge Shahabuddeen which follows this opinion. It is clear that views in the Court have fluctuated, in response to competing considerations. On the one hand, there has been the view that it is preferable that, as Judge Anzilotti in 1926 put it, "the Court should only deal with the question of jurisdiction when it had before it the merits of the case ... at all events up to a certain point" (*P.C.I.J., Series D, Addendum to No. 2*, p. 79). On the other hand, there has been the view that it is preferable that, as the then Registrar and later Judge Ake Hammarskjöld maintained,

> "a State should be able to stop the proceedings before any discussion on the merits ... any inequality between the Parties must be avoided and that equality might not be secured if the Court decided the question of jurisdiction after having received a Case on the merits from one Party only" (*ibid.*, p. 84).

Lord Finlay took an intermediate position:

> "Often, a State against whom an action was brought before the Court, simply declared that the Court had no jurisdiction and refused to acknowledge the obligation which the other side had alleged to exist under some treaty. In that case, it was necessary that the Court should be able to decide in a summary and rapid manner in regard to that first objection. But often also, the question of jurisdiction and the merits were so intermingled that it was difficult, sometimes impossible, to decide the question of jurisdiction before

examining the merits. It did not therefore seem right to insert in the Rules an invariable rule. It should rather be for the Court to exercise its power of discrimination by deciding in accordance with the circumstances of each case." (*P.C.I.J., Series D, Addendum to No. 2*, p. 87.)

In 1926, the Court decided in favour of the position of Judge Anzilotti; in 1936, as Judge Shahabuddeen more fully describes, the Court reversed that position to permit a preliminary objection to be filed before as well as after the filing of the applicant's Memorial. The Court, when reconstituted as the International Court of Justice in 1946, maintained that reversed position in its 1946 Rules and in the Rules adopted in 1972, which were maintained on this point in 1978 in the terms in which Article 79 of the Rules of Court today appear.

At the same time, apparently in order to conciliate the positions represented at one extreme in the Anzilotti approach and at the other extreme in the Hammarskjöld approach, the Court adopted what is now paragraphs 5 and 6 of Article 79, providing:

> "5. The statements of fact and law in the pleadings referred to in paragraphs 2 and 3 of this Article, and the statements and evidence presented at the hearings contemplated by paragraph 4, shall be confined to those matters that are relevant to the objection.
>
> 6. In order to enable the Court to determine its jurisdiction at the preliminary stage of the proceedings, the Court, whenever necessary, may request the parties to argue all questions of law and fact, and to adduce all evidence, which bear on the issue."

Accordingly, in the pleadings and oral argument on the preliminary objection, the parties shall confine themselves to those matters that are relevant to the objection and not enter unduly into the merits of the case. At the same time, in so far as it may be necessary for the Court, in determining a preliminary objection, to be more fully informed of the facts or the law of the merits of the dispute (which otherwise would be expected to have been argued in the Memorial), the Court itself may request the parties to argue such questions of law and fact in so far as they bear on the jurisdictional issue.

THE PRACTICE OF THE COURT

What of the practice of the Court in implementation of its Rules? Does that practice substantially maintain or substantially modify their import?

In my understanding, the practice, while variable, more sustains than subtracts from the provisions of the Rules.

There are a number of cases in which the respondent did not appear but in which, nevertheless, it made manifest its objections to the jurisdiction

on which the applicant relied. That is to say, while, because of its non-participation, the respondent could not and did not file a preliminary objection strictly so-called and so denominated by it, at the same time it brought to the attention of the Court its objections to the Court's jurisdiction. It is significant that, in these cases, the preliminary objections which, had the respondent been appearing in the case, could have been regularly filed and determined either before or after the filing of the applicant's Memorial, were in substance uniformly determined before the filing of any Memorial. While these cases are not dispositive, they accordingly support rather than counter the terms of the Rules.

