INTERNATIONAL COURT OF JUSTICE

PLEADINGS, ORAL ARGUMENTS, DOCUMENTS

CASE CONCERNING THE CONTINENTAL SHELF

(TUNISIA/LIBYAN ARAB JAMAHIRIYA)

VOLUME IV

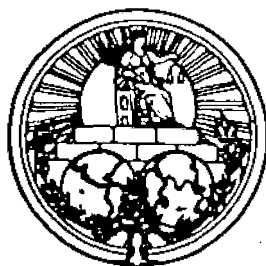
COUR INTERNATIONALE DE JUSTICE

MÉMOIRES, PLAIDOIRIES ET DOCUMENTS

AFFAIRE DU PLATEAU CONTINENTAL

(TUNISIE/JAMAHIRIYA ARABE LIBYENNE)

VOLUME IV



ORAL ARGUMENTS ON THE APPLICATION FOR PERMISSION TO INTERVENE

MINUTES OF THE PUBLIC SITTINGS

held at the Peace Palace, The Hague, from 19 to 23 March and on 14 April 1981, President Sir Humphrey Waldock presiding

PLAIDOIRIES RELATIVES À LA REQUÊTE À FIN D'INTERVENTION

PROCÈS-VERBAUX DES AUDIENCES PUBLIQUES

tenues au palais de la Paix, à La Haye, du 19 au 23 mars et le 14 avril 1981, sous la présidence de sir Humphrey Waldock, Président

FIRST PUBLIC SITTING (19 III 81, 10 a.m.)

Present : President Sir Humphrey WALDOCK ; *Vice-President* ELIAS ; *Judges* GROS, LACHS, MOROZOV, NAGENDRA SINGH, RUDA, MOSLER, ODA, AGO, EL-ERIAN, SETTE-CAMARA, EL-KHANI, SCHWEBEL ; *Judges* ad hoc EVENSEN, JIMÉNEZ DE ARÉCHAGA ; *Registrar* TORRES BERNÁRDEZ.

Also present :

For the Government of Malta :

Dr. Edgar Mizzi, Attorney-General of Malta, *as Agent and Counsel* ;

H.E. Mr. Emanuel Bezzina, Ambassador of Malta to the Netherlands, *as co-Agent* ;

assisted by

Sir Gerald Fitzmaurice, G.C.M.G., Q.C., *as Consultant and Co-ordinator* ;

and by

Professor Pierre Lalive, Professor at the Faculty of Law of the University of Geneva, and at the Graduate Institute of International Studies ; Member of the Geneva Bar,

Mr. M. E. Bathurst, C.M.G., C.B.E., Q.C.,

Mr. E. Lauterpacht, Q.C., *as Counsel* ;

and

Mr. M. C. Tynan, Solicitor (Bischoff and Co.).

For the Government of the Libyan Arab Jamahiriya :

H.E. Mr. Kamel H. El Maghur, Ambassador, *as Agent* ;

Dr. Abdelrazeg El-Murtadi Suleiman, Professor of International Law, University of Garyounis, *as Counsel* ;

Sir Francis A. Vallat, K.C.M.G., Q.C.,

Professor Antonio Malintoppi, Professor of International Law, Rome University,

Mr. Keith Highet, Member of the District of Columbia and New York Bars, *as Counsel and Advocates* ;

and

Mr. Walter D. Sohier,

Mr. Rodman R. Bundy,

Mr. Richard Meese,

Mr. Michel Vodé, *as Counsel.*

For the Government of Tunisia :

H.E. Mr. Slim Benghazi, Ambassador of Tunisia to the Netherlands, *as Agent* ;

Professor Sadek Belaïd, *Professeur agrégé*, Faculty of Law, Political Science and Economics, University of Tunis, *as Co-agent and Counsel* ;

Professor R. Y. Jennings, Q.C., Whewell Professor of International Law, University of Cambridge, *as Counsel* ;

Mr. Abdelwahab Cherif, Counsellor at the Tunisian Embassy to the Netherlands,

Mr. Samir Chaffai, Secretary at the Tunisian Embassy to the Netherlands.

OPENING OF THE ORAL PROCEEDINGS ON THE APPLICATION FOR PERMISSION TO INTERVENE

The PRESIDENT : The Court meets today to examine the application of the Government of the Republic of Malta for permission to intervene in the case concerning the *Continental Shelf*, between the Tunisian Republic and the Socialist People's Libyan Arab Jamahiriya.

The proceedings in the case were instituted by the notification to the Court on 1 December 1978 of a Special Agreement (see I, pp. 3-27) signed on 10 June 1977 between the Republic of Tunisia and the Socialist People's Libyan Arab Jamahiriya, which provided for the submission to the Court of a dispute concerning the question of the continental shelf between the two countries.

Since the Court did not include upon the bench a judge of either Tunisian or Libyan nationality, both the Parties to the case proceeded to exercise the right conferred on them by Article 31 of the Statute of the Court to choose a judge *ad hoc* to sit in the case. On 14 February 1979 the Libyan Arab Jamahiriya designated Mr. Eduardo Jiménez de Aréchaga, a former judge and President of this Court, and on 11 December 1979, Tunisia designated Mr. Jens Evensen, a former Norwegian minister for the Law of the Sea and head of the Norwegian delegation to the United Nations Conference on the Law of the Sea. Judges *ad hoc* are required by Articles 20 and 31, paragraph 6, of the Statute to make a solemn declaration that they will exercise their powers impartially and conscientiously, and under Article 8 of the Rules of Court this declaration is to be made at a public sitting in the case in which the judge *ad hoc* is participating. This being the first such public sitting in the *Continental Shelf* case, I shall now call on the two judges *ad hoc*, in the order of precedence laid down by Article 7 of the Rules, to make their solemn declarations.

I invite all present in the Hall of Justice to stand while the declarations are made. Judge Evensen.

Judge EVENSEN : I solemnly declare that I will perform my duties and exercise my powers as judge honourably, faithfully, impartially and conscientiously.

The PRESIDENT : Judge Jiménez de Aréchaga.

Judge JIMÉNEZ DE ARÉCHAGA : I solemnly declare that I will perform my duties and exercise my powers as judge honourably, faithfully, impartially and conscientiously.

The PRESIDENT : I place on record the solemn declarations made by Judges Evensen and Jiménez de Aréchaga as Judges of the Court for the *Continental Shelf* case between the Republic of Tunisia and the Socialist People's Libyan Arab Jamahiriya, duly appointed in conformity with Article 31 of the Statute of the Court.

On 30 January 1981 the Government of the Republic of Malta filed in the Registry of the Court an Application (see pp. 257-262, *supra*), dated 28 January 1981, for permission to intervene in these proceedings under Article 62 of the Statute of the Court, and Article 81 of the Rules of Court. As prescribed by paragraph 1 of Article 83 of the Rules, certified copies of the Application

were communicated forthwith to the Parties to the case, who were invited to furnish written observations within a time-limit fixed by the President of the Court ; and the notifications required by paragraph 1 of that Article were duly effected. On 26 February 1981, each of the two Parties filed written observations (see pp. 265-267 and 268-275, *supra*) on the Application for permission to intervene, in which they set out their respective reasons for contending that the Application does not satisfy the conditions laid down by the Statute and Rules of Court. The present sitting is therefore being held in order that the Court may hear the State seeking to intervene and the Parties to the case, in accordance with Article 84, paragraph 2, of the Rules of Court, before deciding whether or not to grant the permission to intervene requested by Malta.

By a letter of 2 March 1981, received in the Registry on 4 March 1981 (see V, Correspondence, No. 63), the Government of Malta notified the Court that in reliance on Article 31, paragraph 3, of the Statute of the Court, it nominated a judge *ad hoc* "for the purpose of the intervention proceedings", and raised certain other questions concerning the application of that Article and in particular the participation of Judges Jiménez de Aréchaga and Evensen in the intervention proceedings. On 7 March 1981 the Court observed that at the present stage of the proceedings the matters which were the subject of the letter from the Government of Malta do not, on their face, fall within the ambit of Article 31 of the Statute of the Court. It decided that a State which seeks to intervene under Article 62 of the Statute has no other right than to submit a request to be permitted to intervene, and has yet to establish any status in relation to the case ; and that pending consideration and decision of a request for permission to intervene the conditions under which Article 31 of the Statute may become applicable do not exist. The Government of Malta was therefore informed that, the letter of 2 March 1981 being in the circumstances premature, the matters to which it referred could not be taken under consideration by the Court at the present stage of the proceedings.

Judge Forster is unable, for family reasons, to be present for these hearings, and will thus not be participating in the decision on the Application of Malta to intervene.

I note the presence in Court of the Agents and other representatives of the Republic of Malta which is seeking to intervene and of the two Parties to the case. After consulting the Parties and the Republic of Malta, the Court will hear the representatives of the three States concerned in the present proceedings in the following order : first, the representatives of the Republic of Malta ; secondly, the representatives of the Socialist People's Libyan Arab Jamahiriya ; and thirdly, the representatives of the Republic of Tunisia.

ARGUMENT OF DR. MIZZI

AGENT FOR THE GOVERNMENT OF MALTA

Dr. MIZZI: Mr. President and Members of the Court, it is a traditional opening courtesy to say how honoured and privileged one feels to appear before this eminent Tribunal. It is indeed a great honour and a privilege for me to represent my country before this Court. But in these proceedings such statement is much more than a simple courtesy. Before I say why this is so however, Mr. President, I wish to remove any misunderstanding that may arise from the fact that we are sitting on the right side of the rostrum, next to one of the two States which are Parties to the main case. We are sitting there only as a matter dictated by the seating arrangements allocated to us. We side with neither of those two States. Having said that, I may now come to the reasons why my opening statement was not pure courtesy.

Malta is a small State, and for the small States of our world this Court has a special importance. Malta is in every way a small State. Small in extent, small in population, small in economic and financial means and, above all in financial resources. It is also small in the physical, industrial and political power or influence it can hope to exercise. Nevertheless, relative to our size we have had a long and eventful history of which any country could be proud. In the particular context of the law of the sea Malta is well known for the initiative it took in 1967 when it proposed to the world that the sea-bed and subsoil beyond national jurisdiction should be treated as the common heritage of mankind.

In paragraph 5 of our written application for permission to intervene we drew particular attention to the situation of Malta as an island State without natural resources, and therefore as possessing a special and vital interest in any questions affecting the extent and limits of its continental shelf and of the resources of that shelf, and it is not necessary for me to enlarge upon them.

But, if Malta is a small State, the principle of the equality of all States, great and small, before the law, entails that small does not mean diminished. Malta is entitled to the full extent of its rights as a State.

Here I ought perhaps to deal with a possible misconception concerning the differences in regard to continental shelf rights between the position of an island which is itself a State and a metropolitan territory, and that of an island which, though not geographically part of a larger piece of territory, is politically part of it. There are islands which are not themselves metropolitan territory but belong to or are dependent on, such a territory, whether situated off or near those coasts, or possibly off, or near, the coasts of another State or again out on their own in the deep ocean. These are all dependent islands and whatever may be the continental shelf rights in respect of them — as to which I say nothing here, one way or the other — the continental shelf rights of an island which is itself a State and a metropolitan territory, that is to say a State which happens also to be an island, are exactly the same in principle as those of a State which is not an island. An island State is entitled to the same continental shelf rights as a continental State. But in the case of an island which is both a State and very small, there may be dangers of confusion and this is why I have ventured to mention this point. The fact is that size as such has nothing to do with the matter. If this were not so, where would one draw

the line among the island States of greatly varying sizes. Even Australia is an island State ; so are Sri Lanka and Fiji, Malagasy and Mauritius, Cuba and Barbados ; and so are several other island States.

Mr. President and Members of the Court, for the small States of this world your Court – together with the United Nations Organization of which it is an integral part – represents not only the most important and the best, but almost the only forum to which they can refer their problems in the expectation that these will receive a sympathetic hearing and a just solution. Malta's problems over the extent of its continental shelf in the Mediterranean Sea are of very long standing. This is at least partly due to the fact that its geographical situation places it as it were at the hub of a number of other States and islands whose continental shelf areas are liable to impinge on one another, and to impinge on Malta's, as Malta's may impinge on theirs. These are eminently matters which, in the absence of agreement between the States concerned, call for resolution by an impartial body ; and since, in the context of continental shelf boundaries, they involve questions predominantly, if not almost exclusively, of a juridical character, this Court is most clearly the appropriate body for the purpose.

I believe it is well known that Malta has accordingly, for some time, been making considerable efforts to refer its continental shelf problems to this Court without, up to the present, any definite result. Then came the *Libya/Tunisia* case. Malta is geographically situated on what is essentially the same continental shelf as Libya and Tunisia ; and there can be little doubt that the *Libya/Tunisia* case, considered in legal and physical terms, meshes closely with the continental shelf interests of the Republic of Malta. In these circumstances what was Malta to do ? Could we reasonably have been expected to stand by and see the Court decide that case without making any attempt to put ourselves in a position to acquaint the Court with our views about a region which is as much a Maltese as a Libyan or Tunisian concern ? The problem is one that existed and still exists whether or not Malta has any prospect of herself engaging Libya or Tunisia in independent proceedings before the Court, for these must necessarily be later in time than the present *Libya/Tunisia* proceedings. Thus the only way in which Malta can make its position known to the Court is by means of the intervention process contemplated by Article 62 of the Statute.

It may be asked – indeed has been asked by both Libya and Tunisia – why then did we not present our request sooner ? The technical answer is that we were in no way bound to do so. Unless the Court extends the time, the rule allows up to the date of the closure of the written proceedings in the case. We have never actually known what that date in the *Libya/Tunisia* case was ; nor indeed, whether the written proceedings have yet been closed at all. However, for safety we decided to lodge our requests by the date fixed for the filing of the last Counter-Memorial in the *Libya/Tunisia* case, which was 2 February last, and we sent in our request on 30 January.

But of course there were more substantial reasons for the delay, if delay it was. Malta believed that a request for permission to intervene which had to be based on the existence of a legal interest liable to be affected by the Court's decision in the case, should be founded on a knowledge of what was being contended for in that case, – something that could only be derived from the relevant pleadings. Indeed, the very fact, that prima facie, a request for permission to intervene need not be lodged before the date of the closure of the written proceedings implied the relevance of those proceedings for deciding whether to request permission to intervene or not ; and in the affirmative for

the framing of the actual request. Accordingly, acting under Article 53 of the Rules, Malta, as far back as August of last year, made a formal request for copies of the written pleadings in the case. No reply was received until November, and it was a refusal. Malta then had to do her best to draft her intervention application without sight of those pleadings, and in the circumstances I submit that no undue delay can be said to have occurred by reason of the fact that Malta's application was not lodged until 30 January.

I now come to what is for Malta one of the cardinal points on the subject of her request for intervention. In view of this point I do not propose to pursue any further the matters about which I have just been speaking. Nor do I propose now to enlarge upon or burden the Court with the history of those efforts which were in part mentioned in Malta's earlier application for copies of the written pleadings in the *Libya/Tunisia* case – the application which the Court did not see fit to grant. Nor, equally, will I embark upon a description of the steps which, in the light of recent events, Malta has felt compelled to take before the Security Council of the United Nations.

The reason for this forbearance, if I might so term it – a compelling reason of logic and good faith – is a very simple one. It is that the Government of Malta, in its present application for permission to intervene in the *Libya/Tunisia* proceedings now current before the Court, is not seeking to appear as a plaintiff or claimant against either of those States, or to assert any specific right against either of them as such. Indeed my Government notes that Libya and Tunisia do not themselves in their case before the Court stand in the strict relationship to each other of plaintiff and defendant – a fact, the implications of which for the jurisdictional and other procedural aspects of the case for intervention, we shall develop later. In any event, we ourselves seek to intervene simply as interveners for the protection of Malta's own legal rights and interests.

In broad terms – my colleagues will develop the details later – the precise object of Malta's intervention can be quite easily stated. Malta's geographical situation in the central Mediterranean, and in relation to a number of surrounding States and islands, so places her, that almost any pronouncement by this Court – at least any pronouncement of principle – regarding the legal and/or equitable considerations governing the delimitation of continental shelf areas and boundaries in that region, or the methods applicable to such delimitation, will be certain to affect or have repercussions upon Malta's own rights and legal interests whenever – as is highly likely to be the case – those rights and interests are similar or analogous to those, or some of those, upon which the Court has pronounced. In this connection there are two points I would like particularly to emphasize.

First – although, as I have said, Malta's object in seeking to intervene is not to make a specific claim, or assert any specific legal right as against either Libya or Tunisia as such, her object and interest in intervening does relate to the general area in which those two States also claim continental shelf rights. As was duly stated in our earlier application for copies of the written pleadings therefore, our interest is *emphatically not* – "merely that of a State which ... might be seeking information out of a general interest in the law of the sea questions, or because of some hypothetical issue which it might possibly become involved in at a future time ...". Malta's interest, in other words, is not in the nature of what is known in English parlance as a general "fishing" interest – an enquiry made simply in the hope of eliciting something useful.

Of course all States have an interest in continental shelf matters and all of them will have an interest in any judicial pronouncements this Court may

make in that context. Unlike our opponents in these intervention proceedings, I would not care entirely to discount the possibility that this alone might suffice to entitle a State to intervene in a specific dispute between two other States. But this is a question on which I will not now venture an opinion, for it is not necessary for me to do so. Malta's situation is quite different. She is placed in the very area to which the *Libya/Tunisia* dispute relates, so that owing to the geographical configuration of the area, there is a high degree of probability – certainly of possibility – that any pronouncement made by the Court in the *Libya/Tunisia* context must prove relevant in one way or another, and in measurable degree, to Malta's own legal situation. It not only "may", as Article 62 of the Statute provides : it inescapably must affect that situation.

The second point I want to make, and I shall do this in a moment, arises out of the danger for Malta of seeing her rights as it were foreclosed and her legal interests shut out, by pronouncements of the Court – at least of principle, or relating to situations analogous to Malta's. All such pronouncements are bound to have the status of authoritative declarations of the law, almost automatically applicable to any comparable situation, and will certainly be viewed as such. This would happen without Malta having had any opportunity of presenting argument to the Court, despite her physical presence in the affected region, so that any argument that Malta might subsequently present – whether to this Court or in any other forum – would tend to come, or at least might come, too late.

That is why, Mr. President, and I would ask the Court particularly to note this, one of the principal arguments advanced by our opponents in these intervention proceedings is beside the point. This argument – though we could not of course know of it, not having been allowed to see the written pleadings – is to the effect that Malta's situation cannot be affected because the *Libya/Tunisia* proceedings are so conceived that any delimitation of the continental shelf boundary lines of those two States will be suspended at the point where it might impinge on those of other States in the region. Here I might ask, in parenthesis, how will it be known when that point is reached without entering upon the question of Malta's continental shelf entitlement ? But in any event this is not what Malta is primarily concerned about. The decision of the Court in the *Libya/Tunisia* case could not in any event, having regard to Article 59 of the Statute, be directly binding on, or have any direct operative effect for Malta. It is the pronouncements and grounds of law on which such a decision would be based, with special reference to the region, that could very materially affect Malta's future legal situation.

I can now make my second point, which is that the pertinence of Malta's request for intervention can in no way be affected by the possibility – and it is still no more than that – that Malta might appear before this Court as a principal party in parallel proceedings against Libya or possibly also Tunisia if either of those States agreed to this, or took Malta before the Court unilaterally by invoking our latest Declaration, dated 23 January of this year, accepting the Court's obligatory jurisdiction under paragraph 2 of Article 36 of the Statute. This situation arises from the fact that any decision given in such proceedings (Malta being a principal party to them) would be bound to be rendered later in date – considerably later – than that in the current *Libya/Tunisia* case now before the Court.

Moreover, it would be possible to go still further than this, and ask whether, given Malta's geographical situation in the Mediterranean, relative to Libya and Tunisia, it would be proper for the Court to give any decision at all, even in the current *Libya/Tunisia* case now before it, without hearing Malta. The

principle involved is comparable to that which caused the Court some 27 years ago to decline jurisdiction is the *Monetary Gold* case, on the grounds that Albania was not before the Court and had not asked to intervene. That case also has important implications for the jurisdictional question that arises in the present case by reason of subparagraph *(c)* of paragraph 2 of Article 81 of the Court's Rules. But this, my colleagues will deal with later.

To sum up, Malta's interest as a potential intervener in the current *Libya/Tunisia* proceedings must therefore persist whatever the outcome of our endeavours to bring our own dispute with Libya before the Court. Having said this however, I must reiterate that Malta's object as an applicant for permission to intervene in this case is not, by indirect means, to prosecute a dispute with either of the Parties to it, but only to apprise the Court of our views on the continental shelf questions that may – on account of Malta's geographical situation – immediately affect her legal interests in consequence of the decision of the Court in the present *Libya/Tunisia* case – and to do this before it is, or may be, too late.

That concludes what I have to say on this aspect of the purpose of our application to intervene, other aspects of which will be developed later by my learned friends Professor Pierre Lalive and Mr. Lauterpacht. I must however end this part of my statement with a *caveat*. From the facts that I have just outlined as to the broad purpose for which Malta wants to intervene, it must not for a moment be assumed that we in any way contend that this is the only sort of purpose that will justify a request for intervention. It is an essential part of our case, to which I shall be coming next, that the one and the sole juridical condition of the grant of permission to intervene is – as provided for by Article 62 of the Statute – the existence of "an interest of a legal character which may be affected by the decision in the case" – that is to say, by the decision in the current proceedings to which the application for intervention relates. But interests of a legal character may be very diverse in their nature, and there may be many different, legitimate, objects in citing them as reasons for requesting intervention. My colleague Professor Lalive will show later that the faculty of intervention is a common feature of mature legal systems ; and he will show in particular what assistance may be derived in the interpretation of Article 62 of the Statute, from the general theory of procedure and from the experience of domestic systems of procedural law, with which international law has many valid analogies.

To put our contention in a nutshell – and I would ask the Court to particularly note this – we say that if a legal interest of the kind specified in Article 62 of the Statute exists, that is to say one that "may be affected by the decision in the case", then the protection of that interest, whatever may be the ultimate purpose of doing so, constitutes in itself a sufficient ground for the request to intervene, and a sufficient reason for granting it.

In this the second and final part of my present statement, I wish to address myself to two questions which Malta considers to be of outstanding importance, not only in the immediate context of our present Application, but generally in regard to what I will call the faculty of intervention under Article 62 of the Statute. These questions are, first, the rationale and intention of Article 62, and secondly, the correct view of the relationship of Article 81 of the Court's Rules to Article 62 of the Statute.

The only absolute right embodied in Article 62 of the Statute is the right of any State to request permission to intervene in a current case before the Court if it considers "that it has an interest of a legal nature which may be affected by the decision [of the Court] in the case". The grant of the request, however,

and consequently the exercise of the faculty to intervene, is subject to the decision of the Court; and intervention may therefore be regarded as being in the nature of what I believe is characterized jurisprudentially as an imperfect right.

It must, however, at least be assumed that the underlying intention of Article 62 (for otherwise why incorporate it in the Statute at all ?) was that the request would in fact be granted whenever the requisite conditions appear to be fulfilled. In short, I suggest that the Court would be taking up an unduly restrictive attitude – contrary to the spirit and true intention of Article 62 – if it were to take the view that there exists some sort of presumption against the admissibility of intervention, or that any specially heavy burden of proof rests upon the Applicant. If this is correct, then what would be the reasonable conditions under which Article 62 could be invoked ?

Article 62 is a peculiarly open provision. It applies to all States, and these are not limited to any particular class or category of States, as are certain other provisions of the Rules and Statute. Nor does it comprise any limitations as to the class or category of case, dispute, or topic which is to form the object of the proposed intervention. It does not require the requesting State at that stage to demonstrate that the interest of a legal nature which it considers to exist will in fact be affected by the decision to be given in the case. So far as the English text of the Article is concerned, it suffices that it may be so affected. The French text proceeds from a different drafting approach, but, I submit, the same notion of the tentative or potential, rather than of the definitive, is implicit in the words "Lorsqu'un Etat estime (qu'un) . . . intérêt d'ordre juridique est pour lui en cause", for on that basis, it suffices that the State considers its legal interest to be "en cause" in the case, that is capable of being affected by its outcome, or in short, regards its interests as being at risk.

Naturally, and in spite of the oblique and indirect character of the language used in Article 62 – in both the English and the French texts – it may be argued that a prima facie existence of a legal interest liable to be affected by the Court's decision must be a condition of the grant of the right to intervene. But, if this is the correct conclusion, it immediately leads to, and entails, another conclusion, equally correct and equally important : namely that no other condition than the existence of a legal interest of this kind can be regarded as being imposed by Article 62, in the sense of constituting a *sine qua non* of the grant of permission to intervene. For in these circumstances how could it be legitimate, or even possible, to postulate or read into the Article conditions – other than the contemplated legal interest – not alluded to in the Article at all ? In our submission, – and I am going to state this quite starkly – nothing can be regarded as being properly a condition of the grant of permission to intervene that does not either figure expressly as such in Article 62 or arises as a necessary inference from it ; and no such requirement is derivable from Article 62 other than the existence of a legal interest liable to be affected by the Court's decision in the case. This of course has a direct bearing on the interpretation to be placed on subparagraph *(c)* of paragraph 2 of Article 81 of the Rules of Court, with which my colleague Mr. Bathurst will be especially dealing. But before I come to that, I must complete what I have to say on what, in Malta's submission, is the correct view that ought to be taken as to the intention and significance of Article 62 of the Statute.

I have already had occasion to draw attention to the noticeably open and unrestricted character of this provision, its lack of any limitation as to either the category of State qualified to intervene, or the class of case in which intervention may be sought, or as to the reason for it, other than the existence

of a specific kind of legal interest. I will now venture to point to a further respect in which this Article is an open one, namely inasmuch as it contains no condition or requirement calling for the existence of any particular relationship, jurisdictional or otherwise, between the State applying to intervene and the States already parties to the case. No requirement coming under that head figures in Article 62. Indeed it is clear that the original philosophy of intervention in the days of the former Permanent Court was quite a broad one, and there is material in the records to support this view, as my colleagues will show. It seems that intervention was contemplated as possible even on the basis of only a general international law interest in the case. In other international jurisdictions it occurs quite frequently. Any predisposition against intervention would therefore be misplaced.

We therefore submit that the intention of Article 62 is to provide a facility, analogous to that existing under most systems of private law, and necessary for the good administration of justice, whereby, subject to the duty of the Court to ascertain that the proper conditions exist, States can intervene in any type of case before the Court, for the protection of a legal interest that might be affected by the Court's decision. This is a valuable and necessary facility in any system of law, of which States should not be deprived by the play of technicalities ; and as we shall show later, there is much in the original drafting history of Article 62 to support the view that the intention was to provide a generally available remedy, and that any serious restrictions on it would have been felt as unacceptable. Even the specific, although as we have seen oblique reference to the existence of a legal interest seems to have been due in part to the desire to make it quite clear that the possibility of intervention on *political* as opposed to legal grounds, should be excluded.

It is in the light of these considerations that the effect of any provision of the Court's Rules that has reference to Article 62 of the Statute, and in particular, in the present context, Article 81 of those Rules, falls to be interpreted.

To begin with then, I want to submit a few observations as to the general relationship between the Court's rule-making function and the provisions of the Statute. No doubt it is an inherent power of any court — implicit in the fact that it *is* a court — that it can make the rules requisite to enable it to operate as a court, but necessarily such a power cannot be an unlimited one. It cannot extend beyond the purpose for which it exists. To take an obvious example, it could not validly be employed to enable a tribunal to confer upon itself a jurisdiction exceeding in scope that provided for by its basic constitution.

In the case of the International Court, however, recourse to inherent powers is neither necessary nor appropriate; since its rule-making power is both conferred, and also defined, by Article 30 of the Court's constitution itself — that is to say by the Statute — and must accordingly be exercised within the limits of that definition. The relevant paragraph of Article 30 of the Statute reads as follows : "The Court shall frame rules for carrying out its functions. In particular, it shall lay down rules of procedure." From this language, two broad conclusions can be drawn, first that the principal object of the rule-making power is to frame rules of procedure, which in practice would mean rules for the conduct of proceedings of one kind and another before the Court, rules such as figure in Parts III and IV of the Court's actual Rules ; and secondly, to make rules not immediately concerned with the actual process of litigation or of advisory cases, but relating for instance to the composition and internal functioning of the Court and its Registry as a judicial entity, such as appear in Parts I and II of the present Rules. No doubt in all this the boundaries will be a little blurred, a certain amount of elasticity will be in order

and, in general, what in a different context has come to be known as a reasonable margin of appreciation concerning what the Court legitimately can or cannot do by means of its rule-making power, must be allowed for.

What is in any event quite certain is that however much give and take may, within limits, be permissible, what never could be permissible, and the Court never would sanction or I am sure even contemplate, would be the exercise of a rule-making power in a manner inconsistent with or in contravention of a provision of the Statute, or for the purpose of introducing into such a provision, whether directly or by way of interpretation, a condition or requirement of substance not contained as clearly implied by it. There must therefore always be an absolute presumption, that is a presumption of law, that the Court did not and does not, intend this. Rules may legitimately be made for the purpose of giving effect to the substantive provision of the Statute, but not for that of altering, adding to, or qualifying the substance of those provisions. In this context, few things are more striking than the fact that President Loder in the administrative deliberations of the Court in 1922, on this very question of intervention, refused even to put to the vote a proposal made by one of his colleagues, and based his refusal on the consideration that the effect of the proposal would be "to limit the right of intervention (as prescribed by Article 62) *to such States as had accepted compulsory jurisdiction*"; and he went on to say that this "would be contrary to the Statute" (*1922, P.C.I.J., Series D, No. 2*, p. 96).

Equally, the fact that paragraph 2 of Article 62 vests in the Court the power to decide upon a request for permission to intervene, does not in any way mean, as our opponents in these present proceedings seem to think, that the Court is thereby entitled to create its own conditions for granting or refusing. It must, in granting or refusing, act within the substantive limits of paragraph 1 of Article 62 which, as I have said, contemplates as the only requirement, and that in a very indirect fashion, the existence of a legal interest. In the *Wimbledon* case (*1923, P.C.I.J., Series A, No. 1*, p. 12) the Permanent Court was very definite on this question and said that intervention was:

> "based on an interest of a legal nature advanced by the intervening party, and the Court should only admit such intervention if, in its opinion, the existence of this interest is sufficiently demonstrated".

The Court did not suggest that anything else than the existence of a legal interest needed to be demonstrated.

I now pass to Rule 81 itself. In the light of the considerations I have ventured to place before the Court, how is this Rule, or rather the particular part of it that may be especially relevant to the present connection, to be interpreted? The details of this will be developed by my colleagues, and I shall only offer a few remarks of principle that follow logically from what I have already said. Admittedly the Rule as such, and indeed as a whole, is not new. But in its present form it was only introduced as recently as some three years ago, and paragraph 2 of it, which is the only one I shall deal with, calls for certain comments.

Previous successive revisions of the Rules, including that of 10 May 1972, had left this paragraph virtually unchanged in substance from how it stood in the days of the Permanent Court. Under that régime the three standard requirements which the request for permission to intervene had to set out, were: a specification or description of the case, a statement of the law and fact justifying intervention in it, and a list of the relevant documents supporting the application, and these had to be attached. The present version of paragraph 2

of Rule 81, as issued on 14 April 1978, retains the last of these requirements concerning supporting documents, but, for the first two, substitutes two others, perhaps, though I am not sure, intended to have the same practical effect but differently worded, and then adds a third requirement. Instead of calling for a description of the case and a statement of law and fact justifying intervention, the paragraph now requires *(a)* a statement of the legal interest involved, and *(b)* a statement of the "precise object of the intervention".

In substance there is nothing new in the requirement that the nature of the legal interest involved should be stated by the Applicant, since this merely reflects Article 62 of the Statute, and resulted equally from the previous requirement of a statement of law and fact justifying the intervention. In the present case, the nature of Malta's legal interest, involving law of the sea and continental shelf questions, will be developed by Mr. Lauterpacht; and his statement will I believe demonstrate that this interest, liable to be affected by the Court's decision in the *Libya/Tunisia* case, is both clear and evident, and fully adequate to support Malta's application for permission to intervene in that case.

The second requirement of the present paragraph 2 of Rule 81, namely a statement of the precise object of the intervention, can perhaps also be regarded as implied in the former notion of a statement of law and fact justifying the intervention. But, and here is the difference, unlike the legal interest question, there is nothing at all in Article 62 of the Statute about the object of the intervention, or at least nothing about any object separate from and independent of the legal interest involved; and nothing requiring that the intervention should be motivated by any particular object other than the implication that it will be for the protection of the legal interest liable to be affected. Understood in that sense, and within those limits, I have already indicated in a general way what the object of our intervention is, and further aspects of it will be developed by my colleagues. If, however, the notion of the object of the intervention, as expressed in subparagraph *(b)* of paragraph 2 of Article 81, is to be interpreted in the present connection as relating to an object beyond, and unconnected with, Malta's legal interest, then it can be stated at once that Malta has no such object. But it would also have to be noted that such an interpretation would involve viewing Malta's application for permission to intervene in the light of a new requirement not apparently to be found in Article 62 of the Statute.

This aspect of the matter, of something in the Article not derivable from a corresponding provision of the Statute, will be more conveniently considered in connection with the next, and quite new, requirement of paragraph 2 of Article 81, namely that embodied in subparagraph *(c)* to which I now come.

This requirement is to the effect that the State applying to intervene must set out in its Application "any basis of jurisdiction which is claimed to exist between that State and the parties to the case", that is to say the case in which intervention is being sought. In paragraph 25 of our Application we have done this, but this does not in any way imply, as our opponents here have sought to contend, that Malta admits the necessity for a basis of jurisdiction. Malta does not admit that; for we have also pointed out, paragraph 24 of our Application, that since, as I have already mentioned, Malta is not seeking any substantive or operative decision against either Libya or Tunisia, is not making any claim or calling for any remedy, as the object for intervention, the question of a basis of jurisdiction as between herself and either of those two States is irrelevant; it cannot and does not arise. But our contention is even more fundamental than what would be involved by any matter of simple irrele-

vance. It involves the whole issue which is most clearly and strikingly raised by subparagraph *(c)* of paragraph 2 of Article 81.

The requirement embodied in this subparagraph *(c)*, which is entirely new, reflects nothing that is contained in Article 62 of the Statute, or even remotely to be derived from its language. If the existence of a basis of jurisdiction as between the State seeking to intervene and the parties to the case, had to be considered as a condition of the grant of permission to intervene, it would rank as a condition of substance, not merely of procedure, a condition not imposed by the Statute. However, for the reasons which I have already submitted to the Court, it cannot be so considered, for in that event it would "be contrary to the Statute" as President Loder said, speaking on this very question of a basis of compulsory jurisdiction.

Hence this new subparagraph *(c)* cannot be regarded or interpreted as being intended to create a new condition of substance governing the grant of permission to intervene, in the sense that if no basis of jurisdiction were found to exist between the Applicant and the Parties to the case, the Application would have to be refused, or the Court would be justified in rejecting it on that ground alone. On the contrary – in order to give effect to the presumption to which I have referred, namely that no inconsistency between Article and Statute can be intended, and in order to reconcile this subparagraph *(c)* with Article 62 of the Statute, which must prevail, and which neither contains nor implies any such restrictive requirement as subparagraph *(c)* mentions, but rather by its generality, tends to exclude it – it must follow that the requirement of subparagraph *(c)* must be viewed as a purely presentational one, attaching to the making of the request, but not the grant or the refusal of it.

This would be a perfectly adequate and understandable role for this subparagraph to play, for it can easily be recognized that the Court may have an interest in knowing whether there does, or does not, in fact exist a basis of jurisdiction between the applicant State and the Parties involved, and in the affirmative what that basis is. To view it as implying more, as being capable of having a substantive and decisive bearing on the actual grant or refusal of intervention would, in our submission, be to set up a conflict between Statute and Rule, which must not exist, and in no way needs to, on a correct interpretation of this part of Article 81.

It is not only that Article 62 contains nothing to suggest any necessity for the existence of a basis of jurisdiction between the States concerned ; it is not only that, as Mr. Bathurst will show later, such a condition would give rise to serious difficulties of application, especially in a case like the present one ; it is also that such a condition, regarded as a condition *sine qua non* of the grant of permission to intervene, would be wholly inconsistent with the spirit and intention of Article 62. It would at once narrow down the possibility of intervention to the comparatively small number of instances in which a jurisdictional link does exist between the States concerned. But these are precisely the cases in which the need for intervention is least likely to be felt, while on the other hand it is precisely where no such basis of jurisdiction between the States concerned exists, that the need and the justification for intervention will be felt more strongly. At one stroke most of the value of Article 62 would be destroyed, or else its scope would be confined within such narrow limits as to be of little practical worth. Furthermore, given the sort of jurisdictional basis postulated by our opponents in these intervention proceedings, the real effect would be to make the possibility of intervention depend in practice on the consent of the Parties to the case, instead of that of the Court as Article 62 of the Statute clearly contemplates.

In conclusion, therefore, although Malta contends that in fact a basis of jurisdiction does exist between herself and Libya and Tunisia, she also contends – first, that there is nothing in the Statute to require the existence of any basis of jurisdiction as a condition of the grant of permission to intervene; and secondly, that whatever its precise object and effect, subparagraph *(c)* of paragraph 2 of Rule 81 cannot be interpreted or applied as a requirement of substance creative of such a condition.

These conclusions apply equally, *mutatis mutandis*, to the requirement of subparagraph *(b)* of paragraph 2 of Rule 81, if that requirement should be held to relate to and call for an object of intervention not resulting from Article 62 of the Statute – that is to say, in practice, an object not connected with, or which goes beyond, the legal interest intended to be protected by the intervention.

There is one further observation which I should perhaps make as a sort of appendix to the rest of my remarks, which I am about to conclude. We have not failed to note that our opponents in these intervention proceedings seek to place us on the horns of a dilemma. If we contend – as we do – that the object of our intervention is not to make a claim or seek an operative decision or remedy against Libya or Tunisia then, so they say, we have no greater legal interest in the matter than any other State might have. If on the other hand we do have a greater interest than that, a specific interest in the result of the *Libya/Tunisia* case or of the grounds for it, then a basis of compulsory jurisdiction between Malta, Libya and Tunisia is called for. Our answer to the second of these propositions is that such a basis of jurisdiction is not called for by the Statute and cannot be created by the Rules. As to the first proposition, I believe I have already dealt with it, but when the Court has heard Mr. Lauterpacht I hope it will be convinced that Malta's geographical situation and the relationship of her continental shelf areas to those of Libya and Tunisia, do give her a very real and very specific interest, liable to be affected, "which may be affected", by the Court's decision in the *Libya/Tunisia* case – and this is all that Article 62 of the Statute requires.

ARGUMENT OF MR. LAUTERPACHT

COUNSEL FOR THE GOVERNMENT OF MALTA

The PRESIDENT : Mr. Lauterpacht, before you begin : I think that your (95) map is meant for purposes of illustration and not as a further document.

Mr. LAUTERPACHT : Mr. President, that is correct.

The PRESIDENT : You have made available copies to the other Parties to the case so that they can follow your argument.

Mr. LAUTERPACHT : Copies have been given to both the Libyan and the (95) Tunisian delegations. The purpose of this map which I have next to me is only to enable me to identify for the Court points which the Court will find on the smaller versions of the same map which have been distributed to the Court.

May it please the Court, Mr. President and Members of the Court. As on the previous occasions on which I have appeared before this high tribunal, I am deeply conscious of the privilege of participating in the proceedings of this Court and honoured to be involved in the fundamental mission which it performs. I am equally conscious of the obligations of such participation – obligations to the Court to assist it as an advocate in such humble way as I may to see that justice is done : obligations to the Government I have the honour to represent to endeavour to ensure that the novelty of the present form of proceedings does not obscure the importance of recognizing and giving effect to the serious, significant and extended legal interest which Malta has in the case between Libya and Tunisia.

It is my task to present to the Court the considerations on the basis of which the Court will be able to identify – and here I use the words of Article 62, paragraph 1, of the Statute – "an interest of a legal nature which may be affected by the decision" in the *Libya/Tunisia* case. My concern will be, therefore, first to point to the substantive connection between the issues in the *Libya/Tunisia* case and the legal interest of Malta ; secondly, I shall seek to show how that legal interest may be affected by the decision in the *Libya/Tunisia* case. In other words, Mr. President, my subject will be the delimitation of the continental shelf of Malta and its relationship to the delimitation of the continental shelves of Libya and Tunisia.

But, and I must stress this, I shall not be attempting to argue the merits of the respective claims of Libya, Malta and Tunisia. Malta is not seeking to take sides in the *Libya/Tunisia* case. Knowing nothing about the issues in that case Malta could not know which side, if either, to support, and indeed the possibility exists that were it to know the issues it might wish to adopt some of the views of one side and some of the views of the other side, so there could be no clear-cut identification between Malta and either Party.

Nor is Malta seeking to obtain from the Court a decision on the continental shelf boundary between itself and Libya and Tunisia. The Government of Malta is fully aware that such a determination at this stage would not be the proper object either of the present application or of the intervention if it were allowed.

What Malta is concerned about is simply this : here is a case involving the delimitation of a particular continental shelf. Not any continental shelf anywhere, but one particular continental shelf which is shared not by Libya and

Tunisia alone, but by Malta also, and for most of the relevant area is not shared by any other State.

Now continental shelf cases are peculiar, as I need hardly suggest to the Court. To some extent they turn upon general propositions of law applicable to all States with continental shelves. But to a greater extent, indeed the greatest extent, they turn upon their particular facts – for example, the geographical configuration of the coast, the geographical relation of the coasts of each of the contending States, the identification of the material coastline, the assessment of the role of islands, the geology and geomorphology of the sea-bed. These are just a few of the principal and special factors that must affect the determination of the continental shelf boundary in any particular case.

So the determination of the boundary must involve at least three stages : first, there is the stage of laying down the applicable general principles and the rules of international law ; second, there is the identification and assessment of local or regional factors such as the ones I have just listed ; and third, there is the stage of putting the factors together in such a way that they lead rationally to the choice of a particular line.

In the present situation Malta is not concerned about the first and the third of these stages. It is not concerned with the laying down of general principles as between Libya and Tunisia. Nor is it concerned with the choice of the particular line between Libya and Tunisia. To the extent that the Court lays down general concepts these are generally applicable to all States and must be accepted as such, and as to the particular boundary that is a matter for the two States to determine in the light of the indications which the Court gives to them, and that is a matter for those two States, provided, of course, that the areas which they claim on the basis of that line do not trespass upon Malta's proper area of continental shelf.

What worries Malta is the second of the stages – the stage in which the Court looks at the local or regional factors. It seems pretty evident that the importance of a regional or local factor may not be exhausted simply because it has been identified and applied as between two States. The possibility clearly remains that the view which the Court may take of particular features of, say, the Tunisian or Libyan coast, or the effect which the Court may accord to the grant of concessions, could directly affect the role which these same features may play in a subsequent delimitation as between Malta and Libya or Malta and Tunisia respectively. In other words, Mr. President, to say that the situation which exists between Libya and Tunisia is not the same as that between Malta and Libya and Malta and Tunisia, which is what the Libyan observation suggests, is not the equivalent of saying that they are different in every respect, which is what must be shown if the Maltese application is to fail.

In such circumstances, it would not be prudent for Malta simply to sit by while matters are litigated which could so closely affect its vital interests. It is of course conceivable that the Court might, without the intervention of Malta, give a decision which is in no way prejudicial to Malta's interests. It is conceivable that elements in the decision could even work in favour of Malta. But there is no way in which Malta can know that now : no way in which Malta can even attempt an informed assessment of the prospects – because she is not entitled to see and has not seen the pleadings in the case. Under these conditions, what is a responsible government to do ? The only course open to it is to seek to intervene in the proceedings so that the Court may, first, be made aware of the elements in the situation which could adversely affect Malta and, second, so as to inform the Court of the position of Malta on those elements with a view to ensuring that the interests of Malta are protected to the

extent that awareness and understanding of them can lead to their protection.

Enough has, I hope, now been said – albeit in summary terms, – in reply to the observations of Tunisia and Libya, for the purpose of showing the following points :

First, why it is that Malta has an interest which is distinct from, and more specific than, the interests of other States ;

Secondly, why it is meaningless for Libya and Tunisia to suggest that Malta's interests are safeguarded by the limitation which Libya and Tunisia have placed upon the scope of the Court's decision. This is a limitation which those two States say will restrict the operation of the Court's decision to those areas which appertain to Libya and Tunisia and will not allow the judgment of the Court to extend to an area appertaining to a third State ; and

Thirdly, I hope I have said enough to show why there is no merit in the proposition that Article 59 of the Statute of the Court sufficiently safeguards Malta's position. Because in this application Malta is not concerned with the formal operative part of the decision of the Court which is the matter to which Article 59 relates. Malta is concerned with the substantive content of the decision, the elements which lead up to the formal operative part ; elements which though perhaps not in form must in content inevitably have an impact upon subsequent relations between Malta and Libya and Tunisia.

I now turn to the substance of what I have to say, leaving to my learned friend, Professor Lalive, the question of what is meant by the words "an interest of a legal nature". That legal question will be dealt with by him. My concern is to identify the character of Malta's interest and the manner in which a prospective decision may affect that interest.

The Court will, I am sure, forgive me if in the course of my argument I state a number of facts and develop some legal propositions with which the Court may already be familiar by virtue of their appearance in the pleadings in the *Libya/Tunisia* case.

There are, however, two comments which I must make on this prospect of overlap between my argument and those of Libya and Tunisia in the principal case.

The first comment is that even if Malta were fully acquainted with all the details of the Libyan and Tunisian pleadings in the main case, it would still be neccessary for Malta to refer to many of the facts because they are themselves directly relevant to the problem of delimiting Malta's own continental shelf. Indeed, as the Court will see, perhaps the most important element in Malta's contention that it should be allowed to intervene is that the Court's determination of certain facts and elements for the purposes of the *Libya/Tunisia* case will inevitably have a direct bearing on Malta's boundary negotiations with Tunisia and Libya respectively. In other words, *the very fact* that the statement of elements material to the Libyan/Tunisian situation has to be repeated in the context of the Maltese application – that very fact itself provides cogent support for the existences of Malta's legal interest in the main action.

The second comment, on the possible repetition of statements of fact and of legal considerations which may appear in the Libyan and Tunisian pleadings is that Malta has no choice in the matter. It cannot by reference incorporate into its statement of its own position comparable statements which may have been made by Libya and Tunisia. For reasons which have already been stated by the learned Attorney-General of Malta the content of the Libyan and Tunisian pleadings remains for Malta entirely a matter of speculation. It is true that a person who has given the matter some thought may believe that he can

identify what are likely to be the main points in the Libyan and Tunisian cases. But this can never be more than enlightened guesswork. In the nature of things the Government of Malta cannot know all the particular facts upon which Libya and Tunisia have lavished many months of thought and careful research. Nor can the Government of Malta know what use Libya and Tunisia have made of the facts. The Government of Malta cannot know what line the legal argument of these two parties has taken.

I must, therefore, ask the Court's indulgence in respect of unavoidable repetition of facts and legal considerations. The Court will, I am sure, understand that the Government of Malta has no choice but to support its application in this way.

Mr. President and Members of the Court, it is convenient to begin by (95) examining the map and to note certain fairly obvious but nonetheless essential geographical facts, and I respectfully invite the Court to look at the map with me. This map is a reduction of a British Admiralty Chart. The details relating to boundaries and concessions have been added in the Hydrographic Office of the Government of Malta.

The Court adjourned from 11.24 a.m. to 11.40 a.m.

Before the break, I was just bringing the Court to the map with a view to demonstrating certain essential geographical facts. I said that the map is a reduction of a British Admiralty chart but that the details on it have been added by the Government of Malta Hydrographic Office, that is to say the details relating to concession areas, boundaries and so on. The full-size map is on the easel beside me and I shall use it only for the purpose of assisting the Court to find its way on the Court's own copies of the map to the various places which I identify.

(95) This map shows the sector of the Mediterranean Sea stretching from Cape Bon in Tunisia, in the north-west corner of the map, to Greece and Crete in the north-east corner. Malta, Gozo and the small island of Filfla which constitute the archipelago of Malta are to be found just to the east of the intersection of the lines of 36° N latitude and 14° E longitude, where my finger points. Opposite Malta, to the west and the south-west on the mainland of North Africa is the coast of Tunisia. This stretches from Cape Bon in the north to Ras Ajdir, where the land boundary with Libya meets the coast. My finger is there now. From Ras Ajdir eastwards the coast is that of Libya and runs eastward round the Gulf of Sirte to the point at which the land boundary between Libya and Egypt reaches the coast, somewhere off the map on the eastern side.

The length of the Tunisian coastline from Cape Bon to Ras Ajdir is approximately 405 miles. The length of the Libyan coastline from Ras Ajdir to Egypt is about 970 miles.

The nearest point to Malta on the Tunisian coast is Ras Kaboudia, just here, the cape approximately halfway down the east-facing Tunisian coast. The distance from there to Malta is 155 nautical miles.

The distance from Malta, taking the Filfla Island as the base point, to Ras Ajdir, the coastal terminus of the Libyan/Tunisian land boundary, is 211 nautical miles.

The nearest point to Malta on the Libyan coast is near Tripoli, where the distance from Malta is 184 nautical miles. The distance from Malta to Benghazi, on the eastern side of the Gulf of Sirte, is 352 nautical miles.

To the north of Malta, my finger is on Malta, to the north of Malta lies the

Italian island of Sicily and the minimum distance between the Maltese island of Gozo and the southern shore of Sicily is 44 nautical miles.

Now a word about the other islands in the area.

First, the Italian islands other than Sicily.

To the west-northwest of Malta on the direct line between Malta and Cape Bon lies Pantelleria. This is 111 nautical miles from Gozo. As will be seen, this island has almost no effect on the delimitation with which the Court is concerned.

Almost due west of Malta lies Linosa, at a distance of 64 nautical miles. Twenty-three miles south-west of Linosa lies Lampedusa and 10 nautical miles west of Lampedusa lies Lampione. Again Lampione will be seen to have little relevance to the present problem.

Now I turn from the Italian islands to the Tunisian islands. These are all relatively close to the Tunisian coast. If we start from Cape Bon at the northern end of the peninsula and move southwards along the east coast we come first to two small islands, Juzur and Kuriate. They also are of no present relevance.

Further south we come to the larger cluster of islands collectively called the Kerkennah Islands. Due south of the Kerkennah Islands, just beyond the bend which is called the Gulf of Gabes is the island of Djerba, very close to the shore, indeed I believe even connected to it by a causeway.

While referring to the Kerkennah Islands I should add that Tunisia claims to draw a series of straight base lines round them. These lines start just to the south-east of Ras Kaboudia, which is the point on the Tunisian shore closest to Malta, and run in a south-easterly direction to a point about 23 nautical miles east of the most eastern point of the Kerkennah Islands, approximately here where my finger points, and then the lines turn to run very roughly in a south-westerly direction back towards the Gulf of Gabes.

Then those straight base lines at their south-western terminus join a straight line running almost due south for a distance of about 45-nautical-miles to Ras Taguerness on the north-eastern corner of the island of Djerba. This 45-nautical-mile straight line is a closing line for the Gulf of Gabes, landward of which all the waters are claimed by Tunisia as internal waters. There are no Libyan islands.

The only other geographical features that require mention are the two Gulfs. One is Tunisian, the Gulf of Gabes which I have just mentioned, the other is Libyan. About 120 miles to the east of Tripoli, this is Tripoli here, 120 miles to the east of it is the Gulf of Sirte stretching as far eastwards as approximately Benghazi. As regards this gulf, Libya claims that south of a line drawn along latitude 32°30′ N, which is this black line across here, south of that line the gulf is a part of Libyan territory and falls under Libyan sovereignty. Malta has, since 1974, refused to recognize this claim and maintains that the base lines for the delimitation of Libyan territorial waters and continental shelf are those recognized as applicable prior to October 1973.

Finally, as regards the geography of the area we may observe that although the coasts of Libya and Tunisia in the immediate proximity of Ras Ajdir, this point where the land boundary meets the coast, although at that point, or in that area, the coasts are marked by a quality of adjacency, they begin to lose this quality as one moves westward following the coast of the Gulf of Gabes as it turns to the north and north-east and then extends northwards up to the Tunisian peninsula. And the same is true, though at a greater distance, as one moves eastward along the Libyan coast following the shore of the Gulf of Sirte as far as Benghazi. The result is that at the two extremes of Cape Bon in the north-west and Benghazi in the south-east the coasts of Tunisia and Libya

respectively are opposite to each other rather than adjacent, that is to say they are separated from each other by an area of water in which the respective coasts are facing each other. In this respect, in this quality of being opposite each other, the relationship of Tunisia and Libya cannot easily be distinguished from that between Malta and any part of Tunisia and Libya respectively.

I emphasize this because in the Tunisian observations reference is made to the difference in geographical relationships between on the one hand Libya and Tunisia and on the other hand Malta and Tunisia and Malta and Libya. The way in which the Tunisian observations on this point refer to the decision of this Court in the *North Sea Continental Shelf* cases may suggest a rather clearer and firmer distinction between adjacent and opposite States than the Court actually drew. And the absence of rigid distinction between the two situations has been clarified by the words of the Arbitral Tribunal in the *United Kingdom-French Continental Shelf* case. The tribunal in that case said, referring expressly to the relevant passage in the Judgment of this Court in the *North Sea* case, the Arbitral Tribunal said :

> "It is also clear that the distinction drawn by the Court between the two geographical situations is one derived not from any legal theory but from the very substance of the difference between the two situations." (54 *International Law Reports*, p. 66.)

"From the very substance of the difference between the two situations"; and my point is that the substance of the relationship between Libya and Tunisia, at any rate in that dimension, is as much an opposite State situation as is the relationship between Malta and Tunisia in this direction and Malta and Libya in that or that direction.

So much for the relevant land areas and their principal coastal and associated features. We must now turn to the impact of the land areas upon the contiguous and adjacent marine areas.

It is of course unnecessary for me to mention to the Court the elementary rules which attribute adjacent sea areas to coastal States. The territories of Libya, Malta and Tunisia, as well as the Italian islands, each generate a territorial sea, a continental shelf and an exclusive economic zone. Of the territorial sea I need say no more as I have already referred to the straight base line claims of both Libya and Tunisia. Nor need anything more be said about the economic zones since at this stage of the proceedings they appear to have no relevance.

As regards the continental shelf, each of the four States claims one. The Court is fully aware of the nature of Libya's and Tunisia's claims, at any rate in relation to each other. As to their claims vis-à-vis Malta, I shall come to that later. Italy's claims to a continental shelf go back to 1965. Malta's claim to a continental shelf goes back to its continental shelf legislation of 1966 and has been maintained in diplomatic negotiations and by the grant of concessions and I shall be referring to those in more detail presently.

There clearly exists a basis in law for dividing the sea-bed between Italy, Libya, Malta and Tunisia in the area of the Mediterranean Sea which lies roughly between 10° E longitude and 19° E longitude and 30° N latitude and 37° N latitude. It is true that as continental shelf the area may not satisfy that part of the definition in the 1958 Geneva Convention which refers to a depth of not more than 200 metres since there are parts of the area which are over 3,000 metres deep. However, there are large parts of the area which satisfy the other criteria for the definition of continental shelf, namely that of exploitability. In any event, the whole of the area falls within the definition of the

continental shelf which now appears in Article 76 of the draft convention on the Law of the Sea (Informal Text) which was produced on 22 September 1980. This text may be taken as the latest reflection of "recent trends admitted at the Third Conference on the Law of the Sea", this quotation being from the words of the *compromis* in the principal action between Libya and Tunisia. Article 76 of the 1980 Law of the Sea draft provides as follows :

> "The continental shelf of a coastal State comprises the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance."

In other words there is a 200-nautical-mile minimum continental shelf deemed to adhere to every coastal State. And there is no evidence that any of the four States denies to any part of the area the quality of continental shelf.

Although the area which I have mentioned falls to be divided between the four States, Italy, Libya, Malta and Tunisia, division has so far proceeded only slowly. There has been only one agreement, the one made between Italy and Tunisia on 20 August 1971 which entered into force on 6 December 1978. (The text and an illustrative map are printed in US Department of State, *Limits in the Seas*, No. 89, Continental Shelf Boundary : Italy-Tunisia (January 1980).)

The principal provision of this Agreement is as follows :

> "Article 1. The boundary of the continental shelf between the two countries shall be the median line, every point of which is equidistant from the nearest points of the baselines from which the breadths of the Italian and Tunisian territorial seas are measured, taking into account islands, islets and low-tide elevations with the exception of Lampione, Lampedusa, Linosa and Pantelleria."

The special provisions regarding Lampione, Lampedusa, Linosa and Pantelleria are illustrated by the line on the map. These lines were constructed by a Tunisian-Italian Technical Commission established pursuant to Article III of the Agreement. As can be seen, these lines reflect the attribution to the islands of a continental shelf limited to a belt of territorial sea 12 miles in width, round each island, plus, with the exception of Lampione, 1-mile width of continental shelf beyond the territorial sea. So the line, according to the Italian-Tunisian Agreement begins at point 25 in the north-western part of the upper circle and then moves anti-clockwise following the circle round Linosa first, then round Lampione, continuing round Lampedusa and then starting again and going round Linosa as far as point 30 on the map. That is the agreed Italian-Tunisian boundary line. I shall return in due course to the significance of this Agreement between Italy and Tunisia. For the moment I refer to it as being the only agreement delimiting any continental shelf boundary between any of the four States in the area.

The claims of the four States and their relationship to one another in respect of the area can best be described in two parts. First, by reference to the concessions that the States have awarded ; second, by reference to the diplomatic exchanges between them. With your leave, Mr. President, I start with the concession position and here again I must invite the Court to look at the map.

The concessions have not been marked in detail on the map. What has been marked have been the limits, the outer limits, of some of them in so far as those

limits are relevant to the points which I am seeking to make. For example, the concessions awarded by Italy between Sicily and Malta have not been marked in, nor have the concessions which were awarded by Italy round the various Italian islands but within the limits prescribed by the Italian-Tunisian Agreement been marked in. But as the Court will see when we come to look at the diplomatic negotiations, Italy has awarded concessions up to 500 metres north of the equidistance line between Sicily and Malta, while Malta has done the same on its side of the equidistance line falling short by 500 metres of the equidistance line. Thus in that area Italy and Malta have, by a policy of mutual restraint, established a kind of *de facto* continental shelf boundary. The position as regards relations between Malta and Tunisia, and Malta and Libya, is different.

May I ask the Court first to examine the position of Malta. It is convenient to begin by looking at the line with which Malta has depicted her continental shelf boundary. This falls into two parts.

First, there is the equidistance line constructed between Malta and Italy in the north, Libya in the south-east and south, and Tunisia in the west and south-west.

Second, there is the area which is affected by the presence of the Italian islands of Linosa and Lampedusa. As the Court will already have seen, in the Italian-Tunisian continental shelf agreement of 1971 these islands were accorded a continental shelf 1 mile wider than the 12-mile belt of territorial waters surrounding them. As small and detached dependencies of Italy this solution to the question of the width of continental shelf to be attributed to these islands seems to Malta to be entirely equitable. Accordingly, Malta has adopted the same approach in determining the boundary between herself and the islands, and that is why one sees this curved line drawn round Linosa to its north and north-east and continuing on down to point 3 on Malta's equidistance boundary.

So, if the Court will start at the extreme western point of the Maltese area as depicted on the map, a point identified as point 5, and will follow the straight line due south to point 4, just a short segment, it will find that the solid straight line intersects the circular line around Linosa, the pecked line round Linosa.

The Court may disregard for present purposes the southern and southwestern parts of that pecked line. They represent again the agreed Italian-Tunisian boundary. But if the Court will follow that pecked line clockwise from point 4 it will first of all see a small section between point 4 and point 25. This is regarded by Malta as part of the boundary between the Maltese continental shelf and the Italian continental shelf round Linosa. It is also regarded by Tunisia and Italy as part of the agreed boundary of the continental shelf between Italy and Tunisia around Linosa.

The clockwise continuation of the pecked line from point 25 to point 30 represents Malta's view of the boundary between the continental shelf of Linosa and the continental shelf of Malta. From point 30 the continuation of the pecked line to point 3 once again serves the double function of representing the boundary of the Linosa and Lampedusa continental shelf in terms both of the agreed Italian-Tunisian line and of the line claimed by Malta. Then, at point 3 the circular line reaches the Maltese equidistance line and runs south-east from point 3 to point 2 to point 1 and straight on to point 6.

The Court will note that there lies to the north-east of that straight line point 3-2-1-6, which is Malta's construction of the Maltese-Tunisian equidistance line, another straight line, very roughly parallel to it, which starts at point 30 on the circular line round Linosa and passes through points 31 and 32. This is part of the

agreed Italian-Tunisian line. Another part of that same line projects to the north-west of the circular boundary around Linosa from point 25 to point 24 and then intersects the Maltese straight equidistance line at point 5. This is a small sector, 25-24-5 which lies to the north-west of the line around Linosa.

The Court will observe that there is an overlap between the areas claimed by Tunisia under the Italian-Tunisian Agreement and the areas claimed by Malta under the combination of equidistance and the acceptance of the equitable restriction of the continental shelf appertaining to Linosa and Lampedusa. In the north-west corner there is a small triangle of overlap between point 5 on the Maltese equidistance line, point 5, point 4 and then point 25 on the circular line around Linosa. To the south-east of Linosa and east of Lampedusa there is a substantial area of overlap lying between these two straight lines : the Italian-Tunisian line between the points 30 and 32 and the Maltese equidistance line between points 3 and 6.

In each of these areas of overlap Tunisia has granted concessions. The outer lines of these concessions are marked by yellow lines in the area, identified by the words in the box "outermost limits of concessions granted by Tunisia". There is an arrow connecting the box to the yellow line which marks the outer limits of concessions which at one time or another have been granted by Tunisia. Some of these concession areas have already been surrendered by the concessionaires back to Tunisia. But this does not affect the fact that at one time or another Tunisia has granted concessions up to the yellow line.

It is necessary next to concentrate more closely on this southern section of the Maltese area. From point 32, the southern terminus of the agreed Italian-Tunisian boundary, the yellow line of the outer limits of the Tunisian concessions continues south-eastwards and reaches the Maltese equidistance line between points 1 and 6. The continuation southwards of the Tunisian concession limits into the area, presumably in dispute between Libya and Tunisia in the main proceedings, have not been marked on the map. But enough is shown on the map to demonstrate clearly the way in which Tunisia's claims extend even beyond the agreed Tunisian-Italian boundary south-eastwards into Malta's equidistance area.

At this point we are naturally brought to a consideration of the position as between Malta and Libya. As the Court will see, Malta's equidistance line continues from point 6 at the south-west corner of the area, south-east and east through points 1, 2, 3, 4 and so on as far as point 12 in the extreme east, before turning north-west towards point 9, 8 and so on on the leg of the line that moves back towards Italy.

Malta opened part of this area for exploration in 1973. The part so opened consists of 16 blocks indicated by thin black lines. Eight of these blocks are also marked by diagonal hatching. Within this group of blocks 2, 3, 4, 9, 10, 11, 14 and 16, the ones marked by the hatching, have been granted as concession areas in 1974. This group of blocks in the southern part of the Maltese area should not be confused with the group of blocks immediately around the islands of Malta and Gozo themselves, which are slightly to the north and west of the blocks of which I am speaking.

Now, as the Court will immediately see, Libya has also granted concessions in the same area, north of the Maltese equidistance line. The outer limits of the Libyan concession area are marked in green. If I may start at the Libyan coast, the green line begins in the south-east just near Benghazi. It moves due north, then west, then north, then west and north and west again and north and west and once again north, crossing the Maltese equidistance line between points 10 and 11. It continues north inside the Maltese area and then turns west and then

south again and recrosses the Maltese line before turning west once more and then turning north again to cross back into the Maltese area just to the east of point 7. It continues northwards in the Maltese area to approximately the Medina Bank, turns westward and once again southward and recrosses the Maltese equidistance line just to the east of point 5. There it turns west for a short distance, moves slightly to the north and then follows along towards the west by a series of small changes of direction until it ends up as depicted on the map before the Court with a question mark, and this question mark is placed there because, like the Libyan/Tunisian boundary itself, the end of the Libyan concession claims must be in issue in the current proceedings between Libya and Tunisia.

