

Establishing the existence of a dispute before the International Court of Justice: Drawbacks and implications

*Béatrice I. Bonafé**

I. *Introduction*

1. The determination of the existence of the dispute is a crucial aspect according to which the International Court of Justice (ICJ or the Court) decides whether it can exercise its contentious jurisdiction. ‘The Court, as a court of law, is called upon to resolve existing disputes between states. Thus, the existence of the dispute is the primary condition for the Court to exercise its judicial function’.¹ The existence of the dispute is a general, preliminary condition, such as legal standing, to be kept separate from other preliminary issues such as jurisdiction but nonetheless crucial for the exercise of the Court’s judicial function. In the recent judgments concerning the *Marshall Islands* cases, the Court adopted a particularly strict approach in that regard.² It will be argued, first, that this new approach is hardly consistent with the Court’s jurisprudence and, second, that it excessively narrows the scope of the Court’s jurisdiction and may have a number of drawbacks.

II. *Determining the existence and content of the dispute*

2. Notably, the determination of the existence of the dispute has been central in some of the most controversial cases decided by the Court. The

* Associate Professor in International Law, Sapienza University of Rome.

¹ *Nuclear Tests (Australia v France, New Zealand v France)* Judgment [1974] ICJ Rep 253, para 55.

² *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v United Kingdom, Marshall Islands v India, Marshall Islands v Pakistan)* (Preliminary Objections) ICJ Judgment 5 October 2016, nyr (hereafter *Marshall Islands v United Kingdom*).



South West Africa cases,³ the *Nuclear Tests* cases,⁴ and lately the *Marshall Islands* cases are just the most obvious examples. In all these cases, the crucial issue was related to the existence of a dispute between the parties, but the *Marshall Islands* cases stand out because for the first time the Court declined jurisdiction on the basis of the absence of a dispute between the parties. When applied to future cases, the criteria developed in these decisions render the proof of the existence of a dispute unnecessarily difficult and uncertain when there were no prior diplomatic exchanges between the parties.

II.A. *The Marshall Islands Cases and the new requirements for the existence of a dispute*

3. On 24 April 2014, the Marshall Islands filed nine applications against nuclear states, namely, China, France, India, Israel, North Korea, Pakistan, Russia, the United Kingdom (UK), and the United States (USA), contending they were breaching their obligation to negotiate in good faith the cessation of the nuclear arms race and nuclear disarmament. Five cases were not entered in the Court's General List because China, France, Israel, North Korea and Russia had not consented to the Court's jurisdiction for the purposes of the case. With respect to the remaining three cases, India, Pakistan, and the UK had recognised the compulsory jurisdiction of the Court pursuant to Article 36(2) of the Statute of the Court. Proceedings were duly entered in the Court's List but they would never reach the merits. The three respondent states had raised preliminary objections, and in three analogous judgments adopted on 5 October 2016 the Court concluded that, at the time the application was submitted, there was no dispute between the parties. In other words, for the Court the parties had no opposing legal views on nuclear disarmament before the Marshall Islands instituted proceedings. The absence of such a dispute was the essential reason that ultimately led the Court to say it had no jurisdiction.

4. The Marshall Islands claimed that nuclear states were breaching the obligation to negotiate a complete nuclear disarmament arising either

³ *South West Africa (Ethiopia v South Africa, Liberia v South Africa)* (Preliminary Objections) Judgment [1962] ICJ Rep 328.

⁴ *Nuclear Tests* (n 1).



under treaty law, ie Article VI of the Non-Proliferation Treaty (NPT)⁵ or customary international law depending on whether the nuclear state had ratified the NPT or not. Despite some minor differences, the three cases brought to the Court's attention were pretty similar. The following overview of the main arguments of the parties will focus on the case between the Marshall Islands and the UK.

5. The applicant maintained that its claim was clearly 'formulated in multilateral fora'.⁶ Secondly, it argued that the very filing of the application and the views expressed by the parties during the proceedings showed the existence of a dispute between them. Thirdly, it relied on the UK voting records on nuclear disarmament in multilateral fora. Fourthly, it contended that the respondent's opposing view was demonstrated by its conduct both before and after the filing of the application. In particular, the Marshall Islands maintained the UK had 'not pursued in good faith negotiations to cease the nuclear arms race'; instead, it had 'opposed the efforts of the great majority of States to initiate such negotiations' and it took 'actions to improve [its] nuclear weapons system and to maintain it for the indefinite future'.⁷ Therefore, the applicant contended having clearly stated its claim, a claim positively opposed by the UK.

6. In its first preliminary objection, the UK argued that there was no dispute between the parties and, as a consequence, that the Court had no jurisdiction. Especially, it maintained that under customary international law notification of claims is a precondition to the existence of a dispute,⁸ and that the Marshall Islands had never notified the existence of specific claims concerning UK's conduct. In other words, the UK contended that the applicant made no formal step to bring the dispute to its attention. Thus, at the date of the filing of the application there simply was no dispute between the parties.

7. The Court did not believe the traditional definition of dispute according to which a dispute exists when it can be shown that 'the claim of

⁵ Art VI of the NPT provides: 'Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.'

⁶ *Marshall Islands v United Kingdom* (n 2) para 46.

⁷ *ibid* ICJ Application Instituting Proceedings (24 April 2014) paras 15-16 <www.icj-cij.org/files/case-related/160/18296.pdf>.

⁸ *Marshall Islands v United Kingdom* (n 2) para 27.



one party is positively opposed by the other'; it confirmed that the 'determination of the existence of a dispute is a matter of substance', and that 'a formal diplomatic protest' is not a necessary condition for the existence of a dispute.⁹ However, the Court revisited its previous case law, and added two crucial requirements for proving the existence of a dispute between the parties. The Court required a) that the respondent be 'aware' of the existence of the dispute and b) that the dispute must exist at the time of the submission of the application.

8. The Court reasoned that the opposing views of the parties must be clearly stated and that the existence of a dispute can only be established if the respondent 'was aware, or could not have been unaware' of the applicants' claims.¹⁰ Although the Court referred to two precedents, that will be discussed below, this awareness requirement can be regarded as an entirely new criterion devised by the Court in 2016.¹¹ It rendered much more difficult for the Marshall Islands to show the existence of the dispute with the UK. The Marshall Islands' position was pretty well known in international fora, but they had no specific, bilateral diplomatic exchanges with nuclear states in that regard before seising the Court. When compared to nuclear states, the applicant is a smaller country that has suffered enormously from the effects of past nuclear tests. The applicant made a number of public statements recalling nuclear states' responsibility to negotiate complete disarmament, but it did not invoke the specific, individual responsibility of each nuclear state under international law.

9. For the Court, the Marshall Islands' statements were not enough: they contained too general a criticism on the conduct of nuclear states; they did not specifically refer to the claim advanced by the Marshall Islands; they did not specify the conduct of nuclear states that gave rise to the alleged breach of international law; they did not call for a specific reaction by the respondent.¹² The Court concluded that the UK could not have been aware of the Marshall Islands' claims.

⁹ *ibid* paras 37-39.

¹⁰ *ibid* para 41.

¹¹ See *ibid* in particular the dissenting opinion of Judge Yusuf, paras 21-22. For example, the various contributions to the AJIL Unbound Symposium on the Marshall Islands case do all agree in that regard: <www.cambridge.org/core/journals/american-journal-of-international-law/ajil-unbound>.

¹² *Marshall Islands v United Kingdom* (n 2) paras 49-51.



