

## DISSENTING OPINION OF JUDGE CHAGLA

I regret that I am unable to agree with the conclusion arrived at by the majority of my colleagues. As the matter is of considerable importance, I think it necessary to give the reasons for my dissent.

There are two unique features in this case—one is the third condition in the Portuguese Declaration, and the other is that the Portuguese Application which started this case was filed within three days of the making of the Declaration and before the provision contained in the second part of Article 36 (4) of the Statute of the Court could be complied with. Neither of these aspects has ever been considered by this Court, and they both raise very important questions with regard to the jurisdiction of the Court.

Turning to the First Objection of India, it may be readily granted that the Optional Clause gives the widest freedom to a State which submits to the compulsory jurisdiction of the Court. This freedom is in two respects. A State has the right to define the categories of disputes which it is prepared to submit to the compulsory jurisdiction of the Court. It may make any reservation it likes and it may limit the categories to any extent that it desires. The other respect is that it can limit the time of the pendency of the Declaration. The Declaration may last two years, one year, six months, or even it could be terminable on mere notice. But the third condition of Portugal is an entirely different kind of reservation. It reserves the right to Portugal to alter and modify the scope of its Declaration during the pendency of that Declaration.

It was urged by India that this reservation was retroactive and it was open to Portugal to withdraw a pending litigation by having resort to this reservation. It is pointed out that the expression "from the date of the notification" used in the third condition only indicates the point of time from which the reservation becomes effective; it does not refer to its scope or ambit. There is no limitation placed by Portugal upon the extent of the reservation and, therefore, it is suggested that Portugal, under this third condition, reserves to itself the right of withdrawing a pending litigation before the Court. India is not without support in this interpretation. The reaction of Sweden to this condition was the same as India. (See Sweden's Note to the Secretary-General of the United Nations dated 23rd February, 1956.) Portugal replied to this Note by its Note of 5th July, 1956, in which it stated that this condition did not warrant the conclusion that the Portuguese

Government would be in a position to withdraw from the jurisdiction of the Court any dispute, or category of disputes, already referred to it. If the reservation is retroactive, then there can be no dispute that the reservation is bad. On the other hand, it must be borne in mind that a court must always lean against giving retroactive or retrospective effect to an instrument, the more so when such an interpretation is likely to invalidate the instrument and to deprive a tribunal of its jurisdiction. Even if the language of the reservation is susceptible of this interpretation, if the other interpretation is possible, the Court would rather give the interpretation to the instrument which would render it valid and which would not deprive this Court of its jurisdiction.

But whatever interpretation the Court places upon this condition, it must be an interpretation based upon the language used in the instrument itself. No assistance can be sought from the *ex post facto* and *ex parte* statement made by Portugal to which reference has been made by which it attempted to clarify and elucidate its own Declaration. No canon of construction is more firmly established than the one which lays down that the intention of a party to an instrument must be gathered from the instrument itself and not from what the party says its intention was.

But even if no retroactive effect can be given to Portugal's Declaration, it suffers from a defect, which, in my opinion, is fatal. Once a reservation is made with regard to categories of disputes which are submitted to the compulsory jurisdiction of the Court, categories over which the Court has jurisdiction must be specified and defined. The jurisdiction of the Court with regard to these categories of disputes must be finally accepted when the Declaration is made.

It is futile to try and draw a distinction between the Portuguese reservation and the right to terminate a Declaration at any time. It was suggested in the course of the arguments that, in the latter case, a State can put an end to its obligation to submit to the compulsory jurisdiction of the Court with regard to all categories of disputes, while, in the former case, a more limited right was reserved by Portugal in that it could only limit the scope of its obligation. This argument is specious. In the latter case, by terminating the Declaration, the juridical bond between a declarant State and the other State comes to an end. The State no longer adheres to the Optional Clause and is not liable to the compulsory jurisdiction of the Court with regard to any matter. In the former case, the juridical bond continues. In the latter case, both the right to bring a dispute before the Court and the obligation to submit to the jurisdiction of the Court come to an end. In the former case, the right remains and the State can put an end to the obligation with regard to any dispute at its own discretion.

