

INTERNATIONAL COURT OF JUSTICE

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REPORTS OF JUDGMENTS,  
ADVISORY OPINIONS AND ORDERS

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CASE CONCERNING  
RIGHT OF PASSAGE OVER  
INDIAN TERRITORY

(PORTUGAL *v.* INDIA)

PRELIMINARY OBJECTIONS

JUDGMENT OF NOVEMBER 26th, 1957

**1957**

COUR INTERNATIONALE DE JUSTICE

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RECUEIL DES ARRETS,  
AVIS CONSULTATIFS ET ORDONNANCES

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AFFAIRE DU  
DROIT DE PASSAGE  
SUR TERRITOIRE INDIEN

(PORTUGAL *c.* INDE)

EXCEPTIONS PRÉLIMINAIRES

ARRÊT DU 26 NOVEMBRE 1957

This Judgment should be cited as follows:

*"Case concerning right of passage over Indian territory  
(Preliminary Objections),  
Judgment of November 26th, 1957: I.C.J. Reports 1957, p. 125."*

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Le présent arrêt doit être cité comme suit:

*"Affaire du droit de passage sur territoire indien  
(Exceptions préliminaires),  
Arrêt du 26 novembre 1957: C. I. J. Recueil 1957, p. 125. "*

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## INTERNATIONAL COURT OF JUSTICE

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November 26th, 1957

CASE CONCERNING  
 RIGHT OF PASSAGE OVER  
 INDIAN TERRITORY

(PORTUGAL *v.* INDIA)

## PRELIMINARY OBJECTIONS

*Jurisdiction of Court.—Optional Clause.—Article 36 of Statute.—Preliminary Objection.—Condition in Declaration providing for exclusion of categories of disputes at any time during validity of Declaration.—Consistency of Condition with Article 36 of Statute.—Total and partial denunciation.—Retroactive effect of exclusion.*

*Deposit of Declaration with Secretary-General.—Interval between deposit of Declaration and filing of Application instituting proceedings.—Transmission by Secretary-General of copy of Declaration.*

*Article 36 (2) of Statute.—Prior definition of dispute through negotiations.*

*Reservation of disputes as to matters falling within domestic jurisdiction.—Joinder of Objection to merits.*

*Objection based on reservation ratione temporis.—“Disputes” and “facts or situations” prior to specified date.—Joinder of Objection to merits.*

## JUDGMENT

*Present: President HACKWORTH; Vice-President BADAWI; Judges GUERRERO, BASDEVANT, WINIARSKI, ZORIĆ, KLAESTAD, READ, ARMAND-UGON, KOJEVNIKOV, Sir Muhammad ZAFRULLA KHAN, Sir Hersch LAUTERPACHT, MORENO QUINTANA, CÓRDOVA, WELLINGTON KOO; Judges ad hoc CHAGLA and FERNANDES; Registrar LÓPEZ OLIVÁN.*

In the case concerning right of passage over Indian territory,

*between*

the Republic of Portugal,  
represented by

Dr. João de Barros Ferreira da Fonseca, Ambassador of Portugal  
to the Netherlands,

as Agent,

and by

Professor Inocêncio Galvão Telles, Director of the Faculty of  
Law of Lisbon, Member of the Upper House,

as Agent, Advocate and Counsel,

assisted by

M. Maurice Bourquin, Professor in the Faculty of Law of the  
University of Geneva and in the Graduate Institute of Interna-  
tional Studies,

as Advocate and Counsel,

and by

M. Pierre Lalive d'Épinay, Professor in the Faculty of Law of  
the University of Geneva,

Dr. Henrique Martins de Carvalho, Counsellor for Overseas  
Affairs at the Ministry of Foreign Affairs,

Dr. Alexandre Lobato, Secretary of the Centre for Overseas  
Historical Studies,

as Expert Advisers,

and by

Dr. Carlos Macieira Ary dos Santos, Secretary of the Embassy  
of Portugal at The Hague,

as Secretary,

*and*

the Republic of India,

represented by

Shri B. K. Kapur, Ambassador of India to the Netherlands,

as Agent,

assisted by

Shri M. C. Setalvad, Attorney-General of India,

The Right Hon. Sir Frank Soskice, Q.C., M.P.,

Professor C. H. M. Walcock, C.M.G., O.B.E., Q.C., Chichele Pro-  
fessor of Public International Law in the University of Oxford,

M. Paul Guggenheim, Professor of International Law in the Faculty of Law of the University of Geneva and of the Graduate Institute of International Studies,

Mr. J. G. Le Quesne, Member of the English Bar,  
as Counsel,  
and by

Shri J. M. Mukhi, Legal Adviser in the Ministry of External Affairs,  
as Assistant Agent and Secretary,

THE COURT,

composed as above,

*delivers the following Judgment:*

On December 22nd, 1955, the Minister of Portugal to the Netherlands, acting on the instructions of his Government, filed on that date with the Registrar an Application signed by himself as the appointed Agent of the Portuguese Government and submitting to the Court a dispute between the Republic of Portugal and the Republic of India concerning the right of passage over Indian territory between the territory of Daman (littoral Daman) and the enclaved territories of Dadra and Nagar-Aveli as well as between each of the two last-mentioned territories.

In the Application, the Government of Portugal stated that the Court had jurisdiction in the dispute for the reason that both Portugal and India had accepted the Optional Clause which forms the subject of Article 36, paragraph 2, of the Statute of the Court. The Application was communicated to the Government of India in conformity with Article 40, paragraph 2, of the Statute, on the day on which it was filed. It was also notified under Article 40, paragraph 3, of the Statute to the other Members of the United Nations and to other non-member States entitled to appear before the Court.

By an Order of March 13th, 1956, the Court fixed June 15th, 1956, as the time-limit for the filing of the Memorial of the Government of the Republic of Portugal, and December 15th, 1956, as the time-limit for the filing of the Counter-Memorial of the Government of the Republic of India. In the same Order the Court reserved the rest of the procedure for further decision. The Memorial was filed within the prescribed time-limit. At the request of the Government of India, which had announced its intention to submit a Preliminary Objection to the jurisdiction of the Court, the time-limit for the filing of the Counter-Memorial, or of the Preliminary Objection, was extended, by an Order of November 27th, 1956, to April 15th, 1957. Within the new time-limit thus fixed, the Government of India filed a « Preliminary Objection » designed, on

various grounds stated therein, to obtain a finding from the Court that it is without jurisdiction to entertain the Portuguese Application.

On April 16th, 1957, an Order, recording that the proceedings on the merits were suspended under Article 62, paragraph 3, of the Rules of Court, fixed a time-limit expiring on June 15th, 1957, for submission by the Government of Portugal of a written statement containing its Observations and Submissions on the Preliminary Objections. Subsequently, at the request of the Government of Portugal, the Court, by an Order of May 18th, 1957, extended that time-limit to August 15th, 1957. On that date, the written statement was filed and the case, in so far as the Preliminary Objections were concerned, was ready for hearing.

The Honorable Mahomed Ali Currim Chagla, Chief Justice of Bombay, and M. Manuel Fernandes, Director-General at the Ministry of Justice of Portugal and Member of the International Relations Section of the Upper House, were respectively chosen, in accordance with Article 31, paragraph 3, of the Statute, to sit as Judges *ad hoc* in the present case by the Government of India and the Government of Portugal.

