DISSENTING OPINION OF VICE-PRESIDENT SETTE-CAMARA

1. I regret that I am unable to concur with the Judgment of the Court and, that being so, I set forth the grounds of my dissent below.

2. When the founding fathers of the Statute of the old Court decided to find a place in the draft prepared by the Hague Advisory Committee of Jurists for the institution of intervention, they were not innovating in any way. The did nothing but introduce in the basic document of the Court a procedural remedy known and recognized by all the legal systems of the world as a legitimate means by which third parties, extraneous to a legal dispute, have the right to come into the proceedings to defend their legal rights or interests which might be impaired or threatened by the course of the contentious proceedings.

3. In most systems of law – through different models – principal or accessory intervention, assistance, or "aggressive" intervention, the legal basis is always the same : the existence of a right or of an interest of a legal nature of a third party that may be affected by the course of the proceedings. The proof of the existence of this legal interest is by necessity not definitive and beyond dispute. Already in Roman law the simple appearance of its existence was enough to justify intervention.

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4. Since paragraph 35 *in fine* of the Judgment refers to the *travaux préparatoires* for adoption of the Statute as evidence that Article 62 does not derogate from the general rules on jurisdiction, I feel compelled to recall some highlights of said *travaux préparatoires.*

5. The Advisory Committee of Jurists of 1920 could not ignore a procedural institution which is present in all systems of law. As an indispensable instrument for the defence of the legal interests and rights of third parties in contentious proceedings it constitutes an important stage of procedural law in internal legal orders and it could not be set aside in the procedural structure which was being constructed as the first experiment of a permanent judicial body in international law.

6. The first drafts of the Committee embodied only the substance of the present Article 63, namely the case of intervention by the parties to an international convention in a contentious dispute dealing with the interpretation of such a convention, to which States, other than those participating in the case, are parties. In such a situation, the Registrar, according

to Article 63, should notify all such States forthwith and every one of them would have the right to intervene, accepting thereby to be bound by the judgment.

7. Already at the 28th private meeting of the Hague Committee of Jurists on 20 July 1920, Lord Phillimore

> "raised the question of the right of intervention. He thought that Paragraph 4 would be useless if this right were not conceded to a wider extent than had been done in Article 23, which only mentioned general treaties." (See P.C.I.J., *Advisory Committee of Jurists : Procès-verbaux of the Proceedings of the Committee,* p. 587.)

8. During the debates on the draft the question was raised that to conform with the generality of systems of national procedural law another form of intervention should be contemplated. One that would not be confined to the "construction" of an international convention, but would embrace all forms of contentious proceedings, so that a third party would have at its disposal a remedy capable of coping with possible injury or damage to its interests of a legal nature that might be caused by a decision in a case between other contending parties. That was at the root of Article 62. Several formulations were presented by Mr. Fernandes, Mr. Loder and other members of the Committee, but it was the President, Baron Descamps, who proposed the final wording adopted by the Committee. It ran as follows :

> "Should a State consider that is has an interest of a legal nature, which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene. It will be for the Court to decide upon this request."

It coincides almost completely with the text which has survived until today (*ibid.,* p. 594).

9. The formula was embodied in the Draft Scheme, amended by the Council of the League of Nations as Article 60.

10. The Léon Bourgeois report to the Council of the League stated in relation to this Article :

> "They [the Committee] have, indeed, given to non-litigant States the right to intervene in a case where any interest of a judicial nature which may concern them is involved." (P.C.I.J., *Documents concerning the Action Taken by the Council of the League of Nations under Article 14 of the Covenant,* p. 50.)

11. The work of the Committee was also discussed in the Preliminary Session of the Court in 1922. During the preparation of the first Rules of Court in 1922 the opinions were divided on the question of the need of a jurisdictional link : Judges Lord Finlay, Weiss, Oda, Loder and Moore for the negative and Judges Anzilotti, Huber, Negulesco, Altamira and Yo-

vanovitch for the affirmative. On 24 February 1922, the President, Judge Loder, went further in the interpretation of the text, ruling :

> "The President stated that he could not take a vote upon a proposal the effect of which would be to limit the right of intervention (as prescribed in Article 62) to such States as had accepted compulsory jurisdiction. If a proposal in this sense were adopted, it would be contrary to the Statute." (*P.C.I.J., Series D, No. 2,* p. 96.)

12. So, already in those early days the need of a jurisdictional link was doubtful, to say the least.

13. At the same meeting there was a forceful statement by Lord Finlay :

> "Lord Finlay agreed with the President that it was impossible to maintain that intervention should only take place in suits between two States which had accepted the compulsory jurisdiction of the Court, or that this right should only be exercised by a State which had accepted the same jurisdiction. In his opinion, there was no foundation for this view in the Statute." (*Ibid.,* p. 90.)

14. The argument often used in the pleadings of Libya and Malta, according to which Article 62 is a leftover from the time when the drafters of the Statute were inspired by the ideal of the creation of a permanent international tribunal endowed with compulsory jurisdiction, deserves some comments. Malta and Libya argued that when this ideal gave place to the more realistic approach of consensual jurisdiction, the drafters of the Statute "forgot" to adapt Article 62 to the new reality, or to delete it altogether.

15. This theory of the negligence of the authors of the Statute goes back to the position taken by Judge Altamira, who stated :

> "the scheme of the Jurists of 1920 was based on the principle of the compulsory jurisdiction of the Court. When this principle was modified by the Assembly, the text of certain articles had unfortunately not been brought into line with the new principle which had been introduced." (*Ibid.,* p. 89.)

16. The fact that the text of the article was carefully re-examined in several instances, especially by the Committee of Jurists assigned the task of drafting the Statute of the International Court of Justice, which met in Washington from 9 to 19 April 1945, and emerged practically unchanged from this Committee (see UNCIO, *Documents*, Vol. 14, pp. 485-676) belies completely the far-fetched argument based on a presumption of negligence in the course of the drafting of the very constitutional document of the Court.

* * *

17. The context of Article 62, as it was embodied in the Statute and preserved ever since, with the only modification, in 1945, of the suppression of the term "as a third party", to align it with the French text, is very general and concise. According to the text any State is entitled to request intervention if it considers that is has an interest of a legal nature which may be affected by a decision of the Court. In the light of the best traditions going back to Roman law, it is enough that the State *considers* that is has an interest of a legal nature. It is not bound to produce proof, in a positive and indisputable way, of the existence of this legal interest. Moreover, it suffices that the legal interest *may* be affected. The simple possibility is enough. A proof of pending effective and concrete harm is not required for the decision of the Court under Article 62, paragraph 2. The only thing necessary, according to the Statute, is that the interest be of a legal nature and not of a merely factual or political nature.

18. Article 62 of the Statute encompasses three main requirements :

(a) a State (besides those involved in a contentious case before the Court) considers that it has an interest of a legal nature in the case ;
(b) this interest of a legal nature may be affected by the decision of the Court ;
(c) the Court shall have the power to decide on the request for intervention.

* * *

19. The practice of the Court in the matter of intervention has been extremely meagre. The Permanent Court was confronted with an intervention under Article 62 in only one case, the *S.S. "Wimbledon"* case. In fact, Poland's request for intervention in that case was originally based on Article 62, but, since the interpretation of Article 380 of the Treaty of Versailles in relation to the access to the Kiel Canal was the crucial point in contention, the Court decided to uphold the application for intervention, but on the basis of Article 63 (see *P.C.I.J., Series A, No. 1,* pp. 12-13). So the Permanent Court had no experience whatsoever in dealing with Article 62.

20. The experience of the present Court in the question of intervention is also far from rich. In the *Haya de la Torre* case (*I.C.J. Reports 1951,* pp. 74-77) the Court acceded to the request by Cuba to intervene under Article 63, Colombia being in agreement and Peru objecting. The problem involved was the interpretation of the Havana Convention of 1928 on the Right of Asylum.

