

## SEPARATE OPINION OF JUDGE BHANDARI

*Concur with the conclusions of the majority — Existence of a dispute is central to the exercise of the Court's jurisdiction — On the basis of documents and pleadings of the Parties, no dispute existed — ICJ lacks jurisdiction — Greater emphasis ought to have been given that no dispute existed and lesser on the Respondent's awareness — Other preliminary objections ought to have been adjudicated in the facts of this case — Monetary Gold principle — Judgment will have no concrete effect — Respondent's reservation — Dispute relating to situation of hostilities or self-defence — The Applicant accepted ICJ's jurisdiction for this case only — Interpretation or application of multilateral treaties.*

1. I concur with the conclusions of the majority Judgment upholding the objection to jurisdiction raised by India based on the absence of a dispute. However, I wish to append a separate opinion to expand the basis of the reasoning of the Judgment. I also propose to deal with another aspect of this case, that in the facts of this case, the Court ought to have dealt with the other preliminary objections raised by India because the issues raised in the case affect not only the Parties, but also the entire humanity. Additionally, adjudicating these objections would have further crystallized the controversy involved in the case, particularly when all documents, pleadings and submissions were placed on record *in extenso*.

2. The question, which needs to be decided, is whether from the documents, pleadings and the conduct of the Parties it can be established that a dispute existed between them at the time of filing the Application in the terms prescribed by the applicable legal instruments and the Court's jurisprudence.

3. Under Article 36, paragraph 2, and Article 38, paragraph 1, of the Statute of the Court, it can only exercise its jurisdiction in case of a dispute between the parties. The concept of "dispute", and more specifically "legal dispute", is thus central to the exercise of the Court's jurisdiction. The majority Judgment acknowledges this and reflects on certain key aspects from the Court's jurisprudence on this concept.

4. Any analysis of the existence of a dispute should start with a definition of the term "dispute". Black's Law Dictionary offers the following definitions, which may help in guiding the analysis:

"Dispute: A conflict or controversy; a conflict of claims or rights; an assertion of a right, claim, or demand on one side, met by contrary claims or allegations on the other."

"Legal dispute: Contest / conflict / disagreement concerning lawful existence of (1) a duty or right, or (2) compensation by extent or type, claimed by the injured party for a breach of such duty or right."

5. Mr. Harish Salve, appearing for the Respondent, submitted that in absence of a dispute this Court has no jurisdiction to deal with this case. He further submitted that on the basis of documents and pleadings of the Parties there is no legal dispute between them. Reliance has been placed by him on the Judgment of this Court in the *South West Africa* cases. The relevant passage is reproduced below:

“The subject-matter of the dispute is a disagreement between the States on a point of law or fact. Whether there is a dispute, and if so, what the dispute is, is a matter for objective determination by the Court. In the *South West Africa* cases, this Court held that it has to assess whether the ‘the claim of one party is positively opposed by the other’. It is the claim and not the legal submissions in support of the claim which would delineate the contours of the dispute.”<sup>1</sup>

6. Mr. Salve also placed reliance on the *Fisheries Jurisdiction (Spain v. Canada)* case as follows:

“[T]his Court referred to Article 40 (1) of the Statute and Article 38 (2) of the Rules — provisions which have been characterized as essential from the point of view of legal security and the good administration of justice — and came to the conclusion that there may be uncertainties with regard to the real subject-matter of the dispute, and the Court must for its objective evaluation give ‘*particular attention* to the formulation of the dispute chosen by the Applicant’.”<sup>2</sup>

7. Mr. Alain Pellet, also appearing for the Respondent India, submitted that the condition for the exercise of jurisdiction of this Court is that there must a dispute between the Parties. He cited the *Nuclear Tests* cases. The relevant passage is reproduced below:

“The Court, as a court of law, is called upon to resolve existing disputes between States. Thus the existence of a dispute is the primary condition for the Court to exercise its judicial function; it is not sufficient for one party to assert that there is a dispute, since ‘whether there exists an international dispute is a matter for objective determination’ by the Court.”<sup>3</sup>

8. Mr. Pellet also relied on the following passage of the *South West Africa* cases of the Court:

“In other words it is not sufficient for one party to a contentious case to assert that a dispute exists with the other party. A mere assertion is not sufficient to prove the existence of a dispute any more than a mere denial of the existence of the dispute proves its non-existence. Nor is it adequate to show that the interests of the two parties to such a case are in conflict. It must be shown that the claim of one party is positively opposed by the other.”<sup>4</sup>

9. In *Georgia v. Russia*, in determining whether a legal dispute existed between the Parties at the time of the filing of the Application, the Court undertook a detailed review of the relevant diplomatic exchanges, documents and statements. The Court has carried out an extensive analysis of the evidence, covering numerous instances of official Georgian and Russian practice from 1992

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<sup>1</sup>*South West Africa (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962, p. 328; CR 2016/4, p. 27, para. 42.*

<sup>2</sup>*Fisheries Jurisdiction (Spain v. Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998, p. 448, para. 30; CR 2016/4, p. 27, para. 43; original emphasis.*

<sup>3</sup>*Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974, pp. 270-271, para. 55; Nuclear Tests (New Zealand v. France), Judgment, I.C.J. Reports 1974, p. 476, para. 58, quoting Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950, p. 74; CR 2016/4, pp. 37-38, para. 3.*

<sup>4</sup>*South West Africa (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962, p. 328; CR 2016/4, p. 38, para. 4.*

to 2008. The Court found that most of the documents and statements before it failed to evidence the existence of a dispute, because they did not contain any “direct criticism” against the Respondent, did not amount to an “allegation” against the Respondent or were not otherwise of a character that was sufficient to found a justiciable dispute between the parties, and in this case the Court also held that it is a matter of substance and not a question of form or procedure (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, pp. 84-91, paras. 30-46).

