

CASE CONCERNING RIGHT OF PASSAGE OVER INDIAN TERRITORY (PRELIMINARY OBJECTIONS)

Judgment of 26 November 1957

The case concerning right of passage over Indian territory (Preliminary Objections) between Portugal and India was submitted by Application of the Portuguese Government requesting the Court to recognize and declare that Portugal was the holder or beneficiary of a right of passage between its territory of Damão (littoral Damão) and its enclaves of Dadra and Nagar-Aveli and between each of the latter and that this right comprises the faculty of transit for persons and goods, including armed forces, without restrictions or difficulties and in the manner and to the extent required by the effective exercise of Portuguese sovereignty in the said territories, that India has prevented and continues to prevent the exercise of the right in question, thus committing an offence to the detriment of Portuguese Sovereignty over the enclaves and violating its international obligations and to adjudge that India should put an immediate end to this situation by allowing Portugal to exercise the right of passage thus claimed. The Application expressly referred to Article 36, paragraph 2, of the Statute and to the Declarations by which Portugal and India have accepted the compulsory jurisdiction of the Court.

The Government of India for its part raised six Preliminary Objections to the jurisdiction of the Court which were based on the following grounds:

The First Preliminary Objection was to the effect that a condition in the Portuguese Declaration of December 19th, 1955, accepting the jurisdiction of the Court reserved for that Government "the right to exclude from the scope of the present Declaration at any time during its validity any given category or categories of disputes by notifying the Secretary-General of the United Nations and with effect from the moment of such notification" and was incompatible with the object and purpose of the Optional Clause, with the result that the Declaration of Acceptance was invalid.

The Second Preliminary Objection was based on the allegation that the Portuguese Application of December 22nd, 1955, was filed before a copy of the Declaration of Portugal accepting the compulsory jurisdiction of the Court could be transmitted to other Parties to the Statute by the Secretary-General in compliance with Article 36, paragraph 4, of the Statute. The filing of the Application had thus violated the

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equality, mutuality and reciprocity to which India was entitled under the Optional Clause and under the express condition of reciprocity contained in its Declaration of February 28th, 1940, accepting the compulsory jurisdiction of the Court.

The *Third Preliminary Objection* was based on the absence, prior to the filing of the Application, of diplomatic negotiations which would have made it possible to define the subject matter of the claim.

The *Fourth Preliminary Objection* requested the Court to declare that since India had ignored the Portuguese Declaration before the Application was filed, India had been unable to avail itself on the basis of reciprocity of the condition in the Portuguese Declaration enabling it to exclude from the jurisdiction of the Court the dispute which was the subject matter of the Application.

The *Fifth Preliminary Objection* was based on the reservation in the Indian Declaration of Acceptance which excludes from the jurisdiction of the Court disputes in regard to questions which by international law fall exclusively within the jurisdiction of the Government of India. That Government asserted that the facts and the legal considerations adduced before the Court did not permit the conclusion that there was a reasonably arguable case for the contention that the subject matter of the dispute was outside its domestic jurisdiction.

Finally, in the *Sixth Preliminary Objection*, the Government of India contended that the Court was without jurisdiction on the ground that India's Declaration of Acceptance was limited to "disputes arising after February 5th, 1930 with regard to situations or facts subsequent to the same date." The Government of India argued: first, that the dispute submitted to the Court by Portugal did not arise after February 5th, 1930 and, secondly, that in any case, it was a dispute with regard to situations and facts prior to that date.

The Government of Portugal had added to its Submissions a statement requesting the Court to recall to the Parties the universally admitted principle that they should facilitate the accomplishment of the task of the Court by abstaining from any measure capable of exercising a prejudicial effect in regard to the execution of its decision or which might bring about either an aggravation or an extension of the dispute. The Court did not consider that in the circumstances of the present case it should comply with this request of the Government of Portugal.

In its Judgment, the Court rejected the First and the Second Preliminary Objections by fourteen votes to three, the Third by sixteen votes to one and the Fourth by fifteen votes to two. By thirteen votes to four it joined the Fifth Objection to the merits and by fifteen votes to two joined the Sixth Objection to the merits. Finally, it declared that the proceedings on the merits were resumed and fixed as follows the time-limits for the rest of the proceedings:

For the filing of the Counter-Memorial of India, February 25th, 1958; for the filing of the Portuguese Reply, May 25th, 1958; for the filing of the Indian Rejoinder, July 25th, 1958.