10. The second requirement introduced by the Court and concerning the critical date for the establishment of the existence of the dispute is also highly problematic. In a contradictory paragraph, the Court first recalled settled case law according to which ‘*in principle*, the date for determining the existence of a dispute is the date on which the application is submitted to the Court’. This ‘in principle’ is important because it includes the possibility that the dispute might crystallise *after* the introduction of proceedings. At the end of the same paragraph, the Court held that Article 38(1) of its Statute ‘relates to disputes existing at the time of their submission’.¹³ But no further explanation and no clue on the reasons for adopting this particular interpretation of Article 38(1) were added. The Statute makes no mention whatsoever of the critical date at which the existence of the dispute must be determined, and does not exclude that the precise contours of the dispute be determined during the proceedings before the Court.

11. In the case at hand, the introduction of this new requirement was clearly instrumental in declining jurisdiction. During the proceedings, the existence of a dispute between the parties was undeniable. The large majority of the judges shared this opinion.¹⁴ But they were divided on the existence of the dispute *before* the filing of the application. Again, in that regard the absence of some form of bilateral exchange was regarded as crucial because the Court concluded that the application and the statements made by the parties during the proceedings ‘cannot create a dispute *de novo*, one that does not already exist’.¹⁵ In other words, the fact that the critical date corresponds to the date of the submission of the application prevented the Court from taking into account the subsequent conduct of the parties. It appears, on the contrary, that previous cases might have supported a different conclusion.

12. A third related argument inevitably led the Court to conclude that a dispute between the parties did not exist at the time the Marshall Islands submitted their application. The Court did not take into account the respondent’s conduct. Having concluded that the statements of the

¹³ *ibid* para 42.

¹⁴ It would suffice to add to the minority judges, those of the majority having stated in their separate opinions that a dispute undeniably existed when the parties set forward their views before the Court. See in particular, *ibid* the opinions of Judge Bhandari, para 13; Judge Gaja; Judge Owada, para 21; and Judge Xue, para 16.

¹⁵ *Marshall Islands v United Kingdom* (n 2) para 54.

applicant did not articulate an alleged breach by the UK of Article VI NPT, the Court merely turned a blind eye on the fact that the UK declined to co-operate with certain diplomatic initiatives, failed to initiate any disarmament negotiations, and replaced and modernized its nuclear weapons. For the Court, the absence of awareness of the Marshall Islands' claim was sufficient to ignore the fact that the claim was positively opposed by the respondent conduct.¹⁶ Otherwise, the existence of the dispute would have been evident.

13. In the judgment, two statements figure as justifications for this position of the Court.¹⁷ First, the Court reasoned that, if the dispute could have been established on the basis of conduct subsequent to application and statements made during the proceedings, the 'respondent would be deprived of the opportunity to react before the institution of proceedings to the claim made against its own conduct'. What the Court did not explain is why the respondent should be able to react *before* the institution of proceedings. This aspect is discussed below. Second, the Court added: 'the rule that the dispute must in principle exist prior to the filing of the application would be subverted'. This sentence is a mere affront to logic: it seems obvious that a rule admitting itself exceptions ('in principle'), would not be subverted by the existence of such exceptions. The reasoning of the Court on both new criteria is hardly convincing, and it remains unclear why the conduct of the parties should be entirely irrelevant in determining the existence of a dispute.¹⁸

14. The decision to decline jurisdiction was not an easy decision. The Court was divided, and it adopted one of the judgments eight votes to eight with the casting vote of the President. These judgments have been criticised for a number of reasons among which the fact that the awareness condition is at odds with previous case law not requiring prior notification,¹⁹ but other inconsistencies with the case law of the Court can be pointed out.

¹⁶ *ibid* para 57.

¹⁷ For further analysis in that regard see BI Bonafé, 'La Cour internationale de Justice et la notion de différend' [2016] *Ordine Internazionale e Diritti Umani* 924 <rivistaoidu.net>.

¹⁸ *Marshall Islands v United Kingdom* (n 2) para 43.

¹⁹ *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)* (Preliminary Objections) ICJ Judgment 17 March 2016, nyr, para 72.



II.B. *Consistency of the Court's approach with previous case law*

15. As no definition of dispute is to be found in either the Statute or the Rules of Court, the notion has been clarified in the Court's case law. Traditionally, the Court has considered that whether the dispute exists is a matter for objective determination.²⁰ This means that the existence of opposing views of the parties is a question of fact that can be established by taking into account, basically, either statements and documents exchanged by the parties, including exchanges in multilateral settings, or the material conduct of the parties. The decision adopted a few months earlier in the *Nicaragua v Colombia* case clearly created an expectation that the Court would conclude that a dispute between the Marshall Islands and nuclear states in fact existed.²¹ The formal diplomatic protest of Nicaragua was sent to Colombia six months *after* the institution of proceedings. Thus, the Court had to establish the existence of the dispute on the basis of public statements rather than bilateral diplomatic exchanges of the parties. While Nicaragua had insisted on compliance with the Court's 2012 maritime delimitation, Colombia had declared to be ready to reach an agreement on that delimitation. Such statements were sufficient for the Court to conclude that Colombia could not ignore that its conduct was in contrast with Nicaragua's claim. Thus, in the absence of specific proof of Colombia's awareness the Court concluded that a dispute existed concerning the violation of the rights recognized in the 2012 judgment. In the *Marshall Islands* decisions, the Court should have justified departure from this precedent.

16. With respect more specifically to the awareness requirement, an analysis of the Court's case law shows that it was introduced for the first time in *Marshall Islands* despite the reference to two previous decisions.²² The first reference is the already mentioned *Nicaragua v Colombia* case, in which the respondent complained that Nicaragua's application came as a 'complete surprise'.²³ The Court replied that, on the contrary, 'Colombia could not have misunderstood the position of Nicaragua over

²⁰ S Rosenne, *Law and Practice of the International Court 1920-2005*, vol 2 (4th edn, Martinus Nijhoff 2006) 508.

²¹ *Alleged Violations of Sovereign Rights* (n 19) para 71-73.

²² *Marshall Islands v United Kingdom* (n 2) para 41.

²³ *Alleged Violations of Sovereign Rights* (n 19) para 56.



such differences'.²⁴ Most importantly, the Court did not regard awareness as a requirement for the determination of the existence of a dispute, as it was not mentioned in the general part of the judgment dedicated to the notion of dispute.²⁵

17. The second precedent mentioned by the Court is *Georgia v Russia*.²⁶ As in *Nicaragua v Colombia*, the awareness of claims advanced by the other party was not listed among the requirements for the determination of the existence of the dispute.²⁷ It is true that the Court tried to establish whether the applicant's claims concerning racial discrimination came to the attention of the respondent before the institution of proceedings.²⁸ However, this enquiry appeared to be strictly related to the fact that Georgia relied, as jurisdictional basis, on the compromissory clause of the Convention on the elimination of racial discrimination (CERD) providing that procedural pre-conditions (negotiations) be met before bringing the case before the Court. As pointed out by Judge Greenwood,

‘the existence of a Convention dispute must be sufficiently clear to enable the other party to appreciate that a claim is being made against it regarding the interpretation or application of the Convention [...] That is far from being an exacting requirement but it is an important one, especially in the context of a provision like Article 22 of CERD, which refers to more than one method of dispute settlement. A State cannot be expected to attempt to negotiate a dispute if no steps have been taken to make it aware that it might be a party to such a dispute’.²⁹

18. Notwithstanding the absence of precedents applying the awareness requirement, one may understand the concern of the Court wishing

²⁴ *ibid* para 73.

²⁵ *ibid* paras 50-52.

²⁶ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)* (Preliminary Objections) Judgment [2011] ICJ Rep 70.