Distinguished authors have regretted the continuous decline of the Optional Clause, and it is the duty of the Court to prevent any

further decline of this Clause. Judge Lauterpacht in the *Norwegian Loans* case (*I.C.J. Reports of Judgments, Advisory Opinions and Orders*, 1957), when considering the French reservation in that case, said (p. 64) that it "tended to impair the legal—and moral—authority and reality of the Optional Clause", and also (p. 65) that it "threatens to disintegrate that minimum of compromise which is embodied in the Optional Clause". These observations also apply to the novel reservation embodied by Portugal in her Declaration. Acceptance by Portugal of the compulsory jurisdiction of the Court is entirely illusory. The minimum of compromise which is embodied in the Optional Clause is the right given to the State to limit the categories of disputes which it is prepared to submit to the compulsory jurisdiction of the Court; but any further derogation from that minimum of compromise should not be permissible. Once a State, by its Declaration, has expressed its clear will to submit to the compulsory jurisdiction of the Court a particular dispute, the jurisdiction of the Court with regard to that dispute must continue so long as the Declaration lasts. As the intention of the Optional Clause is to make a State accept the compulsory jurisdiction of the Court, any reservation which frustrates that intention must be held to be opposed to the general purpose of the Optional Clause and therefore invalid.

It was suggested that even if this reservation was invalid, as it did not affect the present case, it could be severed from the rest of the Declaration and the rest of the Declaration could be held valid. The doctrine of severance is well settled in municipal law and it also applies to international law. If a provision in an instrument is an essential condition, and if the court is satisfied that in the absence of that essential condition the instrument would not have been executed, then if the condition is bad, the court is powerless and the whole instrument must be declared to be invalid. Otherwise, the court would be writing a new instrument without the essential condition. In this case there cannot be the slightest doubt that the reservation we are considering is an essential condition of Portugal's adherence to the Optional Clause. It is on this condition that Portugal has agreed to confer jurisdiction upon the Court. The condition is of the very essence of the submission of Portugal to the compulsory jurisdiction of the Court, and if this condition is invalid, the whole Declaration must be declared to be invalid.

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As I am of the opinion that India's First Objection should prevail, it would be unnecessary to consider her Second and Fourth Objections, but as they have been argued at considerable length

and as they raise questions of considerable importance, I would like to express my opinion on them.

Both the Objections are based on the fact that Portugal's Declaration was deposited with the Secretary-General of the United Nations on the 19th December, 1955, and the present Application was filed on the 22nd December, 1955. I do not think there is any instance in the history of this Court where a State has filed an Application with such lightning speed. It is urged on behalf of Portugal that adherence to the Optional Clause is a unilateral act by a State and the Declaration comes into force immediately it is deposited with the Secretary-General of the United Nations. It is further pointed out that there is nothing in the Statute or the Rules of the Court which requires that any time should elapse between the making of the Declaration and the filing of the Application. It is therefore said that although copies of the Declaration were not transmitted by the Secretary-General to the Parties to the Statute nor to the Registrar of this Court, and although India had no knowledge that any such Declaration had been made by Portugal, the Declaration became immediately effective, and to the extent that the same obligations were undertaken by the Declaration of Portugal and the Declaration of India, India became liable to be called before the Court in answer to any claim made by Portugal which fell within the scope of the two Declarations.

The narrow question that we have to consider is whether the Statute of the Court contemplates that the Declaration should be immediately effective without knowledge, presumptive or actual, on the part of the other States who have already adhered to the Optional Clause—in other words, whether a juridical bond can be created by a new declarant with the other States who are already Parties to the Optional Clause by the mere deposit of the Declaration with the Secretary-General so as to entitle the new declarant immediately to file an Application and bring another State before the Court. India has contended that by this precipitous Application, Portugal has violated the principle of equality of States before the Court, a principle which is the very basis of the Optional Clause. Portugal, on the other hand, has relied on the letter of the law and has urged that apart from the reciprocity of obligations at the date of the Declaration, there is no other reciprocity or equality which is contemplated by Article 36 (2) of the Statute. Whether the Statute permits a State to file an Application before the ink on its Declaration is dry or not, it will be agreed that this is a practice which should not be countenanced by the Court; and if there is any provision in the Statute which can permit the Court to refuse to entertain Portugal's Application, it should do so under the circumstances of the case.

