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Part Three Statute of the International Court of Justice, Ch.III Procedure, Article 43

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finding to that effect.⁷⁶⁴ However, this outcome does not necessarily preclude the reopening of the question of jurisdiction in case of changed circumstances,⁷⁶⁵ (p. 1298) subsequent argument as to the scope of that jurisdiction,⁷⁶⁶ or a subsequent challenge to jurisdiction on other grounds.⁷⁶⁷

3. Declaration that the Objections Are Not Exclusively Preliminary

201 Originally, the Court could either ‘give its decision on the objection or ... join [all or part of] the objection to the merits’.⁷⁶⁸ Joinder of the preliminary objections to the merits was to be decided whenever the interests of the good administration of justice so required or a decision on the preliminary objections raised questions of fact and law with regard to which the parties were in disagreement and which were too closely linked to the merits to adjudicate upon them separately.⁷⁶⁹ The Court had availed itself of this possibility on several occasions.⁷⁷⁰

202 In 1972, the possibility to join an objection to the merits was deleted from the Rules of Court.⁷⁷¹ The revision of the Rules was prompted by the *Barcelona Traction* case where the Court had joined the preliminary objection to the merits, but ultimately decided the case on the preliminary objection, after requiring the parties to plead the merits fully.⁷⁷² The Court acknowledged in 1986 that this was regarded ‘as an unnecessary prolongation of an expensive and time-consuming procedure’.⁷⁷³ Under Article 79, para. 9 of the present Rules, the Court can no longer formally join an objection to the merits. It can, however, reach de facto the same result by declaring that an ‘objection does not possess, in the circumstances of the case, an exclusively preliminary character’.⁷⁷⁴ However, the 1972 modification of the Rules was intended to be not just one of drafting but of substance.⁷⁷⁵ Under the new wording, the Court must ‘take a definite stand’⁷⁷⁶ and make a specific finding that the objection does not have an ‘exclusively preliminary character’.⁷⁷⁷ It is no longer open to it to join the objection to the merits simply because doing so would ‘place the Court in a better position to adjudicate with a full knowledge of the facts’.⁷⁷⁸

(p. 1299) **203** According to Article 79, para. 8 of the Rules, the Court may, whenever necessary, request the parties to argue ‘all questions of law and fact’ (emphasis added), including those touching upon certain aspects of the merits,⁷⁷⁹ in order to enable it to determine its jurisdiction or the admissibility of the case at the preliminary stage of the proceedings. Rather than carrying the preliminary objections over into the merits phase, questions of fact and law ‘touching upon’ the merits are now brought forward into the jurisdictional phase, to dispose of the objections at the earliest possible stage in the proceedings. Thus, under the present Rules, objections should be decided at the preliminary stage wherever reasonably possible: *in dubio preliminarium eligendum*.⁷⁸⁰ This also seems to be in line with the approach taken by the Court, which has been very cautious in declaring an objection to be ‘not exclusively preliminary’ in character and, in fact, has done so only on four occasions.⁷⁸¹ Specifically, the following objections were declared to be of a non-exclusively preliminary character, in the circumstances of the relevant cases: an objection to jurisdiction based on a multilateral treaty reservation;⁷⁸² an objection based on the mootness of the claim on the basis of events subsequent to the filing of the application;⁷⁸³ an objection that a boundary delimitation would affect the rights of third States;⁷⁸⁴ and an objection to jurisdiction on the basis that the applicant’s claims related to acts or omissions that took place before the respondent came into existence as a State.⁷⁸⁵ The Court also recorded the view expressed by a party that the objection that the alleged wrongful conduct took place outside its territory and therefore the Court lacked jurisdiction *ratione loci* to entertain the case did not possess an exclusively preliminary character.⁷⁸⁶