It is in this area that I must invite the Court's closest attention to the situation. In this area the claims and interests of Libya, Malta and Tunisia meet and quite clearly overlap. Equally clearly the question placed before the Court by Libya and Tunisia in the special agreement is expressed in terms which extend to this area. Tunisia, in its observations, refers to statements in both the Libyan and Tunisian pleadings in the main proceedings to the effect that the delimitation between Tunisia and Libya must extend only to the point where it would meet the continental shelf area appertaining to other States. With all respect to the Tunisian observations and to the pleadings which they reflect, statements of this kind simply skate over the issue with which the Court is now concerned. This issue is : does Malta have a legal interest which may be affected by the decision in the proceedings ? One cannot avoid giving the answer "yes" by pretending that the line which will emerge as a result of the main proceedings will not extend to the area in dispute with Malta. For there will always be a question ; where should the Libyan-Tunisian line stop if it is to avoid trespassing into Malta's area ? Moreover, this is very important, even if this question could be answered definitely now it would still not dispose of Malta's concern, which I elaborated before the break, that specific local factors which the Court might treat as relevant to the determination of the Libyan-Tunisian boundary could also be invoked by Tunisia and Libya in respect of their boundaries with Malta. In short, the very question in issue between Libya and Tunisia involves, in part, an area in which Malta prima facie has as much of an interest as Libya and Tunisia prima facie have. I say prima facie because it is not for the Court to consider now the substance of the claims of the three States. Nor, indeed, will it be for the Court in the main action between Libya and Tunisia to consider the substance of the claims of either against Malta. That is an entirely separate matter. At this point, the sole task of the Court is to identify an interest of a legal nature possessed by Malta which may be affected by the decision in the main case.

We may now move further east in our examination of the map. It is important not to lose sight of the massive extension of Libya's claims north of Malta's equidistance line. This is shown first by the outer limits of Libya's concession areas of which the most northerly line is situated on the Medina Bank, in Block 4 of the Maltese concession area. Moreover, Libya's claims go even further. This is shown by the boundary which Libya proposed to Malta in 1973, much further to the north and which it appears never to have abandoned. Unfortunately, I failed to have that line marked on to the maps which have been distributed to the Court. But it has been marked on this large chart in heavy red ink and it can be seen to lie well to the north of the Maltese equidistance line and, in fact, parts of it are as close as about 20 nautical miles to the island of Malta and at furthest about 28 nautical miles from the island of Malta. I will come back to that matter later. As the Court will no doubt know,

in August/September 1980, a Libyan warship forced a drilling ship operating on behalf of a licensee from the Government of Malta to withdraw from a location in Block 3 north of the most northerly Libyan concession claims and nearly half-way between Malta's equidistance line and the island of Malta itself. The exact location in Block 3 is marked on the map and is noted in the inscription on the map. I shall return as I said to the Libyan claim of 1973 when I come to describe the diplomatic exchanges between the two countries.

So much for the facts relating to the respective concession claims of Libya, Malta and Tunisia. Enough has, I suggest, been said to show that this element alone is sufficient to distinguish Malta's legal interest in the area from that of any other State in the world. But if there should be any room for doubt on this point a summary description – I emphasize summary – of the diplomatic exchanges between Malta, Libya and Tunisia should make it plain that Libya and Tunisia clearly regard Malta as in a position relative to their claims to the continental shelf quite different from all other States. The negotiations between the countries show several things :

First, they show that the boundaries between Malta and her neighbours are still unsettled. These boundaries are, therefore, still open to be influenced by assertions and arguments related to physically proximate areas, arguments which may be buttressed by observations of the Court in the *Libya/Tunisia* case. Mr. President, I emphasize the words "physically proximate". In doing so I seek to stress the points that the elements which the Court finds as relevant to the practical specification of the boundary between Libya and Tunisia are almost certain to affect the practical specification of the line between Malta and Libya and Malta and Tunisia. The concept of practical specification is, of course, drawn directly from the second paragraph of the first Article of the Special Agreement submitting the *Libyan/Tunisian* case to the Court. The Court will recall that in addition to being asked to specify the general principles and rules of international law applicable, it is further requested to specify precisely the practical way in which the aforesaid principles and rules apply in this situation so as to enable the experts of the two countries to delimit those areas without any difficulties. With all respect, in my submission, this provision requires from the Court a fairly high degree of specificity in the judgment which it must undoubtedly render between Libya and Tunisia, and it is just that degree of specific consideration of local factors in an area physically proximate to Malta which is the cause of Malta's concern and the justification for its request to intervene in these proceedings.

Now may I turn to the diplomatic exchanges between the countries. I said that one reason for looking at them is that they show that the boundaries are unsettled and the second reason for looking at them is that they may show some of the arguments which have been used by Malta's maritime neighbours in their consideration of the boundary line with Malta. The Court will, no doubt, compare these arguments with those which are advanced in the *Libya/Tunisia* case. Libya has suggested in paragraph 30 of its observations that the issue in the main case "will in every likelihood differ in the Libya/Tunisia context from the issues in the Malta/Libya context". The Court will, I am sure, note the proper caution which marks this statement by Libya. The words "in every likelihood", not the words "will for certain" be different, but they will "in every likelihood" be different. There is here a recognition that at any rate some of the issues may be similar or even identical. In other words, the possibility that some of the issues will differ does not exclude the possibility that some of the issues will be the same and it is this latter possibility of the identity of the issues that matters in the present proceeding because identity

necessarily leads to interaction – that is the crucial word, the prospective interaction of the determination by the Court of the *Libyan/Tunisian* case with prospective delimitations of the Maltese boundaries with Libya and Tunisia. Once that possibility and interaction, however small it may be, is recognized, Malta has, I submit, shown the existence of the legal interest.

There is a third reason why it is desirable to look at the negotiations, and this is that the very fact and nature of the activity, of this diplomatic activity, serves to show that vis-à-vis Libya and Tunisia, Malta is in a quite different position from other States which have a continental shelf. Tunisia and Libya cannot point to a comparable relationship, in continental shelf delimitation terms, with any other State – with the exception, of course, of their relationship with each other or possibly with their maritime neighbours in different directions, for example Tunisia with Italy or Libya with Egypt. In the face of discussions and correspondence of the kind which I am about to describe, it verges on the absurd for Libya and Tunisia to suggest, as they do in their observations, that Malta's position cannot be distinguished from that of other States generally and that Malta does not have a specific legal interest in the very continental shelf in which Libya and Tunisia are seeking to find a boundary between themselves.

The description of the relationship with Italy is primarily to complete the circle of information regarding Malta's relations with her ring of three neighbours.

I should add by way of explanation of the description of the diplomatic exchanges which follows, that it has been drawn in part from the text of diplomatic notes and in part from summary, and sometimes very brief records of meetings kept by officials of the Government of Malta. I hope that what I am about to say will not give rise to any serious disagreement regarding facts, but if any such disagreement does arise and the Court so requires, the Government of Malta will of course be willing to place before the Court the relevant material [1] in its possession.

And so, I pass now to look at each of the three sets of relationships.

The PRESIDENT : Mr. Lauterpacht, the question of these documents, are they available to all the Parties ?

Mr. LAUTERPACHT : They have not been made available to all the Parties, Mr. President.

The PRESIDENT : I hope that if they wish to see them they will be available at once.

Mr. LAUTERPACHT : They can be made available very rapidly.

The PRESIDENT : I reserve the position of the Court on this matter, I mean as to whether we shall also want to look at them.

Mr. LAUTERPACHT : I quite appreciate that and I am not trying to place the Court in a position in which it will be embarrassed. It is merely that I am seeking to give the Court a summary description of an extended set of negotiations, extended in the sense of extended over a period of time, to give the Court a sense of those negotiations not because the actual content of the negotiations matters so much as the fact that the negotiations took place. However, as I say, if there is any problem at all I am sure that these documents can be made available rapidly.

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[1] Not reproduced.

It will be convenient to start with the relationship with Libya. Discussions started in July 1972 when a Maltese delegation proposed to Libya a draft agreement based on the equidistance concept. No counter-proposal was offered by Libya and no agreement was reached. Nearly seven months later, on 7 February 1973, at a meeting with the Prime Minister of Malta, a Libyan minister suggested that the length of the median line should bear some relationship to the length of the coastlines of the two countries. This Libyan proposition was more fully developed in April 1973 when a Libyan delegation visisted Malta and tabled a draft agreement drawn up on that basis. The Libyan delegation explained that the relevant section of Libyan coastline was defined by Libya as extending from the Tunisian border to Misurata – the Tunisian border at this point on the map to Misurata which is just near the point where the Gulf of Sirte begins to bend southwards from the Libyan coastline. The distance between Malta and Libya was divided in the same proportion that the coastline between the Tunisian boundary and Misurata bore to the coastline of Malta. The result of this proposal, or this system, is nothing short of astounding. Unfortunately, as I said earlier, I failed to arrange to have the line marked on to your maps, but it is here on the large map marked in red. As you will see, the line at its nearest point to Malta is about 20 miles from the coast and at its most distant point about 28 miles from the coast. The line would cut Malta off from an enormous section of its continental shelf. If one is to presume continuity in the Libyan approach to continental shelf delimitation, and the concession claims and the gun-boat episode of 1980, suggest that some such kind of continuity may exist, then the area which Libya, in its own mind at any rate, seeks to divide with Tunisia must include a very substantial part of what on a more traditional view, and traditional I must say is something of a mild euphemism, what on a more traditional view of the matter would be regarded as Maltese continental shelf. Quite understandably the Prime Minister of Malta, in April 1973, sent a message direct to the Chairman of the Revolutionary Command Council of the Libyan Arab Republic stating that the Libyan proposal was completely unacceptable to Malta and indicating that tenders would now be invited for areas delimited by reference to the provisional median line proposed by Malta to Libya in 1972.

Since this episode is rather important as shedding light on the way in which Libya's continental shelf boundary with Tunisia may affect Malta, I ought to pause to offer one or two comments on it.

First, it may be observed that the selection by Libya of the stretch of coast from the border with Tunisia to Misurata as being opposite to Malta appears to be an exercise of an entirely arbitrary character. There may, however, be a reason for this which is developed in the Libyan pleadings in the main proceedings. Should this be so, and should the relevance, the length, the direction or the weight of Libya's coastline be in issue in the *Libya/Tunisia* case, it is clear that whatever the Court may say in the main proceedings, i.e., in the *Libya/Tunisia* case, is bound to have a direct impact on the use to which Libya may put its coastline in its relationship with Malta.

Second, in so far as the identification of the relevant Libyan coastline is not an arbitrary matter, it may be noted that it begins at the Tunisian boundary, thus suggesting that in some way the point at which Libya meets Tunisia is material to Malta's interest.

Third, one may observe the effect of constructing a triangle, or quadrilateral, which has as its points the Tunisian border, Misurata and the two extremes of the Maltese coast. In particular, a straight line from the border with Tunisia at Ras Ajdir drawn to Malta treats as an area of Libyan continental shelf relevant

to the delimitation with Malta a substantial part of what must surely be the area now in dispute between Libya and Tunisia. I have not drawn that line, but if I place my sheet of paper very roughly like that to reflect a straight line in the direction from Ras Ajdir to Malta, the Court will see that Libya is claiming continental shelf as being relevant to the delimitation of its areas with Malta that extends right up to here and therefore up to a point which must undoubtedly be in issue in the proceedings between Libya and Tunisia. How can it be asserted in such circumstances that the delimitation of the boundary between Libya and Tunisia does not affect an area in which Malta has a legal interest ?

I return now to the course of the Libyan/Maltese exchanges. Early in July of the same year, 1973, a Libyan delegation came to Malta and once again referred to the criterion of the length of the coastline. Malta maintained that its case was founded on paragraph 85 of the decision of this Court in the *North Sea Continental Shelf* cases. Malta insisted that the Libyan proposals were inequitable and maintained that a clear distinction was to be drawn between islands which were the territory of sovereign States and those which were merely dependencies. Nothing came of this meeting.

Then in January 1974 Malta handed to Libya a memorandum reasserting the justness of the equidistance concept and seeking an assurance that Libya would not raise any objection to Malta granting oil exploration concessions based on the median line as the dividing line.

Further discussions took place in April 1974 between the Prime Minister of Malta and Mr. Ben Amer, a representative of Libya. The latter proposed that both sides should abandon their positions and compromise. The Prime Minister of Malta pointed out that this proposal had been previously made and was not acceptable, and I may point out that for both of the Parties to abandon their positions and compromise would of course have meant that Malta was abandoning the relatively restrained claim to an equidistance line, i.e., was prepared to compromise on something less than equidistance, and Libya was going to abandon this vast claim and compromise on something more than equidistance. That may not have in it much in the way of an element of true compromise. It was then agreed that a draft agreement for the submission of the dispute to arbitration should be prepared.

Later in the same month of April 1974 there was a meeting in Tripoli between the Prime Minister of Malta and the then Prime Minister of Libya at which the latter said that Malta could proceed to arbitration, but the Prime Minister of Libya was reminded that agreement was needed on the part of Libya if Malta was to proceed. In the course of June 1974 Libya requested a copy of Malta's concession to Texaco. Malta declined to supply it and Libya expressed its reservation towards the grant. In July, Libya renewed its request for details of seismic surveys and for a map showing the concessions granted by Malta. To this request Malta replied in August 1974 identifying the location of the seismic operations as lying north of the equidistance line separating the submarine areas of Malta and Libya. At the same time Malta stated that it could not accept Libya's reservation made on 30 June 1974 regarding the Maltese concession to Texaco. A map of the area was attached to the Maltese note. Malta also took the opportunity to state that it could not accept or recognize the Libyan claim that the Gulf of Sirte south of a line drawn along latitude 32° 30' N was subject to Libyan sovereignty.

On 24 October 1975 Libya sent a note to Texaco, Malta's concessionaire, alleging that the area within which it was operating was part of the Libyan continental shelf.

Then, in January 1976, Libya sent to Malta a draft agreement to submit to this Court a request for a statement of the pinciples of international law to be applied for determining the continental shelf areas, and the economic zone areas, belonging to Libya and Malta respectively. An agreement was concluded along those lines on 23 May 1976 and for reasons which have already been mentioned this agreement has not yet come into force. In the meantime, in 1978-1980, there has been correspondence between the two Governments on the subject, in the course of which each has reiterated its position : in the case of Malta, its commitment to the equidistance line ; in the case of Libya, its claim to unspecified areas of continental shelf north of the equidistance line. As a result of the intervention of the Secretary-General of the United Nations in the latter part of 1980, Libya agreed that it would proceed to ratification of the agreement for submission of the dispute to this Court and to participate in the joint notification of the agreement to the Court. However, the ratifications have yet to be exchanged and the agreement has yet to be notified to the Court.

I come now to the negotiations between Malta and Tunisia. These have been much more limited than those between Malta and Libya. Some preliminary discussion took place in the course of an official visit by the Prime Minister of Malta to Tunisia in March 1973. The first significant Note is dated 8 April 1974, when Malta wrote to Tunisia referring to the grants of concessions by Tunisia "in an offshore area which the Maltese Government considers . . . appertains to Malta". Malta stated that in the absence of an agreed dividing line, the Tunisian authorities should refrain from allowing oil companies to undertake work programmes in any offshore area which falls on the Malta side of the median line between Malta and Tunisia.

The Tunisian Reply of 9 May 1974 was to the effect that the concessions granted to AMOCO, CFP and AGIP were situated in a zone delimited on a provisional basis. The Note said that a date for further discussions would be proposed later.

It appears from an examination of the location of the concessions that Tunisia may have been affected in its initial determination of the boundary by two factors :

First, it looks as if the Tunisian boundary line has been constructed as a line of equidistance based on Tunisia and Sicily, giving no weight to Malta.

Second, it is possible that Tunisia may have related the extent of its claim to the 200-metre isobath, without reference to any possibly opposing claim by Malta.

Later in 1974 Malta twice informed Tunisia of its intention to hold a regional seismic survey between latitudes 34° 26' S and 36° 20' and longitudes 13° and 15°, covering a section of the area in which the Government of Tunisia had provisionally granted offshore concessions. No reply was received from the Government of Tunisia.

By an undated Note, but probably of 18 May 1976, the Government of Tunisia conveyed to the Maltese Ambassador, for his information, a copy of a Note sent by Tunisia to Libya on 13 May 1976, protesting against the location by Libya of four buoys in what Tunisia regarded as its area of continental shelf. And by a further Note dated 18 May 1976 the Government of Tunisia conveyed to the Government of Malta, for its information, a copy of another Tunisian Note to Libya regarding the delimitation of the Tunisian/Libyan continental shelf boundary. This Note is important in relation to the boundary beyond the 50-metre isobath, for its insistence on the application of equidistance. I quote a short passage from the Note :

> "Examination of the maps shows that the general configuration of the Tunisian and Libyan coasts is simple and presents no difficulty regarding the application of the criteria, rules of law and international usages. The delimitation of the continental shelf between Tunisia and Libya, beyond the 50m isobath, should be based on the equidistance line, traced, in accordance with international law, taking account of geographical considerations and zones of economic interest of which the reality and importance are attested by long usage."

Why – it must be asked – why should Tunisia have sent copies of these Notes to Malta if it were not in recognition of Malta's special interest in delimitation of the continental shelf in the area and the factors relevant thereto ? Why ?

Two more years passed without action. Then, on 10 August 1978, the question of delimitation was touched on in discussions between the Prime Ministers of Tunisia and Malta respectively. The Tunisian Prime Minister invited Malta to submit its views in writing. This Malta did by a Note of 25 August 1978 in which Malta proposed the division of the continental shelf between the two countries on the basis of equidistance, treating the Italian islands as *res inter alios*. This proposal was, on 8 November 1978, flatly rejected by Tunisia, which in its turn merely suggested further talks based on the spirit of friendship and good neighbourliness. Since then there appears to have been no further correspondence.

And so, I come lastly, and for the purpose of completing the picture, to relations with Italy. Italy declared its rights over its continental shelf in 1965. In 1965 and 1969 it addressed certain enquiries to the Government of Malta and in 1969 proposed boundary talks. The Government of Malta replied in October 1969 that it had not yet completed the preparations necessary to enable it to enter into fruitful discussions. In July 1970 the Government of Malta indicated to Italy that it was in a position to start talks and at about the same time, on 17 July 1970, the Government of Malta issued a notice in the Malta *Government Gazette* indicating that the area between Malta and Sicily as far as 500 metres on the Maltese side of the median line was open for tenders. By a note of 14 August 1970 the Italian Government indicated that it would adopt the same course to the north of the median line, subject to any adjustments that might be made in subsequent negotiations, and this is a confirmation of the *de facto* situation which I referred to earlier in my argument.

No further exchanges took place between Malta and Italy until 1975. In particular, Italy did not inform Malta of the negotiation and conclusion with Tunisia of the boundary agreement relating to the area to the south-west of Malta and covering the position of the Italian islands of Pantelleria, Lampedusa, Linosa and Lampione. But eventually Malta became aware of this agreement from other sources.

At this point I should just interpose a few words about the Italian-Tunisian continental shelf agreement of 1971. Ratifications were not exchanged until 6 December 1978, and the agreement only entered into force on that date. Malta does not accept the validity of that part of the delimitation between Italy and Tunisia which brings within the area of the Tunisian continental shelf parts of the sea-bed which fall within the area of Malta's continental shelf as delimited on the basis of the principle of equidistance. This principle would be applied in the present case – the principle of equidistance – in Malta's view – would be applied in the present case by measuring from the island of Malta,

or Filfla, the islet just off its coast, to the island of Kerkennah, allowing a 12-mile belt of territorial sea plus a 1-mile belt of continental shelf around the Italian islands of Pantelleria, Linosa and Lampedusa. As can be seen from the map, the areas claimed by Tunisia encroach significantly on the area of Malta's claim, while the area claimed by Italy does so to a lesser degree.

So, to return to the course of negotiations with Italy, in 1975 upon the initiative of Malta talks took place between the two countries in the course of which Malta presented a draft agreement for the division of the shelf between the two countries on the basis of equidistance, with the exception of the islands of Linosa and Lampedusa. As regards these islands, they were to be accorded a belt of continental shelf of 13-nautical mile radius, as I have just indicated. This proposal echoed the solution adopted in respect of the islands in the Italian/Tunisian Agreement of 1971.

At a meeting on 19 June 1975 the Italian Government rejected the proposal of Malta regarding the islands, claiming that the islands were entitled to a full share of the continental shelf lying between them and Malta on a basis of equidistance. Malta insisted that there was a clear distinction to be drawn between the island of Malta, the metropolitan territory of a State, and the Italian islands, which were no more than distant dependencies of the mother States.

That same meeting is important in another respect. The representative of Italy explained that the special treatment accorded to the islands in the Italian/Tunisian Agreement reflected in part the fact that the islands were sitting on the extension seawards of the Tunisian land mass – a factor to which he attached importance. Evidently this may also be a factor to which Tunisia attaches importance in the *Libya/Tunisia* case, and if that should be so, Mr. President, it would seem that anything that the Court may say on this topic in the main case would have some direct bearing on the relationship between Malta and Tunisia.

After this meeting, three years passed without action on either side, until 25 August 1978, when Malta urged Italy to renew negotiations. Further Notes from Malta followed on 25 September 1978 and 6 November 1978, but have not been answered by Italy. And so we come to the conclusion of the narrative of the relations between Malta and its maritime neighbours. Nothing – but nothing – could illustrate more vividly the interconnection of the four countries in the Mediterranean continental shelf and, in particular, with specific reference to the proceedings now before you, the common interest of Malta, Libya and Tunisia in a single continental shelf area.

The Court rose at 12.59 p.m.

SECOND PUBLIC SITTING (19 III 81, 3 p.m.)

Present : [See sitting of 19 III 81, a.m.]

Mr. LAUTERPACHT : Mr. President and Members of the Court I am sorry to have had to burden you with an oral presentation going into so great a degree of detail as did my exposition this morning. It was, however, more than a necessary survey of the situation, it was an unavoidable one. My task is to satisfy you that Malta has an interest of a legal nature which may be affected by the decision in the *Libya/Tunisia* case. I do not contend that Malta has an interest in the case simply by virtue of the fact that it has a continental shelf. If that were the sole basis of Malta's request to be allowed to intervene Malta would be in a position no different from that of any other State with a continental shelf and with a general interest in the judicial development of the law on that subject. But a mere general interest in the continental shelf is not, I emphasize, the sole basis of Malta's request. The foundation of the present request is something much more specific, something which distinguishes in kind the position of Malta vis-à-vis the *Libya/Tunisia* case from that of any other State. Malta's specific and unique interest in the course of the *Libya/Tunisia* proceedings arises out of the involvement of Malta in the facts of the *Libya/Tunisia* case by virtue basically of Malta's geographical location vis-à-vis the two litigants. And it is that background, that geographical background, that I have necessarily had to describe in some detail to the Court as essential to the first stage of my submissions.

This morning you asked me whether I had reached the conclusion of my submissions. I said that regrettably I had not, because I have now to develop my argument regarding the relationship of the facts which I described to the very issues in the *Libya/Tunisia* case in so far as an outsider can perceive them.

May I begin by inviting the Court to look at the situation from Malta's point of view. In the main proceeding Libya and Tunisia have requested the Court to do two things : first, the Court is requested to identify the principles and rules of international law that should be applied to the delimitation of continental shelf areas appertaining respectively to Libya and Tunisia. In so doing the Court is asked to take account of equitable principles and the relevant circumstances which characterize the area as well as the recent admitted trends at the Third Conference on the Law of the Sea.

Second, and one must always remember the second, the Court is asked to specify precisely the practical way in which the aforesaid principles and rules apply in this particular situation, so as to enable the experts of Tunisia and Libya to delimit their respective areas of continental shelf without any difficulties.

All that is in Article I of the *Compromis* : in paragraph 1 the reference to the general principles ; in paragraph 2 the reference to the specific and practical application of the principles.

But there is more. One also has to recall Article III, which deals with the problem of what happens if the experts cannot agree on the delimitation within a relatively short period. Should that happen, the two parties shall together go back to the Court and request such explanations or clarifications as

may facilitate the task of the two delegations to arrive at the line separating the two areas of the continental shelf, and the two parties shall comply with the judgment of the Court and with its explanations and clarifications.

That is going almost as far as one can in asking the Court to draw the line but at the same time not actually to put it on paper. The Court is asked to be very precise in the indications which it gives.

Now this second stage, reflected in the second paragraph of Article I of the *Compromis* and in Article III, must necessarily involve the Court in a detailed consideration of all the elements which specifically affect the delimitation in this particular situation. Now it is Malta's contention that by virtue of its geographical position the elements in this particular situation, that is to say the situation between Libya and Tunisia, are also elements in Malta's own situation as regards Libya and Tunisia respectively.

Obviously the elements will not be absolutely identical but the likelihood is that there will be a substantial overlap. Even the Libyan observations acknowledge that possibility, as I shall presently indicate to the Court in some detail.

And it is that prospect which makes Malta's situation unique in comparison with every other State in the world. A situation unique for its relationship with Libya and Tunisia. It is the State which is closest to the area of the Libyan/Tunisian dispute. It is the State which shares the same continental shelf as Libya and Tunisia are seeking to divide.

Therefore, the basis on which the shelf is divided between Libya and Tunisia will inevitably affect the manner in which the remainder of the shelf is to be divided between Malta and Libya and Tunisia.

The exposure of Malta to this feature of the Libya/Tunisia proceedings is made even greater by virtue of the fact that the Libya/Tunisia agreement sets no northern terminus to the process of delimitation. The agreement, I am speaking of the *Compromis*, the special agreement, does not say how far north, or in the case of Tunisia how far east, the areas of continental shelf appertaining to each State extend, and it will evidently be in the interest of each of the contesting States if each of them were to present its case in such a way as to secure the approval of the Court for elements which could subsequently be invoked in a continental shelf delimitation or litigation with Malta.

I shall therefore, Mr. President, with your leave, now turn to the potential substantive impact upon Malta's position of the Court's determination of the kind of specific issues which we can perceive as likely to be considered in connection with the *Libya/Tunisia* case ; not for the purpose of arguing the merits of those issues but merely for the purpose of showing that any decision on those substantive issues is bound to touch the position of Malta in its relations with Libya and Tunisia respectively.

It is not necessary for me to make any extended submission to the Court regarding the general law likely to be applied in the main proceedings. Neither Libya nor Tunisia has ratified the 1958 convention on the continental shelf. In consequence its provisions regarding the delimitation of continental shelf boundaries are not, as such, applicable. The latest statement of the recent trends admitted at the third Law of the Sea Conference is to be found in the draft convention of September 1980. The relevant provision is in Article 83, paragraph 1, which I shall read :

> "The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement in conformity with international law. Such an agreement shall be in accordance with equitable principles, employing the median or equidistance line, where appro-

> priate, and taking account of all circumstances prevailing in the area concerned."

Now this is not the place for the Government of Malta to express its adherence or non-adherence to this text as a statement of the relevant rule of contemporary international law on the delimitation of the continental shelf and the Government of Malta formally reserves its position in this regard.

But in referring to the concepts of equitable principles, equidistance and prevailing circumstances in the area, the current law of the sea text provides a convenient peg on which to hang an analysis of the situation.

Basically there are two concepts. One is the concept of equidistance which is objective, technically easy to apply and relatively predictable. The other is the concept of equitable principles, or special circumstances. Although these last two ideas may not be identical they are similar in that their application involves a significant exercise of judicial discretion and its outcome in any particular case is not easy to predict. Nonetheless, many of the factors which may be taken into consideration can be identified and it is with these that we shall be concerned. The convenient method of approach is to apply each standard in turn with a view to seeing how the determination of the *Libya/Tunisia* case could affect any subsequent delimitation between, on the one hand, Malta and, on the other hand, Libya and Tunisia respectively.

We may start with the equidistance approach. This is the one upon which Malta has hitherto based the delimitation of its continental shelf. It is evident that the application of the equidistance approach can be affected by a number of factors.

First, there is the base line. The equidistance method necessarily involves the use of base points or base lines, otherwise there would be nothing from which the boundary line could be equidistant. In the 1958 Convention on the Continental Shelf the base line was described in Article 6, paragraph 1, as the base line *"from which the breadth of the territorial sea of each State is* measured". The same phrase appears in the definition of the continental shelf in Article 76, paragraph 1, of the draft convention on the Law of the Sea of September 1980.

The normal way of drawing an equidistance line between Malta, Libya and Tunisia would be on the following basis. As regards Malta, the base line would be the low-water mark on the coast line of the main islands of Malta and Gozo, including therein the low-tide elevation of Filfla.

As regards Libya, the base line would be the lòw-water mark of the coast line, from Ras Ajdir in the west to approximately Sidi Sueicher east of Benghazi.

As regards Tunisia, the base line would be the low-water mark of the coast line from Ras Mostet, at the north-eastern point of the Tunisian peninsula, to Ras Ajdir, making allowance for the relevant part of the coast lines of the Kerkennah Islands and Djerba Island.

If, for any reason, Libya and Tunisia establish valid grounds for claiming base lines seawards of those which I have just set out, the effect on the equidistance line with Malta will be to move that line closer to Malta.

Now, it is in the nature of the case between Libya and Tunisia that each Party will, in all likelihood, be wanting to claim for itself the most seaward possible base line, while at the same time pressing for the most landward possible line for its opponent. Libya will wish to push its line seaward and Tunisia's line landward. Tunisia will wish to push its line seaward and Libya's line landward. The point may be illustrated by two examples – one from the Libyan, the other from the Tunisian, coast line.

As I have already indicated, Libya claims to close the Gulf of Sirte by a straight base line along the line of latitude 32°30'. This black line across the map here. This claim is contested by Malta. If Libya validates its claim to close the Gulf of Sirte in its relationship with Tunisia, then that will also have an impact upon the validity of the closure of the Gulf of Sirte in Libya's relations with Malta. It will have a direct effect on one basic ingredient of the equidistance line between Libya and Malta. The effect of a straight closing line across the Gulf of Sirte is to push the equidistance line between Malta and Libya northwards towards Malta by 35 nautical miles. A very significant impact in this area.

As an example of a disputable feature of the Tunisian base line we may recall the system of straight base lines claimed by Tunisia around the Kerkennah Islands. I have already described the almost triangular manner in which this system of straight base lines projects into the Mediterranean Sea. Unless the selection of the most seaward points in the system of straight base lines can be justified as a low-tide elevation within 12 nautical miles of the Tunisian coast line, the general direction of the system of straight base lines around the Kerkennah Islands is open to question. If Tunisia establishes the validity of its straight base lines in relation to Libya, this will also have an effect upon the prospective boundary line with Malta by pushing the equidistance line approximately six nautical miles towards Malta.

Having given these illustrations of the effect which certain factors affecting the application of the equidistance approach as between Libya and Tunisia can have upon the boundaries between Libya and Tunisia on the one hand, and Malta on the other, I must next turn to perform a similar exercise in relation to the application by the Court of an approach involving equitable principles or special circumstances.

Before doing this, however, it is necessary to add that the very identification in the circumstances of this case – in the very identification of the circumstances in which such equitable factors will be taken into consideration – is bound to have an effect upon the choice between, on the one hand the equidistance approach, and on the other hand the equitable principles or special circumstances approach, on any subsequent discussion between Malta, Libya and Tunisia. If that choice, between the application of equidistance and the application of equitable principles and special circumstances, is expressed in general legal terms, the effect may not be great. But if the Court were to specify with some particularity what are the features, geographical features for example, which led it to the view that it could resolve the matter simply by the application of equidistance, but must take into consideration the special circumstances or equitable principles, that choice would be dependent upon factors peculiar to the region, and thus would necessarily affect Malta, in Malta's future relations with the two Parties.

In saying this, I must be careful on one point, and that is I must not leave with the Court the impression that Malta absolutely rejects the application of equitable principles or special circumstances to the determination of the continental shelf boundary between it, and Tunisia and Libya. Malta firmly believes that the straightforward application of the equidistance principle by using the actual coasts of Libya and Tunisia as baselines is the best way to achieve a delimitation which corresponds with equitable principles. At the same time, Malta is far from conceding that an approach based primarily, or even exclusively, upon equitable principles or special circumstances must necessarily lead to Malta getting less than it would under an equidistance approach. This is not the occasion for Malta to develop its contentions regar-

ding the operation of the concepts of equitable principles and special circumstances. But when that occasion arises, Malta will be free to contend that the proper application of those concepts may well lead to a boundary line more favourable – more favourable – to Malta than a line of strict equidistance.

This said, I now turn to consider the impact which a determination by the Court of some of the factors involved in the equitable principles or special circumstances approach may have upon the future position of Malta. Again, it is not for me to canvass the detailed application of these concepts as between Libya and Tunisia, but it is appropriate for me to identify some possible considerations – in full ignorance, it must be recalled, of what Libya and Tunisia have actually argued in their written pleadings.

I begin with a reference to one consideration which may be derived from Libya's own communications to Malta. This is the contention that in some way the area of a State's continental shelf should be proportional to the length of its coast line. In its relations with Libya Malta is bound emphatically to repudiate this proposition. But, as I have already said, the possibility remains that in some way this proposition may have been invoked by Libya in its arguments with Tunisia. If that should be the case, Malta would be clearly greatly interested in the manner in which the Court is called upon to accept, to reject, or partially to apply the concept.

Another possibility is that one facet of the concept of the length of coast line might be advanced in a less radical form. This is the idea that coastal fronts, representing the general direction of the coast, may influence the line of the boundary. This could have some bearing on a dispute between two countries in the physical positions of Libya and Tunisia. Yet, if expressed by the Court without a sufficient awareness of its possible impact upon Malta, it might have a markedly detrimental effect upon Malta's subsequent negotiating or litigating position.

Again, there might be some discussion of the weight to be given to such Tunisian islands as the Kerkennah Islands or Djerba Island. If these islands are not to be given full weight, then any reduction in their effect would need to be justified in terms of equity or special circumstances related to their particular character and geographical location. Clearly, there are important and fundamental distinctions to be drawn between those islands and an island, such as Malta, which forms the sole territory of a State, as has already been pointed out by the learned Attorney-General. Nonetheless, an expression of opinion by the Court upon the position of islands in that part of the Mediterranean Sea could again have a direct impact upon Malta's position.

I come now to other features of the situation in the Mediterranean Sea between Malta, Libya and Tunisia. It seems likely, that in developing their arguments regarding the direction of the boundary line, Libya and Tunisia will each have closely considered the nature and effect of the geology and geomorphology of the sea-bed in the disputed area. Should any such examination have taken place, it can only have been in the context of an argument based upon equitable principles and special circumstances, since evidently such a study can have no bearing on the concept of equidistance. Or, possibly, such an examination may have formed the basis for contentions regarding the very existence of one or the other's rights in the sea-bed. It might have been alleged, for example, that one or the other State's claimed area did not, for physical reasons, truly constitute a natural prolongation of the landmass. Alternatively, it might have been said that although a continuation of the landmass, certain physical elements suggested that the area was a continuation more of one country's landmass than of the other country's.

If such arguments have been developed by either side, there is a strong probability that the information on which they rest is pertinent also to the area of sea-bed claimed by Malta. When the area affected by the dispute between Libya and Tunisia is looked at as a whole, it can be seen that it is not a very large area and that the part of the sea-bed claimed by Malta is integrally a part of the sea-bed area lying between the three States ; and certainly the Libyan claims to a line so close to Malta make it clear that Libya shares this view. So, one may suggest that there is simply not enough room in the area for the Court to make findings on the structure of the sea-bed, and its bearing upon the claims of Libya and Tunisia, without the Court, at the same time, saying something which touches the area in which Malta is interested, and doing so in a manner which may affect Malta's subsequent position in its negotiations with Libya and Tunisia.

Moreover, this risk is markedly increased by the fact, which though I have mentioned it before, cannot be too much emphasized, that in their submission to the Court, Tunisia and Libya have not placed any seaward limit upon the boundary which they asked the Court to help them delimit. It is, of course, possible that the Court may find that it can describe the practical way of applying the relevant principles and rules in such a manner that the boundary line can be conceived of as following a particular bearing, and I invent a quotation "until it reaches the outer limit of the continental shelf of Malta".

This might be seen as a formula which would not prejudice the eventual determination of the outer line of the Libyan and Tunisian claim. But that is only a possibility. It has equally to be contemplated that the Court might find it impossible to express its guidance in terms which would lead to a single straight line. Instead, the Court might, as part of the practical indication which it may give, which it will give, have to contemplate a line which changes direction at certain points, and if the Court did contemplate such a line which changes direction at certain points, the Court would presumably give reasons for indicating why at such-and-such a point the line does change direction, and if the Court did that the reason given for the direction of the line at a point close to the coasts of Libya and Tunisia might not be the same reason controlling a change of direction further out in the sea and therefore nearer the area of Malta's claim. In such circumstances the statement of reasons affecting the direction of the outer part of the line could later have a highly material bearing upon Malta's relations with Libya and Tunisia.

So far I have been identifying physical features which might affect the equities of the situation or constitute special circumstances. But it is necessary to contemplate other elements, elements of a non-physical character, which may affect the situation. There is nothing in the judicial or other precedents – but particularly the judicial precedents, the decision of this Court in the *North Sea Continental Shelf* case or of the Arbitral Tribunal in the *United Kingdom-French Continental Shelf* case – there is nothing in those precedents to suggest that the equities are limited to physical equities. It is fully to be contemplated that in relation to a sea-bed area in respect of which physical features might give little aid to the determination of the direction of the line, the Court might find that special significance attached to more general considerations such as the nature and extent of the economic resources of the State, the size of its population, the gross national product, the per capita income, and so on. The Court will remember a passage which I read from a Note which Tunisia sent to Libya, and of which a copy was sent to the Government of Malta, in which Tunisia itself invoked the relevance of "zones of economic interest of which the reality and importance are attested by long usage". To the extent that recourse

to such elements of equity was necessitated by the physical circumstances of the area in dispute, the manner in which the considerations were presented to, or expressed by, the Court would certainly touch on Malta's interests.

I think that I have said enough to show the many important points at which in the specific context of the Libya/Tunisia proceedings the Court might express itself in a way which could affect the interests of Malta, not generally, as it might affect other continental shelf countries, but specifically ; and I stress specifically. In this case we are talking about a single, relatively small area of continental shelf which cannot properly be approached on a bilateral basis without awareness of and concern for the interests of the other State in the immediate vicinity.

And this last point may be quite tellingly illustrated by recalling once again the terms of the Italian-Tunisian Agreement on the boundary around and adjacent to the Italian islands of Pantelleria, Linosa and Lampedusa. This Agreement has evidently been concluded without due consideration of the position of Malta. This is strikingly true as regards the line drawn to the south-east of Linosa, the line from 30 through 31 to 32. This last point – point 32 – appears to be equidistant from Linosa, Lampedusa and the coast of Malta. Yet Malta can properly ask: why, if these islands were not deemed to carry sufficient weight to entitle them to equidistance rights as against Tunisia, why should they be assumed to carry sufficient weight to entitle them to equidistance rights as against Malta ? Yet that differentiation has been made by Italy and Tunisia and a line has been drawn on the map to the obvious disadvantage of Malta. True, it is only a line drawn on a map by two States, and it is therefore entitled to no more authority than comes from the circumstances in which it was drawn and having regard to Malta's obvious reservation of its position.

But the position is likely to be different when a line is drawn, if not by the Court at any rate on the basis of specific guidance given by the Court, for then the line and the elements in it have the authority of the Court behind them, and that authority will inevitably shape the attitude of the Court in later litigation in which issues relating to the same area may arise ; and it will no doubt be accorded great weight in the organs of the international community.

It is not enough in these conditions to say – as do the observations of Libya and Tunisia – that the position of Malta will be safeguarded by the terms of Article 59 of the Statute of the Court, to the effect that decisions of the Court are binding only between the parties and in that case. Here, as I suggested to the Court earlier in the day, we are concerned not so much with the formal decision of the Court between Libya and Tunisia as with the effective decision contained in the Court's reasoning. Obviously if the Court were to give an unmotivated decision Malta's difficulties might be reduced. But a decision of the International Court of Justice without reasons is not to be contemplated. In fact it is excluded by the terms of the Libyan/Tunisian submission to the Court's jurisdiction. The decision of the Court on any aspect of the law relating to the continental shelf will have a clear *de facto* influence. It will be treated, properly treated, with the greatest respect. The Court will in all likelihood itself adhere in later litigation to the substance of what it has already stated after due deliberation. Other tribunals will pay heed to the Court's views, as the *United Kingdom-French Continental Shelf* Arbitration Tribunal followed to a large extent the line indicated by the Court in the *North Sea Continental Shelf* cases.

This being so, it is to be concluded that the only way in which Malta's interests are to be safeguarded is by giving Malta an opportunity to present to the Court the considerations which Malta deems to be relevant. Malta is not seeking a decision against either Tunisia or Libya. It is not seeking to litigate

with Tunisia and Libya about the appropriate boundaries between Malta and Libya and Tunisia in the guise of an intervention in the Libyan/Tunisian proceedings. Malta merely wishes to have an opportunity to ensure that the Court is aware that the elements in the *Libya/Tunisia* case, as seen from Malta's point of view, are not resolved in a manner which causes specific prejudice to Malta's legal interest in the preservation of her sovereign right to explore and exploit the full extent of her continental shelf.

I appreciate greatly the patience with which the Court has heard this detailed recitation of facts and this attempt to relate the facts to what I can only suppose to be issues in the *Libya/Tunisia* case. But facts are at the centre of this Application, and facts also provide an answer to the question of jurisdiction that has been raised in the observations both of Libya and Tunisia. The question of jurisdiction is one which will be dealt with by Mr. Bathurst after Professor Lalive has dealt with the general legal aspects of intervention under Article 62.

But there is one aspect – and it may be a controlling aspect – there is one aspect of the question of jurisdiction which grows quite naturally out of the argument which I have been presenting to you, and therefore, with your leave, I would like for a moment to pursue it.

The facts which I have described to the Court show how in effect Libya and Tunisia are asking the Court to carve up a continental shelf of which part belongs to Malta. When I say "asking the Court to carve up" that continental shelf of course I appreciate that the Court is only being asked to give specific directions as to how that is to be done. But nonetheless the Court is being asked to participate in a process which must necessarily culminate in the splitting up of a continental shelf in which, on the basis of what I have been saying to the Court earlier in the day, inevitably includes an element of Malta's rights.

Mr. President and Members of the Court, if I may make so bold as to invite you to look at the problem from the point of view of a layman. The layman will say : "Wait a minute, you are carving up my continental shelf. You, Tunisia and Libya, are carving up a continental shelf of which I, Malta, am entitled to a part. And then, coming to the Court to ask the Court to assist you in doing that you turn round – you, Tunisia and Libya – turn round to me, Malta, and say 'Oh, No. You can't intervene in these proceedings because you cannot establish any jurisdictional link with either of us' – or 'both of us' as they both say."

My answer to that arises directly out of the facts which I have been presenting to the Court today. My answer to that plea of lack of jurisdiction is that the Court has jurisdiction, a jurisdiction conferred upon it by Tunisia and Libya together coming to the Court with their Special Agreement and asking the Court to decide the case. That Special Agreement expressly conferred upon the Court jurisdiction between those two States.

But, it also impliedly conferred jurisdiction upon the Court as regards an intervention by Malta. The jurisdiction of the Court arose out of the conduct of those two States. Members of the Court will of course be familiar with the approach which the Court adopted in the *Corfu Channel* case to the question of jurisdiction when the Court held that Albania had by its conduct created jurisdiction in the Court by means of the concept of a *forum prorogatum*. I am not saying that this case is identical with that. I am saying that this case is analogous to that.

It is possible for a State, by its conduct, to confer jurisdiction on the Court. Whenever two States conclude the kind of agreement which Tunisia and Libya have concluded, they thereby implicitly confer upon the Court jurisdic-

tion to deal with intervention by a State which claims, as Malta does so strikingly, that its legal interests are affected. That jurisdiction may be said to arise out of waiver or by implication or by *forum prorogatum*, or by a kind of estoppel. It does not really matter which word one uses to describe what is essentially a common sense analysis of the situation. Two States cannot come to this Court and say to the Court "please carve up territory as between us" when there is a third State that may be affected, without implicitly acknowledging the right of that third State to come in to the Court and intervene.

It is not possible, as the jurisprudence of the Court has shown, for two or more States by their special agreement to frame the jurisdiction of the Court in such a way as to exclude the rights of third States that may be affected. The Court will recall its own decision in the case of the *Monetary Gold* when the Court in effect said to Great Britain, Italy and the United States

> "you States cannot by your agreement between you come to this Court and ask us to decide an issue which, although on the face of it, only arises between the three of you, surely involves a determination of the rights of a State which is not before this Court".

I am saying that when two States try to do that, as Libya and Tunisia have tried to do it, they are in effect accepting that the Court must have jurisdiction to deal with an intervention.

The United States Supreme Court in a case called the *National City Bank* v. *The Republic of China* decided in 1955, a case about State immunity, used a phrase which has stuck in my mind. The court there spoke about "the ultimate thrust of the consideration of fair dealing" as being a consideration which justified the court finding that the National City Bank was entitled to make a counter-claim against China, a plaintiff which would otherwise have been entitled to invoke immunity. The situation is of course not identical with the present situation but the underlying elements are the same.

And it would not be fair that, having regard to the facts which I have been at such pains to expound, the Court should decide upon the issues between Libya and Tunisia without giving Malta a chance to be heard. I have said that Malta is not asking for an Order against either side. It cannot ask for an Order because it does not know what either side is seeking. Malta merely wishes to have an opportunity to ensure that justice is done to itself, that no decision is taken affecting its rights without Malta being heard on the subject.

In terms of the law relating to intervention and the terms of Article 62, this is a perfectly proper request. My learned friend, Professor Lalive, will develop the arguments along that line. So, Mr. President and Members of the Court, may I again thank you for the patience with which you have received this statement and ask whether you would be good enough to call on my distinguished colleague, Professor Lalive.

PLAIDOIRIE DE M. LALIVE

CONSEIL DU GOUVERNEMENT DE MALTE

M. LALIVE : Monsieur le Président, Messieurs de la Cour, la tâche qui m'incombe aujourd'hui — *je devrais dire le privilège* — est celle de vous présenter les vues du Gouvernement de Malte sur l'objet et la nature de sa requête à fin d'intervention, à la lumière du Statut de la Cour.

Au seuil de cet exposé je ne puis m'empêcher — et la Cour voudra bien me le pardonner — d'avoir une pensée émue pour la mémoire de celui aux côtés duquel j'avais déjà l'honneur voici quelque vingt ans d'être présent dans cette même salle devant la Cour : j'ai nommé mon maître et collègue le professeur Maurice Bourquin, à la mémoire duquel vous me permettrez d'associer celle des membres de la Cour internationale de cette époque.

Monsieur le Président, ma présentation se composera — avec votre permission — des trois parties suivantes, d'inégales longueurs : la première, la plus longue des trois, sera consacrée à l'intervention telle qu'elle est prévue par le Statut de la Cour, à son objet, à sa nature, à ses conditions — tels que l'on peut et l'on doit les déterminer d'après les sources disponibles, notamment d'après les travaux préparatoires du Statut de la Cour permanente et les rares, trop rares cas où la Cour, ou certains de ses membres, ont eu l'occasion, sinon d'appliquer, du moins de faire allusion à l'article 62 du Statut.

Dans une seconde partie assez brève, je tenterai de dégager les enseignements qui peuvent être tirés de la théorie générale de la procédure et, en particulier, du droit comparé. Ceci pour éclairer les diverses questions non résolues que pose, aujourd'hui encore, l'interprétation des dispositions du Statut relative à l'intervention.

Enfin, dans une troisième et dernière partie, il s'agira pour nous d'appliquer à la présente espèce les *principes* et les *notions* dégagés dans les deux premières parties de mon exposé, c'est-à-dire d'examiner si la requête du Gouvernement de Malte répond bien, comme nous en sommes persuadés, aux conditions et aux buts envisagés par le Statut de la Cour — et ceci de l'examiner au regard des observations déposées par les Parties à l'instance.

Avant d'entrer dans le vif du sujet, il nous faut constater un fait — qui est notoire : l'institution de l'intervention, dans le procès international, est fort mal connue, l'une des plus mal connues qui soient — et peut-être aussi l'une des plus mal comprises !

Ce n'est pas que les textes du Statut, les articles 62, 63, soient particulièrement obscurs ni qu'ils manquent en eux-mêmes de clarté, c'est tout simplement que l'article 63 n'a reçu que de très rares applications et que l'article 62, ici en cause, n'a jamais encore été appliqué !

Il s'agit donc, si je puis m'exprimer ainsi, d'une « première » dans l'histoire de la jurisprudence internationale, d'un cas *primae impressionis*, comme on dit dans certains systèmes, et il résulte de ce fait plusieurs conséquences pratiques :

Il en résulte tout d'abord, me semble-t-il, une responsabilité particulière pour tous ceux qui ont aujourd'hui l'honneur de s'adresser à votre Cour et tout spécialement, bien entendu, pour les représentants du Gouvernement de Malte, demandeur en intervention.

Il en résulte aussi, sans doute, pour la Cour, une responsabilité particulière

— vu l'autorité et le retentissement que sa décision ne manquera pas d'avoir — mais aussi le droit d'attendre, de notre part à tous, le maximum d'assistance.

Les représentants du Gouvernement de Malte, en ce qui les concerne, n'entendent pas se dérober à leur responsabilité, si lourde puisse-t-elle être dans les contraintes de temps qui ont été les leurs. Et pour ma part je voudrais dans cette première partie de mon exposé procéder à un examen attentif des dispositions du Statut sur l'intervention — ceci en m'efforçant de m'en tenir à l'essentiel.

Messieurs les juges, la nécessité d'un examen particulièrement attentif découle donc d'abord de notre obligation d'assister votre Cour dans l'analyse d'une question jamais encore tranchée. Elle s'impose aussi par l'état lacunaire et confus des sources doctrinales disponibles sur l'intervention dans le procès international. Elle s'impose enfin, *last but not least*, pour la raison que ce qui est en cause ici même — comme vous l'a indiqué ce matin M. l'*Attorney-General* de Malte — ce sont les intérêts vitaux d'un petit pays du tiers monde.

Lorsqu'il s'adressait à la Cour permanente, ici même, au nom du Gouvernement français, le professeur Jules Basdevant, dans l'affaire du *Wimbledon* (*série C, n° 3*, p. 119), constatait d'abord que la requête polonaise se fondait sur un « double motif d'intervention » — les articles 62 puis 63 — et il observait :

> « Pour ce qui est de l'article 62, le problème d'une intervention apparait comme étant plus complexe et plus délicat, et la Cour, dans l'établissement de son règlement de procédure, a déjà rencontré les difficultés du problème. »

Pour tenter d'assister la Cour dans la solution de ce que le futur président Basdevant appelait un problème « complexe et délicat », je voudrais, avec votre permission, Monsieur le Président, regrouper mes observations en trois chapitres — pour la clarté de l'exposé :

Dans un premier chapitre et dans une perspective que j'oserai appeler « historique », je rechercherai les éléments d'interprétation que l'on peut trouver : 1) dans les travaux préparatoires du Statut de la Cour permanente et du Règlement ; 2) dans la pratique de ces deux Cours ; et 3) dans la doctrine internationale.

Sur la base des données ainsi recueillies, j'aborderai ensuite le texte même de l'article 62 du Statut et les conditions générales posées à l'intervention. A cette occasion, il y aura lieu de voir si le contexte, et tout spécialement l'article 63 du Statut, commande de nuancer, voire de corriger les indications recueillies précédemment.

Enfin, dans un troisième chapitre, j'aurai à reprendre quelques points particuliers, pour les examiner de manière plus approfondie. Il s'agira notamment de la notion, tout à fait centrale, d'intérêt d'ordre juridique et des problèmes qui peuvent se poser à son propos, compte tenu de la nature et de l'objet de l'intervention.

Enfin, en conclusion de cette première partie, nous verrons s'il est possible de dégager de ce premier examen des conclusions tout au moins provisoires, ou bien s'il demeure un certain nombre de questions incertaines, non résolues, au sujet desquelles il faudrait alors chercher ailleurs des éléments de solution, ce qui sera l'objet de notre deuxième partie.

Monsieur le Président, Messieurs de la Cour, il est superflu, il serait singulier, qu'un conseil du Gouvernement de Malte entreprenne de faire devant vous un historique détaillé de l'élaboration du Statut de la Cour permanente par le comité de juristes choisi par le Conseil de la Société des Nations en 1920. Mais il est indispensable cependant, pour une bonne compréhension des choses

– et sans remonter à ce que j'appellerai la préhistoire du Statut, c'est-à-dire aux conventions de La Haye de 1899 et de 1907 – il est indispensable dis-je – de faire référence aux travaux préparatoires. On ne saurait saisir, je crois, la portée des articles 62 et 63 et le progrès considérable qu'ils représentent dans l'histoire de la justice internationale, un progrès qui fut à l'époque reconnu et salué comme tel, on ne saurait les comprendre si l'on faisait abstraction des travaux accomplis par les éminents jurisconsultes réunis à La Haye du 16 juin jusqu'au 24 juillet 1920.

On ne saurait d'ailleurs bien comprendre ces travaux eux-mêmes si l'on ne tenait pas compte des documents, des projets, des mémoires dont ce comité de juristes était saisi ou du contexte général dans lequel il travaillait et, enfin, des modèles que ses membres avaient présents à l'esprit.

Jetons donc un coup d'œil sur les travaux du comité de juristes sur la question de l'intervention – question qui fut discutée lors de sa vingt-huitième séance.

A l'origine, le seul texte soumis au comité concernait, à l'instar des dispositions des deux conventions de La Haye que je viens de citer, ce qui est devenu l'article 63 du Statut.

Dès le commencement du débat, l'insuffisance du texte proposé est signalée par lord Phillimore et par d'autres orateurs. Et le président du comité de jurisconsultes, le baron Descamps, souligne que le cas de l'actuel article 63 – l'interprétation des conventions – n'est pas le seul aspect de l'institution et qu'il faut admettre l'intervention dans d'autres cas. M. Fernandes, le jurisconsulte brésilien, propose alors la formule selon laquelle le droit d'intervention doit être reconnu « aux Etats ayant un intérêt légitime, soit d'assister une des parties en cause, en raison d'un droit conjoint, soit d'exclure le demandeur ou le défendeur ». Et comme l'observe, peu après, un commentateur quasi contemporain, M. Farag, « cette proposition donne à l'intervention un champ d'action aussi vaste que celui que lui reconnaît généralement la plus libérale des législations internes ».

Le jurisconsulte norvégien Hagerup propose alors au comité de juristes la formule de l'article 21 du projet des pays scandinaves :

> « lorsqu'une affaire soumise à la Cour porte sur l'interprétation d'une convention internationale générale ou universelle, ou si elle concerne d'une autre manière les intérêts d'un Etat tiers, ce dernier aura le droit d'intervenir dans l'affaire ».

On observera en passant que ce document, le projet des pays scandinaves, ne distingue pas entre les cas d'interventions, pas plus qu'il ne distingue entre les Etats Membres de la Société des Nations et les Etats non membres.

Eh bien, nous savons que si le texte qui est devenu l'article 63 du Statut, concernant l'interprétation d'un traité collectif, fut adopté à l'unanimité et très facilement, l'actuel article 62 donna lieu à plus de difficultés. Non pas sur son principe ; l'unanimité régnait quant à la nécessité et à l'opportunité d'une admission générale de l'intervention.

Citons, ici aussi, une monographie contemporaine (Farag) :

> « Tout le monde était d'accord qu'il fallait ajouter une disposition reconnaissant le droit d'intervention aux Etats tiers dans des cas autres que celui de l'article adopté, c'est-à-dire l'article 63. Celui-là même qui s'était déclaré formellement opposé au principe de la compétence obligatoire de la Cour, M. Ricci Busatti, n'a pas soulevé la moindre objection à cet égard. Il fallait seulement trouver le texte qui convînt... »

Je m'en voudrais d'infliger à la Cour une analyse détaillée de ce débat – fort *intéressant au demeurant – débat dont on peut résumer l'essentiel en trois* constatations qui concernent respectivement :

- la formule de l'« intérêt d'ordre juridique » ;
- la formule de l'alinéa 2 de l'article 62 : « la Cour décide » ;
- et enfin la position adoptée sur l'intervention face à l'article 36 du Statut.

Première constatation : Le comité de juristes s'est partagé, quant à la rédaction, en deux ou trois tendances : d'une part, il y avait les partisans de la simple référence aux « intérêts » d'un Etat tiers. Ainsi, M. Loder, des Pays-Bas, lord Phillimore et le jurisconsulte japonais Adatci. Dans le même sens allait l'article 48 du projet des cinq puissances neutres : « lorsqu'un différend soumis à la Cour touche les intérêts d'un Etat tiers, celui-ci a le droit d'intervenir dans le procès ».

D'autre part, le président Descamps proposa, en cours de débat, un texte prévoyant : « Lorsqu'un Etat estime que dans un différend il peut être porté atteinte à ses *droits* », ce n'est plus l'intérêt, c'est le droit. Et entre les deux tendances, si l'on peut dire, se situe par exemple le juriste brésilien Fernandes, favorable à un texte reconnaissant le droit d'intervention en cas, disait-il, d'« intérêt légitime ».

Une formule de compromis fut finalement trouvée par le baron Descamps. Cette formule de compromis c'est la référence à l'« intérêt d'ordre juridique » ; c'est le texte actuel de l'article 62 du Statut.

Deuxième constatation : Quant au rôle de la Cour et à la position de l'Etat tiers, les jurisconsultes de La Haye étaient également partagés : la majorité d'entre eux envisageait un véritable droit pour l'Etat tiers d'intervenir, un véritable droit d'intervention, par exemple lorsque l'Etat tiers estimait que le différend soumis à la Cour touchait ses intérêts. Tel était le sens, nous l'avons vu, du projet des cinq puissances neutres et du projet des Etats scandinaves.

Une autre tendance, représentée par lord Phillimore – bien dans la tradition judiciaire anglaise, je crois – accordait au juge international un très large pouvoir d'appréciation, voire un pouvoir discrétionnaire illimité pour apprécier l'admissibilité de l'intervention. Le texte proposé par lord Phillimore est tout à fait instructif à cet égard :

> « Lorsqu'un Etat tiers pense qu'un différend soumis à la Cour touche ses intérêts, cet Etat peut former une requête aux fins d'admission à l'intervention ; et la Cour, si bon lui semble, y fera droit. »

Mais la majorité des jurisconsultes de La Haye, nourrie de la tradition juridique continentale, ne pouvait pas accepter une pareille formule, et l'on s'arrêta donc finalement au texte actuel : « la Cour décide » – texte sur lequel nous aurons à revenir dans un instant.

Troisième constatation : Toutes les observations que l'on peut faire, quant aux travaux préparatoires, quant aux intentions des auteurs du Statut, pourrait-on m'objecter, seraient incomplètes ou fragiles si aucune allusion n'était faite au contexte et, surtout, à l'important changement opéré par le Conseil de la Société des Nations dans l'avant-projet du comité de juristes. Il s'agit, on l'a compris, du renversement des priorités entre le principe de la compétence obligatoire de la Cour, prévu par l'avant-projet des juristes, et le principe de la compétence facultative, posé par l'actuel article 36 du Statut.

Je suis donc obligé d'en dire quelques mots à ce stade de mon exposé, mais quelques mots seulement, puisque mon confrère M. Maurice Bathurst aura l'occasion de traiter la question dans son ensemble.

Il me suffira de dire ici que l'étude des travaux préparatoires conduit à exclure l'hypothèse selon laquelle le comité de juristes, après la décision du Conseil de la Société des Nations qui a conduit à l'article 36 actuel, aurait oublié de modifier ses textes relatifs à l'intervention. L'hypothèse d'une erreur de rédaction est tout simplement inconcevable déjà en raison de la nature même de l'institution de l'intervention et de son importance considérable pour tous les Etats admis à se présenter devant la Cour, qu'ils soient ou non Membres de la Société des Nations. Et je crois qu'il n'est pas sans intérêt de remarquer à ce propos que les Etats membres du Conseil de la Société des Nations qui s'étaient montrés à l'époque les plus opposés au principe de la juridiction obligatoire, telles l'Angleterre, l'Italie, sont ceux qui, tout au cours de l'élaboration du Statut, ont insisté et lutté pour une large admission de l'intervention.

En ayant terminé avec les travaux préparatoires, pour l'instant du moins, j'en arrive maintenant au deuxième des quatre éléments que je me suis proposé de passer en revue dans une recherche, que l'on pourrait appeler « historique », des éléments d'appréciation qui pourraient contribuer à l'interprétation du texte du Statut.

Ce deuxième élément ne nous retiendra pas longtemps car il faut bien dire qu'il apporte beaucoup plus de doutes que de certitudes : ce sont les discussions au sein de la Cour permanente lors de l'élaboration de son premier Règlement.

Par exemple, la question que je viens d'évoquer – celle de la juridiction obligatoire – fut fortement débattue. Elle révéla des opinions fort différentes, très partagées, et elle fut finalement laissée ouverte. M. l'*Attorney-General* de Malte vous l'a dit ce matin, le Président Loder – qui partageait l'avis de juges comme MM. Oda, Moore, lord Finlay – ne jugea pas pouvoir soumettre au vote l'insertion dans le Règlement d'une telle limitation, insertion, à son avis, contraire au Statut de la Cour.

D'une manière générale, la session préliminaire de la Cour permanente révéla un assez grand nombre de difficultés d'interprétation de l'article 62 et la Cour permanente décida finalement, nous le savons tous, « de ne pas trancher ces problèmes et de les résoudre au fur et à mesure que se présenteraient devant elle des cas concrets ». (G. Guyomar, *Le Règlement de la CIJ*, p. 378.)

On ne peut que rendre hommage à la sagesse de cette décision – quand bien même il faut avouer qu'elle ne nous facilite pas beaucoup, aujourd'hui, la tâche qui incombe à la fois à nos honorables contradicteurs et à nous-mêmes et qui est également celle de la Cour.

Laissons donc de côté le Règlement de la Cour. J'ai d'autant moins de raison de m'y attarder que, comme vous l'indiquait ce matin M. l'*Attorney-General* de Malte, nous n'y pourrions pas trouver, compte tenu de la hiérarchie des normes, d'indications contraires au texte du Statut.

Permettez-moi, par conséquent, d'en venir au troisième élément d'interprétation, très important celui-là : la pratique de la Cour.

L'audience est suspendue de 16 h 16 à 16 h 30

Comme je l'ai dit tout à l'heure je vais donc entamer un rapide survol de la pratique de la Cour, dont tout le monde sait qu'elle n'est pas très abondante et je commence bien entendu par la célèbre affaire du *Wimbledon*, la première à être soumise à la Cour permanente. Dans cette affaire la Cour permanente n'a guère eu l'occasion, on le sait, d'interpréter les dispositions du Statut sur

l'intervention dès lors que la requête de la Pologne n'avait suscité aucune opposition véritable de la part des Parties au litige.

Seul le Gouvernement britannique, par la voix de sir Cecil Hurst, fit observer qu'à son avis il serait préférable que la requête polonaise fût présentée en vertu de l'article 63. Et le Gouvernement polonais, par esprit de conciliation, modifia en conséquence la base de sa requête.

Il y aurait beaucoup à dire sur certaines des considérations énoncées dans cette affaire par l'agent du Gouvernement britannique, considérations dont les commentateurs s'accordent en général à penser qu'elles s'inspirent essentiellement du droit anglais et qu'elles méconnaissent le sens de l'article 62, tel que voulu par les auteurs du Statut, auteurs qui, selon un auteur contemporain : « loin de s'inspirer du droit anglais en cette matière s'en sont écartés en adoptant les principes du droit continental ».