Article 36 (4) of the Statute consists of two parts: one, making it incumbent upon a State making a Declaration to deposit it with the Secretary-General of the United Nations, and the second

making it incumbent upon the Secretary-General to transmit copies thereof to the Parties to the Statute and to the Registrar of the Court. It is common ground that unless the Declaration is deposited as required by Article 36 (4), the Declaration cannot become effective. It is difficult to understand why, if the first part of Article 36 (4) is mandatory, the second part is not equally mandatory. It is said that the second part is purely administrative or procedural and it merely gives a direction to the Secretary-General to carry out his duties. It is difficult to accept the argument that a provision so unimportant should have found a place in so solemn a document as the Statute of the Court. In my opinion, the same importance should be attached to both the parts of Article 36 (4). There must have been some reason why the framers of the Statute inserted this provision in Article 36 (4) and the obvious reason is that some time should elapse between the making of the Declaration and the filing of an Application.

It is unnecessary in this case to speculate as to what is the proper time that should elapse between the making of the Declaration and the filing of the Application. Sufficient unto the day is the law thereof: and it will be sufficient to deal only with the facts of this case. It is clear that in this case an Application has been filed by Portugal before the second part of Article 36 (4) was complied with, and it is open to the Court to say that the Application is premature and that Portugal should have waited until effect had been given to the provision of the second part of Article 36 (4).

Emphasis has been placed upon the expression "*ipso facto*" used in Article 36 (2) of the Statute. It is suggested that this expression makes it clear that the mere deposit of the Declaration, and nothing more, brings about the consensual bond between the declarant State and the State which has accepted the same obligation. The expression "*ipso facto*" must be read with the words that follow "and without special agreement". What the Statute emphasizes is that apart from the Declaration no special agreement is necessary to attract the Application of the Optional Clause. Article 36 (2), in my opinion, does not deal with the question as to when the Declaration becomes effective. For this purpose we have to turn to Article 36 (4).

There is also force in India's contention that by the timing of Portugal's Application, India was deprived of the right to invoke in her favour the third condition in Portugal's Declaration. It is now well-settled law that a State which is a Party to the Optional Clause is entitled to incorporate into its own Declaration any condition contained in the Declaration of any other State which has adhered to the Optional Clause. (See the *Norwegian Loans* case, *I.C.J. Reports of Judgments, Advisory Opinions and Orders*, 1957.) Therefore, it cannot be disputed that India had the right to make use of the third condition as against Portugal as much as Portugal

had the right as against India. But if this right is to have any meaning or significance, it must be a right which can be exercised. Portugal, by filing the Application when she did, made it impossible for India to exercise that right. Portugal could have invoked this condition any time before filing the Application. India could have only invoked it if she had knowledge of the Declaration before the Application was filed. Once the Application was filed, inasmuch as the condition, as I have pointed out, is not retroactive, India was deprived of that right and was compelled to accept the jurisdiction of the Court whether she liked it or not. In the *Norwegian Loans* case, it was stated that Norway, *equally with France*, was entitled to except from the compulsory jurisdiction of the Court disputes falling within the ambit of France's reservation. In the *Phosphates in Morocco* case, although a particular limitation in the Declaration of one State did not appear in the Declaration of the other, it was held that the limitation must hold good as between the Parties; and in the *Electricity Company of Sofia and Bulgaria* case, the Court said that in consequence of the condition of reciprocity laid down in paragraph 2 of Article 36, the limitation contained in the Declaration of one State must be applicable as between the Parties.

Now what is the reciprocity that Article 36 (2) contemplates? Is it the narrow reciprocity suggested by Portugal, namely, the reciprocity that should subsist at the date of the Application, or a wider reciprocity which would entitle a State to avail itself of every limitation contained in the other Party's Declaration to the same extent and in the same manner as the other Party?

It should be remembered that in the *Norwegian Loans* case, at the date of France's Application, Norway had not availed itself of the reservation contained in France's Declaration with regard to domestic jurisdiction. Therefore, if reciprocity had been narrowly construed in that case, Norway could not have availed herself of that limitation. But the Court held that Norway was as much entitled as France to plead that the particular dispute fell within her domestic jurisdiction. Therefore, strictly, the principle of reciprocity had been given effect to after France's Declaration had been filed and the Court did not confine itself to considering the situation as it existed at the date of France's Application. The question that now arises is whether the Court should not look at the situation as it existed before Portugal filed her Application. And if the Court comes to the conclusion that India could only have exercised the third limitation contained in Portugal's Declaration before Portugal filed her Application, and if India has been deprived of that right, then the principle of reciprocity under Article 36 (2) has been violated. In any view of the case, in my opinion, the

Court should come to the conclusion that the haste with which Portugal filed this Application has resulted in an abuse of the Optional Clause and also an abuse of the processes of the Court, and therefore the Court should refuse to entertain Portugal's Application.