21. In the *Monetary Gold Removed from Rome in 1943* case *(I.C.J. Reports 1954),* the Court dealt indirectly with the problem of intervention in the light of the possibility to intervene open to Albania, but which was not made use of by the latter country.

22. In 1974 Fiji requested to intervene in the *Nuclear Tests* case, and on 20 December 1974 an Order of the Court, unanimously adopted, decided

that the Fiji Application had lapsed. Declarations of Judges Dillard and Sir Humphrey Waldock (joint) and in a more detailed way of Judge Jiménez de Aréchaga were appended to this Order, spelling out the need for the jurisdictional link had the intervention request been entertained (see *I.C.J. Reports 1974,* pp. 532-533). Likewise Judge Onyeama and Judge *ad hoc* Sir Garfield Barwick indicated their position in favour of the necessity of the jurisdictional link.

23. In view of the obvious connections between the present proceedings and the 1981 Judgment of the Court on the application of Malta for permission to intervene in the *Tunisia/Libya* case, and the importance of some aspects of this Judgment, I shall deal with it separately.

* * *

24. Since the early days of the Permanent Court, when the Preliminary Session formulated the first Rules for the application of Article 62 (Articles 58 and 59 of the Rules), the three requisites for the request for permission to intervene were very simple and clear-cut. Article 59 in its original French version read :

"La requête visée à l'article précédent contient :

1. la spécification de l'affaire ;
2. l'exposé des raisons de droit et de fait justifiant l'intervention ;
3. le bordereau des pièces à l'appui, qui sont annexées."

25. In the 1936 revision the article remained the same, except for a few drafting changes and changes in numbering. It became paragraphs 1 and 2 of Article 64 of the Rules. Likewise, paragraph 2 of former Article 58 was deleted (it gave the Court power to extend the time-limit for the presentation of the request for intervention).

26. No changes were introduced in the Rules of 1946 or in those of 1972, the provision taking the number of Article 69 of the latter, but the contents of the request were retained without change :

"2. The application shall contain :

a description of the case ;
a statement of law and of fact justifying intervention ; and
a list of the documents in support of the application ; these documents shall be attached."

27. The provision was completely reshuffled in the revision of 1978. Article 69 of the 1972 Rules became Article 81 of the 1978 Rules. The detailed specification of paragraph 3 of Article 38 of the Rules covering institution of proceedings before the Court was extended to intervention. The time-limit was shortened. Instead of "before the opening of the oral proceedings" the request must now be presented before the closure of the

written proceedings. But the most meaningful modifications were those of paragraph 2 of Article 81, which establishes the contents of the request as follows :

> "2. The application shall state the name of an agent. It shall specify the case to which it relates, and shall set out :
>
> *(a)* the interest of a legal nature which the State applying to intervene considers may be affected by the decision in that case ;
> *(b)* the precise object of the intervention ;
> *(c)* any basis of jurisdiction which is claimed to exist as between the State applying to intervene and the parties to the case."

28. This new formulation undoubtedly goes beyond the very terse and concise wording of Article 62 of the Statute, according to which the only requirement justifying intervention is the existence of an interest of a legal nature which may be affected by the decision on the principal case.

29. We see that the more than 60 years of controversy on the problem of whether the intervening State has, or has not, to prove the existence of a jurisdictional link with the principal parties, was resurrected by the revision of the Rules.

30. I do not intend to plunge into the problem of the need of the jurisdictional link for establishing the right of a third State to intervene. But I doubt whether such a substantial and sweeping requirement could be introduced into the meaning of the text of Article 62 of the Statute by a simple rule of procedure.

31. As far as concerns the specific problem of subparagraph *(c)* of paragraph 2 of Article 81 of the Rules, its real meaning is far from clear. On the contrary, perusal of the records concerning the drafting of the new Rules show that there were considerable doubts regarding the real sense of subparagraph *(c)* of paragraph 2 of Article 81, but that the prevailing opinion was that the meaning of the proviso was merely to draw attention to the point and to ensure that a State which could indicate such a title of jurisdiction should so inform the Court.

32. The new formulation of the Rules embodies a few far-reaching novelties. I concede that the precise object of the intervention could possibly be included in the new text. It is an understandable requirement and it could be admitted as implicit in the wording of Article 62. But subparagraph *(c)* of paragraph 2 of Article 81 of the Rules, requiring that the intervener specifies "any basis of jurisdiction which is claimed to exist as between the State applying to intervene and the parties to the case", constitutes the sweeping and surprising innovation of the provision. It is couched in a nebulous language and one does not know if it is simply a requirement for information of the Court or a real prerequisite, indispensable for the admissibility of intervention in a given case.

* * *

33. On 30 January 1981 the Republic of Malta filed with the Registry of the Court an Application for permission to intervene in the above-mentioned case under Article 62 of the Statute of the Court. It was the first time that the Court had to entertain in full a request to intervene under Article 62, and at the same time apply the corresponding new provisions of the 1978 Rules of Court.

34. Malta, in its Application, invoked its interest of a legal nature which might be affected by a decision of the Court in the dispute between Tunisia and Libya. Owing to its geographical location it would be difficult to deny the interest of a legal nature on the part of Malta in the *Tunisia/Libya* case.

35. During the presentation of its case, both in the written and oral proceedings, Malta argued that the requisite of the jurisdictional link was not contemplated in the context of Article 62 of the Statute and that therefore it was not bound to provide proof thereof.

36. I shall not deal in detail with the main aspects of the Judgment of 14 April 1981. The fact is that the Court, in the *Tunisia/Libya* case, discarded the examination of the crucial point of the need of a jurisdictional link, in the following terms :

> "Having reached the conclusion, for the reasons set out in the present Judgment, that Malta's request for permission to intervene is in any event not one to which it can accede, the Court finds it unnecessary to decide in the present case the question whether the existence of a valid link of jurisdiction with the parties to the case is an essential condition for the granting of permission to intervene under Article 62 of the Statute." (*I.C.J. Reports 1981,* p. 20, para. 36.)

37. Therefore, after the Judgment of 14 April 1981, the problem of the need of a jurisdictional link has remained open in the jurisprudence of the Court.

38. Malta lost its case for intervention because it failed to comply with subparagraph *(b)* of paragraph 2 of Article 81 of the Rules, namely the request to define the precise contours of the object of its intervention.

39. And as the Court in its reasoning pointed out in paragraph 32 :

> "Malta, in short, seeks permission to enter into the proceedings in the case but to do so without assuming the obligations of a party to the case within the meaning of the Statute, and in particular of Article 59 under which the decision in the case would hereafter be binding upon Malta in its relations with Libya and Tunisia. If in the present Application Malta were seeking permission to submit its own legal interest in the subject-matter of the case for decision by the Court, and to become a party to the case, another question would clearly call for the Court's immediate consideration." (*I.C.J. Reports 1981,* pp. 18-19.)

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40. On 23 May 1976 the Republic of Malta and the Libyan Arab Jamahiriya signed at La Valletta a Special Agreement to submit to the International Court of Justice a case concerning the delimitation of their respective continental shelves. After protracted "démarches" the Special Agreement was filed with the Registry by a joint letter of notification dated 26 July 1982.

41. Within the deadline established by paragraph 1 of Article 81 of the Rules of Court, namely on 24 October 1983, Italy presented its Application for permission to intervene under Article 62 of the Statute. According to Article 83, paragraph 1, of the Rules, certified copies of the Application were transmitted to the Parties and the time-limit for their observations was set as 5 December 1983. So, again the Court was called upon to take a decision on the application of Article 62 of the Statute.