Sittings were held on September 23rd, 24th, 25th, 26th, 27th and 30th and on October 1st, 2nd, 3rd, 5th, 7th, 8th, 10th and 11th, 1957, in the course of which the Court heard oral arguments and replies from Shri B. K. Kapur, Shri M. C. Setalvad, Professors Waldock and Guggenheim, and Sir Frank Soskice, on behalf of the Government of India, and from M. de Barros Ferreira da Fonseca, and Professors Galvão Telles and Maurice Bourquin, on behalf of the Government of Portugal.

In the course of the written and oral proceedings, the following Submissions were made by the Parties:

On behalf of the Government of Portugal, in the Application:

"May it please the Court,

(a) To recognize and declare that Portugal is the holder or beneficiary of a right of passage between its territory of Damão (littoral Damão) and its enclaved territories 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 or other upholders of law and order, without restrictions or difficulties and in the manner and to the extent required by the effective exercise of Portuguese sovereignty in the said territories.

(b) To recognize and declare 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 of Dadra and Nagar-Aveli and violating its international obligations deriving from the above-mentioned sources and from any others, particularly treaties, which may be applicable.

(c) To adjudge that India should put an immediate end to this *de facto* situation by allowing Portugal to exercise the above-

mentioned right of passage in the conditions herein set out."

On behalf of the same Government, in the Memorial:

"May it please the Court,

1. To adjudge and declare:

- (a) that Portugal has a right of passage through the territory of India in order to ensure communications between its territory of Daman (coastal Daman) and its enclaved territories of Dadra and Nagar-Aveli;
- (b) that this right comprises the transit of persons and goods, as well as the passage of representatives of the authorities and of armed forces necessary to ensure the full exercise of Portuguese sovereignty in the territories in question.

2. To adjudge and declare:

- (a) that the Government of India must respect that right;
- (b) that it must therefore abstain from any act capable of hampering or impeding its exercise;
- (c) that neither may it allow such acts to be carried out on its territory;

3. To adjudge and declare that the Government of India has acted and continues to act contrary to the obligations recalled above;

4. To call upon the Government of India to put an end to this unlawful state of affairs."

On behalf of the Government of India, in the Preliminary Objections:

"The Government of India, accordingly, asks the Court to adjudge and declare that it is without jurisdiction to entertain the Portuguese Application, dated 22nd December, 1955, on one or more of the following grounds:

A. (1) The third condition of the Portuguese Declaration of 19th December, 1955, is incompatible with the provisions of the Optional Clause of the Statute of the Court so that the said Declaration is totally invalid as a recognition of the compulsory jurisdiction of the Court under that Clause; and, in consequence,

(2) The Portuguese Application of 22nd December, 1955, which is expressed to found the jurisdiction of the Court in the present case upon the said Declaration, was ineffective to establish the compulsory jurisdiction of the Court under the Optional Clause (paragraphs 25-34).

B. (1) The filing of the Application in the present case by the Portuguese Government on 22nd December, 1955, both violated the principle of equality of States before the Court, and disregarded the express condition of reciprocity contained in the Declaration of the Government of India, dated 28th February, 1940; and, in consequence,

(2) The Portuguese Application of 22nd December, 1955, was ineffective to establish the compulsory jurisdiction of the Court under the Optional Clause (paragraphs 35-44).

C. (1) Portugal, before filing her Application in the present case, did not comply with the rule of customary international law requiring her to undertake diplomatic negotiations and continue them to the point where it was no longer profitable to pursue them, because

(A) She filed her Application on 22nd December, 1955, without ever previously having given to India the slightest indication that she made any such claims to legal rights of passage as she has since formulated in the Memorial; and

(B) She filed her Application on 22nd December, 1955, immediately after making her Declaration accepting the Optional Clause, and only shortly after becoming a Member of the United Nations without attempting to pursue her diplomatic negotiations with India in the new situation created by the change in the legal relations of the Parties brought about by these events; and, in consequence,

(2) When Portugal filed her Application in the present case on 22nd December, 1955, there was not any legal dispute between the Parties and, in addition, Portugal had not fulfilled an essential condition for the invoking of the Court's compulsory jurisdiction under the Optional Clause (paragraphs 45-50).

D. (1) The filing of the Application in the present case by the Portuguese Government on 22nd December, 1955, was a violation of the reciprocal right conferred upon India, both by the terms of the Optional Clause, and by the terms of India's Declaration, to exercise the power to make reservations contained in the third condition of the Portuguese Declaration, dated 19th December, 1955;

(2) The filing of the Application on 22nd December, 1955, having regard to the terms of the Portuguese third condition, was also an abuse of the Optional Clause and of the procedure of the Court; and, in consequence,

(3) For each and both of the above reasons the Portuguese Application of 22nd December, 1955, was ineffective to establish the compulsory jurisdiction of the Court under the Optional Clause (paragraphs 51-58).

E. (1) The dispute relates to a question which under international law is, in principle, a question falling exclusively within the jurisdiction of India (paragraphs 161-168).

(2) A summary view of the facts shows that each of the interested States has for a long time past treated the matters now in dispute as falling exclusively within the jurisdiction of the territorial sovereign and, in view of the principle in E (1) above, this suffices to establish conclusively that the present dispute is one relating to a question which, by international law, falls exclusively within the jurisdiction of India (paragraphs 156-159).

(3) A summary view of the facts shows that in the past Portugal has unequivocally recognized that the matters now in dispute relate to a question falling exclusively within the jurisdiction of the territorial sovereign and the recognition of this by Portugal suffices to establish conclusively that the present dispute is one relating to a question which by international law falls exclusively within the jurisdiction of India (paragraphs 158-159).

(4) Independently of the attitude of the Parties, a summary view of the relevant facts and applicable law shows that none of the legal grounds of claim based on treaties, custom or general principles of law, which are invoked by the Government of Portugal in the Memorial, justify the provisional conclusion that they are of real importance judicially for determining the legal position of the Parties with respect to the passage of Portuguese persons and goods between Daman and the enclaves, with the result that these legal grounds of claim do not afford any basis for holding that the present dispute is not one relating to a question which by international law falls exclusively within the jurisdiction of India (paragraphs 160-197).

(5) Having regard to the principle in E (1) above, the present dispute, for each of the several reasons given in E (2), E (3) and E (4) above, is a dispute relating to a question which by international law falls exclusively within the jurisdiction of India and, as such, is excepted from India's acceptance of compulsory jurisdiction under the Optional Clause by the express terms of her Declaration dated 28th February, 1940 (paragraphs 159-197).

F. (1) If, contrary to the contentions of the Government of India, Portugal establishes that she was asserting some claim to rights of passage between Daman and the enclaves during the period from 1891 to the filing of the Application in the present case, the facts show that this claim was disputed by the British/ Indian Government; and, in consequence,

(2) The dispute submitted to the Court in the Portuguese Application of 22nd December, 1955, is in that event a dispute with regard to a situation antecedent to 5th February, 1930, and, as such, is excluded *ratione temporis* from India's acceptance of compulsory jurisdiction by the express terms of her Declaration dated 28th February, 1940 (paragraphs 198-201)."