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India's Third Objection is that the present dispute was brought before this Court without preliminary diplomatic negotiations and without the negotiations reaching a deadlock. It is urged by India that the jurisdiction of the Court is confined to deciding legal disputes, and before there can be a dispute, it must be clear that the controversy cannot be settled by negotiations. It is pointed out that before a State is brought before the bar of the International Court, every attempt should first be made to see whether the controversy in question could not be amicably settled. Our attention has been drawn to the various Notes that were exchanged between India and Portugal, and it does appear that Portugal never raised in these Notes the general question of a right of passage as such. What was discussed in these Notes was certain concrete questions relating to special situations arising out of disturbances which had occurred within the Portuguese enclaves; and what Portugal insisted on was that India had incurred an international responsibility by its behaviour at a given time and in a specific situation. Our attention is drawn to the fact that if the general question of a right of passage had been raised in this diplomatic exchange of Notes, this Court would have had a better conception of the right claimed by Portugal. As it is, the Court is not in a position to know or judge what is the actual nature of the right claimed by Portugal. Nor had India been given an opportunity to formulate or express her views with regard to the right claimed by Portugal before the matter was brought before the Court. Reliance is placed on the observations of the Court in the *Electricity Company of Sofia and Bulgaria* case (P.C.I.J., Series A/B, No. 77, p. 132): "What is essential is that, prior to the filing of an Application by one Party bringing a dispute before the Court, the other Party must have been given the opportunity to formulate and to express its views on the subject of the dispute. Only diplomatic negotiations will have afforded such an opportunity."

It is also urged by India that this rule with regard to preliminary diplomatic negotiations does not operate only in those cases where there is a provision to this effect in a treaty between the Parties. The rule is of general application and is based on two considerations: (1) the need of the Court to know what is the subject-matter of the dispute, and (2) efforts made by the Parties to reach an agreement have been fruitless.

There can be no doubt as to the desirability of States negotiating with regard to a dispute and trying to arrive at a fair solution before they avail themselves of the compulsory jurisdiction of the Court. But what we have to consider is whether failure to pursue this desirable course deprives the Court of its jurisdiction. It is clear on the authorities that what the Court has insisted upon is the mere existence of a dispute, and a dispute has been defined as a divergence of opinions or views between two States: It has also been held that this divergence is established after one Government finds that the attitude of the other is contrary to its own. In the *Chorzow Factory* case (Series A, No. 13, p. 10), the Court pointed out that "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, 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 having opposite views." Therefore, it is clear that the dispute should not be manifested in any formal way and all that is necessary is that two Governments should show themselves as holding opposite views. It has also been observed in the case of *Certain German Interests in Upper Silesia* (Series A, No. 6, p. 14): "... a difference of opinion does exist as soon as one of the Governments concerned points out that the attitude adopted by the other conflicts with its own views". It is difficult to take the view that the attitude of India on the question of Portugal's claim with regard to a right of passage does not conflict with the view held by Portugal. I would therefore overrule this Objection.

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Turning to the Fifth Objection, we heard very learned arguments as to the burden of proof. In my opinion, now that all the arguments are before the Court, the question of burden of proof loses much of its importance. But even so, I should like to say a few words about it. It is always for a party which comes before a court or a tribunal to make out a *prima facie* case that the tribunal or court has jurisdiction. If that *prima facie* burden is discharged, it may be that the burden would shift on to the other party. When India objects to the jurisdiction of the Court on the ground that the subject-matter of the dispute falls exclusively within her domestic jurisdiction, it would not be correct to describe her attitude as it has been described by Counsel for Portugal as attempting to obstruct the normal course of statutory procedure. Undoubtedly the party coming to the Court has the right to have the benefit of the procedure

