DISSENTING OPINION OF JUDGE *AD HOC* COT

[Translation]

Vote against the operative part — Lis pendens — *Essential elements of* lis pendens — *Relevance of the relief* — Lis pendens *and quasi-judicial bodies* — *Settlement of CERD-related disputes* — *Plausible interpretation of Article 22* — *Other conditions for the indication of provisional measures* — *Suspension of the proceedings.*

INTRODUCTION

1. I regret that I am unable to support the conclusions reached by the majority of the Court. In my opinion, the Court should have upheld at least the first provisional measure requested by the UAE. I believe that, in light of the doctrine of *lis pendens*, the procedural rights asserted by the UAE are at least plausible under the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) (I), and that the other conditions for the indication of provisional measures are also met (II).

I. *LIS PENDENS* AND THE PLAUSIBILITY OF THE RIGHTS CLAIMED

2. As regards the first provisional measure requested by the UAE, namely that the Court order Qatar to immediately withdraw its Communication submitted to the Committee on the Elimination of Racial Discrimination (the CERD Committee), both Parties referred to the notion of *lis pendens*, but disagreed about its relevance to Article 22 of CERD. The UAE asserts that the doctrine of *lis pendens* requires the Court to order Qatar not to proceed with the parallel proceedings before the Committee (Request, para. 42). Qatar, for its part, considers that this doctrine, if it exists, is not applicable to the dispute settlement mechanisms provided for by the Convention (CR 2019/6, p. 23, paras. 33-35 (Lowe)).

3. The status of the doctrine of *lis pendens* in public international law is not entirely clear. Unlike the principle of *res judicata*, the doctrine of *lis pendens* does not have its textual basis in the Statute or the Rules of Court. Neither the Court nor its predecessor has ever affirmed or rejected the applicability of the doctrine of *lis pendens* in a case brought before it. However, in the case concerning *Certain German Interests in Polish Upper Silesia*, the Permanent Court did consider, when interpreting the request of the Polish Government (the respondent), "whether the doctrine of *litispendance*, the object of which is to prevent the possibility of conflicting judgments, can be invoked in international relations" (*Jurisdiction, Judgment No. 6, 1925, P.C.I.J., Series A, No. 6*, p. 20). The Permanent Court had no difficulty in rejecting Poland's claim that the proceedings brought before the Court by Germany (the applicant) in respect of the factory at Chorzów should be suspended until the Germano-Polish Mixed Arbitral Tribunal had given its judgment on the action relating to the same factory, "because it is clear that the essential elements which constitute *litispendance* are not present" (*ibid*., p. 20).

4. The Permanent Court did not make any general pronouncements about the nature and status of the doctrine of *lis pendens* before it. Nevertheless, the reasoning outlined above suggests that it did not rule out the possibility of the doctrine being applied in a case submitted to it, if the "essential elements" were present. The first question, therefore, is what are the "essential elements" for the doctrine of *lis pendens* to be applied (A). The second is whether the provisions of CERD, in particular Article 22, allow such an application (B).

A. The "essential elements" of *lis pendens*

5. In rejecting the applicability of *lis pendens* in the case concerning *Certain German Interests in Polish Upper Silesia*, the Permanent Court referred to the fact that the parties were not the same, the actions were not identical and the Mixed Arbitral Tribunal and the Permanent Court were "not courts of the same character" (*ibid*., p. 20). While the first element needs no explanation, the other two are not as clear-cut and call for further clarification. In particular, the question arises as to whether, in addition to the facts and legal arguments, the relief sought in the two actions must also be the same for the proceedings to be regarded as identical (1). Moreover, as regards two courts being "of the same character", this depends on whether the doctrine of *lis pendens* is applicable only in respect of concurrency between two judicial organs, to the exclusion of parallel proceedings between a judicial body and a quasi-judicial one (2).