On behalf of the Government of Portugal, in its Observations and Submissions in regard to the Preliminary Objections of the Government of India, the following Submissions were stated:

"The Portuguese Government considers that it has shown that not one of the six Preliminary Objections advanced by the Government of India is justified.

Accordingly, it respectfully begs the Court to reject them and to invite the Government of India to present its Submissions on the merits of the dispute."

On behalf of the Government of India at the sitting of September 27th, 1957:

*"First Objection*

The Portuguese Declaration of 19 December, 1955, by reason of the incompatibility of its third condition with the object and purpose of the Optional Clause of the Statute of the Court, is wholly invalid as a recognition of the compulsory jurisdiction of the Court under that Clause; and, as the Portuguese Application of 22 December, 1955, purports to found the jurisdiction of the Court only upon the said invalid Declaration, the Court is without jurisdiction to entertain that Application.

*Second Objection*

Since the Portuguese Application of 22 December, 1955, was filed before the lapse of such brief period as in the normal course of events would enable the Secretary-General of the United Nations, in compliance with Article 36, paragraph 4, of the Statute of the Court, to transmit copies of the Portuguese Declaration of 19 December, 1955, to other parties to the Statute, the filing of the said Application violated the equality, mutuality and reciprocity to which India was entitled under the Optional Clause and under the express condition of reciprocity contained in her Declaration of 28 February, 1940, and thus the conditions necessary to entitle the Government of Portugal to invoke the Optional Clause against India did not exist when the said Application was filed; and in consequence the Court is without jurisdiction to entertain the said Application.

*Fourth Objection*

Since the Portuguese Application of 22 December, 1955, was filed before the lapse of such brief period as in the normal course of events would enable the Secretary-General of the United Nations, in compliance with Article 36, paragraph 4, of the Statute of the Court, to transmit copies of the Portuguese Declaration of 19 December, 1955, to other parties to the Statute, the filing of the said Application violated the reciprocal right conferred upon India by the Optional Clause and by India's Declaration of 28 February, 1940, to invoke the third condition contained in the Portuguese Declaration of 19 December, 1955, equally and under the same conditions as Portugal; and thus the conditions necessary to entitle the Government of Portugal to invoke the Optional Clause against India did not exist when the said Application was filed and the filing of the said Application constituted an abuse both of the Optional Clause and of the process of the Court; and in consequence the Court is without jurisdiction to entertain the said Application.

*Third Objection*

Since the Portuguese Application of 22 December, 1955, was filed before the Portuguese claim of a right of passage for persons and goods across Indian territory had been made the subject of diplomatic negotiations, the subject-matter of the claim had

not yet been determined and there was not yet any legal and justiciable dispute between the Parties which could be referred to the Court under the Optional Clause; and thus the conditions necessary to entitle the Government of Portugal to invoke the Optional Clause against India did not exist when the said Application was filed; and in consequence the Court is without jurisdiction to entertain the said Application.

*Fifth Objection*

Since the acceptance of compulsory jurisdiction of the Court for the categories of disputes listed in the Optional Clause does not include disputes with regard to questions which by international law fall exclusively within the jurisdiction of India and since also India's Declaration of 28 February, 1940, expressly excluded such disputes from the scope of her acceptance of compulsory jurisdiction under the Optional Clause; and since in principle the subject-matter of the present dispute, namely, the transit of persons and goods over Indian territory between Daman and the enclaves, relates to a question which by international law falls exclusively within the jurisdiction of India, it is for Portugal to show legal grounds of claim which would place a limitation on India's exercise of her exclusive jurisdiction with respect to the subject-matter of the dispute and which are reasonably arguable under international law;

and whereas:

- (a) the authorities cited in paragraphs 163 to 168 of India's Preliminary Objection establish that the Portuguese claim to a right of transit, whether it is considered to be with or without immunity, cannot be regarded as a reasonably arguable cause of action under international law unless it is based on the express grant or specific consent of the territorial sovereign; and since the facts presented to the Court in the pleadings of the Parties show no such express grant or specific consent of the territorial sovereign as could place a limitation on the exercise of India's jurisdiction with respect to the subject-matter of the dispute, the Fifth Objection should forthwith be sustained;

and whereas, in the alternative:

- (b) none of the grounds of claim put forward by the Portuguese Government in its Application and Memorial, namely, treaty, custom and general principles of law, can be regarded on the facts and the law which have been presented to the Court as reasonably arguable under international law, the Fifth Objection must for this reason also be sustained;

and whereas, furthermore:

- (c) regardless of the correctness or otherwise of the conclusions set out in paragraphs 4(a) and 4(b), the uncontradicted facts presented in the pleadings of the Parties establish that the

question of transit between Daman and the enclaves has always been dealt with both by Portugal and the territorial sovereign on the basis that it is a question within the exclusive competence of the territorial sovereign;

and whereas:

- (d) both Portugal and India have accepted the compulsory jurisdiction of the Court only for legal disputes which may be decided by the Court under the provisions of Article 38, paragraph 1, of the Statute; and the dispute submitted to the Court by Portugal is not such a dispute and there has been no agreement between the Parties to submit the dispute to the Court under the provisions of Article 38, paragraph 2, of the Statute; in consequence, for this reason also, the Fifth Objection should be sustained.

*Sixth Objection*

Since India's Declaration of 28 February, 1940, limited her acceptance of the compulsory jurisdiction of the Court to disputes arising after 5 February, 1930, with regard to situations or facts subsequent to that date; and since the claim of Portugal to a right of transit between Daman and the enclaves is formulated in her Application and Memorial as a claim of right dated from a period much before 5 February, 1930; and since that claim, if it was ever made, has been persistently opposed by the territorial sovereign, the present dispute as submitted to the Court by Portugal is a dispute excluded from India's acceptance of compulsory jurisdiction under the Optional Clause by the express terms of the said limitation in India's Declaration of 28 February, 1940; and in consequence the Court is without jurisdiction to entertain the Portuguese Application of 22 December, 1955."

On behalf of the Government of Portugal, at the sitting of October 3rd, 1957:

*"I. On the First Preliminary Objection*

Whereas the reservation in the Portuguese Declaration of December 19th, 1955, on which the Government of India relies in support of its contention that the said Declaration is wholly invalid as a recognition of the compulsory jurisdiction of the Court, in no way contravenes the requirements of the Statute of the Court and cannot therefore be regarded as invalid;

Whereas the invalidity of that reservation would not, in any event, involve the invalidity of the Declaration itself;

Whereas the Application by which the Portuguese Government has referred the present dispute to the Court has therefore, in this respect, a valid foundation;

For these reasons,

May it please the Court

to dismiss the First Preliminary Objection of the Government of India.

*II. On the Second Preliminary Objection*

Whereas Declarations made in accordance with Article 36, paragraph 2, of the Statute enter into force at once and have the effect of making the jurisdiction of the Court compulsory as between States accepting the same obligation;

Whereas no special condition has to be satisfied for this purpose;

Whereas, in particular, it is not made a condition for the exercise of its rights by the declarant State, by the submission to the Court of a dispute by means of an Application, that its Declaration should have been brought to the knowledge of the State which is the other Party to the dispute;

And whereas it is likewise not made a condition that a certain period of time should have elapsed after the making of the Declaration;

For these reasons,

May it please the Court  
to dismiss the Second Preliminary Objection of the Government of India.