10. In *Belgium v. Senegal*, the Court similarly carried out a systematic review of the diplomatic exchanges that had preceded the filing of the Application in order to ascertain if the dispute had been properly notified to Senegal. The Court, in that case, concluded that at the time of the filing of the Application, the dispute between the Parties did not relate to breaches of obligation under customary international law and that it had thus no jurisdiction to decide Belgium’s claims (*Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012 (II)*, pp. 433-435, paras. 24-26).

11. In another important case, *Mavrommatis Palestine Concessions*, the Court considered that a dispute is “a disagreement on a point of law or fact, a conflict of legal views or of interests” between parties (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11).

12. It would be appropriate to recapitulate the documents, pleadings and submissions of the Parties to determine whether a dispute in fact existed between the Parties at the time of the filing of the Application.

13. *The Marshall Islands’ own submissions in its Application and during the oral proceedings.* At paragraphs 35 to 37 of its Application, the Republic of the Marshall Islands (hereinafter “RMI”) summarizes its own understanding of India’s conduct with regard to nuclear disarmament. They are reproduced for the benefit of the reader, verbatim as to show the unambiguous character of the Applicant’s description:

“35. . . . India has consistently voted for the General Assembly resolution welcoming the Court’s conclusion regarding the disarmament obligation. India states that it has never contributed to the spread of sensitive technologies. It adds that it is updating regulations relating to export controls and taking measures to strengthen nuclear security in accord with international efforts to prevent the acquisition of nuclear weapons by non-state actors and additional States.

36. India supports the commencement of negotiations on complete nuclear disarmament in the Conference on Disarmament [(CD)]. It also votes for UN General Assembly resolutions calling for negotiation of a Nuclear Weapons Convention, including ‘Follow-up to the advisory opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons’, and a resolution newly offered in 2013 following up on the High-Level Meeting on Nuclear Disarmament. The latter resolution calls for ‘the urgent commencement of negotiations, in the Conference on Disarmament, for the early conclusion of a comprehensive convention’ to prohibit and eliminate nuclear weapons. India abstained on the 2012 resolution establishing an Open-Ended Working Group to take forward proposals for multilateral nuclear disarmament negotiations, but subsequently participated in the Working Group.

37. The first-ever UN General Assembly High-Level Meeting on Nuclear Disarmament, referenced in the preceding paragraph, was held on 26 September 2013, pursuant to a 2012 resolution which was supported by India. At that meeting, Salman Khurshid, Minister of External Affairs of India, placed India's support for nuclear disarmament in the context of the 1988 Rajiv Gandhi 'Action Plan for a nuclear weapon free and non-violent world order'. He stated that India has a 'posture of no-first use', maintained that India 'refuse[s] to participate in an arms race, including a nuclear arms race', and noted that India's 'proposal for a Convention banning the use of nuclear weapons remains on the table'.<sup>5</sup>

14. The RMI recognized in its submissions and oral proceedings that India's conduct is in fact pro-disarmament and that it has repeatedly and publicly stated so. The Agent of the Applicant submitted on the Respondent's conduct prior to the Application:

"I submit to you the following: 'The production of weapons which have the capacity to destroy all mankind cannot in any manner be considered to be justified or permitted under international law.' That quote . . . , while entirely endorsed by the Marshall Islands, is a quote from India, and specifically from India's submission to this very Court — the International Court of Justice — on 20 June 1995, in the *Legality of Threat or Use of Nuclear Weapons* proceedings.

While the lawyers here will today address India's claims regarding jurisdiction, I wish to respectfully add here certain additional facts that I trust will be helpful to this Court. Specifically, India also agreed in its official 1995 Statement that nuclear weapons could not be produced for deterrence purposes because deterrence is 'abhorrent to human sentiment' and 'disarmament must be given priority and has to take precedence over deterrence'.