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42. In its Application Italy invoked the existence of "an interest of a legal nature" on its part, developing a series of arguments in this sense, *inter alia* :

(a) the areas to be delimited between the Parties all belong to the same region of the central Mediterranean, of which Italy is a coastal State ;

(b) it is a narrow region, there being no point in this area which is more than 400 nautical miles from the coasts of the other coastal States, including, *a fortiori,* the island of Malta ;

(c) the definition of the Convention on the Law of the Sea, Article 76, which establishes as 200 nautical miles the minimum breadth of the continental shelf, if applied to the region, results in effect that the whole sea-bed is part of one and the same continental shelf, with large areas of overlapping ;

(d) as far as natural prolongation is concerned, Malta is in the continental shelf of Sicily which extends further to the south and east of the island of Malta, in the direction of the submarine plateau of Melita and Medina ;

(e) a "glance at the map" is sufficient to show that a considerable area of sea-bed of that region lies off the coasts of Italy and so seaward of such coasts ;

(f) if a median line is drawn, for the sake of argument, between the Italian and Libyan landmasses, it would situate in the Italian side areas over which rights are claimed by Malta.

43. The conclusion of Italy is that some areas of the continental shelf disputed by Malta and Libya are areas over which Italy considers that it has undeniable rights :

"Italy consequently has a legal interest which is indisputably *en*

cause in the case. Its position is even, in procedural law, an absolutely classic case for intervention, and one in which intervention in practice is always admitted : the situation in which the intervener relies on rights as the true *dominus* of the object which is disputed, or a part thereof." (Application for Permission to Intervene by the Government of Italy, para. 11.)

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44. Trying to avoid the same fate reserved to Malta for its application for intervention of 1981, Italy was very careful in being absolutely precise in describing the object of the intervention.

45. The Italian Application, in its paragraph 16, describes the object of its intervention as follows :

"The object of Italy's application to intervene is to ensure the defence before the Court of its interest of a legal nature, so that those principles and rules and, in particular, the practical method of applying them, are not determined by the Court without awareness of that interest, and to its prejudice.

In other words, Italy seeks to participate in the proceedings to the full extent necessary to enable it to defend the rights which it claims over some of the areas claimed by the Parties, and to specify the position of those areas, taking into account the claims of the two principal Parties . . ."

And further on (Italian Application, para. 17) :

"It goes without saying – but it is better that it should be stated expressly to avoid any ambiguity – that the Government of Italy, once permitted to intervene, will submit to such decision as the Court may make with regard to the rights claimed by Italy, in full conformity with the terms of Article 59 of the Statute of the Court."

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46. Regarding the key question of the need of a jurisdictional link with the principal Parties Italy did not fail to point out that the provision of Article 62 does not require any proof of existence of a basis of jurisdiction and that :

"The Rules of Court thus could not make the admissibility of an application for permission to intervene subject to legal conditions not laid down in the Statute." (Italian Application, para. 19.)

Italy subscribes to the interpretation according to which :

"The expression any basis of jurisdiction and the use [in the French text] of the conditional tense imply, on the contrary, that that phrase does no more than lay down a mere requirement for information to be

supplied with a view to fuller knowledge of the circumstances of the case." (Italian Application, para. 20.)

47. In spite of this forthright position denying the necessity of proof of existence of a jurisdictional link, the Italian Application tried, in paragraph 21, to comply with the requirement of Article 81, paragraph 2 *(c)*, of the Rules. Italy contended that its undeniable legal rights and the object of the intervention are automatically creative of jurisdiction by effect of Article 62, to the extent necessary to justify the admission of Italy to participate in the present proceedings as an intervener.

48. Another argument used by Italy to cope with the need of the jurisdictional link is the fact that Italy, like Libya and Malta, as a Member of the United Nations, is a party to the Statute of the Court and therefore belongs to the "judicial community" created by the United Nations system for judicial settlement of disputes by way of the Statute. The imminent link of jurisdiction deriving from the existence of the "judicial community" is rather doubtful and disregards the specific rules of jurisdiction contained in Articles 36 and 37 of the Statute, with the exception of paragraph 6 of Article 36, which gives the Court the power to rule on its own competence. The existence of articles like Articles 41, 60, 61 and 62, from which emanate direct "rules of jurisdiction" is a point that should be discussed.

49. The additional argument of paragraph 22 of the Italian Application, according to which Italy has accepted the compulsory jurisdiction of the Court by becoming a party to the European Convention for the Peaceful Settlement of Disputes of 29 April 1957 – Article 1 of which confers jurisdiction upon the Court –, is also far from convincing, because the jurisdictional link established by the Convention applies only between the parties to the same Convention. At least it is sure that one of the main Parties, namely Libya, is not a party to the Convention, whereas Malta has been a party since 1958.

50. In conclusion, Italy would be in a better position by simply rejecting the need to prove the jurisdictional link under Article 62, rather than resorting to unpersuasive attempts to produce evidence of the existence of this doubtful link.

* * *

51. Within the time-limit established by the Order of the President, pursuant to Article 83 of the Rules, both principal Parties in the case filed observations on the Italian application for permission to intervene on 5 December 1983. The conclusions of both observations are in the negative, and, as they are thoroughly summarized in the relevant part of the Judgment, I shall refrain from describing them.

52. The Judgment, as it seems to establish a link between the object of the intervention and the interest of a legal nature involved therein treats the problem of the interest of a legal nature and the question of the object of the intervention as if they were one and the same question. I beg to disagree with such an approach. The interest of a legal nature that a third State *considers* that it has in the principal case, and the fact that it *may* be affected by the decision of the Court are the only bases for intervention according to Article 62 of the Statute. It is the main requirement to be considered by the Court in entertaining an application for intervention under Article 62. The provision of the Statute does not mention anything about the object of the intervention, which is established by the very nature of the institution of intervention, as the protection of the intervener's rights. It is not the Statute, but Rule 81, paragraph 2 *(b)*, which includes the "precise object" of the intervention among the prerequisites to be ascertained by the Court. The two problems are different and they diverge in their meaning and in their importance regarding the Court's decision.

53. I believe that the Court should examine the two questions separately, starting with the interest of a legal nature, which can hardly be denied to Italy, and keeping apart the problem of the object, which can in no way be confused with the former.

54. The Judgment, in paragraph 28, describes as follows the method it would follow in its reasoning :

> "The Court will confine itself to those considerations which are in its view necessary to the decision which it has to give. On that basis, in order to determine whether the Italian request is justified, the Court should consider the interest of a legal nature which, it is claimed, may be affected. However, it must do this by assessing the object of the Application and the way in which that object corresponds to what is contemplated by the Statute."

55. It is curious that in indicating the general line of the reasoning, the Court subordinates the consideration of the problem of the interest of a legal nature on the part of the State applying to intervene, to the extent it "corresponds" to the object of the intervention. The interest of a legal nature is the main requirement of Article 62 of the Statute which has to be prima facie substantiated as has the possibility of the said interest being affected by the future decision of the Court. The decision of the Court in the first stage of the procedure of intervention, namely the decision under paragraph 2 of Article 62, should be on this specific point, more than anything else.

56. It is therefore surprising that in spite of the numerous pages devoted to the subject of the interest of a legal nature in the introduction as well as in the recount of the positions of the Parties, the Court, apart from some short references in passing, did not dwell at length on the problem whether Italy has an interest of a legal nature which might be affected by the future decision on the main case.

57. In the narrow waters of the central Mediterranean one can hardly

deny the interests of a legal nature on the part of any of the neighbouring coastal States, namely, Italy, Libya, Malta, Tunisia and perhaps also Algeria, in any delimitation of the continental shelf which appears to be one and the same, whether one looks at it under the optics of the principle of natural prolongation, or under the criteria of the new trends of the Montego Bay Convention, with its minimum continental shelf breadth of 200 nautical miles. Of course the Convention is not in force yet, and probably will not be in force for some time, but such are the trends of the new law of the sea that the Court was asked to take into consideration in the *Tunisia/Libya* case. Likewise the principle of proportionality cannot afford to ignore the interests of Italy with its large coasts, and especially those of Sicily, Calabria and Apulia overlooking the central Mediterranean.