*III. On the Third Preliminary Objection*

Whereas international law does not make the institution of proceedings by means of a unilateral Application dependent on the prior exhaustion of diplomatic negotiations, in the absence of a treaty-provision stipulating such a condition;

Whereas no provision of this kind exists in the present case, and whereas the Portuguese Government was therefore under no obligation to pursue diplomatic negotiations with the Government of India up to the point at which they became futile;

Whereas it is, in any event, for the Government of India to prove the insufficiency of these negotiations, and whereas it not only has failed to adduce such proof but proof to the contrary is contained in the documents;

Whereas these negotiations made clear beyond question the existence of a dispute between the Parties;

Whereas it is incorrect to assert that these negotiations were not carried on upon the legal plane, since the Portuguese Government constantly protested against the violation by the Government of India of the rights which it is claiming in the present proceedings, and since it drew attention to the responsibility which the Government of India thereby incurred;

For these reasons,

May it please the Court  
to dismiss the Third Preliminary Objection of the Government of India.

*IV. On the Fourth Preliminary Objection*

Whereas the principle of reciprocity, laid down by Article 36 of the Statute of the Court, relates to the extent of the obligations

binding upon the States involved in a dispute, at the time when that dispute is referred to the Court;

Whereas it does not apply to the measures which the said States would have been entitled to take before the case was brought before the Court, either for the purpose of putting an end to the binding force of their Declarations or for the purpose of restricting their scope;

Whereas the right, of which the Government of India claims to have been wrongfully deprived as a result of the speedy filing of the Portuguese Application, is not therefore covered by the principle of reciprocity as the scope of that principle is laid down by Article 36;

Whereas, even if this were not so, it would have been quite unnecessary for the Government of India to invoke this principle in order to limit the scope of its obligations relating to the compulsory jurisdiction of the Court, before the filing of the Application instituting proceedings, and whereas it was, therefore, in order to obtain this result, quite unnecessary for it to have cognizance of the Portuguese Declaration;

Whereas, furthermore, there is a flagrant contradiction between the First and Fourth Objections, for if the Portuguese reservation were without any legal validity, as contended by the Government of India in its First Objection, it is difficult to see how that Government could have relied on the said reservation for the purpose of drawing the consequences which it envisages in its Fourth Objection;

For these reasons,

May it please the Court  
to dismiss the Fourth Preliminary Objection of the Government of India.

#### V. *On the Fifth Preliminary Objection*

Whereas the Government of India requests the Court to derogate from the provisions of Article 43 of the Statute and of the corresponding articles of the Rules of Court relating to the normal course of the proceedings in contentious cases, claiming that, by international law, the questions which are the subject-matter of the present dispute fall exclusively within the jurisdiction of India;

Whereas, in order to adjudicate upon this claim in the light of all the necessary information, argument upon the merits would be necessary, while the Government of India in fact requests the Court definitively to dispense with such further argument by holding itself *hic et nunc* without jurisdiction to adjudicate upon the Portuguese claim;

Whereas such a contention could in any event only be accepted if the Government of India showed that a summary consideration of the grounds relied upon by Portugal sufficed to make it clear that those grounds are manifestly lacking in substance and that it would consequently be superfluous to prolong the proceedings by complying with the relevant provisions of the Statute and of the Rules of Court;

Whereas the Government of India has failed to prove this, and whereas the arguments adduced, on either side, on the contrary

show the need for full discussion in order to enable the Court to pass upon the substance of the grounds in question;

Whereas, furthermore, it is incorrect to assert that the subject-matter of the present dispute has in the past been regarded as concerning a matter within the exclusive jurisdiction of India, and that Portugal has indeed recognized that it possesses this character;

Whereas the assertions put forward in this connection by the Government of India in paragraph 159 of its Preliminary Objections are based upon a mistaken interpretation of the claim submitted to the Court;

For these reasons,

May it please the Court  
to dismiss the Fifth Preliminary Objection of the Government of India;

Or, in the alternative:  
to join it to the merits.

#### *VI. On the Sixth Preliminary Objection*

Whereas the Government of India, by its Declaration of February 28th, 1940, accepted the jurisdiction of the Court over all disputes arising after February 5th, 1930, 'with regard to situations or facts subsequent to the same date';

Whereas the situations and facts which are to be taken into consideration in applying this clause are solely those which constitute the source of the dispute;

Whereas the situations and facts which are the source of the dispute are all subsequent to February 5th, 1930;

Whereas the Sixth Objection is therefore devoid of substance;

Whereas, in order to avoid this conclusion, the Indian Government has merely put forward a hypothesis and made an assertion, which is formally disputed, to the effect that Portugal neither claimed nor exercised a right of passage before February 5th, 1930, at least since the abrogation of the British-Portuguese Treaty of 1878;

Whereas full discussion of these points is essential, particularly with regard to the true scope of the said Treaty and of the effects of its abrogation;

Whereas such a discussion would raise questions of fact and of law with regard to which the Parties are, in several respects, in disagreement and which are too closely linked with the merits for the Court to be able to pass upon them, in the light of all the necessary information, within the compass of its consideration of a preliminary objection;

For these reasons,

May it please the Court  
to dismiss the Sixth Preliminary Objection of the Government of India;

Or, in the alternative:  
to join it to the merits.

VII. Whereas, in its Conclusions relating to the Fifth Preliminary Objection, the Government of India maintains:

'(d) both Portugal and India have accepted the compulsory jurisdiction of the Court only for legal disputes which may be decided by the Court under the provisions of Article 38, paragraph 1, of the Statute; and the dispute submitted to the Court by Portugal is not such a dispute and there has been no agreement between the Parties to submit the dispute to the Court under the provisions of Article 38, paragraph 2, of the Statute; in consequence for this reason also the Fifth Objection should be sustained';

Whereas this constitutes a new Objection [i.e. an Objection not advanced in the written pleadings];

Whereas it is manifestly lacking in substance as is shown by the legal grounds relied upon by the Portuguese Government in support of its Application;

Whereas, furthermore, in accordance with Article 62 of the Rules of Court, preliminary objections must be filed by a party at the latest before the expiry of the time-limit fixed for the delivery of its first pleading;

Whereas, in these circumstances, the said Objection would in any event be inadmissible;

For these reasons,

May it please the Court

to dismiss the new Objection raised by the Government of India in the guise of an argument in support of its Fifth Preliminary Objection.

VIII. Whereas the Application instituting proceedings was filed in the Registry of the Court on December 22nd, 1955;

Whereas the risk exists that the dispute may become aggravated so long as no decision on the merits is given and whereas that aggravation might compromise the execution of the said decision;

For these reasons,

May it please 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."