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. . . the Marshall Islands officially and publicly declared in February 2014 at the Conference on the Humanitarian Impact of Nuclear Weapons in Mexico, that the States possessing nuclear arsenals are failing to fulfil their legal obligations under customary international law. An official delegation from India attended this Conference, and it is without question that India is a State possessing a nuclear arsenal. India's statement to this February 2014 Conference included the following confirmation:

'We cannot accept the logic that a few nations have the right to pursue their security by threatening the survival of mankind. It is not only those who live by the nuclear sword who, by design or default, shall one day perish by it. All humanity will perish.'<sup>6</sup>

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<sup>5</sup>Application of the Marshall Islands (AMI), paras. 35-37, citing A/RES/68/42, 5 December 2013; Statement of India Prime Minister Manmohan Singh at Seoul Nuclear Security Summit, 27 March 2012, <http://www.mea.gov.in/Speeches-Statements.htm?dtl/19078/>; Nuclear Security Summit National Progress Report, 27 March 2012, <http://www.mea.gov.in/bilateral-documents.htm?dtl/19074/>; Statement by H.E. Mr. Salman Khushid, Minister of External Affairs of India, at the High-level Meeting of the General Assembly on Nuclear Disarmament, 68th United Nations General Assembly in New York, 26 September 2013, [http://www.un.org/en/ga/68meetings/nucleardisarmament/pdf/IN\\_en.pdf](http://www.un.org/en/ga/68meetings/nucleardisarmament/pdf/IN_en.pdf); A/RES/68/42, 5 December 2013; A/RES/68/32, 5 December 2013; A/RES/67/56, 3 December 2012; UN doc. A/67/PV 48, pp. 20-21; A/RES/67/39, 3 December 2012.

<sup>6</sup>CR 2016/1, pp. 18-19, paras. 11, 12 and 14.

15. The Applicant acknowledges that in response to its alleged one instance where it formulated its claim, such claim was not met with resistance from the Respondent. On the contrary, India supported, as it has done continuously since the days before its independence, the call for nuclear disarmament. This support, in fact, has taken the form of concrete steps and actions at the appropriate international fora, notably the General Assembly and the Committee on Disarmament. The Court's 1996 Advisory Opinion on nuclear weapons clearly established that the obligation to negotiate towards nuclear disarmament is an obligation of result and not one of means. It thus requires concrete steps from the members of the international community. Such concrete steps on the part of India are referenced in detail in the Annexes to the Counter-Memorial filed by the Respondent.

16. The Minister of External Affairs of India stated before the General Assembly of the United Nations in 2013 that even prior to the independence,

“from the days of [the] freedom struggle, [India] has been consistent in its support for the global elimination of all weapons of mass destruction. Mahatma Gandhi, the Father of [the] nation, was moved by the tragedy of Hiroshima and Nagasaki [when nuclear weapons were used for the first time in 1945]. He wrote that he regarded the employment of the atom bomb for the wholesale destruction of men, women and children as the most diabolical use of science.”<sup>7</sup>

17. This stance has remained unchanged until today, regardless of the different parties and politicians who have at turns ruled and represented the country.

18. It was submitted that India is fully committed to the goal of nuclear-weapon-free world through global verifiable and non-discriminatory nuclear disarmament. Co-Agent of India, Mr. Gill, submitted that India's stand is that all the States must work together for global, non-discriminatory and verifiable nuclear disarmament. He also submitted that we need a step-by-step process underwritten by a universal commitment of all States and agreed global and non-discriminatory multilateral framework again for all States. He further submitted that India is committed to a credible minimum deterrent, no-first use and non-use against non-nuclear weapons States, such as the RMI.

19. India's first Prime Minister, Jawaharlal Nehru, after India's independence was among the first world leaders to raise concern of the use of nuclear weapons and called for negotiations for the prohibition and elimination of nuclear weapons. On 2 April 1954 he said in the Indian Parliament, and I quote from his speech: “We know that its use threatens the existence of man and civilization” (statement made by Prime Minister Jawaharlal Nehru in Lok Sabha (Lower House of the Indian Parliament), 2 April 1954, Annex 3 to the Counter-Memorial of India).

20. India's Co-Agent, Mr. Gill, submitted that “[i]t was on the combined urging of India and Canada in 1961 that the Soviet Union and the United States became co-chairs of the first standing negotiation forum on nuclear disarmament — the Eighteen Nation Disarmament Committee, precursor to the CD of today”<sup>8</sup>.

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<sup>7</sup>Statement by Salman Khurshid, Minister of External Affairs of India, at the High-level Meeting of the General Assembly on Nuclear Disarmament, 68th United Nations General Assembly in New York, 26 September 2013; Counter-Memorial of India (CMI), Annex 6.

<sup>8</sup>CR 2016/4, p. 15, para. 5.

21. Mr. Gill further addressed the Court in the following terms:

“India’s nuclear programme is one of the oldest in the world and India’s was the first reactor to go critical in Asia in 1956. Apart from the four then nuclear-weapons States, India was the only country in 1965 with a chemical reprocessing plant that could separate significant quantities of plutonium. This was followed by India’s first nuclear power plant in 1969. Among the nuclear-weapons States, India’s nuclear programme is unique in being technology driven rather than weapons driven.

Historically, there has been a consensus in India on nuclear issues that has revolved around support for universal and non-discriminatory global nuclear disarmament and safeguarding of India’s security interests in a nuclearized world through the guarding of India’s options and capabilities.”<sup>9</sup>

22. Mr. Gill, while concluding his submission, also stated that:

“This essentiality is also recognized in India’s position that the first step toward a nuclear-weapons-free world is a universal commitment and an agreed global and non-discriminatory multilateral framework. [India] remain[s] ready to work for this noble goal in the designated multilateral forums.”<sup>10</sup>.