1. Relevance of the relief sought

6. Qatar asserts that the relief it is seeking before the Court is not the same as that which it is seeking before the CERD Committee, because, in its Communication, it has simply asked the Committee to transmit that Communication to the UAE for that State to *(a)* respond within the three-month time-limit and *(b)* take all necessary steps to end the coercive measures. Qatar further maintains that its Note Verbale of 29 October 2018, transmitted to the Committee, was simply a request for the assistance of a conciliation commission. In its view, this is not the same as the relief sought in the present case, in which it has asked the Court to adjudge and declare a series of breaches of international law and to order the UAE to take a series of steps (CR 2019/6, p. 24, paras. 38-40 (Lowe)).

7. However, Qatar's request for its Communication to be transmitted to the UAE and the request made in its Note Verbale of 29 October 2018 were merely procedural steps to be followed under Article 11, paragraphs 1 and 2, of the Convention. They are not relief as such. In its substance, Qatar's Communication to the CERD Committee complains that the UAE has violated its obligations under, *inter alia*, CERD Articles 2, 4, 5 and 6 (see paragraph 57 of the Communication). The Parties do not appear to disagree that the factual bases of these allegations are virtually identical to those which appear in the Application submitted to the Court. Qatar then asks the UAE to take all necessary steps to end the coercive measures which, in its view, are in violation of international law and its obligations under CERD (see paragraph 123 of the Communication). In my opinion, this is sufficient to conclude that the relief sought by Qatar before the Committee is essentially the same as that sought before the Court. Consequently, the relief sought by Qatar, if it is relevant to the application of the doctrine of *lis pendens*, confirms that the claims submitted by Qatar before the two bodies are the same.

2. *Lis pendens* and quasi-judicial bodies

8. Qatar maintains that the doctrine of *lis pendens*, if it exists, applies only to questions of pendency between judicial tribunals and is therefore not applicable in this case, since neither the CERD Committee nor the *ad hoc* conciliation commission provided for by Article 12, paragraph 1 *(a)*, of the Convention is a judicial body (CR 2019/6, p. 23, paras. 33-35 (Lowe)). Qatar emphasizes that there is no possibility of conflicting obligations arising in the present circumstances, because the CERD procedure cannot result in the imposition of an obligation on the Parties (CR 2019/8, p. 13, para. 27 (Lowe)).

9. However, it is not clear that it is only conflicting binding decisions that pose problems in international relations and that contradictory non-binding decisions need not be resolved or

avoided. The arbitral tribunal's finding in the *MOX Plant* case that "a procedure that might result in two conflicting decisions on the same issue would not be helpful to the resolution of the dispute between the Parties" (Order No. 3, suspension of proceedings on jurisdiction and merits, and request for further provisional measures, 24 June 2003, para. 28) holds true regardless of whether the decision in question is binding. Qatar's narrow view appears to ignore the important role of quasi-judicial bodies in the modern international legal order and fails to take account of the growing number of methods of international dispute settlement.

10. The dispute resolution mechanism established by CERD is one such modern method of dispute settlement. An *ad hoc* conciliation commission, provided for by Article 12, paragraph 1 *(a)*, of the Convention, makes its good offices available to the States concerned, with a view to finding an amicable solution "on the basis of respect for this Convention". Furthermore, Article 13, paragraph 1, of the Convention states that a report prepared by an *ad hoc* conciliation commission must embody its findings "on all questions of fact relevant to the issue between the parties" and contain such recommendations "as it may think proper for the amicable solution of the dispute". The inter-State dispute resolution mechanism provided for by CERD thus has a quasi-judicial character, in so far as it makes findings of fact and law on the basis of respect for the applicable provisions of the Convention. It would be too formalistic to assume that a State party to a dispute could ignore a recommendation of an *ad hoc* conciliation commission or the recommendation of the CERD Committee when it contains a conclusion that differs from any decision of the Court.

11. Consequently, I believe that an adaptive approach should be taken to the doctrine of *lis pendens*, so that it may also be applied to issues of concurrency between judicial and quasi-judicial bodies. Such an approach is particularly important when interpreting conventional provisions such as Article 22 of CERD, which provides for multiple methods of dispute settlement, but is rather ambiguous as to how they interrelate. I will address this question in the following section.