provided by the Statute and the Rules for contentious matters. But that is so only on the assumption that the Court has jurisdiction. All that India has done is to draw the attention of the Court to the fact that, looking to her Declaration, the Court has no jurisdiction over this particular dispute. It is ultimately for the Court to decide the question of jurisdiction and it is only if the Court takes the view that the dispute falls within the ambit of India's Declaration that the matter can go on and the rules of statutory procedure can be given effect. It is equally incorrect to say that inasmuch as India is relying on an exception contained in her Declaration which confers jurisdiction upon the Court the burden is upon her to make good that exception. India has accepted the compulsory jurisdiction with regard to certain categories of disputes, and the particular category with regard to matters falling exclusively within her domestic jurisdiction has been excluded. Therefore, it is for Portugal to establish that the dispute which she has brought before the Court falls within the scope of India's Declaration, and she can only establish that provided she satisfies the Court that the dispute is not exclusively within the domestic jurisdiction of India. The reservation made by India with regard to matters falling exclusively within her domestic jurisdiction is not an exception: it is an essential—an integral—part of her acceptance of the jurisdiction of the Court.

Coming to the substance of the matter, there are certain points which are beyond controversy. The first is that India has exclusive territorial sovereignty over the territory through which Portugal claims a right of passage or a right of transit. I think it is equally indisputable that *prima facie* a State enjoying territorial sovereignty has the right to allow or to prohibit a right of passage or transit through her territories to any other State or to permit a right of passage or transit under such terms and conditions as she thinks proper. It is true that even though a subject-matter may fall within the domestic jurisdiction of a State, the State may not have complete discretion with regard to it but its discretion may be controlled by any international obligation undertaken by it. If India has undertaken any international obligation, then the matter is no longer exclusively within her domestic jurisdiction. In other words, the matter would not be within the reserved domain but would be within the international domain into which the Court can enquire and determine what are her obligations according to international law.

It is true that in a large majority of cases, when an Objection is taken on the ground of domestic jurisdiction, the Court is inclined to join the Objection to the merits because the Court feels that it is impossible to arrive at a decision on this issue without investigating into the merits of the subject. But this is not always

so. Otherwise it would never be open to a State to take a Preliminary Objection on this ground. The test has been clearly laid down by this Court as to what has to be established in order that the Court will not uphold the Objection at a preliminary stage but would stand it over to the hearing. Portugal must establish that the legal grounds relied upon by her justify a provisional conclusion that they are of juridical importance for a decision of the dispute according to international law. (See the classical statement of the law in the *Nationality Decrees of Tunisia and Morocco*, Series B, No. 4, p. 25.) To use simpler language, Portugal must show that her claim discloses an arguable cause of action under international law. Again, to use a different language, Portugal must show that the general rule that the subject-matter being within the domestic jurisdiction of India is within her discretion has been displaced by some rule of international law.

Now what is the subject-matter of the dispute between Portugal and India? I will not consider the various metamorphoses which Portugal's claim has undergone. But as finally indicated to this Court it is a right of transit between Daman and the Portuguese enclaves of Dadra and Nagar-Aveli in order to maintain communications between Daman and these two enclaves. The first striking thing about this alleged right is that it is completely indefinite and vague and, as was described by Counsel for India, "something undefined and disembodied, hard both to exercise and to enforce". When a State comes to this Court claiming a right against another State, it must be a right which should be enforceable. It must be a right which, if conceded by the Court, could be given effect to by the defendant State. No Court would give judgment which could not be carried out by the losing party. And the most surprising feature of Portugal's claim in this case is that if she were to succeed in her contentions, the judgment she would obtain from this Court could never be given effect to by India. If the Court were to declare that Portugal has a right of transit over Indian territory from Daman to the enclaves, it would be impossible for India to know what the nature, extent or content of that right would be. Would Portugal be entitled under this right to transport a whole army from Daman to the enclaves in order to suppress the revolt which has taken place there? Would she be able to transport tanks and artillery and all the paraphernalia of modern arms and armaments? Would she be able to fly aeroplanes over Indian territory in order to bomb the enclaves in order to reduce them to subjection? Or would the right be confined to transit facilities to be given to diplomatic envoys or a small unit in order to maintain law and order in the enclaves? These queries conclusively establish that Portugal has failed to formulate any legal right which she can assert against India. It is only by negotiations which may result in a treaty that the modalities of a right of transit can be settled between India and Portugal. But the Court cannot be called upon to draft a treaty between these

two States. The Court can only pronounce upon an existing right, and if the right claimed is so insubstantial as to be incapable of being translated into something which is enforceable, the Court must come to the conclusion that the right claimed is not a legal right, much less a right recognized by international law or a right with regard to which India's discretion is controlled by any international obligation. It seems to me that on this ground alone India's Preliminary Objection must be sustained. It would be a sheer waste of time of this Court to join this issue to the merits when at the end of it the Court would have to come to the conclusion that no effective declaration can be made in favour of Portugal.