23. India’s Prime Minister, Ms Indira Gandhi, in 1968 addressed the Indian Parliament on the question of whether to sign the NPT and described the situation in the following terms:

“Mankind today is at the crossroads of nuclear peace and nuclear war. There can be no doubt that we should take the road to nuclear peace. But the first step in this direction is not yet in sight. It is vitally important, therefore, for the nuclear weapon Powers to undertake as soon as possible meaningful negotiations on a series of measures leading to nuclear disarmament.”<sup>11</sup>

24. India’s negotiator, Mr. V.C. Trivedi, between 1965 and 1966, made several statements at the Conference of the Eighteen-Nation Committee on Disarmament (ENCD), where he again reiterated India’s commitments to nuclear disarmament (statement by India’s negotiator, Mr. V.C. Trivedi at the Conference of the Eighteen-Nation Committee on Disarmament, 12 August 1965, 15 February 1966, 10 May 1966, 23 May 1967, 28 September 1967; CMI, Annexes 13-17). In 1968, it was Ambassador Azim Husain who addressed the ENCD and the Political Committee of the United Nations in similar terms. (Statement by Ambassador Azim Husain at the Conference of the Eighteen-Nation Committee on Disarmament, 27 February 1968, CMI, Annex 19; and statement by Ambassador Azim Husain in the Political committee of the United Nations, 14 May 1968, CMI, Annex 20.)

25. The External Affairs Minister M.C. Chagla, reporting on these appearances before the ENCD in March 1967, informed the Indian Parliament of the progress made at the ENCD, whose work to negotiate an international treaty to prevent the proliferation of nuclear weapons is based on the main principles laid down by the General Assembly in its Resolution No. 2028 (XX) of 19 November 1965. He recalled that “[India’s] views on the question of non-proliferation of

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<sup>9</sup>CR 2016/4, p. 16, paras. 7-8.

<sup>10</sup>CR 2016/4, p. 19, para. 12.

<sup>11</sup>Statement by Prime Minister Indira Gandhi, Lok Sabha, 5 April 1968; CMI, Annex 21.

nuclear weapons have been stated from time to time in the ENDC and at the forum of the United Nations. These views remain unchanged.”<sup>12</sup>

26. Mr. Chagla further stated that

“The Government of India share[s] with the international community the anxiety arising from the proliferation of nuclear weapons. They favour an early agreement on such a treaty and will be willing to sign one which fulfills the basic principles laid down by the United Nations. They are of the view that any such treaty should be a significant step towards general and complete and, particularly nuclear disarmament, and must meet the points of view of both nuclear weapon and non-nuclear weapon Powers.”<sup>13</sup>

27. The Indian Prime Minister Rajiv Gandhi, on 9 June 1988, made a very important and significant speech before the General Assembly of the United Nations where he suggested a concrete action plan for elimination of all nuclear weapons in three stages over the next 22 years beginning now. He stated:

“The heart of our Action Plan is the elimination of all nuclear weapons, in three stages over the next twenty-two years, beginning now. We put this Plan to the United Nations as a programme to be launched at once.

While nuclear disarmament constitutes the centrepiece of each stage of the Plan, this is buttressed by collateral and other measures to further the process of disarmament. We have made proposals for banning other weapons of mass destruction. We have suggested steps for precluding the development of new weapon systems based on emerging technologies. We have addressed ourselves to the task of reducing conventional arms and forces to minimum levels required for defensive purposes. We have outlined ideas for the conduct of international relations in a world free of nuclear weapons.”<sup>14</sup>

28. Had the action plan suggested by the Indian Prime Minister been accepted, all nuclear weapons would have been destroyed by 2010.

29. India’s nuclear policy was again articulated by India’s Prime Minister, Atal Bihari Vajpayee, on 27 May 1998 before the General Assembly of the United Nations. I quote the relevant part of the speech:

“Our nuclear policy has been marked by restraint and openness. It has not violated any International agreements either in 1974 or now, in 1998. Our concerns have been made known to our interlocutors in recent years. The restraint exercised for 24 years, after having demonstrated our capability in 1974, is in itself a unique example. Restraint, however, has to arise from strength. It cannot be based upon indecision or doubt. Restraint is valid only when doubts are removed. The series of tests undertaken by India have led to the removal of doubts. The action involved was

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<sup>12</sup>Statement made by External Affairs Minister M.C. Chagla in the Indian Parliament, 27 March 1967; CMI, Annex 18.

<sup>13</sup>*Ibid.*

<sup>14</sup>“A World Free of Nuclear Weapons: An Action Plan”, tabled at the Third Special Session on Disarmament of the UN General Assembly, 9 June 1988, p. 5; CMI, Annex 4.

balanced in that it was the minimum necessary to maintain what is an irreducible component of our national security calculus. This government's decision has, therefore, to be seen as part of a tradition of restraint that has characterised our policy in the past 50 years.”<sup>15</sup>

30. Mr. Vajpayee also reiterated that global nuclear disarmament is India's preferred approach.

31. The Indian External Affairs Minister on 9 May 2000 made this statement before the parliament that India holds a genuine and lasting non-proliferation that can only be achieved through agreements that are based upon equality and non-discrimination for only those can contribute to the global peace and stability. The cabinet committee on security reviewed progress in operationalizing India's nuclear doctrine on 4 January 2003 and declared India's nuclear policy satisfactory. In reply to the submissions of the Applicant, the RMI, it was suggested that all States possessing nuclear weapons need to intensify efforts to address the responsibilities in moving towards an effective and secure disarmament.