²⁷ *ibid* paras 29-30.

²⁸ In the French version of the judgment references to the ‘connaissance’ of the respondent are to be found in paras 61, 87 and 104, whereas in the English version the only reference to the ‘awareness’ of the respondent is in para 87. This might confirm that for the Court in 2011 such awareness was not so essential in the determination of the existence of a dispute between the parties.

²⁹ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (n 26) Separate Opinion of Judge Greenwood, para 9.



the determination of the existence of the dispute to rest on solid ground, especially where the parties had no prior bilateral exchanges and the Court can only rely on their conduct. In the *Marshall Islands* case a number of judges used a notion of dispute that was based on the attitude of the parties.³⁰ Thus, if the objective existence of the dispute is to be established by taking into account basically the conduct of the parties, the awareness requirement provides additional proof of the attitude of the respondent without amounting to prior notification. Indeed, the Court has unambiguously excluded prior notification from the conditions for the existence of a dispute between the parties.³¹ Therefore, the purpose justifying the introduction of the awareness requirement seems legitimate. However, the problematic aspect with the *Marshall Islands* decisions is that they do not clarify its precise content and the awareness requirement, that can prove essential in the determination of the existence of a dispute, remains extremely vague.

19. With respect to the requirement concerning the critical date for the determination of the existence of a dispute, the case law of the Court is more ambiguous. What can be said with certainty is that the Permanent Court of International Justice (PCIJ) has distinguished between two situations: those in which the jurisdictional clause or agreement provides for the direct unilateral seisin of the Court, and those in which the jurisdictional clause or agreement sets forth procedural conditions before bringing the dispute before the Court.

³⁰ See eg *Marshall Islands v United Kingdom* (n 2) opinions of Judges Owada (para 4), Sebutinde (para 21), and Yusuf (para 28). According to this notion, originally advanced by Judge Morelli, 'The opposing attitudes of the parties [...] may respectively consist of the manifestations of the will by which each of the parties requires that its own interest be realized. It is the case of a dispute resulting, on one side, from a claim by one of the parties and, on the other side, of the contesting of that claim by the other party. But it may also be that one of the opposing attitudes of the parties consists, not of a manifestation of the will, but rather of a course of conduct by means of which the party pursuing that course directly achieves its own interest. This is the case of a claim which is followed not by the contesting of the claim but by the adoption of a course of conduct by the other party inconsistent with the claim. And this is the case too where there is in the first place a course of conduct by one of the parties to achieve its own interest, which the other party meets by a protest.' (*South West Africa* (n 3) Dissenting Opinion of Judge Morelli 567).

³¹ *Marshall Islands v United Kingdom* (n 2) para 38.



‘Article 23 [...] does not stipulate that diplomatic negotiations must first of all be tried; nor does it lay down that a special procedure of the kind provided for in Article 2, No. 1, must precede reference to the Court. A comparison, therefore, between the various clauses of the Geneva Convention dealing with the settlement of disputes shows that under Article 23 recourse may be had to the Court as soon as one of the Parties considers that a difference of opinion arising out of the construction and application of Articles 6 to 22 exists. [...] *Even if, under Article 23, the existence of a definite dispute were necessary, this condition could at any time be fulfilled by means of unilateral action on the part of the applicant Party.* And the Court cannot allow itself to be hampered by a mere defect of form, the removal of which depends solely on the Party concerned’.³²

20. In the former case, a flexible approach is warranted and one party may institute proceedings as soon as it considers that a dispute exists. Therefore, in this case the existence of a dispute is a matter of appreciation of the applicant. And there is no reason to exclude the possibility for the dispute to crystallise during the proceedings. Needless to say, this would not prevent the Court from finding that no dispute exists between the parties. In the latter case, the dispute must exist before the institution of proceedings because the jurisdictional clause or agreement provides that the dispute be the object of prior negotiations, exchanges of views, consultations or other means of diplomatic settlement between the parties. And in order to be the object of such procedures the dispute must necessarily exist before the seisin of the Court. This distinction implies that certain precedents are irrelevant to the determination of the existence of a dispute between the Marshall Islands and the nuclear states, such as the *Georgia v Russia* case.

21. Even so restrained, the case law of the two courts is not entirely uniform as far as the critical date for the establishment of the existence of the dispute is concerned. On the one hand, there are at least two cases in which the PCIJ and the ICJ refused to entertain certain claims because at the time of the filing of the application the existing dispute did not include them. In 1939, the PCIJ preliminary objection decision in the case concerning *The Electricity Company of Sofia and Bulgaria* affirmed:

³² *Certain Polish Interests in Polish Upper Silesia (Germany v Poland)* PCIJ Rep Series A No 6, 14 (emphasis added).



‘Under either the Treaty of 1931 or the declarations of adherence to the Optional Clause, it rested with the Belgian Government to prove that, *before the filing of the Application*, a dispute had arisen between the Governments respecting the Bulgarian law of February 3rd, 1936. The Court holds that the Belgian Government has not established the existence of such a dispute and accordingly declares that the Belgian Application cannot be entertained in so far as concerns that part of the claim relating to this law’.³³

22. In 2012, the ICJ held that the dispute between Belgium and Senegal did not regard compliance with universal criminal jurisdiction under customary law but was limited to the 1984 Torture Convention according to the diplomatic exchanges occurred between the parties before the institution of proceedings.³⁴

23. Some international scholars emphasise the difference between these precedents and the *Marshall Islands* cases. In the latter cases, for the first time the Court declined jurisdiction. In the two previous cases, the Court had only rejected certain claims of the applicants and upheld jurisdiction over the others.³⁵ However, the rejection of certain claims or of the entire dispute is based exactly on the same logic: in both cases, it is the existence of an opposition of legal views between the parties that cannot be determined. In the *Marshall Islands* cases, the Court did not mention the PCIJ precedent, but seemed to make no difference between rejecting a claim and a whole dispute.³⁶

24. On the other hand, there are many cases in which the ICJ determined the existence of a dispute exclusively or essentially on the basis of conduct the parties had taken after the filling of the application. This kind of dispute has been defined as ‘*semitacit*’.³⁷ In the *Marshall Islands* judgments, the Court confined itself to the precedents invoked by the

³³ *The Electricity Company of Sofia and Bulgaria (Belgium v Bulgaria)* (Preliminary Objection) PCIJ Rep Series A/B No 77, 83 (emphasis added).

³⁴ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* Judgment [2012] ICJ Rep 422, paras 54-55.

³⁵ C Gray, ‘Current Developments’ (2017) 111 AJIL 423.

³⁶ *Marshall Islands v United Kingdom* (n 2) para 43.

³⁷ R Lavalley, ‘The Notion of International Legal Dispute and the Assumption of Jurisdiction by the International Court of Justice in the Hostages Case’ (1982-83) 35-36 *Revue Hellénique de Droit International* 99.

applicant.³⁸ The relevance of the *Liechtenstein v Germany* case was quickly dismissed, because ‘the existence of a dispute was clearly referenced by bilateral exchanges between the parties prior to the date of the application’.³⁹ It was less easy to get rid of the first *genocide* case between Bosnia and Serbia, where the Court had established the existence of the dispute exclusively on the basis of the respondent’s conduct ‘whether at the stage of proceedings relating to the requests for the indication of provisional measures, or at the stage of the present proceedings relating to those objections’.⁴⁰ Nowhere in the 1996 judgment did the Court take into account Yugoslavia’s conduct preceding the application. Twenty years later the Court affirmed: ‘in the particular context of that case, which involved an ongoing armed conflict, the prior conduct of the parties was sufficient to establish the existence of a dispute’.⁴¹ The fact that Court had really taken into account such ‘prior conduct’ is impossible to verify on the basis of the 1996 judgment. In any case, the material conduct of the parties was sufficient to prove the existence of a dispute and no enquiry was made into the awareness of the respondent.