I have already pointed out that it is an elementary principle of international law that a State has exclusive competence within its own territory. This principle was emphatically pronounced by Chief Justice Marshall in the *Schooner Exchange* case (1812, 7 Cranch 116): "The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source." It is not suggested by Portugal that India has ever given her consent to any limitation upon her territorial sovereignty over the territory in question. Although in her Memorial Portugal relied upon treaties between the Maratha rulers and herself, this contention was given up or at least not pressed at the hearing. As a matter of fact, the only treaty which deals with this subject at all is the Portuguese-Maratha Treaty of 1741, which, surprising as it may seem, provides expressly that soldiers of either power are not to enter the territory of the other without permission. If, therefore, India has not given her consent to any limitation upon her sovereignty, is there any other international obligation undertaken by India independently of any treaty or her consent? I may observe in passing that Portugal concedes that the right of transit claimed by her, even though it may be without any immunity, does constitute a limitation upon India's sovereignty.

An international obligation may arise through local custom. If for a considerable period of time Portugal has been exercising this right, then the right may be upheld by international law. But in order that local custom should be established, it is not sufficient for Portugal merely to state that for a long period she maintained

communications between Daman and the enclaves. She must go further and establish that the transit facilities that she had were enjoyed by her as a matter of right and not as a matter of grace or concession on the part of the Indian Government. And if one thing is clear beyond anything else from the record that we have before us, it is that throughout the period in question—from 1818 when the British appeared on the scene onwards—the facilities enjoyed by Portugal with regard to communicating with her enclaves were entirely at the discretion of the Indian Government and they were granted to Portugal as a matter of grace and indulgence. The Indian Government always reserved to itself the right to control the passage or transit facilities and even, if occasion arose, to prohibit it altogether. We have instances where a complete embargo was placed by the Indian Government on the carriage of certain goods. We have instances where no less a person than the Consul-General of Portugal reminded the Governor of Diu that authorization by the British authorities was indispensable before any Portuguese troops could cross British territory. Therefore, India is right when she says that a right of passage subject to be revoked in whole or in part by somebody else is not a right at all. I think that Portugal realizes the weakness of her case under this head and therefore what has been really urged before us by Portugal is that this right which she claims is warranted by general principles of international law. General principles of international law would be applicable if Portugal establishes a general custom in contradistinction to a local custom by which a State has the right to have access to enclaves by transit facilities being given to her in order to maintain communications between herself and her enclaves. Now the only general custom which is comparable to the question we have to consider which international law recognizes is the right of innocent passage in territorial seas and in maritime parts of international rivers, and also immunity given to diplomatic representatives when they are in transit between one State and another. No general custom has ever been established permitting a State to have access to her enclaves as of right. Portugal has relied on a learned study made by Professor Bauer of other enclaves, but this study only shows that the right of passage either arises out of treaty or out of local custom which is not applicable to the present case.

A principle of international law may also be imported from municipal law where the principle in municipal law is universally recognized and when that principle is not in conflict with any rule of international law itself; and the strongest reliance is placed by Portugal on the principle of municipal law which may be described as an easement of necessity. It is said that when you have an owner

of land and his land is surrounded by the lands of other owners, the former has a right of access to a public road. This right of access arises out of necessity because but for this access the owner would be landlocked and would not be able to get out of his land, and therefore, in these circumstances, municipal law presupposes a right of way in the first owner over the lands of other owners. In my opinion, it would be extremely unsafe to draw an analogy between the rights of an owner and the obligations of other owners under municipal law and the rights and obligations of States under international law. There can be no comparison between private property and territorial sovereignty nor can there be any comparison between a citizen and a sovereign State. A sovereign State can pass any legislation affecting private property. It can compel the owner of land to cede any right to neighbouring owners. But that surely cannot be true of territorial sovereigns. Portugal cannot compel India to cede any right to her nor can India be placed under any obligation because Portugal is under a necessity to have access to her enclaves. Further, such a rule would obviously be in contradiction with the one undisputed well-established principle of international law, namely, territorial sovereignty, and therefore there is no scope for importing this principle of municipal law into the domain of international law.