On behalf of the Government of India, the following amended and supplementary Submissions were filed at the sitting of October 8th, 1957:

"I. *Sixth Objection*

Since India's Declaration of February 28, 1940, limited her acceptance of the compulsory jurisdiction of the Court to disputes arising after 5th February, 1930, with regard to situations or facts subsequent to that date; and since the present dispute as

submitted to the Court by Portugal is a dispute which did not arise after 5th February, 1930, and was in any case a dispute with regard to situations or facts which were not subsequent to that date, the dispute is excluded from India's acceptance of compulsory jurisdiction under the Optional Clause by the express terms of the said limitation in India's Declaration of February 28, 1940, and in consequence the Court is without jurisdiction to entertain the Portuguese Application of 22nd December, 1955.

*2. With regard to the Seventh Conclusion of the Government of Portugal*

Since the submission of the Government of India in support of its Fifth Preliminary Objection quoted in the Seventh Conclusion of the Government of Portugal in no sense constitutes a new objection, but is simply one aspect of the contention of the Government of India that the matters in dispute fall exclusively within the domestic jurisdiction of India; and since the said submission of the Government of India is well-founded; in consequence the Seventh Conclusion of the Government of Portugal should be rejected.

*3. With regard to the Eighth Conclusion of the Government of Portugal*

Since the Government of Portugal has not invoked the power of the Court to indicate provisional measures under Article 41 of the Statute of the Court; and since that Government asks the Court to address an admonition to the Parties analogous to an indication of provisional measures in circumstances which would not justify the Court in making an Order under Article 41; and since that Government has not disclosed any valid grounds for asking the Court to address such an exceptional admonition to the Parties, and since it would in the circumstances of the present case be wholly inappropriate to accede to the request of the Government of Portugal; in consequence, the Eighth Conclusion of the Government of Portugal should be rejected."

On behalf of the Government of Portugal, the following Submissions were filed at the sitting of October 11th, 1957:

"Whereas the Government of India, by its Declaration of February 28th, 1940, has accepted the jurisdiction of the Court over all disputes arising after February 5th, 1930, with regard to situations or facts subsequent to the same date;

Whereas, by the terms of the Application instituting proceedings, the purpose of the reference of the dispute to the Court is to secure:

- (a) recognition of the right of passage existing in favour of Portugal between its enclaved territories of Dadra and Nagar-Aveli and between these territories and its territory of Daman (littoral Daman);
- (b) a finding that India has prevented and continues to prevent the exercise of that right; and

(c) that India should put an immediate end to this situation;

Whereas the earlier date of the grounds on which the claim is based is not relevant for the purpose of applying the reservation in the Indian Declaration of February 28th, 1940, on which the Sixth Preliminary Objection is founded;

Whereas, on the other hand, the situations and facts which are relevant in applying such a reservation are solely those which constitute the source of the dispute;

Whereas the dispute referred to the Court by the Portuguese Application of December 22nd, 1955, the purpose of which is recalled above, is undeniably subsequent to February 5th, 1930;

Whereas the same is true of the situations and facts which constitute the source of that dispute;

For these reasons,

May it please the Court  
to dismiss the Sixth Preliminary Objection of the Government of India."

\* \* \*

The Declarations by which the Parties accepted the compulsory jurisdiction of the Court are as follows:

Declaration of India of February 28th, 1940:

"On behalf of the Government of India, I now declare that they accept as compulsory *ipso facto* and without special convention, on condition of reciprocity, the jurisdiction of the Court, in conformity with paragraph 2 of Article 36 of the Statute of the Court for a period of 5 years from to-day's date, and thereafter until such time as notice may be given to terminate the acceptance, over all disputes arising after February 5th, 1930, with regard to situations or facts subsequent to the same date, other than:

disputes in regard to which the Parties to the dispute have agreed or shall agree to have recourse to some other method of peaceful settlement;

disputes with the government of any other Member of the League which is a Member of the British Commonwealth of Nations, all of which disputes shall be settled in such manner as the Parties have agreed or shall agree;

disputes with regard to questions which by international law fall exclusively within the jurisdiction of India; and

disputes arising out of events occurring at a time when the Government of India were involved in hostilities;

and subject to the condition that the Government of India reserve the right to require that proceedings in the Court shall be suspended in respect of any dispute which has been submitted to and is under consideration by the Council of the League of Nations, provided that notice to suspend is given after the dispute has been submitted to the Council and is given within 10 days of the notification of the initiation of the proceedings in the Court, and provided also that

such suspension shall be limited to a period of 12 months or such longer period as may be agreed by the Parties to the dispute or determined by a decision of all the Members of the Council other than the Parties to the dispute."

Declaration of Portugal of December 19th, 1955:

"Under Article 36, paragraph 2, of the Statute of the International Court of Justice, I declare on behalf of the Portuguese Government that Portugal recognizes the jurisdiction of this Court as compulsory *ipso facto* and without special agreement, as provided for in the said paragraph 2 of Article 36 and under the following conditions:

- (1) The present declaration covers disputes arising out of events both prior and subsequent to the declarations of acceptance of the "optional clause" which Portugal made on December 16, 1920, as a party to the Statute of the Permanent Court of International Justice.
- (2) The present declaration enters into force at the moment it is deposited with the Secretary-General of the United Nations; it shall be valid for a period of one year, and thereafter until notice of its denunciation is given to the said Secretary-General.
- (3) The Portuguese Government reserves 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."

\* \* \*

India has filed six Preliminary Objections to the exercise of jurisdiction by the Court in the present case. The Court will now proceed to examine these Objections.

*First Preliminary Objection*

The First Preliminary Objection of the Government of India is to the effect that the Court is without jurisdiction to entertain the Application of Portugal on the ground that the Portuguese Declaration of Acceptance of the jurisdiction of the Court of December 19th, 1955, is invalid for the reason that the Third Condition of the Declaration is incompatible with the object and purpose of the Optional Clause. There are, in the view of the Government of India, three main reasons for such incompatibility.

The Third Condition of the Declaration of Portugal provides as follows:

- (3) The Portuguese Government reserves 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."

In the first instance, the Government of India maintains that that Condition gives Portugal the right, by making at any time a notification to that effect, to withdraw from the jurisdiction of the Court a dispute which has been submitted to it prior to such a notification. This is what in the course of the proceedings was described as the retroactive effect attaching to that notification. India asserts that such retroactive effect is incompatible with the principle and notion of the compulsory jurisdiction of the Court as established in Article 36 of the Statute and that the Third Condition is invalid inasmuch as it contemplates an effect which is contrary to the Statute.

The Government of Portugal has contested that interpretation and has affirmed that the Third Condition does not have such retroactive effect and that, in consequence, it is not incompatible with Article 36 of the Statute.

In order to decide whether, as maintained by the Government of India, the Third Condition appended by Portugal is invalid, and whether such invalidity entails the invalidity of the Declaration in which it is contained, the Court must determine the meaning and the effect of the Third Condition by reference to its actual wording and applicable principles of law.

The words "with effect from the moment of such notification" cannot be construed as meaning that such a notification would have retroactive effect so as to cover cases already pending before the Court. Construed in their ordinary sense, these words mean simply that a notification under the Third Condition applies only to disputes brought before the Court after the date of the notification. Such an interpretation leads to the conclusion that no retroactive effect can properly be imputed to notifications made under the Third Condition. It is a rule of law generally accepted, as well as one acted upon in the past by the Court, that, once the Court has been validly seised of a dispute, unilateral action by the respondent State in terminating its Declaration, in whole or in part, cannot divest the Court of jurisdiction. In the *Nottebohm* case the Court gave expression to that principle in the following words:

"An extrinsic fact such as the subsequent lapse of the Declaration, by reason of the expiry of the period or by denunciation, cannot deprive the Court of the jurisdiction already established." (*I.C.J. Reports 1953*, p. 123.)