58. When Malta filed its Application to intervene in 1981 it had to face more difficulties in establishing its interests of a legal nature – although it had alleged that it had

> "a 'specific and unique interest' in the present proceedings which arises out of its 'involvement in the facts' of the *Tunisia/Libya* case. . . . by virtue of its geographical location vis-à-vis the two Parties to the case" (*I.C.J. Reports 1981,* p. 9, para. 13).

59. But the conclusion of the Court, in paragraph 33 of the 1981 Judgment, amounted to a denial of such interests :

> "This being so, the very character of the intervention for which Malta seeks permission shows, in the view of the Court, that the interest of a legal nature invoked by Malta cannot be considered to be one 'which may be affected by the decision in the case' within the meaning of Article 62 of the Statute." (*I.C.J. Reports 1981,* p. 19.)

60. Indeed – and I think this is a point which has not been sufficiently developed in the Judgment, as appears from the short reference in paragraph 39 –, the *Tunisia/Libya* case concerned a delimitation between adjacent States, starting at a predetermined point, namely the extreme point of the territorial boundary line. On the other hand, the geographical situation of Malta, whose coasts confront those of Libya and Tunisia, could hardly have any significance for the lateral delimitation, except as far as it would concern the continuation of the future maritime boundary line, to the point where it would intrude on the Maltese continental shelf, and the Court introduced in the 1981 Judgment a "caveat" for this situation, in its paragraph 35.

61. The present case is completely different. The coasts of Italy are opposite to those of Malta and Libya and any delimitation that will result from the decision of the Court on the principles and rules of international law involved, will necessarily affect the interests of Italy, as this is an imperative of the geography of the region.

62. Moreover, owing to the characteristics of the central Mediterra-

nean, a certain degree of overlapping will be unavoidable, and it is against a delimitation that might ignore the Italian interests in the area of concern that the Application for intervention was presented. Contrary to lateral delimitation, where bilateralism prevails, the delimitation in the case of opposite States may easily involve interests of other coastal States by the very nature of things.

* * *

63. I find myself in disagreement with the reasoning of the Court leading to the finding of paragraph 29 which runs :

> "While formally Italy requests the Court to safeguard its rights, it appears to the Court that the unavoidable practical effect of its request is that the Court will be called upon to recognize those rights, and hence, for the purpose of being able to do so, to make a finding, at least in part, on disputes between Italy and one or both of the Parties."

In repeated statements during the pleadings, both written and oral, Italy has consistently affirmed that it does not seek anything but to "ensure the defence before the Court of its interests of a legal nature", and more :

> "In so doing, Italy is persuaded that it is confining itself strictly to the limits of intervention procedure, which has no other object or raison d'être than precisely to ensure the protection of the interests of third parties when they may be affected by the decision in a case before a court." (Hearing of 25 January 1984, morning.)

64. The Judgment quotes a series of statements where reference is made to "rights" possessed by Italy, as evidence that it is seeking the recognition of such rights. But, I submit, there is a certain amount of confusion over the way the words "rights" and "claims" are used in the pleadings. Of course parties coming before the Court claim the existence of rights. What is an interest of a legal nature but a claim to a right ? The Parties in the mainline case also claim rights on areas that "appertain" to them according to their respective contentions. But there is a considerable difference between the object of a principal case, as the one instituted by Malta and Libya, and an incidental procedure of intervention, which is intended only to seek the protection of interests of a legal nature. And to my mind, that is all that Italy's application is aiming at. Therefore, I do not see how the Judgment in paragraph 33 can reach the following conclusion : "it follows that it is being asked to make a finding of the existence of such rights, and as to at least the approximate extent of them".

65. In the first stage of the procedure of intervention – and that is all we are concerned with here – the only thing that the Court is asked to do is

to decide whether or not to grant the request to intervene. It is only if intervention is granted that the intervener is bound to substantiate its claims and its reasons to consider that its interests may be affected. Therefore, how could the Court "make a finding of the existence" of rights of Italy in this early stage of the proceedings, when not even the area of concern has been established ? Even the principal Parties, up to now, have claims to certain rights and that is why they brought their claims before the Court, and the decision of the Court, in due time, will ascertain the existing rights, if they exist.

66. Moreover, in paragraph 29 *in fine,* the Judgment states that Italy is requiring the Court "to make a finding, at least in part on disputes between Italy and one or both of the Parties".

67. I must respectfully remark that in the whole course of the pleadings, Italy, to the best of my recollection, has never described to the Court any dispute with the principal Parties. On the contrary, it is exactly the non-existence of a previous dispute that was brandished against Italy as an argument for the rejection of the application and even for the use of the drastic remedy of estoppel. So I hardly see how the Judgment can refer to a "dispute" described by Italy.

68. And such a non-existing dispute is at the heart of the Judgment when it finds in paragraph 32 :

> "The distinction which Italy has endeavoured to make is between a request that the Court take account of, or safeguard, its legal interests, and a request that the Court recognize or define its legal interests, which would amount to the introduction of a distinct dispute."

69. This finding is a crucial part of the Judgment and I beg to submit that the conclusion is a *non sequitur.*

70. I do not see how a genuine, and even classical, case of intervention may be assimilated to the introduction of a distinct dispute. What dispute ? Has either Libya or Malta any dispute with Italy ? Not according to their counsels, who went as far as invoking the absence of a dispute to justify the application to Italy of the principle of estoppel, as has been mentioned before. In the proceedings of the application to intervene, the indications given by Italy to define prima facie the contours of the area where it claims to have interests of a legal nature, and even the more detailed information provided in response to a question put by one of the Judges, were not contested by the Parties. Neither could they endeavour to do so because the Court did not reach the second stage of the intervention procedure, where the merits of the application would be discussed. So I do not see how the Judgment can identify in the object of the Italian application a "distinct dispute". As to the future presentation of the merits of the intervention, it is premature to conclude that it would be tantamount to a distinct dispute.

71. And the existence of this future and non-substantiated independent

dispute provides the decisive argument of the Judgment to reject the application, namely the need of a new and special jurisdictional link between Italy and the Parties in the case. Indeed the Judgment in paragraph 37 states :

> "Such a dispute may be the subject of negotiation, leading either to its settlement – in the case of a maritime boundary dispute, to an agreed delimitation – or to the conclusion of a special agreement for its resolution by a judicial body ; it may not however be brought before the Court by way of intervention."

72. Therefore, the conclusion of the Judgment is still based on the absence of a jurisdictional link for that "distinct dispute" – the existence of which is not proved –, although the Court, at the end of paragraph 38, says that

> "the Court . . . does not have to rule on the question whether, in general, any intervention based on Article 62 must, as a condition for its admission, show the existence of a valid jurisdictional link".

73. And again in paragraph 41, the Court insists :

> "It has been emphasized above that the Italian Application to intervene tends inevitably to produce a situation in which the Court would be seised of a dispute between Italy on the one hand and Libya and Malta on the other, or each of them separately, without the consent of the latter States ; Italy would thus become a party to one or several disputes which are not before the Court at present. In this way the character of the case would be transformed. These considerations, in the view of the Court, constitute reasons why the Application cannot be granted."

74. That being so, the application is rejected while there is no dispute whatsoever between the principal Parties and Italy – in the name of a distinct dispute that the Court believes is inevitable in the future and for which a special link of jurisdiction will be necessary. I respectfully disagree with this finding based on foretelling the future and previewing forthcoming circumstances. For the time being, and for the purpose of Article 62, there is no dispute, there is no need for the consent of the Parties, and to my mind, the incidental jurisdiction would be quite sufficient for granting permission to intervene.