25. Even more problematic is the argument used by the Court to set aside the *Land and maritime boundary* precedent: ‘The reference to subsequent materials in the *Cameroon v Nigeria* case related to the *scope* of the dispute, not to its *existence*’.⁴² In that judgment, the Court took into account the views expressed by the parties *after* the filling of the application in order to determine whether the dispute also extended to specific claims. The distinction made in 2016 between the *scope* of the dispute and its *existence* is not convincing. Ruling on the scope of the dispute simply means ruling on specific claims of the parties rather than the entire dispute. As mentioned, the fact that the Court focuses on specific claims does not justify adopting a different methodology from that used when

³⁸ See also for instance *Fisheries Jurisdiction (Spain v Canada)* (Jurisdiction of the Court) Judgment [1998] ICJ Rep 432, para 33, where the Court had ascertained the existence of ‘the dispute between Spain and Canada taking account of Spain’s Application as well as the various written and oral pleadings placed before the Court by the parties’.

³⁹ *Marshall Islands v United Kingdom* (n 2) para 54.

⁴⁰ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia)* (Preliminary Objections) Judgment [1996] ICJ Rep 595, para 28.

⁴¹ *Marshall Islands v United Kingdom* (n 2) para 54.

⁴² *ibid* (emphasis added).



assessing the existence of a broader dispute. It is difficult to understand how the Court can take ‘subsequent material’ into account when establishing the existence of specific claims but it cannot do that when establishing the existence of the entire dispute. Thus, the *Cameroon v Nigeria* case can only confirm the possibility to rely on subsequent conduct when establishing the existence of a dispute. On the contrary, if the distinction between the scope of the dispute and its existence is to be retained, then the Court was wrong in the two decisions mentioned above. In the cases concerning *The Electricity Company of Sofia and Bulgaria* and *Questions relating to the Obligation to Prosecute or Extradite*, the Court should have taken into account subsequent conduct because it was merely determining the scope of those disputes.

26. The difficulties associated with the definition of the critical date lead us to consider that this date is better appreciated on a case-by-case basis. As noted by Rosenne, one of the reasons

‘why it is doubtful whether the accumulated case law offers any clear guidance on how this [the determination of the critical date] is done [...] is the equally artificial nature of the endeavour to relate such a dispute, or the situations and facts out of which such a dispute arose, to an arbitrarily fixed date, which may even be the product of circumstances completely unrelated to the case before the Court’.⁴³

27. A cautious approach in that respect is clearly at the basis of the Court’s consistent statement that ‘in principle’ the existence of the dispute should be appreciated at the time of the filing of the application.⁴⁴

II.C. *The determination of the existence of a dispute by arbitral tribunals*

28. More generally, one may wonder whether the approach of the Court adopted in the *Marshall Islands* cases – that is, the introduction of

⁴³ S Rosenne (n 20) 511-512.

⁴⁴ This statement (‘in principle, ...’) is consistently repeated in the Court’s case law. See in particular *Georgia v Russia* (n 26) para 30, *Nicaragua v Colombia* (n 19) para 52, *Marshall Islands v United Kingdom* (n 2) para 42 and even more recently *Immunities and Criminal Proceedings (Equatorial Guinea v France)* (Request for the Indication of Provisional Measures) Order 7 December 2016 nyr, para 37.

new, rigid criteria for the establishment of the existence of the dispute – finds correspondence in the case law of other international tribunals dealing with inter-state disputes. Some recent arbitration cases can be usefully recalled because they provide no support for the Court restrictive approach. They are also important to maintain the distinction between the determination of the existence of the dispute and that of subject-matter jurisdiction.

29. In the *Marshall Islands* decisions, the Court tried to justify the introduction of the awareness requirement by the need to protect the respondent.⁴⁵ In other words, the Court was protecting the respondent from the ‘surprise’ of an unexpected institution of proceedings. It can be recalled that similar concern was expressed by Colombia, without being taken into account by the Court. While the *Marshall Islands* judgments did not use the term ‘surprise’, certain judges and parties did so.⁴⁶ In any case, the decisions can only be based on the assumption that states need protection when they are not aware of the fact that the future applicant is going to bring the dispute before the Court. In the end, even if the Court does not admit it, the awareness requirement is not so much about the existence of the dispute but rather about the intention of the applicant to seize the Court. The risk is that the awareness requirement be understood as requiring the applicant to show that the respondent was aware of the former’s intention to have recourse to judicial settlement rather than another means of dispute settlement. But this had nothing to do with the existence of the dispute, as will be discussed below. The choice of the dispute settlement procedure to be followed by the applicant can only be established by the applicable jurisdictional clauses that are binding for the parties.

30. The decision rendered in the *Chagos Islands* case confirms that the awareness requirement may play a role only when the jurisdictional basis provides for procedural preconditions.⁴⁷ In the part dedicated to the preliminary establishment of jurisdiction, the tribunal borrowed from

⁴⁵ *Marshall Islands v United Kingdom* (n 2) para 43.

⁴⁶ See in particular *ibid*, declaration of Judge Xue (para 6) and UK Preliminary Objections (15 June 2015) para 5 <www.icj-cij.org/files/case-related/160/20150615_preliminary_objections_en.pdf>.

⁴⁷ *In the Matter of the Chagos Marine Protection Area Arbitration (Mauritius v United Kingdom)* Award 18 March 2015 <<https://files.pca-cpa.org/pcadocs/MU-UK%2020150318%20Award.pdf>>.



the *jurisprudence constante* of the Court both the notion of dispute and the objective, flexible approach to be applied to the determination of its existence.⁴⁸ On the one hand, the tribunal adopted a broad understanding of the dispute existing between Mauritius and the UK. Certain specific points of disagreement between the parties have in fact been included in the larger dispute concerning sovereignty even though ‘prior to the initiation of these proceedings, there is scant evidence’ on such specific points.⁴⁹ On the other hand, the diverging views of the parties essentially concerned the scope of the arbitral tribunal subject-matter jurisdiction, that is, whether the existing dispute could have been regarded as included in Part XV of the United Nations Convention on the Law of the Sea (UNCLOS). It is on subject-matter jurisdiction that the tribunal adopted a very restrictive approach.⁵⁰

31. The restrictive interpretation of the international tribunal’s subject-matter jurisdiction does not imply that an equally restrictive approach should guide the determination of the existence of a dispute. The two aspects should be kept separate. In the latter case, the tribunal has to determine whether the dispute exists at all. In the former case, after having established that the dispute does exist, the tribunal establishes whether it falls into the purview of the clause or agreement expressing consent to its jurisdiction.

32. The *Chagos Islands* award is also one of the rare decisions in which the ‘surprise’ of the respondent was taken into account as a procedural precondition necessary for the exercise of the tribunal’s jurisdiction. Article 283 UNCLOS reads:

‘When a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means’.

33. The arbitral tribunal reasoned that the provision ‘was intended to ensure that a state would not be taken entirely *by surprise* by the initiation of compulsory proceedings’, and therefore it required ‘that a dispute have arisen with sufficient clarity that the parties were aware of the issues

⁴⁸ *ibid* para 208.

⁴⁹ *ibid* para 211.