That statement by the Court must be deemed to apply both to total denunciation, and to partial denunciation as contemplated in the Third Portuguese Condition. It is a rule of interpretation that a text emanating from a Government must, in principle, be interpreted as producing and as intended to produce effects in accordance with existing law and not in violation of it.

The second reason, contended for by the Government of India, for the incompatibility of the Third Portuguese Condition with the object and purpose of the Optional Clause, is that it has introduced into the Declaration a degree of uncertainty as to reciprocal rights and obligations which deprives the acceptance of the compulsory jurisdiction of the Court of all practical value. In particular, it was contended that, in consequence of the Third Condition, the other Signatories are in a continuous state of uncertainty as to their reciprocal rights and obligations which may change from day to day.

While it must be admitted that clauses such as the Third Condition bring about a degree of uncertainty as to the future action of the accepting government, that uncertainty does not attach to the position actually established by the Declaration of Acceptance or as it might be established in consequence of recourse to the Third Condition.

As Declarations, and their alterations, made under Article 36 must be deposited with the Secretary-General, it follows that, when a case is submitted to the Court, it is always possible to ascertain what are, at that moment, the reciprocal obligations of the Parties in accordance with their respective Declarations. Under the existing system, Governments can rely upon being informed of any changes in the Declarations in the same manner as they are informed of total denunciations of the Declarations. It is true that during the interval between the date of a notification to the Secretary-General and its receipt by the Parties to the Statute, there may exist some element of uncertainty. However, such uncertainty is inherent in the operation of the system of the Optional Clause and does not affect the validity of the Third Condition contained in the Portuguese Declaration.

It must also be noted that, with regard to any degree of uncertainty resulting from the right of Portugal to avail itself at any time of its Third Condition of Acceptance, the position is 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 any obligatory period of notice. India did so on January 7th, 1956, when it notified the Secretary-General of the denunciation of its previous Declaration of Acceptance, for which it simultaneously substituted a new Declaration incorporating reservations which were absent from its previous Declaration. By substituting, on January 7th, 1956, a new Declaration for its earlier Declaration, India achieved, in substance, the object of Portugal's Third Condition.

It has been argued that there is a substantial difference, in the matter of the certainty of the legal situation, between the Third Portuguese Condition and the right of denunciation without notice.

In the view of the Court there is no essential difference, with regard to the degree of certainty, between a situation resulting from the right of total denunciation and that resulting from the Third Portuguese Condition which leaves open the possibility of a partial denunciation of the otherwise subsisting original Declaration.

Neither can it be admitted, as a relevant differentiating factor, that while in the case of total denunciation the denouncing State can no longer invoke any rights accruing under its Declaration, in the case of a partial denunciation under the terms of the Third Condition Portugal can otherwise continue to claim the benefits of its Acceptance. For, as the result of the operation of reciprocity, any jurisdictional rights which it may thus continue to claim for itself can be invoked against it by the other Signatories, including India.

Finally, as the third reason for the invalidity of the Third Condition, it has been contended that that Condition offends against the basic principle of reciprocity underlying the Optional Clause inasmuch as it claims for Portugal a right which in effect is denied to other Signatories who have made a Declaration without appending any such condition. The Court is unable to accept that contention. It is clear that any reservation notified by Portugal in pursuance of its Third Condition becomes automatically operative against it in relation to other Signatories of the Optional Clause. If the position of the Parties as regards the exercise of their rights is in any way affected by the unavoidable interval between the receipt by the Secretary-General of the appropriate notification and its receipt by the other Signatories, that delay operates equally in favour of or against all Signatories and is a consequence of the system established by the Optional Clause.

Neither can the Court accept the view that the Third Condition is inconsistent with the principle of reciprocity inasmuch as it renders inoperative that part of paragraph 2 of Article 36, which refers to Declarations of Acceptance of the Optional Clause in relation to States accepting the "same obligation". It is not necessary that the "same obligation" should be irrevocably defined at the time of the deposit of the Declaration of Acceptance for the entire period of its duration. That expression means no more than that, as between States adhering to the Optional Clause, each and all of them are bound by such identical obligations as may exist at any time during which the Acceptance is mutually binding.

As the Court finds that the Third Portuguese Condition is not inconsistent with the Statute, it is not necessary for it to consider the question whether, if it were invalid, its invalidity would affect the Declaration as a whole.

For these reasons, the First Preliminary Objection of the Government of India must be dismissed.

\* \* \*

### *Second Preliminary Objection*

The Second Preliminary Objection of the Government of India is based on the allegation that—as the Portuguese Application of December 22nd, 1955, was filed before the lapse of such brief period as in the normal course of events would have enabled the Secretary-General of the United Nations, in compliance with Article 36, paragraph 4, of the Statute of the Court, to transmit copies of the Portuguese Declaration of Acceptance of December 19th, 1955, to the other Parties to the Statute—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 of reciprocity contained in its Declaration of February 28th, 1940; that, in consequence, the conditions necessary to entitle the Government of Portugal to invoke the Optional Clause against India did not exist when that Application was filed; and that, as a result, the Court is without jurisdiction to entertain the Application.

The principle of reciprocity forms part of the system of the Optional Clause by virtue of the express terms both of Article 36 of the Statute and of most Declarations of Acceptance, including that of India. The Court has repeatedly affirmed and applied that principle in relation to its own jurisdiction. It did so, in particular, in the case of *Certain Norwegian Loans* (*I.C.J. Reports 1957*, pp. 22-24) where it recalled its previous practice on the subject. However, it is clear that the notions of reciprocity and equality are not abstract conceptions. They must be related to some provision of the Statute or of the Declarations.

The two questions which the Court must now consider are as follows: in filing its Application on the date that it did, namely, December 22nd, 1955, did Portugal act in a manner contrary to any provision of the Statute? If not, did it thereby violate any right of India under the Statute or under its Declaration?

In the course of the oral argument the Government of India disclaimed any intention of contending that Portugal was not entitled to file its Application until the notification of the Secretary-General had reached the Government of India. The latter merely maintained that before filing its Application Portugal ought to have allowed such period to elapse as would reasonably have permitted the notification of the Secretary-General to take its "appropriate effects".

The material dates, as stated by the Government of India, are as follows: On December 19th, 1955, the Representative of Portugal to the United Nations made the Declaration, on behalf of the Government of Portugal, accepting the compulsory jurisdiction of

the Court under the Optional Clause. On December 22nd, the Government of Portugal filed in the Court the Application instituting the present proceedings against the Government of India. On the same day, a telegram was sent by the Court notifying the Government of India of the filing of the Portuguese Application. On December 30th, 1955, the Government of India received a copy of the Portuguese Declaration of Acceptance which had been obtained from the Court by its Embassy at The Hague. On January 19th, 1956, a copy of the Portuguese Declaration was officially transmitted to the Government of India by the Secretary-General of the United Nations in compliance with Article 36, paragraph 4, of the Statute.

