

DISSENTING OPINION OF JUDGES WINIARSKI AND  
BADAWI

[*Translation*]

It is with great regret that we find ourselves unable to subscribe to the decision of the Court which rejects the Sixth Objection of the Indian Union and consequently finds that the Court has jurisdiction in the present case.

1. By its Declaration of 19 September 1929, ratified on 5 February 1930, India accepted the compulsory jurisdiction of the Court for disputes that might arise after the date of ratification with regard to situations or facts subsequent to that ratification.

The date of 5 February 1930—which we shall call the crucial date—was maintained in the Indian Declaration of 28 February 1940. The twofold condition set out in that Declaration constitutes an important limitation *ratione temporis* of the obligation assumed by the Indian Union.

The Parties discussed at length the bearing of the Sixth Objection upon the present case; they did so in their written pleadings and at the hearings, both in 1957, during the proceedings on the Preliminary Objections, and in the present stage of the case concerned with the merits. The fact that the Court, in 1957, decided to join this objection to the merits shows how aware it was of the importance, not to say the necessity, of only deciding upon the fate of this objection when it had obtained sufficient knowledge about the facts of the dispute.

Of the two limitations just mentioned, the Judgment rejects the first: the Court has admitted the argument that the dispute arose after 5 February 1930, the crucial date of the Indian Declaration; the discussion of the merits furnished no evidence to the contrary. On the other hand, the question whether the dispute arose with regard to situations or facts subsequent to that date should, in our opinion, be answered in the sense of the Indian argument, thus involving as a consequence a finding by the Court that it is without jurisdiction.

The final submission of Portugal on this point is *inter alia* :

“Whereas ... the situations or facts in respect of which the dispute arose are likewise subsequent to 5 February 1930, since they also date from 1954;

Whereas these situations or facts are really nothing but those giving rise to the dispute, and whereas one must regard as such the situations or facts imputed by the applicant State to the respondent State as unlawful, i.e. as constituting violations of the respondent State's international obligations;

Whereas the situations or facts which Portugal imputes to the Indian Union as unlawful also date from 1954, as has already been pointed out;

For these reasons,

May it please the Court to dismiss the Objection.”

2. When the case was heard in Court, both Parties invoked the Judgment of the Permanent Court of International Justice in the *Phosphates in Morocco* case, seeking in it arguments to support their respective claims.

That Judgment, with the Judgment given in the case of the *Electricity Company of Sofia and Bulgaria*, is an important contribution by the jurisprudence of the Permanent Court to the study of the question of limitations *ratione temporis* to the obligations of States which accept the compulsory jurisdiction of the Court. We feel bound to refer to it.

The Judgment quoted itself warns the parties against hasty conclusions.

In one place it states “that the use of these two terms [situations or facts] shows the intention of the signatory State to embrace, in the most comprehensive expression possible, all the different factors capable of giving rise to a dispute”. And it goes on to say: “The Court [the Permanent Court of International Justice] also observes that the two terms ‘situations’ and ‘facts’ are placed in conjunction with one another, so that the limitation *ratione temporis* is common to them both, and that the employment of one term or of the other could not have the effect of extending the compulsory jurisdiction.” In another passage the Judgment says: “The question whether a given situation or fact is prior or subsequent to a particular date is one to be decided in regard to each specific case, just as the question of the situations or facts with regard to which the dispute arose must be decided in regard to each specific case.”

It is the duty of the Court to establish a relationship contemplated by the Declaration between the dispute and the “situations or facts”.

3. The Portuguese Counsel tried to keep the content of these notions—situations or facts—within the narrowest possible limit. In their view “the facts or situations” must be understood to mean those “which the applicant Party imputes to the respondent Party as unlawful”. “A State commits certain acts, creates certain situations. Another State stigmatizes these acts or situations as unlawful. It declares that they violate its right...” And again: “All that has to be considered is the situation denounced as unlawful by the applicant State and what unlawful act that State puts forward as the origin of that situation.”

It was observed in this connection that the Permanent Court considered it sufficient, as a reason for holding itself to be without jurisdiction, that the act which was the subject of the dispute

between France and Italy was merely the application of a *dahir* of 1920, that is, a date earlier than the crucial date, and held that it was unnecessary to consider whether the *dahir* was or was not contrary to the international obligations assumed by France. In order to appreciate the Court's meaning, the important point in this statement to keep in mind is that, in order to dismiss the arguments of Italy, the Court saw no need to determine that the situations or facts which gave rise to the dispute were unlawful acts. A State does not commit an unlawful act, nor incur international responsibility, simply by enacting a law containing provisions that are incompatible with its international undertakings. If the application of that law leads to acts which conflict with the State's international undertakings, the judge will simply declare that that State cannot validly invoke its law in support of those acts. The Permanent Court of International Justice decided in that sense on two or three occasions.