⁵⁰ *ibid* paras 213-221.

in respect of which they disagreed.⁵¹ It is then possible for ‘surprise’ to play a role in the establishment of an international court’s or tribunal’s jurisdiction, but it has to be provided for by a specific rule, such as Article 283 UNCLOS, that imposes on the parties prior recourse to diplomatic procedures of dispute settlement. There is no need to protect the respondent from the ‘surprise’ of instituting proceedings before the Court when judicial settlement is not made dependent on any procedural preconditions. As discussed below, the rules of procedure of the Court include specific safeguards in that regard.

34. In the *South China Sea* award on jurisdiction and admissibility,⁵² the arbitral tribunal adopted on the contrary a broad approach when ascertaining subject-matter jurisdiction. The case has been strongly criticised in that respect. However, what is important here is that the arbitral tribunal relied on the same notion of dispute and the same objective method for the determination of its existence as those adopted by the ICJ.⁵³ Thus, it confirmed the traditional approach rather than the new restrictive approach adopted in the *Marshall Islands* decisions. In addition, the tribunal carried out a detailed analysis of the Court’s case law in order to establish whether the existence of the dispute between the parties could be determined on the basis of their conduct alone, and it concluded to be entitled ‘to examine the conduct of the parties – or, indeed, the fact of silence in a situation in which a response would be expected – and draw appropriate consequences’.⁵⁴

35. Finally, it must be admitted that in the *South China Sea* decision the arbitral tribunal stated that ‘the dispute must have existed at the time the proceedings were commenced’,⁵⁵ and the relevant footnote referred to the Court’s judgment in *Georgia v Russia*. This does not mean that this position has a general application. In both cases, the Court and the arbitral tribunal had jurisdiction according to jurisdictional clauses that required some procedural preconditions to be met before seizing the Court, and in turn such procedural conditions required the dispute to be

⁵¹ *ibid* para 382 (emphasis added).

⁵² *South China Sea Arbitration (The Republic of Philippines v The People’s Republic of China)* Award on Jurisdiction and Admissibility 29 October 2015 <www.pcacases.com/web/sendAttach/1506>.

⁵³ *ibid* paras 148-150.

⁵⁴ *ibid* para 163.

⁵⁵ *ibid* para 149.



already in existence if it were to be submitted to diplomatic procedures. Therefore, these cases cannot be relied upon to set the critical date in connection with the determination of the existence of a dispute.

III. *Legal implications of the new approach regarding the existence of a dispute*

36. The decisions of the Court in the *Marshall Islands* cases have been criticised mainly for their formalism.⁵⁶ Instead of adopting a flexible approach that would have allowed the cases to proceed to the merits, the Court left the applicant with as only option to introduce new proceedings against nuclear states. Another common criticism concerns the political nature of those decisions,⁵⁷ that were essentially supported by nuclear states judges.⁵⁸ In sum, it has been argued that with those decisions the Court preferred to protect the private interests of a few powerful states rather than the general interests of the international community as a whole, a criticism that those decisions share with some of the most controversial cases in the Court's case law.⁵⁹

37. The following paragraphs will focus on the legal implications and drawbacks that those decisions may have with respect to future cases in which the existence of the dispute may be in doubt. First, the assumption behind the position adopted by the Court seems at odds with the procedural guarantees that contentious proceedings before the Court offer to the parties. Second, the new approach of the Court has significant impact on the way in which the existence of a dispute can be proved, not only in

⁵⁶ See the various contributions to the AJIL Unbound Symposium on the Marshall Islands case (n 11). See also VJ Proulx, 'The World Court's Jurisdictional Formalism and its Lost Market Share: The Marshall Islands Decisions and the Quest for a Suitable Dispute Settlement Forum for Multilateral Disputes' (2017) 30 *Leiden J Intl L* 925.

⁵⁷ *ibid.* See also N Krisch, 'Capitulation in The Hague: The Marshall Islands Cases' *EJIL:Talk!* (10 October 2016) <www.ejiltalk.org/capitulation-in-the-hague-the-marshall-islands-cases/#more-14629>.

⁵⁸ For an analysis of the ICJ judges voting patterns see MA Becker, 'The Dispute that Wasn't There: Judgments in the *Nuclear Disarmament* Cases at the International Court of Justice' (2017) 6 *Cambridge Intl L J* 4.

⁵⁹ See in particular I Venzke, 'Public Interest in the International Court of Justice – A Comparison between *Nuclear Arms Race* (2016) and *South West Africa* (1966)' in AJIL Unbound Symposium on the Marshall Islands case (n 11) 68.



principal proceedings. Finally, the new requirements for the existence of the dispute are not entirely consistent with the stated purpose that inspires the Court's exercise of its judicial function.

III.A. *Consistency with existing procedural safeguards and general principles*

38. In the *Marshall Islands* decisions, the introduction of new requirements for the determination of the existence of the dispute was justified by the need that the respondent be able 'to react' to the claims advanced by the applicant.⁶⁰ Arguably, the Court started from the assumption that a respondent should be able to address the claims of the other party *before* the institution of proceedings, that is outside the Court. It is as if the Court should not exercise its judicial function until such time as the parties have failed to settle the dispute by other means.

39. When the parties accept the Court's jurisdiction and agree that proceedings can be instituted by unilateral application, the procedural safeguards provided under the Statute and the Rules of Court in any case ensure the respondent possibility 'to react'. It will be for the Court to decide whether there is a dispute, to make sure that the parties express their views and that they can reply to the other's allegations. It seems that there could be no better place than the International Court of Justice to afford protection not only to the respondent but more generally to all the parties involved in contentious proceedings. As noted by Judge Robinson in his dissenting opinion,

'to react is more properly addressed as a question of procedural due process rather than as an element of the dispute criterion. If a party is embarrassed by hearing for the first time, through the commencement of Court proceedings, a claim against it, it is surely open to the Court to address that matter by recourse to the rules of procedure'.⁶¹

40. In other words, the Statute and the Rules confer upon the Court all necessary powers to ensure that the respondent presents its views, submits documents, responds to the applicant, and so on in conformity with the

⁶⁰ *Marshall Islands v United Kingdom* (n 2) para 43.

⁶¹ *ibid*, Dissenting Opinion of Judge Robinson para 51.



principle of the equality of the parties.⁶² If independent technical assessment is required, the Court can nominate experts.⁶³ If the interests of third parties risk to be affected by its decision, the Court has the means to protect those broader interests with or without third party intervention.⁶⁴ If additional information from international organizations is necessary, the Court can ask them to submit written observations.⁶⁵ And the list could be much longer. Simply put, the very protection of the respondent is provided first of all by the rules governing the Court's contentious function and in practice by the decisions of the Court applying those rules to the special circumstances of each case.

41. The solution of the *Marshall Islands* case should have rather rested on the general principles governing the Court's judicial function. First, those decisions do not appear to be consistent with the principle of judicial economy and sound administration of justice. In *Croatia v Serbia*, the Court stated:

'What matters is that, at the latest by the date when the Court decides on its jurisdiction, the applicant must be entitled, if it so wishes, to bring fresh proceedings in which the initially unmet condition would be fulfilled. In such a situation, it is not in the interests of the sound administration of justice to compel the applicant to begin the proceedings anew – or to initiate fresh proceedings – and it is preferable, except in special circumstances, to conclude that the condition has, from that point on, been fulfilled'.⁶⁶

42. The very same reasoning could have applied to the *Marshall Islands* cases. Certainly, it is not to be excluded that these cases could have been dismissed on other grounds, but at least the Court would have acknowledged the existence of the dispute on nuclear disarmament. The Marshall Islands would not have been in the position to decide whether to initiate

⁶² See arts 44-68 of the Rules of Court.

⁶³ See art 50 of the ICJ Statute.

⁶⁴ See arts 62 and 63 of the ICJ Statute.

