SEPARATE OPINION OF JUDGE NDIAYE

[*Translation*]

1. In this case Singapore (hereinafter the "Respondent") claimed that Malaysia (hereinafter the "Applicant") had failed to comply with the obligations devolving upon it under article 283, paragraph 1, of the Convention. "[T]he negotiations between the Parties, which Article 283 of the Convention makes a precondition to the activation of the Part XV compulsory dispute settlement procedures, have not occurred" (Response, paragraph 6).

2. The Respondent argued that the Applicant's referral of the matter to the (Annex VII) arbitral tribunal was premature since, contrary to the requirement of article 283 of the Convention, no exchange of views had taken place. Paragraph 1 of that article reads as follows:

> 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.

3. The Applicant stated that on a number of occasions it had requested that meetings be held to examine each party's concerns with a view to reaching an amicable settlement to the dispute. It contended that the Respondent had repeatedly refused to enter into consultations, requiring the other party to prove first the substance of its case.

The principle of prior exhaustion of the negotiation process would therefore appear to be involved; hence the objection *in limine litis*. Which poses the problem of the *actuality* of the dispute.

4. Negotiation can be taken to mean both a method of determining the subject of the dispute and a method of settling that dispute. It was in the first sense that the Permanent Court of International Justice explained that "before a dispute can be made the subject of an action at law, its subject matter should have been clearly defined by means of diplomatic negotiations" (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 15).

5. That is to say that the attitude of the parties must be such as will enable them to come to an agreement. They are not, however, required to accept a basis for settlement that would damage their own interests. Similarly, a State Party is not obliged to continue with an exchange of views when it concludes that the possibilities of reaching agreement have been exhausted (see *MOX Plant (Ireland* v. *United Kingdom), Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001*, p. 95 at p. 107, paragraph 60).

6. It would appear that in the present case the persistent refusal by the Respondent to examine the claims of the other party encouraged the latter to resort to the procedure established in paragraph 5 of article 290 of the Convention.

Was the Applicant thus in contravention of the provisions of article 283, paragraph 1?

7. The rule that the negotiation process should first be exhausted is to be found in certain international conventions (e.g., the *Covenant of the League of Nations*, article 13, paragraph 1). Its customary nature is doubtful, however. The rule appears as a condition governing jurisdiction of courts or as a condition governing admissibility of an action brought by means of an application.

8. In the first case, international courts examine the conditions laid down and dispose of them without any difficulty. This involves primarily a factual examination of the attitude of the two parties. The ICJ's approach to settling the question of jurisdiction in this field is wholly applicable to the facts of the present case.

The Court said:

> The true value of this objection will readily be seen if it be remembered that the question of the importance and chances of success of diplomatic negotiations is essentially a relative one. Negotiations do not of necessity always presuppose a more or less lengthy series of notes and despatches; it may suffice that a discussion should have been commenced, and this discussion may have been very short; this will be the case if deadlock is reached, or if finally a point is reached at which one of the Parties definitely declares himself unable, or refuses, to give way, and there can be therefore no doubt that the dispute cannot be settled by diplomatic negotiation.
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> But it is equally true that if the diplomatic negotiations between the Governments commence at a point where the previous discussions left off, it may well happen that the nature of the latter was such as to render superfluous renewed discussion of the opposing contentions in which the dispute originated. No general and absolute rule can be laid down in this respect. It is a matter for consideration in each case (*South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, pp. 345–346).

9. Now in the present case, deadlock has clearly been reached on the questions in dispute; the parties even spoke of the negotiations "breaking down".

10. The prior exhaustion of the negotiation process would also appear to be a prerequisite, from the legal point of view, to the bringing of a case before an international court. The admissibility of the application is thus subject to

compliance with this rule, which applies, however, only if the parties are bound by a contractual obligation. That is to say that the party invoking the rule of prior exhaustion of the negotiation process must provide proof that it is bound to the other party by a contractual undertaking to that effect.

11. In this case, the Respondent has not proved that such an undertaking exists between the parties. That is to say, that the Tribunal is competent and may exercise its judicial power and hear the claims of the parties in order to make its determination concerning those claims.

12. While the rule of prior exhaustion of the negotiation process is to be found in certain treaties, it hardly makes its presence felt in general international law. On a number of occasions the International Court of Justice has refused to accept it. It has even taken the view, relying on State practice, that the application could be submitted to it while negotiations were continuing.

In the *Aegean Sea Continental Shelf* case, the Court stated:

> The Turkish Government's attitude might thus be interpreted as suggesting that the Court ought not to proceed with the case while the parties continue to negotiate and that the existence of active negotiations in progress constitutes an impediment to the Court's exercise of jurisdiction in the present case. The Court is unable to share this view. Negotiation and judicial settlement are enumerated together in Article 33 of the Charter of the United Nations as means for the peaceful settlement of disputes. The jurisprudence of the Court provides various examples of cases in which negotiations and recourse to judicial settlement have been pursued *pari passu*. Several cases, the most recent being that concerning the *Trial of Pakistani Prisoners of War* (*I.C.J. Reports 1973*, p. 347), show that judicial proceedings may be discontinued when such negotiations result in the settlement of the dispute. Consequently, the fact that negotiations are being actively pursued during the present proceedings is not, legally, any obstacle to the exercise by the Court of its judicial function (*Judgment, I.C.J. Reports 1978*, p. 12, paragraph 29); see also *Military and Paramilitary Activities in and against Nicaragua, Jurisdiction and Admissibility*, *Judgment, I.C.J. Reports 1984*, p. 440, paragraphs 106–108; *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 303).

13. On the basis of the above, the Tribunal could have rejected the objection to jurisdiction raised by the Respondent, particularly as it had already taken the view that a State Party is not obliged to pursue procedures under Part XV, section 1, of the Convention when it concludes that the possibilities of settlement have been exhausted (see *Southern Bluefin Tuna (New*

Zealand v. *Japan; Australia* v. *Japan), Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999*, p. 208 at p. 295, paragraph 60).

(Signed) Tafsir Malick Ndiaye