75. In the arguments of the Parties, and in the Judgment itself, one simple but important point has not been duly emphasized. And that is related to the very nature of intervention as it has been known and practised in internal legal orders, which its inclusion in the Statute cannot change. Intervention, within the framework of the Statute, is and will always be an incidental procedure, like preliminary objections to admissibility, indication of provisional measures of protection under Article 41, and interpretation and revision under Articles 60 and 61.

76. The incidental procedures have in common the fact that they presuppose the existence of principal contentious proceedings established by application or by special agreement between the main parties. They are, so to say, "grafted" on the existing case, and their existence is ancillary to the principal case. Therefore, there is no question of the necessity of a new and special jurisdictional link for the incidental procedure. The jurisdictional link is the same as already established for the principal case, which covers the incident of procedure, represented by the application for intervention. Moreover, intervention under Article 62 is a preliminary procedure, the fate of which is expressly subject to the decision of the Court according to paragraph 2 of the same Article. The discretionary (or "quasi-discretionary" as Sir Gerald Fitzmaurice put it) decision of the Court closes the first stage of the intervention procedure. If permission is granted, the intervener is bound to fully provide the elements of fact and law that support its case. That will be the second stage, of which the Court has no experience, since the few cases of intervention entertained so far never went beyond the preliminary procedure.

77. That explains why Article 62 requires only prima facie evidence to support the would-be intervener as it considers (no more than *considers*) that it has an interest of a legal nature which *may* be affected by the decision of the Court in ongoing contentious proceedings between the principal parties. The Court will entertain this preliminary procedure within the framework of the principal case, jurisdiction being established by the main litigants.

78. During the oral argument, it was maintained by the principal Parties that Article 62, being embodied in Chapter III of the Statute which deals with Procedure, cannot disregard the general provisions on jurisdiction contained in Articles 36 and 37. To that one should observe that Chapter III – Procedure – contains also Article 53, a very important article – in some aspects a remnant of the old ideals of establishing a permanent international tribunal endowed with compulsory jurisdiction –, which empowers the Court to entertain a case even against the will of one of the parties, by the procedure of default. And the Court has had considerable experience in this sort of cases in which one party does not appear before the Court, or fails to defend its case *(Fisheries Jurisdiction, Nuclear Tests, Trial of Pakistani Prisoners of War, Aegean Sea Continental Shelf, United States Diplomatic and Consular Staff in Tehran).* But in the case of Article 53, in which a jurisdictional link must be established *a fortiori,* what does the Statute provide for ? Is it silent on the problem of jurisdiction like Article 62 ? No, it spells out in paragraph 2, in very clear-cut terms, that the Court must satisfy itself that it has jurisdiction in accordance with Articles 36 and 37. Should not the Statute, if the jurisdictional link were indispensable for the application of Article 62, contain a similar proviso ?

79. To my mind, the issue of the need of a special jurisdictional link for the procedure of intervention is very clear. Both in Article 62 and Article 63

termes de l'article 63, le Greffier doit avertir tous ces Etats sans délai, et chacun d'eux a le droit d'intervenir, acceptant par là d'être lié par la décision.

7. Déjà, dans le compte rendu de la vingt-huitième séance de travail du comité de juristes de La Haye, tenue le 20 juillet 1920, on lit que lord Phillimore :

> « soulève la question du droit d'intervention. Il croit que l'alinéa 4 est inutile si ce droit n'est pas admis dans une mesure plus large que cela n'a été fait dans l'article 23, qui parle seulement de traités généraux. » (Voir C.P.J.I., *Comité consultatif de juristes, Procès-verbaux des séances du comité,* p. 587.)

8. Au cours des débats sur le projet, et en vue de se conformer à la généralité des systèmes nationaux de droit judiciaire, il fut proposé d'envisager une autre forme d'intervention – non pas limitée à l'« interprétation » des conventions internationales, mais s'étendant à toutes les formes de procédure contentieuse, pour que les tierces parties disposent d'un recours leur permettant de remédier au préjudice ou dommage qu'une décision rendue dans une affaire opposant d'autres parties causerait à leurs intérêts juridiques. Telle est l'origine de l'article 62. Diverses formules furent présentées par M. Fernandes, M. Loder et d'autres membres du comité, mais c'est le président, le baron Descamps, qui suggéra le libellé que le comité devait adopter pour finir :

> « Lorsqu'un Etat estime que dans un différend un intérêt d'ordre juridique le concernant est en cause, il peut adresser à la Cour une requête à fin d'intervention. La Cour décide. »

Ce texte coïncide presque mot pour mot avec celui qui a survécu jusqu'à aujourd'hui (*ibid.,* p. 594).

9. La même formule fut reprise dans l'avant-projet qui, modifié par le Conseil de la Société des Nations, devint l'article 60.

10. Le rapport de Léon Bourgeois au Conseil déclare à propos de cet article :

> « Ils [le comité] ont, en effet, donné aux Etats non parties au litige un droit d'intervention dans les cas où un intérêt d'ordre juridique qui leur est propre se trouve en jeu. » (C.P.J.I., *Documents relatifs aux mesures prises par le Conseil de la Société des Nations aux termes de l'article 14 du Pacte,* p. 50.)

11. Les travaux du comité furent aussi discutés à la session préliminaire de la Cour de 1922. Lors de la rédaction du premier Règlement de la Cour en 1922, les avis furent partagés sur la nécessité d'un lien juridictionnel : lord Finlay et MM. Weiss, Oda, Loder et Moore répondirent par la négative et MM. Anzilotti, Huber, Negulesco, Altamira et Yovanovitch par

17. L'article 62, tel qu'inscrit au Statut et toujours conservé depuis lors – sous réserve de la seule suppression, en 1945, de l'expression *as a third party,* afin d'aligner le texte anglais sur le français – est rédigé en termes généraux et très concis. Selon ce texte tout Etat est en droit de demander à intervenir si un intérêt d'ordre juridique est pour lui en cause dans une affaire soumise à la Cour. Conformément aux meilleures traditions remontant au droit romain, il suffit que l'Etat *estime* avoir un intérêt d'ordre juridique : il n'est pas tenu de rapporter la preuve positive et indiscutable de l'existence de cet intérêt. De plus, c'est assez que cet intérêt juridique soit *en cause* : la simple éventualité suffit, et la preuve d'un préjudice réel, concret et imminent n'est pas nécessaire à la décision de la Cour en vertu de l'article 62, paragraphe 2. La seule exigence, aux termes du Statut, c'est que l'intérêt soit d'ordre juridique et non pas politique ou de pur fait.

18. L'article 62 du Statut pose trois exigences principales :

a) un Etat (outre ceux qui participent à un procès contentieux devant la Cour) estime qu'un intérêt d'ordre juridique est pour lui en cause ;
b) cet intérêt d'ordre juridique peut être affecté par la décision de la Cour ;
c) la Cour a le pouvoir discrétionnaire de statuer sur la requête à fin d'intervention.

* * *

19. La pratique de la Cour en matière d'intervention est des plus maigres. La Cour permanente n'a eu à connaître qu'une seule fois d'une intervention fondée sur l'article 62, dans l'affaire du *Vapeur* Wimbledon. Ou plutôt, la requête de la Pologne avait bien été faite à l'origine en vertu de l'article 62 ; mais, comme l'interprétation de l'article 380 du traité de Versailles dans son application à l'accès au canal de Kiel constituait le point essentiel en litige, la Cour décida d'autoriser l'intervention, mais sur la base de l'article 63 (voir *C.P.J.I. série A n° 1,* p. 12-13). Jamais donc la Cour permanente n'a eu à s'occuper de la mise en œuvre de l'article 62.

20. L'expérience de la Cour actuelle n'est pas abondante non plus, tant s'en faut. Dans l'affaire *Haya de la Torre (C.I.J. Recueil 1951,* p. 74-77), la Cour a accueilli la requête à fin d'intervention de Cuba, fondée sur l'article 63, avec l'accord de la Colombie et malgré l'opposition du Pérou. Il s'agissait en l'espèce d'interpréter la convention de La Havane sur l'asile de 1928.