B. *Lis pendens* and the settlement of CERD-related disputes

12. Read in light of the doctrine of *lis pendens* considered above, the CERD provisions show that the procedural right not to be forced to defend oneself against the same allegations in parallel proceedings is at least plausible (1). It should also be noted that the Court's Order does not preclude this interpretation (2).

1. A plausible interpretation of Article 22

13. At the provisional measures stage, it is not necessary to conclude definitively whether a claimed right exists. The Court can exercise its power to indicate provisional measures if it is satisfied that the rights asserted are "at least plausible" (*Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran* v. *United States of America), Provisional Measures, Order of 3 October 2018*, para. 53). The present Order does not appear to depart from this jurisprudence (see paragraph 18 of the Order).

14. I believe that one possible interpretation of Article 22 of CERD is that the dispute resolution mechanism provided for by the Convention should be exhausted before the case is brought before the Court. In the *Georgia* v. *Russian Federation* case, the Court interpreted "the terms of Article 22 . . . [as] establish[ing] preconditions to be fulfilled *before* the seisin of the Court" (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment,*

I.C.J. Reports 2011 (I), p. 128, para. 141; emphasis added). It follows that the proceedings before the CERD Committee, if pending, must be concluded before the Court is seised. This can be viewed as a conventional test for *lis pendens*. In my opinion, if a treaty provides for several methods of dispute settlement to be followed in a certain order, the parties to a dispute concerning that treaty have the procedural right to expect that order to be respected. Accordingly, under Article 22, the parties to a dispute concerning CERD may legitimately expect that the dispute cannot be pending simultaneously before the Court and the CERD Committee.

2. The Court does not preclude this interpretation of Article 22

15. In my view, the Order that the Court has made today does not preclude that this interpretation of Article 22 is at least plausible. The Court has found that the first measure requested "does not concern a plausible right under CERD", and that this measure "rather concerns the interpretation of the compromissory clause in Article 22 of CERD" (see paragraph 25 of the Order). However, in the case concerning *Pulp Mills on the River Uruguay*, the Court concluded that it did have jurisdiction to entertain the request for the indication of provisional measures with respect to "Uruguay's claimed right to have the merits of the present case resolved by the Court under Article 60 of the 1975 Statute" (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 23 January 2007, I.C.J. Reports 2007 (I)*, p. 11, para. 29). In other words, the Court found that Article 60 of the 1975 Statute — a compromissory clause enabling the parties to bring a dispute to the Court — confers a procedural right to be able to benefit from the protection of provisional measures. The fact that the rights asserted may relate to the interpretation of a compromissory clause does not, therefore, prevent the Court from concluding that those rights must be protected by provisional measures in so far as they are plausible. In my opinion, the question whether the procedural rights asserted exist is intrinsically linked to "the permissibility of proceedings before the CERD Committee when the Court is seised of the same matter" (see paragraph 25 of the Order).

16. Paragraph 25 of the Order also states that the Court has already examined the question of parallel proceedings in its Order of 23 July 2018 and concludes that the Court "does not see any reason to depart from these views at the current stage of the proceedings in this case". However, in its Order of 23 July 2018, the Court found that it was not necessary to decide whether a *lis pendens* exception would be applicable in the present situation, since the procedural preconditions under Article 22 of CERD for its seisin appear to have been complied with (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Provisional Measures, Order of 23 July 2018, I.C.J. Reports 2018 (II)*, pp. 420-421, paras. 39-40). In my opinion, the Court has never drawn any particular conclusions on whether Article 22 of the Convention comprises the procedural right of States parties not to be forced to defend themselves in parallel proceedings.