⁶⁵ See art 69 of the Rules of Court.

⁶⁶ *Application of the Convention for the prevention and punishment of the crime of genocide (Croatia v Serbia)* (Preliminary Objections) Judgment [2008] ICJ Rep 412, para 85.



fresh proceedings, as it seems unlikely that they would be able to do so.⁶⁷ More generally, a flexible determination of the existence of the dispute facilitates judicial settlement when the parties have previously consented to the Court's jurisdiction.

43. Second, one may doubt that the formalistic approach of the Court is consistent with the principle of equality of the parties.⁶⁸ On the one hand, it is possible to consider that, as a consequence of the *Marshall Islands* decisions, states willing to seize the Court would merely exchange more diplomatic notes with their counterparts and be more specific about their claims. On the other hand, this is far from describing what happens in reality. Diplomacy is generally aimed at finding points of contact between the parties, at avoiding conflicts, rather than formulating precise allegations with respect to specific disputes. The purpose of diplomatic exchanges is to find a commonly acceptable settlement rather than advance specific claims that could in the future be the object of judicial proceedings. Indeed, judicial settlement is generally viewed as a last resort procedure. No doubt, powerful states can be in a position to invoke the responsibility of the future respondent at such an early stage. Take for example the position of the USA with respect to North Korea. It would be difficult to deny the existence of a dispute between the USA and North Korea even in the absence of bilateral diplomatic exchanges because, arguably, the conduct of North Korea and Trump public statements threatening 'fire and fury'⁶⁹ would suffice to satisfy the Court. However, weaker states could not be able to do so. Advancing specific claims has costs in terms of diplomatic action.

44. The substantive equality of the parties is certainly more protected before the Court, where the parties confront one another on legal grounds

⁶⁷ This is arguably for political reasons. It must be recalled that in 2014 when the case was pending the UK amended its optional clause declaration and excluded from the Court's jurisdiction 'any claim or dispute which is substantially the same as a claim or dispute previously submitted to the Court by the same or another Party'. However, it does not seem that the institution of fresh proceedings is precluded by this clause. In fact, the Court never ruled on the merits of the *Marshall Islands* cases.

⁶⁸ See in that regard *Marshall Islands v United Kingdom* (n 2) Dissenting Opinion of Judge Cançado Trindade, paras 132-135, and GRB Galindo, 'On Form, Substance and Equality between States' in *AJIL Unbound Symposium on the Marshall Islands case* (n 11) 75.

⁶⁹ S Lee Meyers, C Sang-Hun, 'Trump's 'Fire and Fury' Threat Raises Alarm in Asia' *The New York Times* (9 August 2017) <www.nytimes.com>.



and procedural guarantees apply equally to both of them, than at the stage of diplomatic or bilateral exchanges where the confrontation is much broader and may include recourse to means for the protection of political, economic, strategic, and other interests. To ask a smaller state to engage in further diplomatic exchanges rather than bringing the dispute directly before the Court is to weaken its position instead of ensuring that the parties are equally protected. In fact, powerful states can be able to dissuade smaller states from bringing a case before the Court, for instance, by simply exercising political pressure.

45. In 1949, the Court rejected the argument of the UK according to which a state could secure possession of evidence in the territory of another state in order to submit it to an international tribunal. Although such intervention might facilitate its task, the Court reasoned that ‘it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself’.⁷⁰

46. Therefore, the *Marshall Islands* decisions are a source of concern not only for the dismissal of those particular cases, but mainly for the introduction of new requirements concerning the determination of the existence of a dispute. In fact, the introduction of such new requirements has general application and can have an impact on all kinds of proceedings that require the previous establishment of the existence of a dispute.

III.B. *Spillover effects*

47. The *Marshall Islands* precedent may have a number of spillover effects. The fact that the Court rendered more difficult the establishment of the existence of a dispute has first of all an impact beyond the preliminary objections proceedings. The new awareness and critical date requirements should in principle apply to the other situations in which new claims, ie new disputes, are advanced by the parties or third states. In other words, the *Marshall Islands* precedent can apply to incidental proceedings such as counter-claims and intervention or to other proceedings such as the interpretation of previous judgments.⁷¹

⁷⁰ *Corfu Channel (United Kingdom v Albania)* Judgment [1949] ICJ Rep 35.

⁷¹ Provisional measures proceedings may raise a similar concern as the Court increasingly focuses on the *prima facie* existence of the dispute at that stage. See for instance the *Equatorial Guinea v France* case (n 44).

48. Let us start with the latter example. According to Article 60 of the Court's Statute, '[i]n the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party.' The case law of the Court has consistently held that the existence of a dispute concerning the interpretation of the previous judgment is a requirement under Article 60.⁷² Thus, if the *Marshall Islands* precedent had to be applied to interpretation proceedings, the applicant would be required to show that, before the institution of such proceedings, the respondent was aware of the existence of a dispute on the interpretation of the Court's judgment. However, this possibility was explicitly ruled out by the PCIJ already in 1927.⁷³ No mention of an awareness requirement is to be found in the case law of the Court concerning interpretation proceedings.

49. According to Article 80 of the Rules of Court, counterclaims 'shall be made in the Counter-Memorial and shall appear as part of the submissions contained therein'. A well-settled case law of the Court has interpreted the notion of counter-claim as regarding new claims that the respondent may advance in connection with the main dispute.⁷⁴ This means that a counter-claim involves the submission of a new dispute – ie a new claim of the respondent that is positively opposed by the applicant – which

⁷² S Rosenne (n 20) 1620 ff.

⁷³ *Interpretation of Judgments Nos 7 and 8 (Factory at Chorzów) (Germany v Poland)* Judgment PCIJ Rep Series A No 13, 10-11: 'In so far as concerns the word 'dispute', the Court observes that, according to the tenor of Article 60 of the Statute, the manifestation of the existence of the dispute in a specific manner, as for instance by diplomatic negotiations, is not required. It would no doubt be desirable that a State should not proceed to take as serious a step as summoning another State to appear before the Court without having previously, within reasonable limits, endeavoured to make it quite clear that a difference of views is in question which has not been capable of being otherwise overcome. But in view of the wording of the article, the Court considers that it cannot require that the dispute should have manifested itself in a formal way; according to the Court's view, it should be sufficient if the two Governments have in fact shown themselves as holding opposite views in 'regard to the meaning or scope of a judgment of the Court. The Court in this respect recalls the fact that in its Judgment No. 6 (relating to the objection to the jurisdiction raised by Poland in regard to the application made by the German Government under Article 23 of the Geneva Convention concerning Upper Silesia), it expressed the opinion that, the article in question not requiring preliminary diplomatic negotiations as a condition precedent, recourse could be had to the Court as soon as one of the Parties considered that there was a difference of opinion arising out of the interpretation and application of Articles 6 to 22 of the Convention.'

⁷⁴ See in particular *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia)* (n 40) para 27.



is connected but that, at the same time, remains independent from the main dispute being the object of the principal proceedings. If the new requirements for the determination of the existence of the new dispute apply to counter-claims, it follows that the applicant should be aware of the counter-claim before the filing of the application. This could render counter-claims extremely difficult to be adjudicated by the Court. In addition, the case law of the Court on counter-claims does not seem to have previously required proof of the awareness of the applicant at that critical date. Previous cases have generally focused on two basic requirements, namely, jurisdiction and direct connection with the principal claim, and they have largely relied on the principles of judicial economy and sound administration of justice.⁷⁵ Indeed, the purpose of admitting counter-claims is to enable the Court to have a more general overview of the claims of the parties and to decide them consistently. In such circumstances, it would not make much sense to render the proof of the claims of the respondent particularly difficult.