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Judge Kojevnikov stated that he could not concur either in the operative clause or in the reasoning of the Judgment because, in his opinion, the Court should, at the present stage of the proceedings, have sustained one or indeed more of the Preliminary Objections.

Vice-President Badawi and Judge Klaestad appended to

the Judgment statements of their dissenting opinions. M. Fernandes, Judge *ad hoc*, concurred in the dissenting opinion of Judge Klaestad and Mr. Chagla, Judge *ad hoc*, appended to the Judgment a statement of his dissenting opinion.

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With regard to the *First Preliminary Objection* to the effect that the Portuguese Declaration was invalid for the reason that the condition enabling Portugal to exclude at any time from the scope of that Declaration any given categories of disputes by mere notification to the Secretary-General, the Court said that the words used in the condition, construed in their ordinary sense, meant simply that a notification under that condition applied only to disputes brought before the Court after the date of the notification. No retroactive effect could thus be imputed to such a notification. In this connection the Court referred to the principle which it had laid down in the *Nottebohm* case in the following words: "An extrinsic fact such as the lapse of the Declaration by reason of the expiry of the period or of denunciation cannot deprive the Court of the jurisdiction already established." The Court added that this principle applied both to total denunciation, and to partial denunciation as contemplated in the impugned condition of the Portuguese Declaration.

India having contended that this condition had introduced into the Declaration a degree of uncertainty as to reciprocal rights and obligations which deprived the Acceptance of the compulsory jurisdiction of the Court of all practical value, the Court held that as Declarations and their alterations made under Article 36 of the Statute had to be deposited with the Secretary-General it followed that, when a case was submitted to the Court, it was always possible to ascertain what were, at that moment, the reciprocal obligations of the Parties in accordance with their respective Declarations. Although it was true that during the interval between the date of the notification to the Secretary-General and its receipt by the Parties to the Statute there might exist some element of uncertainty, such uncertainty was inherent in the operation of the system of the Optional Clause and did not affect the validity of the condition contained in the Portuguese Declaration. The Court noted that with regard to any degree of uncertainty resulting from the right of Portugal to avail itself at any time of the Condition in its Acceptance, the position was substantially the same as that created by the right claimed by many Signatories of the Optional Clause, including India, to terminate their Declarations of Acceptance by simple notification without notice. It recalled that India had done so on January 7th, 1956, when it notified the Secretary-General of the denunciation of its Declaration of February 28th, 1940 (relied upon by Portugal in its Application), for which it simultaneously substituted a new Declaration incorporating reservations which were absent from its previous Declaration. By doing so, India achieved in substance the object of the condition in Portugal's Declaration.

Moreover, in the view of the Court, there was no essential difference with regard to the degree of uncertainty between a situation resulting from right of total denunciation and that resulting from the condition in the Portuguese Declaration which left open the possibility of a partial denunciation. The Court further held that it was not possible to admit as a relevant differentiating factor that while in the case of total denunciation the denouncing State could no longer invoke any rights accruing under its Declaration, in the case of a par-

tial denunciation under the terms of the Portuguese Declaration Portugal could otherwise continue to claim the benefits of its Acceptance. The principle of reciprocity made it possible for other States including India to invoke against Portugal all the rights which it might thus continue to claim.

A third reason for the alleged invalidity of the Portuguese Condition was that it offended against the basic principle of reciprocity underlying the Optional Clause, inasmuch as it claimed for Portugal a right which in effect was denied to other Signatories whose Declarations did not contain a similar condition. The Court was unable to accept this contention. It held that if the position of the Parties as regards the exercise of their rights was in any way affected by the unavoidable interval between the receipt by the Secretary-General of the appropriate notification and its receipt or by the other Signatories, that delay operated equally in favour of or against all Signatories of the Optional Clause.

The Court also refused to accept the view that the Condition in the Portuguese Declaration was inconsistent with the principle of reciprocity inasmuch as it rendered inoperative that part of paragraph 2 of Article 36 which refers to the acceptance of the Optional Clause in relation to States accepting "the same obligation". It was not necessary that "the same obligation" should be irrevocably defined at the time of acceptance for the entire period of its duration; that expression simply meant no more than that, as between the States adhering to the Optional Clause, each and all of them were bound by such identical obligations as might exist at any time during which the acceptance was mutually binding.

As the Court found that the condition in the Portuguese Declaration was not inconsistent with the Statute, it was not necessary for it to consider the position whether, if it were invalid, its invalidity would affect the Declaration as a whole.