Thus, in the *Fisheries Jurisdiction* case, Iceland, while not appearing, submitted communications in which it "was asserted that there was no basis under the Statute of the Court for exercising jurisdiction in the case"; the Court nevertheless indicated provisional measures "which ... in no way prejudges the jurisdiction of the Court to consider the merits of the dispute". The Court then continued: "Whereas, in these circumstances, it is necessary to resolve first of all the question of the Court's jurisdiction"; and the Court decided "that the first pleadings shall be addressed to the question of the jurisdiction of the Court to entertain the dispute" (*Fisheries Jurisdiction (United Kingdom* v. *Iceland), Order of 18 August 1972, I.C.J. Reports 1972*, p. 182). The Court subsequently proceeded to consider pleadings on jurisdiction and to find that it had jurisdiction to entertain the Application filed by the United Kingdom; only thereafter did it fix time-limits for the written proceedings on the merits, including the Memorial of the United Kingdom (*Fisheries Jurisdiction (United Kingdom* v. *Iceland), Order of 15 February 1973, I.C.J. Reports 1973*, p. 94).

In the *Aegean Sea* case, Turkey, while not appearing, communicated observations to the Court maintaining that it had no jurisdiction to entertain the Greek Application. The Court responsively concluded that "it is necessary to resolve first of all the question of the Court's jurisdiction with respect to the case" and it decided that "the written proceedings shall first be addressed to the question of the jurisdiction of the Court to entertain the dispute" (that is, it decided that the written proceedings should not first of all comprise the Memorial of Greece) (*Aegean Sea Continental Shelf, Interim Protection, Order of 11 September 1976, I.C.J. Reports 1976*, pp. 13-14). The Court subsequently determined, without having had the benefit of a Greek Memorial on the merits, "that it is without jurisdiction" to entertain the Greek Application (*Aegean Sea Continental Shelf, Judgment, I.C.J. Reports 1978*, p. 45).

In the *Nuclear Tests* cases between Australia and New Zealand, and France, the French Government informed the Court that it "was manifestly not competent in the case" and was not represented at the hearings on provisional measures; the Court indicated interim measures of protection; it held that, "in these circumstances, it is necessary to resolve as soon

as possible the questions of the Court's jurisdiction and the admissibility of the Application"; and it decided that "the written proceedings shall first be addressed to the questions of the jurisdiction of the Court to entertain the dispute, and of the admissibility of the Application" (*Nuclear Tests (Australia* v. *France), Interim Protection, Order of 22 June 1973, I.C.J. Reports 1973*, pp. 105-106; and *Nuclear Tests (New Zealand* v. *France), Interim Protection, Order of 22 June 1973, I.C.J. Reports 1973*, p. 142). Once again, there was no question of the Court concluding that, in order to resolve those questions, it had need of a prior filing of the Applicants' Memorials on the merits.

Finally, in the case of *Trial of Pakistani Prisoners of War*, India claimed that "there was no legal basis whatever for the jurisdiction of the Court in the case" and, while not appearing at public hearings on Pakistan's request for interim measures, sent communications which "presented a further reasoned statement that the Court had no jurisdiction in the case". While the Court in circumstances in which Pakistan asked the Court to postpone consideration of its request for the indication of interim measures held that it was not called upon to pronounce upon that request, the Court concluded that it "must first of all satisfy itself that it has jurisdiction to entertain the dispute". It accordingly decided that "the written proceedings shall first be addressed to the question of the jurisdiction of the Court" (i.e., before the filing of any Memorial of the applicant on the merits) (*Trial of Pakistani Prisoners of War, Interim Protection, Order of 13 July 1973, I.C.J. Reports 1973*, pp. 329-330).

The cases in which the issue has arisen and in which the respondent participated also are predominantly consistent with the terms of the Rules of Court.

In the *Monetary Gold* case, a case of exceptional singularity, the Court issued an Order providing for the filing of a Memorial on the merits by the Applicant, Italy. Before the due date of that Memorial, Italy filed a document entitled, "Preliminary Question", by which Italy requested the Court to adjudicate "on the Preliminary Question of its jurisdiction to deal with the merits of the claim" (case of the *Monetary Gold Removed from Rome in 1943 (Preliminary Question), Judgment, I.C.J. Reports 1954*, p. 22). By an Order of 3 November 1953, the Court, "without prejudging the question of the interpretation and application of Article 62 [today, Article 79] of the Rules of Court" (*ibid.*, pp. 22-23), suspended proceedings on the merits and fixed time-limits for pleadings on the preliminary question. The submissions of Italy in the Court were couched as "Having regard to Article 62 of the Rules of Court" (*ibid.*, p. 23), and requested the Court to adjudicate the preliminary question of its jurisdiction and to hold that the Court was without jurisdiction to adjudicate the merits of the claim. The United Kingdom submitted, *inter alia*, that the Court had jurisdiction. In its Judgment, the Court noted that Italy, "instead of presenting a Memorial on the merits within the time-limit fixed for that purpose by