21. Dans l'affaire de l'*Or monétaire pris à Rome en 1943 (C.I.J. Recueil 1954),* la Cour s'occupa directement du problème de l'intervention, vu la possibilité d'intervenir qu'avait l'Albanie, mais que ce pays n'utilisa pas.

22. En 1974, Fidji demanda à intervenir dans l'affaire des *Essais nucléaires.* Le 20 décembre 1974, une ordonnance de la Cour adoptée à

apportés au paragraphe 2 de l'article 81, qui définit la teneur de la requête dans les termes suivants :

« 2. La requête indique le nom de l'agent. Elle précise l'affaire qu'elle concerne et spécifie :

a) l'intérêt d'ordre juridique qui, selon l'Etat demandant à intervenir, est pour lui en cause ;
b) l'objet précis de l'intervention ;
c) toute base de compétence qui, selon l'Etat demandant à intervenir, existerait entre lui et les parties. »

28. Cette nouvelle rédaction dépasse sans aucun doute le libellé très sobre et concis de l'article 62 du Statut, aux termes duquel la seule condition de l'intervention est l'existence d'un intérêt d'ordre juridique en cause.

29. Comme on le voit, la controverse vieille de soixante ans sur la question de savoir si l'Etat intervenant doit ou non prouver l'existence d'un lien juridictionnel avec les parties principales s'est trouvée ressuscitée par la revision du Règlement.

30. Je n'ai pas l'intention d'examiner en détail le problème de la nécessité de l'existence d'un lien juridictionnel pour établir le droit d'intervenir des Etats tiers. Mais il me paraît douteux qu'une condition aussi importante et générale puisse être greffée sur le texte de l'article 62 du Statut par une simple disposition du Règlement.

31. En ce qui concerne le problème particulier de l'alinéa *c)* de l'article 81, paragraphe 2, du Règlement, son sens véritable n'est pas clair, tant s'en faut. Et même, la lecture des procès-verbaux relatifs à la rédaction du nouveau Règlement montre que des incertitudes considérables planaient sur le sens véritable de cet alinéa, mais que, selon l'opinion dominante, il s'agissait seulement d'attirer l'attention sur ce point et de veiller à ce que tout Etat qui peut indiquer un tel titre de compétence le fasse connaître à la Cour.

32. Cette nouvelle rédaction du Règlement comportait de profondes innovations. Il était peut-être opportun d'inclure dans le nouveau texte l'objet précis de l'intervention. Cette exigence est compréhensible, et peut être considérée comme sous-entendue dans le texte de l'article 62. Mais c'est l'alinéa *c)* du paragraphe 2 de l'article 81 qui, en obligeant l'intervenant à préciser « toute base de compétence qui, selon l'Etat demandant à intervenir, existerait entre lui et les parties », constitue l'innovation radicale et surprenante de cette disposition. Cette disposition est en effet formulée en termes nébuleux, et elle n'indique pas s'il s'agit seulement d'une obligation d'informer la Cour ou d'une condition préalable à proprement parler, nécessaire à la recevabilité de l'intervention dans une affaire donnée.

* * *

40. La République de Malte et la Jamahiriya arabe libyenne ont signé le 23 mai 1976, à La Valette, un compromis en vue de soumettre à la Cour internationale de Justice une affaire concernant la délimitation de leurs plateaux continentaux respectifs. Après de longues démarches, le compromis a été déposé au Greffe sous couvert d'une lettre conjointe de notification en date du 26 juillet 1982.

41. Dans le délai prévu au paragraphe 1 de l'article 81 du Règlement de la Cour, l'Italie a présenté le 24 octobre 1983 une requête à fin d'intervention sur la base de l'article 62 du Statut. Conformément aux dispositions de l'article 83, paragraphe 1, du Règlement, des copies certifiées conformes de la requête ont été transmises aux Parties, et la date limite pour la réception de leurs observations a été fixée au 5 décembre 1983. Ainsi la Cour se trouve de nouveau appelée à prendre une décision concernant l'application de l'article 62 du Statut.

*

42. Dans sa requête, l'Italie invoque l'existence d'un « intérêt d'ordre juridique » qui serait pour elle en cause, en développant dans ce sens une série d'arguments :

a) Les zones à délimiter entre les Parties appartiennent toutes à une même région de la Méditerranée centrale, dont l'Italie est riveraine.

b) Il s'agit d'une région étroite, dont aucun point ne se trouve à plus de 400 milles marins des côtes des autres Etats riverains, et notamment de l'île de Malte.

c) Si l'on applique à cette région la définition de l'article 76 de la convention sur le droit de la mer, qui dispose que la largeur minimum du plateau continental est de 200 milles marins, il en résulte que la totalité des fonds en question fait partie d'un seul et même plateau continental, avec de vastes zones de chevauchement.

d) En ce qui concerne le prolongement naturel, Malte se trouve sur le plateau continental de la Sicile, qui se prolonge encore au sud et à l'est de l'île de Malte, en direction du plateau sous-marin de Melita et Medina.

e) Il suffit de jeter un « coup d'œil sur la carte » pour constater qu'une grande partie des fonds de ladite région se trouve devant les côtes italiennes et au large de ces côtes.

f) Une ligne médiane tracée, à titre d'hypothèse, entre les masses terrestres de l'Italie et de la Libye placerait du côté italien certaines des zones sur lesquelles Malte revendique des droits.

43. L'Italie conclut que certaines zones de plateau continental en litige entre Malte et la Libye sont des zones sur lesquelles l'Italie a des droits indéniables :

« l'Italie a par conséquent un intérêt juridique incontestable en cause

sance plus complète des circonstances de l'affaire. » (Requête de l'Italie, par. 20.)

47. Malgré cette nette prise de position contre la nécessité de prouver l'existence d'un lien juridictionnel, la requête italienne essaie au paragraphe 21 de se conformer aux stipulations de l'article 81, paragraphe 2 *c*), du Règlement de la Cour, en affirmant que les droits juridiques indéniables de l'Italie et l'objet de l'intervention créent automatiquement, sur la base de l'article 62, la compétence de la Cour, dans une mesure suffisante pour justifier l'admission de l'Italie à participer à la présente procédure en qualité d'intervenant.

48. Un autre argument invoqué par l'Italie pour démontrer l'existence d'un lien juridictionnel est le fait qu'en tant que Membre des Nations Unies, l'Italie, de même que la Libye et Malte, est partie au Statut de la Cour et appartient donc à la « communauté judiciaire » créée par le système des Nations Unies pour le règlement des différends. Le lien juridictionnel immanent résultant de l'existence de cette « communauté judiciaire » est assez douteux, et ne tient pas compte des règles spéciales de compétence énoncées aux articles 36 et 37 du Statut, exception faite du paragraphe 6 de l'article 36, qui habilite la Cour à décider de sa propre compétence. L'existence de textes tels que les articles 41, 60, 61 et 62, qui créent des « règles de compétence » directes, est un point qui mérite examen.

49. L'argument additionnel du paragraphe 22 de la requête de l'Italie, à savoir que ce pays a accepté la juridiction obligatoire de la Cour en devenant partie à la convention européenne pour le règlement pacifique des différends du 29 avril 1957, dont l'article I prévoit la compétence de la Cour, n'est pas plus convaincant, le lien juridictionnel créé par cette convention n'ayant d'effet qu'entre les parties à cet instrument. Or l'une au moins des Parties au principal, la Libye, n'est pas partie à la convention, si par contre Malte y est partie depuis 1958.

50. En conclusion, l'Italie se trouverait en meilleure posture en rejetant tout simplement la nécessité de démontrer le lien juridictionnel aux termes de l'article 62, au lieu de se livrer à des efforts peu convaincants pour démontrer l'existence d'un lien aussi douteux.