50. A similar reasoning applies to intervention as a party. The Court has never admitted third states to intervene in contentious proceedings as ‘parties’, but it has accepted this possibility when the rights of the third state risk to be affected by the decision of the Court in a certain case, and provided that there is a jurisdictional link between the parties and the third state. The Court has also clarified that:

‘If it is permitted by the Court to become a party to the proceedings, the intervening State may ask for rights of its own to be recognized by the Court in its future decision, which would be binding for that State in respect of those aspects for which intervention was granted, pursuant to Article 59 of the Statute’.⁷⁶

⁷⁵ See also *Oil Platforms (Iran v United States)* (Counter-claims) Order [1998] ICJ Rep 190, paras 32-39; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria)* Order [1999] ICJ Rep 983, 985-986; *Armed Activities in the Territory of the Congo (Congo v Uganda)* Order [2001] ICJ Rep 660, paras 27-44; *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)* (Counter-claims) Order [2013] ICJ Rep 200, paras 33-37.

⁷⁶ *Territorial and Maritime Dispute (Nicaragua v Colombia)* (Application by Honduras for permission to Intervene) Judgment [2011] ICJ Rep 420, para 29.



51. Again, this means that the Court would decide, along with the principal claims of the parties, also the additional claims of the intervening state. In other words, intervention as a party implies the submission to the Court of a new dispute between the third state and one of the parties to the main proceedings. If the new approach adopted in the *Marshall Islands* decisions were to be followed, the establishment of the awareness of the party opposing the claims of the state seeking to intervene at the time the case was instituted may be very difficult. The third state is hardly aware of the details of cases brought by other states before the Court and of their possible connections with the disputes it may have with one of the parties. It seems too much of a burden to require that the third state show the existence of the dispute before the filing of the application regarding the main proceedings, in the rather rare situation in which all the parties including the third state accept the jurisdiction of the Court. It should be for the Court to decide on a case-by-case basis whether the sound administration of justice recommends the intervention of the third state and the joint decision of the various but connected disputes.

52. This is true all the more so when the dispute brought before the Court is a multilateral dispute. Indeed, the new awareness and critical date requirements are particularly problematic when applied to the determination of the existence of such disputes. All cases in which the Court has taken controversial, restrictive views on preliminary issues – such as those mentioned above – concerned disputes having a multilateral character. These particular disputes are typically raised in multilateral gatherings or during the meetings of international organizations. Most of the time, specific claims would not be advanced on a bilateral basis, but rather efforts would be made to find consent on very general aspects of common concern for all the parties involved in order to prevent or settle underlying general disputes. In such contexts, the reaffirmation of a certain rule can be indicative for instance of the existence of a dispute between two or more states on the respect of that rule.

53. Therefore, statements in multilateral fora, despite their general character, are essential to prove the existence of multilateral disputes. In the *Marshall Islands* decisions, the Court seemed, on the contrary, to downplay the role of such statements when it stated that:

‘considerable care is required before inferring from votes cast on resolutions before political organs such as the General Assembly conclusions as



to the existence or not of a legal dispute on some issue covered by a resolution. The wording of a resolution, and votes or patterns of voting on resolutions of the same subject-matter, may constitute relevant evidence of the existence of a legal dispute in some circumstances, particularly where statements were made by way of explanation of vote. However, some resolutions contain a large number of different propositions; a State's vote on such resolutions cannot by itself be taken as indicative of the position of that State on each and every proposition within that resolution, let alone of the existence of a legal dispute between that State and another State regarding one of those propositions'.⁷⁷

54. Thus, the Court is setting too high a threshold for establishing the relevance of statements made in multilateral fora. It is difficult to share the opinion of the Court according to which the Marshall Islands statements made at the Nayarit conference had no precise addressees. The applicant said that nuclear states were breaching their obligation under Article VI NPT. There are nine nuclear states. Could nuclear states really be unaware of the claim advanced by the Marshall Islands? More generally, disregarding this type of public statements can prevent the Court from dealing efficiently with the increasing number of international multilateral disputes. Needless to recall that in the past, the Court accepted that a dispute might crystallise in multilateral fora, although jurisdiction should be construed in purely bilateral terms.⁷⁸

55. It has been suggested that the Court may not be the ideal forum for the settlement of multilateral, highly political and sensitive disputes.⁷⁹ However, the Court has previously made it clear, on the one hand, that diplomatic efforts to settle a dispute are to be kept separate from the exercise of its judicial function, and that such diplomatic efforts would not prevent it from adopting a judicial decision concerning that dispute.⁸⁰ On the other hand, the case law of the Court has also rejected the view that complex, multilateral disputes are beyond its reach and that they should be

⁷⁷ *Marshall Islands v United Kingdom* (n 2) para 56. It suffices to recall that the UK had voted *against* General Assembly Resolution 68/32 of 2013 that called all states to comply with their obligations concerning nuclear disarmament.

⁷⁸ *South West Africa* (n 3) 346.

⁷⁹ See *Marshall Islands v United Kingdom* (n 2) Separate Opinion of Judge Tomka, para 38. See also Proulx (n 11) 96.

⁸⁰ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)* (Jurisdiction and Admissibility) Judgment [1984] ICJ Rep 392, para 107-108.

dealt with at the political or diplomatic level.⁸¹ Therefore, its settled case law shows that the Court should not try to avoid multilateral disputes. On the contrary, it would be part of the Court's judicial function to develop specific procedural tools allowing it to protect more efficiently collective interests.⁸²

III.C. *The purpose of the existence-of-the-dispute requirement and the ICJ judicial function*

56. In principle, the purpose of the existence-of-the-dispute requirement is to safeguard the judicial function of the Court. The existence of the dispute makes the contentious function of the Court effective, as clarified in the *Northern Cameroons* case.⁸³ The existence of the dispute distinguishes the contentious jurisdiction from the advisory jurisdiction of the Court. Otherwise, states would be able to use the former to obtain opinions on legal questions.

57. The purpose of the existence-of-the-dispute requirement is not to protect the parties from 'surprise' applications. A good example in that regard is provided by *forum prorogatum*, that is, the situation in which the respondent consents to the Court's jurisdiction for the purposes of the case after the institution of proceedings.⁸⁴ This procedural rule allows the Court to exercise its judicial function even if the respondent is not aware of the existence of the dispute before the submission of the application, but becomes aware of it during the proceedings before the Court. The only condition is consent to jurisdiction. The rule on *forum prorogatum* shows that what counts for the exercise of the Court's jurisdiction is the *objective* determination of the existence of the dispute. Such determination can only be made by the Court in order to protect its judicial function. The *subjective* perception that the parties may have before the application does not matter. This example also shows that the essential requirement for the exercise of contentious jurisdiction is the existence of a dispute. Even in the

⁸¹ *United States Diplomatic and Consular Staff in Tebran (United States v Iran)* Judgment [1980] ICJ Rep 3, para 36.

⁸² See eg Ranganathan, 'Nuclear Weapons and the Court' in AJIL Unbound Symposium on the Marshall Islands case (n 11) and Venzke (n 59).

⁸³ *Case concerning the Northern Cameroons (Cameroon v United Kingdom)* (Preliminary Objections) Judgment [1963] ICJ Rep 38.

⁸⁴ See art 38 para 5 of the Rules of Court.



case of *forum prorogatum*, and even if the respondent is unaware of it, the Court has to ascertain objectively the existence of the dispute because this is crucial for safeguarding its judicial function.