Even in municipal law parties may agree as to the nature and extent of an easement, and if parties agree, then municipal law will not presume an easement of necessity. In this case, the relations between Portugal and the territorial sovereign of India clearly demonstrate that the conditions of Portugal's passage or transit over Indian territory were clearly settled and those conditions were that Portugal had no right to a passage or transit but she could only be afforded such facilities as the Indian Government, in its absolute discretion, thought fit to concede. Therefore, Portugal has failed to make out any case, let alone an arguable case, that India's discretion with regard to this particular subject-matter, which clearly falls within her own domestic jurisdiction, is controlled by any international obligation or that there is any rule of international law which takes this matter out of the reserved domain. Under the circumstances, I think that the Court should uphold this Objection raised by India and should decide that there is no necessity for further investigation of the facts and no useful purpose would be served by joining this Objection to the hearing.

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I now come to the last and final Objection of India, which is Objection Six. It is with regard to *ratione temporis*, and India's contention is that the dispute brought before the Court arose

prior to 5th February, 1930, with regard to situations or facts prior to that date and that therefore the dispute is clearly excluded from the competence of the Court by reason of her reservation in her Declaration of 28th February, 1940. It is clear from the jurisprudence of the Court that the only facts or situations which can be considered for the purpose of this Objection are those facts or situations which are the source or cause of the dispute. It is clear to my mind that the source of the dispute is the divergence of opinion between India and Portugal as to the legal implications of what transpired from 1812 onwards. The divergence is not only as to what happened in 1954. The divergence is as to the whole concatenation of facts and situations relied on by Portugal for asserting her right. Portugal says that India has acted contrary to her obligation to allow right of passage to Portugal and the breach of her obligation only took place in 1954, and therefore it is irrelevant to consider for the purpose of this Objection any facts or situations prior to 1954. This is clearly a fallacy. The obligation of India itself is in dispute and according to Portugal herself the obligation of India arises from facts and situations prior to 1930. The question that the Court has to consider is not whether there was any breach of Portugal's legal right by India in 1954. The question is whether Portugal had any legal right at all and Portugal can only establish the legal right by a body of evidence from 1818 to 1954 which forms a single and continuous whole. This is not a new dispute which Portugal seeks to bring before the Court. The conflict of views between the two Governments stretches back to 1818. It is a dispute as to the true result in law of facts and situations from 1818 onwards. In the *Phosphates in Morocco* case (P.C.I.J., Series A/B, No. 74, p. 24), the Court observed that the expression "facts and situations" was wide enough to embrace all the different facts capable of giving rise to a dispute, and a situation would include within its connotation not merely facts but also legal consequences resulting from a given set of facts. Again, in the *Phosphates in Morocco* case, dealing with the general object of the limitation *ratione temporis*, it is stated (p. 24): "... it was inserted with the object of depriving the acceptance of the compulsory jurisdiction of any retroactive effects, in order both to avoid, in general, a revival of old disputes, and to preclude the possibility of the submission to the Court by means of an application of situations or facts dating from a period when the State whose action was impugned was not in a position to foresee the legal proceedings to which these facts and situations might give rise". This observation in all its force applies to the present case. The Government of India was not in a position to foresee the legal proceedings to which the facts and situations from 1818 onwards might give rise. And the whole object of India's limitation contained in her Declaration is to prevent adjudication by the Court with regard to such

facts and situations. In my opinion, there is no answer to India's Sixth Objection.

I should like to make one general observation with regard to the question of the jurisdiction of the Court. It has been said that a good judge extends his jurisdiction. This dictum may be true of a judge in a municipal court; it is certainly not true of the International Court. The very basis of the jurisdiction of this Court is the will of the State, and that will must clearly demonstrate that it has accepted the jurisdiction of the Court with regard to any dispute or category of disputes. Therefore, whereas a municipal court may liberally construe provisions of the law which confer jurisdiction upon it, the International Court on the other hand must strictly construe the provisions of the Statute and the Rules and the instruments executed by the States in order to determine whether the State objecting to its jurisdiction has in fact accepted it.

I would, therefore, dismiss Portugal's claim on the ground that the Court has no jurisdiction to entertain it.

*(Signed)* M. C. CHAGLA.