Sur le terrain procédural – c'est-à-dire sur le terrain de l'intervention – une importante leçon me paraît se dégager de la décision de la Cour dans l'affaire du *Wimbledon*, une leçon qui, assez curieusement, paraît avoir échappé à la plupart des commentateurs : c'est que la Cour a parfaitement admis – et à pleine raison, ai-je besoin de le dire ? – la transformation de la requête polonaise, d'une demande d'intervention fondée sur l'article 62 en une demande d'intervention fondée sur l'article 63. Et d'ailleurs rien n'aurait empêché, soit dit en passant, que la requête fût fondée sur les deux articles à la fois.

Deuxième espèce : l'affaire *Haya de la Torre*.

Cette affaire concerne, on le sait, l'article 63 du Statut et non pas l'article 62. Mais cependant il paraît permis et même utile d'en tenir compte puisque, pour les auteurs du Statut et pour la doctrine dominante, voire unanime, l'article 63 loin de s'opposer à l'article 62 n'est qu'un cas particulier de l'article 62 et n'est qu'une partie de l'institution générale de l'intervention ; par conséquent, la pratique de la Cour dans l'affaire *Haya de la Torre* est susceptible de nous éclairer.

A ce stade préliminaire de mon exposé, je retiendrai seulement deux indications intéressantes :

Première indication : malgré les diverses objections soulevées par le Gouvernement du Pérou, la Cour a considéré comme recevable la demande d'intervention de Cuba.

Deuxièmement, l'intervention a été jugée recevable essentiellement sur la base des explications données en plaidoirie par l'agent du Gouvernement de Cuba intervenant, alors que, dans sa présentation initiale (celle de la requête d'intervention et du mémoire y annexé), il semble bien que la requête eût été irrecevable.

Et enfin j'en arrive à l'affaire la plus récente, l'affaire dite des *Essais nucléaires* et à la demande d'intervention de Fidji sur laquelle je me contenterai, à ce stade, de trois brèves observations :

La première c'est que la décision de la Cour consacre un principe général, un autre principe général de procédure, principe indiscutable en matière d'intervention. C'est le principe selon lequel dans tout procès – qu'il soit international ou interne – l'intervention doit nécessairement porter sur une instance déjà pendante et encore pendante, c'est-à-dire qu'elle doit avoir un objet. Et la Cour a estimé que la demande n'avait plus d'objet pour les raisons que vous connaissez. Au-delà de l'affirmation de ce principe général, la Cour ne s'est donc pas prononcée sur l'institution et la procédure de l'intervention si bien

qu'il est impossible, à notre avis, de tirer de l'affaire des *Essais nucléaires* des enseignements valables dans la présente espèce.

Au demeurant, il aurait été extrêmement malaisé à la Cour de se prononcer sur d'autres conditions de recevabilité de l'intervention, cela d'autant plus que Fidji n'avait pas ou pas encore fait valoir ses vues sur cette procédure, n'avait pas précisé l'objet et la nature exacts de sa requête.

Cela m'amène à ma deuxième observation : c'est que Fidji, selon une interprétation possible, voulait appuyer la thèse de certains Etats parties contre d'autres. Donc, dans une telle interprétation, il se serait agi apparemment de ce type bien déterminé d'intervention que l'on appelle en procédure l'intervention « accessoire » ou « adhésive ».

Mais, selon une autre interprétation possible, Fidji aurait en réalité cherché, non pas à « intervenir » à proprement parler, mais à s'immiscer dans le procès pendant comme une véritable partie, au sens fort et plein du terme.

Et dans les deux cas, que l'on adopte l'une ou l'autre de ces deux interprétations, le résultat est le même en ce qui nous concerne car il saute aux yeux que la requête de Fidji est totalement différente de l'intervention du Gouvernement de Malte dans le cas présent.

Cela m'amène à ma troisième et dernière observation : c'est donc par une erreur manifeste, à mon avis, que les observations du Gouvernement libyen s'appuient, et s'appuient fort longuement, sur les intéressantes observations et déclarations faites par certains membres de la Cour dans l'affaire des *Essais nucléaires*. Or ces observations et ces déclarations visent une situation procédurale, un contexte procédural qui – en fait comme en droit – est entièrement différent de celui de la présente espèce.

J'ai d'autant moins de raison de m'attarder à cette affaire que mon confrère Me Maurice Bathurst s'y référera dans son exposé sur la question de compétence.

Voilà pour la pratique de la Cour. Laissons donc, pour le moment, cette pratique pour jeter un coup d'œil à la doctrine internationale.

Lorsqu'on aborde la doctrine, lorsqu'on parcourt la doctrine en matière de procédure internationale, on ne peut s'empêcher d'être frappé par deux caractéristiques générales.

La première c'est que les monographies, les études spécialisées, consacrées à l'intervention sont inexistantes ou rarissimes et généralement très anciennes. Dans le temps – il est vrai limité – qui nous a été accordé pour préparer nos explications, je crois avoir lu, sinon tout, du moins une grande partie de la production doctrinale en la matière et je n'ai guère trouvé que deux monographies de 1927 et 1933, l'une d'un juriste sans doute égyptien écrivant en français, M. Farag, l'autre d'un savant allemand, M. Friede.

Ce qu'on trouve le plus souvent, ce ne sont pas des monographies, ce sont quelques paragraphes isolés, quelques phrases éparses, souvent même des notes en bas de page, sur les articles 62 et 63 du Statut, dans des études plus générales consacrées ou bien à l'activité de la Cour dans son ensemble ou bien à tel ou tel sujet particulier comme les exceptions préliminaires devant la Cour ou les effets des jugements de celle-ci.

Première constatation donc : l'extraordinaire pauvreté quantitative des sources doctrinales existant en matière d'intervention. Et cette pauvreté s'explique, à l'évidence, par la rareté des cas pratiques, nul n'ignorant en effet que la présente espèce (je me suis permis de l'indiquer en commençant) est la première dans laquelle la Cour se voit donner l'occasion de s'exprimer sur l'article 62.

La seconde constatation préliminaire n'est pas moins importante que la première : si l'on examine tout le matériel doctrinal qu'il est possible de rassembler, on ne peut manquer d'être frappé par les incertitudes, les contradictions, les lacunes qu'il révèle. Les confusions, les flottements sont constants ; ce qui frappe, c'est aussi et surtout l'extrême prudence qui caractérise les quelques commentaires des auteurs, parmi les plus éminents.

Et ici encore je crois que l'explication s'impose : l'absence presque totale d'expérience pratique de l'institution de l'intervention en procédure internationale. Cette absence presque totale d'expérience pratique n'a évidemment guère stimulé l'intérêt des juristes et ne leur a pas fourni la « matière première » indispensable à la réflexion scientifique.

En outre un savant peut être un très grand internationaliste et fort mal connaître le droit de procédure, donc s'y sentir très mal à l'aise, et voilà peut-être une autre raison des hésitations des auteurs.

C'est dire aussi l'importance exceptionnelle que revêt la présente espèce, non seulement, nous l'avons dit, pour l'Etat requérant, non seulement pour le développement du droit international mais aussi, subsidiairement sans doute, pour les progrès de la science du droit international, de cette doctrine des publicistes les plus qualifiés dans laquelle le Statut a vu si justement un « moyen auxiliaire de détermination des règles de droit ».

Quelles conclusions provisoires, quelles indications est-il permis de tirer quant à l'interprétation de l'article 62, de notre examen des travaux préparatoires, de la pratique de la Cour, à la lumière de ce qu'il existe de doctrine ?

C'est ce que je voudrais essayer de résumer maintenant en quelques brèves propositions, dans ce deuxième chapitre avant d'analyser plus en détail dans un troisième et dernier chapitre de cette première partie quelques points particuliers qui me paraissent mériter une analyse plus approfondie.

Première proposition : Les articles 62 et 63 du Statut ne visent pas deux institutions différentes, mais deux formes différentes d'une même institution. En réalité l'article 63 – et sur ce point au moins la doctrine paraît quasi unanime – n'est qu'un cas particulier de l'institution prévue par l'article 62.

D'ailleurs, comme il fut observé au sein de la Cour permanente lors de l'élaboration de son Règlement, rien n'empêche que, dans certains cas, les articles 62 et 63 du Statut trouvent simultanément leur application et on en trouverait une confirmation, s'il en était besoin, dans l'affaire du *Wimbledon* et dans les observations, que j'ai citées, du professeur Basdevant, agent du Gouvernement français, sur ce qu'il appelait très justement le « double motif d'intervention » de la Pologne.

Deuxième proposition : L'article 62 du Statut vise, englobe, permet plusieurs formes d'intervention et le fait que le texte parle seulement d'« intervention » au singulier n'y change absolument rien. On ne saurait prétendre, et d'ailleurs nul ne prétend à ma connaissance, y voir le signe que les auteurs du Statut n'auraient eu en vue qu'un seul type d'intervention et, soit dit en passant, le droit français de l'époque, qui a incontestablement exercé une forte influence sur le comité de juristes de La Haye, ne connaissait lui aussi qu'un texte parlant de l'intervention au singulier alors qu'aussi bien la jurisprudence française que la doctrine française distinguaient nettement et continuent à distinguer plusieurs types d'intervention volontaire.

Il ne fait donc absolument aucun doute que l'article 62 du Statut a admis, de la manière la plus large, plusieurs formes d'interventions. Cela ne résulte pas seulement de ce que j'appellerai la nature des choses, de la diversité des situations procédurales qui peuvent se présenter dans tout litige, de l'expérience acquise par toutes les nations en matière de procédure. Cela est confirmé, sans

discussion possible, par les travaux préparatoires. J'ai déjà cité l'intervention du jurisconsulte brésilien Fernandes. Citons encore le rapporteur du Comité des jurisconsultes, M. de Lapradelle :

> « Trois cas peuvent se présenter : une partie peut vouloir se ranger, soit près du demandeur, soit près du défendeur. Une partie peut faire valoir certains droits qui lui sont propres. Une partie peut demander que l'un des deux Etats en cause disparaisse parce qu'il n'est pas le véritable *dominus* du droit qu'il revendique. Dans ce cas l'intervention tend à l'exclusion... »

Si je me suis quelque peu étendu sur cette deuxième proposition, c'est-à-dire sur la pluralité des formes de l'intervention, c'est que l'on ne saurait trop souligner, me semble-t-il, un aspect aussi essentiel du Statut ; or, il s'agit d'une vérité qui, assez curieusement, est constamment méconnue. Faute d'avoir conscience de cette vérité, faute de tenir compte des distinctions élémentaires du droit de procédure en cette matière, on se condamne nécessairement à commettre les confusions et les erreurs qui émaillent tant d'écrits de doctrine, et qui caractérisent aussi, il faut bien le dire ici avec respect avant de le démontrer par la suite, une bonne part des observations qui ont été soumises à la Cour au sujet de notre requête.

Ma *troisième proposition* se réduira à un simple rappel. L'article 62 a un sens naturel, qu'il est permis de juger « clair » ; il ne prévoit aucune autre condition que celle qu'exprime son texte : il faut qu'un Etat « estime que, dans un différend, un intérêt d'ordre juridique est pour lui en cause ».

Le sens d'un pareil texte peut être déterminé sans difficulté exceptionnelle, sans recourir à l'hypothèse tout à fait hasardeuse d'un « oubli » et sans insertion de conditions implicites comme celle de l'existence d'une compétence obligatoire. Et il faut ici, selon l'excellent conseil donné par sir Cecil Hurst dans l'affaire du *Wimbledon*, suivre « d'aussi près que possible le texte même des articles » et cela « en raison de la façon minutieuse dont furent rédigés les articles 62 et 63 du Statut ».

Quatrième proposition : On a vu à la suite de quelles discussions au sein du comité de juristes le texte de l'article 62, alinéa 2, a été adopté : « La Cour décide. » Je n'y reviens pas, sinon pour signaler que cela ne veut en tout cas pas dire qu'elle déciderait « comme bon lui semble », selon la formule envisagée par lord Phillimore, ou à sa « discrétion » au sens français du terme, mais tout simplement en s'assurant, en vérifiant que les conditions légales sont bien réalisées. J'y reviendrai tout à l'heure.

Cinquième et dernière proposition : Elle concerne la nature de l'intervention devant la Cour. On lit par exemple, dans votre arrêt du 13 juin 1951, dans l'affaire *Haya de la Torre*, page 76 : « la Cour rappelle que toute intervention est un incident de procédure ».

« Toute intervention. » Le caractère incident de l'intervention devant la Cour internationale ne peut en effet faire l'objet d'aucun doute et il était du reste expressément signalé, sauf erreur de ma part, par l'article 59 du Règlement de 1926.

C'est d'ailleurs de la même façon que l'intervention est définie dans le *Dictionnaire de la terminologie du droit international* préfacé par le président Jules Basdevant, et par la doctrine dans son ensemble.

Ce caractère incident de l'intervention peut avoir un rôle capital et ses conséquences sont importantes à divers égards, dans le procès international aussi bien que dans le procès interne. Je me bornerai à indiquer à ce stade qu'aucune intervention, quel que soit son objet, quelle que soit sa forme du point de vue du tiers intervenant, ne saurait être considérée comme une demande introductive d'instance ; il est évident, par conséquent, qu'une inter-

vention n'a pas à être soumise aux mêmes conditions, notamment de compétence, que la demande. Je me bornerai à citer ici l'adage bien connu, le brocard bien connu : « Le juge de l'action est juge de l'exception. »

J'en arrive maintenant au troisième chapitre de cette première partie où il s'agira d'examiner de plus près, sur ce que j'appellerai la « toile de fond » ainsi tissée par cette introduction, quelques notions, quelques éléments essentiels de l'article 62, c'est-à-dire : 1) la notion d'intérêt d'ordre juridique ; 2) ce qu'il faut entendre par les termes « être en cause » ou « may be affected » ; et enfin 3) le contrôle de la Cour quant à ces divers éléments.

Ces trois thèmes, ces trois éléments, il convient de les examiner successivement pour la clarté du débat, mais sans perdre de vue bien entendu leur liaison intime, voire leur interdépendance.

Et tout d'abord une remarque préliminaire : des conditions requises du Gouvernement de la République de Malte pour intervenir en l'espèce, il faut bien entendu distinguer les conditions générales de toute action devant le juge, qu'il soit du reste international ou interne, telles la qualité pour agir ou la capacité d'ester en justice. Je crois vraiment superflu de m'y arrêter et je m'adresserai donc à la condition spécifique posée par l'article 62 en matière d'intervention.

A vrai dire, quand je dis la condition spécifique, je ne suis pas certain de parler correctement. A proprement parler, le texte de l'article 62 ne pose pas ce que l'on peut appeler une « condition » ou en tout cas pas clairement. Mais faisons abstraction, pour simplifier, de ces nuances de texte et admettons aux fins de la discussion qu'il s'agit bien, en pratique, sinon au sens technique du terme, d'une condition, la seule, nous l'avons vu, qui soit prévue par le Statut. On me permettra, pour la clarté des choses, de lire en entier les deux textes de l'article 62, bien qu'ils soient parfaitement connus de tous :

> « 1. Lorsqu'un Etat estime que, dans un différend, un intérêt d'ordre juridique est pour lui en cause, il peut adresser à la Cour une requête, à fin d'intervention.
>
> 2. La Cour décide. »
>
> « 1. Should a State consider that it 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.
>
> 2. It shall be for the Court to decide upon this request. »

Je voudrais me permettre d'attirer respectueusement l'attention de la Cour sur quelques éléments d'interprétation qui concernent tout d'abord la notion même d'« intérêt d'ordre juridique ».

Il n'est pas dans mes intentions de disserter longuement sur la notion d'« intérêt » ou sur les termes d'« ordre juridique ». On pourrait, à ce propos, être tenté d'évoquer par exemple la convention de La Haye de 1899 ou encore l'article 36, alinéa 2, du Statut.

Ce n'est, à mon avis, ni nécessaire ni utile en l'espèce. On peut d'ailleurs laisser ouverte, aux fins de la présente discussion, la question de savoir si, et dans quelle mesure, il serait légitime ou même possible de transposer sans autre, sur le terrain procédural de l'intervention, des indications recueillies dans d'autres domaines ou d'autres contextes.

Il est à peine besoin de rappeler tout d'abord que, en insérant les termes d'« ordre juridique », suivant la formule de compromis proposée par le baron Descamps, les auteurs du Statut se sont montrés un peu plus restrictifs que les systèmes juridiques internes dont ils s'inspiraient, systèmes qui souvent se contentent d'un « intérêt » tout court, un intérêt de l'intervenant. De même, je

n'insisterai pas sur l'opposition classique entre l'intérêt juridique et l'intérêt politique ou moral.

Prise en elle-même, cette condition de l'intérêt ne peut guère susciter de grandes difficultés : en principe, tout Etat est juge de ses propres intérêts, dont il est mieux à même que tout autre d'apprécier la réalité. Constatons donc d'abord que, selon la lettre du texte, il faut, et il suffit, sous réserve de ce que nous allons voir tout à l'heure à propos des deux autres thèmes, qu'« un Etat estime ou considère » qu'il a, comme le précise le texte anglais, un intérêt d'ordre juridique en cause dans un différend. On peut tirer de cette lecture la conclusion qu'en a tirée la Cour dans l'affaire *Haya de la Torre*, c'est que l'intervention doit réellement « avoir trait », en anglais *« relate to »*, à ce qui est l'objet de l'instance en cours. Et tout ceci nous conduit déjà inévitablement au deuxième thème, à la deuxième question, c'est-à-dire l'interprétation des mots « en cause ... dans un différend ». Mais avant d'y revenir, si vous le permettez, je dois faire encore une observation, non pas sur ce que l'article 62 prévoit, mais sur ce qu'il ne prévoit pas. En effet le texte parle dans les deux langues d'« un » intérêt et, dès lors que cet intérêt est d'ordre juridique, il semble bien qu'« un » intérêt, un intérêt quelconque, suffit, sous réserve évidemment de ce qui va suivre : « La Cour décide. » Que cet intérêt soit direct ou indirect, qu'il soit immédiat ou médiat, qu'il soit important ou minime, peu importe. Il faut que l'Etat considère qu'il a un intérêt.

On pourrait penser que ces constatations sont superflues autant qu'élémentaires, mais, s'agissant d'une « rédaction minutieusement élaborée », comme disait sir Cecil Hurst, il serait difficile de voir, dans l'absence de toute qualification quelconque apportée au mot intérêt, le résultat d'une inadvertance des auteurs du Statut, le résultat d'une sorte d'incapacité législative, le résultat d'un oubli. La claire volonté des auteurs du Statut a été, nous l'avons vu, d'admettre très largement l'institution de l'intervention, de la prendre du droit commun comme disait le président Descamps. Dans ces conditions, on comprend que personne ne semble avoir envisagé de demander à la Cour de vérifier par exemple le degré d'importance, le caractère plus ou moins direct, le caractère plus ou moins personnel de l'intérêt en cause. Non, lorsqu'un Etat estime, considère qu'il a « un » intérêt et que cet intérêt est « en cause » dans un différend, cela suffit, sous réserve qu'il soit d'ordre juridique et que la Cour décide. Nous allons y venir. Mais cela suffit. On voit du reste assez mal que le contrôle prévu par l'alinéa 2 puisse vraiment porter sur l'intérêt en tant que tel. En revanche le Statut a prévu ce contrôle sur un autre objet et d'un autre point de vue, ce qui m'amène au deuxième thème de ces quelques observations.

En effet *l'intérêt d'ordre juridique doit être en cause dans le différend* pendant devant la Cour ou, comme l'exprime un peu plus précisément le texte anglais, il faut que cet *« interest of a legal nature . . . may be affected by the decision in the case »*.

J'ai déjà dit, mais il faut peut-être le rappeler, que le fait que, selon l'article 62, l'intérêt doit être en cause dans un différend a conduit la Cour à déduire que l'intervention elle-même devait « avoir trait » à ce qui est l'objet de l'instance, *« relate to »*.

Quant aux termes « être en cause », on remarquera d'abord leur caractère extrêmement général, neutre, très large. Il semble bien en être de même du terme anglais *« affected »*.

Voilà un langage extrêmement large, extrêmement général, et ce fait mérite peut-être d'être relevé, surtout si l'on compare les termes du Statut avec ceux de certaines législations ou jurisprudences internes qui, on le sait, étaient extrêmement présents dans l'esprit des juristes de La Haye, membres du comité de

1920. En effet on trouve, dans plusieurs droits internes, comme une condition de l'intervention, cette exigence que l'intérêt de l'intervenant risque d'être négativement affecté, *impaired*, compromis, *endangered*. Rien de semblable dans le texte du Statut.

Pour l'article 62, il suffit que l'intérêt soit en cause, on dirait aujourd'hui concerné, c'est-à-dire, pour traduire exactement le texte anglais, qu'il suffit que l'intérêt puisse être affecté, puisse être touché de n'importe quelle manière, défavorable bien sûr, mais touché directement, indirectement, immédiatement, médiatement, profondément, légèrement, par la décision qui sera rendue entre les parties à l'instance pendante devant la Cour.

Mais l'important n'est peut-être pas là. L'important, c'est que, de par la nature des choses, il est absolument impossible au moment de l'intervention, au moment du dépôt de la requête et même au moment de la décision sur l'admissibilité de la requête d'intervention, de savoir ce que sera la décision dans le procès en cause. Par conséquent il est tout aussi impossible de dire ce que pourront être les répercussions éventuelles sur l'intérêt d'ordre juridique que l'Etat intervenant estime être en cause.

Dans sa requête, au paragraphe 4, le Gouvernement de Malte a fait remarquer que, pour cette raison,

> « it . . . cannot be known whether any legal interest of Malta will in fact be affected by that decision, or not. This must therefore be a matter of possibilities – as Article 62 of the Statute recognizes by its use of the phrase "which may be affected" ».

A titre d'illustration je voudrais respectueusement attirer l'attention de la Cour sur quelques décisions de juridictions internationales sur ce point là, par exemple et d'abord sur celle des tribunaux mixtes qui, après la première guerre mondiale, ont été institués par les traités de paix et qui siégeaient, ce n'est peut-être pas sans importance ni intérêt de le noter au passage, à l'époque même des débuts de la Cour permanente de Justice internationale.

Premier exemple : le tribunal arbitral mixte franco-allemand, dans une décision du 27 mai 1921, sous la présidence du grand juriste néerlandais Asser, dans une affaire *S.A. du Charbonnage Frédéric-Henri c. Etat allemand*.

Dans cette affaire le tribunal arbitral mixte applique son règlement de procédure, dont l'article 20 reconnaissait le principe de l'intervention : « toute personne qui prétend faire valoir un intérêt légitime dans une instance peut intervenir au procès ». Mais l'important n'est pas là. Se fondant sur, « les faits contenus dans la requête en intervention », des faits allégués mais nullement prouvés encore bien entendu, le tribunal a constaté que les requérants en intervention « pouvaient » avoir un intérêt à intervenir. Et il a pris cette décision malgré l'opposition d'une des parties à cette demande d'intervention. Il a pris cette décision pour un motif extrêmement significatif qu'il me paraît utile de citer intégralement :

> « il suffit de constater que, *dans l'hypothèse* que les faits allégués par les requérants soient exacts, ceux-ci peuvent avoir un intérêt dans l'instance, la justification de ces faits devant être réservée pour la discussion du fond ».

Décision parfaitement justifiée, parfaitement correcte.

Je signale en passant un tout petit détail, c'est que dans la décision imprimée dans le recueil officiel, les mots « dans l'hypothèse » sont imprimés en italiques. Le tribunal a voulu insister sur les mots « dans l'hypothèse » où les faits allégués par les requérants seraient exacts.

Deuxième exemple : tribunal arbitral mixte germano-belge, décision du 22 décembre 1921, *Compagnie internationale des wagons-lits c. Etat allemand.*

Même attitude de ce tribunal que dans l'affaire précédente : il admet l'intervention malgré l'opposition d'une des parties et constate que l'intervenant « a, incontestablement, le plus grand intérêt » à intervenir car, dit la décision, « il est à craindre » que l'intervenant subisse un préjudice.

Mieux encore, pour arriver à cette conclusion, le tribunal se fonde, non pas même sur des faits prouvés ni même des faits allégués, mais sur certaines circonstances que, dit-il, « on ne pourrait même imaginer ».

Troisième exemple : même jurisprudence toujours de la part du tribunal arbitral mixte hungaro-tchécoslovaque, dans une série d'arrêts, par exemple dans une décision du 23 juillet 1927, affaire *Comte Andrassy c. Etat tchécoslovaque,* où, je passe sur les détails, le tribunal considère que l'intervenant n'avait pas de droit et qu'il n'avait qu'un espoir, mais que cet espoir, cette expectative, peut constituer un intérêt légitime.

On pourrait multiplier les citations. Quant à la commission arbitrale des biens, droits et intérêts en Allemagne, elle est beaucoup plus récente et peut-être moins intéressante pour évoquer l'état d'esprit contemporain des débuts de la Cour permanente. Sa jurisprudence est inévitablement un peu différente sur certains points, ce qui s'explique déjà par le fait que son règlement de procédure se bornait à admettre le principe de l'intervention mais sans fixer aucune condition. Par conséquent, elle n'avait pas à sa disposition un texte comme le Statut de la Cour.

Il est cependant intéressant de noter ici aussi l'attitude ouverte à l'intervention et la jurisprudence constante de la commission arbitrale qui admet l'intervention, qui y voit un principe généralement admis pour autant, dit-elle, qu'un intérêt légitime puisse être affecté. C'est ainsi, pour me contenter d'un exemple, que, dans une affaire *Royaume de Grèce et autres c. République fédérale d'Allemagne,* décision n° 42 du 11 mars 1959, des requérants nommés Rammos avaient demandé à être admis comme parties intervenantes. La commission arbitrale a admis leur intervention pour le motif que : « Il semble que (les requérants) aient un intérêt légitime qui pourra être affecté par la décision devant être prise dans la présente affaire. »

Ce que l'on peut donc rassembler de la jurisprudence internationale sur les conditions de l'intervention, et je viens d'en citer quelques échantillons assez caractéristiques, permet je crois, de résoudre, et de résoudre en plein accord avec l'esprit du Statut de la Cour, une question de procédure que le texte de l'article 62, à s'en tenir à la lettre, laisse indécise. Cette question, c'est celle de savoir si le requérant en intervention a une preuve à apporter et, si oui, laquelle ?

A strictement parler, le texte de l'article 62, et M. l'*Attorney-General* de Malte y a déja fait allusion ce matin, n'exige pas cette preuve ; mais peu importe. Admettons pour les besoins de la discussion que, même si chaque Etat est en principe juge, et meilleur juge, de l'existence de son intérêt, il devra tout de même rendre vraisemblable l'existence d'un intérêt, et bien sûr d'un intérêt d'ordre juridique ; mais notre discussion actuelle ne porte pas sur ce point-là.

Ce que je voudrais mettre ici en évidence, c'est la leçon qui se dégage de l'expérience des tribunaux arbitraux mixtes et autres juridictions internationales, une leçon qui est confirmée par la nature des choses, par la nature du problème procédural qui se pose et, mais j'anticipe un peu, par l'expérience générale des systèmes de procédure. Cette leçon on peut la résumer ainsi très simplement.

Peu importe en réalité que les règles qui régissent telle ou telle juridiction

internationale précisent expressément ou pas que l'intervenant doit prouver l'existence d'un intérêt pouvant être affecté ou que, comme c'est le cas pour le Statut de la Cour, il ne demande pas cette preuve. Dans les deux cas, la juridiction internationale est nécessairement amenée, par la force des choses pourrait-on dire, à se contenter d'une allégation et d'une vraisemblance concernant l'existence de l'intérêt juridique qui est en cause. Car ce qui est décisif, ce n'est pas seulement que l'intérêt vraisemblable ou justifié *prima facie* comme disent les juristes anglo-saxons, justifié d'une façon suffisante, soit d'ordre *juridique et pas politique ; mais c'est encore que cet intérêt, et c'est là l'essentiel,* soit en cause dans le différend. Qu'il puisse être affecté, qu'il puisse être touché par la décision qui sera rendue, c'est cela le point cardinal, c'est cela l'essentiel, c'est cela la difficulté principale.

Or on constate ici, partout, la même expérience judiciaire. Le juge international, en ce qui concerne cet élément-là, cet élément de preuve, ou si l'on veut cette condition, se contente d'une simple possibilité. Pourquoi ? Parce qu'il ne peut pas faire autre chose ! Il ne peut exiger ni la preuve de répercussions imprévisibles, ni la preuve de l'effet qu'aura la décision à rendre, ni même la preuve de la probabilité ou de la vraisemblance !

Le juge international doit nécessairement, s'il ne veut pas risquer de dénier justice à l'intervenant, se contenter d'une pure et simple possibilité. Et même, le cas échéant, d'une possibilité lointaine.

J'ai cité quelques décisions des tribunaux arbitraux mixtes. Ce qui est frappant, c'est d'y retrouver les termes comme « crainte », « espoir », « expectative », *« hypothèse »*, et autres termes semblables. On y voit donc que des répercussions simplement possibles suffisent à justifier l'intérêt, bien entendu sous réserve de l'abus de droit et de la mauvaise foi.

Il suffit même que le juge international puisse imaginer des circonstances dans lesquelles la décision qui sera rendue pourrait avoir un effet, à l'heure qu'il est, imprévisible. Dès lors qu'un effet de la décision à rendre sur un intérêt d'ordre juridique du demandeur en intervention ne peut pas être exclu, l'intervention doit être admise.

En résumé, on ne saurait attendre du requérant, par la force des choses, qu'il fournisse la preuve que l'intérêt juridique qu'il allègue sera touché ou affecté.

On pourrait penser que tout cela va de soi, on pourrait penser que ces principes ne méritent guère d'être précisés ici et que je suis en train, qu'on me pardonne l'expression, « d'enfoncer des portes ouvertes ». Mais je ne le crois pas car, dans ce domaine si mal connu de la procédure internationale, les confusions ne sont pas rares à cet égard et on en trouve un récent mais clair témoignage dans les observations du Gouvernement libyen au sujet de ce que l'Etat intervenant, je cite le paragraphe 25 des observations libyennes, « doit établir » ou sur ce que le Gouvernement libyen appelle, je cite le paragraphe 31, le « niveau de précision nécessaire pour qu'une intervention soit admise ».

De ces confusions au sujet de ce qu'il est permis d'attendre du requérant en intervention, permettez-moi, pour en terminer sur ce sujet, de vous soumettre encore deux illustrations supplémentaires, l'une tirée des débats de la Cour permanente et l'autre de la jurisprudence des tribunaux arbitraux mixtes.

Pour commencer par cette dernière, je me référerai très brièvement à une décision du tribunal arbitral mixte hungaro-tchécoslovaque, du 27 février 1927, *Ungarische Landescentral Sparkassa, etc. c. Etat de Tchécoslovaquie et Malterie franco-suisse*. Dans cette affaire, l'une des parties soulevait une exception d'irrecevabilité pour s'opposer à la demande d'intervention. Ceci au motif que l'intervenant n'avait pas prouvé l'existence de l'intérêt juridique allégué et

insistait sur le fait qu'à son avis l'intérêt « doit être fondé juridiquement et moralement ». Le tribunal arbitral mixte a écarté cette exception. Il a admis l'intervention, et avec pleine raison comme l'observe très justement un juriste tunisien, M. Mabrouk, dans son ouvrage *Les exceptions de procédure devant les juridictions internationales* (Paris 1966), avec une préface de Mme Suzanne Bastid :

> « Exciper de l'absence d'un « intérêt » « fondé juridiquement et moralement » pour opposer l'irrecevabilité d'une intervention, équivaut à reprocher à l'intervenant de n'avoir pas prouvé un droit lui appartenant. Une telle exception ne saurait être accueillie... »

Et plus loin :

> « L'appréciation de l'intérêt pour agir n'est pas enfermée dans un cadre trop étroit : l'intérêt se déduit selon les circonstances, il lui est conféré « un sens suffisamment large. »

On ne peut qu'approuver le commentaire de ce juriste tunisien.

La même conclusion logique se dégage des discussions survenues au sein de la Cour permanente lors de l'élaboration de son premier Règlement.

La discussion portait sur le droit de regard du demandeur en intervention sur les pièces de procédure présentées par les parties. La Cour permanente avait, dans un premier stade, adopté un texte proposé par M. Altamira, qui n'accordait le droit de regard à l'Etat tiers qu'avec deux ordres de limitation. Première limitation, qui ne nous intéresse pas ici, mais que je cite tout de même : le demandeur en intervention ne pouvait consulter que les mémoires et les contre-mémoires et non pas jouir d'une faculté plus étendue, comme l'auraient souhaité le Président Loder et lord Finlay. Deuxième limitation, plus intéressante ici, prévue par M. Altamira : seul aurait eu un droit de regard un Etat : « qui aurait *justifié* devant la Cour de sa faculté d'intervention dans l'affaire, en vertu de l'article 62 », etc.

Or, comme l'écrit un commentateur contemporain, M. Farag :

> « Le droit de regard sur les pièces n'a comme raison d'être que de donner aux tiers la possibilité de connaître s'il y a pour eux un intérêt d'ordre juridique en cause dans un litige entre d'autres Etats et de savoir éventuellement s'ils doivent intervenir en vertu de cet intérêt. Soumettre le droit de regard à la justification préalable de l'intervention équivaudrait à rendre ou bien impossible l'intervention, ou bien inutile le droit de regard. »

On ne saurait mieux dire et la Cour permanente l'a bien compris car, suite aux observations de son comité de rédaction composé du Président Loder, de M. Weiss et de lord Finlay, elle s'est aperçue du « caractère tout à fait illusoire de la faculté qu'accordait aux tiers le texte de M. Altamira » et elle a modifié sa première décision pour adopter ce qui était alors l'article 36 de son Règlement.

La question du droit de consulter ou de recevoir copie des pièces de la procédure n'est pas du tout l'objet de la présente discussion, mais l'épisode est très significatif et il méritait, je crois, d'être cité au minimum par analogie, pour démontrer le caractère fallacieux, relevant véritablement du cercle vicieux, de l'objection qui serait opposée à une requête d'intervention au motif que l'intervenant n'aurait pas établi, comme dit le Gouvernement libyen, ou fait la preuve que son intervention était bien fondée, alors que, comme on vous l'a dit ce matin, il n'a pas pu prendre connaissance du dossier !

J'en arrive au dernier point particulier de ce passage de mon exposé, qui

concerne le rôle et les pouvoirs de la Cour, c'est-à-dire à l'article 62, paragraphe 2.

J'en arrive à un élément essentiel, à un élément capital, mais il ne me retiendra pas longtemps. Le paragraphe 2 prévoit que : « La Cour décide. » A ce sujet vous me permettrez de soumettre à la Cour trois petites observations sur un texte qui appelle tout de même une certaine interprétation puisque, après tout, il ne dit pas expressément comment et sur quelle base la Cour décide.

Première observation, qui est purement linguistique : Il n'est peut être pas tout à fait superflu de signaler d'emblée l'équivoque très fréquente dans la doctrine qui nous menace en cette matière et dont la source pourrait bien être liée à ce que les spécialistes de la traduction et de l'interprétation appellent parfois les « faux amis du traducteur ». Vous savez qu'il s'agit de ces mots apparemment semblables dans deux langues, mais qui ont ou peuvent avoir des sens très différents ou partiellement différents. Un bon exemple en est le mot *discretion* anglais et le mot « discrétion » en français.

Or, on lit souvent dans la doctrine et même chez d'excellents auteurs – et c'est peut être lié à cette confusion linguistique – que le pouvoir de la Cour dans le cadre de l'article 63 serait nul ou quasiment nul, alors que dans le cas de l'article 62 il serait total. Il serait « of a discretionary character ». Il y aurait donc, si l'on suit cette ligne de pensée une opposition totale entre les articles 62 et 63 et ce genre d'observation revient fréquemment, je m'en excuse auprès de mes confrères de langue anglaise, dans les écrits de la doctrine d'origine américaine ou anglaise.

Or, il me semble qu'il y a ici un danger de malentendu. Et ce malentendu semble être apparu dès les délibérations du comité de juristes de 1920 et dès les délibérations de la première Cour permanente au sujet de son Règlement. Cela est assez curieux puisque les mots *discrétion* ou *pouvoir discrétionnaire* ne figurent nulle part dans les articles 62 et 63.

La raison de tout cela est que le risque d'équivoque n'est pas lié seulement à une question de langue mais bien entendu, et j'en arrive à ma deuxième observation, au fond du problème.

Deuxième observation : Sur le fond du problème, quelle a été l'intention des auteurs du Statut ? Je rappellerai ici deux éléments décisifs des débats de La Haye sur ce point. D'abord, je l'ai dit, fidèle a une conception semble-t-il anglaise, lord Phillimore avait proposé un texte que j'ai cité et selon lequel la Cour décide, si bon lui semble, d'admettre ou de ne pas admettre l'intervention. Cette formule a été rejetée. La majorité des jurisconsultes de La Haye, sans aucun doute influencés par ce qu'on peut appeler en abrégé la « conception continentale », n'envisageaient nullement d'accorder au juge international une pareille liberté d'action, la liberté d'être un juge de l'opportunité.

Tout démontre en effet qu'ils ont voulu confier au juge international, conformément à cette conception générale continentale, le droit et le devoir de vérifier si les conditions légales du paragraphe 1 étaient remplies dans un cas concret, mais non celui, pour normal qu'il puisse peut-être paraître à un juriste de la tradition de *common law*, de rejeter la demande d'intervention quand bien même les conditions légales seraient réalisées.

Troisième observation : La pratique des juridictions internationales confirme ce principe général de procédure. Voir par exemple la jurisprudence des tribunaux arbitraux mixtes. Quant à la jurisprudence de la Cour, le peu qu'il en existe me paraît confirmer aussi cette interprétation. On lit en effet dans la première décision rendue le 28 juin 1923 par la Cour permanente sous la présidence de M. Loder, page 12, que l'une des interventions prévues par le

Statut de la Cour, celle de l'article 62, a « pour fondement, l'intérêt d'ordre juridique allégué par l'intervenant ; et il appartient à la Cour de ne l'accueillir que si l'existence de cet intérêt lui paraît suffisamment justifié ». La Cour constate ensuite que le Gouvernement polonais, « renonçant à suivre la voie exclusive dans laquelle il avait paru s'engager en premier lieu, entend aujourd'hui se prévaloir du droit que lui confère l'article 63 du Statut », etc. Et j'en arrive au point qui m'intéresse ici : ce qui, poursuit l'arrêt, « dispense la Cour d'examiner et de vérifier si vraiment l'intervention de la Pologne dans le litige soumis à son jugement est justifiée par un intérêt d'ordre juridique, au sens de l'article 62 du Statut ». Il me paraît donc certain que, au sens du Statut, la Cour peut et doit vérifier si la condition posée par l'article 62, paragraphe 1, est réalisée. Et cela implique en pratique — nous l'avons indiqué — que la Cour vérifie le caractère d'ordre juridique de l'intérêt allégué, probablement aussi la vraisemblance de l'existence d'un intérêt, qui est un élément nécessairement lié, la jurisprudence internationale le montre, à la pure et simple possibilité que cet intérêt puisse être touché, puisse être affecté par la décision à rendre.

En conclusion, il est permis de penser que, au sens de l'article 62 du Statut, dès lors qu'elle a constaté le caractère d'ordre juridique de l'intérêt allégué, rendu vraisemblable par le requérant, dès lors qu'elle a constaté la possibilité que cet intérêt soit éventuellement touché par la décision qui sera rendue et que nul ne peut prévoir, la Cour doit admettre l'intervention et a l'obligation juridique de la déclarer recevable.

De cette conclusion on trouve une confirmation très nette — j'allais dire pour une fois — dans les débats de la Cour permanente à propos de son premier Règlement. En effet la Cour a rejeté la thèse du juge Beichmann qui prétendait que la condition envisagée par l'article 62 n'était pas nécessairement la seule. Pour le juge Beichmann, il ne suffisait pas que la Cour soit d'avis que le requérant a justifié un intérêt d'ordre juridique, etc. : « Si la Cour estime que cette condition est remplie, la Cour pourra refuser de donner suite à la demande. » Voilà la proposition Beichmann, et cette thèse a été rejetée. Cette thèse, peut-être assez proche de la proposition anglaise déjà rejetée par les auteurs du Statut, ne fut pas retenue. Les malentendus et les préjugés ayant la vie dure, la même thèse — inutilement d'ailleurs — était encore évoquée, vous le savez, par l'agent du Gouvernement britannique dans l'affaire du *Wimbledon*.

Enfin, je suis tenté d'ajouter une toute dernière remarque en ce qui concerne la vérification par la Cour de l'existence d'un intérêt d'ordre juridique pouvant être en cause dans la présente espèce. Si l'on fait abstraction un instant, pour les besoins de l'analyse, des conditions particulières prévues par le Statut pour le cas de l'intervention, on sera enclin à admettre que la condition de l'intérêt ne peut être qu'un exemple, certes un exemple particulier, mais un exemple quand même, d'une exigence plus générale du droit international — et d'ailleurs du droit interne aussi — qui exige non seulement de l'intervenant mais du demandeur en justice qu'il ait un intérêt à sa demande.

Je me permets de citer ici une fois de plus le Président Winiarski dans son opinion dans l'affaire du *Sud-Ouest africain*. Le Président Winiarski, citant un ouvrage néerlandais, disait ceci : « Pourquoi, le précepte vaudrait-il uniquement pour l'intervenant et non pas pour le demandeur ? » Il s'agissait du précepte selon lequel il faut avoir un intérêt pour agir.

Et le Président Winiarski poursuivait : « C'est un principe de droit international qui lui est commun avec les ordres juridiques nationaux. »

En examinant les demandes qui lui sont soumises aujourd'hui par la Libye

et par la Tunisie dans un compromis qui fixe comme sa toute première mission la détermination ou l'indication de certains principes, de certaines règles, de certaines tendances, la Cour ne manquera pas de se poser, dans ce contexte aussi, la question de l'intérêt, non pas quant à l'intervention mais quant à la demande. Or les Parties à l'instance ont allégué, ne fût-ce qu'implicitement, *l'existence d'un intérêt à la détermination par la Cour des principes, règles,* tendances, etc., concernant la détermination du plateau continental, sa délimitation dans une certaine région de la Méditerranée.

Mais alors peut-on sérieusement imaginer, comme semblent pourtant le faire nos estimés contradicteurs, peut-on imaginer un instant qu'un juge international puisse simultanément, et surtout après avoir entendu aujourd'hui les plaidoiries de mon confrère Me Lauterpacht, admettre l'intérêt des parties à l'instance principale et refuser d'admettre l'intérêt de l'intervenant à la détermination de ces principes ?

J'aborde la seconde partie de mon exposé.

Les sources que nous avons passées en revue jusqu'ici, le texte du Statut, les travaux préparatoires, les délibérations de la Cour permanente sur son premier Règlement, la pratique de la Cour ou ce qu'il en existe, ces sources laissent donc sans solution, il faut bien le dire, un grand nombre de questions du droit international de procédure. Ces sources ne fournissent pas, ou guère, d'indications, par exemple, sur les diverses catégories et sous-catégories d'interventions, ou sur la position procédurale exacte, dans chacune de ces catégories, de l'intervenant par rapport aux parties à l'instance pendante, ou encore sur les effets du jugement qui sera rendu dans une instance en cas d'intervention. Toutes ces questions-là restent à vrai dire indécises, non résolues.

Cela étant il convient de rechercher si d'autres sources permettraient d'apporter des éclaircissements complémentaires, éclaircissements indispensables. Il convient donc de jeter maintenant un coup d'œil en particulier sur la théorie générale du droit de procédure. C'est ce que je me propose de faire dans cette seconde partie qui sera sensiblement plus courte que la première.

Premier point, pourquoi se tourner vers la théorie générale de la procédure ? Est-il vraiment besoin de justifier, dans les conditions que nous connaissons, le recours aux enseignements de la pratique et de la science de la procédure interne. S'il est un cas où cette référence apparaît – je ne dis pas seulement utile –, mais indispensable, c'est bien ce cas où il s'agit d'interpréter pour la première fois dans l'histoire l'article 62 du Statut. Si je suis convaincu qu'il convient de consulter ici les principes généraux et les notions fondamentales de la procédure civile interne c'est, en résumé, pour deux raisons, l'une négative, l'autre positive. La raison négative est toute simple ; c'est dans le caractère lacunaire, le caractère encore très peu développé, il faut le dire, du droit procédural international qu'on trouve cette raison.

La seconde raison, positive, est double. Elle est double parce qu'elle est à la fois générale et spéciale. Elle est générale en ce sens qu'elle touche l'ensemble de la procédure internationale. Et elle est spéciale en ce sens qu'elle est tout à fait particulière à l'institution de l'intervention dans un procès. Expliquons-nous en deux mots : du point de vue général, quand bien même le procès international sur divers points présente des caractères spécifiques incontestables et incontestés, il n'en demeure pas moins qu'il offre aussi des analogies multiples et des analogies frappantes avec le procès interne. Ce qui suffit d'ailleurs à expliquer le nombre tout à fait remarquable de références aux principes de la procédure interne que l'on trouve sous la plume des juges de la Cour permanente et des juges de la Cour internationale, qu'ils s'expriment dans leur activité judiciaire ou qu'ils s'expriment dans une activité scientifique.

J'épargnerai à la Cour des citations bien connues. Devant un certain embarras de richesse à cet égard, je me bornerai à un seul exemple, à une seule référence empruntée à l'un des très grands spécialistes de la procédure internationale, à l'un des éminents représentants de la science juridique italienne dont on connaît l'importante contribution qu'elle a fournie en particulier au développement du droit procédural international, j'ai nommé M. Gaetano Morelli, alors professeur, dans un cours à l'Académie de La Haye sur « La théorie générale du procès international ».

Dans un chapitre sur la nature juridique du procès international, le professeur Morelli distingue dans l'activité des Etats ce qu'il appelle « deux moments » ; un premier moment constitutionnel et normatif (c'est la création soit d'un tribunal arbitral, soit de la Cour) et un second moment, le moment du procès proprement dit.

M. Morelli écrit ce qui suit :

> « Dans le second moment, c'est-à-dire en ce qui concerne le procès proprement dit, les Etats apparaissent comme parties dans le procès dans la même position que celle des parties entre elles dans le procès interne. »

Les Etats apparaissent comme parties dans le procès dans la même position que celle des parties entre elles dans le procès interne. Voilà en bref pour la raison que j'ai appelée générale.

D'autre part, une raison positive spéciale justifie tout particulièrement en l'espèce, et suffirait à elle seule à justifier, que l'interprète de l'article 62 du Statut s'appuie sur les renseignements de la théorie générale de la procédure interne et sur les expériences de la procédure comparée. Je me permets, pour éviter un malentendu, de signaler au passage que cette démarche, qui consiste à s'appuyer sur les enseignements de la théorie générale de la procédure, sur les expériences de l'analyse comparative, est une démarche plus large que celle qui se ramènerait seulement à rechercher l'existence des principes généraux de droit reconnus par les nations civilisées dans les législations internes au sens de l'article 38 (paragraphe 1 *c)*) du Statut de la Cour. Cette raison spéciale c'est tout simplement que les auteurs du Statut, les éminents jurisconsultes du comité consultatif réunis à La Haye en 1920, représentant la plupart des systèmes juridiques du monde, se sont appliqués sans contestation possible, à introduire, d'après un commentateur contemporain, « dans la justice internationale les principes de la justice interne ».

Dans son rapport au Conseil de la Société des Nations sur l'avant-projet du comité de juristes, le rapporteur, M. Léon Bourgeois, s'exprimait de la façon suivante :

> « Vous dûtes remarquer avec quel soin les juristes de La Haye ont essayé de rapprocher l'organisation et le fonctionnement de la Cour nouvelle des conditions habituelles de l'administration de la justice interne. »

Et je cite à nouveau le même commentateur, M. Farag :

> « Pour se rendre compte de ce qu'il faut appeler l'intimité qui règne entre le droit international et le droit interne en cette matière [en matière d'intervention], il suffit de jeter un regard sur le procès-verbal de la 28e séance du comité de juristes de La Haye où furent élaborés les deux articles sur l'intervention, les articles 62 et 63 du Statut. »

Je ne multiplierai pas les citations, j'en ai déjà fait quelques-unes, mais je tiens à ajouter tout de même l'observation du président du comité de juristes, le

baron Descamps, jurisconsulte belge, selon qui : « La solution de la question de l'intervention doit être empruntée au droit commun », ce qui amène le président Descamps à proposer le texte qu'il a rédigé sur la base de cette thèse, un texte qui fut unanimement adopté par le comité et qui fut conservé dans la rédaction définitive du Statut.

Tout cela, on peut le dire, me paraît absolument essentiel si l'on veut comprendre la notion de l'intervention dans le Statut.

Avant d'entamer un survol, ce ne sera guère qu'un survol, de la théorie générale de la procédure, tâche ingrate s'il en est, il n'est peut-être pas superflu que je tente de prévenir deux malentendus éventuels.

Premier point : En évoquant ici quelques notions ou questions de procédure interne je n'entends nullement affirmer, ni même sous-entendre, que toutes ces questions vont se poser ou se poseront ici. Je n'en sais rien, nous ne le savons pas ou, plus exactement, nous ne le savons pas encore et nous pouvons d'autant moins le savoir avec certitude que le Gouvernement de Malte n'est que fort imparfaitement renseigné, on vous l'a dit, sur les positions exactes des Parties à l'instance actuellement pendante. Il se peut donc qu'un certain nombre des questions que je vais brièvement évoquer ne se posent finalement pas. Il est possible que la Cour puisse parvenir à la décision sur la requête d'intervention sans prendre explicitement partie sur l'une ou l'autre de ces questions. Mais cette incertitude qui est tout à fait liée à la nature des choses et à laquelle nous ne pouvons rien, ne saurait nous dispenser, me semble-t-il, du devoir de fournir à la Cour le maximum d'éléments d'appréciation dont elle aura besoin pour résoudre ce que, je dois le rappeler, placé dans une situation comparable à la nôtre en l'affaire du *Wimbledon*, le futur président Basdevant, représentant le Gouvernement français, appelait si justement un problème complexe et délicat.

Deuxième observation : En invitant respectueusement la Cour à se référer, dans la mesure où elle l'estimera nécessaire, à des notions et à des principes généraux de procédure interne je ne songe pas un instant à suggérer — et j'essaie de couper court ici à une confusion classique — je ne sais quelle transposition automatique, ni à méconnaître les différences de structures entre la société internationale et les sociétés internes. Il s'agit ici de tout autre chose, il s'agit ici tout simplement de respecter le sens véritable de l'article 62, de respecter la nature de cette institution telle que l'a voulue le comité de juristes de La Haye.

Dans un autre contexte, celui de l'article 59 du Statut, dans le contexte procédural de la notion classique de la chose jugée et des limites de la chose jugée, le célèbre juge et grand juriste italien Anzilotti, dans son opinion dissidente à l'arrêt n° 11, énonçait des considérations qui me paraissent s'appliquer parfaitement, et je dirai presque à fortiori, à l'institution de l'intervention. Ce qu'il disait de la notion procédurale de la force de la chose jugée me paraît s'appliquer admirablement à la notion procédurale de l'intervention et c'est pourquoi je me permets de citer en entier le passage de cette opinion. Après quoi, si vous le voulez bien, ce pourrait être un moment convenable d'interruption, mais encore une fois je suis tout à fait prêt à continuer.

Anzilotti disait, après avoir donné son opinion fondée sur des principes internes :

> « Si, pour arriver à ce résultat, je me suis fondé sur des principes tirés de la procédure civile, c'est parce que je me croyais autorisé à le faire grâce aux considérations suivantes ... le Statut de la Cour, dans son article 59 se réfère clairement à une théorie traditionnelle et généralement admise sur

les limites matérielles de la chose jugée : il n'était donc que naturel de s'en tenir aux éléments essentiels et aux données fondamentales de cette procédure, sauf indication contraire que je ne trouve nulle part, soit du Statut lui-même, soit du droit international. En second lieu, il me semble que s'il y a un cas dans lequel il est justifié d'avoir recours, faute de conventions et de coutumes, aux « principes généraux de droit reconnus par les nations civilisées », dont parle le n° 3 de l'article 38 du Statut, ce cas est assurément le nôtre. »

Ce que ce grand juriste disait dans cet autre contexte sur la force de chose jugée me paraît, je le répète, s'appliquer admirablement à l'institution procédurale de l'intervention.

L'audience est levée à 17 h 57

THIRD PUBLIC SITTING (20 III 81, 10 a.m.)

Present : [See sitting of 19 III 81, Judge Schwebel absent.]

The PRESIDENT : Before calling on Counsel for Malta, I have to announce that Juge Schwebel is unfortunately indisposed and will therefore not be able to be present at today's hearings.

M. LALIVE : Monsieur le Président, Messieurs les membres de la Cour, à la fin de l'audience d'hier j'ai donc entamé sur votre invitation la deuxième partie de mon exposé dont l'objet, je me permets de le rappeler, est le suivant :

Devant le silence des textes et des sources internationales sur une série de questions qui peuvent se poser ici, quant au droit de procédure de l'intervention, il apparaît utile et indispensable de rechercher ailleurs les éclaircissements nécessaires ; c'est-à-dire dans les principes généraux du droit de procédure, dans l'esprit même du Statut, dans les sources directes d'inspiration des auteurs du Statut et dans la théorie générale du droit de procédure. Pour justifier cette méthode, j'ai évoqué rapidement des raisons générales et spéciales, notamment la raison spécifique à l'institution de l'intervention, qui est une institution empruntée « au droit commun », je cite ici le président Descamps, président du comité de juristes de La Haye.

Et enfin, comme vous vous en souvenez, je me suis réclamé de Dionisio Anzilotti pour qui il était tout naturel de se fonder sur les principes tirés de la procédure civile, dans un cas de ce genre, sauf, disait-il, indications contraires du Statut, et ces indications contraires sont, non seulement inexistantes ici, mais elles sont même inconcevables puisqu'il s'agit précisément d'une institution du Statut qui est empruntée au droit interne.

Monsieur le Président, au moment d'entamer la substance de cette deuxième partie qui ne sera pas trop longue, je dois vous avouer une crainte. Malgré la très grande attention que la Cour a bien voulu apporter à mes explications d'hier et malgré l'encouragement que je peux trouver dans les déclarations de M. Anzilotti, du Président Winiarski, de nombre de juges de la Cour qui se sont référés aux principes du droit interne et, notamment, de la procédure interne, je suis très conscient, sur ce chapitre, de la difficulté toute particulière de ma tâche.

En effet il ne s'agit vraiment pas ici d'inviter la Cour, comme le faisait hier avec brio mon confrère Me Lauterpacht, à un beau voyage sur les eaux de la Méditerranée, il s'agit bien plus de demander à la Cour de pénétrer avec moi dans ce qu'il faut bien appeler les terres arides et rocailleuses du droit de procédure et, cela, dans un secteur d'une assez mauvaise réputation, le secteur de l'intervention. Permettez-moi d'en donner un tout petit exemple un peu anecdotique en passant.

Avant de venir à La Haye, j'ai eu la curiosité de voir ce que, à l'Université de Genève, mes collègues processualistes pouvaient bien dire de l'intervention à nos étudiants. Je trouve dans un polycopié de droit judiciaire, sous la plume de mon collègue le recteur Thorens de l'Université de Genève, la phrase révélatrice suivante à la page 140 : « Il s'agit d'une des questions les plus délicates et les plus difficiles de tout le droit processuel. » N'y a-t-il pas là une convergence de plus entre le droit interne et le droit international si on se souvient de ce que le

professeur Basdevant disait à la Cour permanente dans l'affaire du *Wimbledon* ?

C'est pourquoi je voudrais solliciter l'indulgence toute particulière de la Cour avant de m'engager maintenant dans l'examen de quelques principes généraux de droit en matière d'intervention. Ces principes ont été dégagés au cours de siècles d'expérience judiciaire de toutes les nations, ils ont été mis à l'épreuve par la pratique, analysés par la science de tous les processualistes de tous les pays. Je m'attacherai, bien entendu, spécialement aux principes de procédure généralement admis à l'époque où les jurisconsultes de La Haye, en 1920, élaboraient le Statut de la Cour permanente. Ces principes ne contredisent d'ailleurs en rien ceux qui sont valables aujourd'hui encore.

Pour dégager ces notions et ces principes généraux, une étude comparative était, de toute évidence, indispensable. Le Gouvernement de Malte l'a demandée à un représentant particulièrement éminent de la science juridique allemande, dont les travaux font autorité en la matière, le professeur Walter Habscheid, professeur aux Universités de Würzburg et de Genève, ancien recteur de l'Université de Würzburg, directeur de l'Institut de droit procédural national et étranger, de son université, membre de l'Institut international de droit procédural, président de l'Association scientifique pour les droits procéduraux international et comparé, et j'en passe ; le professeur Habscheid était tout spécialement qualifié pour mener à bien, dans des délais fort brefs, l'enquête et l'analyse comparatives qui lui étaient demandées (ci-après p. 459-484).

La Cour m'en voudrait avec raison de mettre sa patience à l'épreuve en entrant dans le détail, ou en citant textuellement des pages de la consultation du professeur Habscheid. Je ne le ferai pas. Cette consultation est à la disposition, cela va de soi, de la Cour et des honorables représentants des Parties à l'instance dans un nombre suffisant d'exemplaires. A moins que vous ne souhaitiez que j'en donne ici lecture, je me contenterai de la déposer, comme une annexe à ma plaidoirie, d'en signaler quelques points saillants, et d'en résumer brièvement les conclusions.

Le professeur Habscheid examine dans sa consultation le droit de procédure d'un grand nombre de pays, regroupés, selon la méthode classique des comparatistes, en systèmes ou familles juridiques. En examinant à chaque fois la législation, la jurisprudence et la doctrine, il passe ainsi en revue d'abord le groupe de ce qu'il appelle « les pays romanistes ». Dans ce groupe, sont étudiés tour à tour les droits de procédure de la France, de l'Italie, de l'Espagne, du Portugal, du Brésil et d'autres pays encore, parmi lesquels il est intéressant de signaler aussi l'Egypte, la Tunisie et la Libye.

Un deuxième volet de l'étude comparative porte sur les pays germaniques et le Japon, un troisième sur l'Angleterre et les Etats-Unis. Dans une quatrième section, on trouve enfin une analyse détaillée des textes en vigueur et de la pratique en matière d'intervention, ainsi que de la doctrine, dans les pays socialistes, URSS, République démocratique allemande, Hongrie, etc.

Dans un deuxième chapitre, intitulé « Analyse de droit comparé », le professeur Habscheid conclut, en résumé, à l'admission tout à fait générale, dans tous les systèmes de procédure civile considérés, de l'institution de l'intervention volontaire, sous diverses formes. Il met en lumière les remarquables convergences existantes, au-delà des modalités techniques d'expression, convergences quant à la justification, au fondement, au but des diverses formes d'intervention.

Ce qui frappe d'emblée, à lire l'étude de mon savant collègue allemand, c'est qu'elle aboutit – un peu plus de cinquante ans plus tard – à des conclusions tout à fait identiques à celles auxquelles parvenaient les premiers commentateurs de l'institution, et je pense aux auteurs des deux monographies que j'ai

citées hier, MM. Farag et Friede, dans leurs ouvrages sur l'intervention devant la Cour permanente de Justice internationale, en 1927 et en 1933.

Permettez-moi de citer ici, rapidement, le premier qui vers 1927 s'exprime ainsi :

> « Il est des institutions juridiques qui, quoique d'une importance indéniable, ne trouvent pas le même accueil auprès des différentes législations, pas même auprès de celles qui remontent à une source commune... Il en est d'autres, telles que la tutelle, le droit de défense en justice et l'autorité de la chose jugée, qui ont reçu une consécration universelle plus ou moins uniforme... On ne risquerait pas trop de s'éloigner de la vérité si l'on faisait rentrer dans cette dernière catégorie l'institution de l'intervention du tiers en justice. On trouve cette institution, partout, à peu près la même dans son ensemble et avec peu de variations dans les détails. »

Un demi-siècle plus tard, le professeur Habscheid parvient à une conclusion semblable et, cela on le notera en passant, après avoir élargi son enquête comparative, bien au-delà du cercle des pays considérés par le premier auteur, et par exemple à l'Amérique latine, au Japon, à l'URSS et aux autres pays socialistes.

Ce qui m'amène à la première des six propositions par lesquelles je voudrais résumer les leçons, les importantes leçons qui se dégagent, à notre avis, de cette magistrale analyse comparative.

Première proposition : Qu'elles datent des années 1920 ou qu'elles datent d'aujourd'hui, les études comparatives en matière de procédure démontrent donc l'existence universelle, dans tous les systèmes modernes, de l'institution de l'intervention. Il ne fait guère de doute qu'on pourrait voir là, même si les articles 62 et 63 n'existaient pas, un « principe général de droit reconnu par les nations civilisées » au sens du Statut de la Cour.

Je viens de parler des « systèmes modernes » de procédure. En réalité l'intervention est une institution fort ancienne, puisqu'elle était connue déjà en droit romain. Elle a été reprise et développée par le droit ecclésiastique ; elle était enfin connue, troisième exemple, par l'ancien droit français qui reconnaissait de la façon la plus large aux tiers le droit d'intervenir dans un procès toutes les fois qu'ils avaient intérêt à le faire. On voit que l'institution est ressentie, à travers les âges et à travers les sociétés les plus diverses, comme répondant à un besoin fondamental de justice et que cette institution s'est développée à travers une expérience millénaire.

Deuxième proposition : Le professeur Habscheid constate l'existence d'une tendance générale des droits modernes de procédure à élargir et libéraliser l'institution de l'intervention, dans l'intérêt d'une saine administration de la justice et de l'économie procédurale. Il voit des illustrations de cette tendance dans diverses réformes récentes, par exemple en France, aux Etats-Unis, etc.

Troisième proposition : L'étude du droit comparé révèle l'admission générale de plusieurs formes d'intervention et non pas seulement celles des deux grandes figures que sont l'intervention dite « principale » et l'intervention dite « accessoire » ou comme dit mieux la terminologie italienne « adhésive ». Des nécessités pratiques, la nature des choses, la variété des situations et des conflits d'intérêts ont entraîné partout la création, souvent par la voie jurisprudentielle, de sous-catégories et de variantes de ces deux grandes formes.

Quatrième proposition : Le principe de l'autorité de la chose jugée, dont l'article 59 du Statut est une illustration, ce principe connaît partout, dans tous les systèmes juridiques, plusieurs exceptions et il n'est nulle part admis comme

un motif d'exclure l'intervention. Parmi les exceptions se trouve le cas des jugements constitutifs et partout se fait jour la tendance grandissante, en droit moderne, à admettre l'idée réaliste de ce que la terminologie allemande nomme *Reflex-Wirkung*, l'effet réflexe. Le réalisme conduit en effet les systèmes modernes, souvent jurisprudentiels, à admettre l'intérêt à intervenir pour prévenir l'effet possible qu'aura *de facto* le jugement à rendre, compte tenu de sa force de vérité légale et de son autorité au moins morale.

Au surplus, il ne faut pas perdre de vue que divers systèmes de procédure — par exemple appartenant à la famille que l'on peut appeler « française », dont on sait l'influence qu'elle a eue sur le Statut de la Cour — attribuent la force de la chose jugée non seulement au dispositif proprement dit mais aussi en liaison avec lui aux motifs décisifs essentiels de cette décision.

Cinquième proposition : Partout, dans tous les systèmes de procédure internes, le droit d'intervention, quelles que soient ses modalités et formulations techniques, repose en définitive sur des motifs, sur une *ratio legis* semblables, sur un double motif à la fois moral et de politique juridique, les impératifs d'une saine administration de la justice, le respect des droits de tous les intéressés et notamment du droit d'être entendu.

Sixième et dernière proposition : Dans tous les systèmes étudiés, le professeur Habscheid relève comme un exemple traditionnel et véritablement classique du droit d'intervenir la situation du tiers qui prétend à des droits sur un objet ou sur un terrain en litige entre les deux parties au procès. A cet égard, je dois attirer l'attention de la Cour, pour conclure cette deuxième partie, sur deux fort intéressantes décisions de cours fédérales des Etats-Unis, décisions que cite le professeur Habscheid et qu'il discute en détail à la fin de sa consultation. Il s'agit des causes *State of California* v. *United States* de 1950 (180 F 2d 596, *certiorari denied* 340 US 826), et surtout de la cause *Atlantis Development* v. *United States* (379 F 2d 818 (1967)).