58. On the contrary, the *Marshall Islands* case and the newly introduced awareness and critical date requirements rather fulfil the purpose of protecting the interest of the respondent state not to be caught by surprise and accord a crucial role to the subjective perception of the parties in the determination of the existence of the dispute. In the end, the real concern of the Court in those cases was to protect the ‘dignity’ of the respondent from an ‘unfriendly’ act of the applicant by ensuring that it has ‘the opportunity to react before the institution of proceedings’. It should be recalled that in 1982 the UN General Assembly adopted a resolution recognising that ‘Recourse to judicial settlement of legal disputes, particularly referral to the International Court of Justice, should not be considered an unfriendly act between States.’⁸⁵

59. More broadly, the new requirements for the existence of the dispute reflect a conception of judicial settlement that is secondary to diplomatic settlement. If bringing a case before the Court without prior exchange is an unfriendly act from which the respondent should be protected, this means that the ordinary means of dispute settlement is diplomatic settlement. With the words of Sir Humphrey Waldock, this view ‘est en effet une survivance du passé.’⁸⁶ Certainly, the PCIJ stated that ‘the judicial settlement of international disputes, with a view to which the Court has been established, is simply an alternative to the direct and friendly settlement of such disputes between the Parties; as consequently it is for the Court to facilitate, so far as is compatible with its Statute, such direct and friendly settlement’.⁸⁷ However, no requirement of previous diplomatic settlement is provided under the ICJ Statute,⁸⁸ and the case law of the

⁸⁵ UNGA Res 37/10 ‘Manila Declaration on the Peaceful Settlement of International Disputes’ (15 November 1982) UN Doc A/RES/37/10 para 5.

⁸⁶ *Annuaire de l’Institut de droit international, Session de Grenade, 1956*, p. 204. In 1956, the *Institut* was discussing the adoption of a resolution concerning ‘L’élaboration d’une clause modèle de compétence obligatoire de la Cour internationale de Justice’ and the plenary rejected the proposal to confine the exercise of the contentious jurisdiction of the Court to situations in which the dispute ‘n’a pas pu être réglé par la voie diplomatique’.

⁸⁷ *Case of the Free Zones of Upper Savoy and the District of Gex (France v Switzerland)* PCIJ Rep Series A No 22, 13.

⁸⁸ S Rosenne (n 20) 1153.

Court has recognised that judicial settlement is not secondary to diplomatic settlement.⁸⁹

60. Even assuming that the awareness requirement has now general application, one must be careful in maintaining the distinction between the awareness of the existence of the dispute and the awareness of the intention of the applicant to bring the case before the Court. The latter element is not a requirement for the exercise of the Court's jurisdiction, unless it is provided under a specific clause. The *Marshall Islands* decisions should not be read as requiring proof of the awareness of the intention of the applicant to bring the case before the Court. That is a subjective element that would be extremely difficult to establish, and would render almost unpredictable the Court's jurisdiction. In addition, such a different requirement clearly serves the purpose of protecting the respondent and not the Court's judicial function. In the end, it would operate as a bar to the Court's jurisdiction, not really as a criterion for the establishment of the existence of the dispute.

61. The new Optional Clause Declaration deposited by the United Kingdom demonstrates that the risk of blurring these two requirements is real. On 22 February 2017, after the Court rendered the decisions on the *Marshall Islands* cases the UK excluded from the jurisdiction of the Court:

‘any claim or dispute in respect of which the claim or dispute in question has not been notified to the United Kingdom by the State or States concerned in writing, including of an *intention to submit the claim or dispute to the Court* failing an amicable settlement, at least six months in advance of the submission of the claim or dispute to the Court’.⁹⁰

First, the awareness requirement is understood as requiring previous notification, which is in contrast with the Court's settled case law. Second, the declaration interprets the requirement as concerning the intention to submit the dispute to judicial settlement. This might be considered as a specific feature of the UK declaration. However, it shows how the *Marshall*

⁸⁹ See *Nicaragua v United States* (n 80) and accompanying text.

⁹⁰ The new declaration of the United Kingdom is available on the Court's website (emphasis added). It also provides that ‘any claim or dispute that arises from or is connected with or related to nuclear disarmament and/or nuclear weapons, unless all of the other nuclear-weapon States Party to the Treaty on the Non-Proliferation of Nuclear Weapons have also consented to the jurisdiction of the Court and are party to the proceedings in question’ shall be excluded from the Court's jurisdiction.



Islands decisions can be misinterpreted and can entail additional hurdles to judicial settlement.

IV. *Concluding remarks*

62. In practical terms, the main criticism concerning the *Marshall Islands* decisions and the new requirements for the determination of the existence of the dispute is that they may render this determination extremely difficult. As a consequence, the Court would have to decline jurisdiction in a larger number of cases, its jurisdiction would be based on the subjective notion of awareness and be therefore less predictable, and all this would have an impact on peaceful settlement of international disputes. Such a position finds no support either in the Court's case law, in arbitral tribunals' recent case law or in the intention of the parties when they consent to unilateral institution of contentious proceedings. In short, it is simply difficult to understand why a state should not be taken by surprise, when it has accepted this possibility. Contentious proceedings before the Court afford all sorts of procedural guarantees for the parties and are clearly more advanced in that respect than diplomatic settlement. As discussed above, this new approach is at odds with the principle of substantive equality of the parties, and it may also have a number of unwarranted spillover effects as far as different kinds of proceedings are concerned.

63. More basically, the new requirements introduced with the *Marshall Islands* decisions are aimed at protecting the respondent party. Not only is this protection unnecessary but it is also inconsistent with the purpose that a settled case law of the Court has attributed to the existence-of-the-dispute requirement. The determination of the existence of a dispute is to be carried out, in an objective way, by the Court itself. Its purpose is to protect the exercise of the judicial function of the Court, not the parties. New requirements for determining the existence of the dispute that at the same time are rigid and that depend on the subjective appreciation of the parties fulfil a purpose that is not the safeguard of the Court's judicial function. Assuming that the new requirements are acceptable, they should be introduced with extreme caution. In addition, they should not prevent the Court from taking into account the conduct of the parties and their public statements in multilateral fora. These two aspects are increasingly im-

portant in the determination of the existence of disputes having a multilateral dimension and entailing the protection of collective interests of the international community. With the *Marshall Islands* decisions, the Court reverts to a strictly bilateral understanding of international adjudication.

64. Finally, assuming *arguendo* that nuclear disarmament is a political issue and that as such it is not suitable for international litigation,⁹¹ the Court could have restrained its jurisdiction by having recourse to the tool it has at its disposal as a judge, that is, judicial propriety and discretion to identify those limits of its judicial function that are necessary to preserve it.⁹² A properly reasoned decision in that respect would have made a huge difference when compared to the solution adopted in the *Marshall Islands* case. The criteria for determining the existence of a dispute would have remained the same. The Court would have assumed responsibility for declining jurisdiction, more or less in the same way in which domestic constitutional courts all around the world decline to hear certain cases having a political character. Most importantly, the Court would have defined with precision the circumstances in which such judicial restraint could apply to political issues. If something close to a separation of powers between the judicial function and the political function is to appear at the international level, it would be extremely important to know its precise contours in order not to jeopardise the exercise of the Court's judicial function. Unpredictable and creeping self-restraint in the name of political reasons can only frustrate international dispute settlement and ultimately justice.

⁹¹ This opinion is shared by a number of judges and commentators. See in particular Becker (n 58) 25, and Proulx (n 79) 100-101.

⁹² See in particular *Case concerning the Northern Cameroons* (n 84) 38, and *Nuclear Tests* (n 1) para 58. For a comment, see Rosenne (n 20) 532-539.