* * *

51. Avant l'expiration du délai fixé par ordonnance du Président de la Cour en application de l'article 83 du Règlement, les deux Parties à l'instance principale ont présenté le 5 décembre 1983 des observations au sujet de la requête à fin d'intervention introduite par l'Italie. Les conclusions de ces deux séries d'observations sont négatives et, comme la partie correspondante de l'arrêt en donne un résumé complet, je m'abstiendrai de les exposer.

on ne saurait guère nier que des intérêts d'ordre juridique peuvent être invoqués par chacun des Etats riverains, à savoir l'Italie, la Libye, Malte, la Tunisie et peut-être aussi l'Algérie, dans toute délimitation d'un plateau continental qui semble former un tout, qu'on l'envisage sous l'angle du prolongement naturel ou d'après les critères des « nouvelles tendances » de la convention de Montego Bay, où le plateau continental a une largeur minimale de 200 milles marins. Certes, la convention n'est pas encore en vigueur et ne le sera probablement pas d'ici quelque temps, mais telles sont les tendances du nouveau droit de la mer qu'il a été demandé à la Cour de prendre en considération dans l'affaire *Tunisie/Libye.* De même, le principe de proportionnalité ne saurait faire abstraction des intérêts de l'Italie avec ses longues côtes, surtout celles de la Sicile, de la Calabre et de l'Apulie, donnant sur la Méditerranée centrale.

58. Quand Malte a déposé sa requête à fin d'intervention en 1981, elle se heurtait à des difficultés plus grandes pour établir un intérêt d'ordre juridique. Pourtant elle a soutenu qu'elle avait :

> « un « intérêt spécial et unique » en l'instance en cours, parce qu'elle serait « concernée par les faits » de l'affaire *Tunisie/Libye* ... en raison de sa situation géographique par rapport aux deux Parties à l'instance » (*C.I.J. Recueil 1981,* p. 9, par. 13).

59. Cependant la conclusion de la Cour, au paragraphe 33 de l'arrêt de 1981, revient à nier l'existence d'un tel intérêt :

> « Cela étant, le caractère même de l'intervention demandée par Malte montre, de l'avis de la Cour, que l'intérêt d'ordre juridique invoqué par elle ne peut être considéré comme susceptible d'être en cause en l'espèce au sens de l'article 62 du Statut. » (*C.I.J. Recueil 1981,* p. 19.)

60. De fait, et ce point, selon moi, n'a pas été approfondi suffisamment dans l'arrêt, comme l'atteste la brève référence qui figure au paragraphe 39, l'affaire *Tunisie/Libye* concernait une délimitation entre Etats limitrophes, à partir d'un point prédéterminé, le point extrême de la frontière territoriale. D'autre part, la situation géographique de Malte, dont les côtes font face à celles de la Libye et de la Tunisie, pouvait difficilement avoir une incidence sur la délimitation latérale, sauf dans la mesure où il s'agirait de prolonger la future ligne de délimitation maritime jusqu'à l'endroit où elle pénétrerait sur le plateau continental maltais ; or la Cour a introduit, au paragraphe 35 de l'arrêt de 1981, une réserve à ce sujet.

61. La situation actuelle est totalement différente. Les côtes de l'Italie font face à celles de Malte et de la Libye, et toute délimitation résultant de ce que la Cour décidera au sujet des principes et règles du droit international applicables ne pourra manquer de se répercuter sur les intérêts de l'Italie, car la géographie de la région le veut ainsi.

62. De plus, par suite des caractéristiques de la Méditerranée centrale,

décider si elle entend ou non faire droit à la requête. Ce n'est que si elle admet l'intervention que l'intervenant est tenu d'exposer sur le fond l'objet de sa demande et les raisons pour lesquelles il estime que ses intérêts sont en cause. Comment donc la Cour pourrait-elle « statuer sur l'existence » des droits de l'Italie aussi tôt dans la procédure, avant même que la région considérée soit définie ? Les Parties principales elles-mêmes ne font jusqu'à présent qu'invoquer certains droits et c'est pourquoi elles ont saisi la Cour de leurs prétentions ; la décision de la Cour, le moment venu, déterminera les droits qui existent, s'il y en a.

66. De plus, à la fin du paragraphe 29, l'arrêt déclare que l'Italie demande à la Cour « de statuer au moins partiellement sur les différends entre l'Italie et l'une des Parties ou les deux ».

67. Je ferai respectueusement observer que tout au long de la procédure l'Italie, que je sache, n'a jamais exposé à la Cour aucun différend avec les Parties principales. Au contraire, c'est précisément l'inexistence d'un différend antérieur qui a été brandie contre l'Italie comme un argument pour justifier le rejet de la requête et même la mise en œuvre du remède radical de l'*estoppel.* Je vois donc mal comment l'arrêt peut parler d'un « différend » exposé par l'Italie.

68. Or, ce différend inexistant tient une place centrale dans l'arrêt, dont le paragraphe 32 est ainsi conçu :

> « L'Italie s'est efforcée en effet de distinguer entre une demande faite à la Cour de tenir compte de ses intérêts d'ordre juridique ou de les sauvegarder et une demande tendant à ce que la Cour reconnaisse ou définisse ses intérêts juridiques, ce qui reviendrait à lui soumettre un autre litige. »

69. Cette déclaration constitue un élément crucial de l'arrêt et je me permettrai de qualifier de *non sequitur* la conclusion à laquelle elle aboutit.

70. Je ne vois pas comment un cas d'intervention authentique et même classique peut être assimilé à l'introduction d'un différend distinct. Quel différend ? La Libye ou Malte ont-elles un différend quelconque avec l'Italie ? Non, selon leurs avocats, qui sont allés jusqu'à invoquer l'absence de différend comme une raison d'appliquer à l'Italie le principe de l'*estoppel,* ainsi que je l'ai déjà souligné. Au cours de la procédure sur la demande en intervention, les indications données par l'Italie à titre de première définition du domaine où elle estime avoir des intérêts d'ordre juridique, et même les renseignements plus détaillés fournis en réponse à la question de l'un des juges, n'ont pas été contestés par les Parties. Celles-ci n'auraient d'ailleurs pas pu les contester, car la Cour n'a pas atteint la deuxième phase de la procédure d'intervention, celle de l'examen de la requête au fond. Je ne vois donc pas comment l'arrêt peut apercevoir, dans l'objet de la requête italienne, un « différend distinct ». Quant à la présentation future de l'intervention sur le fond, il est prématuré de conclure qu'elle équivaudrait à un autre litige.

71. Or, l'existence de cet autre litige futur et indéterminé fournit l'ar-

76. Les procédures incidentes ont en commun de présupposer l'existence d'une procédure contentieuse principale, introduite par voie de requête ou de compromis entre les parties principales. Elles « se greffent », pour ainsi dire, sur l'affaire en cours et leur existence présente un caractère ancillaire par rapport au procès principal. Il n'est donc pas question de la nécessité d'un lien juridictionnel nouveau et spécial pour la procédure incidente. Le lien juridictionnel est celui même qui, établi pour l'affaire principale, s'étend à l'incident de procédure constitué par la requête à fin d'intervention. De plus, l'intervention en vertu de l'article 62 est une procédure préliminaire, dont le sort dépend de la décision de la Cour comme le paragraphe 2 du même article le prévoit expressément. La décision discrétionnaire ou, selon l'expression de sir Gerald Fitzmaurice, « quasi discrétionnaire » de la Cour achève la première phase de la procédure d'intervention. Si la requête est accueillie, l'intervenant doit fournir tous les éléments de fait et de droit à l'appui de sa cause. Ce serait la deuxième phase, dont la Cour n'a pas l'expérience, car aucun des rares cas d'intervention dont elle a connu jusqu'ici n'a dépassé le stade préliminaire.