The *dahirs* of 1920 were not in themselves unlawful acts; nevertheless, the French objection was allowed, because they were the source of the acts denounced by Italy as unlawful and they were prior to the crucial date.

4. The Portuguese case appears to assign to the applicant State the principal if not decisive part in determining the sources of the dispute. It was said on behalf of Portugal that the facts and situations really deserving that name are "those facts or situations which the applicant Party imputes to the Respondent as unlawful".

The Court cannot simply register this claim by the applicant State, especially as that State, confronted with the crucial date, may have an interest in circumscribing the period of time; for instance, by ignoring certain relationships or by minimizing their bearing upon its case; in a word, by isolating the dispute from the situation of which it is the result; just as the respondent State may tend to antedate the sources of the dispute by attributing them to a time when they would not be covered by the Declaration.

The Court remains entirely free in its examination of the connections between the facts and situations of the case and the subject of the dispute. In some cases, where the facts are isolated and easily ascertainable, that task will be comparatively easy; in other cases, where the situation or state of affairs or skein of *de facto* and *de jure* relationships is complex and difficult to unravel, the task may be a hard one; but the first question of all to decide is the jurisdiction of the Court.

5. We find it hard to accept the Portuguese argument for another reason: it appears to confuse the facts of the dispute with the facts and situations from which that dispute arose, to employ a formula adopted by the Permanent Court. The facts of the dispute may be of

recent date and may be comprised within a comparatively short space of time, whereas the facts or situations from which the dispute arose may date back far enough to fall outside the jurisdiction of the Court as accepted by the Declaration of the respondent State. In the Judgment already quoted, the Permanent Court of International Justice said: "It would be impossible to admit the existence of such a relationship [a really subsequent date] between a dispute and subsequent factors [subsequent to the crucial date] which either presume the existence or are merely the confirmation or development of earlier situations or facts constituting the real causes of the dispute."

We will cite one more dictum of the Permanent Court: "The dispute cannot be separated from the situation of which it is the result." Thus, the Permanent Court implies that there may be cases in which one of the Parties tries to separate the dispute from the situation of which it is the result.

In the case now before the Court, the applicant State declares that all the facts and situations relating to the dispute are comprised within the year 1954, and do not date back farther; these are exclusively the acts which it imputes to the opposite Party as unlawful. The latter, however, replies that the case is in fact not so simple, that the facts and situations from which the dispute arose already existed before 1930, to which the applicant State replies that until 1954 it had no cause of complaint and that the various incidents, differences of opinion, minor disputes, and even formal prohibitions are to be ascribed only to the exercise by the territorial State of a control and regulation which Portugal readily admits to have been legitimate. Portugal declares that it has always possessed and effectively exercised the right of passage, a general right, within the limits necessary for the exercise of its sovereignty over the enclaves, and that that right was respected by the territorial State until 1954.

The Judgment seems to admit that the situation which forms the origin of the dispute is both prior and subsequent to the crucial date, but from this it draws conclusions to which we cannot subscribe. It begins by finding that the limitation *ratione temporis* in the Indian Declaration is drafted "in a positive manner ... indicating the disputes which are included within that acceptance". It certainly does not proceed in a negative manner by excluding disputes arising from situations or facts prior to the crucial date, but there is no doubt that the Indian Union, when it accepted the compulsory jurisdiction of the Court for subsequent situations or facts giving rise to disputes, intended to exclude prior situations or facts.

The Judgment in the *Phosphates in Morocco* case, already quoted, also says: "However, in answering these questions it is necessary always to bear in mind the will of the State which only accepted the compulsory jurisdiction within specified limits and consequently

only intended to submit to that jurisdiction disputes having actually arisen from situations or facts subsequent to its acceptance.”