32. India's 2006 Working Paper on Nuclear Disarmament strongly urges “the complete elimination of nuclear weapons” (India Working Paper on Nuclear Disarmament, p. 4; originally issued in the First Committee in 2006 under the symbol A/C.1/61/5 and submitted to the CD as CD/1816 of 20 February 2007, Annex 1).

33. India's Minister of External Affairs on 26 September 2013 stated before the General Assembly of the United Nations:

“As a responsible nuclear power, we have a credible minimum deterrence policy and a posture of no-first use. We refuse to participate in an arms race, including a nuclear arms race. We are prepared to negotiate a global No-first use treaty and our proposal for a convention banning the use of nuclear weapons remains on the table. As we see no contradiction between nuclear Disarmament and non-proliferation, we are also committed to working with the international community to advance our common objectives of non-proliferation, including through strong export controls and membership of the multilateral export regimes.

Mr. President, the Non-Aligned movement, of which India is a proud founding member, has proposed today the early commencement of negotiations in the CD on nuclear disarmament. We support this call. Without prejudice to the priority we attach to nuclear disarmament, we also support the negotiation in the CD of a non-discriminatory and internationally verifiable treaty banning the future production of fissile material for nuclear weapons and other nuclear explosive devices that meet India's national security interests. It should be our collective endeavor to return the CD, which remains the single multilateral disarmament negotiating forum, to substantive work as early as possible.”<sup>16</sup>

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<sup>15</sup>“Evolution of India's Nuclear Policy”, paper presented in the Lok Sabha by Prime Minister Atal Bihari Vajpayee, 27 May 1998, p. 6; CMI, Annex 5.

<sup>16</sup>Statement by Salman Khurshid, External Affairs Minister of India, at the High-level Meeting of the General Assembly on Nuclear Disarmament, 68th Session of the United Nations General Assembly, 26 September 2013; CMI, Annex 6.



34. India was a party to the resolution adopted on 7 December 2015 by the General Assembly of the United Nations. In the resolution it is mentioned “[c]onvinced that the continuing existence of nuclear weapons poses a threat to humanity and all life on Earth”, and “[r]ecognizing that the only defence against a nuclear catastrophe is the total elimination of nuclear weapons and the certainty that they will never be produced again”.

35. India’s Co-Agent, Mr. Gill, in referring to Annex 9 to the Counter-Memorial of India, presented the situation in clear terms when he summarized the Parties’ voting patterns on this issue during the oral proceedings:

“In closing, I would like to reiterate that there is no dispute between the Republic of the Marshall Islands and India. Annex 9 to India’s Counter-Memorial shows without the shadow of a doubt that while India consistently voted for, in fact even co-sponsored, the resolution on the Advisory Opinion of the ICJ calling upon ‘all States immediately to fulfil that obligation by commencing multilateral negotiations leading to an early conclusion of a nuclear weapons convention prohibiting the development, production, testing, deployment, stockpiling, transfer, threat or use of nuclear weapons and providing for their elimination’, the Republic of the Marshall Islands mostly abstained and once even voted ‘No’ on that resolution. This underlines like no other fact the contrived nature of this dispute.”<sup>17</sup>

36. The chart submitted by the Respondent as Annex 9 is reproduced here for ease of reference:

**Voting pattern on ICJ Resolution (2003-2012)**

<b>Year</b>	<b>India Co-sponsorship</b>	<b>India’s Vote</b>	<b>Marshall Island’s Vote</b>
2003	Yes	Yes	No
2004	Yes	Yes	Yes
2005	Yes	Yes	Abstained
2006	Yes	Yes	Abstained
2007	Yes	Yes	Abstained
2008	Yes	Yes	Abstained
2009	Yes	Yes	Abstained
2010	Yes	Yes	Abstained
2011	Yes	Yes	Abstained
2012	Yes	Yes	Abstained

37. India’s permanent representative on 24 February 2015 made this statement before the CD regarding nuclear disarmament policy of India:

“India has been unwavering in its commitment to universal, non-discriminatory, verifiable nuclear disarmament. In our view, nuclear disarmament can be achieved through a step-by-step process underwritten by a universal commitment and an agreed global and non-discriminatory multilateral framework. We have called for a meaningful dialogue among all states possessing nuclear weapons to build trust and confidence and for reducing the salience of nuclear weapons in international affairs and security doctrines. We believe that increasing restraints on use of nuclear weapons would reduce the probability of their use — whether deliberate, unintentional or accidental and this process could contribute to the progressive de-legitimization of

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<sup>17</sup>CR 2016/4, p. 18, para. 11.

nuclear weapons, an essential step for their eventual elimination, as has been the experience for chemical and biological weapons.”<sup>18</sup>

38. India’s nuclear policy was thus reflected by the statement of India’s permanent representative, Mr. Varma, to the CD.