17. I would point out that this is just one possible interpretation of Article 22 and that it does not, therefore, prejudge the final finding of the Court at a later stage of the proceedings. The plausibility of a right deriving from a treaty is sometimes founded on a possible interpretation of the provisions of that treaty (see, for example, *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran* v. *United States of America), Provisional Measures, Order of 3 October 2018*, para. 67). Nevertheless, the presentation of such a plausible interpretation at the provisional measures stage does not prevent the Court from subsequently arriving at a different interpretation following a full examination of the case.

II. THE OTHER CONDITIONS FOR THE INDICATION OF PROVISIONAL MEASURES

18. In addition to the plausibility of the procedural right asserted, I believe that the other conditions for the indication of provisional measures are also met. First, the prima facie jurisdiction of the Court to entertain a request for the indication of provisional measures made by the respondent is examined in light of the merits of the case brought by the applicant (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 23 January 2007, I.C.J. Reports 2007 (I)*, p. 10, para. 24), and the Court has already confirmed its prima facie jurisdiction on this basis in its Order of 23 July 2018 (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Provisional Measures, Order of 23 July 2018, I.C.J. Reports 2018 (II)*, p. 421, para. 41). The present Order does not appear to depart from that conclusion (see paragraph 16 of the Order).

19. Second, as regards "the link between the alleged rights the protection of which is the subject of the provisional measures being sought, and the subject of the proceedings before the Court on the merits of the case" (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 23 January 2007, I.C.J. Reports 2007 (I)*, p. 10, para. 27), I am of the view that there is a sufficient link between the procedural right claimed by the UAE and the subject-matter of the proceedings before the Court on the merits of the case, since the right in question is that of the UAE not to be forced to defend itself in the dispute brought by Qatar.

20. Third, I believe that the *lis pendens* situation entails "a risk that irreparable prejudice could be caused" (see *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran* v. *United States of America), Provisional Measures, Order of 3 October 2018*, para. 77), since an unsatisfactory defence on the part of the UAE, as a result of the parallel proceedings, may irreparably influence the final decisions of the Court or the CERD Committee, or both.

21. Having concluded that all the conditions are met, it is my view that the first request of the UAE for the indication of provisional measures should have been granted. The final question, therefore, is what measure should have been adopted to address the *lis pendens* situation in this case appropriately. In this regard, Qatar suggested that the immediate withdrawal of its Communication to the CERD Committee could cause it disproportionate harm (CR 2019/6, pp. 55-56, paras. 1-5 (Klein)).

22. In my opinion, an immediate withdrawal was not the only way to resolve the *lis pendens* situation. If the measure requested by the UAE risked having a disproportionate effect on Qatar, the Court could have made an order providing for the suspension of the proceedings before the CERD Committee, by directing Qatar to take all measures at its disposal to ensure that the proceedings before the Committee are suspended pending the final decision in this case. Alternatively, the Court could have exercised its power under Article 75, paragraph 1, of the Rules of Court to conclude, for example, that it should suspend the present proceedings until the CERD Committee had issued its concluding observations on the Communication submitted by Qatar. There are in fact examples in international practice of proceedings being suspended. The arbitral tribunal in the *MOX Plant* case decided to suspend its own proceedings in a similar situation (Order No. 3, suspension of proceedings on jurisdiction and merits, and request for further provisional measures, 24 June 2003, para. 29). In the case concerning *Certain German Interests in Polish Upper Silesia*, the Polish Government requested a suspension rather than the withdrawal of the proceedings before the Permanent Court in the face of allegedly parallel proceedings before it and the Germano-Polish Mixed Arbitral Tribunal (*Jurisdiction, Judgment No. 6, 1925, P.C.I.J., Series A, No. 6*, p. 19). Moreover, the UAE itself has, in the present case, mentioned the possibility of suspending the

proceedings (CR 2019/5, p. 29, para. 6 (Reisman)). I believe that such a suspension, instead of a withdrawal, would not cause disproportionate harm to Qatar.

23. In any event, it is my opinion that the Court should have indicated a provisional measure to resolve the *lis pendens* situation, whether the withdrawal or the suspension of the proceedings. For these reasons, I voted against the operative part of the present Order.

(Signed) Jean-Pierre COT.