77. Voilà pourquoi l'article 62 demande seulement au candidat à l'intervention de fournir un commencement de preuve à l'appui de ce qu'il estime (il *estime* et rien de plus) être un intérêt d'ordre juridique pour lui *en cause* dans la procédure contentieuse entre les parties principales. Cette procédure préliminaire se déroulera devant la Cour dans le cadre de l'affaire principale, la compétence étant établie par les plaideurs principaux.

78. Pendant la procédure orale, les Parties principales ont soutenu que, du fait qu'il figure au chapitre III du Statut relatif à la procédure, l'article 62 ne saurait déroger aux dispositions générales des articles 36 et 37 en matière de compétence. Il convient de répondre à cela que le chapitre III – « Procédure » – contient aussi l'article 53, disposition très importante – vestige à certains égards de l'ancien idéal d'établir un tribunal international permanent à compétence obligatoire – qui habilite la Cour à connaître d'une affaire, même contre la volonté de l'une des parties, dans la procédure par défaut. La Cour a une grande expérience de ce genre d'affaires, où l'une des parties ne comparaît pas ou ne fait pas valoir ses moyens *(Compétence en matière de pêcheries, Essais nucléaires, Prisonniers de guerre pakistanais, Plateau continental de la mer Egée, Personnel diplomatique et consulaire des Etats-Unis à Téhéran)*. Or dans le cas de l'article 53, où un lien juridictionnel doit être établi à fortiori, que prévoit le Statut ? Garde-t-il le silence sur la question de compétence comme l'article 62 ? Non, il déclare catégoriquement, au paragraphe 2, que la Cour doit s'assurer qu'elle a compétence aux termes des articles 36 et 37. Si le lien juridictionnel était nécessaire à l'application de l'article 62, le Statut ne contiendrait-il pas dans ce cas une disposition semblable ?

79. Selon moi, au sujet de la nécessité d'un lien juridictionnel spécial pour la procédure d'intervention, la situation est tout à fait claire. Aucune

there is no such requirement. Even those who proclaim the necessity of the link in the case of Article 62, concede that it is not required for Article 63. If that is so, it would only be normal for Article 62 to contain some wording similar to paragraph 2 of Article 53, to establish the difference of procedure in entertaining the two types of incidental issue of intervention. A well-known writer, devoted to problems related to the International Court of Justice, maintains :

> "The characteristic feature of the incidental jurisdiction is that it depends not upon the specific consent of the parties but upon some objective fact, such as the existence of 'proceedings' before the Court . . .
>
> The fact that the incidental jurisdiction of the Court rests only indirectly upon the consent of the parties, that is to say, has an objective characteristic, also enables it to be regarded as an inherent jurisdiction." (Rosenne, *The Law and Practice of the International Court,* Vol. I, pp. 422-423.)

80. Those who insist on the need of the jurisdictional link do not see the salient difference of treatment given by the Statute to normal and principal cases and to cases of incidental jurisdiction. Intervention is one of the latter, together with the interim measures of protection, interpretation and revision of judgments.

* * *

81. In paragraph 42 the Judgment discusses the relationship between Articles 59 and 62 of the Statute, a problem on which there was much to say during the pleadings. I believe that Article 59 is intended to preserve the relative character of the *res judicata* in a general way. If it would provide sufficient protection for third States in the circumstances under which they are compelled to apply for permission to intervene, Article 62 would have no place in the Statute. If Italy resorted to Article 62 it was not by mere choice, as is said in paragraph 42 of the Judgment, but because it *considered* that the decision to be given by the Court in the principal case might affect its interests of a legal nature. This is a form of direct protection provided for by Article 62, different from the general principle of Article 59, which confines itself to enunciate the principle that judgments are *res inter alios acta* for third States.

82. As regards paragraph 43 of the Judgment, which still deals with the problem of the rights and interests of third States, I would like to recall that rights relating to the continental shelf are recognized as inherent, *ipso facto* and *ab initio,* and are not depending on proclamation, occupation or title of any kind. Article 77, paragraph 3, of the Montego Bay Convention states very clearly :

> "The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation."

The use of the word "title" referring to the principal Parties and third States may be misleading, and runs against the doctrine behind the very nature of continental shelf rights.

83. Moreover, I do not agree with the final part of that paragraph, which gives too much meaning to the "preferences" of the parties regarding an application to intervene. The choice of the parties cannot be ignored by the Court, but none of them possess the power of "veto". Their opinion cannot condition the decision of the Court or influence and determine whether the Judgment will be of more or less assistance to them. That is the business of the Court. As the Judgment itself recognizes in paragraph 46 :

> " 'it shall be for the Court to decide' upon a request for permission to intervene, and the opposition of the parties to a case is, though very important, no more than one element to be taken into account by the Court".

* * *

84. In the present proceedings it is more than the subject-matter of the Italian application that is at stake. What is at stake is the usefulness of the institution of intervention within the framework of the Statute.

85. As has been said before, intervention is an important device of procedural law in all legal systems of the world without exception ; it is the appropriate remedy to protect the interests of third parties in pending contentious proceedings. It is an instrument indispensable for good administration of justice, its expediency and efficacy.

86. The drafters of the Statute knew what they were doing, and the importance as well as the necessity of retaining the institution of intervention in the structure of permanent judicial bodies is still recognized today.

87. An eloquent proof of that fact may be found in the elaboration of the Statute of the International Tribunal of the Law of the Sea, Annex VI to the Convention on the Law of the Sea, of 7 October 1982 (A/CONF.62/122, pp. 173 ff.). Articles 31 and 32 of the Statute of the Tribunal are closely aligned with Articles 62 and 63 of our Statute. So, 62 years later the same formulations have been embodied in the most recent attempt to establish a permanent international judicial body for matters concerned with the law of the sea.

88. If the wording of Articles 62 and 63 were vague, ambiguous, imprecise, and incomplete, should it not be modified, amended, and corrected during the long and careful exercise leading to the drafting of the Statute of

the new tribunal ? If the prerequisites of the jurisdictional link and precise object, novelties of our Rules of Court, really deserved recognition by the international legal community, should they not be incorporated in the text of the new articles ?

89. Nothing of that kind happened, and the old Articles 62 and 63 are again enshrined in an important international document constituting the framework of the new tribunal.

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90. If a State in the situation of Italy cannot intervene under Article 62, I would like to know when and in what circumstances intervention could take place. Could a State that considers that it has an interest of a legal nature which may be affected by the decision of the Court in ongoing proceedings between other parties negotiate a Special Agreement with those parties, thereby gaining *locus standi* for intervention ? Generally negotiations of that kind take a long time. It took more than six years for Libya and Malta to present to the Court the Special Agreement signed as early as 1976. And once the principal proceedings are instituted, could the would-be intervener have such a special agreement negotiated, signed and ratified before the closure of the written proceedings in the principal case ? This course would obviously be unfeasible. On the other hand, in the heat of contentious proceedings could the would-be intervener make the declaration of Article 36, paragraph 2, of the Statute, securing at the same time from the principal parties the necessary reciprocity before it enters its application ? This solution would also be contrary to good sense and impossible to achieve in view of the time required for these démarches, and for the fact that the principal parties would not normally welcome the incidental procedure of intervention, which might disrupt the course of the incumbent proceedings. So, the only case for intervention would be that in which there would be the co-incidence of the existence of a jurisdictional link previously established with both parties in the proceedings. If that were to ever happen, there would be no need for intervention since the State benefiting from this jurisdictional link would be in a position to institute normal proceedings against the other parties. So I fail to see how the requirement of the jurisdictional link could be worked out in the incidental procedure of intervention. I do not hesitate to say that the Italian application for permission to intervene in the *Libyan Arab Jamahiriya/Malta* case was undoubtedly admissible. I believe that the Italian application fulfilled all the required conditions for intervention under Article 62 of the Statute.

(Signed) José SETTE-CAMARA.