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The Court then dealt with the *Second Objection* based on the allegation that as the Application was filed before Portugal's acceptance of the Court's jurisdiction could be notified by the Secretary-General to the other Signatories, the filing of the Application violated the equality, mutuality and reciprocity to which India was entitled under the Optional Clause and under the express condition contained in its Declaration. The Court noted that two questions had to be considered: first, in filing its Application on the day following the deposit of its Declaration of Acceptance, did Portugal act in a manner contrary to the Statute; second, if not, did it thereby violate any right of India under the Statute or under its Declaration.

India maintained that before filing its Application Portugal ought to have allowed such period to elapse as would reasonably have permitted the other Signatories of the Optional Clause to receive from the Secretary-General notification of the Portuguese Declaration.

The Court was unable to accept that contention. The contractual relation between the Parties and the compulsory jurisdiction of the Court resulting therefrom are established "*ipso facto* and without special agreement" by the fact of the making of the Declaration. A State accepting the jurisdiction of the Court must expect that an Application may be filed against it before the Court by a new declarant State on the same day on which that State deposits its Acceptance with the Secretary-General.

India had contended that acceptance of the Court's jurisdiction became effective only when the Secretary-General

had transmitted a copy thereof to the Parties. The Court held that the declarant State was concerned only with the deposit of its Declaration with the Secretary-General and was not concerned with the duty of the Secretary-General or the manner of its fulfilment. The Court could not read into the Optional Clause the requirement that an interval should elapse subsequent to the deposit of the Declaration. Any such requirement would introduce an element of uncertainty into the operation of the Optional Clause system.

As India had not specified what actual right which she derived from the Statute and the Declaration had been adversely affected by the manner of the filing of the Application, the Court was unable to discover what right had in fact thus been violated.

Having arrived at the conclusion that the Application was filed in a manner which was neither contrary to the Statute nor in violation of any right of India, the Court dismissed the *Second Preliminary Objection*.

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The Court then dealt with the *Fourth Preliminary Objection* which was also concerned with the manner in which the Application was filed.

India contended that having regard to the manner in which the Application was filed, it had been unable to avail itself on the basis of reciprocity of the condition in the Portuguese Declaration and to exclude from the jurisdiction of the Court the dispute which was the subject matter of the Application. The Court merely recalled what it had said in dealing with the *Second Objection*, in particular that the Statute did not prescribe any interval between the deposit of a Declaration of Acceptance and the filing of an Application.

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On the *Third Preliminary Objection* which invoked the absence of diplomatic negotiations prior to the filing of the Application, the Court held that a substantial part of the exchanges or views between the Parties prior to the filing of the Application was devoted to the question of access to the enclaves, that the correspondence and notes laid before the Court revealed the repeated complaints of Portugal on account of denial of transit facilities, and that the correspondence showed that negotiations had reached a deadlock. Assuming that Article 36, paragraph 2, of the Statute by referring to legal disputes, did require a definition of the dispute through negotiations, the condition had been complied with.

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In its *Fifth Objection*, India relied on a reservation in its own Declaration of Acceptance which excludes from the jurisdiction of the Court disputes with regard to questions which by international law fall exclusively within the jurisdiction of the Government of India, and asserted that the facts and the legal considerations adduced before the Court did not permit the conclusion that there was a reasonably arguable case for the contention that the subject matter of the dispute was outside the exclusive domestic jurisdiction of India.

The Court noted that the facts on which the Submissions of India were based were not admitted by Portugal and that elucidation of those facts and their legal consequences would involve an examination of the practice of the British, Indian and Portuguese authorities in the matter of the right of passage, in particular to determine whether this practice showed that the Parties had envisaged this right as a question which according to international law was exclusively within the jurisdiction of the territorial sovereign. All these and similar questions could not be examined at this preliminary stage without prejudging the merits. Accordingly, the Court decided to join the Fifth Objection to the merits.

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Finally, in dealing with the *Sixth Objection* based on the reservation *ratione temporis* in the Indian Declaration limiting the Declaration to disputes arising after February 5th, 1930, with regard to situations or facts subsequent to that date, the Court noted that to ascertain the date on which the dispute had arisen it was necessary to examine whether or not the dispute was only a continuation of a dispute on the right of passage which had arisen before 1930. The Court having heard conflicting arguments regarding the nature of the passage formerly exercised was not in a position to determine these two questions at this stage.

Nor did the Court have at present sufficient evidence to enable it to pronounce on the question whether the dispute concerned situations or facts prior to 1930. Accordingly, it joined the Sixth Preliminary Objection to the merits.