The Government of India has contended that, in filing its Application on December 22nd, 1955, the Government of Portugal did not act in conformity with the provisions of the Statute. The Court is unable to accept that contention. The Court considers that, by the deposit of its Declaration of Acceptance with the Secretary-General, the accepting State becomes a Party to the system of the Optional Clause in relation to the other declarant States, with all the rights and obligations deriving from Article 36. 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. Accordingly, every State which makes a Declaration of Acceptance must be deemed to take into account the possibility that, under the Statute, it may at any time find itself subjected to the obligations of the Optional Clause in relation to a new Signatory as the result of the deposit by that Signatory of a Declaration of Acceptance. 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 with the Secretary-General its Declaration of Acceptance. For it is on that very day that the consensual bond, which is the basis of the Optional Clause, comes into being between the States concerned. When India made its Declaration of Acceptance of February 28th, 1940, it stated that it accepted the jurisdiction of the Court for a specified period "from to-day's date".

It has been contended by the Government of India that as Article 36 requires not only the deposit of the Declaration of Acceptance with the Secretary-General but also the transmission by the Secretary-General of a copy of the Declaration to the Parties to the Statute, the Declaration of Acceptance does not become effective until the latter obligation has been discharged. However, it is only the first of these requirements that concerns the State making the Declaration. The latter is not concerned with the duty of the Secretary-General or the manner of its fulfilment. The legal effect of a Declaration does not depend upon subsequent action or inaction of the Secretary-General. Moreover, unlike some other

instruments, Article 36 provides for no additional requirement, for instance, that the information transmitted by the Secretary-General must reach the Parties to the Statute, or that some period must elapse subsequent to the deposit of the Declaration before it can become effective. Any such requirement would introduce an element of uncertainty into the operation of the Optional Clause system. The Court cannot read into the Optional Clause any requirement of that nature.

India has further contended that, even though the filing of the Application by Portugal be held to be otherwise in accordance with Article 36, it was effected in a manner which violated rights of India under the Statute and under its Declaration of Acceptance.

Apart from complaining generally of an impairment of its rights of equality, mutuality and reciprocity under the Statute, India has not specified what actual right has been adversely affected by the manner of the filing of the Portuguese Application. The Court has been unable to discover what right has, in fact, thus been violated.

As the Court has arrived at the conclusion that the manner of filing the Portuguese Application was neither contrary to Article 36 of the Statute nor in violation of any right of India under the Statute, or under its Declaration of Acceptance, the Court must dismiss the Second Preliminary Objection of the Government of India.

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#### *Fourth Preliminary Objection*

As the Second and Fourth Preliminary Objections are concerned with cognate aspects of the filing of the Portuguese Application, it is convenient to consider the Fourth Preliminary Objection before examining the Third.

In the Fourth Preliminary Objection, India contended that, since it had no knowledge of the Portuguese Declaration before Portugal filed its Application, it was unable to avail itself, on the basis of reciprocity, of the Third Portuguese Condition and to exclude from the jurisdiction of the Court the dispute which is the subject-matter of the Portuguese Application. This Objection is based on considerations substantially identical with those adduced in support of the Second Preliminary Objection. Accordingly, the Court will confine itself to recalling what it has already said in dealing with the Second Preliminary Objection, in particular that the Statute does not prescribe any interval between the deposit by a State of its Declaration of Acceptance and the filing of an Application by that State, and that the principle of reciprocity is not affected by any delay in the receipt of copies of the Declaration by the Parties to the Statute.

As the manner of the filing of the Portuguese Application did not in respect of the Third Portuguese Condition deprive India

of any right of reciprocity under Article 36 of the Statute, so as to constitute an abuse of the Optional Clause, the Court cannot regard the Fourth Preliminary Objection of the Government of India as well founded.

\* \* \*

*Third Preliminary Objection*

In its Third Preliminary Objection, as defined in the Submissions, the Government of India contended that, as the Portuguese Application of December 22nd, 1955, was filed before the Portuguese claim was effectively made the subject of diplomatic negotiations, the subject-matter of the claim had not yet been determined and that there was therefore, as yet, no legal and justiciable dispute between the Parties which could be referred to the Court under the Optional Clause. It was therefore submitted that, as the conditions necessary to entitle the Government of Portugal to invoke the Optional Clause did not exist at the time of the Application, the Court is without jurisdiction to entertain the Application.

In particular, the Third Objection is based on the allegation that, although neither Article 36(2) of the Statute nor the Portuguese or Indian Declarations of Acceptance refer directly to the requirement of previous negotiations, the fact that the Application was filed prior to the exhaustion of diplomatic negotiations was contrary to Article 36(2) of the Statute, which refers to legal disputes. It was contended by India that, unless negotiations had taken place which had resulted in a definition of the dispute between the Parties as a legal dispute, there was no dispute, in the sense of Article 36(2) of the Statute, the existence of which had been established in the Application and with respect to which the Court could exercise jurisdiction.

In examining this Objection, the Court must consider the question of the extent to which, prior to the filing of the Application by Portugal, negotiations had taken place between the Parties in the matter of the right of passage. An examination of these negotiations shows that, although they cover various aspects of the situation arising out of the political claims of India in respect of the enclaves, a substantial part of these exchanges of views was devoted, directly or indirectly, to the question of access to the enclaves. A survey of the correspondence and Notes laid before the Court reveals that the alleged denial of the facilities of transit to the enclaves provided the subject-matter of repeated complaints on the part of Portugal; that these complaints constituted one of the principal objects of such exchanges of views as took place; that, although the exchanges between the Parties had not assumed the character of a controversy as to the nature

and extent of the legal right of passage, Portugal described the denial of passage requested by it as being inconsistent not only with requirements of good neighbourly relations but also with established custom and international law in general; and that these complaints were unsuccessful.

While the diplomatic exchanges which took place between the two Governments disclose the existence of a dispute between them on the principal legal issue which is now before the Court, namely, the question of the right of passage, an examination of the correspondence shows that the negotiations had reached a deadlock.

It would therefore appear that assuming that there is substance in the contention that Article 36 (2) of the Statute, by referring to legal disputes, establishes as a condition of the jurisdiction of the Court a requisite definition of the dispute through negotiations, the condition was complied with to the extent permitted by the circumstances of the case.

The Court finds that the legal issue was sufficiently disclosed in the diplomatic exchanges, and considers that the Government of Portugal has complied with the conditions of the Court's jurisdiction as laid down in Article 36 (2) of the Statute. Accordingly, the Court must dismiss the Third Preliminary Objection.

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#### *Fifth Preliminary Objection*

In its Fifth Preliminary Objection the Government of India has relied on the reservation which forms part of its Declaration of Acceptance of February 28th, 1940, and 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. In particular, it was asserted by the Government of India 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 is outside the exclusive domestic jurisdiction of India. It was therefore submitted that the dispute is outside the jurisdiction of the Court.