Ces deux cas présentent des analogies tout à fait frappantes avec le présent litige. Le premier concerne une demande d'intervention de l'Etat de Californie, qui alléguait un titre juridique propre sur l'eau disputé dans un procès entre les Etats-Unis et une société concessionnaire. Je ne m'y arrêterai pas, le professeur Habscheid la discute en détail.

Le second cas, l'affaire *Atlantis*, concerne un litige relatif au plateau continental des Etats-Unis. Le Gouvernement des Etats-Unis était demandeur dans une instance contre la société Acme et voulait clarifier la question de ses titres juridiques sur le plateau continental et sur les îles relevant, à son avis, du *outer continental shelf of the United States*. Devant ce procès, la société Atlantis, craignant de voir ses droits méconnus, a demandé à intervenir.

Je me bornerai à signaler ici deux points tout particulièrement intéressants dans la décision de la Cour fédérale, qui a admis l'intervention au motif que l'intérêt de l'intervenant ne pouvait faire aucun doute, et ceci sur la base de deux critères d'appréciation.

Premièrement, la Cour fédérale a examiné si les intérêts de l'intervenant étaient déjà représentés et défendus d'une manière adéquate et suffisante par l'une ou l'autre des parties au litige — c'est une méthode qu'on pourrait appeler « classique », et sa réponse a été négative.

Deuxième point, plus intéressant encore : la Cour fédérale s'est demandée, et s'est demandée seulement, s'il pouvait y avoir une atteinte à l'intérêt de l'intervenant, si cette atteinte était possible dans le cas où l'intervention ne serait pas admise. On voit que cette démarche, cette méthode intellectuelle, est semblable, identique, à celle des juridictions internationales, comme les tribunaux arbitraux mixtes que j'ai cités hier. La Cour fédérale a admis en outre la

possibilité d'une telle atteinte au motif extrêmement significatif que des questions de droit tout à fait nouvelles devaient être tranchées dans le cadre de l'instance en cours. Par conséquent, la décision sur ces questions aurait ou bien force de précédent, ou en tout cas une très grande autorité par rapport aux mêmes questions de droit qui seraient soulevées ultérieurement dans une procédure analogue. Si une telle procédure devait avoir lieu ultérieurement, a conclu la Cour fédérale, il serait pratiquement des plus invraisemblables qu'un tribunal en vienne à écarter ou à ne pas suivre une décision de ce genre.

Pratiquement donc, dit la Cour, si l'intervention était rejetée, la société intervenante ne pourrait plus jamais défendre ses intérêts de la même manière. Elle ne serait plus jamais dans la même position pour faire valoir ses droits.

J'en ai ainsi terminé sinon avec la théorie générale de la procédure, du moins avec ma deuxième partie, et il m'appartient maintenant, dans la troisième et dernière partie de cette présentation, de vous exposer le point de vue du Gouvernement de Malte quant à l'application en la présente espèce du Statut, des principes et des notions que nous avons passés en revue au cours des deux premières parties, et nous devons envisager cette application, bien entendu, à la lumière des observations que les Gouvernements tunisien et libyen ont remises à la Cour. Quand je dis « à la lumière » c'est peut-être une manière de parler, car on ne saurait affirmer sans exagération que ces observations projettent beaucoup de clarté sur notre sujet et nous allons voir pour quelles raisons.

Certains regretteront sans doute que les Parties à l'instance – et tout spécialement le Gouvernement libyen – ne se soient pas inspirées de l'exemple donné par les Etats parties à l'affaire du *Wimbledon*, qui ont soit reconnu de bonne grâce la recevabilité de l'intervention polonaise, soit s'en sont rapportés à la justice. D'autres s'en féliciteront, puisque les objections qui nous sont faites vont permettre à la Cour de se prononcer sur des questions nouvelles et qu'elles favorisent ainsi, indirectement, la clarification du droit international.

Quoi qu'il en soit, les doutes et les objections exprimés ont ce mérite commun de nous donner l'occasion bienvenue de dissiper des malentendus évidents, et de relever des erreurs véritablement « classiques » au sujet de l'intervention en tant qu'institution procédurale consacrée par le Statut de la Cour.

On me permettra de ne pas m'arrêter au premier grief formulé contre notre requête, celui d'« imprécision », qui ne résiste pas un instant à l'examen ; et pour s'en convaincre il suffit par exemple de comparer la requête de Malte à la requête d'intervention de la Pologne dans l'affaire du *Wimbledon*, requête fondée sur l'article 62 du Statut et qui tient en une petite page.

Ce grief formel, je dirai même ultraformaliste, me paraît très surprenant. En effet, à supposer même qu'il y ait dans notre requête un élément d'imprécision quelconque, il serait la conséquence obligée d'une décision de la Cour – qui n'a pas cru pouvoir accéder à la demande du Gouvernement de Malte de prendre connaissance des mémoires échangés par les Parties. Nous nous bornerons donc à constater qu'il résulte de cette décision de la Cour, nécessairement, certaines conséquences qu'il suffira d'indiquer ici rapidement :

Première conséquence : c'est que dans l'appréciation du niveau de précision requis à son avis, la Cour ne manquera pas évidemment de tenir compte du fait que le Gouvernement de Malte n'a pas eu la possibilité d'être exactement informé de l'objet, des limites, de la nature du litige et des positions des Parties.

Seconde conséquence : il est tout aussi évident que les Gouvernements libyen et tunisien jouissent d'une supériorité indiscutable lorsqu'il s'agit d'émettre des jugements quant à la précision plus ou moins grande de telle ou telle explica-

tion. Ils connaissent parfaitement, eux, les données du litige soumis à la Cour et leurs arguments respectifs, alors que Malte les ignore. Or il me paraît difficile d'imaginer que devant la Cour les Parties à l'instance puissent être admises à exploiter une pareille inégalité de situation.

Monsieur le Président, la principale des objections qui sont opposées à notre requête à fin d'intervention — et de très loin la plus importante puisqu'elle tient à peu près les deux tiers des observations libyennes — est fondée sur l'absence de lien juridictionnel. Je ne traiterai pas cette question devant vous puisque c'est mon confrère, M. Bathurst, qui exposera à ce sujet le point de vue du Gouvernement de Malte, mais je dois tout de même en dire deux mots à ce stade sous peine de fausser l'équilibre de ma démonstration et d'exposer celle-ci au soupçon d'avoir été volontairement incomplète. Mon sentiment à cet égard peut tenir en deux propositions très simples :

Premièrement, le texte de l'article 62 ne contient, on l'a vu, aucune trace quelconque de cette prétendue condition.

Deuxièmement, pareille condition n'a aucune place dans le système de l'intervention selon les articles 62 et 63 du Statut ; elle ferait un véritable non-sens de cette institution, qui doit être qualifiée d'« incident de procédure ». D'où il découle, nécessairement, que la question de lien juridictionnel ne se pose ici en aucune manière.

En réalité, toutes les objections qui nous sont opposées à cet égard reposent sur la même erreur fondamentale, sur une confusion entre « intervention » et « demande en justice ». Toutes ces discussions portent donc, à mon avis, sur ce qu'il faut bien appeler un faux problème.

Cependant, pour ne laisser aucune zone d'ombre, aucun doute dans ce débat, le Gouvernement de Malte n'entend aucunement esquiver une discussion complète et approfondie de ce sujet, puisque les Parties à l'instance semblent y tenir tellement. C'est la raison pour laquelle, et en quelque sorte *ex abundanti cautela*, mon confrère, M. Bathurst, traitera tout à l'heure la question devant vous.

Cela étant précisé, je voudrais ici, dans cette troisième et dernière partie, traiter quatre points : le premier, c'est ce que j'appellerai la deuxième objection, la deuxième critique qui nous est faite, selon laquelle notre requête serait en quelque sorte une demande d'avis consultatif déguisée. Le deuxième point, c'est la nature procédurale exacte de notre intervention. Le troisième point, c'est l'objection tirée du principe de la relativité de la force de la chose jugée ; enfin, le quatrième, ce sont les objections que l'on peut appeler les objections d'opportunité.

Premier point : Le deuxième grief qui nous est opposé d'après les observations du Gouvernement libyen (par. 33) : « la requête de Malte confond pratiquement l'intervention dans une affaire contentieuse avec la comparution dans une affaire consultative au titre de l'article 66 du Statut ». Que faut-il penser de cette objection ? Je crois inutile de la réfuter en détail et je me contenterai de vous soumettre trois brèves observations.

La première observation c'est qu'il est bien vrai qu'il y a des analogies, certaines, entre la procédure d'intervention et la demande d'avis consultatif. Cette constatation n'est pas nouvelle certes ; elle avait déjà été faite, si ma mémoire est bonne, lors des travaux préparatoires du Statut de la Cour. Mais ces analogies n'empêchent pas des différences importantes, des différences dont on peut dire, peut-être pour simplifier, qu'elles ont leur centre dans une notion, celle d'intérêt propre de l'intervenant.

Si bien qu'en réalité, lorsqu'on critique notre prétendue « confusion » avec la procédure d'avis consultatif, on ne fait que reprendre sous une autre forme et en d'autres termes l'allégation surprenante selon laquelle Malte n'aurait pas d'intérêt propre à la décision de la Cour. Telle est ma première observation.

La seconde est d'un ordre un peu différent. Par leur compromis notifié le 1er décembre 1978, les deux Parties à la présente instance ont suivi, tout en le modifiant, ce qu'on peut appeler le modèle des compromis dans l'affaire du *Plateau continental de la mer du Nord* et elles ont demandé à la Cour une certaine sorte de jugement.

On peut interpréter de diverses manières la nature procédurale de ce genre de jugement. Peu importe, puisque, de toute façon, le résultat est le même en ce qui concerne la question de l'intervention. Dans toutes les hypothèses, la demande d'intervention doit se rapporter, ou « avoir trait » comme disait la Cour dans l'affaire *Haya de la Torre*, à l'instance en cours, à l'instance telle qu'elle a été définie, par d'autres. En effet ce n'est pas le Gouvernement de Malte qui a rédigé le compromis entre la Libye et la Tunisie et ce n'est pas le Gouvernement de Malte qui a choisi de définir et de limiter la mission de la Cour.

Si donc, en raison de la nature et de l'objet de l'instance pendante devant la Cour, certains croient voir dans la requête du Gouvernement de Malte, à tort ou à raison, certains aspects qui rappelleraient la procédure d'avis consultatif, je suis tenté de répondre tout simplement : « A qui la faute ? »

Avant de poursuivre notre examen critique des objections variées qui sont faites à la requête, il est nécessaire je crois de s'arrêter un instant et d'attaquer, si je puis dire, de front un problème fondamental que la Cour se posera probablement ou peut-être, mais en tout cas qu'elle pourrait s'étonner de nous voir éviter. La Cour pourrait s'étonner de ce que nous n'ayons pas le courage de l'aborder, de l'attaquer de front. Le courage, pourquoi ? Parce qu'il s'agit d'un problème procédural indiscutablement difficile, nouveau, complexe et délicat, comme disait le Président Basdevant.

Ce problème est celui de la nature juridique exacte de l'intervention de Malte. Nous avons donc vu qu'avec l'article 62 le Statut a voulu permettre plusieurs formes diverses d'interventions, et je n'y reviens pas. Mais il reste, cela étant, à se demander quelle est la nature juridique exacte du point de vue procédural du genre d'intervention demandé par Malte.

Sur ce point, la seule conclusion qui peut être tirée de façon certaine d'une analyse du Statut et des travaux préparatoires est une conclusion surtout négative. Il est manifeste que l'intervention de Malte n'est pas une intervention accessoire ou adhésive ; elle ne vise en aucune manière à appuyer ou soutenir les prétentions d'une Partie contre l'autre.

Donc l'intervention maltaise est une intervention principale. Fort bien, mais de quel type ? A quel genre, à quelle « sous-catégorie » faudrait-il la rattacher ? Là-dessus, Messieurs, les textes sont muets. Les travaux préparatoires et la pratique internationale, ou ce qu'il en existe, ne permettent à peu près aucune conclusion. Force est donc de se tourner, comme l'ont fait avant nous tant d'illustres juges internationaux en des circonstances plus ou moins analogues, vers les enseignements de la théorie générale de la procédure.

Un exemple typique de l'intervention principale en droit comparé est le cas suivant, et je m'excuse d'emblée d'agir vraiment d'une manière un peu professorale .

A intente contre B une action en revendication d'une chose. Un tiers C,

pensant que la chose lui appartient ou pourrait lui appartenir, intervient dans une action qui est dirigée à la fois contre A et B pris comme consorts.

Il y a ce que la terminologie latine appelle le *litis consortium*.

En droit de procédure, l'action de C est une action, mais elle a une double nature : en tant qu'elle est dirigée contre le possesseur de la chose B, c'est une action en revendication ; en tant qu'elle est dirigée contre A, c'est une action en constatation de droit. Donc c'est une action d'une double nature ou, si l'on veut, c'est une action à deux branches.

Dans tous les cas de ce genre, où il y a consorité des défendeurs, l'action est une malgré sa double nature, mais elle n'a pas nécessairement et toujours une double nature.

Il se peut aussi que les deux branches de l'intervention soient de même nature. Tel est le cas dans l'exemple suivant, un exemple dont on saisira immédiatement les analogies avec la présente instance :

Un certain A actionne un certain B, mais seulement en constatation de ses droits sur une chose – mobilière ou immobilière. Un tiers C estime que le bien lui appartient et il intervient dans le procès en cours ; il forme une intervention principale.

Son intervention est donc dirigée contre A et contre B, pris comme consorts. Ici aussi, il s'agit d'une intervention unique, à double branche, mais à la différence du premier cas les deux branches sont exactement de même nature.

C'est ici l'une des formes bien connues, et qu'on peut appeler même typiques, de l'intervention principale, ainsi que le montre le professeur Habscheid dans sa consultation en ce qui concerne par exemple la France (ci-après p. 461) et, avec des modalités différentes, l'Allemagne (p. 466-467), pays dont les systèmes procéduraux respectifs ont eu, chacun le sait, une très forte influence dans de nombreux autres pays européens et extra-européens, y compris la Libye et la Tunisie.

L'analogie est évidente avec la situation procédurale que nous trouvons dans la présente espèce, et il est je crois superflu de rappeler à des juristes de la qualité de nos estimés contradicteurs en quoi consiste la notion de l'analogie, qui ne signifie nullement identité de situations.

Il se peut cependant qu'on songe à nous objecter que le litige soumis à la Cour ne peut être identifié à un procès en revendication quant à sa nature juridique. Cela est parfaitement exact sur le plan procédural – encore que le bon sens populaire ne manquerait pas de retenir le fait qu'il n'y aurait pas de litige devant la Cour, quelle que puisse en être la nature formelle, si la Libye et la Tunisie ne revendiquaient pas les mêmes portions du plateau continental.

Du point de vue du droit de procédure, il est donc vrai que la présente instance, si elle a des analogies avec le procès en revendication, en diffère aussi à plusieurs égards. En revanche l'analogie est beaucoup plus frappante, beaucoup plus forte avec le second exemple typique d'intervention principale où toutes les parties se limitent à demander une constatation de droit. En un tel cas, le tiers qui intervient veut prévenir une constatation de droit qui pourrait produire pour lui des effets défavorables. Son droit d'intervenir est universellement reconnu. Cette reconnaissance universelle correspond à un besoin fondamental de justice et d'équité et il y a lieu d'y voir un « principe général de droit » ; ceci aussi bien si l'on donne à ces termes le sens étroit de principe reconnu *in foro domestico*, selon l'expression de lord Phillimore, ou si on leur donne un sens plus large et plus proche de l'idée de principes généraux du droit international.

En l'absence d'indications claires et expresses du Statut, c'est sans doute dans

les systèmes processuels français et apparentés que l'on peut trouver la « clé » du problème, si problème il y a. J'ai montré combien les auteurs du Statut avaient été influencés par les procédures de l'Europe continentale, tout particulièrement par le droit français. J'ai cité déjà les déclarations du président du comité de juristes de La Haye, le baron belge Descamps, le projet des pays scandinaves, le rapport d'Albert de Lapradelle, rapporteur du comité, les déclarations de M. Léon Bourgeois, rapporteur à la Société des Nations, etc. Tout démontre, on l'a vu, l'influence dominante du droit continental et surtout du droit français dans la conception des articles 62 et 63 du Statut.

Or, dans les systèmes continentaux, et spécialement dans les systèmes de procédure français et inspirés du modèle français, parmi lesquels il faut ranger entre autres ceux de l'Egypte, de la Libye, de la Tunisie, l'intervention est considérée essentiellement comme un incident de procédure.

Il en résulte que l'intervention, jugée recevable, va donner lieu à un procès non pas entre trois parties, mais entre trois participants, ou, pour être plus exact encore mais pour employer une image, je dirais presque à deux participants trois quarts ou à deux participants et demi. En effet, dans cette conception fondamentale, il ne s'agit nullement de reconnaître à la « partie intervenante » sur pied de totale égalité le statut d'une véritable « partie ».

Tout à l'heure, après avoir suggéré une méthode qui pourrait éventuellement permettre à la Cour, dans le silence total du Statut, d'élucider le problème de la nature procédurale exacte de notre intervention, je me suis permis d'ajouter « si problème il y a ! » Pourquoi ?

Eh bien il est possible qu'une telle analyse, pour scientifique qu'elle soit, ne soit pas indispensable au règlement de cet « incident de procédure » — dès lors qu'il me paraît tout à fait évident que l'article 62 a prévu une pluralité de formes d'intervention et que la requête de Malte tombe indiscutablement dans le cadre large ainsi tracé.

Cependant, s'il m'a paru utile de chercher à préciser la nature procédurale de notre intervention, c'est au fond pour deux raisons. La première c'est que nous sommes en quelque sorte condamnés par les faits à naviguer à l'aveugle, à naviguer au jugé, puisque nous ignorons la situation procédurale exacte des Parties et les données complètes de leur procès. Mais la seconde raison c'est qu'un malentendu complet semble bien exister à cet égard entre les Parties à l'instance et le Gouvernement de Malte.

Ce gouvernement avait cru de son devoir de préciser dans sa requête qu'il ne cherchait aucunement à prendre la place d'une partie à la présente instance et que, par conséquent, il ne cherchait pas à bénéficier de l'arrêt qui serait rendu entre les Parties de la même manière que ces dernières et, si l'on peut dire, « sur pied d'égalité avec elles ».

Le Gouvernement de la République de Malte a voulu faire comprendre qu'il ne cherchait pas autre chose que la position procédurale d'un « participant » à titre d'intervention, selon l'article 62, c'est-à-dire ce qu'on peut appeler une « partie intervenante » dans cette procédure particulière introduite par les Gouvernements tunisiens et libyens aux termes de leur compromis.

Monsieur le Président, ce souci du Gouvernement de Malte n'a pas été bien compris, me semble-t-il, par les auteurs des observations qui vous ont été soumises.

Il n'a pas été bien compris et j'en trouve plusieurs témoignages dans les textes qu'ont rédigés nos estimés contradicteurs, par exemple, dans les passages suivants :

Selon le Gouvernement libyen (ci-dessus, observations, p. 273, par. 29) :

« L'intervention dans une affaire contentieuse devrait pourtant avoir un autre objet que « d'exposer des vues... », et plus loin, au paragraphe 32, notre requête est citée comme précisant que : « L'intervention n'a pas pour objet d'aboutir à une décision de fond ou à une décision obligatoire contre l'une ou l'autre Partie. » (Et c'est parfaitement exact !)

Mais le Gouvernement libyen en tire la conclusion surprenante que la demande d'intervention de Malte ne procéderait en réalité d'aucun intérêt d'ordre juridique pouvant être mis en cause et ceci même dans l'hypothèse, dit-il, où la Cour déciderait qu'elle pourrait intervenir. Cette critique est encore développée au paragraphe suivant (n° 33), où il est soutenu que :

> « Malte deviendrait essentiellement une « quasi-partie ». Elle aurait le droit d'être entendue, d'exprimer ses vues ... mais serait également autorisée à prétendre que ses propres droits ne sont pas et ne peuvent être affectés par la décision de la Cour. »

Faisons abstraction du caractère tendancieux de ces observations et reprenons très brièvement quelques-uns de leurs éléments principaux sur le fond :

1) D'abord, présenter notre demande d'intervention comme ayant pour seul et unique objet « d'exposer des vues » dans une affaire contentieuse est ou bien un pur artifice verbal, ou le signe d'un sérieux malentendu. On me permettra à cet égard de me référer simplement à mes explications précédentes sur l'objet procédural de notre intervention et sa nature juridique exacte. On percevra sans peine alors l'erreur d'interprétation commise dans ces observations.

2) Ensuite il me paraît à la fois confus, scientifiquement erroné et contradictoire d'affirmer que Malte chercherait d'une part à devenir une « quasi-partie » et d'autre part confondrait sa position avec la comparution dans une affaire consultative. C'est rigoureusement contradictoire.

Sur les deux branches de cette critique, je crois m'être déjà clairement exprimé et ma réponse peut se résumer en une phrase : le Gouvernement de Malte ne cherche nullement à devenir une partie dans le procès en cause, il demande à intervenir au sens de l'article 62 du Statut. Et ceci compte tenu nécessairement de la nature spécifique de l'instance en cours, telle que déterminée par le compromis.

J'en arrive à mon avant dernier point qui est l'objection tirée de l'article 59 et de la relativité de la chose jugée. Selon le Gouvernement libyen, Malte n'aurait aucun intérêt d'ordre juridique à intervenir pour diverses autres raisons tenant essentiellement au principe de la relativité de la chose jugée.

Monsieur le Président, une réfutation détaillée m'apparaît d'autant plus superflue qu'elle résulte en quelque sorte d'elle-même, *ipso facto*, des deux premières parties de mon exposé, c'est-à-dire de mon analyse du Statut et de la pratique internationale, d'une part, et de la théorie générale de la procédure, d'autre part. Vous me permettrez donc de prier respectueusement la Cour de bien vouloir s'y référer – ce qui me mettra en mesure de me contenter de quelques commentaires.

Premièrement, il m'apparaît qu'un certain nombre de remarques des auteurs des observations qui nous sont opposées procèdent d'une confusion entre deux domaines, qu'il convient de distinguer soigneusement en matière d'intervention : celui de la recevabilité de la requête d'intervention et celui de son bien-fondé.

Deuxièmement, dans leur souci de démontrer que notre requête ne remplirait pas les conditions du Statut, plus celles qu'ils jugent opportun d'y ajouter bien entendu, nos estimés contradicteurs ne distinguent pas, ou pas suffisam-

ment, premièrement ce qui relève de la preuve d'un préjudice, deuxièmement ce qui relève de la vraisemblance d'un préjudice et troisièmement ce qui relève de la simple possibilité d'un préjudice. Le titre donné à la troisième partie des observations libyennes : « Absence d'effet possible », ne change absolument rien à cette constatation. Le sens de l'article 62 – nous l'avons vu hier – est qu'il suffit que la possibilité d'un effet de la décision ne puisse pas être exclue. Or en fait, après l'exposé que vous ont fait hier mes confrères, qui pourrait sérieusement douter que la démonstration du Gouvernement de Malte est allée bien au-delà de ce qu'exigeait l'article 62 du Statut.

Troisièmement, l'argument essentiel que nous oppose, par exemple, le Gouvernement libyen est parfaitement exposé au paragraphe 28 de ses observations, qui mérite d'être cité :

> « L'instance entre la Libye et la Tunisie représente un cas parfaitement normal dans lequel les intérêts d'Etats tiers sont protégés par les limitations juridiques, subjectives et objectives, inhérentes à la force obligatoire de toute décision judiciaire – autrement dit la chose jugée. Aucune protection particulière n'est nécessaire, comme celle qui résulterait à titre exceptionnel d'une intervention. Par conséquent la thèse maltaise suivant laquelle un intérêt d'ordre juridique serait pour elle en cause en l'espèce n'est pas plausible et s'effondre d'elle-même. » (Ci-dessus p. 273.)

Cette déclaration est très significative ; elle fournit une excellente illustration de ce qu'il faut bien appeler une totale méconnaissance du droit de procédure et en particulier une totale méconnaissance de l'institution de l'intervention dans la procédure de la Cour. C'est ce que je voudrais montrer par les six remarques suivantes :

1. Vous aurez noté d'abord les mots « à titre exceptionnel ». Avec eux, on voit apparaitre, selon l'expression bien connue, « le bout de l'oreille ». L'intervention serait donc quelque chose qu'il faut limiter et réduire par tous les procédés possibles, par exemple, en l'assortissant d'une multitude de conditions implicites. Or, les auteurs du Statut ont voulu, nous le savons, admettre l'intervention de la manière la plus large. Tandis que le Gouvernement libyen voudrait, lui, récrire le Statut, le réduire à rien, supprimer le « progrès considérable » qu'ont réalisé en 1920, consciemment et à l'image du droit commun interne, tant le comité de juristes de La Haye que le Conseil de la Société des Nations.

2. Pareille thèse, il est à peine besoin d'y insister, heurte le sens clair des textes et contrevient, entre autres, au principe de l'interprétation effective.

3. Quant à l'argument tiré de la relativité de la force de la chose jugée, il est, peut-on dire, vieux comme le monde. Il a été constamment utilisé par les parties qui voulaient s'opposer à une intervention. Et il a, non moins constamment, été rejeté par les tribunaux de tous les pays pour la très simple raison qu'il n'a aucune valeur quelconque. S'il avait une valeur, il n'y aurait pas d'institution de l'intervention. Il est véritablement absurde d'imaginer que les auteurs du Statut eûssent pu y insérer les articles 62 et 63 s'il était permis à un Etat d'invoquer l'article 59 et la relativité de la chose jugée pour en paralyser l'application, et ce n'est pas moi seul qui le dis.

Permettez-moi de citer un passage très pertinent d'une étude parue il y a cinq ans dans l'ouvrage collectif publié à New York par Leo Gross : *The Future of the International Court of Justice*, avec une préface de Philip Jessup et Edvard Hambro. On lit, à la page 556 de l'étude consacrée à l'intervention par John T. Miller, ce qui suit, qui mérite d'être cité :

« Theoretically, the Court could so narrowly construe its authority as to hold that no State can qualify because Article 62 contemplates an *interest* which may be affected by the Court's decision and Article 59 specifically provides that the 'decision of the Court has no binding effect except between the parties and in respect of that particular case'. Therefore, a non-intervening State cannot have an interest of a legal nature affected by litigation before the Court to which it is not a party. [C'est très exactement l'argument libyen. Et cet auteur continue :] But such an interpretation would lead to the nonsensical conclusion that the States which drafted the Statute had an intention to create a meaningless cause for intervention and an unavailable remedy. »

A nonsensical conclusion indeed.

4. L'argument libyen, Monsieur le Président, méconnaît totalement, non pas seulement l'institution de l'intervention, mais aussi la réalité des choses, les circonstances de la présente espèce et la portée des décisions de la Cour :

a) il méconnait d'abord la réalité des choses, car, comme l'établirait, s'il en était besoin, la magistrale étude de mon collègue le professeur Habscheid, tous les systèmes juridiques admettent l'intervention, et sous diverses formes. Ils l'admettent tous précisément parce que, pas plus que la tierce opposition (qui vient après coup, qui vient trop tard), la relativité de la chose jugée ne peut suffire à protéger les intérêts des tiers. C'est le cas, en matière de jugement constitutif ; c'est le cas dans les systèmes où le jugement a valeur de précédent (principe *stare decisis*) ; c'est le cas encore dans les systèmes de type français ou, si je suis bien informé, la chose jugée ne comprend pas seulement le dispositif du jugement, mais aussi les motifs essentiels – ce que les processualistes appellent le *nervus sententiae*. C'est le cas enfin, d'une manière générale, chaque fois que, par sa force de vérité légale ou par son autorité morale, un jugement est susceptible d'avoir des effets pratiques, primaires ou secondaires, sur des tiers.

b) La thèse libyenne méconnaît ensuite les particularités de la présente espèce, particularités dues au compromis et au caractère à certains égards abstraits de ce qui est demandé par les Parties à la Cour.

c) La thèse libyenne méconnaît enfin surtout, et gravement, la portée réelle des décisions de la Cour – portée réelle dont soit dit en passant les auteurs du Statut avaient été parfaitement conscients. On se reportera ici, par exemple, à la déclaration Balfour, au rapport de M. L. Bourgeois à la Société des Nations, ou encore, par exemple, à la fameuse décision de la Cour permanente dans l'affaire de *Chorzów* sur le fond où la Cour a jugé, vous vous en souvenez, qu'elle ne saurait se départir de l'avis qu'elle avait donné précédemment, etc. On pourrait multiplier les citations et les exemples.

L'objection qui nous est faite ignore, ou feint d'ignorer, la très grande autorité générale qu'aura la décision de la Cour dans la présente espèce et je ne pourrai rien ajouter à cet égard aux observations qui ont été présentées ici par mes confrères sur les effets qui peuvent en résulter, qui en résulteront pour Malte.

5. On nous oppose encore (paragraphe 28 des observations libyennes) qu'« aucune protection particulière ne serait « nécessaire » en l'espèce ». C'est là une affirmation purement gratuite et qui heurte la vraisemblance. En l'espèce, il est à peine besoin de constater qu'aucune des Parties n'est en mesure – dans l'hypothèse où elle en aurait l'intention – de protéger les intérêts de la République de Malte. Et ceci, déjà, pour la simple et bonne raison que, pour

protéger les intérêts de la République de Malte, il faudrait nécessairement les connaître, en être parfaitement informé et à même de les apprécier exactement.

6. Enfin la même constatation de bon sens suffit à disposer de l'argument tunisien et libyen selon lequel une intervention serait inutile parce que la Cour, d'office, serait à même de protéger les intérêts de l'Etat intervenant. Pareil argument, s'il était exact, aurait rendu totalement superflue l'institution de l'intervention – aussi bien dans les procédures internes que dans la procédure internationale – et on ne parviendrait absolument pas à s'expliquer son admission universelle. Ai-je besoin de dire que ce qui est en cause ici, ce n'est évidemment pas la volonté de la Cour ou d'un tribunal de protéger les intérêts du tiers, c'est sa possibilité de le faire, en l'absence de l'intervenant et sans le concours de l'intervenant ? Je m'excuse de devoir rappeler ici, dans cette enceinte, des vérités aussi élémentaires.

J'en arrive à mon dernier point avant de conclure. Que reste-t-il des objections multiples qui ont été opposées à notre requête d'intervention ?

Il reste quelques arguments de pure opportunité. La requête créerait des retards et entraînerait d'importantes complications ou perturbations, etc., si bien que, nous est-il dit, si la Cour arrivait à la conclusion que les conditions de l'article 62 sont bien remplies en l'espèce, elle devrait, malgré tout, rejeter la requête du Gouvernement de Malte.

Ma réponse à ce sujet pourra être extrêmement brève. Ces arguments sont manifestement mal fondés, dans la mesure où ils ne sont pas tout simplement irrecevables.

Tout d'abord ils procèdent d'une erreur que j'ai déjà constatée, textes à l'appui, quant à la portée de l'article 62, paragraphe 2 : « La Cour décide », et quant aux intentions des rédacteurs du Statut. La volonté évidente des juristes réunis à La Haye au comité consultatif et celle du Conseil de la Société des Nations qui a approuvé leur projet, cette volonté évidente a été de confier à la Cour la mission de contrôler si la condition posée par le paragraphe 1 était réalisée. Elle n'a pas été de lui confier un pouvoir discrétionnaire ou quasi discrétionnaire, au sens français du terme, de décider selon des considérations d'opportunité. Mais ceci est à mon sens sans aucune portée pratique tant les arguments invoqués sont insignifiants. L'intervention, si elle était admise, serait source de retard dans la procédure. La réponse saute aux yeux.

Bien entendu toute intervention – comme n'importe quel autre incident de procédure – est de nature, par la force des choses, à créer certains retards. Mais, premièrement, ces retards seront contrôlés par la Cour et, deuxièmement, en tout état de cause il n'y a pas, il ne saurait y avoir aucune commune mesure entre, d'une part, ces éventuels retards et, d'autre part, les intérêts supérieurs d'une bonne administration de la justice et l'intérêt de la Cour elle-même à pouvoir entendre les vues de tous les intéressés et à permettre à l'intervenant de faire valoir ses intérêts d'ordre juridique, à éviter des litiges ultérieurs dont on pourrait parfaitement faire l'économie et à éviter enfin des contrariétés éventuelles de décisions.

Quant aux prétendus troubles, aux prétendues complications qui résulteraient – à en croire les considérations complémentaires libyennes – d'une admission de l'intervention de Malte, l'argument, il faut le dire, est dépourvu de sérieux. Il révèle au demeurant une très singulière défiance envers la Cour, défiance envers sa volonté et sa capacité de diriger la procédure conformément aux exigences d'une saine justice, dans le plein respect de l'égalité de traitement et des droits respectifs des Parties à l'instance et de l'intervenant.

Tout cela – disons-le pour terminer – relève d'une tactique traditionnelle :

la tactique bien connue qui consiste à « peindre le diable sur la muraille ». On vous a dit, on vous dira peut-être encore, qu'une admission de la requête de Malte va bouleverser le rôle et l'horaire de la Cour, créer des situations inextricables, préjudiciables au prestige de la justice internationale, etc. On vous dira peut-être aussi que, si la requête de Malte était jugée admissible, les écluses seraient ouvertes devant un flot, un raz de marée d'interventions surgissant de toutes parts, de tous les points de la planète.

Quelle juridiction, et surtout quelle juridiction internationale, serait susceptible d'être impressionnée par des considérations de ce genre ?

J'en arrive à ma conclusion.

Monsieur le Président, Messieurs de la Cour, je suis ainsi parvenu au terme de cette présentation du droit de l'intervention selon le Statut de la Cour — présentation dans laquelle j'ai tenté d'éclairer l'objet et la nature exacte de la requête que vous a soumise le Gouvernement de Malte.

Veuillez croire que j'ai conscience des lacunes de cet exposé, pourtant assez long déjà, et du caractère non seulement complexe mais quelque peu aride des problèmes posés par l'article 62 du Statut.

D'une part, la nouveauté du sujet en procédure internationale et l'importance vitale des intérêts en cause nous faisaient un devoir particulier — je l'ai dit en commençant — de fournir à la Cour le maximum d'éléments d'appréciation. Mais, d'autre part, il fallait évidemment choisir, s'en tenir à l'essentiel — au risque de négliger, qui sait, de bons arguments. Quoi qu'il en soit, nous nous sommes efforcés de traiter le problème d'une façon claire et objective.

Et qu'a révélé notre examen attentif des textes du Statut ? Un examen fait à la lumière des travaux préparatoires, de la pratique de la Cour, de la jurisprudence et de la doctrine internationales — un examen complété par l'analyse comparative, par le recours aux principes généraux et à la théorie générale de la procédure.

L'examen de toutes ces sources, de tous ces éléments divers révèle, en fin de compte, une étonnante, une remarquable harmonie. La raison en est, sans doute, que l'institution de l'intervention en procédure — internationale comme interne — répond partout aux mêmes besoins fondamentaux de justice, de saine économie judiciaire et, disons-le, de bon sens.

Le Gouvernement de Malte pense avoir largement démontré — et bien au-delà de ce à quoi il eût été strictement tenu selon les textes applicables — que sa requête à fin d'intervention répond en tous points aux exigences du Statut, à sa lettre comme à son esprit. L'intérêt d'« ordre juridique », et même les intérêts vitaux de Malte, sont indiscutablement « en cause » en l'espèce, c'est-à-dire sont, à tout le moins, susceptibles d'être affectés. On vous l'a très abondamment montré hier et toutes les subtilités juridiques du monde, toutes les constructions formalistes qu'on pourrait nous opposer n'affaibliront jamais la force de cette évidence.

Pour une multiplicité de raisons conjuguées, de droit et de fait — des raisons dont je serais tenté de dire avec le poète que « Chaque est suffisante seule » — la requête du Gouvernement de Malte m'apparaît comme si entièrement justifiée qu'un critique tant soit peu sévère pourrait presque penser que la solution de cet « incident de procédure » est toute simple et qu'elle va en définitive de soi, que les représentants du Gouvernement de Malte ont peut-être exagéré dans leur démonstration et, pour employer une expression populaire, qu'ils ont « utilisé un marteau-pilon pour casser une noisette ».

Mais, s'il est un cas où un Etat tiers, de par sa position spécifique, se trouve très directement affecté et concerné, c'est bien celui-ci. S'il est un cas où l'article 62 a un sens et doit être appliqué, c'est bien celui-ci. Et j'aurai la candeur

de m'étonner de la vigueur, du peu de nuances, du caractère catégorique de certaines au moins des objections qui ont été opposées au désir du Gouvernement de Malte de faire entendre sa voix dans ce débat qui le touche de si près, comme si sa voix était si redoutable devant la justice internationale.

On a dit souvent que l'homme n'apprécie vraiment le prix de sa liberté que lorsqu'il est menacé de la perdre.

Faudra-t-il dire de même de la faculté d'intervention prévue par l'article 62 du Statut de la Cour, un article si peu utilisé jusqu'ici et dont l'existence même se voit aujourd'hui menacée par des thèses qui – sous couleur d'« interprétation » – réduiraient cette institution à rien et entraineraient un recul déplorable, un retour en arrière inadmissible ? Mais le risque heureusement est bien théorique. Par leur excès même, par leurs outrances et leurs confusions, les objections qui nous ont été opposées apportent en réalité à la requête de Malte, involontairement, le soutien d'une sorte de « contre-épreuve », d'une démonstration par l'absurde. Elles confirment que notre analyse de l'article 62 est correcte et correspond seule au texte et à l'esprit du Statut, à la volonté de ses auteurs, tout comme au sentiment élémentaire de la justice et aux besoins de la juridiction internationale.

Permettez-moi, à ce propos et en concluant, Monsieur le Président, l'expression d'un sentiment personnel. En tant que ressortissant d'un petit pays, très attaché traditionnellement à la cause de la juridiction internationale, j'avoue être particulièrement sensible à la situation qui est aujourd'hui celle du requérant en intervention, la République de Malte, un tout petit pays au riche passé, un petit pays du tiers monde qui, comme vous le disait si bien hier son *Attorney-General*, tente de faire entendre sa voix alors que deux grands voisins s'apprêtent à se partager – j'allais dire « le gâteau », non ! – le plateau continental de la région.

C'est dire l'immense valeur d'exemple, pour la communauté internationale tout entière certes, mais au premier chef pour les petits pays, qu'aura, à n'en pas douter, la décision de la Cour.

Monsieur le Président, Messieurs les juges, vous avez bien voulu accorder à mon exposé votre très patiente attention. Permettez-moi de vous en dire ici, en terminant, ma vive gratitude.

L'audience est suspendue de 11 h 15 à 11 h 30

ARGUMENT OF MR. BATHURST

COUNSEL FOR THE GOVERNMENT OF MALTA

Mr. BATHURST : Mr. President, Members of the Court.

I

I share with my colleagues who represent the Government of Malta the honour and the privilege of appearing before this Court. My task is to present to the Court Malta's submissions on that subparagraph of Article 81 of the Rules of Court which refers to the requirement that an application for permission to intervene in a case must state "any basis" of jurisdiction claimed to exist between the Applicant and the Parties to the case, that is Article 81, paragraph 2, subparagraph *(c)*. Libya and Tunisia, in their respective observations on Malta's Application, see this requirement of the Rules of Court as meaning that Malta must "prove" (which is Tunisia's word) must prove that there exists a "valid jurisdictional link" (and those are Libya's words) between Malta and Libya and between Malta and Tunisia. Malta submits that it is the Statute of the International Court of Justice that must govern the matter, and that the Statute neither prescribes nor supports any such requirement.

II

I begin by reminding the Court that intervention by a State in proceedings pending in the Court may be either as of right under Article 63 of the Statute, or with permission given by the Court under Article 62. In both types of intervention, of course, certain conditions must exist before it is allowed. I will deal with only one aspect of those Articles and will not repeat what my learned friend Professor Lalive has said about them.

Article 63 of the Court's Statute provides for intervention as of right. It deals with intervention in litigation between parties to a case which puts "in question" (as the words are) the construction of a convention, by which States other than the parties to the case are also bound, either as signatories or as acceding States. The latter, being parties to the convention but not parties to the case, have a right to intervene in the proceedings. If they do, they will be bound by the construction given in the Court's judgment on the issue between the Parties to the case.

Certain features of these provisions are worthy of notice. Under Article 63, the intervening State need not be a Member of the United Nations, and so bound by the provisions of the Charter on the jurisdiction of the Court. The intervening State need not be a party to the Statute of this Court. The convention, the construction of which is before the Court in such a case, need not include a provision whereby the parties to the convention have consented in advance to the exercise of jurisdiction by this Court when a point of construction is in dispute. The convention may perhaps be concluded between

three States only, the parties to the pending case and the intervening State. Between them there is the international obligation arising from the convention's provisions, whatever they may be, but there may not be, and there need not be, any jurisdictional link between them, and a State, otherwise a stranger to this Court, still has the right to intervene.

Article 62 of the Court's Statute provides for intervention in a case when, in certain circumstances, the Court gives its permission. Some of those circumstances have been discussed by my learned friends appearing for Malta. But the first words of paragraph 1 of Article 62 of the Statute should be noted: "*Should a State* consider that it has an interest of a legal nature which may be affected by a decision" in the pending case. "Should a State" – this wording may be contrasted with that of Article 66 of the Statute which, in the context of advisory opinions, speaks of "States entitled to appear before the Court". As in Article 63, so with Article 62, the State seeking to intervene need not be either a member of the United Nations or a party to the Statute of this Court. Yet, say Libya and Tunisia, there must be a valid jurisdictional link between the Applicant State seeking to intervene and both of the parties to the case, or with all of the parties to the case, if there are more than two of them. If such a jurisdictional link were necessary, in circumstances in which a State which is not a party to the Charter or to the Statute was seeking to intervene, only its *ad hoc* agreement made with each, or all, of the parties to the case would provide that link, in the absence of a pre-existing treaty link between them. So then, Mr. President, in result it would be the parties to the case which would be in a position to decide whether or not intervention should be permitted. And it would not necessarily be both, or all, of the parties to the case which would hold this power of decision. One of the two parties to the case might agree to forge a jurisdictional link by making an *ad hoc* agreement with the intervening State; the other could refuse to do likewise. Then, according to Libya and Tunisia, intervention could not be permitted by the Court because, in the absence of a link between the intervener and one of the two parties to the case, the Court, it is said, has no power to decide to grant the request to intervene.

Throughout my submissions I ask the Court, with respect, to keep in mind the consequences of any ruling which would in effect transfer from the Court to a party or the parties to a case the power of decision which is, beyond doubt, given to the Court by Article 62, paragraph 2, of the Statute, which states in unambiguous language: "It shall be for the Court to decide" upon the request for permission to intervene.

Article 62 itself is silent on the subject of any jurisdictional link between an intervening State and the parties to the case in which intervention is sought, and it contains no requirement of that kind. Until the adoption of the current Rules of Court on 14 April 1978, the Rules of Court were also silent on this subject. This Court has not had to give a decision involving Article 62 – the only previous application to the Court for permission to intervene in a case having lapsed when the case itself became moot. Nor did the Permanent Court have occasion to clarify this issue. Nor, so as available records show, did revisions of the Rules in 1926, 1931, 1936, 1946 and 1972 cast any light upon the problem. The "Background Note" issued by the Registry on the 1978 Revision of the Rules of Court merely commented that the new Rule 81 covered "the same ground" as did its predecessor but with different wording. This suggests that it was not intended to presage any changes of substance in the conditions for the grant of permission to intervene.

In the year 1981 one has to look back nearly 60 years, to the year 1922, in order to find the reason for the silence over the years; and one must look to the

cases, more recently, between Australia and France and between New Zealand and France on *Nuclear Tests* (*I.C.J. Reports 1974*, p. 253 (Australia) and p. 457 (New Zealand)) to discern, perhaps, why the silence was broken on 14 April 1978.

Looking back to the year 1922, one must first recall that the Permanent Court was available to States which were not members of the League of Nations (Statute, Arts. 34 and 35). Article 62 of that Court's Statute dealt with intervention with the Court's permission and it also opened with the words: "Should a State." Should a State. Not necessarily a Member of the League of Nations. As my learned friend Professor Lalive has mentioned, when the Permanent Court met in January onwards in 1922 to draft its first set of rules, the Members of the Court discussed this very issue of a possible jurisdictional link of the Applicant intervener with the parties to a case. The records reveal an instructive exchange of views (*P.C.I.J., Series D, No. 2* (1922), pp. 89-91 and 95-96). The President was Judge Loder of the Netherlands. Lord Finlay was the British Judge and Dr. John Bassett Moore was the American Judge. The President is recorded, and I quote from the record (p. 89), as having "thought it was impossible to withhold the right of intervention from States which had not accepted the compulsory jurisdiction of the Court". Lord Finlay – again I cite the record (p. 90) – "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". That is what Lord Finlay said. Judge Moore – again I quote (p. 91) – "could not see how the condition of reciprocity in regard to compulsory jurisdiction could nullify the provisions of an Article of the Statute, i.e., Article 62". Later Judge Moore added this (p. 95) – "the proposals made – those for instance of M. Beichmann [M. Beichmann was the Norwegian Judge, Mr. President] (p. 95; Ann. 55, p. 349) – amounted to a proposal for the amendment of Article 62 of the Statute, the effect of which would be to limit its application to States which had accepted the compulsory jurisdiction of the Court – a suggestion which seemed to be quite inadmissible". Those are the words of Judge Moore.

Then, in due course, the President ended the discussion in this way, according to the record (p. 96), by saying "he could not take a vote upon a proposal the effect of which would be to limit the right of intervention (as prescribed by Art. 62) to such States as had accepted compulsory jurisdiction. If a proposal in this sense were adopted, it would be contrary to the Statute."

It therefore appears that Members of the Permanent Court, in administrative session at the outset of their work in applying the Statute of their Court, gave consideration to this very problem of the jurisdictional link. They did so on the basis of a Statute which did not prescribe general obligatory jurisdiction as between States, but on the basis that the provisions of Article 62 had to be applied in a régime of the optional clause, whereby some States might, and some States might not, accept the compulsory jurisdiction of the Court on terms of reciprocity.

The submission of Malta is that the then President of the Permanent Court and those of his colleagues who were of like mind were correct in their view that a Rule of Court which purported to limit intervention to States that had accepted compulsory jurisdiction of the Court on a reciprocal basis would be contrary to the provisions of the Court's Statute, then, as now, Article 62. Such a Rule would, in Malta's submission, be *ultra vires* the rule-making power given to the Court.

III

I hasten to add that Malta does not take the view that this Court intended to make, or made, a Rule having any such effect when, in 1978, it enacted for future cases the provisions which we see as Article 81, paragraph 2, subparagraph *(c)*, of the current Rules of Court. It must be a presumption – a presumption of law – that the Court did not intend to act *ultra vires*, and the Rule should be interpreted in the light of that presumption. Only Libya and Tunisia suggest an effect of that sub-Rule which would render it contrary to Article 62 of the Statute.

In Article 62 of the Statute there is neither expressly nor by necessary, or even on its language, possible, implication, according to any acceptable canons of interpretation, any justification for a Rule which would add to the conditions for the grant of permission to intervene beyond those in the Article itself and require a jurisdictional link – for in truth there is only one requirement, the existence of a legal interest that may be affected. Nor does the Rule, Article 81, 2 *(c)*, attempt to do this, as its language shows. That sub-Rule requires an application for permission to intervene in a pending case to "set out" (those are its words) some information. It does not call for "proof", as Tunisia's observations suggest ; it does not call for proof of anything at all. That sub-Rule equally does not ask for information on *the* basis of jurisdiction claimed to exist between the intending intervener and the parties to the case in which intervention is sought. It asks information on "*any*" basis of such jurisdiction. It asks, if one may put it this way, for "the information, *if any* . . .", on jurisdiction relevant as between the States involved ; or in other words, it asks for information concerning such jurisdictional links as *may* happen to exist without making it a condition that they must exist. The French text of the sub-Rule in its use of the words "*toute base*" is to like effect. This sub-Rule calls for that information as respects the Applicant and every party to the case, whether the party is Plaintiff or Respondent and whether or not the intervening State would wish to make common cause with either one party or the other or with neither.

Such information on jurisdiction, assessed in the light of the terms of the Application for permission to intervene, might be of assistance to the Court in reaching its decision whether or not to allow intervention for the following reasons.

IV

It might appear from the information supplied to the Court in the Application that the State seeking to intervene could itself initiate its own proceedings in the Court against either one of the States, parties to the pending case – for example, where all three States had accepted the optional clause in terms which applied to the particular circumstances. Or it might be that the State applying for permission to intervene could itself create the opportunity to initiate a case between itself and either one of the parties to the case merely by accepting the optional clause in terms suitable to match the already existing acceptances of compulsory jurisdiction by those others.

It might even be apparent from all the information given in the Application for permission that the applicant State saw its legal interest in the pending litigation as requiring it to side with the plaintiff in the case and to claim against the respondent the like relief or redress as that plaintiff itself was seeking from the Court. In such circumstances, Mr. President, it might be

argued that the applicant State would be seeking, by the route of intervention, to enter the case as a third party in the fullest sense of the term, as a co-plaintiff against the respondent, and not as an intervening party; and that to attempt to use intervention in that way would violate the consensual character of the Court's jurisdiction. It may be significant that throughout its life the Permanent Court was working under Article 62 of its Statute in terms which stated (in the English text) that the application for permission to intervene was to intervene "*as a third party*". The French text of the Statute of the Permanent Court had no equivalent of the words "as a third party". This discrepancy between the English and the French texts of the former Statute has a certain significance for the present Court in this application, for when at Washington and at San Francisco it was a matter of drafting the Statute of the present Court on lines as close as possible to those of the Permanent Court's Statute, the negotiators chose to delete the words "as a third party" from the English text rather than to add an equivalent phrase to the French text of that Article, perhaps realizing that the words "third party" are an ambiguous description of an intervener. The *Nuclear Tests* cases would seem to afford examples of a case in which some of the judges of this Court thought that an attempt was being made to use intervention for a purpose alien to its nature. Australia, a complainant against France, had accepted the compulsory jurisdiction of the Court. So had New Zealand, the complainant in the other case, also against France. France had also accepted the compulsory jurisdiction of the Court in terms which suggested reciprocity with both Australia and New Zealand. Australia and New Zealand, on the one side, and France on the other, stood *inter se* in a clear relationship of plaintiffs and defendant. Fiji, which sought to intervene, had not accepted the compulsory jurisdiction of the Court either before seeking leave to intervene or at any time thereafter. Fiji manifestly sought to intervene as a partisan on the side of Australia and New Zealand and against France. Thus Fiji sought the opportunity to enter the case as a co-plaintiff, but to do so by way of intervention without the consent of France. If the Application filed by Fiji for permission to intervene did not at first reading make this purpose clear, some Members of the Court commented on what they saw as the true nature of Fiji's Application. I need only quote the words of Judge Jiménez de Aréchaga; this is what he said: "In my view, in order to be entitled to intervene under Article 62 of the Statute" – and I emphasize these significant words of the learned Judge – "for the purpose of asserting a right against the respondent a State must be in a position in which it could itself bring the respondent before the Court" (*I.C.J. Reports 1974*, p. 533). The learned Judge also pointed out: "In circumstances like those in the present case", those were his words, that is of the case between Australia or New Zealand on the one side and France on the other, with Fiji seeking to intervene on the side of the plaintiffs, there must be presumed to be a requirement, and I take up his words again – "of establishing an independent jurisdictional link between intervenor and respondent" (*ibid.*).

The Application by Fiji stated (English version, p. 10) that "legal considerations" similar to those affecting New Zealand affect Fiji's position, and this statement when read with Fiji's description of New Zealand's case as being that France's conduct "constitutes a violation of New Zealand's rights under international law" (English text, p. 4), this made clear to some Members of the Court the real character of that Application to intervene. Judge Gros observed that Fiji's Application could not "in any way be regarded as a request to be permitted to intervene within the meaning of" Article 62 (*I.C.J. Reports 1974*, pp. 326, 356). May I again remind the Court of the *Haya de la Torre* case,

which arose out of the earlier proceedings in the *Asylum* case between Colombia and Peru. When in the *Haya de la Torre* case the Court was at first disposed to reject Cuba's request to intervene on the ground that the request dealt almost entirely with issues covered by the *Asylum* case judgment with the authority of *res judicata*, the Court saw the request as failing to "satisfy the conditions of a genuine intervention" (*I.C.J. Reports 1951*, p. 71 at p. 77; *Asylum* case, *I.C.J. Reports 1950*, p. 266). There seems possibly to be a common factor in the treatment of Fiji's Application in the *Nuclear Tests* cases in the *dicta* of the learned judges of this Court, and that of the Court itself in respect of Cuba's Application in the *Haya de la Torre* case, namely, the search for the real purpose of the Application to intervene.

V

The present case is very different from those cases. Malta's application for permission to intervene has quite another purpose, different from that of Fiji in the one case, and that of Cuba in the other.

In the present case, the circumstances are such that earlier pronouncements by Members of the Court in judicial proceedings cannot, in Malta's submission, be called in aid by Libya and Tunisia in order to seek to veto Malta's application for permission to intervene because they related to a different situation.

In the present case, when one looks at the Special Agreement, the *Compromis*, between Libya and Tunisia one sees there is no plaintiff; there is no respondent. Neither Libya nor Tunisia assumes the posture of complainant against the other. So neither is respondent. Even if, prima facie, the case appears as contentious proceedings, it is its formal guise; both Parties, Libya and Tunisia, come to the Court jointly, both put the same question to the Court, and both request the Court to answer that question, and no other question. In this case Malta does not seek to intervene in order to make common cause with either Party to the case against the other. Malta does not seek to intervene in order to obtain from the Court relief or redress against either of the Parties to the case. Malta does not intervene "for the purpose of asserting a right as against" either Party to the case. Malta does not seek to intervene in order to invite the Court to make a declaration or to reach a decision on any questions that may exist, or may arise in the future, as between herself and Libya, or as between herself and Tunisia. Malta's application has the very limited but very important purpose of putting Malta's views to the Court before the Court reaches a decision in the case between the Parties, in regard to a region that affects Malta's vital interests.

That is, it is submitted, one of the purposes envisaged for intervention by Article 62 of the Statute. It calls for no reciprocity of obligation as between the intervening State and the Parties to the case.

Nor do other forms of intervention necessarily require the existence of the jurisdictional link between the intervener and party when the application is, I use the Court's words again, for "genuine intervention".

One may recall here, briefly, the facts of the *Monetary Gold* case (*I.C.J. Reports 1954*, p. 19) and the Court's attitude in that case towards the absence of Albania. France, the United Kingdom and the United States, acting under standing inter-allied agreements for the restitution of monetary gold that had been removed from Germany during the Second World War, were defending a claim by Italy for the return of certain gold. The gold was originally Albanian and it had been removed from Rome in 1943. This gold was also claimed by

the United Kingdom in lieu of the unpaid damages awarded against Albania in favour of the United Kingdom in the *Corfu Channel* case (*I.C.J. Reports 1948*, p. 15 ; *I.C.J. Reports 1949*, pp. 4, 244). The Albanian Government was not a party to the proceedings in the *Monetary Gold* case in this Court. Nor had Albania applied to intervene in that case. Nor was there any suggestion or indication that Albania might do so. Nor was there any suggestion or indication that Albania might accept the compulsory jurisdiction of the Court. But it was never suggested that, because of this, Albania could *not* intervene in the case.

On the contrary, the Court proceeded to hold that because Albania *did not* intervene, the case could not continue. In consequence the Judgment of the Court concluded as follows on this point :

> "Albania has not submitted a request to the Court to be permitted to intervene. In the present case, Albania's legal interests would not only be affected by a decision, but would form the very subject-matter of the decision. In such a case, the Statute cannot be regarded, by implication, as authorizing proceedings to be continued in the absence of Albania." (*I.C.J. Reports 1954*, p. 32.)

In my submission that passage in the Court's Judgment makes sense only on the assumption that, had Albania applied to intervene as a claimant to the gold, the application would have been granted, despite the total absence of any jurisdictional link and despite the fact that Albania would have been opposing the claims of the other three countries concerned. I further submit that the *Monetary Gold* case, to that extent, affords a very telling illustration of the view that there could be a variety of cases in which justice would require intervention to be permitted despite the absence of a jurisdictional link, and that Article 62, by the generality of its wording, was intended to allow of that, which was evidently the view taken in 1922, from the start, by some eminent judges of the Permanent Court.

VI

How very different is the result contended for by Libya and Tunisia in their observations submitted to the Court on Malta's Application for permission to intervene.

Tunisia, perhaps somewhat tentatively, says "it seems" that it would be necessary for Malta to "prove" a basis of jurisdiction between it and the Parties (p. 3, sub. *(c)*).

Libya makes the same point :

> "The intervention, however, cannot be admitted unless the Court is satisfied that there exists a valid jurisdictional link between the Parties to the proceedings and the intervening State." (*Supra*, p. 269, para. 6.)

Then Libya tells the Court what it must hold before it allows intervention in this case, assuming that the other conditions for intervention are found to exist.

Paragraph 11 of Libya's Observations (Eng. text) states :

> "For this purpose nothing will suffice short of
>
> (i) adherence by all three States to one special agreement or to more than one, but identical, special agreements or to the same treaty or convention ; or

(ii) acceptance by all three States of Article 36 (2) of the Statute of the Court without reservations affecting the case ; or

(iii) acquiescence by Tunisia and Libya in the intervention by Malta . . ."

and then Libya adds to this third item these words : "even though a problem would still then exist as to the limitation on the subject-matter as described in Article 1 of the Libya/Tunisia Special Agreement".

These words making this qualification to the third item, must, we suppose, refer to the fact that, not surprisingly, the Special Agreement between Libya and Tunisia only relates in terms to questions concerning the areas of the continental shelf appertaining respectively to those two States, but as my learned friend, Mr. Lauterpacht, has submitted, that does not exclude Malta from claiming an interest of a legal nature in the case between the Parties.

On the second of Libya's suggestions, acceptance by all three States of Article 36, paragraph 2, of the Statute, without reservations, I can but remind the Court that Malta has done this, by reference to the appropriate subject-matter of the case, in its Optional Clause Declaration dated 2 January of this year. Without conceding the need for a jurisdictional link of any kind, as suggested by Libya, Malta has offered to both Parties to the case the jurisdictional link. The Parties to the case demand a jurisdictional link ; Malta does all that is within Malta's power ; Malta offers, to both, that link ; but it has yet to be accepted by either of the Parties to the case.

But may I again remind the Court that the power to grant or withhold permission to intervene is vested in the Court and in no one else. Yet this second item of Libya's listing of so-called essential links would, in effect, give the power of veto to either of the Parties. Let one suppose that Tunisia, which has confessed to a feeling of some sympathy with the reasons for Malta's desire to intervene, were subsequently to accept Article 36, paragraph 2, in terms of reciprocity sufficient to forge a compulsory jurisdictional link with Malta, if such a link were required at all. Libya could then exercise the veto, by declining to do likewise. In those circumstances, the power of decision in respect of intervention would be with one of the three States concerned with the case, and not with the Court, as Article 62 clearly says it is.

The same considerations apply, *mutatis mutandis*, to the first item of Libya's desiderata — a tripartite special agreement or the equivalent international instrument. If, for example, Malta and Tunisia were to adopt this Libyan suggestion, Libya's refusal to do likewise would, on Libya's view of Article 62 of the Statute — for it is the Statute and not the Rules that governs — exclude the possibility of the Court's granting permission for intervention by Malta. But if one were to suppose that all three States, the two Parties to the case and the intending intervener, were to enter into such a tripartite agreement, that would not be an arrangement to permit intervention by the intervener in the Parties' case ; it would be the basis of jurisdiction for contentious proceedings between the three States, one on the one side, the others in opposition. The case would then not be a true case of intervention.

Thus the real Libyan position is revealed. There is according to Libya's observations no jurisdictional difference between the right of a State to bring another State compulsorily to this Court in contentious proceedings and the right of a State to be permitted by the Court to intervene in a case in which that other State is one of the parties. According to Libya, both for intervention in a pending case and for initiation of contentious proceedings, there must be one of Libya's alternative jurisdictional links existing between the States involved. But the position, as seen by Libya, goes even further. It is this. There must also

be one of those links with the other party to the litigation as well. And this in all cases of intervention – not merely in the very different case of the Fiji type of application.

VII

The observations of Libya in these respects, suggesting as they do the need for a link of compulsory jurisdiction, equally for intervention as for contentious proceedings, must derive from a misconception that there was some sort of relationship between Article 62 of the Statute and the notion of a régime of universal compulsory jurisdiction for the Permanent Court and now for the International Court. Libya's observations seem to be based on a theory that Article 62 would never have been adopted in the form in which it was agreed unless it had been supposed that this régime of universal compulsory jurisdiction would be instituted, or that Article 62 was only adopted on that assumption.

This suggestion, or theory, does not – it is submitted – seem to be borne out by the record ; indeed it seems that the records actually negative any such idea.

I will not take up the time of the Court with a lot of detail on this. Briefly then, it appears that the idea of universal compulsory jurisdiction, enthusiastically put forward as a worthy ideal, which of course it was and indeed still is, never really got off the ground. It very soon proved to be highly controversial and a non-starter. As soon as it reached the Council of the League of Nations from the Committee of Jurists that had prepared the first draft of the Statute, it was not only eliminated, it was rejected with something approaching irritation, as being totally impracticable ; and the jurisdictional provision eventually adopted was that which corresponds to Article 36 of the Statute.

At no time, so far as we have been able to find, was Article 62 of the Statute seriously linked with any idea of universal compulsory jurisdiction for the Court. Nor again, when that idea was dropped, was any suggestion put forward for introducing a jurisdictional requirement into Article 62.

During the 18 months or so that elapsed before the Statute of the Permanent Court was finalized and adopted in its definitive form, no proposal for changing the substance of Article 62 was made. That Article of the Statute seems not to have been then the subject of any real controversy, although it was, as I have mentioned, the subject of discussion during the later Rule-making process in 1922. As my learned friend Professor Lalive has already said, we submit therefore that any attempt to read a jurisdictional requirement into Article 62 on the ground that such a requirement was intended as a condition of intervention, but was inadvertently omitted, or failed to be inserted because of an oversight, must be totally unwarranted.

This conclusion we submit must also automatically dispose of any suggestion, which might also have been the basis of Libya's observations on this question, to the effect that Article 62 must be regarded as having always been subject to an implied jurisdictional requirement and that it must be interpreted and applied as being still subject to that implied condition ; or, in other words, the suggestion that subparagraph *(c)* of paragraph 2 of Article 81 of the Rules of Court involves nothing new but merely, 60 years on, reflects an unexpressed, but implied, requirement of Article 62 of the Statute. In our submission, no such extreme conclusion can properly be reached on such a fragile and speculative basis.

Indeed, the drafting of Article 62, which I have only touched upon in very

brief outline, justifies quite the opposite conclusion. Originally drafted, as my learned friend the Attorney-General has described to the Court, in a noticeably open and unrestricted form – apart from the one necessary requirement of the existence of a legal interest – and therefore clearly intended to provide a generally available facility, remains, as it has remained, without change affecting that evident purpose.

Finally, it is not only the records that fail to support the point of view of Libya and Tunisia on this matter. The literature of the subject, scanty though it is and in any case contradictory, confused and inconclusive, equally fails to do so, by reason of those very deficiencies – so much so that, unless those who oppose Malta's Application bring forward any point on which we feel we must reply, I do not propose to trouble the Court with citations or excerpts from the literature that are of no real assistance to the Court in coming to a conclusion on the matter to which I am directing my submissions on behalf of Malta.