the Court . . . raised an issue as to the Court's jurisdiction" and had done so "in the form of a 'preliminary question'" (*I.C.J. Reports 1954*, pp. 26-27). The Court observed that it is "indeed unusual that a State which has submitted a claim by the filing of an Application should subsequently challenge the jurisdiction of the Court to which of its own accord it has applied" (*ibid.*, p. 28). Nevertheless, the Court characterized Italy's action as "a genuine Preliminary Objection" and proceeded to deal with it (*ibid.*, p. 29). In so doing, it held that Article 62 did not preclude the raising of a preliminary objection by an applicant. What is suggestive for present purposes is that the Court treated that preliminary objection not only as genuine but as filed in a timely fashion, even though filed before the filing of a Memorial on the merits whose filing had already been provided for. At the same time, the current Rules expressly contemplate that, where a preliminary objection is made by a party other than the respondent, it "shall be filed within the time-limit fixed for the delivery of that party's first pleading" (Art. 79, para. 1). Thus *Monetary Gold* may be held to shed no clear light on the present issue.

The remaining cases are only somewhat more instructive.

In the *Ambatielos* case, Greece filed an Application; the United Kingdom notified the Court that it was its intention to contest the grounds on which Greece maintained that the Court had jurisdiction; and the President of the Court, "having ascertained the views of the Parties upon questions of procedure", fixed the time-limits of Greece and the United Kingdom for the Memorial and Counter-Memorial on the merits (*Ambatielos, Order of 18 May 1951, I.C.J. Reports 1951*, p. 12). The United Kingdom did not choose to file in advance of the pleadings on the merits a preliminary objection which sought to suspend proceedings on the merits; it was content to receive Greece's Memorial and to argue at the outset of its Counter-Memorial that the Court had no jurisdiction in the case (United Kingdom Counter-Memorial, *I.C.J. Pleadings, Ambatielos (Greece* v. *United Kingdom)*, pp. 132, 133-139). The Court apparently was not called upon to decide the question of whether or not the United Kingdom could if it wished file its preliminary objection before receipt of Greece's Memorial; rather, it seems that the United Kingdom itself preferred to receive Greece's Memorial before responding both on jurisdiction and on the merits, as was its right. Thus, in my view, the *Ambatielos* case leans neither one way nor the other.

In the *Interhandel* case, the United States filed a succinct document denominated as "Preliminary Objection" with respect to only one element of Switzerland's Application, in the following terms:

> "The Government of the United States of America . . . herewith files a preliminary objection under Article 62 of the Rules of the Court, to the proceedings instituted by the Government of Switzerland in the Interhandel case by its application of October 1, 1957, in so far as that application relates to the sale or other disposition of the

> shares of General Aniline and Film Corporation now held by the United States Government. The United States Government has determined that such sale or disposition of the shares in the American corporation, title to which is held by the United States Government in the exercise of its sovereign authority, is a matter essentially within its domestic jurisdiction. Accordingly, pursuant to paragraph *(b)* of the conditions attached to this country's acceptance of the Court's compulsory jurisdiction, dated August 14, 1946, this country respectfully declines, without prejudice to other and further preliminary objections which it may file, to submit the matter of the sale or disposition of such shares to the jurisdiction of the Court." (*I.C.J. Pleadings, Interhandel (Switzerland* v. *United States of America)*, p. 77.)

