

DISSENTING OPINION OF JUDGE KLAESTAD

In its Fifth Preliminary Objection the Government of India invokes a reservation contained in its Declaration of 1940 accepting the compulsory jurisdiction of the Court, which excludes from this jurisdiction "disputes with regard to questions which by international law fall exclusively within the jurisdiction of India". It contends that the Court lacks jurisdiction because the present dispute concerning Portugal's alleged right of passage over Indian territory between Daman and the enclaves and between the enclaves themselves relates to questions which fall exclusively within the national jurisdiction of India.

The legal principle applicable to a question of this kind was formulated by the Permanent Court of International Justice in its Advisory Opinion concerning *Nationality Decrees issued in Tunis and Morocco*. Applying that principle to the circumstances of the preliminary phase of the present dispute, I shall have to examine in a summary and provisional manner whether the legal grounds invoked by the Government of Portugal may justify the provisional conclusion that they are of juridical importance for the dispute and, if so, whether these grounds relate to questions of international law.

The Government of Portugal invokes a Treaty of 1779 concluded between Portugal and the Mahratha ruler and various Mahratha Decrees purporting to carry out the provisions of Article 17 of that Treaty. It contends that sovereignty over the enclaves was thereby ceded to Portugal by the Mahratha ruler, while the Government of India alleges that Portugal acquired only certain revocable fiscal rights with regard to the enclaves, and that the sovereignty over them was retained by the Mahratha State. It is possible that this divergence of opinion may have a bearing on the question of right of passage between Daman and the enclaves. As it involves the interpretation of a treaty, it relates to a question of international law.

The Government of Portugal further invokes a Convention of 1785 concluded with the Mahratha ruler. By this Convention it was provided that Portugal was obliged to quell any rebellion which might break out in the enclaves. It is argued that this provision presupposed Portugal's access to the enclaves, thereby affirming her right of passage over Mahratha territory. Whether this view is justified or not may depend on an interpretation of this Convention and would consequently relate to a question of international law.

The Government of Portugal also relies on an alleged local custom which during a period of nearly two centuries is said to

have developed between Portugal and the Mahratha State and its successors. The question whether a possible usage with regard to passage between Daman and the enclaves was exercised in such a manner as to satisfy the requirements of Article 38, paragraph 1 (b), of the Statute of the Court is a question of international law (compare Judgment in the *Asylum* case, *I.C.J. Reports 1950*, pp. 276-277).

The Government of Portugal finally invokes an alleged international general custom as well as general principles of law recognized by civilized nations (Statute, Article 38, paragraphs 1 (b) and (c)), while the Government of India, refuting the Portuguese allegations in this respect, places itself upon the same ground of international law.

It is unnecessary to pursue this summary and provisional examination of the legal grounds invoked by the Government of Portugal in order to form an opinion upon the nature of the dispute. This examination is sufficient to show that in any case some of these grounds may be of juridical importance for the present dispute and that they relate to questions of international law. It is in my view evident that the subject-matter of the dispute can only be decided on the ground of international law, and that it cannot be considered as relating to "questions which by international law fall exclusively within the jurisdiction of India". I am therefore unable to accept the Fifth Preliminary Objection.

With regard to the question whether this Objection should be rejected or joined to the merits, opinions have differed. In my view it should be rejected, since a summary and provisional examination of the legal grounds invoked by Portugal has in a sufficient measure disclosed elements of international law which may be of relevance for the decision of the dispute.

This provisional finding as to the nature of the dispute does not in any way prejudice the consideration of the merits. With regard to the question whether the Portuguese contentions as to the alleged right of passage over Indian territory are justified or not, I have formed no opinion whatsoever. Such an opinion could be arrived at only when the dispute at the next phase of the proceedings has been argued and considered on the merits. The preliminary question whether the Court has jurisdiction to decide these merits should be distinguished from the actual exercise of that jurisdiction.

With regard to the other questions in dispute, I am in general agreement with the Court.

(Signed) Helge KLAESTAD.