VIII

On the other hand there exists another field far more authoritative than that of the literature of the subject, namely the practice of States in the field of intervention in judicial and arbitral proceedings. It is, we submit, quite evident that in the days of the Permanent Court, and particularly in the period of the 1920s, great importance was attached, both by jurists and by governments, to the concept of intervention. This attitude is abundantly reflected in the treaties of the period. The concept of intervention was not even new ; in the series of Hague Conventions of 1899 and 1907, the one on the Pacific Settlement of Disputes contains a provision on intervention. It is a provision on the same subject as Article 63 of the Court's Statute, namely intervention by a third State in a case between others raising questions of construction of a convention to which the third State is also a party. It is, however, significant that in 1907 (Art. 84) the 1899 Convention's requirement of consent by the parties to the case to the intervention by another party to the convention in the former's case, was deleted from the relevant article. This was, as we know, followed by Articles 62 and 63 of the Statute of the Permanent Court and, yet again, in 1928, by the General Act for the Pacific Settlement of International Disputes (*LNTS*, Vol. 93, p. 343), which contained provisions on intervention which were retained in the Revised General Act of 1949 adopted by the General Assembly of the United Nations (*UNTS*, Vol. 71, p. 103). These provisions are, in my submission, of considerable interest in these present proceedings. Three Articles of the General Act are relevant : Articles 35, 36 and 37.

Paragraph 1 of Article 35 states that the General Act shall be applicable between the parties to it "even though a third Power, whether a party to the Act or not, has an interest in the dispute". So this contemplates proceedings in which there is a third Power, possibly not a party to the Act, having an interest in a dispute. I leave aside for the moment the second paragraph of Article 35 of the General Act and turn at once to Article 36, which is concerned with judicial and arbitral proceedings. Paragraph 1 of Article 36 reads as follows :

> "In judicial or arbitral procedure, if a third Power should consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit to the Permanent Court of International Justice [of course the 1928 Act here referred to the Permanent Court] or to the Arbitral Tribunal a request to intervene as a third Party."

Those are words which, as the Court will readily see, are more than merely reminiscent of the language of Article 62 of the Statute with necessary adaptations ; they have been taken from that Article. This is also true of paragraph 2 of the Act's Article 36 : "It will be for the Court or the tribunal to decide upon this request."

I should add, for completeness, that also Article 37 of the Act corresponds to Article 63 of the Statute in almost the same language about intervention in a case involving the interpretation of a Convention.

There is thus close identity between the Act and the Statute.

Now, it is with the terms of the second paragraph of Article 35 of the General Act that I invite the Court to compare these provisions of Article 36, paragraph 1, which, as I mentioned, deal with intervention in judicial or arbitral proceedings. Paragraph 2 of Article 35 is concerned with conciliation, a procedure for which the Act also provides, as contrasted with the judicial or arbitral settlement of disputes. This is what that paragraph says : "In conciliation procedure, the parties may agree to invite such third Power to intervene." That is, a third Power, whether or not a party to the Act, which has a legal interest which might be affected by the decision. So, in conciliation, the invitation of the parties is a prerequisite of intervention : in judicial or arbitral proceedings no such invitation, no such consent of the parties is required. It is for the Court or Tribunal to decide upon the request to intervene.

These provisions of the General Act of 1928 not only remain unaltered in substance in the revised Act of 1949 – they were also reproduced or reflected in a strikingly large number of bilateral treaties of the period. These treaties are listed in Volume I of the *United Nations Survey of Treaties for the Pacific Settlement of Disputes*, and an explanatory note summarizes their virtual identity with the corresponding provisions of the General Act. The existence of this large body of treaties shows, we submit, two things. First, that there was at the time, and this would extend back to the date of the adoption of the Statute of the Permanent Court, a general preoccupation with the concept of intervention, and a general desire to render the faculty of intervention possible without undue restrictions. Secondly, we submit that the Act and the treaties copying it make clear that there was absolutely no question in anybody's mind, at the time, of a jurisdictional link between the intervener and the parties to the case in judicial or arbitral proceedings. If those concerned were prepared to allow intervention on the part of *any* third Power, it is inconceivable that they could have had it in their minds to restrict this to third Powers between whom and the parties to the dispute there existed a link of mutual compulsory, consensual jurisdiction, and let it be borne in mind, Mr. President, I ask with respect, that the relevant clauses in the Act and in those treaties were framed on exactly the same lines as Article 62 of the Statute of the Court.

So important is this for the decision on the present Application that I make no excuse for reminding the Court again, in summary form, of the conclusions to be drawn from these provisions of the General Act.

First of all, they make a clear distinction between conciliation procedures and judicial and arbitral proceedings. Intervention by a third Power in the former – in conciliation – is by invitation of the parties. It is with their express consent. In judicial and arbitral proceedings no such invitation or consent is required ; intervention is for the Court or the Tribunal to decide on the basis of whether or not the applicant third Power has an interest of a legal nature which may be affected by the decision in the case. As the parties are not required to invite intervention or to consent to it in judicial or arbitral proceedings, clearly no jurisdictional link between them, or either of them, and

the intervening third Power is called for, since such a link would depend on their consent.

Secondly, as Article 36 of the General Act and the bilateral treaty provisions which copied that Article 36 were evidently inspired by Article 62 of the Statute of the Permanent Court, the latter Article must have been taken by those who drafted those provisions as not entailing any consent by the parties to intervention by a third State, which would have been so if the parties to the case had to have agreed to be taken compulsorily to the Court by the intervening State.

Thirdly, the term "third Power" in Articles 35 and 36 of the General Act clearly includes in the context States not party to the General Act – thus evidencing the intention of the drafters to create a wide-open opportunity of intervention in the interests of all States.

IX

I hope that the Court will bear with me if in conclusion I refer to two or three points in the observations of Libya and Tunisia that may not have been entirely covered by what I have already said or what was said by the learned Attorney-General. These are minor points, but they have their significance and importance, and I will deal with them more or less in the order in which they occur.

First, it is suggested that Malta, by making her second, and additional, Declaration in January of this year on compulsory jurisdiction, under Article 36, paragraph 2, of the Statute, has admitted, by implication, that a jurisdictional link of some kind is requisite for intervention under Article 62 of the Statute.

This is, of course, incorrect. Malta maintains that no jurisdictional link at all is needed between herself and either Libya or Tunisia in order to sustain Malta's Application for permission to intervene in this pending case. But, in addition to the considerations mentioned in the Application, namely, assisting the initiative of the Secretary-General of the United Nations relating to ratification of the Special Agreement between Malta and Libya, Malta in planning this Application to intervene had to take account of the possibility, however remote it might seem – and remote it seems to Malta – that the Court might hold otherwise; in the uncertain state of the law and practice on Applications to intervene it would have been unwise to ignore that remote possibility. Malta's additional Optional Clause Declaration makes the offer of a clear jurisdictional link with Libya and Tunisia relevant to the subject-matter of the case pending between them.

Furthermore, Malta maintains that that additional Declaration, even standing alone without corresponding Declarations from Libya and Tunisia, would be a sufficient jurisdictional act to fulfil any requirement that the Court might see to be necessary as a prerequisite to the grant of the particular Application now under consideration by the Court.

To require not only that a State requesting intervention should be able to be brought, compulsorily, to the Court by the parties to the case in respect of the particular subject-matter of the case, but also that each of the parties to the case should be able to be taken compulsorily by the intervening State to the Court – when in truth they are already there – would in practice reduce Article 62 to virtually nil, and go far to emasculating the whole concept of intervention. If all such reciprocal jurisdictional links were to exist between the parties and the applicant for intervention, intervention proceedings would in the majority of

cases be unnecessary. It is precisely where those links do not exist that intervention offers the only means of avoiding prejudice and injustice.

Secondly – and here I refer, for an example, to paragraph 6 of the Libyan observations – it seems to be suggested that the second paragraph of Article 62 of the Statute, which provides that it shall be for the Court to decide on the request for permission to intervene, somehow enables the Court to create its own conditions for granting the request. This cannot be so, according to the language of the paragraph nor, as Professor Lalive has shown from his study of the *travaux préparatoires* in the context of the Applicant's legal interest, was it the intention of those who drafted the provision. Of course it is for the Court to decide upon the request. But when the Court decides, it decides whether the conditions which are required by the Statute for the grant of permission to intervene are fulfilled in the circumstances of the case : the Court cannot decide on the basis of conditions which the Statute neither prescribes nor implies. I have already emphasized the point that the parties to a case must not be allowed by claiming to consent or to withhold consent to intervention, to arrogate to themselves that power of decision, so that in result paragraph 2 of Article 62 would refer to no more than the Court's performing the empty formality of endorsing what the parties have seen fit to permit or seen fit to deny by their actions or by their inaction.

Thirdly, and consequential to what I have just been saying, we find in paragraph 10 of the Libyan observations what seems to be a complete misconception – at least in the context of intervention – of the effect of paragraph 1 of Article 36 of the Statute of the Court which provides that the jurisdiction of the Court comprises all cases which the parties refer to it.

Here again the underlying thought of the observations seems to be that intervention proceedings require the consent of the parties to the case in which intervention is sought. But, in the nature of the case, the parties to a pending case do not and cannot themselves refer to the Court an intervention Application by a third State. It is the very nature of an Application for permission to intervene in a case that it must be made unilaterally and *ex parte* by the State seeking to intervene. Article 36 is, broadly speaking, irrelevant in that context. It is a context governed by Article 62, and by Article 62 alone.

Mr. President, I intend no discourtesy to those who oppose Malta's Application when I say in conclusion that of the remaining points on the jurisdictional question contained in the Libyan and Tunisian observations, some, we submit, are repetitive and others merely question-begging, while the remainder have, I believe, been covered in one way or another by my earlier remarks and by those of my learned colleagues who preceded me on behalf of the Government of Malta.

The Court rose at 12.45 a.m.

FOURTH PUBLIC SITTING (21 III 81, 10 a.m.)

Present : [See sitting of 19 III 81.]

ARGUMENT OF MR. EL MAGHUR

AGENT FOR THE GOVERNMENT OF THE LIBYAN ARAB JAMAHIRIYA

Mr. EL MAGHUR : Mr. President and honourable Members of the Court. It is a great honour and pleasure for me to represent my country today before this honourable Court, particularly since I have not had this privilege before. I shall be very brief, for the issues before you in this matter involve legal questions of a procedural nature, and they will be dealt with in a few minutes by my colleagues.

It would have been easier for me today to address the Court in my native language, Arabic. But I note that none of the other Agents is using his native tongue. And if I were to make my observations in Arabic I must confess I would not be brief and I might be tempted to stray into irrelevant matters. For example, I might have wanted to explain to the Court my views as to the meaning and scope of intervention under Libyan and comparative Arab and Islamic law. But this is not a seminar and, more important, I am not a professor. For this reason, I ask your indulgence to bear with me in the English language.

I assure the Court that we shall avoid irrelevancies in putting forward the views of Libya. Nor shall we deal with the questions of intervention in its generalities. We shall focus our attention on the specific case of whether the Application of Malta to intervene in this case may be granted. And we shall attempt not to use, in the words of distinguished counsel of Malta "a sledge-hammer to crack a nut".

It is the policy of Libya to support peaceful settlement of disputes between States within the existing international legal framework and in accordance with international legal principles and rules. The case presently before the Court involves the very important issues of legal principles and rules applicable to the delimitation of the continental shelf as between Libya and Tunisia. The two Parties, by submitting these questions to the International Court of Justice pursuant to Special Agreement, have put themselves in the forefront of States willing to bring such matters before the Court. Libya is proud of the part it is playing in this way in supporting the role of the Court in the peaceful settlement of international differences.

It is a good omen indeed that States are ready to bring their disputes to this Court – a legal not a political forum – and it is important to all States interested in protecting this means of settling international disputes that the procedures for utilizing this forum be scrupulously followed. When States choose this legal forum they are necessarily agreeing to be bound by its procedures as contained in both the Statute and the Rules of Court.

Libya is very conscious of the importance that other States may attach to the principles and rules of law that will be stated by the Court in this case in

connection with the delimitation of the continental shelf appertaining to Libya and to Tunisia. I should hardly need to add that the settlement of differences involving the continental shelf are of importance to States regardless of whether they are large or small, rich or poor. In this respect Libya understands well the interest and concern of Malta as to these matters. It looks forward to the participation of Malta at the appropriate time, and in the appropriate manner, in proceedings before this Court with respect to the legal principles and rules applicable to the delimitation of the continental shelf appertaining to Libya and Malta, pursuant to Special Agreement between them.

However, Libya does not believe that the Statute and the Rules of Court permit an intervention in the present case before the Court such as that requested by Malta. There is no multilateral treaty involved here. The issues are between Libya and Tunisia alone. The Special Agreement between these two States contains specific provisions agreed to by them after their own bilateral negotiations for the settlement of this matter by the Court, that in no way contemplate the intervention of a third State.

I should add that in listening to distinguished counsel of Malta, I noted what seemed to be three, not necessarily consistent, aspects of their request to intervene. First, Malta would like the opportunity to express its views as to some or all of the matters before the Court in the pending case, brought by Libya and Tunisia, but not to be bound by the decisions of the Court. Secondly, Malta has gone to considerable lengths to attempt to show the substantial nature of its interest that might be affected, and it has alleged that this interest is unique to Malta and is not an interest that other States concerned with continental shelf delimitation could assert. I should say here, Mr. President, that I heard no example given by counsel to Malta that would not be of interest to another maritime State. And third, it was asserted by distinguished counsel to Malta that only – to repeat the assertion in French – "un intérêt – direct ou indirect – immédiat ou médiat – important ou minime" is required to be alleged by a State in order to qualify a State for intervention. This third point left one wondering why the second point, relating to the alleged substantial and unique interest of Malta, was made at all. In any event, the test of merely "un intérêt" would open the door of intervention to practically any State.

It is clear that Malta has a number of international forums in which to express its views. Regarding Malta's own specific situation, the same route pursued by Libya and Tunisia to submit a specific case of delimitation to this Court by Special Agreement has already been adopted. On the more general plane, there are other ways in which a State such as Malta can make its views known. I mention here the Third Conference on the Law of the Sea as an example, not to speak of other international forums and conferences. And I should note the distinguished role played by Ambassador Pardo of Malta in connection with the creation of the Third Conference on the Law of the Sea.

If the legal procedures in this case were to be stretched so as to permit a third State in the position of Malta to intervene, the inhibitive effect upon use of the International Court of Justice for the peaceful settlement of these kinds of disputes referred to the Court by special agreement must be considered closely. And the other day counsel for Malta seemed to extend an invitation to a fourth State to intervene in the pending case. Would States not tend to seek other means for settlement of disputes if there were the risk that the specific and precisely drawn terms of a special agreement should suddenly be widened to permit the intervention of third parties ?

It is to avoid such a deterrent to the submission of matters to the Court that

Libya feels impelled to oppose the application to intervene by Malta without the appropriate jurisdictional link.

I make this statment to the Court without the slightest reservation, since it reflects the facts of international life. Moreover, Libya does not subscribe to the view that intervention is required if Malta is to be protected from the effect of a decision in the case presently before the Court. We do not believe the Court lacks the means to render its judgment in one case involving two States but having ramifications for other States in such a way as to leave the interests and rights of such other States unaffected.

Before concluding, I would like to place on record the fact that Libya, being brief, reserves all its rights in respect to any facts or points of law introduced into these proceedings. Our silence with regard to any such points, which in many cases we may have regarded as irrelevant, in no way implies the acquiescence of Libya.

I mentioned earlier, it is not my purpose to go further into the legal reasons why Libya considers that Malta should not be permitted to intervene in the present case. I am accompanied by learned counsel who will develop our oral observations. My colleagues Sir Francis Vallat, and Professor Antonio Malintoppi, who need no introduction to this Court, as well as my colleague, Keith Highet, who has appeared before you in the past. I have asked Sir Francis Vallat to take the lead and to outline to you, Mr. President, the manner in which our observations will be presented.

ARGUMENT OF SIR FRANCIS VALLAT

COUNSEL FOR THE GOVERNMENT OF THE LIBYAN ARAB JAMAHIRIYA

Sir Francis VALLAT : Mr. President and Members of the Court. May I associate myself, in the customary manner, with the Agent for the Libyan Arab Jamahiriya, Ambassador Maghur, in expressing my sense of honour and pleasure in having an opportunity to address this honourable and distinguished Court. May I be permitted also to add a personal expression of pleasure in appearing before the Court in its present composition.

As the Agent for Libya has already indicated, we do not appear so much in opposition to the Application for permission to intervene submitted by the Government of Malta as to try to place before the Court considerations that may assist it in reaching a proper decision on that Application.

May I, at this point, also say a word about brevity. Time is short and I am omitting general remarks about the arguments on behalf of Malta that I might have made with more time at my disposal and if it appears that my remarks are to some extent abbreviated and cryptic, it is in no way out of disrespect for the Court but, on the contrary, it is in my desire to facilitate the task of the Court.

If I may, I should like to begin by indicating the way in which we intend, as counsel, to present the oral observations on behalf of Libya.

First, I plan to make some remarks of a general character on the nature of the matter or questions now before the Court. Then the main observations on behalf of Libya will be linked to Article 81, paragraph 2, of the Rules of Court. The broad division of our work will correspond to the subparagraphs of paragraph 2 and will be given in the same order. This does, incidentally, have the advantage of following the order of the written observations submitted on behalf of Tunisia. So, my task will be to comment on :

"*(a)* the interest of a legal nature which the State applying to intervene considers may be affected in the case" ;

my colleague, Mr. Highet, will follow with observations on :

"*(b)* the precise object of the intervention" ;

and my colleague, Professor Malintoppi, will conclude our oral presentation by dealing with the question of the jurisdictional link or, in the words of subparagraph *(c)* ;

"*(c)* any basis of jurisdiction which is claimed to exist as between the State applying to intervene and the parties to the case".

It is apparent that the various aspects to which I have referred are linked, they are closely related, and perhaps the separation is somewhat artificial. Hence there may be some slight overlap in our statements, although we have done our best to eliminate these.

There are perhaps questions that could be raised about the compliance of the Application with the Rules, especially regarding subparagraph *(c)* of paragraph 2 and the submission of documents, but it is not our intention to make any objection to the Application on that kind of ground.

If I may now come to the substance of the matter. First, as to the nature of the questions before the Court.

The Application by Malta raises certainly some basic and, in fact, novel but comparatively simple issues concerning intervention in proceedings before the International Court of Justice. The issues are novel in the sense that there has been no previous decision either of this Court or of its predecessor concerning the application of Article 62 of the Statute. These issues include the nature of the legal interest of an applicant under Article 62 and its relation to the subject-matter of the proceedings. The Maltese Application also raises the question : What is meant by the words "affected by the decision in the case" ? One underlying problem, which should be examined together with those that I have just mentioned, is the nature of intervention in proceedings before the Court. What does intervention signify, and what are its implications ?

There is also, I submit, the basic principle of consent as the very foundation of the jurisdiction of the Court linked to questions of reciprocity and questions of equality of arms, a principle with which I know the Members of the Court are very familiar, so familiar indeed that I think there is absolutely no need to expand on them at this juncture, and I do no more than to call to mind the relevance of fundamental principles of this kind.

The Maltese application is of course made under Article 62 of the Statute. It could not be made under Article 63 because the present case between Tunisia and Libya does not concern in any way, as far as I know, the construction of a convention – so that, I think, eliminates Article 63. The present case concerns and what I am about to say is, I think, almost at the heart of the matter before the Court, it concerns the determination of the principles and rules of international law that may be applied for the delimitation of the areas of the continental shelf appertaining to each of the Parties respectively and the clarification of the practical method for the application of the principles and rules in this specific situation. So we are concerned in the proceedings before the Court with a limited area and with a specific situation. According to Article 1 of the Special Agreement between Libya and Tunisia, the express purpose of the clarification is to enable the experts of the two countries to delimit those areas without any difficulties. So the Special Agreement relates to areas of continental shelf appertaining to Libya and Tunisia and not to any areas of continental shelf appertaining to Malta.

Accordingly, on the face of the Special Agreement, it is made plain that no legal right or interest of Malta is involved in the present proceedings. Moreover, by Articles 1 and 2 of the Special Agreement, the actual delimitation – I think that this is absolutely clear – the actual delimitation is not to be decided by the Court, but is left to be settled by agreement between the Parties themselves. So there is another limitation on the scope of the forthcoming judgment of the Court in this case. This would seem to remove any possibility that any legal interest of Malta could be affected by the decision of the Court.

I have ventured to repeat certain provisions of the Special Agreement because, in my submission, the grounds for the application for permission to intervene must be found in the Special Agreement itself. I believe that this is implicitly admitted in paragraph 6 of the Application, but with a tone of complaint, repeated indeed during the oral hearing, because Malta has not been furnished with copies of the written pleadings.

However, may I suggest that this situation is, in the light of the Statute and the Rules of Court, normal, not abnormal. As is well known, in accordance with Article 53 of the Rules, it requires the permission of the Court, or of you, Mr. President, if the Court is not sitting, for copies of the pleadings and documents annexed to be made available to a State which is entitled to appear before it. Now normally the pleadings, as in this case, are not provided to third

States – it is not frequently done. Paragraph 2 of Article 53, on the other hand, does indeed make it possible for the Court, after ascertaining the views of the parties, to decide that copies of the pleadings and documents shall be made accessible to the public on or after the opening of the oral proceedings, that is to say, well after the written pleadings are closed. Well, at that stage, it is clearly too late for a State to apply for permission to intervene, although perhaps this might be allowed in very exceptional circumstances. This follows from Article 81 of the Rules which requires that (apart from exceptional circumstances) an application for permission to intervene has to be filed as soon as possible and not later than the closure of the written proceedings. As I have said, in a normal case the written pleadings will not be available to a State that wishes to intervene. The logic of the situation is made even more clear by Article 85, paragraph 1, of the Rules of Court which provides that if a State is given permission to intervene under Article 62 of the Statute the intervening State shall be supplied with copies of the pleadings and documents annexed. So it is implicit that at that stage, normally the pleadings will not have been provided to the State applying to intervene. In principle, I suggest that this is right, because the Special Agreement itself will show whether or not the decision, and I emphasize the word decision, of the Court in the case, which will flow from it, may or may not affect a legal interest of the State applying to intervene.

Well, with these remarks of a general nature, may I now turn to one of the essential questions in this case, namely, whether having regard to the provisions of the Special Agreement any legal interest of Malta could be affected by the Court's decision. As already indicated, it is difficult to see how this could be possible. But the question is in this case somewhat blurred by paragraphs 3 and 4 of the Application. These paragraphs are clear in themselves, but they seem to put the questions on to the wrong foot. It does not, in reality, carry the matter one step forward for Malta's request for permission to intervene to assert, as is done in paragraph 3, that Malta has satisfied the only condition for *making a request* by stating that "Malta considers that it has 'an interest of a legal nature which may be affected by the decision' to be given by the Court in the *Libya/Tunisia* case". It is clearly one thing for a State to make a request, it is quite another for the Court to give permission to that State to intervene.

I further submit that the question before the Court is not just a matter of bare possibilities, as is alleged in paragraph 4 of the Application. Nor is it in my submission "sufficient to demonstrate the existence of reasonable grounds for thinking that the decision, whatever it is, may have such an effect", as also alleged in paragraph 4. This may indeed be sufficient to justify the submission of the request but it does not begin in any meaningful sense to satisfy the requirements of Article 62.

The view of Article 62 that I would ask the Court to adopt is that the legal interest must be related legally to the subject-matter of the proceedings so that whichever way the decision of the Court may go the legal interest will be affected by that decision. That is to say, either in a positive or a negative sense. This is perhaps, so far as the legal interest side of this present Application is concerned, the key question that has to be considered. A question which has to some extent been minimized by counsel for Malta. They have also minimized the importance of the word "decision" in Article 62 by asking to have a chance to influence – and I am now referring to the Application, I will return to this point later – the findings of law and fact providing a basis for the decision and not the decision itself – of course I am now referring to the language of paragraph 1 of Article 62.

Now, I am well aware that the word "decision" is in itself a term that is ambiguous but terms, as we well know, have to be interpreted in their ordinary meaning in the context in which they appear. Words which I quote from memory but I think are familiar – very familiar – to the Members of this distinguished Court. I suggest that the word "decision" in the context of intervention in Article 62 of the Statute clearly is referring to the decision as such on the claim put forward by one of the parties in the dispute before the Court. It does not refer intrinsically to the, as it were, *consideranda* of the judgment, and I would in this connection for this purpose distinguish between the reasoning leading up to the decision and the decision itself. *How otherwise* can the interest be in a legal sense affected by the decision of the Court.

Now, as I have already indicated I would not for a moment deny to Malta the right to make this Application but that is very far from being the same as gaining the permission of the Court to intervene. In my submission the essence of the matter in this respect is *the grant of permission to intervene*. As paragraph 2 of Article 62 of the Statute says, "It is for the Court to decide". On this I believe that our learned friends representing Malta are really in agreement with us. It is not sufficient, I suggest, for a State merely to show some possibility that it has a legal interest that may be affected by the decision. This is necessary but not enough, and it is for the Court to decide on this question.

Both the Application and counsel for Malta have not unnaturally tended to focus attention exclusively on paragraph 1 of Article 62, thus tending to ignore the words "by the decision" and the whole of paragraph 2 of the Article. But, if I may be forgiven for repeating, it is for the Court to assess, having regard to the provisions of the Special Agreement, whether the alleged interest is of a legal nature that may be affected by the decision in the case.

I would go further than this, and I would submit that on an Application for permission to intervene the Court can and should take into account questions of jurisdiction, competence and admissibility, and indeed – and this perhaps in some ways is most important – the good administration of justice, or if I may borrow the words used by Judge Eduardo Jiménez de Aréchaga in his Gilberto Amado Memorial Lecture of 15 June 1972, "the orderly and expeditious administration of justice". Those words admirably express the idea that I am trying to express.

Now if I may turn to Article 81, paragraph 2, of the Rules of Court (read with Article 62 of the Statute) we there find the matters which at least are to be taken into account by the Court in deciding whether or not to grant permission to intervene. It surely cannot be assumed that the Court has decided to ask for the information indicated in paragraph 2 of Article 81 just as a matter of intellectual interest. On the contrary, it must be assumed that these are matters of vital concern to be taken into consideration by the Court for the purpose of arriving at its decision on an application to intervene.

Paragraph 2 of Article 81 is perhaps not exhaustive of the matters to be taken into account by the Court, but it does at least indicate the essential matters on which the Court requires to be satisfied if it is to decide to grant permission to intervene.

As I have said, I leave subparagraph *(b)* and subparagraph *(c)* to my colleagues. I should now like, if I may Mr. President, to add some observations on subparagraph *(a)* which, of course, in terms reflects Article 62, paragraph 1, of the Statute.

Two questions arise. First, has Malta shown an interest of a legal nature within the meaning of Article 62 ? Secondly, is it an interest which may be affected by the decision in the case ? As we are dealing with judicial proceed-

ings concerning legal rights I submit that as a matter of principle the interest of a legal nature must have some legal involvement in the proceedings in question, and there must be a possibility that the interest will be affected in a legal sense by the decision in the case.

Malta's alleged legal interest for the purposes of its Application is an interest in the delimitation of prospective Malta/Libya and Malta/Tunisia continental shelf boundaries. Now I make no comment on the substance of this alleged legal interest but, given that this is unquestionably a legal interest *in abstracto*, it is not involved in any way in the present proceedings and could not in any legal sense be affected by the decision concerning the Tunisia/Libya delimitation, which is the subject of the present proceedings.

It is of course possible, as counsel for the Applicant have done, to argue that the findings of law and of fact by the Court in one case may be relied upon by States in other cases and may well have a persuasive influence. But this is a characteristic of the international legal system which is of significance not just to Malta but to other States, and perhaps in particular States in the Mediterranean area such as Italy, Yugoslavia, Greece, Albania, Egypt, but not so much because they are Mediterranean littoral States but because they are members of the international community of States. So far as having a legal interest involved in the present proceedings goes, Malta does not really stand in a different legal position from other States.

Indeed, this situation seems to be recognized by the Application itself. Paragraphs 10 to 14 of Malta's Application amount to a request to be allowed to try to influence the Court on questions of law and fact actually involved in the present case without its being bound with respect to a future case with Libya or possibly Tunisia. It is a very remarkable proposition, Mr. President, when dealing with judicial proceedings. I am not going to trouble the Court by examining the details set out in paragraphs 10 to 14 of the Application, but I do feel bound to refer to paragraph 22. By that paragraph Malta virtually admits that it has no interest of a legal nature which is involved in the proceedings or could be affected by the decision of the Court. Malta expressly renounces "any object, by way, or in course, of intervention in the Libya/Tunisia case, to obtain any form of ruling or decision from the Court concerning its continental shelf boundaries with either or both of those countries", so that the very legal interest which is alleged is not to form the subject of the proposed intervention.

What is Malta asking? Malta is asking to be allowed to interfere – and I use the word "interfere" deliberately – in the ordinary course of the judicial process as between Tunisia and Libya, and to express its views in an attempt to influence the Court in those proceedings without in any way affecting in a legal sense the alleged legal interest on which it relies for the purposes of the Application. It really is, Mr. President and Members of the Court, a most remarkable proposition.

Now in this context my good friend and distinguished advocate, Professor Lalive has referred to a number of cases and sources. I will not go through all of them, partly because I think it is quite unnecessary and partly because it has been physically impossible to consult all his references in the middle of the night. The sources simply have not been available. But I would refer to one or two.

He mentioned the case of *Monetary Gold Removed from Rome in 1943* (*I.C.J. Reports 1954*, p. 79). My colleague, Professor Malintoppi, will be discussing some aspects of the case with which I am not concerned. The only point I want to make here is this: that if ever there was a case in which the interest of a State, namely Albania, was involved in the very subject-matter of the litiga-

tion, it was the case of *Monetary Gold Removed from Rome in 1943* ; so I do not see how in this respect – and indeed I do not see how in any respect – the case concerning *Monetary Gold Removed from Rome in 1943* furthers the case of the Applicant – if anything, quite the reverse.

If one looks at the other cases before the Mixed Arbitral Tribunals, for example, I have not found a case – there may be one, but I do not know of it – I have not found a case where there has been intervention unless there has really been a legal interest of the intervening State in the subject-matter of the litigation. Now it may be that my learned friends have some cases, but I do not think they have produced them so far.

For example, the well-known case of *Compagnie Internationale des Wagons-lits* against *Germany* (*Recueil des décisions des tribunaux arbitraux mixtes*, 1922, p. 873) – if I may refer to the photocopy that I have here of the report on that, the headnote (heaven forbid that I should ever refer to a headnote, being an English barrister, but I will do so just for once):

> "Intervention of a third party can be admitted when the intervening party has a separate interest from that of the defendant whether a title of property or of mere ownership."

Now that does represent the essence of the matter in this case. Because, as the record goes on to show, the question was this, whether the interest of the Company, which was not the same as that of Germany, should make it possible for intervention by the Company. Now the interest of the Company was, in the words of the French text "de conserver ses wagons", which perhaps might be loosely translated "to protect its wagons-lits". The interest of Germany, on the other hand, in the same subject-matter was really to obtain indemnification or compensation, but the subject-matter of the litigation was the same for the intervening party as it was for the German Government. How very different from the type of case with which we are faced here.

If one looks again – and I'm afraid I have to take time just to refer to one of the other cases which has come to my hand this morning, the case of the *Hungaro-Czechoslovak* Tribunal of 22 February 1927 (*Recueil des décisions des tribunaux arbitraux mixtes*, 1928, p. 59), also a Mixed Tribunal case, where it was admitted by the Parties that there was a material interest of the intervening party in the subject-matter of the litigation. If I may quote the French : "l'existence matérielle de l'intérêt n'étant pas contestée et ne pouvant pas l'être". Well now, here we do contest the legal interest of Malta in the subject-matter of the litigation by Special Agreement between Tunisia and Libya.

I have also glanced at the remarkable memorandum on intervention in civil proceedings by Dr. Habscheid, to which reference was made yesterday. I am not going to take the time of the Court to go through that, but in the references to the common law system it is quite clear that once more it is involvement of the interests of the intervening party in the very subject-matter of the litigation that is the important point. It is put very briefly by Jowett, which is quoted on page 30 of the copy of the memorandum that I have, "any person may intervene who can show that he has an interest in the matter in dispute". There the interesting point is that the emphasis is put on "matter in dispute". If one looks, as no doubt Members of the Court will, at what follows it will be seen that there is the same line of approach in the case of the United States jurisdiction as in the case of the English jurisdiction, and I may say in passing, that, frankly, I cannot imagine an English court allowing a party to intervene

in litigation merely to express its views, which is what is asked in this case. To my mind this is quite unthinkable.

Well now, if I may pass on I would like to refer also to my learned friend Mr. Lauterpacht's development of paragraphs 10-14 of the Application, by his fascinating exposition of the facts concerning Malta's claims to continental shelf areas, if I may say so all round the compass, but especially vis-à-vis Malta and Libya. Now, please don't be upset with me. I am not going to follow the expedition into the facts, particularly the facts of the delimitations – the future delimitations – of the continental shelf of Malta, but I might observe in passing that perhaps we have been given a foretaste of Malta's concept of intervention in the present case. The point I do want to make is that this excursion round the Mediterranean did not establish any interest of a legal nature that would actually be affected by the decision of the Court in the present proceedings. It led, to my way of thinking at any rate, to the inescapable conclusion that the delimitation of continental shelf areas is essentially, and in the normal case, a bilateral matter to be settled by agreement between the pairs of States concerned. I do not exclude the theoretical possibility of a multilateral conference where you would have all the States meeting together, but that is not the normal practice. One has to look at the State practice. There are now almost endless bilateral agreements dealing with the delimitation between pairs of States, and there is, in my submission, no reason to see why that practice should be departed from in the present case.

I am afraid at this point, Mr. President, I find it necessary to do what I dislike doing, that is to read from the record of Thursday morning's proceedings, but I think it is the shortest and most efficient way of really seeing what was the central point being put forward by Mr. Lauterpacht. I am referring to page 294, *supra*, of the transcript, the provisional text, for Thursday morning. I think for this purpose I need to read about one and a half paragraphs. With your indulgence, Mr. President, I will do this, because I think it very important in the presentation of the case on behalf of Malta. My learned friend, Mr. Lauterpacht said:

> "So the determination of the boundary must involve at least three stages: first, there is the stage of laying down the applicable general principles and the rules of international law; second, there is the identification and assessment of local or regional factors such as the ones I have just listed; and third, there is the stage of putting the factors together in such a way that they lead rationally to the choice of a particular line."

Now, if I may interpose, it is not with the analysis as such that I quarrel, but it is to what follows that I really do.

> "In the present situation Malta is not concerned about the first and the third of these stages. It is not concerned with the laying down of general principles as between Libya and Tunisia. Nor is it concerned with the choice of the particular line between Libya and Tunisia."

The necessary implication of these remarks – as I understand them, perhaps I misunderstand their implication, but the necessary implication of these remarks seems to be that Malta is really only concerned with the facts in the *Libya/Tunisia* case and that what it wants to do is to intervene on the facts in that dispute, as it were to upset the normal process of litigation, without being bound by the findings of fact by the Court. Now if there comes a question of the exercise of judicial discretion, quite apart from any other

consideration. I would ask the Court to refuse this application on that ground alone.

I would only add the observation that while the real purpose of the application has now been revealed. Malta has not, in fact, amended her Application, but that's a trivial remark.

Before proceeding further, may I say a very few words about the nature of intervention. If a State is given permission to intervene to protect a legal interest, it does seem that, in justice, the State should be bound by the decision of the Court at least to the extent of the interest for the protection of which it is given permission to intervene. This seems to me to be an elementary principle of what I might call judicial logic.

According to Article 63 of the Statute the construction of a convention given by a judgment is expressly stated to be binding upon the intervening State. It is true, there is no such corresponding statement in Article 62. But it does seem to be a necessary incident of the judicial process that a State participating before the Court in contentious proceedings should, at least to the extent of the precise object of its intervention, be bound by the judgment of the Court. There are also indications that this was the intention when Article 62 of the Statute was drafted but, as I have said, this is inherent in the nature of intervention to protect a legal interest whether intervention is adhesive, accessory or principal. But I beg leave to return to this point a little later, when discussing the *travaux préparatoires* of the Statute, because I will avoid repetition this way.

But now I should like to comment on a few of the arguments – one or two of the arguments perhaps – put forward by Professor Lalive on the interpretation of Article 62. Unfortunately, even after a lapse of some 60 years we have very little guidance on the scope or the meaning of Article 62 of the Statute. As Professor Lalive said, no application made under Article 62 has ever been granted by this Court or by its predecessor. As he also said, we have no direct help from the cases on the interpretation of Article 62. But in connection with the question of the interest of a legal nature that may be affected by the decision of the Court, I should like to try to dispel some misapprehension that may have arisen from his examination of them. I am afraid I am now forced to go into a certain amount of detail, the first contentious case before the Permanent Court of International Justice was indeed the *S.S. "Wimbledon"* in 1923 *(P.C.I.J., Series A, No. 1, 1923).*

As the facts of this case are so well known, it is unnecessary to state them, but the history of the Polish Government's application to intervene is not so well known and, with the indulgence of the Court, I should like to examine that history in a little detail.

By an application dated 22 May 1923 (see P.C.I.J., Third Public Sitting, 25 June 1923, Annex 12), the Polish Government, relying on Article 62 of the Statute of the Court, applied for permission to intervene in the case brought to the Court by an application on behalf of Great Britain, France, Italy and Japan against Germany with regard to the refusal of the German authorities on 21 March 1921 to allow the British *S.S. Wimbledon* chartered by a French company, free access to the Kiel Canal. The application for permission to intervene recited that the *S.S. Wimbledon* was bound for Danzig with a cargo of military material destined for the Polish Government, so the Polish Government had a direct interest in the cargo of the ship, if not in the ship itself, and that the German Government justified its refusal to allow passage to the *S.S. Wimbledon* on the grounds that, the Treaty of Peace not having then been ratified, a state of war existed between Poland and Russia and that the German regulations with regard to neutrality prohibited the transit of war material

through German territory to these two countries. Poland also relied on the facts that it was one of the parties to the Treaty of Peace of Versailles and that the refusal in question constituted a violation of the rights and material advantages guaranteed to Poland by Article 380 of the Treaty of Versailles. I mention these details which I have taken from the application because they indicate what happened, what the implication of the steps that followed were.

The application then presented to the Court was presented in agreement with the Governments of Great Britain, France, Japan, and Italy and it requested leave for permission to intervene on the side of those other States in the case of the *S.S. Wimbledon*. Well, of course, it is well known that by Article 386 of the Treaty of Versailles it was provided that any party to the Treaty had the right to apply to the Court in the event of an alleged violation of Articles 380-386, so there was clearly a basis of jurisdiction of the Court in that case. Now, for the purposes of its application under Article 62 of the Statute, the Polish Government was apparently relying on its right to receive military material which, as I have said, was clearly involved in the decision as to whether or not Germany was entitled to prohibit passage of the *S.S. Wimbledon* through the Kiel Canal.

Nevertheless, written observations (*ibid.*, Annex 13) were submitted on behalf of the British Government signed by Sir Cecil Hurst, as he then was, which pointed out that Poland was entitled as of right to intervene in the proceedings in accordance with Article 63 of the Statute, but raised certain doubts about Article 62 as a basis for the application. The observations said, first, that the application was not one "for permission to intervene as a third party as provided in Article 62, but is an application to be allowed to intervene on the side of the British, French, Italian and Japanese Governments"; secondly, if I may be permitted to quote from the observations again, they said:

> "Article 62 relates only to States alleging an interest of a legal nature *(un intérêt d'ordre juridique)* which may be affected by the decision in the case. Apart from the general Polish interest in the interpretation of the Treaty of Versailles, it is not clear that the Polish Government possesses any interest of a legal nature in the matters at issue in the *S.S. Wimbledon* case. Indeed, the Polish application itself states the grounds of the application in a way which shows that it is based merely on the injury which the Polish Government would suffer from any restriction of its rights under Article 380 of the Treaty of Versailles. It is therefore submitted that an application of this nature would very properly be made under Article 63."

Now there are two observations I would like to make on this statement on behalf of the British Government. The first is it clearly contemplates that Article 62 would apply where an interest of a legal nature is involved in the decision. Why do I say this? Because Sir Cecil Hurst goes on to say that it is not clear that the interest will be of that character because it concerns the cargo whereas the real nub of the matter was the interpretation of a provision of the Treaty of Versailles. Yet, in that case, the interest of the Polish Government was obviously much more closely related in law to the subject-matter of the dispute than is the interest claimed by Malta in this case.

Before continuing with the very brief history, may I be permitted to refer to Sir Cecil Hurst's observations. I am not going to read the whole of them. I have no doubt that Members of the Court will satisfy themselves of the text as it is. But the observations concluded by saying:

> "As the position which will be enjoyed by a State allowed to intervene under Article 62 appears to be identical in all respects with that of a State

> which intervenes under Article 63 so far as concerns the binding nature of the final decision given by the Court, it is submitted that it would be preferable that the intervention of the Polish Government in the 'Wimbledon' case should take place under Article 63 and not under Article 62."

This touches a nerve point in this case on which counsel for Malta are, I suspect, rather sensitive because it touches on the question of the binding nature of the final decision given by the Court. As I said, if the intervening party is not going to be bound by the decision what is the character of the "intervention".

Now, just to complete the history very quickly ; after the other observations had been made on behalf of the other applicant States briefly supporting or acquiescing in intervention under Article 63 rather than Article 62, and the Polish Government had indicated that it did not ask the Court to rely on its arguments supporting the application under Article 62, but was content for the Court to accept intervention under Article 63, the Court, not unnaturally, by a judgment of 28 June 1923 decided that it was unnecessary to consider and satisfy itself whether Poland's intervention was justified by an interest of a legal nature within the meaning of Article 62 of the Statute and in effect accepted the intervention of Poland in the exercise of the right conferred upon it by Article 63.

I have taken a little time to go through this history, but it seemed to me that the presentation by my distinguished colleague, Professor Lalive, did not quite give the exact nature of the procedure and bring out the full flavour of the observations by Sir Cecil Hurst which are, I think, very important. He was near to the drafting of the Statute and I think he understood very well the essence of what was contemplated. Well, like my learned friend Professor Lalive, the only other cases we have found concerning intervention in cases before the Court are the declaration by Cuba to intervene under Article 63 in the *Haya de la Torre* case (*I.C.J. Reports 1951*, p. 71) and the application of Fiji under Article 62 for permission to intervene in the *Nuclear Tests* cases. Mr. President you will be relieved to hear that as my colleague, Professor Malintoppi, will be referring to the latter case, I shall leave it to him, so my remarks will be short. However, there is one short passage in the judgment of the Court in the *Haya de la Torre* case which again, it seemed to me, counsel for Malta did not bring out very clearly. The Court observed, and this is at page 76 of the Judgment :

> "that every intervention is incidental to the proceedings in a case ; it follows that a declaration filed as an intervention only acquires that character in law, if it actually relates to the subject-matter of the pending proceedings".

This remark is directed to the character of an intervention. Now, although the declaration of Cuba was one made under Article 63, the observation of the Court is, I suggest, equally applicable to an application to intervene under Article 62. In fact I will go further and say *a fortiori* it must apply to a case under Article 62.

Finally, as regards the nature of intervention, I think that it is worth referring to the record of the 28th meeting of the famous Committee of Jurists which was drafting the Statute of the Permanent Court which was held at the Peace Palace on 20 July 1920 (see Procès-verbal, 28th meeting (private)). Now this was during discussion of what was then draft Article 23. Lord Phillimore explained the right of intervention as existing in English law. He emphasized in

particular the fact that in England an intervening party could only associate itself with the defendant. Now I am not saying whether Lord Phillimore was right or wrong in making that assertion, but the point is that he was referring to the English common law.

Mr. Loder explained that Dutch law allowed intervention both on the side of the plaintiff and of the defendant. Subsequently the President of the Committee said that he thought that the solution of the question of intervention should be drawn from common law and the wording of the drafts which he then suggested for what is now Article 62 of the Statute, was substantially the same as the text of that Article as it now appears in the Statute.

My researches may be deficient but so far as my researches have disclosed anything, this strictly speaking was the end of the *travaux préparatoires* of Article 62. I need not elaborate on the fact that the discussion among the judges in drafting the Rules may be part of the *travaux préparatoires* of the Rules but does not form part of the *travaux préparatoires* of Article 62 itself, because of the very nature of *travaux préparatoires*. We then get perhaps – I say with great doubt – into the realm of subsequent practice, but I hardly need emphasize this point to the Members of this particular Court.

What I find so interesting about this is that, whatever was the understanding of common law of those who were taking part in the Committee of Jurists, they thought, to say the least, that they were reflecting the common law concept of intervention in Article 62 of the Statute.

Now I would think that they probably had in mind that this would mean, as is the case normally in the common law, that the intervener – as it were – becomes a party, a third party possibly, in the proceedings, and this is the thought that is reflected, of course, in Sir Cecil Hurst's observations.

Well, we are all well aware of the danger of relying on *travaux préparatoires*. I would not go as far as my distinguished predecessor Sir Eric Becket in this respect, but one always has to handle them with care so that I do not put forward the point on the *travaux préparatoires* as being a major point in my argument but it is very interesting and, so far as the *travaux* do throw light on the situation, I suggest that they indicate quite clearly that Article 62 of the Statute was based on the background of the common law's concept of intervention and that the worldwide ranging investigation of Professor Lalive really has very little to do with the case which is now before us.

Now briefly, and I am coming to the end of my remarks. I hope I have kept more or less to the hour that I had promised in the circumstances. Briefly I maintain that in the present case Malta does not have a legal interest sufficiently related to the subject-matter of the proceedings to sustain its application for intervention and that even if it had such an interest there is no risk of the legal interest being affected by the decision of the Court.

Quite apart from the express limitation contained in the Special Agreement, any interest of Malta in any further delimitation which Malta might be involved is, we believe, adequately protected by Article 59 of the Statute. But above that, one knows perfectly well from the way in which these cases have been previously dealt with, that the interests of Malta will be protected by the judicial wisdom of the Court.

In any event, may I ask, having regard to the state of the case and the object of the intervention, would permission to intervene in this case be in the interests of the good administration of justice ? I would submit, not. But at this point, I begin to trespass on Mr. Highet's field and he will continue the presentation of the observations on behalf of Libya.

ARGUMENT OF MR. HIGHET

COUNSEL FOR THE GOVERNMENT OF THE LIBYAN ARAB JAMAHIRIYA

Mr. HIGHET : May it please the Court. Mr. President and Members of the Court, permit me first to associate myself with the remarks of our Agent, Ambassador Maghur, and those of my colleague, Sir Francis Vallat. It is indeed a great privilege to be able to appear before this honourable Court in order to address it upon certain aspects of the application of the Government of Malta for permission to intervene in the case pending between Libya and Tunisia concerning the delimitation of their respective continental shelves.

I am to address myself to considerations relating to the requirement expressed in Article 81, subparagraph 2 *(b)*, of the Rules of Court, to the effect that an application to intervene under Article 62 of the Statute : "shall set out the precise object of the intervention". Article 69, paragraph 2, of the now superseded Rules of Court had only indicated that "application shall contain a statement of law and of fact justifying intervention". Perhaps as a result of its experience in the *Nuclear Tests* cases the Court found it appropriate to make clear that as part of such a statement of law and fact the intervening State should in the future expound what the precise object of its intervention might be.

In a significant part of his address on Thursday, the distinguished Attorney-General of Malta commented on this provision of the 1978 Rules. He said :

> "there is nothing at all in Article 62 of the Statute about the object of the intervention, or at least nothing about any object separate from and independent of the legal interest involved . . ." (*supra*, p. 290).

And yet, Mr. President, Malta cannot be clear about what its object might be. We have already mentioned their insistence on the submission of views, and have pointed out to the Court that submitting views alone cannot be an object or an end in itself. Although Malta may well have as a purpose the obtaining of an opportunity of submitting views, its precise object for intervention must be something else. It must be, as we have tried to make clear, the protection of an alleged interest of a legal nature against something. And we have not yet been able to understand what it is against which such an interest of Malta is required to be protected in connection with these proceedings.

To get right to the point it is our position that it is not an intervention at all which Malta seeks within the meaning of Article 62 of the Statute. It is something quite different. For want of a better word it is a quasi-intervention and the Statute and the Rules of Court contain no mention of such a concept. Malta apparently would seek an advisory role in contentious proceedings. Indeed, what Malta has requested is in effect no more and no less than a watching brief, or a position more or less in the nature of *amicus curiae*.

The problem is that our colleagues on the Maltese side can point to no provision of the Statute of the Court, which has in this regard remained completely unchanged since its first adoption, which contemplates a procedure of this type. There is no provision for semi-advisory proceedings before the Court, for quasi-intervention, or for status as *amicus curiae*.

Reading the *travaux préparatoires* of the Committee of Jurists one under-

stands full well why this might be so. In the clear and, if I may say, eloquent words of Judge Yovanovich in 1922 :

> "The jurisdiction of this Court is always dependent upon agreements concluded between States, that is to say, agreements by which States mutually undertake to submit a particular dispute or certain classes of disputes to the jurisdiction of this Court. This agreement is to be found in every case, both in the case of a special agreement (compromis) regarding a dispute already in existence and in the case of special treaties in force . . . and finally in the case of the optional clause instituting the compulsory jurisdiction, provided for in Article 36 of the Statute.
>
> The question of intervention in proceedings before the Court must be regarded from this standpoint.
>
> A State which is already a party to a case before the Court is not bound to accept the intervention of a third State unless it has undertaken as regards that State to accept the jurisdiction of our Court in disputes which may arise between them." (*P.C.I.J., Series D, No. 2*, p. 381.)

I do not propose here, to go into a detailed recitation on the element of jurisdiction, as Professor Malintoppi will address that point. But I do, however, wish to state a fundamental truth, and that is that it is a commonplace that jurisdiction in international law is inextricably linked to the consent of States to submit to that jurisdiction by one means or by another. My point is this. If States wish to provide for anomalous or innovative forms of jurisdictional title, then let them, by express provision to that effect, consent thereto. For example, it would not be difficult for States to agree to permit other States to effect the type of anomalous intervention sought by Malta in this proceeding. Libya and Tunisia might have done so, agreeing to permit Malta or any third State access to the Court "to submit its views" – in the words of Malta's Application (para. 20) – on any issue raised in the real proceedings. They might have gone even further. They could have conceded to third States the right to intervene, or interpose, or perhaps interfere on certain points of interest in the litigation as so far then developed, and then to offer cool observations on issues of fact or law, without being engaged in the commitment of any decision, or captured by any form of *res judicata*.

But they did not do so. Instead, Libya and Tunisia executed, ratified, and notified to this Court a special agreement which asked the Court to consider certain very specific issues as between Libya and Tunisia, and them alone. Under these circumstances Malta's proposed intervention can serve no conceivable purpose. It would be disruptive, not helpful, confusing, not clarifying, and it is baffling to the real litigants in the case at hand. In short, none of this can possibly be helpful to the orderly or expeditious administration of justice by this Court.

Permit me, Mr. President, one more introductory comment. It is with no sense of enthusiasm that we feel constrained to indicate the lack of merit of the Maltese position. As our Agent has eloquently put it earlier today, we feel that it is essential that the positive development of international law be fostered and encouraged by States, provided however that they act within the orderly existing procedures and the principles and rules of international law.

In our view, the propriety of an exceptional procedure such as intervention should be tested by examining the purpose or object for which such procedure is sought, as well as the effect it will have on existing proceedings, the rights of other third parties, and the orderly administration of justice. It is this relatively simple precept which is expressed, *inter alia*, by Article 81 (2) *(b)* of the Rules

of Court. As the Court is well aware, this provision requires the application to "set out . . . [among other things] *(b)* the precise object of the intervention". We would not wish to imagine that our learned friends on the Maltese side also consider this subparagraph, as well as subparagraph *(c)* to be supererogatory or unsupported by statutory command. To the contrary, it expresses a simple and concise rule of common sense. Why does a State wish to make an intervention, and precisely why ?

This requirement can hardly be satisfied by a bald assertion or assertions, such as is the only reason actually given by Malta that "the precise object of Malta's intervention . . . would be to enable Malta to submit its views to the Court on the issues raised in the pending case . . ." (para. 20). We find this a thin or flimsy justification for an intervention. The precise object must be more than merely to submit views on issues. Why ? Because the submission of views is a means, a method, a means to an end. And yet Article 81 (2) *(b)* of the Rules calls for an end. It calls for an object ; it calls for a purpose to the intervention.

One need only look to the sister provisions of Article 63 of the Statute to discover the reasons which may well be involved. In Article 63, as of course the Court is aware, a State possesses an unqualified right of intervention whenever the construction of a convention to which it is a party is in question. In that instance the Rules do not require the intervener to indicate the "precise object of the intervention". Such an object of course would already be obvious by the very terms of Article 63 – the construction of a convention – and need not be recited in any greater detail than that required by Article 82 of the Rules. However, in the more far-reaching context of Article 62, a better indication of purpose is called for by the Rules in order to justify intervention in such a case. The intervener must state the precise object, the purpose, of its intended action and not merely the means by which it intends to achieve that object. Of course I am fully mindful of the fact that it is Article 62, paragraph 2, of the Statute which indicates that the Court will decide, and that the Rules do not themselves contain any more than an indication of the considerations which should be provided to, and examined by, the Court.

In our view, the requirement that the "precise object" be set forth is intimately related to the very nature and limitations of intervention. For intervention is an exceptional procedure, and in the present proceedings it is proposed to be superimposed or grafted upon a pending proceeding which is itself, in another manner of speaking, also an exceptional procedure. By this I refer, of course, to the fact that the pending case has been brought by special – and I stress special – agreement between Libya and Tunisia.

A State, moreover, should not be permitted to intervene for just any reason at all. The reason must be substantive. There must be a concrete purpose. This purpose, we would submit, must be all the more compelling when it is a proceeding brought by special agreement in which intervention is sought. It is for these reasons, I submit, that Article 81 (2) *(b)* of the Rules obligates a State, *or instructs a State, applying to intervene, to indicate its "precise object" in* doing so. But that is precisely what the Maltese application fails to do. Why ? It fails in the context of this case to set out a precise object. It is not a real intervention which is being requested. It is some form of watching brief which provides Malta with the luxury of comment, together with the freedom from any decision and for which the Statute, quite wisely, has never made provision. It is respectfully submitted that the Court should not decide to give its permission for intervention of this sort and in this instance.

Mr. President, permit me to develop this point along a slightly different line.

In his address on Thursday, the learned Attorney-General confirmed some very interesting concessions concerning Malta's proposed position in these proceedings. The Attorney-General said :

> "the Government of Malta . . . is not seeking to appear as a plaintiff or claimant against either of those States [Tunisia or Libya], or to assert any specific right against either of them as such" (p. 284, *supra*).

Now the Court will undoubtedly recall paragraphs 22 and 24 of Malta's Application, which also contain similar reservations as to Malta's "object" in intervening. Paragraph 22, I may remind the Court, states quite openly that :

> "it must be stressed that it is not Malta's object. . . . to obtain any form of ruling or decision from the Court concerning its continental shelf boundaries with either or both of those countries".

And paragraph 24 of the Application reiterates this, and then adds that "the intervention would not seek any substantive or operative decision against either party . . .".

It is therefore clear that Malta is not and cannot be asserting any rights against either Tunisia or Libya. It follows that Malta of course is not asserting rights against any other State such as, for example, Italy which, although mentioned to considerable extent in the address of Mr. Lauterpacht, is of course not a party to these proceedings. Thus, by its own concession, Malta is not asserting rights against any State. The question then becomes : is Malta asserting any rights at all ? And the answer, I submit, is plain. But, Mr. President and Members of the Court, if Malta is not asserting any rights against any State, what right or interest of a legal nature is Malta trying to protect ? Put another way, what is the object of the proposed intervention, and in the light of the requirement of Article 62 of the Statute, we ask again, what interest of a legal nature may be affected, could possibly be affected, by the decision in this case ? With respect, Mr. President, do we not have a complete paradox ? It is a situation where Malta, on the one hand, is arguing vehemently to the Court that it possesses an interest of a legal nature which may be affected by the decision, – but yet, on the other hand, is adopting a posture where in effect Malta is seeking to assert no rights at all against either Party in the case. How can one right, as a matter of pure logic, be protected if another right is not asserted ? How can a State claim an interest of a legal nature which might be affected by a decision in a case, and then retreat from asserting it ?

If I may carry this paradox one step further, what is the proceeding in which Malta fears that its legal right or interest will be affected ? Surely it cannot be the pending case ? For, if it were, Malta would have to assert some form of claim against at least one of the Parties. Well, Malta cannot assert a right or an interest at large. By way of analogy, nothing can be more concrete and more susceptible of solid appreciation than an interest or a right in real property, and we would urge that an interest in one's continental shelf is just as concrete. But this is precisely the right or interest which is not being asserted.

Let us go further and ask why has Malta gone to such lengths to stress that it is asserting no rights against Libya or Tunisia, no claims. Could it be because there is no basis of jurisdiction in this case, on which such rights or interests may be determined ? The Parties to this case – both of which are opposed to this form of intervention by Malta – have selected this honourable tribunal for the determination of their case, and their case alone. And because there is no jurisdiction for intervention in this case – a requirement which is therefore

stated to be irrelevant by Malta – Malta is constrained to maintain that she seeks to assert no right against either Party in the case.

This contains, quite obviously a fatal *lacuna* or gap in the logic. If there is no jurisdiction, and if Malta is asserting no right and defending no interest in this proceeding, how can this proposed intervention serve any useful purpose whatever ? To phrase the question differently, how can the interest of a legal nature, which Malta contends may be affected by the decision in this case, be protected unless some right or interest is in fact asserted ?

In a nutshell, we suggest that Malta cannot cause the Court to protect any right of Malta without Malta's asserting a claim against a Party in this case. For example, it is not enough to allege, as Mr. Lauterpacht, with respect, has done, "the elements which the Court finds as relevant to the practical specification of the boundary between Libya and Tunisia are almost certain to affect the practical specification of the line between Malta and Libya and Malta and Tunisia" (p. 303, *supra*) ? Nor can the matter be resolved by a contention that : "In this area the claims and interests of Libya, Malta and Tunisia meet and quite clearly overlap." (*Ibid*., p. 302.) For what can the Court conceivably do with regard to such boundaries or such area of alleged overlap which would not result in an assumption of jurisdiction, or stated alternatively, in the effective assertion of the rights of one as against the rights of the other ?

Although I do not wish to engage in this address at all in a detailed rebuttal of what the distinguished representatives of Malta have said, it is necessary at least to react to the distinguished Attorney-General's point on Thursday morning that our argument is "beside the point" (p. 285, *supra*). In the words of the Attorney-General, the argument which was beside the point was that : "any delimitation of the continental shelf boundary lines of . . ." Libya and Tunisia "will be suspended at the point where it might impinge on those of other States in the region". Then the Attorney-General continued to ask : "in parentheses, how will it be known when that point is reached without entering upon the question of Malta's continental shelf entitlement ?" (*Ibid.*)

With great respect to the Attorney-General, it does not require a view of the pleadings or submissions in this case to understand that the Court has no jurisdiction to indicate where such a point might be. Is it not obvious that any indication of such a point could not even be entertained ? For, as Malta is surely aware, the drawing of a line of delimitation has been left to the Parties – that is to Libya and Tunisia – and to their experts. Thus, it cannot possibly be known where that point is, and the question of Maltese continental shelf entitlement could not possibly be determined in the context of these proceedings.

But the matter does not end there. Even if the Court were being asked to draw a line – which I submit it is not – and even if the Court were to indicate a point at which that line should stop – which I respectfully again submit it could not and would not do – still there is something missing. Now, that point was very well brought out by the extensive exposition by Mr. Lauterpacht of the various diplomatic exchanges between Malta and Tunisia, on the one hand, and Malta and Libya on the other. What was missing ? There would have to be agreement between the three pairs of States, or conceivably amongst all three States, to reach the famous point at which paragraph 10 of Malta's written Application says that "the boundaries between all three States converge". In the context of this proceeding between Libya and Tunisia that statement is fallacious. It is fallacious simply because the boundaries do not exist and will not in fact converge until it has been competently

agreed by each of the three States concerned, first that they are boundaries, and then that they do in fact converge.

But the Attorney-General's comment is important to consider just a slight bit further. Unless or until the three States concerned have agreed in parallel, or in tandem, or amongst one another, as to what distance from each the hypothetical suspense point is, he will have an even worse quandary. Consider the following. When the Court indicates, in the future, principles and rules in accordance with our Special Agreement with Tunisia, and the experts and the Parties establish thereafter a line of delimitation between Libya and Tunisia, unless the Court has in fact indicated to both Parties the suspense point of the line in its course toward Malta (which it, in my submission, could not do) it will be a matter for each Party to determine for itself. And thus one could imagine an agreed line of delimitation (agreed, following the experts and everything else foreseen in the Special Agreement) proceeding from the edge of the territorial seas, but this line could only separate the areas of Tunisian shelf from the areas of Libyan shelf. Both Libya and Tunisia might very well have different or differing ideas as to each of their respective shelf rights as against Malta, or on either respective side of that agreed line of delimitation between them. And indeed from what we heard on Thursday that would already appear to be the case, at least in the past, and I mention only the reference to baselines to prove the point.

Thus, purely *ex hypothesi*, we must conclude, I would submit, that a line of determination between Libya and Tunisia can logically have no effect whatsoever as to Malta, since the delimitation (if any) between Malta and either Libya or Tunisia will probably occur in different manners, at different distances, and for different reasons, on two different sides of a Libya/Tunisia delimitation line. Malta could not care about the identity of the State with which it is to share any given part of the continental shelf, whether with one, or with another, or with both.

There is a point which probably does not even require to be mentioned, but to place this matter in the proper perspective I should perhaps touch upon it. None of this argument which I have just made concerning points or lines or similar matters is designed or intended to trench upon details or on the merits of these proceedings or with respect to any other proceedings. This discussion is only intended to elaborate an attempt at a logical analysis of, in my submission, the illogical position which Malta has adopted in these proceedings, namely, that it is impossible to say – and this is Malta's position – it is impossible to say where the point is at which a delimitation line between Libya and Tunisia should terminate, and then and therefrom to imply that such a line will probably have some sort of effect upon areas of Maltese shelf. Our argument, and it is purely analytic, is that it makes no difference whatsoever to Malta in any event where that hypothetical point might be, since it hardly represents the establishment of a transverse line of delimitation by either or of both States as against Malta.

And Malta's own counsel – perhaps inadvertently – has confirmed this point by saying on Thursday that Malta is not "concerned with the choice of the particular line between Libya and Tunisia" (p. 294, *supra*).

Now concluding on this point: this analysis, I may add, confirms the correctness of my colleague Sir Francis Vallat's statement earlier this morning to the effect that all of the delimitations in question are essentially matters, by State practice, by logic, for bilateral agreement unless there is a multilateral agreement by some chance between the States concerned.

In following our line of argument, I do not find it necessary, of course, to

repeat points which have been so ably put by my colleague Sir Francis. But I must again stress, however, that the absence of an interest of a legal nature which may be affected – and I emphasize the word "affected" – is directly related to Malta's inability to set forth a proper purpose, or a precise object, for its proposed intervention.

We maintain that this is directly related to the fact that Malta is not seeking relief as such, a ruling, a *res judicata*, in this case, but rather some ambiguous or paradoxical form of consideration or reassurance which is completely outside, and possibly goes against, the spirit and the letter of Article 62 of the Statute. Now it is not hard to understand why Malta should avoid seeking binding relief. It borders on the absurd to imagine Malta becoming the beneficiary of a binding determination, following a hypothetical intervention in this case, as to the principles and rules which should be applied in determining the continental shelves of two other States.

Malta is impelled, rather than fencing with this dilemma, to disavow *res judicata*, and in so doing, Malta has been forced to paper over the very reason why it might hypothetically have sought to assert the existence of an interest of a legal nature in the first place : to justify an intervention in order to protect that interest by an adjudication capable of protecting it.