39. *The position taken by the Respondent in its Counter-Memorial and during the oral proceedings.* Specifically responding to the Applicant’s contention that it had raised the dispute with all nuclear States, including India, during the 2nd Conference on the Humanitarian Impact of Nuclear Weapons at Nayarit in February 2014, the Respondent described how in fact the positions of the Parties are aligned and no dispute exists:

“The reading of . . . India’s and the RMI’s statements at this conference clearly shows that their positions on the issue of nuclear disarmament, far from being ‘positively opposed’, in fact converge. If the RMI called on ‘all states possessing nuclear weapons to intensify efforts to address their responsibilities in moving towards an effective and secure disarmament’, India expressed its support for nuclear disarmament and reiterated its commitment to the complete elimination of nuclear weapons in a time-bound, universal, non-discriminatory, phased and verifiable manner.”<sup>19</sup>

40. The Respondent’s Agent, Ms Neeru Chadha reiterated the convergence of the Parties’ positions during the oral proceedings when she stated that “the position of the parties at that conference [the Nayarit February 2014 conference] regarding the need for nuclear disarmament actually coincided” (CR 2016/4, pp. 10-11, para. 12).

41. It is evident from the excerpts transcribed, there is more convergence than divergence in the Parties’ stated positions. Nuclear disarmament is a complex issue and it is clear that the Parties’ positions are not identical. But they are very far from being so distant as to qualify for the existence of a dispute.

42. The RMI and India have been chasing the same goal of disarmament and how the world can become free of nuclear weapons. Both countries are making serious efforts in this direction, therefore by no stretch of the imagination can it be concluded that there is any dispute between the RMI and India.

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<sup>18</sup>Statement on Nuclear Disarmament delivered by Ambassador D. B. Venkatesh Varma, Permanent Representative of India to the CD at the CD Plenary meeting, 24 February 2015; CMI, Annex 10.

<sup>19</sup>CMI, para. 13, citing MMI, para. 18; India’s Statement at the Second Conference on Humanitarian Impact of Nuclear Weapons, available at: [http://www.mea.gov.in/Speeches-Statements.htm?dtl/22936/Statement\\_by\\_India\\_at\\_the\\_Second\\_Conference\\_on\\_the\\_Humanitarian\\_Impact\\_of\\_Nuclear\\_Weapons\\_at\\_Nayarit\\_Mexico](http://www.mea.gov.in/Speeches-Statements.htm?dtl/22936/Statement_by_India_at_the_Second_Conference_on_the_Humanitarian_Impact_of_Nuclear_Weapons_at_Nayarit_Mexico); Republic of the Marshall Island’s Statement at the Second Conference on Humanitarian Impact of Nuclear Weapons, available at: <http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/nayarit-2014/statements/MarshallIslands.pdf>; *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328; *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 40, para. 90; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, pp. 84-85, para. 30; and *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012 (II)*, p. 442, para. 46.

43. On application of the Court's Statute and its jurisprudence to the documents and pleadings placed before the Court, the irresistible conclusion is the absence of any dispute between the Parties, and consequently, on the facts of this case, the Court lacks jurisdiction to deal with this case.

44. The majority Judgment, instead of looking into these aspects closely, chose to focus mainly on the lack of awareness of the Respondent of the impending dispute. The Judgment considers that what is required is that "[t]he evidence must show that . . . the respondent was aware, or could not have been unaware, that its views were 'positively opposed' by the applicant" (Judgment, paragraph 38).

45. The Court has the freedom to choose any preliminary objection when examining its own jurisdiction. In doing so, it usually chooses the most "direct and conclusive one". C. Tomuschat summarized the situation in clear terms in his contribution on Article 36 to the handbook *The Statute of the International Court of Justice — A Commentary* (Second Edition). He stated:

"The Court is free to choose the grounds on which to dismiss a case either for lack of jurisdiction or as being inadmissible. It does not have to follow a specific order, nor is there any rule making it compulsory to adjudge first issues of jurisdiction before relying on lack of admissibility. The Court generally bases its decisions on the ground which in its view is 'more direct and conclusive'. In pure legal logic, it would seem inescapable that the Court would have to rule by order of priority on objections related to jurisdiction. However, such a strict procedural regime would be all the more infelicitous since the borderline between the two classes of preliminary objections is to some extent dependent on subjective appreciation. The Court therefore chooses the ground which is best suited to dispose of the case ('direct and conclusive')."<sup>20</sup>

46. This freedom of the Court was first stated in the *Certain Norwegian Loans (France v. Norway)* case, where the Court considered that its jurisdiction was being challenged on two grounds, and that the Court is free to base its decision on the ground which in its judgment is more direct and conclusive (*Certain Norwegian Loans (France v. Norway)*, Judgment, *I.C.J. Reports* 1957, p. 25).