The relevant Submissions of the Government of India filed on September 27th, 1957, are based largely on the following assertions: in paragraph (a) of its Submissions on the Fifth Objection it is asserted that "the Portuguese claim to a right of transit ... cannot be regarded as a reasonably arguable cause of action under international law unless it is based on the express grant or specific consent of the territorial sovereign", and that "the facts presented to the Court in the Pleadings of the Parties show no such express grant or specific consent of the territorial sovereign as could place

a limitation on the exercise of India's jurisdiction...". In paragraph (*b*) it is asserted that none of the grounds put forward by the Government of Portugal, namely, treaty, custom and general principles of law, can be regarded on the facts and the law which have been presented to the Court as reasonably arguable under international law. Paragraph (*c*) deals exclusively with factual aspects of the matter before the Court. India urges that the Fifth Preliminary Objection must be sustained for the reason that "regardless of the correctness or otherwise of the conclusions set out in paragraphs 4(*a*) and 4(*b*), the uncontradicted facts presented in the Pleadings of the Parties establish that the question of transit between Daman and the enclaves has always been dealt with both by Portugal and the territorial sovereign on the basis that it is a question within the exclusive competence of the territorial sovereign". Finally, in paragraph (*d*) it is urged that the dispute submitted to the Court by Portugal is not a legal dispute which may be decided by the Court under Article 38, paragraph 1, of the Statute.

The facts on which those Submissions of the Government of India are based are not admitted by Portugal. The elucidation of those facts, and their legal consequences, involves an examination of the actual practice of the British, Indian and Portuguese authorities in the matter of the right of passage--in particular as to the extent to which that practice can be interpreted, and was interpreted by the Parties, as signifying that the right of passage is a question which according to international law is exclusively within the domestic jurisdiction of the territorial sovereign. There is the further question as to the legal significance of the practice followed by the British and Portuguese authorities, namely, whether that practice was expressive of the common agreement of the Parties as to the exclusiveness of the rights of domestic jurisdiction or whether it provided a basis for a resulting legal right in favour of Portugal. There is, again, the question of the legal effect and of the circumstances surrounding the application of Article 17 of the Treaty of 1779 and of the Mahratha Decrees issued in pursuance thereof.

Having regard to all these and similar questions, it is not possible to pronounce upon the Fifth Preliminary Objection at this stage without prejudging the merits. Accordingly, the Court decides to join that Objection to the merits.

In these circumstances, it is not necessary for the Court to examine the other questions relating to the Fifth Objection which have been raised by the Parties in their Submissions.

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### *Sixth Preliminary Objection*

In its Sixth Objection the Government of India contended that the Court is without jurisdiction on the ground that India's Declaration of February 28th, 1949, accepting the compulsory jurisdiction of the Court is limited to "disputes arising after February 5th, 1930, with regard to situations or facts subsequent to the same date". In particular, the Government of India maintained: (a) that the dispute submitted to the Court by Portugal is a dispute which did not arise after February 5th, 1930, and (b) that in any case it is a dispute with regard to situations and facts prior to that date.

The Court must examine the relevant Indian reservation, in the first instance, in so far as it refers to the date on which the dispute may be said to have arisen. The first contention advanced in this connection by the Government of India is that the dispute submitted to the Court did not arise after February 5th, 1930, but—partly or wholly—before that date. However, the Government of Portugal contends that the dispute submitted to the Court arose after 1953, when the Government of India adopted certain measures relating to passage and transit between the littoral territory of Daman and the enclaves of Dadra and Nagar-Aveli.

That divergence of views cannot be separated from the question whether or not the dispute submitted to the Court is only a continuation of a dispute which divided Portugal and the territorial sovereign prior to 1930 concerning the right of passage. The Court, having heard conflicting arguments regarding the nature of the passage formerly exercised, is not in a position to determine at this stage the date on which the dispute arose or whether or not the dispute constitutes an extension of a prior dispute.

Similar considerations apply to the second element of the reservation *ratione temporis* which forms part of the Indian Declaration of Acceptance, namely, in so far as it refers to "situations or facts" subsequent to 5th February, 1930.

It was contended that the question of the existence or non-existence of a legal right of passage was not, prior to 1930, in controversy between the Parties concerned and that they managed throughout to settle, without raising or resolving the question of legal right, the practical problems arising in this connection. On the other hand it was also contended that the dispute now before the Court is a continuation of a conflict of views going as far as 1818, and that it is a dispute "beyond any question with reference to situations or facts stretching far back before 1930".

The Court is not at present in possession of sufficient evidence to enable it to pronounce on these questions. To do that would necessitate an examination and clarification of, often complicated, questions of fact bearing on the practice pursued by the authorities concerned for a period of very considerable duration and stretching back to 1818, or even 1779. There are other factors which give rise to similar considerations. These factors include the disputed interpretation of the Treaty of 1779 between the Mahrathas and the Portuguese. Any evaluation of these factors, although limited to the purposes of the Sixth Preliminary Objection, would entail the risk of prejudging some of the issues closely connected with the merits. Accordingly, the Court must join the Sixth Preliminary Objection to the merits.

\* \* \*

The Government of Portugal 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 decisions or which might bring about either an aggravation or an extension of the dispute. The Government of Portugal has expressly disclaimed any intention of invoking the provisions of Article 41 of the Statute concerning the indication of interim measures. The Court does not consider that, in the circumstances of the present case, it should comply with the request of the Government of Portugal.

For these reasons,

THE COURT,

by fourteen votes to three,  
rejects the First Preliminary Objection;

by fourteen votes to three,  
rejects the Second Preliminary Objection;

by sixteen votes to one,  
rejects the Third Preliminary Objection;

by fifteen votes to two,  
rejects the Fourth Preliminary Objection;

by thirteen votes to four,  
joins the Fifth Preliminary Objection to the merits;

by fifteen votes to two,  
joins the Sixth Preliminary Objection to the merits;

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resumes the proceedings on the merits;  
and fixes the following time-limits for the rest of the procedure:

- for the filing of the Counter-Memorial of the Government of India, February 25th, 1958;
- for the filing of the Reply of the Government of Portugal, May 25th, 1958;
- for the filing of the Rejoinder of the Government of India, July 25th, 1958.

Done in English and French, the English text being authoritative, at the Peace Palace, The Hague, this twenty-sixth day of November, one thousand nine hundred and fifty-seven, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Portuguese Republic and to the Government of the Republic of India, respectively.

(Signed) GREEN H. HACKWORTH,  
President.

(Signed) J. LÓPEZ OLIVÁN,  
Registrar.

Judge KOJEVNIKOV states that he cannot 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 hold that it is without jurisdiction on one or indeed more of the Preliminary Objections raised by the Government of India.

Vice-President BADAWI, availing himself of the right conferred upon him by Article 57 of the Statute, appends to the Judgment of the Court a statement of his dissenting opinion.

Judge KLAESTAD, availing himself of the right conferred upon him by Article 57 of the Statute, appends to the Judgment of the Court a statement of his dissenting opinion, in which M. FERNANDES, Judge *ad hoc*, concurs.

Mr. CHAGLA, Judge *ad hoc*, availing himself of the right conferred upon him by Article 57 of the Statute, appends to the Judgment of the Court a statement of his dissenting opinion.

(Initialled) G. H. H.  
(Initialled) J. L. O.