I would now like to turn briefly to Malta's expressed desire (I refer you and the Court to paragraphs 10 through 12 of the Application) to address the Court on principles and rules of international law which, albeit applicable to the Libya/Tunisia delimitation, are nonetheless considered by Malta (and I quote para. 10) to be "bound to be relevant to the delimitation of" Malta's boundaries with Libya and Tunisia. In support of this contention, Malta states that these principles and rules will be "cited and appealed to" in any dispute involving Malta as a State with a Mediterranean continental shelf.

We must confess to a certain degree of puzzlement at a totally contrary representation made on Thursday by Malta's counsel, who indicated with great persuasion and even greater clarity (p. 294, *supra*) : "[Malta] is *not concerned with the laying down of general principles as between Libya and Tunisia*" (emphasis added). My colleague Sir Francis Vallat alluded a few minutes ago to this apparent change of position, and I note it here only for the record and for the interest of the Court, in determining what the precise object of Malta (if any) can possibly be.

Even assuming that Malta is still in fact preoccupied with principles and rules, which may or may not be applicable to it, the question then arises whether this preoccupation alone can be considered as being a proper or sufficient justification for intervention under Article 62 ? Again, we submit not. Malta has still seen fit to raise concepts such as the role of proportionality, equidistance, consideration of baselines and other matters as being issues on which she would like to comment. But is this really the proper forum for such comment ? And, moreover, how then would any other maritime State in the world, which might have a potential dispute concerning shelf delimitation with its neighbour, be excluded from intervening in this case ? Or any other case ? Only, one might say, because of the physical proximity of Malta to Libya and Tunisia. But what of other Mediterranean States in the same or similar positions ? What does proximity, in reality, in law, have to do with it, since it is in any event for the parties by their agreement to draw the line, or reach the "single, as yet undetermined, point" where the three lines some day might in fact merge ? As mentioned in our written observations any coastal State in the world could be entitled to intervene if Malta is entitled to intervene in this proceeding.

In this connection, it is useful to recall to the Court, if I may, the cogent observations made by Judge Anzilotti during the 1922 preliminary sessions for the drafting of the Rules of the Permanent Court. I quote from the Minutes of the Sixteenth Meeting of the Preliminary Session, held on 23 February 1922 :

> "Mr. Anzilotti . . . thought that, according to the terms of Article 62 of the Statute, the right of intervention could only exist either in virtue of an agreement between the two original parties or when the parties to the case, as well as those who desired to intervene, had accepted the optional clause with regard to the compulsory jurisdiction of the Court. He pointed out that the legal grounds on which his view was based were reinforced by practical considerations ; States would hesitate to have recourse to the Court if they had reason to fear that third parties would intervene in their cases."

We share the same practical concern and in particular in the context of the law of the sea and the continental shelf. Sea frontiers join many States who would, on such a theory as now espoused by Malta, be eager to intervene at all times in order to safeguard their rights, however vague or unspecified those rights or interests could be seen to be. And what is more, on Malta's theory of intervention, States would intervene while maintaining a status as quasi-parties to the subject-matter of the intervention. They would assert that there would be no "substantive or operative decision" – and I am quoting the Application – or "ruling or decision . . . concerning" their actual shelf boundaries, and no *res judicata* which might affect them unfavourably.

I would respectfully propose that to permit this type of interference, which is in our respectful submission a concept quite different from genuine intervention and more in the role of an advisory office, would be to open a box of which even Pandora would have been proud.

In addition, how could Malta be certain, were its intervention permitted, as to the subjects or points which might be considered important ? Would not its natural inclination be – or of any like-minded or similarly-placed other intervener be, since as I have already indicated there really is no interventional object here at all – to seek out its own targets and priorities, targets of opportunity, its own preoccupations as to fact and law, debating points as to which it would desire to submit its views to the Court (para. 20) ? And how could the Court itself regard or evaluate the expression of such views ? What weight would they have ? And at the end of the day how difficult or easy would it be for the Court to untangle quasi-submissions from real submissions, statements of fact on the one hand and on the other, the intervener's argument from the arguments of the parties, the points and issues on which rulings were requested from those where a decision was ostensibly withheld ?

Instead we are of the view that if a State applies for permission to intervene in proceedings instituted by special agreement but cannot satisfy the Court that the precise object of its intervention is meaningful, and involves the protection of a real interest of a legal nature which may actually be affected by the decision in this case, then that request should and must be rejected under Article 62, paragraph 2, of the Statute.

This result is all the more compelling when the proceedings have been brought under the exceptional régime of special agreement and when, as my colleague Professor Malintoppi will elaborate in a few minutes, there exists no jurisdictional link between the State applying to intervene and the Parties to the existing case.

Mr. President and Members of this honourable Court, my remarks have now been completed. I am most grateful for the courteous patience with which you have heard my observations, and I would once again express my deep personal appreciation and professional pride at having been accorded the privilege of addressing you.

PLAIDOIRIE DE M. MALINTOPPI

CONSEIL DU GOUVERNEMENT DE LA JAMAHIRIYA ARABE LIBYENNE

M. MALINTOPPI : Monsieur le Président, Messieurs de la Cour, c'est la quatrième fois que j'ai l'honneur de plaider devant votre haute juridiction : c'est toujours avec la même émotion, toujours avec le même sentiment d'admiration.

Monsieur le Président, sir Francis Vallat vous a démontré que le gouvernement cherchant à intervenir n'a pas fait la preuve de l'intérêt d'ordre juridique qui serait pour lui en cause dans la présente affaire. M. Keith Highet, pour sa part, vous a montré pourquoi la demande de Malte n'a pas précisé non plus l'objet de l'intervention ainsi qu'il est prévu par les règles applicables en la matière. Il m'appartient de compléter à mon tour nos argumentations en vous soumettant quelques observations concernant la question de compétence. Il s'agit, en particulier, de donner une réponse au point de savoir si la Cour, pour admettre la demande en intervention de Malte, doit s'assurer au préalable qu'il existe, en l'espèce, un lien juridictionnel entre les Etats initialement parties à la procédure et l'Etat cherchant à intervenir.

Nous sommes ici, en pleine humilité, pour essayer d'assister la Cour dans les limites de nos forces, avec toutes nos incertitudes et les petites certitudes qui ne découlent parfois, hélas, que de notre propre présomption. Dans cet esprit, nous avons commencé par nous demander – et par demander à la Cour – si un système quelconque de protection judiciaire saurait admettre des actes de procédure sans que l'on ait établi si, et dans quelles limites, le juge est compétent à cet égard. Ainsi, par exemple, l'article 62, paragraphe 2, du Statut confère à la Cour compétence pour se prononcer quant à l'admissibilité de la demande d'intervention. Mais assurément cette disposition ne vise que son propre objet et n'attribue dès lors guère de compétence à la Cour en ce qui concerne son pouvoir de connaître d'une procédure élargie à l'intervenant. C'est cette deuxième forme de compétence que l'on pourrait qualifier de compétence sur le fond de l'intervention pour la distinguer de la compétence relative à l'admissibilité de l'intervention.

La question que nous nous étions posée de notre côté de la barre – la question de savoir si l'on peut avoir des actes de procédure sans règles attribuant au juge la compétence y afférente – était de toute évidence une question de pure réthorique. Elle l'était d'autant plus que dans notre cas l'article 81, paragraphe 2 *c)*, du Règlement de la Cour exige que l'Etat cherchant à intervenir spécifie dans sa requête toute base de compétence qui, selon ce même Etat, existerait entre lui et les parties. Cet article du Règlement interprète correctement l'article 62 du Statut comme exigeant qu'un lien juridictionnel soit établi pour que la Cour puisse connaître du fond de l'intervention.

Ce qui nous semblait une constatation élémentaire a cependant été contesté avec acharnement par les conseils du Gouvernement de Malte. Ils ont déployé à cet égard beaucoup de talent et beaucoup de fantaisie. Ils ont par contre démontré une cohérence toute relative vu que chaque conseil a cru nécessaire de s'occuper de la question de la compétence tout en jugeant aussi nécessaire de le faire en soutenant des thèses différentes et parfois contradictoires entre elles.

Pour ma part, je me propose d'aborder le sujet brièvement, car on assiste la Cour même par la brièveté de ses interventions, et de la façon suivante.

D'abord je me propose de montrer pourquoi nous avons la faiblesse de croire que la Cour a correctement interprété l'article 62 du Statut et qu'elle ne s'est nullement trompée ni n'a même excédé ses pouvoirs lorsqu'elle adopta en 1978 l'article 81, paragraphe 2 *c)*, du Règlement.

En deuxième lieu je tâcherai de montrer pourquoi nous ne pourrions pas souscrire à la première des thèses soutenues par le Gouvernement de Malte. Je me réfère ici à des remarques du professeur Lalive mais surtout à la thèse reprise par Me Bathurst, au cours de l'audience d'hier, thèse d'après laquelle aucun lien de juridiction ne saurait être requis en relation avec l'intervention prévue à l'article 62 du Statut.

En troisième lieu je m'occuperai de la thèse brillamment amorcée par mon collègue et ami Me Lauterpacht, d'après laquelle la compétence quant au fond de l'intervention en l'espèce découlerait de la conduite des Parties initiales à la procédure.

Finalement j'aurais quelques mots à dire au sujet de la nouvelle déclaration d'acceptation de la juridiction obligatoire de la Cour qui a été notifiée par Malte au Secrétaire général des Nations Unies le 2 janvier dernier.

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Si l'on examine la requête à fin d'intervention présentée par le Gouvernement de Malte, l'on est frappé par le fait que la question concernant la compétence de la Cour y est confinée en sa troisième section. La question, il est vrai, n'y est pas ignorée, ce qui devrait suffire pour montrer qu'elle ne saurait l'être. Mais elle est en quelque sorte surtout « dégradée » du plan statutaire à celui du Règlement de la Cour, vu que la troisième section de la requête est formellement et précisément consacrée à l'article 81 du Règlement.

C'est dans ces conditions que la requête du Gouvernement maltais se préoccupe de souligner, au paragraphe 23, que la disposition de l'alinéa *c)* de l'article 81, paragraphe 2, du Règlement en vigueur « ne figurait sous aucune forme dans les versions précédentes du Règlement... ». Mais l'Etat cherchant à intervenir dans la présente affaire s'empresse également de préciser – et l'affirmation a été reprise tout au long des plaidoiries – que : « Bien entendu, cette disposition ne saurait avoir imposé une nouvelle condition de fond pour que l'intervention soit autorisée... » et que, dès lors, l'indication demandée par le Règlement actuellement en vigueur aurait « pour objet d'informer la Cour de tout lien juridictionnel éventuel entre les Etats intéressés ».

Aucune indication n'est donnée par le Gouvernement de Malte quant au sens de cet adjectif « éventuel » qui, d'après lui, qualifierait le lien juridictionnel dont il est question à l'article précité du Règlement. Mais le but de l'argument est évident : dans l'esprit de la requête maltaise, il s'agirait d'une indication surabondante, superflue.

L'argument développé dans la requête (par. 23) ne s'arrête cependant pas là. L'on arrive à conclure carrément que « l'intervention en tant que telle ne dépend pas de l'existence d'une base de compétence entre l'Etat cherchant à intervenir et les parties à l'instance ». L'affirmation revient tellement de fois dans les discussions orales que je peux me dispenser de toute citation à cet égard. En d'autres termes, pareille conclusion semble impliquer que s'il est établi que l'Etat demandant à intervenir fait la preuve de son intérêt d'ordre juridique la Cour devrait autoriser l'intervention, sans même se demander s'il

existe, oui ou non, un lien valable de juridiction entre l'Etat cherchant à intervenir et les Etats déjà parties à la procédure.

Je ne crois pas que l'on puisse souscrire à pareil argument. Il est frappé par plusieurs vices logiques qu'il convient de signaler séparément. Je me propose aussi, ce faisant, d'esquisser les lignes fondamentales de notre interprétation de la question.

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Tout d'abord, il convient de rappeler que les intervenants ne sont pas, en principe, des privilégiés qui ne devraient pas justifier d'un titre de compétence pour qu'ils puissent participer au procès international dans lequel ils demandent à intervenir. Ce principe a une portée tellement générale qu'il trouve application même dans les systèmes juridiques internes des Etats, qui sont pourtant caractérisés par l'organisation institutionnelle de l'administration de la justice – ce qui n'est certes pas le cas du système juridique international. Ainsi, par exemple et pour se limiter à un seul pays dont la législation et la jurisprudence en ont certainement influencé beaucoup d'autres, le professeur Morel fait observer, dans la deuxième édition de son *Traité élémentaire de procédure civile française* (Paris, 1949, p. 300-301), que :

> « La demande en intervention doit être de la compétence du tribunal saisi de la demande principale, sauf la prorogation légale de juridiction dans les cas où elle est admise. »

De même, Me Robert indique avec autorité qu'en matière d'arbitrage qui – on voudra bien l'admettre – présente des affinités singulières avec la procédure internationale :

> « L'*intervention volontaire* étant incompatible avec le caractère contractuel du compromis, les parties ou une seule d'entre elles peuvent s'y opposer. L'intervention volontaire n'est donc possible que si toutes les parties l'acceptent. » (*Répertoire de procédure civile et commerciale*, t. I, 1955, n° 200.)

En vous soumettant ces deux citations, j'ai suivi bien volontairement l'exemple de mon contradicteur et ami, le professeur Lalive, qui a également accordé sa préférence aux données de la procédure française.

Cela dit, je m'empresse d'ajouter que, pour ma part, je n'ai pas la moindre intention de suivre mon éminent collègue dans la direction du droit comparé. Je me bornerai à exprimer toute mon admiration à l'égard des connaissances dont il a fait étalage sans épargne, voire même sans pitié. En réalité, je ne crois pas qu'en matière de procès il y ait réellement de véritables principes généraux communs aux différents droits internes qui auraient exercé, en tant que tels, une influence marquée sur le développement du procès international. Je n'ai aucune peine à admettre que les choses en sont autrement en ce qui concerne les règles de fond où l'influence des principes généraux des droits internes et notamment du droit privé a été considérable. J'ai beaucoup admiré, à cet égard, le passage de l'opinion dissidente du juge Anzilotti, à l'arrêt n° 11, concernant la nature et les caractères des limites de la chose jugée. Qu'il me soit aussitôt permis d'observer que la chose jugée est une notion qui relève essentiellement du droit civil – c'est-à-dire de règles de substance, de fond – et non pas du droit de la procédure. L'institution de la chose jugée demeure, quinze siècles après, telle qu'elle avait été définie dans le *Digeste* de Justinien : *Res judicata pro veritate habetur*. M. Anzilotti s'est donc limité à examiner certaines conséquences d'ordre processuel d'une institution tirée du droit civil.

En réalité, il faut éviter une confusion toujours possible entre certaines notions de base qui sont propres à toutes les grandes branches du droit et les véritables principes généraux du droit interne dont il est question à l'article 38, paragraphe 1 *c)*, du Statut de la Cour. Sans doute, il faut reconnaître qu'il y a certaines idées élémentaires qui constituent le tissu structural de tout phénomène juridique et de tout système de procédure, telles que la notion de partie, de droit d'action, de qualité pour agir, d'ordonnance, de jugement.

Il s'agit ici, je le répète, des outils de base comme la notion de sujet, de droit subjectif, voire même de règle juridique. Mais dès que l'on cherche à aller plus loin et à individualiser ces principes communs au sens véritable de l'expression, l'on est aussitôt en difficulté. Force est-il de penser immédiatement à la distinction entre juridiction et compétence qui est caractéristique de certains systèmes nationaux et qui, par contre, est totalement ignorée par d'autres systèmes. Peut-on réellement, dans ces conditions, songer à utiliser des prétendus principes généraux du droit interne pour déterminer ce qu'est la juridiction en droit international, alors que ce dernier ne connaît même pas de distinction entre juridiction et compétence ?

A vrai dire, le recours aux principes généraux du droit interne devrait toujours être réalisé *cum grano salis*, avec toutes les précautions nécessaires. C'est seulement à cette condition que l'on éviterait de confondre entre des principes de ce genre et l'illusion de voir de tels principes là où, en réalité, il n'y a que la transposition involontaire de la formation culturelle de l'interprète sur un plan qu'il prétend être plus général, seulement parce qu'il lui est plus familier.

Or, en matière d'intervention, et notamment en ce qui concerne la question de la compétence en matière d'intervention, il n'y a même pas besoin de rechercher s'il y a vraiment des principes généraux communs aux différents systèmes juridiques de droit interne. Peu importe ; vu qu'en réalité c'est le problème de la juridiction en tant que tel qui se pose différemment selon qu'il s'agit du droit international ou d'un droit interne quelconque. Point n'est besoin d'insister ici pour rappeler en quoi consiste cette différence capitale. En droit interne, la fonction juridictionnelle est institutionnalisée, centralisée, confiée à des structures superposées aux sujets, alors qu'en droit international c'est le volontarisme qui l'emporte et ce sont les sujets eux-mêmes qui déterminent de par leur propre volonté si, et dans quelles conditions, la solution d'un litige déterminé doit être confiée au juge. Ainsi que la Cour permanente l'affirma dès le début, dans l'affaire de l'*Usine de Chorzów* (*compétence, arrêt n° 8, 1927, C.P.J.I. série A n° 9*, p. 19) : « la juridiction de la Cour est toujours une juridiction limitée n'existant que dans la mesure où les Etats l'ont admise... » ou, si l'on préfère, dans l'affaire des *Concessions Mavrommatis en Palestine* (*arrêt n° 2, 1924, C.P.J.I. série A n° 2*, p. 16) : « sa juridiction est limitée... » parce qu'« elle se fonde toujours sur le consentement du demandeur et ne saurait subsister en dehors des limites dans lesquelles ce consentement a été donné ».

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Nous nous approchons ainsi du cœur même du problème. Assurément, il est inutile d'ajouter toute autre citation, qu'elle soit tirée de la jurisprudence de la Cour permanente ou de votre haute juridiction. Le principe du fondement volontaire de la juridiction de la Cour est un principe dont la validité ne saurait être mise en discussion. La question essentielle est ici plutôt celle de savoir si, en matière d'intervention, la compétence de la Cour est régie par les règles

générales énoncées par l'article 36 ou bien si, exceptionnellement, l'on est en présence ici d'une compétence établie d'une manière directe par le Statut de la Cour lui-même.

Sans doute, le Statut connaît des hypothèses dans lesquelles la compétence de la Cour est déterminée par le Statut lui-même. L'exemple le plus immédiat nous est fournit par le paragraphe 2 de l'article 62. Bien entendu, même ici, le *fondement* de la compétence de la Cour réside toujours dans la volonté des parties. La différence entre ce cas et les cas visés à l'article 36 découle du fait que lorsque la compétence de la Cour est établie directement par le Statut, les Etats ont manifesté la volonté de la lui conférer au moment où ils sont devenus parties au Statut.

Quoi qu'il en soit, le paragraphe 2 de l'article 62 n'a pour objet, de toute évidence, que la compétence de la Cour pour se prononcer sur la demande en intervention. Celle-ci, on l'a vu, doit être autorisée par la Cour, ce qui est précisément l'objet de la présente procédure incidente. Mais la compétence découlant de l'article 62, paragraphe 2, ne s'étend nullement au-delà du prononcé sur l'autorisation à intervenir. Il s'ensuit que l'article 62 ne confère aucunement à la Cour, d'une manière expresse, la compétence pour connaître du fond de la demande de l'Etat intervenant, à *supposer* que l'intervention ait été autorisée.

Dans ces conditions, le Gouvernement de Malte n'aurait évidemment d'autre possibilité que de soutenir que la compétence de la Cour, pour connaître d'une procédure étendue au tiers intervenant, serait implicite dans le système de l'article 62. Nous nous attendions donc à des efforts désespérés dans cette direction, à la lumière notamment de la référence contenue dans la requête, à l'innovation que constituerait l'article 81, paragraphe 2 *c)*, du Règlement par rapport aux versions précédentes. Ces efforts sont venus au cours de la procédure orale — bien que sous une forme quelque peu étonnante — mais je crois qu'il suffira de mieux préciser certains points de l'interprétation des travaux préparatoires des textes de la Cour pour rétablir la réalité des choses.

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Nous n'avons aucune difficulté à admettre, de ce côté de la barre, qu'à l'occasion de la préparation du premier Règlement, celui du 24 mars 1922, les opinions des membres de la Cour permanente étaient relativement partagées quant à la question de savoir si l'intervention devait être subordonnée à la présence d'un lien juridictionnel entre les parties à l'instance et les tiers cherchant à intervenir.

Mais ce qui est de loin beaucoup plus important, c'est de rappeler pourquoi un certain nombre de juges de la Cour permanente estimaient que l'article 62 du Statut de cette Cour — passé sans changement dans le Statut de votre Cour — devait être interprété de façon à permettre, dans les mots de lord Finlay, aux Etats d'accepter le Statut de la Cour « avec la conviction que, si une question touchant leurs intérêts vitaux se présentait devant la Cour, ils seraient appelés à communiquer leur opinion » (*C.P.J.I. série D n° 2*, p. 90). En réalité, et ainsi que M. Anzilotti le faisait observer immédiatement après, selon lord Finlay l'article 62 viserait « les cas présentant un intérêt au point de vue du droit international » *(ibid.)*.

En d'autres termes, les divergences de vues au sein de la Cour découlaient surtout des tendances généreuses de la période antérieure à la première guerre mondiale en vue de l'établissement d'un système judiciaire de solution des différends internationaux. Si ces tendances avaient été oubliées par une opi-

nion publique bouleversée par la première guerre mondiale, elles demeuraient encore, et parfois intactes, au niveau culturel dans l'esprit des savants. L'idée même de la Société des Nations s'inspirait d'ailleurs de ces principes, qui n'étaient pas aussi morts que M. Bathurst aimerait le faire croire pour les besoins de sa cause. Et c'est ainsi que M. Altamira pouvait à juste titre faire « observer que le projet des juristes de 1920 était fondé sur le principe de la juridiction obligatoire de la Cour » et que « lorsque ce principe fut modifié par l'Assemblée, on a malheureusement omis de faire concorder le texte de certains articles avec le nouveau principe qu'on a introduit ». C'est-à-dire, avec le principe du fondement volontaire de la juridiction de la Cour. Dans ces conditions, l'on comprend pourquoi les véritables caractères de la juridiction de la Cour n'avaient pas encore été pleinement dégagés parmi certains membres de la Cour permanente.

Par contre, une opinion à la fois lucide et complète dans ses prémisses tout autant que dans ses conséquences est celle du juge Anzilotti, qui :

> « croit qu'aux termes de l'article 62 du Statut, le droit d'intervention peut seulement exister, soit en vertu d'un accord entre les deux parties initiales, soit lorsque ces parties aussi bien que celles qui désirent intervenir, ont accepté la disposition facultative concernant la juridiction obligatoire de la Cour » (*ibid.*, p. 87).

Ainsi donc, dans l'esprit de M. Anzilotti, l'intervention visée par l'article 62 déduit de l'article 36 les conditions du procès en ce qui concerne la compétence pour connaître d'une instance élargie au tiers intervenant. En d'autres termes, l'article 62 ne contient aucune règle sur la compétence, sauf celle, extrêmement limitée, qui porte sur l'admissibilité de la demande en intervention. Mais le juge Anzilotti ne se limita pas à indiquer le principe. Il s'empressa d'en préciser la *ratio* : « les Etats hésiteraient à s'adresser à la Cour s'ils avaient à craindre l'intervention, dans leur procès, d'Etats tiers » (*ibid.*).

En réalité, il est évident que s'il n'en était pas ainsi et si tout Etat, du fait de s'être engagé dans une procédure judiciaire à l'égard d'un Etat donné, se trouvait exposé à l'intervention de tout Etat tiers dont les intérêts juridiques seraient mis en cause, le fondement volontaire de la juridiction de la Cour en serait considérablement affecté.

Il est pourtant vrai que d'après un autre juge non moins connu, et aussi éminent que Dionisio Anzilotti, John Bassett Moore, l'intervention des Etats tiers aurait dû être facilitée surtout lorsqu'il s'agirait des grandes puissances. Ainsi qu'il est également relaté dans les travaux préparatoires de 1922 :

> « En relevant le fait qu'aucune grande Puissance n'a jusqu'ici accepté la disposition facultative, M. Moore déclare qu'il est d'autant plus désirable de donner à ces Puissances [grandes Puissances], le droit de venir devant la Cour dans des procès introduits par de petites Puissances, afin d'obtenir une décision de celles-ci sur les grands principes de droit. » (*Ibid.*, p. 91.)

Ainsi la Cour était partagée entre une sorte de « doctrine Anzilotti », qualifiée par le réalisme de son auteur et par le souci de placer tous les problèmes concernant la juridiction de la Cour dans le cadre rigoureux de sa nature volontaire et réciproque, et une sorte de « doctrine Moore » qui tendait par contre à créer les prémisses pour une organisation institutionnelle de la justice internationale. Bien entendu, Anzilotti et Moore se plaçaient l'un et l'autre, en pleine bonne foi, dans l'optique du moment. Mais les temps n'étaient guère favorables à des élans vers l'extension maximale de la juridiction obligatoire.

La lettre de l'article 62 ne donne certes pas trop d'espace à des élans de ce

genre, et l'on comprend aisément pourquoi. Toutefois, bien que l'opinion d'Anzilotti était également partagée par d'autres juges et notamment par les juges tels que MM. Max Huber et Negulesco, l'on finit par se rallier à la sagesse de M. Anzilotti qui proposa lui-même de laisser à la pratique de la Cour le soin de résoudre la question au fur et à mesure dans les cas qui se présenteraient devant elle.

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Lors de la revision du Règlement en 1935 – celle qui devait aboutir au Règlement du 11 mars 1936 –, le juge Anzilotti posa de nouveau dans des termes fort précis la question de la juridiction de la Cour : « Si deux Etats ont signé un compromis, sont-ils toujours tenus d'accepter l'intervention d'une tierce Puissance ? » en ajoutant que : « La même question se pose d'ailleurs au sujet d'une affaire introduite par requête. » (*C.P.J.I. série D, troisième addendum au n° 2*, p. 306). La Cour, une fois de plus, préféra de ne pas aborder le sujet et se borna à maintenir la solution adoptée par le Règlement antérieur, c'est-à-dire, le silence sur la question de la juridiction.

D'autre part, une telle tendance au renvoi de la question n'avait certes pas été entravée par le comportement des Etats devant la Cour. Sans doute, une demande d'intervention fut présentée aussitôt dans la première affaire dont la Cour permanente fut saisie, celle du *Vapeur* Wimbledon. Mais l'Etat cherchant à intervenir, la Pologne, qui avait en premier lieu demandé à intervenir en vertu de l'article 62, fut amené par la Cour elle-même à se fonder plutôt sur l'article 63. Et la Cour le constata dans son arrêt du 17 août 1923.

La Cour permanente n'eut donc pas d'occasion de se pencher sur ces « cas spéciaux » qui, selon la formule indiquée par le juge Anzilotti lors de la rédaction du Règlement originaire de 1922, aurait dû lui permettre de se prononcer sur la portée de l'article 62 au point de vue de sa juridiction (*C.P.J.I. série D n° 2*, p. 90).

La Cour actuelle, à son tour, n'a pas été en mesure de profiter de l'intervention de Cuba dans l'affaire *Haya de la Torre*, vu que celle-ci relevait, elle aussi, de l'article 63 (*C.I.J. Recueil 1951*, p. 76-77). Ce n'est donc qu'à la suite de la requête d'intervention du Gouvernement fidjien dans les affaires des *Essais nucléaires* que la Cour a été finalement saisie d'une demande fondée sur l'article 62. Il est bien vrai que par ses deux arrêts du 20 décembre 1974 la Cour dit que les demandes, respectivement, de l'Australie et de la Nouvelle-Zélande étaient désormais sans objet et qu'il n'y avait dès lors pas lieu à statuer. Il est aussi vrai que le même jour et par voie d'ordonnance la Cour dit que, par conséquent, la demande d'intervenir tombait et qu'il n'y avait plus aucune suite à lui donner (*C.I.J. Recueil 1974*, p. 535 et suiv.). Néanmoins, la question était désormais sur le tapis. C'est pourquoi ladite décision constitue, dans le problème qui nous occupe, un véritable tournant.

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Nous avons déjà examiné, dans nos observations écrites, la décision en question et notamment les déclarations qui l'accompagnent. Dans un souci de brièveté, je crois donc pouvoir me reporter tout simplement audit exposé, d'autant plus que plusieurs des auteurs de ces déclarations siègent encore, aujourd'hui, sur le banc de la Cour. J'aurai beaucoup d'hésitation avant de suggérer aux éminents membres de cette Cour une interprétation quelconque de leur propre pensée ou de la pensée des autres juges non moins éminents qui étaient leurs collègues en 1974.

Les travaux préparatoires de ce dernier Règlement n'ont pas encore été publiés. Au surplus, ici encore il me serait particulièrement difficile d'exprimer devant votre haute juridiction des opinions quelconques à ce sujet vu qu'un temps très court s'est écoulé depuis l'adoption dudit Règlement. Dans ces conditions, je voudrais plutôt me limiter à deux considérations qui seront cependant, à mon avis, suffisantes pour montrer qu'en adoptant l'article 81, paragraphe 2 *c)*, du nouveau Règlement la Cour a interprété correctement l'article 62 du Statut sans y introduire aucun élément nouveau.

En réalité, lors de la dernière revision du Règlement, la Cour, appelée par la décision de 1974 à concentrer l'attention sur l'article 62 du Statut, a pu en même temps profiter de l'expérience acquise le long d'un demi-siècle en ce qui concerne le fondement, la nature et les limites qui caractérisent sa propre compétence. L'on était désormais bien loin, en 1978, de certaines idées — oserais-je dire, de certaines illusions généreuses — qui étaient encore présentes à plusieurs esprits en 1922. Entre 1922 et 1978, en d'autres termes, la Cour a bien précisé le sens dans lequel sa compétence constitue une compétence « volontaire ». A cet égard je pourrais retenir trois affirmations et précisions contenues dans la jurisprudence de la Cour :

1. « La Cour, en considération du fait que sa juridiction est limitée, qu'elle se fonde toujours sur le consentement en dehors des limites dans lesquelles ce consentement est donné... » (*Concessions Mavrommatis en Palestine, arrêt n° 2, 1924, C.P.J.I. série A n° 2*, p. 16) ;
2. « La juridiction de la Cour est toujours une juridiction limitée, n'existant que dans la mesure où les Etats l'ont admise... » (*Usine de Chorzów, compétence, arrêt n° 8, 1927, C.P.J.I. série A n° 9*, p. 32) ;
3. Et surtout : « Statuer sur la responsabilité internationale de l'Albanie sans son consentement serait agir à l'encontre d'un principe de droit international bien établi et incorporé dans le Statut, à savoir que la Cour ne peut exercer sa juridiction à l'égard d'un Etat si ce n'est avec le consentement de ce dernier » (*Or monétaire pris à Rome en 1943, arrêt, C.I.J. Recueil 1954*, p. 32).

Si l'on considère ces affirmations typiques sur le fondement de la juridiction de la Cour, il est aisé de s'apercevoir que ce sont en réalité l'objet et l'étendue de la volonté du défendeur qui déterminent la mesure de la compétence de la Cour dans une instance déterminée. La juridiction découle en effet de la volonté des parties, c'est-à-dire de la combinaison des manifestations individuelles de volonté des différentes parties au procès. Or, dans le cas de l'intervention, la demande de l'Etat cherchant à intervenir vise précisément à élargir le domaine subjectif de la procédure.

Il est vrai que les distingués conseils du Gouvernement de Malte ont essayé de se tirer de cette impasse en soutenant que dans le système de l'article 62 du Statut l'Etat intervenant ne sera pas en réalité une « partie » véritable, mais une « quasi-partie » ou même, selon la formule toute nouvelle du professeur Lalive, un « participant ». Mais — ainsi que mes confrères, et nomment M. Keith Highet, l'ont démontré ce matin — le gouvernement cherchant à intervenir se heurte ici à un dilemme inévitable : ou bien l'Etat cherchant à intervenir ne « demande » rien au sens juridique et formel de l'expression, et son intervention ne saurait alors être autorisée ; ou bien ce même Etat « demande » quelque chose, même à faire des remarques, et il devient dès lors dans ces limites, si l'intervention est admise, un sujet au sens formel de la procédure.

Dans ces conditions, et en ce qui concerne le Statut de la Cour, il s'agit donc d'une intervention dans laquelle le tiers cherchant à intervenir est un véritable

demandeur et par rapport à laquelle les parties initiales à l'instance sont des défendeurs au sens propre de l'expression. Il s'ensuit que c'est le résultat cumulatif de la volonté de l'une et de l'autre des parties initiales combinée avec la volonté du tiers intervenant qui donne, en droit international, la mesure de la compétence nécessaire pour décider sur une instance élargie au tiers intervenant. Point n'est-il besoin à ce stade, de rappeler que Malte n'est pas partie au compromis conclu entre la Libye et la Tunisie et qu'il n'y a pas d'autre lien juridictionnel qui soit commun aux trois Etats.

La deuxième constatation à faire au sujet de la solution adoptée par le Règlement de 1978, c'est que la Cour, à juste titre, a exclu que l'intervention visée par l'article 62 soit l'objet de l'une des formes de juridiction « incidente » ou « inhérente » ou « accessoire » ou « implicitement obligatoire » prévues par le Statut de la Cour.

De toute évidence, il n'est point nécessaire d'examiner ici dans les détails l'ensemble des problèmes posés par la juridiction dite « incidente » de la Cour. Il s'agit, d'après les opinions doctrinales courantes, de la compétence visée par des dispositions du Statut telles que les articles 36, paragraphe 6, 41, 53, 60, 61, 62 et, en ce qui concerne la recevabilité de la demande, 63 et 64.

A cet égard, je me bornerai à renvoyer aux exposés systématiques de mes savants collègues et amis, les professeurs Briggs (« La compétence incidente de la Cour internationale de Justice en tant que compétence obligatoire », dans *Revue générale de droit international public*, 1960, p. 217 et suiv.) et Starace (*La competenza della Corte internationale di giustizia in materia contenziosa*, Naples, 1970, p. 249 et suiv.).

Ce qu'il faut cependant souligner ici, c'est que, dans le système du Statut de la Cour, la compétence incidente est l'exception et non la règle. La règle est celle de la compétence volontaire, telle qu'elle ressort de l'article 36 du Statut. L'ensemble des normes qui établissent la compétence incidente est constitué par conséquent par des règles d'interprétation stricte. Ainsi, si la Cour qui ne pouvait encore laisser subsister, après sa décision de 1974 sur la demande en intervention de Fidji, l'équivoque du Règlement de 1922, si la Cour – disais-je – avait interprété en 1978 l'article 62 comme impliquant *ipso jure* une juridiction obligatoire et incidente quant au fond, elle aurait en réalité apporté une modification à l'article 62 du Statut et, plus généralement, au système qui est à la base même de sa juridiction. Mais la Cour n'a pas innové. En adoptant en 1978 l'article 81, paragraphe 2 *c)*, du nouveau Règlement, elle a tout simplement interprété, et de la façon la plus correcte, le sens et la portée de l'article 62 du Statut pour résoudre ce que le juge Anzilotti appelait justement « la question de la juridiction ». En d'autres termes, la Cour a précisément résolu la question en accordant à ce que je me suis permis de qualifier comme la « doctrine Anzilotti » la préférence à celle que j'ai nommé la « doctrine Moore ».

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J'en ai ainsi terminé avec la première partie – et, rassurez-vous, de loin la plus longue – de mon intervention. En effet je crois vous avoir montré pourquoi l'article 62 exige qu'un lien juridictionnel entre tous les sujets soit établi pour que la demande en intervention puisse être admise. Je crois vous avoir également montré que l'article 62 ne constitue pas de par lui-même un titre de juridiction et que c'est donc dans l'article 36 qu'il faut, dans ce cas aussi, rechercher le fondement de la juridiction de la Cour. Il me reste donc à faire quelques remarques en ce qui concerne les trois versions qui caractérisent la

position du Gouvernement de Malte et de ses conseils à ce sujet. Je le ferai aussi brièvement que possible.

Nos distingués contradicteurs soutiennent d'abord que l'article 62 n'exige nullement un lien juridictionnel. Et puisque toujours d'après nos éminents collègues, l'article 62 ne constituerait pas non plus, en soi, un titre de juridiction, Me Bathurst – je ne me réfère pour l'instant qu'à lui, vu que le professeur Lalive et Me Lauterpacht ont été beaucoup plus prudents – Me Bathurst, disais-je, semble impliquer qu'en ce qui concerne l'intervention visée par l'article 62 la juridiction descendrait du ciel.

Les arguments qui devraient étayer cette thèse sont essentiellement au nombre de trois. Tout d'abord, on vous a fait observer que l'intervention visée à l'article 63 – je dis bien à l'article 63 – serait ouverte aux Etats parties au Statut de la Cour et aux Etats qui, tout en étant parties à la convention multilatérale que la Cour est appelée à interpréter, ne seraient pas parties au Statut de la Cour. L'on serait tenté de répondre tout simplement que la question dont la Cour est actuellement saisie relève de l'article 62 et non pas de l'article 63. Mais je n'ai aucune difficulté à me placer sur le terrain évoqué par mon éminent contradicteur.

L'octroi d'un droit d'intervention à un Etat qui, selon l'article 63, est partie à une convention multilatérale tout en n'étant pas partie au Statut de la Cour n'est la manifestation ni d'un universalisme juridictionnel ni de l'absence de tout titre de juridiction. Les Etats qui sont parties au Statut de la Cour confèrent par la voie de l'article 63 à tout Etat qui est membre d'une convention multilatérale sans être partie au Statut le droit d'intervenir lorsque l'interprétation de cette convention est en cause devant la Cour. L'article 63 contient à cet égard une disposition octroyant un droit à un Etat tiers dans le sens actuellement prévu à l'article 36 de la convention de Vienne de 1969 sur le droit des traités. En exerçant ce droit, l'Etat tiers contribue, en ce qui le concerne, à établir le fondement consensuel de la compétence de la Cour en l'espèce.

En deuxième lieu, on nous a opposé que si l'article 62 exigeait un lien juridictionnel entre les parties initiales et l'Etat cherchant à intervenir, le Statut aurait transféré, de la Cour aux parties au litige, le pouvoir d'autoriser l'intervention. L'argument peut être aisément et totalement renversé. Si l'article 62 n'exigeait aucune base de juridiction pour que l'intervention soit admise, les Etats parties au litige seraient privés du droit, que leur confère l'article 36 du Statut, de fonder sur leur propre consentement la compétence de la Cour.

En troisième lieu, il n'est pas exact non plus que si un lien juridictionnel était requis l'intervention prévue par l'article 62 se réduirait à néant, puisque si l'Etat tiers avait un lien juridictionnel à l'égard des parties initiales à la procédure, il aurait tout intérêt à introduire devant la Cour une instance directe plutôt qu'à demander à intervenir. Une telle thèse méconnaît cependant qu'un Etat ne peut exercer un droit d'action que s'il est partie à un différend déterminé et que, par contre, l'intérêt à intervenir peut subsister même lorsque son titulaire n'est pas partie au différend déjà soumis à la Cour.

Permettez-moi de saisir cette occasion pour une très courte remarque au sujet de la citation concernant l'affaire de l'*Or monétaire*, puisque mon distingué contradicteur se méprend à cet égard. Je vous prie de croire, Monsieur le Président, que je ne peux pas évoquer cette affaire sans une profonde émotion, parce qu'il s'agit d'une affaire qui a été plaidée devant votre haute juridiction par mon maître vénéré Tomaso Perassi. Il n'a jamais été question dans l'affaire de l'*Or monétaire* d'une « intervention » au sens propre de l'expression. Les Etats-Unis, le Royaume-Uni et la France, par le traité de Washington, avaient

alloué à l'un d'entre eux l'or de la Banque d'Albanie qui avait été pillé à Rome. Le traité de Washington invitait cependant l'Italie et l'Albanie, qui n'y avaient pas participé, à saisir la Cour si elles voulaient contester la décision prise par les trois puissances. La Cour fut saisie par l'Italie, mais non pas par l'Albanie. Dans ces conditions l'Italie fit observer, dans une question qui n'était pas une exception préliminaire au sens formel, que l'affaire ne pouvait être considérée comme étant du ressort de la compétence de la Cour, si l'Albanie ne prenait pas, elle aussi, part au procès. D'où cette expression « intervenir », dans le sens de « prendre part au procès par une introduction d'instance », qui fut employée par la Cour. La Cour, cependant, accepta la thèse du Gouvernement italien par une majorité écrasante. Et la Cour déclina sa compétence précisément du fait que l'affaire qui lui avait été soumise ne pouvait pas être jugée si l'Albanie ne l'avait pas, elle aussi, saisie. Je ne crois pas que l'on voudrait prétendre ici que la Cour ne saurait connaître de l'affaire visée par le compromis entre la Libye et la Tunisie parce que Malte n'a pas été invitée par ces deux Etats à participer à la procédure.

En conclusion, si les arguments déployés par Me Bathurst témoignent assurément de sa *maestria*, il est néanmoins vrai qu'ils relèvent de ce l'on peut qualifier d'arguments de circonstances. Ils n'ont aucun fondement en droit, mais ils visent à poser des problèmes de justice ou de morale positive qui en réalité n'existent pas. Ils se traduisent notamment par de véritables rideaux de fumée qui essaient de cacher le principe fondamental du procès international, à savoir le principe qui se traduit par la formule « pas de juridiction sans consentement ».

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Le professeur Lalive, quant à lui, a essayé de se placer sur un terrain beaucoup plus familier, mais en définitive non moins glissant. D'après mon éminent collègue du Léman, la question de la juridiction ne serait qu'un faux problème, parce que l'intervention se traduirait par un incident de procédure. Mais il a oublié de vous dire quel est le but caractérisé de cet incident. Il a notamment évité de vous dire qu'une demande en intervention vise à introduire un nouveau sujet dans la procédure. Il a, il est vrai, essayé d'esquiver ce petit détail en alléguant que l'intervenant ne serait pas une partie véritable à la procédure. N'empêche que l'intervenant – que je considère, pour ma part, une partie au sens propre de la procédure – est en tout cas un sujet dans le cadre de la procédure parce que s'il n'en était pas ainsi il ne pourrait même pas y prendre la parole. Dès lors, l'Etat intervenant ne saurait échapper au principe fondamental du procès international : « pas de juridiction sans consentement ». Une fois de plus les prétendues analogies avec le droit processuel interne sont fallacieuses, vu que le droit international n'est pas doué d'une administration de la justice institutionnalisée et superposée aux Etats.

Me Lauterpacht, qui connaît fort bien les caractéristiques de la communauté internationale et de son droit, n'a pas commis cette erreur. La thèse d'après laquelle l'article 62 n'exigerait aucun lien de juridiction a dû, toutefois, lui paraître quelque peu excessive. Voilà pourquoi il s'est empressé aussitôt d'affirmer, au cours de l'audience de jeudi après-midi, que la condition de la juridiction aurait bel et bien été réalisée en l'espèce. Elle l'aurait eté du fait que les Parties initiales à la procédure, c'est-à-dire la Libye et la Tunisie, se seraient rendu compte, lors de la conclusion du compromis, du lien inextricable qu'aurait subsisté entre le litige qui les opposait et les intérêts de Malte. De ce fait, le compromis ne pouvait pas ne pas impliquer une attribution de juridic-

tion à la Cour à l'égard de Malte. Dès lors, la juridiction de la Cour pour connaître du fond de la demande d'intervention de Malte découlerait du comportement des Parties initiales à la procédure.

Cette thèse est nouvelle et surprenante. Elle n'a d'ailleurs pas été reprise ni par le professeur Lalive ni par Me Bathurst. L'on pourrait se limiter à répondre qu'il y a là le cas le plus typique d'un procès d'intention. Mais il vaut peut-être mieux tâcher de suivre les équilibrismes qui entachent cette thèse, ne fût-ce que pour montrer jusqu'où l'on peut arriver en désespoir de cause.

De toute évidence, les Parties au compromis, à savoir la Libye et la Tunisie, n'ont certes pas envisagé, dans leur accord, d'attribuer à la Cour la compétence pour connaître du fond d'une demande d'intervention de la part de Malte. Mais M. Lauterpacht n'a pas de difficulté à suggérer qu'à défaut de précision expresse le compromis entre la Libye et la Tunisie aurait conféré à la Cour une juridiction spécifique à l'égard de Malte, que ce soit par voie de renonciation, d'implication, de *forum prorogatum* ou d'*estoppel*.

Il n'est pas aisé de comprendre ce que serait l'hypothèse de la renonciation *(waiver)* dans un contexte pareil. En réalité, il ne saurait s'agir que d'une sorte de renonciation préventive au droit d'exciper le défaut de compétence de la Cour. S'il en était ainsi, l'on ne nous a pas fourni la moindre preuve d'une telle renonciation préventive. A-t-on besoin de rappeler que le fardeau de la preuve incombe au gouvernement demandeur ?

Il ne saurait s'agir non plus d'une attribution implicite de compétence. Une fois, de plus, l'on serait ici en présence d'un accord conférant un droit à un tiers : un accord, en d'autres termes, qui devrait prévoir de la manière la plus claire cette attribution de droits à un tiers conformément aux indications codifiées par l'article 36 de la convention de Vienne de 1969.

Quant à la possibilité du *forum prorogatum*, il s'agit probablement d'un moment de distraction de mon éminent ami. Le *forum prorogatum* suppose une instance introduite par un demandeur et l'acquiescement de la partie défenderesse qui plaide au fond sans soulever la question de juridiction. Ici, il s'agirait d'un *forum prorogatum* à rebours. Un acquiescement avant la lettre, un suicide procédural des parties initiales à la procédure.

La dernière suggestion a été celle de l'*estoppel*. A-t-on réellement besoin de continuer ? L'*estoppel* est une institution de la *common law*, dont l'existence en droit international est très controversée.

Mais enfin tout cet argument se ramène à ceci : le comportement des parties au compromis, la Libye et la Tunisie, n'aurait pas accordé à Malte un *fair deal* si elles n'avaient octroyé implicitement à la Cour la compétence nécessaire pour attribuer à Malte le droit de s'immiscer dans le litige soumis à la Cour sans que cet Etat tiers soit aucunement lié par la conclusion de cette procédure, c'est-à-dire par le jugement de la Cour. L'argument ne porte évidemment pas, mais ce qu'il y a de piquant c'est que Me Lauterpacht se livre à un effort bien hardi pour trouver à tout prix un consentement quelconque de la Libye et de la Tunisie à l'intervention de Malte, alors que le professeur Lalive et Me Bathurst, quant à eux, voudraient plutôt se passer de tout consentement en l'espèce.

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Il me reste à examiner une toute dernière question. Malte, on le sait, a communiqué au Secrétaire général des Nations Unies, le 2 janvier 1981, une nouvelle communication pour élargir la portée de son acceptation de la juridiction obligatoire de la Cour contenue dans la première déclaration du 6 décembre 1966. L'on a déjà souligné à cet égard, dans nos observations écrites, que le fait même d'avoir dû recourir à cette déclaration nouvelle montre combien

Malte a eu, dès le début, et pour cause, assez peu de confiance dans sa thèse principale quant à l'absence de toute règle exigeant un lien de juridiction en matière d'intervention. Au cours des discussions orales, Me Bathurst s'est élevé contre une telle constatation. Malte, nous a-t-il dit, réaffirme en tous points la validité de sa thèse principale quant à l'absence de toute règle exigeant un lien juridictionnel en matière d'intervention sur la base de l'article 62. La nouvelle déclaration de Malte aurait été formée dans l'hypothèse où la Cour ne voudrait pas accepter la thèse principale de Malte. Si donc la Cour devait exiger, hypothèse très lointaine pour Me Bathurst, un lien quelconque de juridiction, elle n'aurait qu'à prendre acte de cette déclaration de Malte pour lui accorder le droit d'intervenir.

La Cour connaît fort bien l'histoire de la clause facultative. La clause qui figure à l'article 36, paragraphe 2, vient en réalité de plus loin. Ainsi qu'il est relaté par l'éminent juge qui fut aussi le premier président de la Cour permanente, M. Loder (« The Permanent Court of International Justice and Compulsory Jurisdiction », dans *The British Year Book of International Law*, 1921-1922, p. 6 et suiv.), la clause en question tire son origine de la conférence de La Haye de 1907. Le système que l'on envisageait à l'époque avait évolué au cours de la conférence vers une solution prévoyant des acceptations réciproques, de la part des Etats, de l'obligation de soumettre à l'arbitrage des catégories déterminées de différents internationaux. C'est cette solution qui est à la base du texte qui figure dans le Statut de la Cour dès 1920.

Or, la « réciprocité » dont il est question ici est inhérente à la clause elle-même. Selon la formule de l'article 36, paragraphe 2, la reconnaissance de la juridiction obligatoire ne produit d'effet qu'« à l'égard de tout autre Etat acceptant la même obligation ». Par conséquent, la volonté manifestée par un Etat déterminé de se soumettre à la juridiction de la Cour par la voie de la déclaration prévue à l'article 36, paragraphe 2, ne peut se combiner qu'avec des manifestations de volonté rendues par d'autres Etats par la même voie et sous la même forme. Par contre, la volonté résultant d'une déclaration de ce genre ne saurait se combiner avec un titre de juridiction d'une autre nature, tel que celui résultant d'un compromis, d'une clause compromissoire ou d'un traité général d'arbitrage. Et puisque ni la Libye ni la Tunisie n'ont déposé des déclarations en vertu de l'article 36, paragraphe 2, le Gouvernement de Malte ne saurait invoquer pareille base de juridiction pour étayer sa demande en intervention.

La déclaration de Malte demeure, par conséquent, ce qu'elle est : une « offre de juridiction », ou, si l'on préfère, une invitation à la valse qui suppose que le partenaire, ou plutôt, dans notre cas, les partenaires soient disposés à s'en prévaloir. Tel n'est certes pas le cas en relation avec la demande en intervention dont la Cour est actuellement saisie. La Libye est tout à fait prête à régler par la voie judiciaire le différend concernant les principes à appliquer dans la délimitation du plateau continental appartenant, respectivement, à Malte et à la Libye elle-même. Mais elle est disposée à le faire au moment opportun et dans une instance réservée aux deux Etats intéressés à cette délimitation. Il n'y a aucune raison pour transformer des questions d'ordre bilatéral en un règlement judiciaire ouvert à une série presque indéterminée d'Etats. En d'autres termes, la Libye voit avec sympathie l'invitation à la valse, mais elle verrait par contre avec beaucoup moins d'enthousiasme toute tentative de Malte de l'entraîner dans une danse à trois ou même dans un quadrille.

L'audience est levée à 13 h 15

CINQUIÈME AUDIENCE PUBLIQUE (21 III 81, 15 h 15)

Presents : [Voir audience du 19 III 81.]

DÉCLARATION DE M. BENGHAZI

AGENT DU GOUVERNEMENT DE LA TUNISIE

M. BENGHAZI : Monsieur le Président, Messieurs de la Cour, c'est pour moi un grand honneur et un privilège que de paraître devant vous, comme agent de mon gouvernement, et je voudrais vous exprimer mes remerciements de me donner l'occasion de pouvoir exposer le point de vue de la Tunisie sur certains points de la requête maltaise.

Mes éminents collègues, le professeur Robert Jennings et le professeur Sadak Belaïd auront, avec votre permission, l'opportunité d'exposer à la Cour, par la suite, d'une manière beaucoup plus détaillée la position de ma délégation sur d'autres aspects légaux et juridiques de cette requête, et ce, à la lumière des déclarations faites par les honorables représentants de Malte.

La requête maltaise a été enregistrée au Greffe de la Cour le 30 janvier 1981 et les Parties ont présenté leurs observations écrites dans le délai fixé par la Cour, c'est-à-dire le 26 février 1981.

Les deux parties ayant fait objection, toutes les deux, à la requête de Malte, la Cour a decidé la tenue des présentes audiences conformément à l'article 84, paragraphe 2, du Règlement de la Cour.

La Cour a successivement entendu les représentants de la République de Malte et ceux de la Jamahiriya arabe libyenne.

La Tunisie, à son tour, va s'efforcer dans toute la mesure de ses moyens, d'apporter sa contribution au débat, en présentant un certain nombre d'observations complémentaires à celles qu'elle a respectueusement soumises à la Cour par lettre en date du 25 février 1981.

Je voudrais signaler tout d'abord que la Tunisie est tout à fait consciente du souci de Malte d'avancer dans la détermination des limites de son plateau continental, souci exprimé par Malte notamment au paragraphe 5 de sa requête.

Nonobstant cette compréhension, la Tunisie estime devoir s'opposer à la requête maltaise, pour des raisons qui lui semblent tout à fait sérieuses et qui sont les suivantes :

En premier lieu, la Tunisie est d'avis que la requête à fin d'intervention maltaise n'est pas fondée en droit. Ce point sera particulièrement développé ultérieurement par MM. les professeurs Jennings et Belaïd.

Cela quant au fond.

Par ailleurs, l'exposé que nous avons entendu qui a été fait au nom du Gouvernement de Malte souligne certaines autres complexités du problème. Par exemple la complexité de la zone caractérisée par ce qu'on a qualifié « an overlapping of claims ». Si la Cour a notre avis était amenée à prendre en considération cette situation complexe avant de trancher le différend entre la Tunisie et la Libye, il en résulterait semble-t-il, inévitablement, une répercus-

sion négative sur le cours normal de la procédure et une prolongation injustifiée, et certainement très dommageable pour les Parties, des délais dans lesquels la Cour devrait normalement, raisonnablement rendre son arrêt.

L'éminent agent de Malte, M. l'*Attorney-General* Mizzi, au cours de son intervention est allé jusqu'à affirmer ce qui suit (ci-dessus p. 285) :

> « it would be possible . . . and ask whether, given Malta's geographical situation in the Mediterranean, relative to Libya and Tunisia, it would be proper for the Court to give any decision at all, even in the current *Libya/Tunisia* case now before it, without hearing Malta ».

J'ignore comment la Cour envisagerait la suite de la procédure si cet argument devait être retenu, mais je me dois de vous faire part, très respectueusement, des vives préoccupations de mon gouvernement à ce sujet.

La Cour n'ignore certainement pas les circonstances dans lesquelles a été signé le compromis tuniso-libyen du 10 juin 1977, en vertu duquel la Tunisie et la Libye ont saisi la Cour de leur différend.

Je ne suis nullement habilité, cela va sans dire, à parler au nom d'un autre gouvernement que le mien. Mais je peux affirmer que le Gouvernement tunisien, en ce qui le concerne, aurait certainement hésité à s'engager dans la voie du compromis du 10 juin 1977 qui intéresse un problème considéré de la plus extrême importance pour la Tunisie, si mon gouvernement avait pu croire que des Etats tiers pouvaient intervenir dans l'affaire soumise à la Cour sur des bases juridiques aussi imprécises et aussi peu restrictives que celles sur lesquelles Malte prétend justifier sa requête.

La position de Malte en effet ne tend, en dernière analyse, rien moins qu'à soutenir qu'il existe un droit pour n'importe quel Etat d'intervenir, et sans aucune conséquence pour lui, dans tout litige porté devant la Cour internationale de Justice, au seul motif qu'il considère posséder un intérêt quelconque d'ordre juridique, si faible et si hypothétique soit-il. Or, ceci nous semble grave et nous semble s'opposer à l'exigence d'une administration rapide et ordonnée de la justice.

Je ne voudrais pas, Monsieur le Président, m'étendre sur ce point qui sera développé par les orateurs qui me suivront.

Par contre, il y a une question sur laquelle j'aimerais, avec votre permission, attirer respectueusement l'attention de la Cour.

Généralement, lorsqu'un différend surgit entre deux ou plusieurs Etats, ces derniers n'ont pas recours immédiatement au règlement judiciaire. Ils essaient dans une première phase et dans la plupart des cas de trouver une solution à leur différend par la voie de négociations.

Le recours au règlement judiciaire constitue, quand il arrive, une reconnaissance implicite de l'échec des négociations engagées, lesquelles négociations d'ailleurs doivent selon les exigences de la Cour avoir été menées de telle façon qu'elles « aient un sens ».

Dans le domaine particulier de la délimitation du plateau continental il existe, on le sait, une condition prévue tant par l'article 6 de la convention de Genève de 1958 que par les différents textes de la troisième conférence des Nations Unies sur le droit de la mer, à savoir que la délimitation doit être effectuée « par voie d'accord ».

C'est seulement dans le cas où des négociations de bonne foi et qui « aient un sens » n'ont pu aboutir à un accord que les Etats peuvent envisager le recours à un règlement judiciaire.

L'un des distingués avocats de Malte s'est longuement étendu, dans son intervention de jeudi dernier, sur le fait qu'il y aurait eu des négociations entre

les Parties. Il a invoqué particulièrement l'échange de notes diplomatiques intervenu à différentes dates entre Malte, d'une part, et la Tunisie, la Libye et l'Italie, d'autre part.

Je tiens à réserver d'ores et déjà, expressément, la position de mon gouvernement quant à l'interprétation abusive qu'a voulu tirer le distingué représentant de Malte de cet échange.

Il n'y a rien dans les correspondances entre Malte et la Tunisie qui puisse valablement être considéré fût-ce comme une simple amorce de négociations et d'ailleurs on pourra aisément le vérifier en consultant ces documents que le Gouvernement de Malte s'est engagé à produire.

Il y a un autre point que j'aimerais signaler. Il s'agit des deux notes tunisiennes dont des copies ont été adressées à La Valette en mai 1976 et au sujet desquelles l'éminent avocat de Malte a déclaré :

> « why should Tunisia have sent copies of these notes to Malta if it were not in recognition of Malta's special interest in delimitation of the continental shelf in the area and the factors relevant thereto ? »

Je ne voudrais pas sur ce point décevoir le distingué représentant de Malte, mais l'explication est tout autre que celle à laquelle il a pensé.

En effet copies de ces notes ont été communiquées, et communiquées pour information, à toutes les missions diplomatiques accréditées à Tunis, dont celle de Malte bien entendu, et cela pour des raisons invoquées dans le mémoire tunisien, notamment au paragraphe 1.25, auquel, la Cour est respectueusement priée de bien vouloir se référer.

Monsieur le Président, Messieurs de la Cour, avant de laisser, avec votre permission la parole au professeur Jennings, qu'il me soit permis de faire une dernière observation.

En présentant sa requête à la Cour, Malte a tenu à souligner que l'objet précis de son intervention était « de lui permettre d'exposer ses vues à la Cour sur les points soulevés dans l'instance avant que la Cour ne se soit prononcée » (par. 20).

L'un des distingués avocats de Malte, dans son intervention, a explicité ce point en fixant deux objets à la requête maltaise :

Premièrement, que la Cour puisse prendre conscience des éléments de la situation qui pourraient avoir des effets préjudiciables pour Malte.

Deuxièmement, que la Cour puisse être informée de la position de Malte sur lesdits éléments. Il me semble que sur ces deux points le Gouvernement de Malte a reçu satisfaction. Parce qu'il est indéniable que Malte, au cours des présentes audiences, a eu toute latitude pour exposer longuement et en détail les aspects essentiels de ce qu'elle considère comme étant ses intérêts dans la région. Bien plus, on peut estimer qu'elle est allée au-delà de ses objectifs déclarés en procédant à l'exposé de questions qui semblent déborder largement l'objet même de la requête. De ce fait, il nous semble que Malte pourra, dorénavant, difficilement soutenir que la Cour pourrait rendre son arrêt dans la méconnaissance de la position de ce pays par rapport à l'affaire du *Plateau continental (Tunisie/Jamahiriya arabe libyenne)*.

Ce fait constitue de l'avis de ma délégation un motif supplémentaire justifiant notre demande de rejet de la requête maltaise.

ARGUMENT OF PROFESSOR JENNINGS

COUNSEL FOR THE GOVERNMENT OF TUNISIA

Professor JENNINGS : Mr. President and Members of the Court, perhaps I might be allowed to begin by expressing my sense of honour and pleasure at the opportunity I now have to address you Sir and this distinguished Court on behalf of the Republic of Tunisia. And I shall, with the Court's permission, consider briefly the legal problems and difficulties which Tunisia sees arising in regard to this application by Malta. And then my friend, Professor Belaïd, Co-agent and Counsel for Tunisia will put to the Court some considerations arising from the way in which the proposed intervention, which is of particular concern to Tunisia, would in our view touch and prejudice Tunisian interest. We believe that the Court may wish to have these considerations in mind when making its decision on the present application.

The Court has heard this morning the submissions on behalf of Libya ; and in what I have to say, there could sometimes be a certain overlap with some of the things that the Court has already heard and for this I must ask the Court's indulgence because, though I shall try to avoid it as far as possible and be as brief as possible, there are of course some things that have to be said, even if twice, on behalf of Tunisia because, whatever Malta may sometimes seem to have thought, the two Parties in this case before the Court at present are in a different interest.

And it so happens that my remarks are rather differently directed from those of Libya's representatives. Whereas they, as it were, spoke from the Rules of Court and especially of Article 81 (2) of the Rules of Court, in my submissions I shall be concerned primarily at any rate with the Statute of the Court. So it will be convenient first to consider the requirements of the Statute and in this we would include the question of jurisdiction, and then finally I shall turn to consider one of the matters raised specifically in Article 81 of the Rules of Court, namely "the precise object of the intervention".

Let me say, Mr. President, at once, that Tunisia has no sort of quarrel with the proposition put forward more than once by Malta that the Rules of Court cannot of themselves add a requirement that is not to be found in the Statute. That must be so of course. But Tunisia does not believe that the 1978 edition of the Rules added anything beyond a certain desirable clarification.

The requirements of the Rules are accordingly important, both because they reflect accurately the requirements of the Statute, in our view, and of general principle ; and because it is quite clear, if Article 62 of the Statute is read as a whole and not in snippets, that the Court has competence to decide whether to give or whether to deny permission for an intervention under that Article, even though an interest of the kind indicated in Article 62 (1) has been shown. And it is for this reason that the Court needs, we take it, to know the nature and object of the proposed intervention, as well as whether it fulfils the requirements of Article 62 (1), because it is the Court that has ultimately to make the decision.

Article 62 of the Statute provides, as the Court well knows :

"1. Should a State consider that it 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.

2. It shall be for the Court to decide upon this request."

What else could those words mean but that the Court decides whether to say yes or no to the request. The Court would hardly have a full hearing of this kind merely in order to appreciate whether the applicant State was really in a position to consider itself as having a right that was touched by the possible decision. That would be nonsense. So that is our first point; that we believe that on a proper interpretation the Court has a complete discretion whether or not to grant the request under Article 62.

Turning to Article 62 (1), there are of course two elements to consider: (i) has Malta in the actual terms of its request demonstrated an interest of a legal nature, which (ii) may be affected by the decision in the case.

Perhaps the first point to make about Article 62 (1) is that these two requirements, interest of a legal nature, and liability to be affected by the Court's decision, need always to be considered together. Because it is the second element that qualifies and gives precise meaning to the first. As this Court itself said in the *Haya de la Torre* case:

> "every intervention is incidental to the proceedings in a case; it follows that a declaration filed as an intervention only acquires that character in law, if it actually relates to the subject-matter of the pending proceedings" (*I.C.J. Reports 1951*, p. 76).

So one must begin by asking what is meant by the "decision in the case" for this purpose? The French text of the Statute is instructive. It expresses the thought in a rather different way: "est pour lui en cause", but the essential meaning is the same precisely and the essential element of the decision must surely be the scope of the *dispositif* of the judgment; that which constitutes the *res judicata* "between the Parties and in respect of that particular case", to quote the words of Article 59 of the Statute. Some confirmation might perhaps be found in Article 94 of the Charter of the United Nations, by which each Member of the United Nations undertakes to comply "with the decision of the International Court of Justice in any case to which it is a party", and in the Article that undertaking is described later as "the obligations incumbent on [a party] under a judgment rendered by the Court".

Thus, Tunisia would submit that what is intended by the term "affected by the decision in the case" in Article 62 is certainly not the reasoning, certainly not the exposition of the applicable law. It is the possible scope of the decision as it directly affects the rights, obligations and legal position of the particular Parties to the case; it is not, and could not be the judgment as it may be used in subsequent cases, early or late, as "a subsidiary means for the ascertainment of the law", to use the words of Article 38.