47. This position has consistently been taken by the Court in the years since the *Certain Norwegian Loans* matter (see, for example, *Aerial Incident of 27 July 1955 (Israel v. Bulgaria)*, Judgment, *I.C.J. Reports* 1959, p. 146; *Aegean Sea Continental Shelf (Greece v. Turkey)*, Judgment, *I.C.J. Reports* 1978, pp. 16-17; *Aerial Incident of 10 August 1999 (Pakistan v. India)*, Jurisdiction, Judgment, *I.C.J. Reports* 2000, p. 24, para. 26; *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, Preliminary Objections, Judgment, *I.C.J. Reports* 2004 (I), p. 298, para. 46).

48. In the instant case, by choosing the lack of awareness on the part of Respondent as the main ground for the dismissal of the claim, it appears, with respect, that the Court has chosen not to give emphasis to the most "direct and conclusive" element of that ground for the dismissal of the claim. The consequence is serious: lack of awareness on the part of the Respondent can be easily cured by the Applicant by giving proper notice of the dispute to the Respondent. In that case, the RMI could simply bring the case again before the Court. In my view, that would be an undesirable

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<sup>20</sup>C. Tomuschat, *The Statute of the International Court of Justice — A Commentary* (Second Edition), p. 707, para. 138, footnotes omitted.

result and should be discouraged. The real ground for the dismissal of the case ought to have been the absence of a dispute between the Parties. The majority has only dealt with preliminary objection number one, and even while dealing with that objection greater emphasis was not placed on the analysis of the documents and pleadings of the Parties, which reveals that there is no dispute between them.

49. The Parties have already submitted documents, pleadings and submissions *in extenso*. In the facts of this case, this Court ought to have examined the other preliminary objections. Otherwise, a re-submission of the case again would entail a waste of the efforts, time and resources already spent by the Parties and the Court in the treatment of this matter.

50. On careful consideration of all documents, pleadings and submissions the irresistible conclusion is that no dispute exists between the Parties. The majority Judgment ought to have rejected the RMI's Application mainly on this ground.

## **PART TWO: OTHER PRELIMINARY OBJECTIONS**

51. In the facts of this case the Court should have examined other preliminary objections taken by the Respondent, namely:

1. *Monetary Gold* principle, i.e., absence of essential parties not party to the instant proceedings;
2. The Judgment would serve no practical purpose; and
3. The application of reservations numbers 4, 5, 7 and 11 to India's optional clause declaration under Article 36 (2) of the Statute of the Court, recognizing the Court's compulsory jurisdiction.

### ***Monetary Gold* principle**

52. I deem it proper to very briefly deal with the other preliminary objections to demonstrate that the other objections are also substantial in character and should have been adjudicated by the Court.

53. In relation to the application of the *Monetary Gold* principle, on behalf of India it was submitted that a judgment of the Court would serve no legitimate purpose in the absence of other indispensable parties.

54. The Applicant in its Application submitted a chart, which indicates that India, Pakistan and the United Kingdom, Respondents in these three proceedings put together, possess less than 3 per cent of the total nuclear weapons in the world (RMI's chart in its Application at p. 14). The other countries, who possess the other more than 97 per cent of the nuclear weapons in the world, are not before the Court and consequently the Court is precluded from exercising its jurisdiction in this matter with respect to those States (the States possessing 97 per cent of the nuclear weapons). Therefore, it is indispensable to have the participation of the other countries who possess such a large quantity of the world's nuclear weapons.

55. It was further contended on behalf of the Respondent that it cannot unilaterally enter into negotiations in the absence of other major nuclear powers.

56. The Court considered in its 1996 Advisory Opinion on nuclear weapons that any realistic search for general and complete disarmament would require the co-operation of all States (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 264, para. 100). This was also stated by India's Agent, Ms Neeru Chadha, in her introductory submissions (CR 2016/4, 10 March 2016, p. 11, para. 18).

57. In the Respondent's view, the question of nuclear disarmament must be the subject-matter of a multilateral treaty and such a legislative function is not within the province of the Court, but "is strictly the preserve of the UN inter-governmental forums" (CMI, para. 42).

58. This preliminary objection is substantial in character and it ought to have been adjudicated by the Court.

### **The Court's Judgment would not have any concrete effect**

59. In another preliminary objection, India contends in its Counter-Memorial that a Judgment by the Court in the present case would serve no legitimate purpose and have no practical consequence. It first points out that the majority of nuclear-weapon States which refuse to consent to the Court's jurisdiction could not be bound by such a Judgment to negotiate with India, and that "a unilateral direction to India to carry out negotiations without the same decision being equally applicable to other States would be meaningless". India further notes that such a Judgment would be purposeless, since it has always firmly indicated its willingness to proceed to negotiations on comprehensive nuclear disarmament in the Conference on Disarmament (CMI, paras. 88-90).

60. This preliminary objection also deserved adjudication by the Court.

### **Reservations**

#### **Applicability of India's fourth reservation (disputes relating to situations of hostilities or self-defence)**

61. India's fourth reservation excludes the jurisdiction of the Court for:

"[D]isputes relating to or connected with facts or situations of hostilities, armed conflicts, individual or collective actions taken in self-defence, resistance to aggression, fulfilment of obligations imposed by international bodies, and other similar or related acts, measures or situations in which India is, has been or may in future be involved."<sup>21</sup>

62. India contends that its measures of self-defence are covered by the fourth reservation. In the Respondent's view, all disputes concerning any weapons, including nuclear weapons, which it might choose to possess or develop to protect itself from hostilities, armed conflicts, aggression and other similar or related acts or situations, are therefore excluded from the Court's jurisdiction.