The Court held with respect to the foregoing contention that, if maintained, "it will fall to be dealt with by the Court in due course" in accordance with the procedure set forth in Article 62 of its Rules (*Interhandel, Interim Protection, Order of 24 October 1957, I.C.J. Reports 1957*, p. 111) but that it was immediately concerned with Switzerland's request for interim measures of protection, a decision as to which "in no way prejudges the question of the jurisdiction of the Court to deal with the merits of the case" *(ibid.)*. It held that, in circumstances in which the sale of Interhandel's shares in the United States was conditional upon a United States judicial decision and in which no time schedule for the sale of such shares was fixed, there was no need to indicate interim measures of protection (*ibid.*, p. 112). On the same day, the Court issued another Order, which, having regard to its Order on interim measures, and having ascertained the views of the Parties, fixed time-limits for the filing of pleadings: the Memorial of Switzerland and the Counter-Memorial of the United States. In due course, Switzerland filed a Memorial on the merits which maintained, *inter alia*, that the Court had jurisdiction, and the United States filed a Counter-Memorial, which exclusively maintained, on a multiplicity of grounds, that it did not or that the case was inadmissible (*I.C.J. Pleadings, loc. cit.*, pp. 139-141, 303-327). Thus in this case, it is clear that Preliminary Objections were filed and argued after the receipt of the Applicant's Memorial on the merits. But what this case does not show is that the Court concluded that this was the necessary course. For the one-paragraph paper initially submitted by the United States and described by it as a "Preliminary Objection", and which was directed solely against the granting of interim measures of protection, was simply not acted upon as a preliminary objection by the Court, which rather found it possible to reject Switzerland's request for interim measures on another ground. Apparently the Court was of the view that "the preliminary objection procedure is only operative to suspend the proceedings on the merits, and cannot be applied in incidental proceedings" (Shabtai Rosenne, *The Law and Practice of the International Court*, 1965, Vol. I, p. 455). It is not at

all clear from this series of events that the United States ever maintained that it was entitled to file a comprehensive Preliminary Objection before Switzerland filed its Memorial on the merits and that the Court rejected such a contention of the United States. Thus the light shed by this case too is limited.

A more instructive case is *Military and Paramilitary Activities in and against Nicaragua.* In that case, at the stage of provisional measures, Nicaragua maintained that the Court had jurisdiction whereas the United States maintained that it did not. The United States also argued that the case was inadmissible on more than one ground, while Nicaragua argued to the contrary. The clash of views between the Parties on these questions was of exceptional intensity. The Court unanimously rejected the United States request that Nicaragua's Application and request for the indication of provisional measures be terminated by removal of the case from the list. It indicated certain provisional measures, most by unanimous vote, the most important measure by a divided vote. Apparently treating the objections of the United States on preliminary grounds as substantially fulfilling the requirements of the Rules, the Court unanimously decided that "the written proceedings shall first be addressed to the questions of the jurisdiction of the Court to entertain the dispute and of the admissibility of the Application" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Provisional Measures, Order of 10 May 1984, I.C.J. Reports 1984,* p. 187). It thereafter ascertained the views of the Parties and issued an Order of 14 May 1984 fixing the time-limits for the Memorial and Counter-Memorial of the Parties on the questions of jurisdiction and admissibility, both to be filed before the filing of any Memorial on the merits of the case. Thus the Court acted as if the United States had filed a preliminary objection; in effect, it suspended proceedings on the merits and required the Parties to plead to jurisdiction and admissibility, a course to which neither Party objected. By proceeding in this way, the Court hardly construed the Rules as meaning that the Memorial of the applicant should be filed before the Court considers preliminary objections of the respondent; rather, it seems to have acted on a contrary understanding.

Finally, in what appears to be consistent with the pattern of agreement — whether express or not — between the parties which some of the foregoing cases suggest, in the case of *Border and Transborder Armed Actions* the Order of the Court records that "the Parties are agreed that the issues of jurisdiction and admissibility should be dealt with at a preliminary stage of the proceedings" (*Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Order of 22 October 1986, I.C.J. Reports 1986,* p. 552). The Court thus decided that the initial pleadings should exclusively deal with issues of jurisdiction and admissibility. This case illustrates the full

freedom of the Court and the parties to a case to deal with pleadings on jurisdiction and admissibility before the filing of a Memorial on the merits by the applicant; it in no way suggests that agreement between the parties is a condition precedent for that result.

In the light of the foregoing analysis, I conclude that predominant practice supports the provisions of the Rules which permit a respondent in a case to file its preliminary objections before the Memorial of the applicant on the merits is filed.

It should be added that, once a respondent files a preliminary objection, what the Court has described as the "categorical" provision of the Rules takes effect (*Interhandel, I.C.J. Reports 1959*, p. 20). As the Court held in *Barcelona Traction*, by filing a plea as a preliminary objection, the respondents "automatically bring about the suspension of the proceedings on the merits" (*Barcelona Traction, Light and Power Company, Limited, Preliminary Objections, Judgment, I.C.J. Reports 1964*, p. 43).

(Signed) Stephen M. SCHWEBEL.