And indeed how could it be otherwise, since the Court has to decide on the application to intervene before it has heard the final oral arguments of the Parties? The Court knows now, from the Special Agreement, what the scope of its decision is going to be and must be. It cannot yet know which way it will decide and it cannot know the reasons for its eventual decision; nor can it know yet what it will say about the meaning of the applicable law.

Consequently, in the submission of Tunisia, there should not be any question, under the terms of Article 62, of a State intervening merely because it has an interest of a legal nature which may be affected by the view of the law taken by the Court.

Of course the effect of the view taken by the Court in its judgment of what the law is may be of very great importance to any third State. The exposition of the principles and rules of law concerning continental shelf boundaries made by this Court in 1969 in the *North Sea* cases judgment, that exposition was of great, even decisive importance, for most, possibly all coastal States. That judgment has affected interests of a legal nature undoubtedly of many of those States, and not least the two States that now appear before this Court as parties. But the Court would find itself in an impossible position if every State with an interest of a legal nature of this general sort were to be encouraged to suppose that this might come within the terms of Article 62, and that it could accordingly seek a permission to intervene in a case between other States which was likely, or seemed likely possibly, to raise points of law affecting the intervening State's interests.

Nor can this objection be overcome by referring the importance of the law, which the Court will expound in its judgment, to Malta's particular geographical position and the position of its own continental shelf. For it is very easy at the present moment to think of several States, some near to the area of the present case, some far distant from it, which have clear, even specific, continental shelf interests of a legal nature that may be touched by the legal reasoning of the Court's judgment when it is eventually given in the present case, and those interests may be just as important to them as any possible effect on Malta's interests. I have been told, Mr. President, that a large number of governments have already requested copies of the pleadings in this case. That in itself is testimony to the breadth of interest which governments feel in what will eventually be incorporated in the judgment of this Court in its view of the law.

So it may be readily conceded that Malta, in common with several other States which come readily to mind and probably many others, has possibly an interest, or interests, of a legal nature that may be touched by the judgment in this case. But that is not the question now to be resolved by the Court, in our submission. The question is whether Malta has an interest of a legal nature that might be affected by the actual decision, in the proper meaning of the term, between the two Parties in this case ; and the burden to show that is, of course, on the would-be intervening State. The Permanent Court of International Justice in *S.S. "Wimbledon"*, when it dealt with Poland's request to intervene, and referring to the difference between intervention under Article 62 and intervention under Article 63, said :

> "The first . . . is based on an interest of a legal nature . . . and the Court should only admit such intervention if in its opinion, the existence of this interest is sufficiently demonstrated." (*P.C.I.J., Series A, No. 1*, p. 12.)

Now, at that point the next step must clearly be to establish the scope of the decision which the Court will make, and since we have the Special Agreement and the terms of it, we know what that will be. For it is that instrument, the Special Agreement, that defines and limits the issues before the Court in the case, thus in turn defining and limiting the eventual decision of the Court.

Article 1 of the Special Agreement of June 1977 between the two Parties asks the Court to state the principles and rules of international law which may be applied for the delimitation of the Tunisian and Libyan areas of continental shelf : and goes on to ask the Court to take account in its decision of equitable principles the relevant circumstances which characterize the area, and recent trends admitted at the Third Conference on the Law of the Sea. Thus, the *compromis* limits the competence of the Court to the problem how to delimit

the boundary between the Tunisian and Libyan areas of continental shelf. So clearly the Court simply cannot, within the terms of this Special Agreement, venture upon any question of the delimitation of the respective continental shelf areas appertaining to Malta or Tunisia, or Malta and Libya. The relevance or irrelevance of continental shelf areas other than those of the two Parties to this case – and one would here have to consider more than Malta – the relevance is one of the questions which my friend Professor Belaïd will be considering in more detail. Suffice it here to say that it is, after all, normal and, almost invariable in fact, in the practice of neighbouring States for respective continental shelf delimitations to be settled by stages. Indeed it is doubtful whether any other procedure is really practicable. It cannot be either right in principle, or manageable in practice, that a Court should find itself asked to consider large issues beyond what is strictly submitted to its jurisdiction in the agreement on which the case before it is founded.

But in any event it is obvious that the Court itself cannot go outside the terms of the Special Agreement, which clearly and expressly do not permit it to adjudicate upon the extent of the continental shelf boundaries of any third State.

Of course, the problem of third State continental shelves is not a new one. It has arisen in both major decisions on the question of the continental shelf so far : the decision of this Court in the *North Sea* cases, and of the Anglo-French Arbitration Court in the 1977 Award.

In the *North Sea* cases in the *dispositif*, it was said, paragraph 101 (D) (3), which deals with factors to be taken into account and especially with proportionality, it refers to :

> "the element of a reasonable degree of proportionality, which a delimitation carried out in accordance with equitable principles ought to bring about between the extent of the continental shelf areas appertaining to the coastal State and the length of its coast measured in the general direction of the coastline, account being taken for this purpose of the effects, actual or prospective, of any other continental shelf delimitations between adjacent States in the same region" (*I.C.J. Reports 1969*, p. 54).

But this is not a matter upon which the Court made any decision in that case. It was reciting the factors which the Parties, in their prospective further negotiations, might need to take into account. In the present case it may well be that the existing delimitation for example between Tunisia and Italy, will need to be taken some account of, but nobody would pretend that it could be affected by the decision in the case.

The relevance of prospective delimitations with third States, and also of a possible tripoint, was adverted to by the Court of Arbitration in the Anglo-French Award in paragraphs 24-27 particularly.

The United Kingdom had contended that some account should be taken in the Atlantic region of a prospective delimitation with the Republic of Ireland, since the United Kingdom, it was said, was "compressed" between the shelf areas of France and Ireland.

And the Court itself put certain questions to the Parties during the hearings, one of which concerned the possibility of the continental shelves of France, Ireland and the United Kingdom meeting at a tripoint ; and the competence of the Court of Arbitration to delimit this boundary at all if it touched upon the interests or claims of a third State (para. 25 of the Award).

France, in its answer to the question, observed that the Court could not base its decision on conjecture as to the course of the boundary between the United

Kingdom and Ireland ; only France and the United Kingdom could be bound by the Award ; and any third State must then proceed to settle the matter with the United Kingdom or France as the case might be. The United Kingdom noted that it had in February 1977 accepted the Irish proposal to refer the delimitation of their respective areas of shelf to some form of judicial settlement ; a position not dissimilar from that in which Libya now finds itself in regard to Malta.

Now the Court took the view that, although the Parties had not ruled out the tripoint possibility, the course of the boundary did not depend "on any nice calculations of proportionality based on conjectures as to the course of a prospective boundary between the United Kingdom and the Republic of Ireland" (para. 27) ; nor would it be open to the Court to pronounce on the site of a tripoint.

> "The Court's sole task in the present decision is, in conformity with Article 2 (1) of the Arbitration Agreement, to delimit the continental shelf boundary between the French Republic and the United Kingdom in accordance with the applicable rules of international law, and to delimit it 'as far as the 1,000-metre isobath'." *(Ibid.)*

And the Court's conclusions on this particular crux in paragraph 28 are so relevant, it seems to us, to this question of the tripoint and the neighbouring boundaries raised by Malta, that with your indulgence I will read the paragraph which is a little long but every word seems to be relevant :

> "Even so, the Court thinks it appropriate at the same time formally to state that both its reasoning and its conclusions in this Decision are directed exclusively to the delimitation of the continental shelf boundary between the Parties to the present proceedings. It follows that no inferences may be drawn from this Decision as to the views of the Court concerning the prospective course of the continental shelf boundary still to be delimited between the United Kingdom and the Republic of Ireland nor concerning the legal and factual considerations relevant to the delimitation of that boundary. The Court's Decision, it scarcely needs to be said, will be binding only as between the Parties to the present arbitration and will neither be binding upon nor create any rights or obligations for any third State, and in particular for the Republic of Ireland, for which the decision will be *res inter alios acta*. In so far as there may be a possibility that the two successive delimitations of continental shelf zones in this region, where the three States are neighbours abutting on the same continental shelf, may result in some overlapping of zones, it is manifestly outside the competence of this Court to decide in advance and hypothetically the legal problem which may then arise. That problem would normally find its appropriate solution by negotiations directly between the three States concerned, negotiations which may indeed be called for by the prolongation of their maritime zones beyond the 1,000-metre isobath to 200 nautical miles." (Para. 28.)

Now, the jurisdiction of this Court in the present case is, similarly, founded on the Special Agreement, alone ; its decision can only bind the two Parties and it cannot involve any ruling as to the extent of Malta's shelf or as to where a tripoint might be. This limitation is inherent. It makes no difference to this whether Malta intervenes or not, since the intervention proposed by Malta could in no sense enlarge the existing scope of the subject-matter of the Court's jurisdiction and Malta does not suggest that it could do so, and indeed

expressly seeks to deny the Court opportunity to give "any form of ruling or decision . . . concerning its continental shelf boundaries with either of the Parties". That is stated in paragraph 22 of the Application.

It follows that the only specific "interest of a legal nature" that Malta could have, exists outside the permissible scope of this case, and is a matter for determination between Malta, on the one hand, and Tunisia and Libya as the case may be, on the other.

This position of Malta in respect of the present case, brought under a Special Agreement which itself excludes the possibility of the Court sitting in judgment on Malta's continental shelf rights, this case may usefully be contrasted with the attempted intervention by Fiji in the *Nuclear Tests* case in 1974 (*I.C.J. Reports 1974*, p. 253).

The Court – this Court – in the end did not have to decide on that proposed intervention. But as far as concerns the possible scope of a judgment of the Court in that case, in the terms asked for by Australia in its application, there can be no doubt that Fiji could, perhaps, have shown an interest of a legal nature which might be affected by the decision. For Australia was asking the Court to consider the legality of atmospheric nuclear weapon tests "in the South Pacific Ocean" (p. 256), and there are many States other than Australia abutting onto, or in, the South Pacific Ocean, and a glance at the map shows that the position of Fiji in that matter fell plumb in the middle of the area described in the Australian application.

Or again, the position of Malta in regard to the Special Agreement in the present case may be contrasted with the *Monetary Gold* case (*I.C.J. Reports 1954*, p. 18) – it has already been mentioned before the Court several times today – where, had Albania been willing and able to intervene, there was a classic case of what may be described in the very words of the procès-verbal of the 1920 Committee of Jurists, page 745, when they say as one example of intervention : "or a party may request that one of the two contesting States should withdraw on the ground that it is not the real *dominus* of the right which it claims".

But this case is entirely different from that. Having regard to the terms of the Special Agreement there is no possibility here, theoretically or practically, of the decision of the Court "affecting" a Maltese interest in her own continental shelf or continental shelf boundaries ; moreover, if it did appear in any way to do so, Malta is, if she does not intervene at least, amply protected by Article 59 of the Statute.

Tunisia is not suggesting, Sir, that in order to have a good case to be permitted to intervene, a State must always show an interest of a legal nature that comes precisely within the issue as it is put before the Court in the terms of the *compromis*, or application. The *Corfu Channel* case (Merits) (*I.C.J. Reports 1949*, p. 4), though not a case where actual intervention was in fact sought, demonstrated how a third State might find its legal interests directly implicated ; in that case, the suggestion that the offending mines could have been laid by Yugoslav naval vessels. But in fact the *Corfu Channel* case also shows that even an interest of a third State of so important a character could be safeguarded within the procedures of this Court, without the need for Yugoslavia actually to intervene.

Malta does now appear most of the time to have resiled from what seemed at one time to be her position, that its quite general and admittedly immediate, interest in the development of the law of the continental shelf would suffice to justify an intervention ; though the distinguished Agent for Malta did actually say (p. 285, *supra*) that he would still "not care entirely to discount the

possibility that this alone might suffice". And Mr. Lauterpacht said (p. 316, *supra*) "we are concerned not so much with the formal decision of the Court between Libya and Tunisia as with the effective decision contained in the Court's reasoning". But with occasional lapses it does seem that most of the time, if not all, it is accepted by Malta that something more specific is required besides a general interest in the development of the law.

And it is in her endeavour, accordingly, to concretize the idea of the legal interest on which she relies that Malta has run into great difficulties ; difficulties which are perhaps characteristic of a case which arises from a Special Agreement referring specifically to the continental shelf boundary between two of a number of neighbouring States. As Mr. Lauterpacht told us, "continental shelf cases are peculiar" (p. 294, *supra*). The difficulty may aptly be illustrated first in general terms by reference to Mr. Lauterpacht's very clear map. That showed a line which indicated apparently the likely outer limit of Malta's possible continental shelf claims. And the trouble, of course, that Malta finds herself in is that any Maltese proper interest inside that line is both outside the Court's present competence in the Special Agreement, and Malta is protected in that area by Article 59 of the Court's Statute ; further, in that area inside that line, even Malta clearly fears, and rightly, whatever she may sometimes say, that a jurisdictional link would be required if she were to ask the Court to do or decide anything in that area, inside the line. But, of course, any concern of Malta outside that line is likely to take the form of a mere vested interest in the development, in general terms, of the law of the continental shelf, which is shared by all States including even non-coastal ones.

The distinguished Attorney-General for Malta concluded his address on the first morning (p. 292, *supra*), by saying that Malta had not failed to notice that "our opponents in these intervention proceedings seek to place us on the horns of a dilemma". But indeed, Mr. President, the dilemma is not of the making of Tunisia, nor I think, of Libya. It is, as Malta well knows, inherent in the position in which she finds herself.

Mr. Lauterpacht, in his address to the Court, recognized, I think, this difficulty, and he first succumbed to the temptation to avoid it by describing the task of delimitation as a division, a sort of carving-up, he called it, of a common area. But this, of course is precisely the German argument about the equitable allocation of a common resource that this Court so decisively rejected in 1969. Sensing this perhaps, he next took us on a most instructive tour of what he called "specific issues which we can perceive as likely to be considered in connection with the *Libya/Tunisia* case ; not . . ." he said, "not for the purpose of arguing the merits of those issues but merely for the purpose of showing that any decision on those substantive issues is bound to touch the position of Malta in its relations with Libya and Tunisia respectively" (p. 311, *supra*). These specific issues consisted of rules, equitable principles, factors, physical and non-physical features, including even economic and financial resources, in an endeavour to find a sort of neutral zone where he might rest safe from either horn of the dilemma. But all such factors, equities and the like, are relative ; and what is found to be true of the relationship between Tunisia and Libya will certainly not necessarily be true of the relationship between Tunisia and Malta.

This difficulty, in which Malta finds itself, is accurately reflected in the Application, which contains an element of contradiction arising from the uncertainty and ambivalence of Malta's attempt to identify a legal interest within the meaning of Article 62 (1). In paragraph 4 of that Application, it is

said that the possibility of a Maltese interest being affected by the Court's decision is contingent, since "it cannot be known what the decision of the Court . . . will be", and it speaks in terms of "a matter of possibilities" ; yet in Part II of the Application it asserts without qualification that the decision "not only could, but must, affect the question of Malta's continental shelf rights and boundaries".

For this difficulty of identifying a legal interest which may truly be affected by the Court's decision has meant that Malta has tried hard to explain the situation by complaining that it has had to rely entirely on the terms of the Special Agreement of 10 June 1977, for the indication of what it calls "the character of the case", since it has not been permitted to see the written pleadings of the Parties.

But justification for intervention surely should not be sought in the "character of the case" put by the Parties in the pleadings. It must be found in the limits of the issue put to the Court in the Special Agreement. It is not the arguments in the pleadings that can have an effect, in the meaning of Article 62 (1), on a legal interest of Malta ; it is, according to the express terms of Article 62, only the decision of the Court that can have such an effect.

In fact Malta's Application really amounts to this : that the Court's exposition of the principles and rules of law to be applied could affect the position of Malta in regard to its continental shelf, and this is no doubt true. But the effect of a decision by the Court on the principles and rules of international law concerning continental shelf boundaries, cannot of itself be a good reason for intervention. As the late Professor Hudson put it in his great book on the Permanent Court of International Justice 1943 edition, page 420 : "the precise character of the interest of a legal nature to be established for intervention under Article 62 is uncertain ; it would seem to require a special interest, in addition to a State's general interest in the development of international law" (Hudson, *The Permanent Court of International Justice*, New York, 1943, p. 420 ; see also *P.C.I.J., Series D, No. 2*, pp. 86-91).

Otherwise, if it were not so, and as has already been mentioned, the contentious jurisdiction of the Court would virtually be assimilated to that for advisory opinions. Many States all over the world with continental shelf boundary problems found their legal interest mightily affected by the Court's Judgment in the *North Sea* cases. But to say that, therefore, they would have had a right to intervene in that case, would be for the Court to import a wholly unpredictable and potentially unmanageable element into its contentious procedure.

Malta in her pleadings in this oral hearing has recognized, I think, the need to make the alleged link more specific by references to elements of the Special Agreement other than principles and rules of law : reference to equitable principles, relevant circumstances, recent trends and so on.

Of equitable principles and relevant circumstances, Malta is only able to assert, in paragraph 10 of the Application, that there is "a substantial probability" that many of the relevant circumstances affecting the boundary between Tunisia and Libya would also be relevant to the determination of Malta's boundaries with those two States.

But the "substantial probability" in fact is that they would not apply in the same way. What is a relevant circumstance is a relative question : relative to the actual boundary in issue. It would indeed be difficult to think of a situation more different than that of two mainland continental States, Tunisia and Libya, with a common boundary, and the position of a small island State, 200 miles and more from these mainland States. As to the recent tendencies at the

Law of the Sea Conference, these must in their nature be part of the general law of the continental shelf and if an interest in these tendencies be sufficient to justify intervention, it is difficult to see whether any of the States participating in the Conference could be kept out of the case if they desired to come in.

But there is almost no need to argue this point because Malta virtually concedes it in paragraph 9, when it says:

> "In contemporary international law relating to continental shelf boundaries, it is impossible to draw any hard and fast distinction between the legal principles and rules, or the equitable principles that respectively apply to the situations of States in different geographical relationships with one another."

That is precisely why such a legal interest in the relevant "legal principles, rules, or the equitable principles" – or for that matter recent tendencies – cannot be a reason for intervention, because on Malta's own assertion there is no hard and fast distinction to be drawn based on different geographical relationships.

The Maltese Application spells out the difficulty in plain terms in paragraph 12, where it says:

> "Malta therefore has to contemplate that whatever principles and rules, legal or equitable, and the practical methods of their application, are laid down by the Court (and even recognition of any special circumstances characterizing the area) will be cited and appealed to in any dispute that exists or subsequently develops regarding Malta's situation as a State with a Mediterranean continental shelf in the same general region as those of Libya and Tunisia."

This is undoubtedly so. But it is certainly not confined to those with a Mediterranean continental shelf; though even if this were conceded, there would still be more than a handful of States with an equal interest in this case. The list of "specific issues" set out in paragraph 13 of Malta's Application, and amplified by Mr. Lauterpacht in his address, serves only to confirm the position. This, of course, must be why the Rules of the Court ask for an indication of the "precise" object of the intervention. An ardent or even urgent interest in the law regarding continental shelf boundaries will not do.

At the same time Malta apprises the Court, in paragraph 22, in unambiguous terms, that it is not Malta's object "to obtain any form of ruling or decision from the Court concerning its continental shelf boundaries with each or both of those countries". Its only interest, in short, is to take part in the Tunisia/Libya argument whilst at the same time apparently wishing to insulate its own case from those rulings, as well as from the decision of the Court. It is doubtful whether such a privileged position should be possible, even if Malta were able to point to specific interests possibly affected by the decision.

Malta states quite frankly what is its object in the intervention (para. 20): "to enable Malta to submit its views to the Court on the issues raised in the pending case, before the Court has given its decision in that case". And it then refers again to the points – essentially points of general law and equity – mentioned in paragraphs 10-14.

This in the view of Tunisia is a very remarkable request. It is a request to intervene in a case in order to argue points of general law, simply because the resulting judgment may form an important precedent as "a subsidiary means for the ascertainment of the law". And at the same time Malta is not proposing to be bound in any way by that precedent. Presumably, if her point of view, if

she intervened, were not reflected ultimately in the judgment, she would feel able to argue it afresh and *ab initio* when her own case against Libya comes along. This would be a charter for third-State intervention in another party's cases, as opportunity arose, and whenever the would-be intervener had a legal axe it felt some interest in grinding before the Court.

If there were, as Malta's request must claim, any common elements in these two cases, the present one before the Court and the future one between Malta and Libya, the Court would wish also to consider, doubtless, whether it would be right, in the terms of equality, that Malta should be enabled to appear twice before the Court on the same legal issues. It is true that the Libya/Malta *compromis* is apparently not registered as yet with the Court. But that could not conceivably be relevant to the issue of intervention. A State cannot use Article 62 simply to make a case before the Court which it is not yet able, though expects eventually to be able, to bring under Article 36. That is a proposed abuse of the purpose of intervention. Nor clearly is it the Court's business to compensate Malta for its failure to get its case properly before the Court as yet under Article 36. Were Malta permitted in effect to make a start on another case in the course of the present one, some very remarkable innovations in the jurisdiction of the Court might become possible.

BASIS OF JURISDICTION

Now I turn to the question of the possible requirement of the basis of jurisdiction, and a great deal has been said about that requirement already, and I have only the briefest comments to add to the material already before the Court. And of course my task is made very much easier by the magisterial analysis of the material on that subject this morning by Professor Malintoppi. And here, nevertheless there are some extra points to be made I think, and it will be necessary in my submission to look both at Article 62 and Article 63 of the Statute.

Now first let it be said that Tunisia was certainly under the impression that both these Articles 62 and 63 were drafted in the first place in anticipation of some measure of compulsory jurisdiction. There is, I believe, a common belief among international lawyers to that effect. Mr. Bathurst was at pains to suggest that the proposal for compulsory jurisdiction was exploded so quickly that nobody noticed it had ever been made. But one observer at the time did notice it, and that was of course Judge Altamira, who said during the Permanent Court's discussion in 1922 of its procedures – and this was already cited this morning :

> "the scheme of the Jurists of 1920 was based on the principle of 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." (*P.C.I.J., Series D, No. 2*, p. 89.)

So the question may still be : what to make of an Article 62 which perhaps omits any reference to jurisdiction or reciprocity, or the need for some jurisdictional link, because it was assumed that jurisdiction would exist anyway ?

I confess to having been astonished at the suggestion made by our colleagues representing Malta, the suggestion that Article 62 could, even should apparently, be interpreted literally and in isolation. That is not, in my submission, the proper way to find the meaning of an article which is a part of a treaty called a Statute. And in particular, of course, it must be read subject to the

provisions of Article 36 governing the jurisdiction of the Court. And one thing that seems clear is that the failure to mention jurisdiction in Article 62 cannot be interpreted as of itself dispensing with the need for a basis of jurisdiction, if such a basis is required in principle, or required in some other part of the Statute. Nor, certainly, can the matter be disposed of by suggesting, as Malta does in paragraph 23 of its Request, that a statement of any basis of jurisdiction is required by Article 81 of the Court's Rules "as a matter of information". It may reasonably be assumed that the Court's Rules do not demand irrelevant information, but are there to secure the fulfilment of the requirements of the Statutes – not of the Statute necessarily, but of the Statutes.

The problem did not escape the attention of the Permanent Court in its 1922 meetings, and Malta has made much of material from those meetings. But it should be remembered that most possible points of view were mentioned in that record in one place or another, and the result is inconclusive because no decision was taken. Tunisia had chosen its own little extracts. The first, Sir, you have heard, I think, at least twice today, from Judge Anzilotti, and I shall not attempt to read it again, except that I would like to read again on behalf of Tunisia, as it were, the last part of that statement by Judge Anzilotti : "He pointed out that the legal grounds on which his view was based" – that some basis of jurisdiction was required – "were reinforced by practical considerations ; States would hesitate to have recourse to the Court if they had reason to fear that third parties would intervene in their cases." (*P.C.I.J., Series D, No. 2*, p. 87.)

And the other citation from that record which we wanted to call to the attention of the Court is from no less a member than Judge Max Huber, who was of the opinion that : "a State which was not bound by the reciprocity clause could not be allowed to intervene in a case between States which had accepted it" and "He did not think that intervention under the terms of Article 62 should be admitted in cases where no actual concrete right was at stake" (*ibid.*, p. 87).

We do not pretend to have proved anything by these extracts. As I have already said, from these extracts it is possible to extract quotations representing almost any view. But I would suggest that the attempt by Malta to extract from this material something conclusive is misguided. Many other opinions are to be found in the material.

The problem, of course, arose before this Court in the attempted intervention by Fiji in the *Nuclear Tests* cases, where several judges expressed the view that in the circumstances of that case at least, some basis of jurisdiction and reciprocity was required.

That of course – the *Nuclear Tests* cases – was one arising from an Application ; and the would-be intervener was attempting to range itself with the applicant State against the respondent.

There is no reason of principle why the position should be any different in a case begun by a Special Agreement. Logically, indeed, the requirement of a basis of jurisdiction and of reciprocity would be more stringent, that is to say, it should require surely a basis of jurisdiction in respect of both the States parties to the Special Agreement. For when the intervening State ranges itself with the applicant State, the applicant State may tacitly waive any objection in regard to jurisdiction. The same result, of course, could happen in a case begun by Special Agreement where one, or both States waived the objection. But where, as here, both States parties to the Special Agreement, possibly or even probably for different reasons, do object to the intervention, then the question of a basis of jurisdiction has to be examined. And that is certainly the position here.

This is the conclusion of Judge Hudson, where he says in his book : "If two States are before the Court by reasons of declarations made under paragraph 2 of Article 36 of the Statute" – the optional clause – "it would seem to be a derogation from the condition of reciprocity in their declarations to allow intervention by a third State which has made no similar declaration ; the situation", says Judge Hudson, "is not essentially different, however, when two States are before the Court under a Special Agreement and it allows intervention by a third State which is not a party to the agreement."

Now the question may be asked : if a basis and link of jurisdiction is necessary, in at any rate some cases under Article 62, how is this to be reconciled with the "right" which is spoken of to intervene in Article 63 ?

Now the "right" referred to in Article 63 refers, I would submit, not to jurisdiction but to the irrebuttable presumption created in that article that, in the case of a common treaty provision, there is a right which may be affected by the decision, and there is no need for the would-be intervening State to demonstrate that there is a legal right which may be affected by the decision in the case. But that the Court can, even then, in an Application under Article 63, refuse a request for intervention appears clearly from the *Haya de la Torre* case. The intervention was permitted there eventually, but there were objections, possible objections, to the admission, which the Court was at pains to point out and emphasize.

But there is another point. An intervention brought strictly under the terms of Article 63 refers in any case only to the "construction" of a treaty provision.

Of course, a jurisdictional link would be required if the intervener were concerned with more than the construction of the convention. It is implicit in the *S.S. "Wimbledon"* case, where Poland sought to intervene, first under Article 62, but eventually under Article 63 ; but did not ask for any special damages from Germany, and this was noted by the Court in its Judgment (*P.C.I.J., Series A, No. 1*, pp. 11-14). Had special damages been sought, then the question of jurisdiction might well have been relevant.

Now if, as Malta seems almost to have argued, Article 62 could have a sort of parallel function to Article 63, and comprehend an intervention to argue the construction of principles and rules of customary law, one would have the absurd and unreasonable result that the permitted intervention over a point of custom would not result in the intervening State being eventually bound by the ruling of the Court on that point, but the intervener as of right over a point of treaty construction would be bound by the Court's ruling. Such an inexplicable discrimination cannot have been the intended consequence of the two Articles. The language of Article 62, and its contrast with Article 63, suggests that intervention to argue the construction of rules of customary law was never contemplated by the Statute at all.

In this matter it is instructive to go back again to the *procès-verbal* of the Court's debate in 1922 of the Permanent Court of International Justice where Mr. Huber :

> "went on to emphasize the difference between Articles 62 and 63 ; according to the terms of the latter, a right of intervention existed ; but there was no corresponding provision in Article 62, in which it was, in the last instance, for the Court to decide whether intervention should be permitted. He did not think that intervention under the terms of Article 62 should be admitted in cases where no actual concrete right was at stake." (*P.C.I.J., Series C, No. 2*, p. 87.)

The question then arises whether every intervention under Article 62

requires a basis of jurisdiction ; or whether it applies only to certain kinds of intervention under Article 62 ? Here again one turns inevitably to the terms of the Special Agreement or the Application by which the issues in the case are defined. It follows from the overriding principle of international law that jurisdiction is based upon consent, that a basis of jurisdiction must always be a requirement of intervention when the State seeking to intervene seeks thereby in any way to affect or change the outcome of the issue between the parties as it is defined in the Special Agreement or the application as the case may be.

The same must also be true where the would-be intervening State is seeking to bring a case parallel to that defined as the issue in the original case, as was the position in the Fiji application. In all these cases it would seem essential to have a basis of jurisdiction to support the intervention. Were this not so, it would follow, would it not, for example, that in the *Barcelona Traction* case, Canada might have intervened once Belgium had got the case on its feet. And the door would be opened to a process of plaintiff-shopping by would-be litigants, and defeat the whole consensual basis of jurisdiction.

But indeed the need for a basis of jurisdiction, at least where the intervening State wishes in any degree to be a party, is impliedly conceded by Malta. In paragraph 24 of the Request, it is said that since "it is not the object of the intervention . . . to obtain from the Court any ruling or decision concerning Malta's continental shelf boundaries", and since therefore :

> "the intervention would not seek any substantive or operative decision against either party, it would appear that no question of jurisdiction in the strict sense of the word could arise as between Malta and the parties to the *Libya/Tunisia* case – for where relevant at all in the context of intervention, jurisdictional questions could be so only in different circumstances".

The implication of this statement is that there would be a need for a jurisdictional link in any intervention which sought the Court to make any decision, or do something, or decide something at the behest of the intervening State.

Nevertheless, whether or not the Maltese request falls into this broad category of cases manifestly requiring a basis of jurisdiction is not easy to say with certainty. For the Request, drafted as it is so as to mention several different and not always entirely mutually compatible reasons for the request, it is very difficult to pin it down anywhere. But the consequence of such ambivalence should obviously be to prejudice the Request ; it is for Malta positively to show cause, as the Permanent Court in the *S.S. "Wimbledon"* case made clear.

Yet the very lack of any specificity in Malta's Request must place it in a dilemma from which its argument has failed to extract it. If, and in so far as, the purpose of the Request might be to enable Malta to make representations to the Court regarding those parts of the Mediterranean sea-bed and subsoil where the Malta claims might meet and even overlap the claims of Tunisia or Libya or both, then it is surely obvious that there must be some basis of jurisdictional link in regard to both Tunisia and Libya. Whatever may be the position of Libya, there is certainly no such basis in regard to Tunisia. And in any event the position of Malta is more than amply safeguarded by a number of considerations if she is not allowed to intervene : (1) the fact that the Special Agreement confines the issues before the Court strictly to those between Tunisia and Libya only ; (2) the fact that, as recalled in Tunisia's written observations, the written pleadings of both Parties expressly ask the Court not to venture into the region of Malta's continental shelf ; and (3) and finally, but conclusively, the effect of Article 59 of the Court's Statute.

On the other hand, if it is not the intention of Malta's Request to intervene in regard to a specific interest in a specific area of sea-bed and subsoil, and if the purpose, as indeed would seem to be the case after all the huffing and puffing of the Application, if the real purpose is to seek the opportunity to make observations in regard to the principles and rules of law governing the continental shelf, and in regard to equitable principles, in regard to relevant circumstances, and in regard to recent trends at the Third United Nations Conference on the Law of the Sea, lest any of these matters might come up again in the case against Libya, and presumably also in later negotiations with Tunisia ; if this is the purpose of the intervention, does it even then require any basis of jurisdictional link in regard to each of the two Parties ?

Well probably not. The question then is a prior one : since there is no reliance on specific legal interests that might be directly affected by the decision of the Court, whether what is contemplated is intervention at all in any sense hitherto envisaged, is the question. For in taking such care to ask for a form of relief which would avoid the possible need for a basis of jurisdiction, Malta seems to have gone to the other extreme and pitched the description of the legal interest she is seeking to protect at such a high level of generality and abstraction, and with such a broad sweep, as to take it right outside anything that could have been contemplated by the draftsmen of Article 62. It is practically coming full circle. Malta is expressing an interest in the entire applicable law of the case, which would be appropriate to a party to the case. But of course she, at the same time, is not prepared to assume any of the corresponding liabilities.

Mr. President, lest this summary of the position may be thought to contain an element of exaggeration, let me remind the Court of the passages in the Maltese Application which put the position in perhaps even plainer terms : paragraph 4 :

> "Since, at the present stage, it cannot be known what the decision of the Court in the above-mentioned case will be, it equally cannot be known whether any legal interest of Malta will in fact be affected by that decision, or not."

And then paragraph 20 :

> "The precise object of Malta's intervention in the *Libya/Tunisia* case would be to enable Malta to submit its views to the Court on the issues raised in the pending case, before the Court has given its decision in that case."

Article 85 of the Rules of Court provides that :

> "3. The intervening State shall be entitled, in the course of the oral proceedings, to submit its observations with respect to the subject-matter of the intervention."

It was clearly never contemplated that the "subject-matter of the intervention" would be virtually the entire applicable law in the principal case, and that the intervening State might adopt, as it were, the role of an *amicus curiae*, with a wide and roving brief and an acknowledged ulterior motive. Such an intervention must introduce, moreover, egregious delays which would amount to a gross injustice to the actual Parties to the case.

The Court adjourned from 4.41 p.m. to 4.56 p.m.

Mr. President, I now turn to the final part of my address which deals first with one of the requirements stated in Article 81 of the Rules of Court and raises the question of the object and purposes of Malta's Application to intervene.

Article 81 of the Court's Rules require the Applicant to set out the "precise object" of the intervention. This is in strict accord with the Statute, Article 62, which, as I have said, in our submission, gives the Court a discretion whether or not to permit an intervention, even if the request has shown a right of a legal nature that might be affected by the decision.

The question of the object and purpose of the proposed intervention is crucial, both in regard to the satisfaction of the conditions laid down in Article 62, therefore, and also in regard to the very important question of the way the Court should exercise its discretion. What then is the precise purpose of the Application to intervene ? There are many descriptions, some of which I have already mentioned, but for this purpose may I take the description by Mr. Bathurst, where he said the object of the intervention had "the very limited but very important purpose of putting Malta's views to the Court before the Court reaches a decision in the case between the Parties, in regard to a region that affects Malta's vital interests" (p. 360, *supra*).

If this is indeed the precise object of the Application to intervene, it does seem to Tunisia that Malta has surely already achieved its object in these very hearings. Malta has chosen to employ these hearings to explain to the Court a very broad range of Maltese preoccupations, points of view, complaints, theories, claims, hopes and fears concerning sea-bed areas to which she might lay claim, and one is left wondering what more could be justified in the way of intervention – interference it was called this morning – in a case between other parties.

Malta has been anxious to argue that it was "meaningless", it was said (p. 295, *supra*), to say that Malta's interests are safeguarded by the limitation which the Special Agreement placed on the Court's decision. How will it be known, asked Dr. Mizzi (p. 285, *supra*), when that point is reached without entering upon the question of Malta's continental shelf entitlement ? Well, whether or not that was right when the learned Attorney-General spoke, it is not so now. All the Court needs to do in answer to the question where it should stop is surely to look at Mr. Lauterpacht's map and read his ample commentary on the extent and the reasons for the Maltese claims and the reasons for the rejection of the claims of the two Parties. Mr. Lauterpacht was quite specific about all the areas where, as he put it (p. 302, *supra*), "the claims and interests of Libya, Malta and Tunisia meet and quite clearly overlap". He not only described them but illustrated them on the map. "For", said Mr. Lauterpacht, "there will always be a question : where should the Libya-Tunisia line stop if it is to avoid trespassing into Malta's area ?" But he told us where, in the clearest possible terms, where, in the view of Malta, it should stop.

So Tunisia feels really very strongly that for a State which is asking to intervene, without any corresponding binding obligation, but merely to explain its preoccupation with some of the aspects of this principal case, Malta has in effect had its chance already and has taken it with both hands. To hear even more of the Malta position in the case between Tunisia and Libya, would be to transform that case and to distort it into something utterly different from what either Party had in mind when they decided in their Special Agreement to submit their case to this Court.

Counsel for Malta several times posed a logical dilemma : if Article 62

means that the intervening State must have a legal interest which will be affected by the Court's decision, he said, and yet Article 59 provides that the decision of the Court is binding only on the Parties, then Article 62 must be meaningless. Professor Lalive cited (p. 350, *supra*) a passage from the monograph by John T. Miller in *The Future of the International Court of Justice* published in New York in 1976 (ed. Leo Gross) where at page 556 this dilemma was posed.

Mr. Miller pointed out that "theoretically, the Court could so narrowly construe its authority as to hold that no State can qualify" under Article 62. Well it is not entirely clear that this must always be so. One supposes that Fiji possibly felt that it had an interest which was not altogether protectable by Article 59. But however that may be, Tunisia is not asking the Court so narrowly to circumscribe the effect to be given by it to this Article ; nor does Tunisia subscribe to the notion that Article 62 can have the broad meaning at the other extreme attributed by Malta – what Mr. Bathurst called "a wide-open opportunity of intervention in the interests of all States" (p. 366, *supra*). In making decisions under Article 62, it is submitted that the Court has to balance the interests involved.

The reasonable answer to the problem put by Malta surely lies not in one extreme view or in another. The Court has to balance the Applicant's assertion that the decision in the case may affect a legal interest of that State, with the need to do fair and expeditious justice in the principal case. This is the very purpose of the discretion given to the Court by Article 62.2 of the Statute.

Now in the present instance, Malta, in a long and thorough argument, has been able to do no more than to point to possibilities and assorted apprehensions. And this the Court has to balance against the need now to carry the present case smoothly to judgment, and the danger that the arguments and issues put to it might, if the intervention is permitted further, become so involved as to defeat that aim.

Finally, Tunisia believes that it is necessary to say a word about the possible repercussions of unbridled intervention on the prospects and future of international litigation.

Professor Lalive, in his address, sought to persuade the Court that even the mere possibility of an effect, existing only in the realm of hypothesis, might be sufficient to ground an intervention under Article 62. And Mr. Lauterpacht has already shown how very broad and comprehensive could be the sweep of such a right of intervention.

It is most respectfully submitted, that when considering these arguments, the Court should also consider the effect of intervention on governments weighing whether or not to submit their disputes by Special Agreement to this Court. For it is well to remember that a Special Agreement is in many respects akin to what is, in a sense, also its competitor, namely submission by *compromis* to *ad hoc* arbitration. Could States realistically be expected to submit their disputes by Special Agreement to this Court, if there were always the risk that a third State might intervene, on the flimsiest ground, into the case ? And if Malta's thesis of the possible grounds of intervention were accepted, this would surely be the case.

We believe that States which come together to this Court with their disputes, do so in the expectation of a reasonably expeditious clarification and settlement of their dispute, and certainly not with the expectation of intervention, maybe on hypothetical grounds, by States not parties to the Special Agreement. That is why we believe that it is vital that the Court safeguard the discretion that, in our view, it is plainly given in Article 62.2.

Now, Mr. President if I might very briefly summarize the conclusions, we would submit :

1. Malta has failed to demonstrate any specific interest or interests of a legal nature that might be affected by the actual decision of this Court regarding the issues submitted to it by the Parties under the Special Agreement.

2. We believe that Malta has been wholly unable to point to any basis of jurisdiction in regard to Tunisia, which basis would be needed to support an intervention regarding specific interests concerning any of the issues actually submitted to this Court in the Special Agreement.

3. Malta's specific interests are in any event fully protected in the circumstances of the present case by Article 59 of the Court's Statute, which protection must be forfeit, or should be forfeit, to the extent of any Maltese intervention.

4. Malta has endeavoured to escape from the requirements of a valid intervention, or intervention as normally recognized, by asking in effect not for permission to intervene in the ordinary sense of the word, but rather for access to the Court in order to argue generally about the principles and rules of law and equity, recent tendencies, and so on, concerning continental shelf boundaries.

5. It is submitted that so broad and yet so general and unspecific a ground of intervention is irreconcilable with the words of Article 62, with the Rules of Court, and with the Court's jurisprudence hitherto on the subject of intervention.

6. If Malta were allowed to intervene on the terms set out in its request, the certain result would be unreasonable delay in the completion of the present case, and also presumably in the timely conclusion of its own case with Libya.

7. Finally, it is the submission of Tunisia that Malta has failed both to fulfil the requirements of Article 62, and of the procedural requirements of the Court's Rules intended to give effect to those requirements, and it is submitted that permission should not be granted because those requirements have not been fulfilled.

PLAIDOIRIE DE M. BELAÏD

COAGENT DU GOUVERNEMENT DE LA TUNISIE

M. BELAÏD : Monsieur le Président, Messieurs les membres de la Cour, permettez-moi tout d'abord de dire combien je suis sensible à l'honneur et au privilège de comparaître devant cette honorable Cour pour participer aujourd'hui à la présentation des observations du Gouvernement tunisien au sujet de la requête à fin d'intervention de Malte dans l'affaire du *Plateau continental* entre la Libye et la Tunisie.

Tout à l'heure, Son Exc. l'ambassadeur Benghazi, agent du Gouvernement tunisien, a tracé le cadre dans lequel, du point de vue de la Tunisie, cette demande d'intervention devait être examinée et a apporté des précisions et éclaircissements sur la position du Gouvernement tunisien à cet égard. Pour sa part, mon éminent collègue et maître, le professeur Jennings, conseil du Gouvernement tunisien, a exposé une série de considérations juridiques qui, du point de vue de la Tunisie, devraient conduire à déclarer irrecevable la requête du Gouvernement maltais.

Ma tâche consistera maintenant, si la Cour veut bien me le permettre, à exposer quelques observations complémentaires qui confirment et complètent les observations présentées par mes prédécesseurs.

Pour la commodité de l'exposé, je regrouperai ces observations autour de trois thèmes différents, que j'envisagerai successivement. Ce faisant, je m'efforcerai, compte tenu de l'état d'avancement des débats, d'être aussi bref que possible.

I

Premier point donc de mon intervention. Le Gouvernement tunisien souhaiterait en premier lieu attirer l'attention de la Cour sur le caractère tardif du dépôt de la requête de Malte et sur les conséquences qui en découleraient si ladite requête venait à être admise dans ces conditions.

1) Malte, on le sait, a enregistré sa requête auprès du Greffe de la Cour à la date du 30 janvier 1981, c'est-à-dire tout juste trois jours avant la date fixée pour l'échange des contre-mémoires entre la Libye et la Tunisie fixé pour le 2 février 1981. Cette date du 2 février 1981 pouvait coïncider avec la clôture de la procédure écrite, qui est évidemment le délai limite prévu par le Règlement de la Cour pour le dépôt des éventuelles requêtes à fin d'intervention, ainsi que le prévoit l'article 81, paragraphe 1, du Règlement de la Cour.

L'opinion du Gouvernement tunisien est que, en procédant ainsi, le Gouvernement maltais n'a pas pleinement respecté dans leur lettre ni dans leur esprit les dispositions pertinentes du Règlement de la Cour, qui tendent précisément à éviter les retards excessifs dans le dépôt des éventuelles requêtes à fin d'intervention.

a) Dans sa version actuelle, le Règlement de la Cour invite en effet les Etats désireux d'intervenir à déposer leur requête *le plus tôt possible* (art. 81, par. 1). Cette expression *le plus tôt possible* n'existait pas dans les versions antérieures du Règlement. Ainsi que le précise la note du Greffe sur le Règlement revisé en 1978, « la disposition concernant les délais pour le dépôt de la requête a été modifiée » (p. 14). En insérant ainsi cette nouvelle disposition dans le

Règlement revisé, la Cour a manifestement entendu éviter les retards excessifs et les conséquences préjudiciables pour l'affaire principale, qui peuvent découler d'un dépôt tardif de la requête à fin d'intervention. Ce souci d'éviter les retards excessifs apparaît d'une manière aussi claire dans d'autres dispositions du Règlement relatives à la matière. Il en est ainsi notamment du paragraphe 2 de l'article 85 qui implique que la requête doit être déposée suffisamment tôt pour que, dans l'hypothèse de son admission, les délais coïncident avec ceux du dépôt des pièces écrites pour la procédure principale. Ce souci de contenir les délais dans des limites raisonnables se justifie en tout premier lieu par le fait que l'intervention est essentiellement une procédure incidente et que, en tant que telle, elle ne doit pas provoquer de retards injustifiables dans le règlement de l'affaire principale. Notons, cependant, que ce souci dépasse le cas spécifique de la procédure de l'intervention et que, d'une manière générale, la Cour a toujours veillé à éviter les prolongations inutiles de délais dans les litiges qui lui sont soumis. Ce souci était déjà présent dans les travaux préparatoires du comité du Règlement de la Cour permanente de Justice internationale en 1926. L'un des membres de ce comité, M. de Bustamante, observait en effet :

> « It would be better clearly to state that a party was not entitled to intervene, if, in doing so, it compelled the other parties to begin again proceedings already commenced. If a State has allowed the right moment to intervene to pass, it must take the consequences. » (*C.P.I.J., Travaux préparatoires, 23 juillet 1926, série D, addendum au nº 2.*)

De même, dans son arrêt relatif à l'affaire de la *Barcelona Traction* la Cour déclare notamment :

> « La Cour demeure cependant convaincue que pour préserver l'autorité de la justice internationale et dans l'intérêt de son bon fonctionnement, les affaires devraient être réglées sans retard injustifié » (arrêt, *C.I.J. Recueil 1970*, par. 27).

En vérité, c'est là une sage précaution car elle constitue une garantie sérieuse pour les Etats qui décident de soumettre à la Cour un litige qui les oppose et pour lesquels le facteur « temps » constitue une donnée importante, surtout lorsqu'il s'agit — c'est le cas dans la présente affaire — d'un litige dont la solution n'a pas été obtenue après de longues années de négociations.

b) Dans la présente instance, le Gouvernement maltais semble lui-même reconnaître qu'il ne s'est pas pleinement conformé à toutes les dispositions pertinentes du Règlement, puisqu'il a cherché à s'en expliquer, en quelque sorte, par avance ; dans sa requête, en effet, on lit :

> « la requête n'a pas été soumise auparavant parce que, avant de décider si elle demanderait finalement à être autorisée à intervenir, Malte désirait disposer, dans la mesure du possible, d'exemplaires des pièces écrites de procédure en l'affaire et avoir le temps de les étudier » (par. 17).

Ces explications ne nous semblent cependant pas convaincantes. Si l'on devait suivre dans sa logique le Gouvernement maltais et communiquer à tout Etat les pièces écrites d'une procédure afin qu'il puisse décider s'il « demanderait finalement à être autorisé à intervenir » (requête maltaise, par. 17), on imagine aisément les graves inconvénients qu'une telle conception pourrait entraîner pour les litiges qui sont soumis à une juridiction internationale.

D'un autre côté, il est à peine besoin de dire que le Gouvernement maltais n'avait en réalité pas besoin de recevoir communication des pièces écrites libyennes et tunisiennes pour décider s'il doit ou non déposer une requête à fin

d'intervention. Le Statut de la Cour l'autorise à présenter une telle requête dès l'instant où il « estime » (article 62 du Statut) que, dans le présent différend, un intérêt juridique est pour lui en cause. Ainsi que l'a excellemment expliqué le professeur Lalive, cette expression « lorsqu'un Etat estime » implique que l'Etat intervenant peut tenir compte de toute considération qui lui semblera pertinente ; une telle possibilité aussi largement ouverte constitue, pour l'Etat qui désire intervenir, une protection appréciable contre « le mauvais vouloir » des Etats en litige qui refuseraient éventuellement de lui donner accès aux pièces écrites de la procédure. Or, dans le présent cas, on peut penser que le Gouvernement maltais était en mesure d'« estimer » s'il avait un intérêt en cause depuis au moins la date du 1er décembre 1978, date de la saisine de la Cour — il y a maintenant plus de deux ans. C'est d'ailleurs ce que semble admettre le Gouvernement maltais lui-même. Ce dernier reconnaît en effet que pour prendre sa décision :

> « il s'est fondé exclusivement sur les indications que l'on peut tirer à ce sujet des termes du compromis entre la Libye et la Tunisie en date du 10 juin 1977, tel qu'il a été publié ».

Cela est tout à fait juste. Ainsi que l'a excellemment expliqué le professeur Jennings, la justification de la demande d'intervention doit être trouvée non pas nécessairement dans les pièces écrites déposées par les Parties mais dans le texte du compromis qu'elles ont signé et dans la mission que les Etats signataires de ce compromis ont ainsi entendu assigner à la Cour.

Dans un autre passage de sa requête, le Gouvernement de Malte admet aussi clairement — mais non sans quelque contradiction — que les considérations susceptibles de justifier à ses yeux l'introduction d'une requête à fin d'intervention pouvaient être formulées en dehors de la connaissance préalable des pièces écrites des Parties. Il a, à cet effet, mentionné dans sa requête un certain nombre de questions qui, selon lui :

> « affecteraient nécessairement l'intérêt juridique de Malte et influenceraient presque certainement toute décision ultérieure au sujet des limites du plateau continental de Malte ».

On peut dès lors s'interroger sur les raisons réelles qui ont poussé le Gouvernement maltais à différer sa demande d'intervention jusqu'à un moment aussi tardif de la procédure écrite. Quelles que soient ces raisons, cependant, il reste que le retard excessif et injustifié risque de perturber gravement le déroulement de la procédure actuellement ouverte devant la Cour et de porter ainsi gravement préjudice aux intérêts des Etats qui ont soumis leur litige à la Cour.

2) D'un autre côté, la demande d'intervention de Malte, si elle venait à être admise, pourrait donner lieu à d'autres complications encore. Elle risque en effet de provoquer, dans un stade ultérieur, des demandes d'intervention d'autres Etats, pouvant ainsi entraver gravement la procédure dans l'affaire principale. La solution de cette affaire n'interviendra alors qu'après des délais beaucoup plus longs que ceux que les Parties au litige ou la Cour pouvaient prévoir.

Ces risques se trouvent encore aggravés par les conceptions particulières développées par le Gouvernement maltais déjà dans sa requête mais encore plus amplement dans les observations orales et relatives aux conditions juridiques de la mise en œuvre de l'intervention, fondée sur l'article 62.

a) Selon la thèse défendue par le Gouvernement maltais, l'intervention constituerait un droit dont la mise en œuvre serait en quelque sorte automatique, chaque fois qu'un Etat « estime », sans autres conditions, que ses intérêts

peuvent être affectés par la décision que prendra la Cour dans une affaire qui lui est soumise. L'intervention serait automatique dès lors qu'un intérêt (comme l'a précisé hier le professeur Lalive) existe, quelle que soit la nature ou l'importance de cet intérêt. Le professeur Lalive est allé jusqu'à suggérer que la Cour devrait à cet égard s'inspirer de la jurisprudence « libérale » des tribunaux arbitraux mixtes qui ont pris en considération à cet égard même les « risques lointains », les « craintes », les « espoirs », les « expectatives », les « hypothèses ».

On voit tous les espoirs qu'une telle conception peut comporter. Il est évident que si les Etats disposent d'un pouvoir discrétionnaire, j'entends ici arbitraire, ils peuvent être tentés de l'utiliser pour retarder sinon bloquer le règlement d'un litige que les Etats parties ont décidé de soumettre à une juridiction internationale. Il est à peine besoin au surplus de noter que, dans une conjoncture déterminée, l'utilisation habile d'une telle possibilité peut être transformée en un moyen de pression redoutable vis-à-vis de l'un des Etats litigants.

b) D'un autre côté, le Gouvernement maltais croit trouver une justification valable et suffisante à l'intervention automatique dans le fait que Malte est située en face du même plateau continental que la Libye et la Tunisie et que la délimitation entre ces deux pays affecte automatiquement ses propres droits. On voit cependant les dangers d'une telle conception. En raison de l'évolution récente du droit de la mer et de l'extension considérable des droits des Etats sur les plateaux continentaux qui leur sont adjacents, rares sont les cas où la délimitation d'un plateau continental intéressera seulement deux Etats. Il s'ensuivrait que, selon la thèse défendue par le Gouvernement maltais, si deux Etats viennent de bonne foi à soumettre à la Cour internationale un litige de délimitation qui les oppose, tous les Etats adjacents à ce plateau continental auraient un droit automatique d'intervenir dans ce litige ; chaque intervention d'un Etat entraînant un retard déterminé auquel s'ajoutera le retard provoqué par l'intervention suivante d'un autre Etat ; l'intervention d'un Etat entraînant l'intervention d'autres Etats, légitimement soucieux de préserver leurs droits. Si une telle hypothèse peut faire le bonheur des spécialistes, elle ne peut guère plaire aux Etats intéressés, soucieux eux d'aboutir à un règlement de leurs litiges aussi équitable mais aussi rapide que possible. Une telle hypothèse ne peut non plus plaire à la juridiction saisie en raison du fait que cette juridiction se trouvera progressivement en face d'une affaire de plus en plus difficile à dominer.

c) Enfin, il a été suggéré au nom du Gouvernement maltais que, dans un litige soumis à la Cour internationale, les Etats parties à ce litige doivent être considérés avoir implicitement admis, par leur compromis même, les Etats tiers qui « estiment » avoir un intérêt en cause dans leur différend à intervenir automatiquement dans ce litige. Il s'agirait là d'une sorte de présomption de *forum prorogatum*, implicitement consentie par les Etats litigants au profit des Etats tiers intéressés.

Je citerais, à propos de cette nouvelle institution que le droit international ne connaît pas encore, un passage de l'intervention de M. Lauterpacht qui estime que le compromis tuniso-libyen « also impliedly conferred jurisdiction upon the Court as regards an intervention by Malta » et M. Lauterpacht d'ajouter plus loin :

> « Whenever two States conclude the kind of agreement which Tunisia and Libya have concluded, they thereby implicitly confer upon the Court jurisdiction to deal with intervention by a State which claims as Malta does so strikingly, that its legal interests are affected. »

On doit cependant se demander si les auteurs d'une telle conception aussi audacieuse ont mesuré tous les dangers qu'elle comporte en fait. Une telle présomption aurait en effet un effet inhibitif sur les Etats qui décident de bonne foi de soumettre leurs litiges à la Cour internationale.

Finalement, la conception défendue à ce sujet par le Gouvernement maltais présente inévitablement deux effets négatifs au moins :

– D'un côté, premier effet négatif, la pénalisation des Etats qui soumettent leurs litiges à la Cour internationale, puisqu'ils se trouveront constamment sous la menace d'une intervention imminente qui reportera à des dates de plus en plus lointaines le règlement de leurs litiges.

– D'un autre côté, une telle conception exercera sur les autres Etats un effet non moins négatif, un effet de dissuasion ; avertis des complications que peuvent entrainer des interventions qu'ils ne prévoyaient pas mais contre lesquelles ils ne peuvent rien, ils préféreront se tourner vers des modes de règlement présentant plus de sécurité et de rapidité.

Quoi qu'en aient dit hier les conseils du Gouvernement maltais, ces deux risques, pénalisation des Etats litigants, dissuasion des autres Etats, existent réellement et ils sont de nature à peser lourdement dans la décision des Etats qui sont désireux ou qui se trouveront amenés à recourir à la juridiction internationale pour résoudre leurs litiges.

Hier, au nom du Gouvernement maltais, il a été rappelé à juste titre que la présente affaire sera la première occasion de l'application de l'article 62 du Statut et que la décision qui sera prise par la Cour à ce sujet constituera, en la matière, un important précédent, qui attirera l'attention de tous les Etats. Cela est indiscutable. Mais il est aussi indiscutable que si la Cour suit le Gouvernement maltais dans la voie qu'il lui suggère, un grand dommage sera occasionné au système de règlement juridictionnel des différends internationaux ; les Etats auront tendance à se détourner de ce système de règlement qu'ils ne prisaient guère déjà et, faute de trouver un moyen sûr de régler leurs litiges, ils préféreront se tourner vers d'autres moyens ou même se résigner à laisser ces problèmes sans solution aucune.

Qu'il soit enfin clairement dit ici qu'en exprimant ses réserves quant à la *conception de l'intervention défendue par le Gouvernement maltais*, le Gouvernement tunisien n'entend nullement, comme semble le penser l'un des représentants du Gouvernement de Malte, « partager le gâteau – ou le plateau continental – avec le pays voisin » en ignorant les droits d'un Etat tiers – si petit soit-il ; le Gouvernement tunisien, pour sa part, tout au contraire s'est adressé à la plus haute juridiction internationale, qu'il a invité à décider dans une instance publique et sur la base du droit jusqu'où peuvent s'étendre ses droits sur le plateau continental vis-à-vis de la Libye, sans empiéter sur les droits des Etats tiers, ainsi qu'il a été expressément mentionné dans les conclusions de ses plaidoiries écrites. Le Gouvernement maltais ne peut de ce fait trouver une meilleure garantie de ses droits.

Monsieur le Président, avec votre autorisation, je voudrais maintenant aborder un autre thème concernant cette fois-ci l'objet de la demande d'intervention.

II

Le Gouvernement tunisien voudrait ici attirer l'attention de la Cour sur le fait que la requête du Gouvernement de Malte ne répond pas à l'une des conditions essentielles prévues par le Règlement de la Cour, qui dispose dans

son article 81, paragraphe 2 *b)*, que la requête à fin d'intervention doit spécifier « l'objet précis de l'intervention ». Ayant manqué de remplir ces conditions, la requête maltaise ne semble pas devoir être admise.

Pour notre démonstration, nous procéderons à une analyse, très brève, des dispositions pertinentes du Statut de la Cour et de son Règlement, pour dégager la signification précise de cette condition – l'objet précis de l'intervention – et les conséquences qui doivent en découler pour la question qui nous préoccupe ici.

A. Ce retour aux textes, fort clairs au demeurant, s'impose en raison de l'interprétation erronée, à notre sens, qui en a été donnée par le Gouvernement maltais, quant à la condition de la définition de l'objet de l'intervention.

Selon le Gouvernement maltais, il existerait une seule condition pour l'admissibilité d'une demande d'intervention : l'existence d'un intérêt d'ordre juridique pouvant être affecté. Tel serait l'objet, l'unique objet, de l'article 62 du Statut de la Cour. Se trouvant cependant confronté avec la disposition de l'article 81, paragraphe 2 *b)*, du Règlement, relative à « l'objet précis de l'intervention », le Gouvernement maltais soutient qu'une telle condition n'est pas conforme à l'article 62 du Statut, qui doit être considéré ici comme la disposition contrôlant la matière. Le distingué agent du Gouvernement maltais a ainsi déclaré :

> « Unlike the legal interest question, there is nothing at all in Article 62 of the Statute about the object of the intervention, or at least nothing about any object separate from and independent of the legal interest involved. » (Ci-dessus p. 290.)

Et dans la conclusion de son exposé, le distingué agent reprend les mêmes affirmations, en soumettant à cet égard au même traitement l'alinéa *b)* et l'alinéa *c)* du paragraphe 2 de l'article 81 du Règlement.

Il n'est pas de notre intention d'ouvrir ici un débat sur cette matière, tant les choses nous paraissent claires par elles-mêmes. Notons cependant la tendance du Gouvernement maltais, dans ce domaine, à écarter les dispositions du Règlement qui le gênent, en les déclarant d'une manière péremptoire non conformes au Statut de la Cour et, de ce fait, non susceptibles d'être : « interpreted or applied as a requirement of substance creative of such a condition » (plaidoirie de M. l'agent du Gouvernement de Malte, ci-dessus p. 292).

Pour notre part, nous nous limiterons à observer qu'il n'est pas de notre ressort d'apprécier la « constitutionnalité » d'un Règlement que le Statut lui-même a habilité la Cour à établir en vue de déterminer « le mode suivant lequel elle [la Cour] exerce ses attributions » et « règle sa procédure » (article 30 du Statut).

Mais, si on laisse de côté ce débat et que l'on examine la question d'un point de vue tout à fait théorique, on aboutira à la conclusion que dans le domaine de l'intervention la désignation de l'objet de cette intervention occupe une place centrale dans cette institution, pour la raison qu'elle constitue à la fois un critère d'appréciation de la recevabilité de la demande d'intervention et un élément important pour l'exercice par la Cour de son pouvoir de « décider », qui lui est conféré par l'article 62 du Statut.

Sur le premier point, pour qu'une intervention soit justifiée, il ne suffit pas à notre avis que l'Etat intéressé affirme l'existence d'un intérêt ou que cet intérêt puisse être affecté par l'affaire soumise à la Cour internationale. Il faut encore que, sur la base de considérations qu'il appartient à cet Etat de déterminer – que ces considérations soient fondées ou non fondées –, l'Etat formule les

moyens qui lui semblent les plus appropriés pour remédier à un éventuel dommage. Il faut qu'il formule une demande ou encore qu'il définisse l'objet de l'intervention. Car l'intervention, qui est par essence, et ainsi que l'a excellemment dit le professeur Lalive, une procédure incidente, ne doit perturber le cours d'un procès, sur lequel elle vient se greffer, que s'il y a des motifs sérieux à cela. Autrement, elle serait le moyen facile par le biais duquel des Etats tiers, n'ayant par hypothese aucun intérêt particulier à défendre, viendront se mêler, sans conséquence pour eux, de litiges qui ne les concernent ni ne les affectent. C'est précisément pour contrôler la réalité et l'importance de l'intérêt en cause, et aussi l'adéquation du moyen de droit invoqué à la protection de cet intérêt en question, que le droit international a depuis longtemps exigé la formulation de l'objet de l'intervention. Dans le Règlement de 1972, cette condition, selon l'observation pertinente du distingué agent du Gouvernement maltais, « can . . . be regarded as implied in the former notion of a statement of law and fact justifying the intervention » (ci-dessus p. 290). Le mérite du Règlement de 1978 est précisément d'avoir explicité cette condition puisqu'il dispose maintenant que la demande d'intervention doit « spécifier » « l'objet précis de l'intervention ».

Ainsi que le montre cette citation, le Règlement exige non seulement que l'Etat intervenant « spécifie » l'objet de l'intervention, mais encore qu'il doit s'agir d'un objet « précis ». L'insistance sur la précision de l'objet par les expressions « spécifie » et objet « précis » a sa raison d'être : cette condition définit et justifie le pouvoir dévolu à la Cour de « décider » (art. 62) du sort de la demande d'intervention. Il a été soutenu au nom du Gouvernement maltais qu'il suffit d'invoquer l'existence d'un « intérêt d'ordre juridique » pouvant être affecté pour que le juge soit obligé d'accueillir la demande d'intervention, sous la réserve bien sûr de la vérification de l'existence et de la nature « juridique » de l'intérêt en cause. Le juge aurait, selon cette thèse, une simple « compétence liée ».

En réalité, le juge a plus qu'une compétence liée, dans ce domaine. Il a d'abord le pouvoir de vérifier la réalité et la nature juridique de l'intérêt en cause bien sûr. Mais il a encore le droit de vérifier, dans le différend spécifique qui lui est soumis, la corrélation entre cet intérêt en cause et les moyens propres à le protéger. C'est pour cela que l'intervenant doit indiquer l'objet et même, dit le Règlement de 1978, l'objet « précis » de son intervention. Au niveau de chacun de ces éléments, le juge dispose d'un large pouvoir d'appréciation qui doit lui permettre de « décider ». S'il se révèle que l'intérêt en cause est inconsistant ou n'est pas de nature juridique, le juge a normalement le pouvoir de rejeter l'intervention. Si d'un autre côté il s'avère que l'objet de l'intervention n'a aucune relation avec le différend spécifique qui lui est soumis ou qu'il n'a aucune relation avec l'intérêt en cause dans ce différend, il a, à notre avis, le même pouvoir de rejeter la demande d'intervention.

Ainsi qu'on le voit, la notion d'« objet précis » de l'intervention est tout à fait distincte de la notion d'intérêt juridique « en cause » et elle joue un rôle bien déterminé dans la mise en œuvre de la procédure de l'intervention. C'est du reste ce que reflète l'actuelle rédaction de l'article 81, paragraphe 2, du Règlement qui traite dans deux paragraphes distincts et successifs de ces deux notions :

a) l'intérêt d'ordre juridique ;
b) l'objet précis de l'intervention.