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<sup>21</sup>India's declaration accepting the Court's compulsory jurisdiction.

63. India adds that the RMI has sought to limit the scope of India's reservation artificially to specific situations of use of force. In its view, such an interpretation of the reservation is not in keeping with the plain meaning of the language used — in particular, India deliberately used very broad language — and runs counter to the intention underlying this reservation, which was to exclude from the Court's jurisdiction any matter pertaining to national security and self-defence (CMI, paras. 54-62).

64. This preliminary objection is substantial in character and it ought to have been adjudicated by the Court.

**Applicability of India's fifth reservation (acceptance of jurisdiction exclusively  
for the purposes of the dispute or less than 12 months  
prior to the filing of the application)**

65. India's fifth reservation excludes from the Court's jurisdiction:

“[D]isputes with regard to which any other party to a dispute has accepted the compulsory jurisdiction of the International Court of Justice exclusively for or in relation to the purposes of such dispute; or where the acceptance of the Court's compulsory jurisdiction on behalf of a party to the dispute was deposited or ratified less than 12 months prior to the filing of the application bringing the dispute before the Court.”<sup>22</sup>

66. India claims in its Counter-Memorial that the RMI accepted the jurisdiction of the Court for the sole purpose of the dispute, and that India's fifth reservation therefore applies. The Respondent notes in this respect that the RMI deposited its declaration recognizing the compulsory jurisdiction of the Court on 24 April 2013, and filed the Application in the present case on 24 April 2014; in its view, this demonstrates that “the Declaration was carefully devised so as to permit the [RMI] to lodge its Application on this artificial dispute as it did with an undue haste” (Counter-Memorial of India, paras. 64-71).

67. The Respondent further argues that this chronology in any event shows that the said Application was filed one day before the expiry of the 12-month time-limit set in the fifth reservation of its declaration, which, by itself, constitutes grounds to reject the Application of the RMI (CMI, para. 72).

68. This preliminary objection also deserved to be considered.

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<sup>22</sup>India's declaration accepting the Court's compulsory jurisdiction.

**Applicability of India's seventh reservation (interpretation or application of a multilateral treaty)**

69. India's seventh reservation provides that the Court has no jurisdiction to settle: "disputes concerning the interpretation or application of a multilateral treaty unless all the parties to the treaty are also parties to the case before the Court or [the] Government of India specially agree[s] to jurisdiction [over such disputes]"<sup>23</sup>.

70. India is of the view that, since the real purpose of the Application is to induce the Court to declare that India is in breach of obligations stemming from Article VI of the NPT, its seventh reservation is also applicable in the present case. It contends that the subject-matter of the case, as defined by the RMI in its Memorial, concerns the question of whether Article VI of the NPT gives rise to a general principle of disarmament applicable *erga omnes*, the alleged disputes therefore concerns the interpretation and application of the NPT.

71. India further argues that the legal context in the present case differs in two respects from that in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*: (i) whereas, in the latter case, the United States invoked the violation of treaties which "codified" customary international law, in the present case the RMI is invoking an obligation of customary international law "rooted" in Article VI of the NPT, which thus necessarily requires interpretation by the Court; (ii) while the American reservation excluded "disputes arising under a multilateral treaty", that of India, which is wider, excludes "disputes concerning the interpretation or application of a multilateral treaty", and therefore bars the jurisdiction of the Court to entertain disputes which, as in the present case, concern the interpretation of a treaty or imply such an interpretation (CMI, paras. 74-82).

72. This preliminary objection deserved consideration by the Court.

**Applicability of India's eleventh reservation (disputes the foundations of which existed prior to the date of India's declaration)**

73. India's eleventh reservation excludes from the jurisdiction of the Court: "disputes prior to the date of this declaration, including any dispute the foundations, reasons, facts, causes, origins, definitions, allegations or bases of which existed prior to this date, even if they are submitted or brought to the knowledge of the Court hereafter"<sup>24</sup>.

74. India claims in its Counter-Memorial that this reservation is particularly wide and excludes from the Court's jurisdiction any dispute whose origin is prior to the date on which it filed its 1974 declaration as in the present case. It recalls in this respect that it refused to sign the NPT and to assume obligations under that Treaty in 1968; it concludes that its alleged failure to negotiate nuclear disarmament is a cause which existed prior to its 1974 declaration and, consequently, cannot be the subject-matter of an application before the Court (CMI, paras. 83-87).

75. The Respondent's preliminary objection is substantial in character and it ought to have been adjudicated by the Court.

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<sup>23</sup>India's declaration accepting the Court's compulsory jurisdiction.

<sup>24</sup>*Ibid.*

76. On the basis of the entire materials on record, it can be safely observed that India has been unwavering in its commitment to disarmament. The majority Judgment ought to have held clearly that, on the basis of documents and pleadings of the Parties, no dispute existed between them at the time of filing the Application, while upholding India's first preliminary objection.

(Signed) Dalveer BHANDARI.

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