6. Portugal sees in the past, beginning with 1779 and continuing till the events of 1954, only the source of its right of passage. The terms are those which the Permanent Court of International Justice had used in its Judgment in the *Electricity Company of Sofia and Bulgaria* case. There the Bulgarian objection *ratione temporis* invoked the decision of the Arbitral Tribunal which preceded the crucial date. But the problem is a different one: the decision of the Arbitral Tribunal had been recognized by both parties to the dispute as lawfully binding upon them; the fact was indisputable. The dispute referred only to certain measures taken by the Bulgarian authorities after the crucial date which Belgium considered to be at variance with the terms of the arbitral decision. The Permanent Court of International Justice found that the source of the dispute was not prior to the crucial date fixed by the Bulgarian Declaration.

In our own case there is no law jointly recognized by both Parties. Portugal claims to infer one, among other things, from practice, that is to say from a series of acts and facts going back more than 150 years; the Indian Union relies upon the same long practice to maintain that the alleged right of passage in Portugal's favour has no existence. For the problem which concerns us, we have not to know who is right and who is wrong; the question to be determined is whether it is not the same situation which entered into an acute stage and reached a climax in 1954, leading rapidly to a dispute and giving rise to the proceedings before the Court. The question is whether the acts denounced by Portugal as unlawful have their origin in a situation going back beyond the crucial date.

We find it hard to subscribe to the interpretation of the Indian Declaration whereby it is enough for the situation or fact concerning the dispute to be subsequent to the crucial date, in order that the Court's jurisdiction may be admitted, still less to the distinction made between a situation and a fact, which, in our opinion arbitrarily, ascribes to the notion of situation a purely geographical meaning (the enclave), whereas that is only one factor in the situation, and the latter, a compound of relationships of fact and law, covers the problem of passage in all its aspects as it presented itself to the Parties in the British and post-British periods. Moreover, it is not possible, for the purposes of the interpretation of the Indian Declaration, to join the facts of the dispute, which date from 1954, to the earlier situation and to regard them as a comprehensive whole which “came into existence only after 5 February 1930”. This is at variance with the clearly expressed intention of the Indian Declaration. If the situation from which the dispute arose goes back beyond the crucial date the consent of the Indian Union is lacking. We say advisedly: situation from which the dispute

arose; it is not a question of a more or less ancient treaty or of a rule of law established a longer or shorter time ago.

7. What seems to us to be decisive is the nature of the action brought by the Portuguese Government.

In the final Submissions of Portugal, the first and principal claim is as follows:

“May it please the Court to adjudge and declare that the right of passage between the enclaves of Dadra and Nagar-Aveli and between these enclaves and the coastal district of Daman, as defined above, is a right possessed by Portugal and which must be respected by India.”

What the Portuguese Government is asking of the Court, therefore, is that it shall deliver in the first place a declaratory judgment. The Permanent Court of International Justice delivered such judgments. In its Judgment No. 11, interpreting Judgments Nos. 7 and 8, it said:

“The Court’s Judgment No. 7 is in the nature of a declaratory judgment, the intention of which is to ensure recognition of a situation at law once and for all and with binding force as between the Parties; so that the legal position thus established cannot again be called in question in so far as the legal effects ensuing therefrom are concerned.”

That is exactly what the first Portuguese submission is asking from the Court. There is therefore no question of unlawful acts; and although this claim is followed by the two others, complementary and contingent, it constitutes the very essence of the case.

It is permissible to enquire whether, in the face of this first submission, the arguments of Portugal with regard to the Sixth Objection retain any force. For here it is not simply a case of applying an indisputable rule of law in order to provide a remedy for the violation of the right of one Party resulting from an unlawful act by the other Party. The object of the suit, as it follows from the first Portuguese Submission, is to obtain from the Court a recognition and statement of the situation at law between the Parties; that is not limited to the events of 1954 and cannot be regarded as part of a collective whole subsequent to the crucial date. On the contrary, all the factors in the dispute contested by one or the other Party are to be found in the post-Maratha period; the Parties did not view matters and their respective positions in the same light; the origin of the present dispute could be seen in that prolonged situation.

It seems, however that we should be justified in going farther than that.

Unable to admit that the right of passage claimed by Portugal has its basis in a treaty, the Court was obliged to turn its attention to the practice which might have been accepted as binding upon the

Parties. It then found itself faced with a very special situation in which, even over a considerable period of time, the Parties were unable to reach agreement as to their respective rights and obligations. They ask the Court to define them. In these circumstances it is clear that not only the situation which gave rise to the present dispute, but also the very subject of the dispute, as it follows from the principal Portuguese claim, come within the period preceding the crucial date of the Indian Declaration.

*(Signed)* B. WINIARSKI.

*(Signed)* A. BADAWI.