Ce paragraphe 2, notons le pour mémoire, ajoute une troisième condition fondamentale, la base de la compétence, sur la légitimité de laquelle tout à

l'heure le professeur Jennings a donné les explications les plus autorisées. Nous n'y reviendrons pas.

B. Qu'en est-il maintenant de la demande d'intervention maltaise, au regard de la condition précise que nous venons d'étudier, « l'objet précis de l'intervention » ?

La thèse que nous soutenons est que la demande en question ne remplit pas les conditions prévues par les dispositions du Règlement et qu'il y a là un motif suffisant pour déclarer cette requête irrecevable.

1) L'objet de l'intervention de Malte, présenté dans la requête et réitéré dans les observations orales, est « de lui permettre d'exposer ses vues à la Cour sur les points soulevés dans l'instance avant que la Cour ne se soit prononcée ». Dans ses observations orales, le Gouvernement maltais a encore précisé ses intentions. M. Lauterpacht a déclaré à ce sujet : « Malta is not concerned with the formal operative part of the decision of the Court, which is the matter to which Article 59 relates » (ci-dessus p. 295). Mais si Malte n'est pas concernée par la décision au sens formel qui sera rendue par la Cour dans l'affaire tuniso-libyenne, sa demande, à priori, n'a plus de raison d'être, pour le motif que l'intervention vise précisément à protéger les intérêts des Etats tiers pouvant être affectés par la décision dans l'affaire considérée, pour reprendre les expressions de l'article 62 du Statut. C'est ce qui ressort de l'article 62 du Statut auquel le Gouvernement maltais s'est référé si souvent.

Malte réplique alors que ce qui la préoccupe, ce n'est pas la décision elle-même, entendue dans le sens strict, dans le sens formel, mais les considérations, les motifs ou encore le *nervus sentenciae*, qui servent de fondement à la décision qui sera prise dans l'affaire tuniso-libyenne. Pour citer à nouveau M. Lauterpacht à cet égard :

> « Malta is concerned with the substantive content of the decision, . . . elements which, though perhaps not in form, must in content inevitably have an impact upon subsequent relations between Malta, Libya and Tunisia. » *(Ibid.)*

C'est la même opinion qui est défendue par le distingué agent du Gouvernement maltais qui déclare que ce qui préoccupe Malte, c'est le risque de voir :

> « her rights as it were foreclosed and her legal interests shut out, by pronouncements of the Court – at least of principle, or relating to situations analogous to Malta's. All such pronouncements are bound to have the status of authoritative declarations of the law, almost automatically applicable to any comparable situation, and will certainly be viewed as such. » (Ci-dessus p. 285.)

Il est vrai qu'il y a une forte probabilité que l'arrêt qui sera rendu dans l'affaire du *Plateau continental (Tunisie/Jamahiriya arabe libyenne)* aura cet impact, comme cela était le cas pour l'arrêt de 1969 dans les affaires de la mer du Nord. Mais cela est dans la nature des choses et dépasse le cas tuniso-libyen. L'impact de l'arrêt tiendra moins aux particularités de l'affaire de l'espèce qu'à l'autorité de la juridiction qui l'aura émis. Il ne peut constituer à lui seul une justification valable pour une demande d'intervention. Autrement, rien n'interdirait à d'autres Etats situés ou non les uns par rapport aux autres dans une position géographique analogue à celle de Malte par rapport à la Tunisie et à la Libye de demander à intervenir. A cet égard, le Gouvernement tunisien ne peut que confirmer les réserves déjà clairement exprimées dans ses observations écrites, où on lit notamment :

« Si un tel intérêt dans les principes et règles juridiques discutées devant la Cour pouvait constituer une base suffisante pour une intervention, il serait difficile de voir comment tout Etat partie à un différend pourrait se voir refuser la possibilité d'intervenir dans une affaire susceptible de donner application aux mêmes principes et règles juridiques. »

A l'instar de Malte, plusieurs autres Etats peuvent bien être hautement intéressés et même plus directement touchés par les principes et règles qui seront dégagés par la Cour dans le litige tuniso-libyen. Cela ne peut constituer pour autant, pour ces Etats, un motif suffisant pour intervenir aux termes mêmes de l'article 81, paragraphe 2 *b)*, du Règlement, qui exige que l'Etat intervenant « spécifie » l'objet précis de l'intervention.

Il est vrai que le Gouvernement maltais tire argument de la situation géographique particulière et unique de cet Etat vis-à-vis de la Tunisie et de la Libye et aussi vis-à-vis du plateau continental dans la région. Cette observation d'ordre géographique est certes pertinente. On ne voit cependant pas en quoi elle peut constituer une justification particulière pour l'intervention compte tenu des termes précis dans lesquels le litige est soumis à la Cour et compte tenu également des termes dans lesquels cette dernière prendra sa décision. En ce qui concerne le premier point, il suffit de rappeler que le compromis tuniso-libyen de 1977 invite la Cour à dire quels sont les principes et règles de droit international applicables pour la « délimitation de la zone du plateau continental relevant de la Jamahiriya arabe libyenne populaire et socialiste » et de la « zone du plateau continental relevant de la République tunisienne ». Rien de plus. La question posée à la Cour concerne et se limite aux seuls rapports réciproques entre la Tunisie et la Libye. C'est ce qui du reste apparaît clairement dans les conclusions que les deux Parties ont déposées dans l'affaire principale. On ne voit plus dès lors quel peut être l'objet précis de la demande d'intervention de Malte, dans un litige intéressant d'une manière aussi spécifique exclusivement la Libye et la Tunisie.

En ce qui concerne le deuxième point, le Gouvernement maltais sait pertinemment que la mission de la Cour et la portée de l'arrêt qu'elle rendra s'inscrivent dans le cadre précis du principe de la relativité de la chose jugée. Le rappel des termes de l'article 59 du Statut de la Cour nous paraît tout à fait utile à cet égard et nous permet de nous passer de tout commentaire. L'article 59 dispose : « La décision de la Cour n'est obligatoire que pour les parties au litige et dans le cas qui a été décidé. » Aux termes de cet article, il est clair que, sur les deux plans envisagés dans le compromis tuniso-libyen, c'est-à-dire la définition du droit applicable et la définition de la manière pratique d'application de ces principes au cas précis de la Tunisie et de la Libye, l'arrêt de la Cour demeure vis-à-vis de Malte *res inter alios acta*.

2) Par ailleurs, le Gouvernement maltais précise que l'objet de son intervention se limite à lui permettre d'exposer ses vues sur un litige dont nous venons de voir qu'il ne le regarde pas et aussi que, en demandant à ce faire, il n'entend pas devenir partie à ce litige. Il a en effet déclaré que « l'intervention n'a pas pour objet d'aboutir à une décision de fond » ni encore moins « d'obtenir ... un prononcé ou une décision quelconque de la Cour au sujet des limites de son plateau continental par rapport à ces deux pays ou à l'un d'eux ».

Une telle attitude n'est cependant pas conforme au Statut ni à la mission de la Cour dans ses fonctions contentieuses. La mission de la Cour est définie par l'article 36, paragraphe 1, du Statut qui dispose que : « La compétence de la Cour s'étend à toutes les affaires que les parties lui soumettront », et aussi par l'article 38 de ce Statut qui dispose aussi clairement : « La Cour, dont la

mission est de régler conformément au droit international les différends qui lui sont soumis... »

L'attitude du Gouvernement maltais est encore moins conforme à un principe fondamental du droit international, que la présente Cour a toujours veillé à faire respecter. Il s'agit du principe de l'égalité des parties dans une instance contentieuse. Dans la présente affaire, la Cour a devant elle, d'un côté, deux Etats litigants acceptant de bonne foi toutes les obligations prévues par le compromis qu'ils ont signé et par le Statut de la Cour et, de l'autre côté, un Etat tiers qui demande, en somme, à être officiellement présent en l'instance, à être autorisé à exposer ses vues sans cependant se trouver lié par la décision de la Cour. Une telle position, si elle peut être attrayante pour le Gouvernement de Malte, par son confort, est cependant difficilement défendable pour la raison simple mais suffisante qu'elle n'est pas conforme au Statut de la Cour et qu'elle constitue de surcroît une atteinte grave au principe d'égalité précédemment mentionné.

III

Troisième et dernier point de mon exposé, Monsieur le Président. Le Gouvernement maltais a déclaré que ce qui le préoccupe dans l'affaire tuniso-libyenne est le fait que les principes et règles de droit international applicables à cette espèce et les circonstances géographiques et autres qui seront prises en considération par la Cour à cet effet auront inévitablement un impact sur les intérêts maltais et seront « nécessairement pertinents pour la délimitation entre Malte et la Libye et entre Malte et la Tunisie ». Dans la requête maltaise, on lit à cet égard :

> « Malte doit donc s'attendre que tous principes et règles, juridiques ou équitables, ainsi que la manière pratique de les appliquer, qui seront définis par la Cour... seront cités et invoqués dans tout différend existant ou qui surgirait par la suite au sujet de la situation de Malte comme Etat ayant un plateau continental méditerranéen dans le même secteur que la Libye et la Tunisie. »

Dans les plaidoiries orales, le Gouvernement maltais par la bouche de son agent et ses conseils, notamment M. Lauterpacht, a encore développé cette manière de voir. Dans son exposé, M. Lauterpacht a insisté, cartes à l'appui, sur le fait que la définition des principes du droit applicable, les méthodes éventuelles utilisées pour leur mise en œuvre pratique dans le cas tuniso-libyen, la définition des circonstances pertinentes qui seront prises en considération et le poids respectif qui sera attribué à ces circonstances pertinentes, tous ces facteurs auront un impact direct sur les droits de Malte sur le plateau continental adjacent à ses côtes. Il en est ainsi pour ne donner que deux exemples seulement — si la Cour veut appliquer la méthode — non pas le principe — de l'équidistance ou les principes équitables ou encore les données « géographiques, géologiques, géomorphologiques, etc. » (requête maltaise).

A ce stade de la procédure, il ne nous semble pas possible, ni qu'il soit utile pour la Cour, de nous lancer dans un débat sur ces diverses questions ; notre intention n'est pas non plus de nous laisser entraîner par le Gouvernement maltais dans un débat sur le fond, là où en réalité l'on doit se limiter à une seule question de procédure, celle de la recevabilité de la requête à fin d'intervention présentée par le Gouvernement de Malte. A cet égard, le Gouvernement tunisien ne peut que réserver ses droits vis-à-vis de la présentation des éléments

de fait ou de droit que le Gouvernement maltais a cru pouvoir avancer à l'appui de sa requête.

Cela étant dit, et même si l'on doit laisser de côté le débat sur les éléments de fond, il demeure que les questions soulevées par le Gouvernement de Malte ne peuvent en aucune manière militer en faveur de la recevabilité de sa requête.

1) En premier lieu, en effet, les considérations de droit évoquées par le Gouvernement de Malte ne peuvent justifier une telle requête. Le Gouvernement maltais, en se référant à l'article 1 du compromis tuniso-libyen, affirme que « les principes et règles juridiques, les principes équitables » et les « tendances récentes admises à la conférence sur le droit de la mer », qui seront appliqués par la Cour dans le cas tuniso-libyen, auront un impact sur les droits de Malte sur son propre plateau continental. Cette affirmation demande, en réalité, à être nuancée. S'il s'agit du contenu général de ces principes et règles, leur formulation par la Cour aura un impact sur les droits de Malte, comme sur les droits de tous autres Etats se trouvant dans la même situation géographique. Il ne peut en être autrement, ainsi que d'ailleurs l'a admis M. Lauterpacht dans ses observations orales déjà citées, lorsqu'il déclare : « To the extent that the Court lays down general concepts these are generally applicable to all States and must be accepted as such. . . » (ci-dessus p. 294).

Mais dans la mesure où il s'agit de l'application de ces principes et règles au cas particulier tuniso-libyen et dans les rapports réciproques de ces deux pays exclusivement, il est évident que cela ne concerne pas le Gouvernement de Malte ni ne peut porter atteinte à ses droits ni, par voie de conséquence, justifier une demande d'intervention de sa part. Il en est de même pour les méthodes de délimitation applicables dans la présente espèce. Le choix de ces méthodes est gouverné et conditionné par les circonstances géographiques propres aux Etats litigants ; le choix de ces méthodes est, pourrait-on dire, taillé à la mesure du cas auquel ces méthodes s'appliquent et la portée de ce choix se limite à ce cas d'espèce. C'est là un principe généralement admis et que le tribunal arbitral franco-britannique a rappelé, à la suite de la Cour, dans les termes suivants :

> « This Court considers that the appropriateness of the equidistance method or any other method for the purpose of effecting an equitable delimitation is a function or reflection of the geographical and other relevant circumstances of each particular case. »

De même, enfin, pour les circonstances géographiques ou géomorphologiques applicables à l'espèce. M. Lauterpacht a exposé, par exemple, au sujet de ces données géomorphologiques ceci :

> « in developing their arguments regarding the direction of the boundary line, Libya and Tunisia will each closely consider the nature and effect of the geology and geo-morphology of the sea-bed in the disputed area » (ci-dessus p. 314).

Si tel est effectivement le cas, il est évident que les données avancées par les deux Parties ne sont pertinentes ni ne seront prises en considération par la Cour que dans la limite des relations réciproques de la Tunisie et de la Libye. Là encore, la jurisprudence internationale est claire à ce sujet et, pour ne pas allonger inutilement le débat, je me permets de renvoyer à l'arrêt de la présente Cour dans les affaires du *Plateau continental de la mer du Nord* de 1969 et à la sentence arbitrale du tribunal franco-britannique de 1977.

Toutes ces considérations, si elles montrent quelque chose, montrent que dans ce domaine complexe — et qui, peut-être, deviendra très compliqué — de

la délimitation des espaces marins et sous-marins, le principe fondamental est que cette opération de délimitation est toujours et ne peut être effectuée que sur la base et compte tenu des données propres à chaque cas d'espèce et compte tenu des rapports réciproques spécifiques aux Etats parties au litige. C'est ce que nous nous permettrons d'appeler les principes de *bilatéralité* – dans le rapport des Etats concernés – et de *relativité* – dans le rapport des situations géographiques et autres propres à chaque cas d'espèce – principes qui doivent gouverner le domaine de délimitation et qui nous semblent pertinents pour le problème posé ici, celui de la recevabilité de l'intervention de Malte. Il est évident que le litige actuellement soumis à la Cour est un litige bilatéral dans le sens qu'il concerne les rapports Libye-Tunisie exclusivement, et aussi que ce litige est relatif dans le sens qu'il porte sur la seule zone de plateau continental qui sera déterminée comme relevant de ces deux pays seulement et enfin que ce litige doit être réglé sur la base des seules données pertinentes propres à ce cas d'espèce. Dans ces conditions, il n'y a aucune raison que l'intervention d'un autre Etat vienne bouleverser les données propres à ce litige, formulé dans des termes aussi précis.

2) Le Gouvernement maltais objecte cependant qu'en raison de la proximité géographique des trois pays les limites des plateaux continentaux des trois Etats « convergent en un point unique qui reste à déterminer ». C'est là, en réalité, une affirmation difficile à soutenir. La Tunisie et la Libye ont demandé à la Cour, par le compromis de 1977, de les aider à définir leur frontière commune sur le plateau continental. Malte et la Libye ont aussi signé un compromis ayant un objectif analogue, pour définir et délimiter leurs plateaux continentaux respectifs. Il est évident que la détermination d'un point de convergence tripartite, s'il en existe un, ne peut être effectuée qu'une fois que, dans des rapports bilatéraux, le litige entre la Tunisie et la Libye et entre la Libye et Malte sont réglés et qu'enfin le plateau continental entre Malte et la Tunisie est lui-même délimité. Ceci est valable dans la mesure où il n'y a que trois Etats intéressés et qu'il n'existe pas de quatrième partie au litige : car dans ce cas, il ne s'agira plus d'un point de convergence tripartite, mais d'un point ou d'une zone de convergence quadripartite. Mais évidemment le problème reste le même.

Ce n'est pas le lieu ni le moment d'envisager ces problèmes impliquant plusieurs Etats qui ne sont pas parties à la présente instance. Il suffit de constater que dans les rapports de Malte, de la Libye et de la Tunisie, la question est posée en termes bilatéraux exclusivement et que le Gouvernement maltais a contribué à ce qu'il en soit ainsi. Si, aujourd'hui, il entend poser le problème en des termes trilatéraux, il faut ou bien que les deux autres Etats intéressés acceptent cette manière de voir ou bien que le juge international reçoive, par un compromis trilatéral exprès, un tel mandat. Or, on sait qu'un tel cas n'existe pas pour le moment, dans la présente instance.

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Au terme de cet exposé, Monsieur le Président, Messieurs de la Cour, il convient de résumer mon exposé dans les trois conclusions suivantes :

– Premièrement, la requête à fin d'intervention de Malte a été présentée avec un retard excessif et injustifié au regard des dispositions pertinentes du Règlement de la Cour et ce retard est de nature à porter gravement préjudice au règlement de l'affaire tuniso-libyenne soumise actuellement à la Cour internationale depuis le 1er décembre 1978.

– Deuxièmement, la requête à fin d'intervention de Malte n'a pas pleinement respecté les conditions prévues par le Statut et le Règlement de la Cour quant à la définition de l'objet précis de l'intervention, et de ce fait elle doit être déclarée non recevable.

– Troisièmement, la requête à fin d'intervention de Malte n'a pas respecté les dispositions pertinentes du Statut et du Règlement de la Cour relatives à « l'intérêt d'ordre juridique qui peut, pour elle, être en cause » dans la présente affaire tuniso-libyenne soumise à la Cour, et de ce fait elle ne peut être déclarée recevable.

The PRESIDENT : The Agent of the Government of Malta which had the task of presenting its observations to the Court in the present proceedings has expressed the wish to have an opportunity to present some comments on the subsequent observations submitted by the Government of the Libyan Arab Jamahiriya and by Tunisia. The Court will therefore sit on Monday, at 10 a.m. to hear those comments.

The Court has been greatly assisted by the observations which have been presented to it by the Agents of the three States concerned in the present proceedings, and by their learned counsel. If it should wish to seek some further clarifications on any point, it may put a question to the Agents of the States concerned at the sitting on Monday.

The Court rose at 6.11 p.m.

SIXTH PUBLIC SITTING (23 III 81, 10 a.m.)

Present : [See sitting of 19 III 81.]

STATEMENT BY DR. MIZZI

AGENT FOR THE GOVERNMENT OF MALTA

Dr. MIZZI : Mr. President, Members of the Court, I thank you for the opportunity of addressing you once more, and I beg the Court's indulgence if we prolong the hearing beyond the dates originally set for it.

We would not have done so if our opponents had not misrepresented – unwilfully of course – some parts of Malta's Application and some of the submissions we have made to the Court in the course of the hearing. We shall, however, be brief, and we shall limit our comments to only a few of the points made by our opponents in these proceedings. We do this because we believe that in the submissions we made during Thursday and Friday of last week we anticipated most, if not all, of the objections which were in fact raised on Saturday.

We believe we have sufficiently shown that those objections cannot inhibit the Court from acceding to Malta's request and grant its permission for Malta to intervene in the *Libya/Tunisia Continental Shelf* case now before the Court.

There are, however, some observations or statements made, or conclusions reached, by our opponents that call for comment.

Before I do this I wish to convey Professor Lalive's apologies for not being with us today. He has been obliged to return to Geneva to honour a commitment which he had already postponed to be able to be present for this hearing and which he could not delay any further.

Throughout the whole sitting last Saturday our opponents repeatedly made the accusation that Malta wants to have her cake and eat it, that Malta does not really want to intervene, but only to submit her views and, above all, that Malta is not prepared to be bound by the decision of the Court even if it were allowed to intervene.

As to some of the views referred to by Libya or Tunisia or both, concerning the question of the precise object of Malta's intervention, my learned friend Mr. Lauterpacht will comment in some detail and will, I am convinced, show the Court – if this is still necessary – that Malta's request for permission to intervene has a very precise object and a very important one. I simply wish to make this comment : Malta's application and our submission on Malta's behalf have been quoted several times to show that Malta's sole object was a mere wish to express views and that Malta's interest was more academic than legal. They have fallen into this error because their quotations have always fallen short of the whole of Malta's submissions. Every time our opponents quoted the words "Malta wishes to have an opportunity to be heard", they have conveniently ignored the reason for which Malta not only wishes but needs to intervene and be heard, and to do that before it is, or may be, too late. Malta needs to be heard to protect her specific interests that could be – indeed are likely to be – affected by the Court's decision in the *Libya/Tunisia* case.

But the unkindest statement of all is that Malta does not want to be bound or to abide by the decisions of the Court.

We have never said this, nor do we say it now. Indeed, if we were to say it, it would – if put in those words – have no legal value whatsoever. If, at law, an intervening State is bound by the decisions of the Court, or by some of those decisions, that legal position cannot be changed by the State's non-acceptance of it. Whether the intervening State accepts it or not, whether it likes it or not, the legal position is what it is, and it is not within the power of the intervening State to alter it. By its application to intervene Malta submits itself to all the consequences and effects of intervention – whatever these may be.

Our opponents have drawn the conclusion that Malta does not accept to be bound by the decisions of the Court from Malta's insistence that it does not seek any ruling or decision of the Court against either Libya or Tunisia concerning the continental shelf boundary with either of these States.

Malta has emphasized the exclusion of that objective to make it abundantly clear that its application to intervene was a request for a genuine intervention. Malta is not seeking a settlement of its delimitation issues with either Libya or Tunisia through the back door of intervention. Malta is genuinely concerned that the Court may, or more likely would, in the course of the Libya/Tunisia proceedings decide specific issues directly concerning the region in which Malta is placed and thereby affect one or more of her interests of an undoubtedly legal character.

But if it is an inevitable legal consequence of intervention that those decisions would have a binding effect on Malta it would serve no purpose whatsoever for us today to say, which we do not, that Malta does not wish to be bound.

Our opponents have tried to distinguish between cases in which the parties have accepted compulsory jurisdiction of the Court on the basis of reciprocity and cases where the jurisdiction of the Court is conferred upon it by a Special Agreement. They have argued that if the Court were to allow intervention in the latter cases, States would be discouraged from submitting their disputes to the Court by Special Agreement.

As the Court well knows, this may have been a good political argument at the time the Statute was being drawn up for limiting intervention as is now being proposed by our opponents. But it certainly cannot be used today as a legal argument in support of the view that Article 62 of the Statute does not apply where the jurisdiction of the Court derives from a Special Agreement, for this is in effect what the argument leads to. My colleagues will have further comment to make on this point.

What I wish to add is simply this. If intervention could be denied on the ground only that the dispute before the Court has been brought by Special Agreement, States parties to that Agreement could, by submitting a dispute to the Court, affect the legal interests of a third State in the knowledge that that third State would not be in a position to protect those interests by means of intervention. They could also so bring their case before the Court as to ensure that their case, and therefore also any decision in it, will precede the settlement of any dispute that may exist with a third State. They could in this way prejudge the issue, without the third State being effectively in a position to protect its interests.

In this respect, I wish to place on record that the *Libyan/Maltese Agreement* to refer the continental shelf dispute was signed in May 1976. The Special Agreement between Libya and Tunisia referring that dispute to the Court was signed in June 1977 and yet the latter case has been before the Court for about

two years whereas the Malta/Libya Agreement has yet to be deposited with this Court. I mention these facts only to show how a State could behave if it knew that no other State could intervene in cases brought by Special Agreement and for no other reason.

The last point I wish to touch upon concerns the kind of interest that is required by Article 62 of the Statute. One of our opponent's propositions, and I do not quote the exact words, is to this effect : that Article 62 of the Statute involves that the intervening State's interest should be so linked to the subject-matter of the dispute that whichever way the decision in the case goes, that interest will be affected.

One needs only to enunciate that proposition in order to see how obviously lacking in all validity it must be. Article 62 only requires that the legal interest involved "may be" affected, or in the French text that it shall be "en cause". The nature of the decision itself cannot conceivably be known at that stage. All that Article 62 can require is that Malta should show the existence of a legal interest in the subject-matter of the dispute, and show that this interest is of such a character that it will be liable to be affected by at least one, or possibly more, of the characteristics which that decision might have and which cannot be known. At the most, what Malta had to show was that there is not even a strong likelihood, but that there is an appreciable risk of its being affected. This I submit, Malta has done and amply done, and I do not think there is anything we could usefully add in this respect to the demonstration of it given by Mr. Lauterpacht the other day.

In this connection I ask the Court to notice that our opponents have not made the smallest attempt to controvert any of the facts or descriptions given by Mr. Lauterpacht. Indeed, they have implicitly admitted the correctness of these, for they say that Mr. Lauterpacht went much further than was needed to establish Malta's legal interest, and that he virtually staked out Malta's continental shelf claim – so much so that any intervention on her part has now become unnecessary.

Except that this really concedes Malta's case, I submit that it is a wholly inadmissible line of argument ; it is a sort of "heads I win, tails you lose" kind of argument. Obviously, in order to establish the existence of her legal interest, Malta has to go fairly fully into at least some of the salient relevant facts and considerations. Unless she does this, her opponents will immediately say "your case is very thin ; you have not shown that any real interest exists". Yet the moment Malta does that our opponents say that we have done it so comprehensively that intervention is no longer necessary, that the Court now knows our case and will take care of it.

This amounts to saying that intervention is rendered unnecessary by the very process – by the mere fact – of telling the Court why Malta considers that intervention is necessary. The self-serving, not to say, absurd nature of this type of argument hardly needs pointing out, and I ask the Court to accord it no weight whatsoever.

Mr. President and Members of the Court, I said at the beginning we shall be very brief in our comments. I therefore end my intervention. Before I do that I again thank the Court for the attention and patience with which it has listened to what we had to say in support of Malta's Application. I also wish, with your permission, Mr. President, to thank the distinguished agents and counsel that have appeared for the Socialist People's Libyan Arab Jamahiriya and of the Republic of Tunisia for the loyal and the fair way in which they have conducted their case, and I hope, of course, that I have not spoken too early.

ARGUMENT OF MR. LAUTERPACHT

COUNSEL FOR THE GOVERNMENT OF MALTA

Mr. LAUTERPACHT: Mr. President and Members of the Court, I shall limit myself in this speech to brief observations upon only a few of the points raised by our distinguished opponents which lie within the scope of my original speech. I shall therefore refer to the following matters.

First, the suggestion that in some way Malta is improperly seeking to avoid becoming bound by a judgment of the Court.

Second, the question of the object of Malta's intervention.

Third, the two associated matters closely associated with each other of Malta's special interest in the case and the manner in which this interest may be affected by the Court's decision.

If I do not give a reference for every allusion which I make to the arguments of learned counsel for Libya and Tunisia, it is partly because some of the arguments were repeated several times and partly because time has not permitted me to check every point against the record.

I begin with a matter which has been given a prominent place in the Libyan and Tunisian arguments. The Court has been several times presented with the contention – expressed in a variety of ways – that Malta seeks to secure the advantage of an intervention without accepting an obligation to be bound.

The argument is completely misconceived.

The first and most obvious reason, as the learned Attorney-General has just said, but I shall not be simply repeating what he has said, is that Malta has never asserted that it will not be bound by the decision of the Court. At no time have those representing Libya and Tunisia ever pointed to any statement, whether in the Maltese Application or in the speeches of those representing Malta, in which it has been said that Malta declines to be bound by the decision of the Court.

What Malta has said is that it does not seek an order or a remedy against Libya and Tunisia. But that is not the same thing as saying that Malta will not be bound by the decision of the Court. The distinguished Attorney-General and Agent for Malta, with all the authority of his position, has already made it plain that Malta acknowledges that whatever are the consequences in law of the Court's decision they must apply to Malta. Obviously, it is impossible for Malta to say now what those consequences exactly will be. They must necessarily depend upon the terms of the decision of the Court – upon what the Court actually says in the main body of the judgment on the merits as well as upon the *dispositif*. There is nothing evasive about the position of Malta in this regard. Whatever the Court may in due course say will be the consequences of the intervention. No statement, Mr. President, could be more forthright than that.

The views expressed by Libya and Tunisia on this matter call, nonetheless, for two sets of comments.

First, Malta is bound to observe that the observations made by Libya and Tunisia upon the position reflect a technical and narrow approach to the binding effect of decisions of the Court which appear indeed to verge on the unprincipled, that is in the sense of abandoning fundamental legal principles.

There is, of course, a formal distinction to be drawn between the reasoning

in the body of the judgment of the Court and the formal conclusions stated in the *dispositif*. But when Article 62, paragraph 1, refers to the decision of the Court in the expression "interest of a legal nature which may be affected by the decision", it does not refer to decision in the narrow sense of the *dispositif*, and it is not only the *dispositif* which is binding in a case. Article 62, paragraph 1, refers to the decision of the Court, the substantive decision embracing the reasoning and the *dispositif*.

Several important considerations support this view.

First, it is necessary to look at the language of Article 62, paragraph 1, not only in the English but also in the French text. Now it is significant that the French text contains no words at all to reflect the English expression "the decision in the case". The French text says :

> "Lorsqu'un Etat estime que, dans un différend, un intérêt d'ordre juridique est pour lui en cause, il peut adresser à la Cour une requête, à fin d'intervention."

And if I may impose on the Court my own literal interpretation of those words, what I understand the French text to be saying is this : when a State considers that in a dispute an interest of a legal character is for it an issue or is affected, that State may address to the Court a request with a view to intervention.

No words whatsoever to reflect the English expression, "the decision in the case".

I do not assert that the French text prevails, but I do submit that the French text may be used as an aid to the interpretation of the English text. If the idea involved in the words from the official English text "the decision in the case" were so significant, so precise and so narrow as Libya and Tunisia now contend, is it not unlikely that the French text would have been worded in a manner to reflect that degree of significance.

It may, I believe, be cogently urged that simply on a proper interpretation of the first paragraph of Article 62, the phrase, "the decision in the case" must be read in a large sense as referring to those utterances of the Court which have the force of law. And so we come to the question of what has the force of law. For this purpose it is quite unnecessary to be concerned about the role of Article 59 though I shall come to that presently. Nor need we be concerned about the question of whether the scope of Article 59 is limited to the *dispositif* or extends as well to the reasoning of the judgment and the incidental but often critically important findings of law contained in the reasoning. What makes the content of a judgment, reasoning as well as *dispositif*, binding in law is that it contains an authoritative statement of law ; and what the Court says is the law is binding because it is the law. It is unnecessary to look to any outside source to attribute legally binding quality to the law. For that reason, the undertaking given by Members of the United Nations in Article 94 of the Charter, to comply with the decisions of this Court to which they are a party, though important no doubt as a general declaration of loyalty to the Court, is really superfluous. Members of the United Nations are merely undertaking to comply with legal obligations which already exist.

The force of this point is brought out by comparing decisions in contentious cases with decisions in advisory cases.

There is nothing in the Statute which says that an advisory opinion is binding. And in formal terms it appears not to be. It is merely an advice to an international organization which the latter is in theory free to accept or reject. Although the advisory opinion has a *dispositif* at its end, there is no distinction

in binding quality or non-binding quality between the main part of the opinion and the *dispositif*. Yet, an advisory opinion cannot be dismissed as lacking binding force. It is a declaration of the law and the law as such is what is binding, otherwise it would not be law. Those who represent Libya and Tunisia seem to have overlooked that.

Now, for this proposition that the content of an advisory opinion is binding as a statement of law, I need hardly cite authority, but the point has been put with such clarity, force and elegance by one of the Members of the Court that I believe it will be helpful to recall the terms of that statement. In the course of his declaration in the *Western Sahara* case, Judge Gros had the following to say :

> "I shall merely recall that when the Court gives an advisory opinion on a question of law, it states the law. The absence of binding force does not transform the judicial operation into a legal consultation, which may be made use of or not according to choice. The advisory opinion determines the law applicable to the question put ; it is possible for the body which sought the opinion not to follow it in its action, but that body is aware that no position adopted contrary to the Court's pronouncement will have any effectiveness whatsoever in the legal sphere." (*I.C.J. Reports 1975*, p. 73.)

And what the distinguished Judge said about an advisory opinion cannot apply with any the less force to a contentious judgment.

What the distinguished Judge said about advisory opinions represents Malta's position entirely. It is the explanation of why Malta seeks to intervene and it is the statement of the effect of the intervention upon Malta.

But that, it seems, is not enough for Libya and Tunisia, and so here I come to my second comment on the position which they have taken. Tunisia and Libya seem to want Malta to commit itself to something more. The question that they never approach is, what is that something more ? And they are wise to avoid it, for those that live in glasshouses should never throw stones. In determining whether there is any relevance in the Libyan and Tunisian suggestion that Malta should "bind" itself in some unspecified way, the Court should consider in what way or to what Malta could at this stage bind herself, and for this purpose the Court must consider to what, if anything, Libya and Tunisia have bound themselves. A lot has been said in these hearings about the fact that Libya and Tunisia have come to the Court by Special Agreement. So, Mr. President, with your leave, let us look again at that Agreement to see what it is that they have bound themselves to. Now the well-nigh incredible thing – bearing in mind the apparent self righteousness with which Libya and Tunisia have charged Malta with "interfering" in their case – taking an advantage, so they said, without accepting a burden – the incredible thing is that Libya and Tunisia themselves expressly deny to the Court the power to give a decision with binding force in any sense greater than that acknowledged by Malta.

Libya and Tunisia absolutely do not ask the Court to decide a case between them. They ask, what are the applicable principles and rules of international law ? They ask the Court to specify precisely the practical way in which the principles and rules apply in this particular situation so that others, *others* – the experts of the two countries – can decide what the line will be. And Libya and Tunisia maintain that position to the end. Even in Article 3 of the Special Agreement – which contemplates a failure of the experts to agree – the Parties only go back to the Court "to request such explanation and clarification as may facilitate the task of the two delegations".

In my earlier speech I contended that if the Court were to comply with the request of the Parties, it would – as I then put it – have to enter into a high degree of "specificity", so that the Court would in fact be deciding on many points of law. But I did not say, and I could not say, that the Court would be deciding the boundary line. And my learned friend Mr. Highet agreed – as can be seen from page 386, *supra* – for there Mr. Highet said: "Even if the Court were being asked to draw a line – *which I submit it is not* . . ." and I end the quote there since the rest of the sentence is not relevant.

So what do Libya and Tunisia say that Malta is avoiding that they are not avoiding themselves? The Parties are asking the Court to tell them what the law is, not to decide the boundary. What the Court says the law is will be binding on them (or at least I hope that they will regard it as so binding). But Malta has no doubts. What the Court says the law is, is the law and it will bind Malta.

Obviously, just as there are likely to be some points in the judgment of the Court which Malta considers may affect its position in relation to Libya and Tunisia, so there will also be points which may not affect Malta's position. It stands to reason that the range of matters concerning Malta will not coincide exactly with the range of matters to be decided in relation to Libya and Tunisia. But that does not weaken in any way the binding force for Malta of what the Court says the law will be. And in so far as the Court says what the law will be in relation to the continental shelf features of the central Mediterranean Sea, Malta has a legal interest which specially and uniquely will be affected by the Court's decision. Really, can anything more be asked of Malta? Or, to put it another way, can Libya and Tunisia really ask Malta to be bound in some way to which they are not prepared to be bound themselves? That would be a procedural impossibility.

Before leaving this point, it may be helpful to identify why it is that Libya and Tunisia are so insistent that the reference to the word "decision" in the English text of Article 62, paragraph 1, is only to the dispositif and that it is the dispositif alone that binds.

What our opponents are really trying to do is to say in advance that the dispositif of the decision, whatever it may be, cannot possibly affect Malta for the simple reason that it will be rendered only as between Libya and Tunisia and, coupled with that, that by virtue of Article 59 of the Statute, the dispositif will be binding only as between Libya and Tunisia.

But, if this is true, it is true and would be true of every single decision the Court ever gave or could give. If this line of argument is correct it would automatically exclude, from the beginning, all possibility of intervention under Article 62 of the Statute on the *a priori* ground that the decision in a case can only bind the parties to it and can never bind any third State. This is to put an impossibly narrow interpretation, not only on the word "decision", but also on the word "affect", and on the very concept of affecting. That is why, earlier in this speech, I set Article 59 aside as not being relevant. It would erode the concept of intervention to the point of disappearance.

I come now to the next major point which requires comment – the question of the object of the intervention. In truth, the solution of this question follows very directly from what I have just said about the binding character of the decision of the Court.

It is, as I understand it, common ground between Libya and Tunisia, on the one hand, and Malta, on the other, that an intervention takes place within the framework of an existing proceeding. Thus, the object of the intervention must be limited by the scope of the main action. For example, in a claim for

damages for denial of justice by State A against State B, State C cannot intervene against State B seeking, say, *restitutio in integrum* in respect of a quite unrelated claim arising out of an expropriation. And, *a fortiori*, State C cannot intervene against State A (the Plaintiff) on an unconnected matter. The intervention must fall within the scope of the main proceedings.

So, in the present case, the object of Malta's intervention must be limited by the object of the principal case. I was about to say, must be limited by the object of Libya's case against Tunisia or Tunisia's case against Libya. But, I realized in time that there is of course no case by Libya against Tunisia or by Tunisia against Libya. This is made very plain in the documentation of the Court regarding the case : for example, the printed version of the application of Malta, or the title page of the *compte rendu*. The formal title of the case is *Tunisia/Libyan Arab Jamahiriya*. Neither State is suing the other. Neither State is claiming an order against the other. Neither State is seeking a remedy or enforcement against the other. My learned friend Mr. Highet was quite wrong when he described the Special Agreement as asking "the Court to consider certain very specific issues as between Libya and Tunisia" (p. 383, *supra*). The Special Agreement does nothing of the kind. It does not refer to any issue, let alone certain specific issues. It does no more than ask the Court to lay down the applicable principles and rules of international law and specify the practical way in which those principles and rules apply in the particular situation. *It certainly does not identify any specific issue or ask the Court to provide any remedy in relation to any allegation of the existence of a right.* Perhaps issues may be identified in the pleadings, but that is a different matter. We cannot know about that. In any case, as counsel for Tunisia has told us, it is to the Special Agreement, not to the pleadings, that we must look for the identification of the case in which Malta seeks to intervene.

The fact is, we are here confronted by another misconception expressed on behalf of the Libyan Government. Counsel for Libya said that Malta seeks "an advisory role in contentious proceedings" (p. 382, *supra*), and then a few lines later goes on to say that there is "no provision for semi-advisory proceedings before the Court". In truth, the proceedings between Libya and Tunisia are exactly that : semi-advisory proceedings. Both the present proceedings before the Court and the earlier comparable proceedings in the *North Sea* cases, have been identified much in those terms by another distinguished Member of this Court. Thus, Judge Mosler, in writing of : "The International Court of Justice at its present stage of development" in the *Dalhousie Law Journal* of 1979, said of the advantages of special agreements, such as the one now before the Court, the following :

> "There may be disputes of a legal character in regard to which the States concerned do not want to run the risk of an unfavourable binding judgment, but which they cannot submit to the Court as a request for an advisory opinion, this procedure being reserved to organs of international organizations." (*Dalhousie Law Journal*, 1979, p. 565.)

And we respectfully adopt that perceptive assessment of the character of the Libyan/Tunisian proceedings. They are proceedings, the very object of which is to secure a statement from the Court of what the appropriate law is – nothing more than that – no declaration of rights, no *restitutio in integrum*, no damages, no remedy, no order of that kind.

To identify the *Libya/Tunisia* case in these terms is not to condemn it. Far from that. It should not be worrying to anybody that there is no express provision in the Statute for this kind of Special Agreement. The innovation is

indeed much to be welcomed because it opens up for the Court a new way to contribute to the settlement of disputes by the exercise of its judicial function and such a procedure does not appear to be excluded by the Statute. But, and this point is relevant to what comes later, it is a procedure which must take place within the confines of the Statute. It is a procedure which cannot give rise to a *de facto* amendment of the Statute by the deletion of Article 62.

But coming back to my main point, once the *Libya/Tunisia* case is identified for what it is – as a quasi-advisory case – what possible justification can there be for suggesting that the object of Malta in seeking to intervene must be more exact, more precise, more operative in formal terms than the object of the original Parties.

And so we come to the question of the precise object of the Maltese intervention. As already stated, the object of an intervention cannot go beyond the objects of the two original parties. They seek the identification of principles and rules of international law and the precise specification of the way in which those principles and rules are to be applied in the delimitation of their respective areas of continental shelf. They do not ask the Court to delimit the boundary.

Now, against that background, what in theory are the possible objects which Malta as an intervener could seek ? I emphasize the words *in theory* because, as will be seen, some of the possible objects are clearly inappropriate in the circumstances. This is a question which has not been approached by Libya or Tunisia for the reason, I would suggest, that no answer can be given to it which supports their contention that Malta has inadequately stated the object of its intervention.

Let me take the first theoretical possibility. It is that Malta could have applied to intervene with a view to obtaining from the Court a specific decision regarding its boundaries with Libya and Tunisia and the delimitation thereof. This would clearly have been an inadmissible object, since it would be asking for more against each original Party than either original Party was seeking against the other.

A second possibility is that Malta might have applied to intervene on the basis that by so doing it could have obtained from the Court, to paraphrase the terms of Article 1 of the Libya/Tunisia Agreement, a decision regarding the principles and rules of international law applicable to the delimitation of its continental shelf relative to Libya and Tunisia, as well as a precise specification of the practical way in which the experts of the three countries might apply those principles and rules. But, whereas the first part of this possibility – the request for the declaration of principles – might have been admissible if Libya and Tunisia had asked the Court actually to determine the boundary line, it surely must be inadmissible where the role of the Court is not extended to the complete settlement of the dispute. The intervener cannot impose upon the original Parties the obligation to negotiate with the intervener on the basis of the judgment, since the only obligation to negotiate which they accepted in the Special Agreement was that of negotiating between themselves alone. True, the judgment could operate in any event as a declaration of law, but Malta could not by its intervention create for the original Parties in relation to itself the specific duties contained in Articles 2 and 3 of the Special Agreement between Libya and Tunisia.

And so one comes to the third theoretical possibility, namely that Malta should have identified in the Application the specific questions involved in the *Libya/Tunisia* case which might affect its continental shelf, and on which it sought a decision from the Court. But that possibility assumes that Malta knew

what specific questions were being discussed in the *Libya/Tunisia* case, and from this it was cut off by the very fact that it could not have access to the pleadings.

And so we come lastly to the fourth theoretical possibility, which is the course which Malta actually adopted – to ask in general terms for leave to intervene and make its submissions "on the issues raised in the pending case" (Application, para. 20). Now perhaps that phrase might have been better framed ; perhaps Malta should have said that it wanted to make its submissions on those issues in the case which subsequent examination of the pleadings might indicate could affect Malta's interests. But this elaboration is surely implicit in what was said in the rest of the relevant section of the Application. Malta did not need to spell out the implications of the submission of its views because, as must be evident from the basis on which the Special Agreement rests, a statement of principles and rules by the Court is a statement of law binding on all States.

Paragraphs 11 to 15 of the Application show clearly that Malta's action was founded on the view – which it maintains – that a decision by the Court on points of law relating to the specific features of the area which could over-spill into the relations between Malta and Libya and Malta and Tunisia, would inevitably bind Malta in her relations with Libya and Tunisia simply as a statement of law. So Malta's object was stated as specifically as it could be in the circumstances, to hear the submission of Malta, before deciding in a manner possibly adverse to Malta, issues of law which could affect Malta's interests.

If Malta is allowed to intervene and is thus given an opportunity to study the pleadings, it will be able more particularly to specify the issues on which it wishes to concentrate its submissions. The last thing that Malta wants to do is to indulge in a roving, or academic commentary on the whole range of issues examined by Libya and Tunisia. Malta is concerned only with such specific issues as it may identify as bearing on its continental shelf delimitation with its two neighbours – the kind of issues which I sought to demonstrate at length in my first speech.

This brings me to the third main point which requires some reaction – the nature of Malta's interest. Time and again the Court has heard it said by Libya and Tunisia that Malta's interest is no different from that of any other State with a continental shelf. My learned friend Professor Jennings, as part of his attempts to indicate that Malta's interest in this specific area of continental shelf was no greater than that of any other State, said – as if to reinforce this point – that a large number of States have already applied for copies of the pleadings.

What would the Court regard as a large number of States – sufficiently large, that is, effectively, to dilute by an admixture of comparable concern the clear evidence of Malta's special interest in the matter arising out of its immediate proximity to Libya and Tunisia ? In fact only six States, of which Malta was one, have asked for the pleadings. Six States out of a possible 100 States that have continental shelf interests. And who were the other five ? Not – if the suggestions made elsewhere in the speeches of Libya and Tunisia are to carry their full weight of terror – not Italy, not Greece, not Yugoslavia, not Albania, not Egypt, not Cyprus – not any of the States in the Mediterranean area ; but the Netherlands, Canada, the United States, Argentina and Venezuela. These are the large number of States that, in the words of Professor Jennings, have "clear, even specific interests, that may be touched".

No doubt they are all continental shelf States with delimitation problems.

But, how are they going to be touched in as precise, immediate and substantial a manner as Malta will be by findings of law on such specific points as I dealt with the other day – points like the effect of Libya's claim to draw a straight line across the Gulf of Sirte ; or the effect of Tunisia's straight baseline system round the Kerkennah Islands ; or the effect of the special features of the sea-bed in the area, both in itself and as the seaward prolongation of the land mass of Tunisia and Libya ; and, perhaps most important of all, the treatment of the areas of continental shelf included in Libya's and Tunisia's very substantial overlapping claims with Malta. And these are only some of the local and controlling legal elements which one may suppose must play a significant, if not dominating part in the dispute between Libya and Tunisia.

So I submit, first that it is exaggeration bordering on nonsense to suggest that the interests of continental shelf States at large, or even of those States which asked for the pleadings, are in any significant sense comparable to the interest which Malta has in the *Libya/Tunisia* case.

Secondly, I venture to observe that what really matters, what is really striking, is that no-one representing Libya and Tunisia made any serious attempt to suggest that these features which I have enumerated – the Gulf of Sirte, straight baselines, the configuration and direction of the coasts, the overlapping of claims – nobody suggested that they would not specially affect the extent of Malta's continental shelf.

Still, some other points were made, and two call for comment. The first is the suggestion that Libya and Tunisia by limiting their request to the Court to determine the principles and rules applicable to the area of shelf appertaining to each of them, were thereby excluding any determination by the Court of the area of shelf appertaining to Malta, and thus could not affect Malta's interests. The Court will, I am sure, not wish me to pursue a purely semantic point, and I won't. What matters is that neither Libya nor Tunisia denied that the shelves of Libya and Tunisia must meet and run with the limits of the shelf of Malta at a certain point and along certain lines. Now there is obviously a range of possible degrees of contact between the shelves of the three States, ranging from large to small. At this moment it is impossible to tell, and no-one is entitled to assume, that it will be small any more than that it will be large. Obviously, the more that the Malta shelf sticks out into the Mediterranean Sea, the less shelf there is for Libya and Tunisia to divide between them, and vice versa. If the Court is to do more than limit its specific discussion of the problem to the line nearest the Libyan-Tunisian land boundary, it is impossible for the Court, or Libya, or Tunisia, to say when that prospective continental shelf boundary will touch Malta's shelf. There is simply no escaping this fact.

But Professor Jennings attempted to escape from it by saying that Malta itself had set the southern limit to its claims by drawing an equidistance line. In so doing, my learned friend overlooked the important – indeed, perhaps crucial – reservation made by me in my speech to the effect that if Malta's neighbours sought the rejection of equidistance as the proper measure of Malta's continental shelf in favour of the application of equitable principles or special circumstances, "Malta will be free to contend that the proper application of those concepts", that is of equitable principles and special circumstances-"may well lead to a boundary line more favourable to Malta than a line of strict equidistance". In other words, Malta is reserving the prospect of claiming south of the equidistance line if the issue becomes one not of equidistance but of the application of equitable principles and special circumstances. And so Malta has not – indeed, not – set the limits to its claims in such a way as to

enable Libya and Tunisia to pretend that the determination of their common boundary can be completed without trespassing on Malta's rights.

More than that, the Court should not lose sight of the fact that, as demonstrated by me on the map, both Libya and Tunisia have asserted claims to substantial areas of Malta's continental shelf on Malta's side of the equidistance line. They must, therefore, surely be precluded from pretending that those claims have not been made, or must not be heeded by the Court when determining what Libya and Tunisia mean when they use expressions such as "the area of continental shelf appertaining" to their respective countries.

And so I come to my second comment on this question of Malta's interest. Professor Jennings referred the Court to passages in the *Anglo-French Continental Shelf* case for the purpose of showing how the question of a third-party interest may be dealt with.

Now before commenting on his substantive point, I think that one may in passing observe the method. Professor Jennings made quite a play with the authority. Here, he was in effect saying, we have a precedent as to how to deal with the problem of third parties. Fair enough – though I shall show in a moment why it is not much of a precedent on this point. But what matters as to method is that Professor Jennings is using the Award as a precedent against Malta as affecting, if I may put it that way, the law to be applied in relation to Malta. Mr. President, he is not using the dispositif : he is using a passage from the reasoning in the case. And yet, at the same time, he and counsel for Libya as well are saying that the elements in the reasoning of the Court in the much more closely related case between Libya and Tunisia *cannot* affect relations between Malta, Libya and Tunisia. As Professor Jennings' use of precedent shows, Libya and Tunisia are being quite unrealistic in suggesting that decisions in matters *in pari materiae* cannot affect the interests of later litigants – and the closer the parity, by virtue of physical proximity, the greater the degree to which the interests are affected. Here they are likely to be affected in the utmost degree.

And now to the use of the precedent itself. Certainly it shows that in the *Anglo-French* case the tribunal considered how to protect the position of Ireland. But there was no alternative. The proceedings were arbitral proceedings. Ireland was not a party and Ireland could not have intervened. It is in the nature of an arbitration that it is limited to the States that have signed the *compromis* unless in their *compromis* they have accorded to third States the facility or faculty of intervening. The perfectly proper attempt of the tribunal in the *Anglo-French* case to qualify its decision so as not to affect Ireland is therefore no precedent to justify a refusal by this Court to permit intervention where intervention is not only procedurally possible but is also specifically requested. The discussion in the Award is interesting, but it has no relevance in a case before this Court.

I hope that these few observations will be responsive to the needs of the Court in the light of the arguments which have been presented on behalf of Libya and Tunisia – at any rate on those parts of the case which fall within the sections covered by my opening speech.

ARGUMENT OF MR. BATHURST

COUNSEL FOR THE GOVERNMENT OF MALTA

Mr. BATHURST : Mr. President, Members of the Court, I have only a few remarks to address to the Court today and I will present them in the following order, on the following topics :

First, the discussions in 1922 on the Court's Rules.
Second, the jurisdictional link.
Third, Article 62 of the Statute.
Fourth, the question of discretion. And finally and
Fifth, compulsory jurisdiction.

The *travaux préparatoires* of the original Rules promulgated by the Permanent Court have been the subject of several references during the hearings. Counsel for Malta were the first to refer to the 1922 discussions without, I should say, attempting to show, as Professor Jennings suggested (p. 417, *supra*), "something conclusive". I told the Court of the views expressed by some of the Judges at the time, from which it was apparent that, among the Judges, opinions on the jurisdictional aspects of intervention were divided. My learned friend, Professor Malintoppi, quoted to the Court words of Judge Anzilotti and of others whose views appeared to support Libya's case. I have quoted others of the Judges whose views were expressed in terms contrary to those of Judge Anzilotti. It is not a worthwhile exercise to attempt an assessment of the relative values of the two schools of thought so represented. Of course, what any of those Judges of the Permanent Court said in 1922 is not the law, any more than is what Sir Cecil Hurst – much quoted by Libya – wrote on behalf of the British Government in the *S.S. "Wimbledon"* case.

The important feature, Mr. President, of those discussions in 1922 is their ending, to which I referred (p. 357, *supra*). The President of the Court, Judge Loder of the Netherlands, ended the discussions by saying that he could not take a vote upon a proposal the effect of which would be to limit the right of intervention, as prescribed by Article 62, to such States as had accepted compulsory jurisdiction. And President Loder added these words : "If a proposal in this sense were adopted, it would be contrary to the Statute."

Now, Malta's submission is that there is still today no Rule of Court which is contrary to the Statute, but that it is the submissions of Libya and Tunisia that invite the Court so to construe and apply Article 81, paragraph 2, subparagraph (*c*), as to make that Rule contrary to the Statute.

When States which are parties to the Statute of the Court, as of course both Libya and Tunisia are, bring their case to the Court whether by Special Agreement or by Application supported by the optional clause, they must take the Court as they find it. They have agreed to the Statute ; and they find the Court exercising its judicial powers under the terms of the Statute. The Statute includes Article 62 in full force and effect in every case. It avails those parties nothing to complain that when they made and filed their Special Agreement they did not contemplate intervention by a third State and that, faced with an Application for permission to intervene, they are thereby exposed to the risk of interference in their own supposedly exclusive resort to the Court.

It must be remembered that States parties to the Statute may not, by

agreement made between themselves to refer their case to the Court, contract out of provisons of the Court's Statute. For example, they could not agree between themselves that a judgment of the Court must be by unanimity. Nor could they agree between themselves that Article 62 of the Statute shall not be applicable to their proceedings. That is a constitutional feature of the operation of the Court. It is the policy of the Statute not to allow consensual amendments of it by parties to a case.

I now turn to the jurisdictional link. One of the counsel opposing Malta's Application has said that even if the object of Malta's intervention were not to make a claim of any kind against either Party to the pending case, but only to influence the outcome of the case, there is still the requirement of links of compulsory jurisdiction between Malta and Libya and between Malta and Tunisia.

This is surely carrying the notion of the need for a jurisdictional link to such exaggerated lengths that it would virtually deprive the possibility of intervention of any real scope – and that must, on any reasonable view, be contrary to what the framers of the Statute certainly intended.

But in the present case there is more than that to the association of the notion of the jurisdictional link with the so-called outcome of the case. The outcome of the case will not be constituted, in any direct sense, by the enunciation by the Court in its judgment of the principles and rules of international law and of the equitable principles about which Article 1 of the Libya/Tunisia Special Agreement enquires. Nor will the outcome be the identification by the Court of the relevant circumstances which characterize the area. Nor will the outcome be the identification and the assessment of the measure of acceptance of recent trends in the Law of the Sea Conference. Nor will the Court's view on the practical way of applying the principles, and so on, have any such final effect.

The outcome of the case will be constituted by the delimitation to be effected on the basis of what the Court says by the experts of the two countries, and by other possible steps that may have to be taken under the Special Agreement.

Malta does not seek in any way to influence this delimitation or those other steps as such – that would wholly exceed her proper place in the matter, except, of course, in so far as a delimitation, when it happens, purported to attribute to Libya or to Tunisia areas that were properly Malta's.

Malta's legal interest lies primarily in the principles and rules to be enunciated by the Court, in the light of the relevant circumstances which characterize the area, but which will not, as such, constitute the outcome of the case. Malta wishes, for the protection of that interest, to have the same possibility of presenting arguments to the Court as Libya and Tunisia themselves will have – as indeed they already have – in respect of the same stretch of continental shelf lying between Malta and the North African coast as the one in which those two countries also have interests. In that continental shelf, Malta, Libya and Tunisia, all three, have *ipso jure* and *ab initio* (to take words from the *North Sea Continental Shelf* cases), sovereign rights of exploration and exploitation of natural resources. Libya and Tunisia do not know over what areas each of them is entitled to exercise those rights as against each other and as against other States – so they come to this Court to get, as a first step to identifying such areas, an answer to the question set out in their Special Agreement. Mr. President, if one looks, at it were, through the question to the real subject-matter of the pending case, it is the entire continental shelf throughout the region that is the subject-matter of the case, for *ex hypothesi* no one yet knows which area is Libya's, which area is Tunisia's or, for that

matter, which area is Malta's. In that ultimate "subject-matter" of the case, Malta has an undoubted legal interest. Malta maintains that her request for permission to intervene has therefore the support of fundamental considerations of natural justice and that the question of a link of compulsory jurisdiction between herself and the two parties to the case is irrelevant.

I turn to Article 62 of the Statute.

Professor Malintoppi reminded the Court that its jurisdiction may, in some cases, be determined by the Statute itself (p. 395, *supra*).

He gave as an example Article 62, paragraph 2, itself.

The jurisdiction of the Court to take a decision under that paragraph on an application for permission to intervene derives, according to him, from the consent of the parties, *la volonté des parties*. He then explained the difference between jurisdiction so conferred directly by the Statute itself and that envisaged by Article 36 of the Statute. He said that when jurisdiction is established directly by the Statute, States had given their consent to that jurisdiction at the time when they became parties to the Statute. Then, later (*ibid.*, p. 400), Professor Malintoppi developed this theme with respect to Article 63 of the Statute. He suggested that States parties to the Statute, by consenting to Article 63, have conferred upon every State, which is a party to a multilateral convention without being party to the Statute, the right to intervene when the interpretation of that convention is in issue before the Court.

If States parties to the Statute consented to the jurisdiction exercised by the Court under Article 62, paragraph 2, and to that exercised under Article 63, when they became parties to the Statute, how is it that they did not also consent to the consequences of the application of Article 62, paragraph 1?

Furthermore, it seems to have been suggested that States which bring their case to the Court by virtue of a special agreement concluded between them have taken some "exceptional" course which entitles them to claim the attention of the Court to the exclusion of all others. Indeed, it was no slip of the tongue when counsel for those who oppose Malta's application referred, more than once, to Malta wishing not merely to intervene in their case but to "interfere" in the case. Malta's proposed intervention was even described in uncharitable anticipation (p. 383, *supra*) as "disruptive, not helpful, confusing, not clarifying" and as "baffling to the real litigants in the case at hand", and it was characterized by Professor Jennings (p. 422, *supra*) as "unbridled intervention".

I would like to add to this part of my remarks, a few words about the *S.S. "Wimbledon"* case. In an article in the *Revue politique et parlementaire*, No. 138 of the year 1929 (at p. 109), Maître Paul Bastid explained that the remarks of Sir Cecil Hurst to the Court, on behalf of the British Government, in the *S.S. "Wimbledon"* case, were partly inspired by a special feature of English law which allowed intervention only on the side of a defendant and not on the side of a plaintiff; and the Court will recall that Sir Francis mentioned the same point as having been made by Lord Phillimore. Maître Bastid commented that such a consideration had no place in the presence of the general terms of the Court's Statute, *en présence des termes généraux du Statut*, and he expressed his opinion that the report of the Committee of Jurists in 1920 foresaw intervention in wider terms and that in his view, Poland, having suffered damage contrary to the Treaty, *"était très certainement dans le cas de l'article 62"*. So, Sir Cecil Hurst's views on behalf on the British Government are somewhat unreliable.

Shortly before the case of the *S.S. "Wimbledon"*, a Danish ship, the *Dorrit*, had also been prevented from going through the Kiel Canal. The Conference of

Ambassadors protested against the action of Germany, but the case was not pursued. Dr. Farag, whose work has already been cited (*L'Intervention devant la C.P.J.I.*, Paris, 1927), commented in this way on the incident. He asked, and I translate the question : "Could one have opposed the intervention of the Danish Government in a case if one had been brought against Germany by the Allied Powers ?" He answered in this way :

> "Nous ne le croyons pas, pourtant le Danemark n'était pas partie au Traité de Versailles et n'avait pas, par conséquence le droit d'invoquer d'autres textes que celui de l'Article 62 du Statut." (P. 129.)

Denmark could have recourse only to Article 62.

Mr. President, a very few words on discretion.

My learned friend Professor Jennings, for Tunisia, stated the first point in his argument as that "on a proper interpretation the Court has complete discretion whether or not to grant the request under Article 62" (p. 408, *supra*). The same learned counsel for Tunisia later said : "the very purpose of the discretion given to the Court by Article 62, paragraph 2, of the Statute" was the need, and I pick up his words again, "to balance the Applicant's assertion that the decision in the case may affect a legal interest of that State, with the need to do fair and expeditious justice in the principal case" (p. 422, *supra*). That is the end of his quotation.

All this is distilled from the words of Article 62, paragraph 2, of the Statute. They are clear words. The Court knows them well. They say that the Court shall decide upon the request to intervene. If these words – "It shall be for the Court to decide . . ." – give a "complete discretion", what other completely discretionary powers are given to international tribunals by such a simple formula ? Article 36, paragraph 6, of the Statute of the Court says this : "In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court." The Court shall decide. It has never been suggested that Article 36, paragraph 6, of the Statute allowed the Court any element of discretion in reaching a decision on its own jurisdiction under that provision.

I pause only to reflect, with some sadness, that the disciples of the late and highly respected Judge Anzilotti are unlikely to follow the present Whewell Professor of International Law at the University of Cambridge into the wilderness of complete discretionary jurisdiction of international tribunals. So much for complete discretion, except to say this, that if the Court were to consider that it has a discretion, that discretion should be exercised in favour of Malta in her interest and the interests of justice.

I finish with words on compulsory jurisdiction.

Professor Malintoppi referred to "*tendances généreuses de la période antérieure à la première guerre mondiale*" (p. 395, *supra*) when there were those with, as he says, "*certaines illusions généreuses*", the illusion of universal compulsory jurisdiction for the Court. That era he contrasts with the present time when, 60 years later, the Court has come to realize, as he would suggest, that the search for a consensual jurisdiction must guide its every act and inspire its every Rule.

I intend no discourtesy to him when I say how disconcerting it is to reflect that, when in the General Assembly of the United Nations and in the Security Council so much effort has been devoted to the furtherance of the judicial settlement of international disputes, such a stultifying philosophy should be preached by so distinguished an international lawyer. Full exercise of the Court's jurisdiction in accordance with a sensible interpretation of its Statute

must be in the interests of the progressive development of international law and of international justice. Of course one must strive for – in those noble words already cited to the Court – "the orderly and expeditious administration of justice"; orderliness, expedition and justice, but the greatest of all of these is justice.

CLOSING OF THE ORAL PROCEEDINGS ON APPLICATION FOR PERMISSION TO INTERVENE

The PRESIDENT : I thank the Agent and counsel of Malta for the further assistance they have given the Court this morning. I repeat what I said on Saturday evening, that the Court has been very greatly assisted by the observations which have been presented to it by the Agents of the three States concerned in the present proceedings, and by their learned counsel. The Court itself does not find it necessary to seek any further clarification of any point, through any questions put to the Agents of the Parties. Therefore the Court, after consulting with the Parties of the three States concerned is in a position when the President may bring the proceedings to a close.

Therefore I shall declare now the sitting closed but I shall of course also ask the Agents of the three States concerned to remain at the disposal of the Court for any information that they might find they wish to have. I now declare the sitting closed.

The Court rose at 11.56 a.m.

SEVENTH PUBLIC SITTING (14 IV 81, 4 p.m)

Present : [See sitting of 19 III 81.]

READING OF THE JUDGMENT ON THE APPLICATION BY MALTA FOR PERMISSION TO INTERVENE

The PRESIDENT : The Court meets today to announce its decision on the Application by the Republic of Malta to intervene under Article 62 of the Statute in the case concerning the *Continental Shelf* between the Republic of Tunisia and the Socialist People's Libyan Arab Jamahiriya.

Certain judges, who have participated in the proceedings and cast their votes on the judgment, are prevented from attending the present sitting.

I shall now read the Judgment of the Court. The opening recitals, which, in accordance with the usual practice I shall not read, set out the procedural history of the case so far as relevant to the Application of Malta.

The Judgment then continues :

[The President reads paragraphs 11 to 37 of the Judgment [1].]

I shall now ask the Registrar to read the operative clause of the Judgment in French.

[The Registrar reads paragraph 37 in French [2].]

Judges Morozov, Oda and Schwebel append separate opinions to the Judgment.

The printed edition of the Judgment will become available in about two weeks' time.

The sitting is closed.

(Signed) Humphrey WALDOCK,
President.

(Signed) Santiago TORRES BERNÁRDEZ,
Registrar.

[1] *I.C.J. Reports 1981*, pp. 7-20.
[2] *Ibid.*, p. 20.