The International Court of Justice Declines Jurisdiction Again (the Aegean Sea Continental Shelf Case)

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Background

On 19 December 1978 the International Court of Justice delivered judgment in the *Aegean Sea Continental Shelf* case between Greece and Turkey.[1] The case had been initiated by Greece on 10 August 1976 when that country filed with the Registrar of the Court an Application instituting proceedings against Turkey in respect of a dispute concerning the delimitation of the continental shelf appertaining to Greece and Turkey in the Aegean Sea and the rights of the parties thereover. In the operative part of the Judgment (paragraph 109), it was stated that the 'Court, by 12 votes to 2, finds that it is without jurisdiction to entertain the Application filed by the Government of the Hellenic Republic on 10 August 1976'.[2] Vice-President Nagendra Singh and four other judges appended separate opinions.[3] Judge de Castro[4] and Judge *ad hoc* Stassinopoulos[5] (a former President of the Hellenic Republic) appended dissenting opinions.

Greece had attempted to found the jurisdiction of the Court mainly on Article 17 of the General Act for the Pacific Settlement of International Disputes of 26 September 1928,[6] which provided: 'All disputes with regard to which the parties are in conflict as to their respective rights shall, subject to any reservations which may be made under Article 39,[7] be submitted for decision to the Permanent Court of International Justice . . .'. This was coupled with Article 36(1) of the Statute of the International Court of Justice which says that the 'jurisdiction of the Court comprises . . . all matters specially provided for . . . in treaties and conventions in force', and Article 37 of the same Statute, which provides that whenever 'a treaty or convention in force provides for reference of a matter to . . . the Permanent Court of International Justice, the matter

1. ICJ Rep 1978, p 3.
2. At 45.
3. Vice-President Nagendra Singh's opinion is at 46-48. The other judges were Gros (at 49); Lachs (at 50-53); Morozov (at 54); and Tarazi (at 55-61).
4. At 62-71.
5. At 72-83.
6. Hudson, 4 *International Legislation* 2529; 93 LNTS 343; UKTS No 32 (1931).
7. Article 39 permitted reservations on a number of matters including 'disputes concerning particular cases or clearly specified subject matters, such as territorial status, or disputes falling within clearly defined categories'. Paragraph 3 of this Article contained the following provision: 'If one of the parties to a dispute has made a reservation, the other party may enforce the same reservation in regard to that party.'

shall, as between the parties to the present Statute, be referred to the International Court of Justice'. Greece had acceded to the General Act on 14 September 1931, with certain reservations, of which that contained in paragraph (b) turned out to be crucial.[8] Turkey had acceded to the General Act on 26 June 1934. She too had made certain reservations, but none of these were relevant.

The dispute related to the delimitation of the continental shelf in the Aegean Sea. The Greek Government's contention, as expressed in its Application, was that the Greek islands in the Aegean Sea, many of which lie quite close to the coast of Turkey, were entitled to a portion of the continental shelf; that the boundary of the portions of the continental shelf appertaining to Greece and Turkey should be defined on the basis of equidistance by means of a median line; that Greece was entitled to exercise over its continental shelf sovereign and exclusive rights for the purpose of researching and exploring it and exploiting its natural resources; and that Turkey was not entitled to undertake any activities on the Greek continental shelf without the consent of Greece. As Turkey did not appoint an Agent, as provided for in Article 42 of the Statute and Article 38 of the Rules of Court, and also did not file a Counter-Memorial, as provided for in Article 43(2) of the Statute and Article 44(1) of the Rules of Court,[9] there was no corresponding indication of the Turkish Government's contentions, but it is clear from the abortive negotiations which preceded the reference of the dispute to the Court by Greece, from other negotiations which took place between the two countries while the case was before the Court, and also from some communications sent by the Turkish Government to the Court, that Turkey's main contention was that the Greek islands were not entitled to a continental shelf and that the boundary line should be a median line, drawn west of the Greek islands, between the mainland coasts of the two countries. Turkey also maintained that the Court lacked jurisdiction to deal with the unilateral Application by Greece. The main grounds for this contention appear to have been that negotiations between the two sides had not yet been exhausted; that the dispute was a political rather than a legal one because it related to the balance of power in the Aegean Sea area; that the General Act of 1928 was no longer in force; and that, even if it was, the Court

8. In view of the importance of this reservation it is necessary to set it out in the original language in which it was expressed, namely French:
   'Sont exclus . . . les différends portant sur des questions que le droit international laisse à la compétence exclusive des Etats et, notamment, les différends ayant trait au statut territorial de la Grèce, y crompris ceux relatifs à ses droits de souveraineté sur ses ports et ses voies de communication.'
   The following is an English translation:
   'Are excluded . . . disputes concerning questions which by international law are solely within the domestic jurisdiction of States, and in particular disputes relating to the territorial status of Greece, including disputes relating to its rights of sovereignty over its ports and lines of communication.'
9. The case was heard under the Rules of Court adopted on 6 May 1946, as amended on 10 May 1972 (11 ILM 903). Cases started on or after 1 July 1978 will be heard under revised Rules of Court adopted on 14 April 1978 (17 ILM 1286).

lacked jurisdiction because of the reservation (b) appended by Greece to its accession to the General Act in 1931.

At this point it is sufficient to say that the controversy was clearly a case in which the parties were 'in conflict as to their respective rights'. There was therefore an unanswerable case in favour of the Court being able to exercise jurisdiction unless it could be shown either that the General Act of 1928 was no longer in force; or that the Court's jurisdiction was excluded either by a reservation made by Turkey when she acceded to the General Act, or by a reservation made by Greece when she too acceded to the General Act provided that Turkey was entitled to enforce that reservation.

The contention that the General Act of 1928 was no longer in force was advanced by France in the *Nuclear Tests* cases brought against her by Australia and New Zealand in 1973. In its Judgments in those cases,[10] delivered on 20 December 1974, the Court held that 'the claim of Australia [New Zealand] no longer has any object and that the Court is therefore not called upon to give a decision thereon'. Consequently, in those cases, the Court found it unnecessary to rule on the question whether the General Act of 1928 was still in force, although four judges appended a joint dissenting opinion in which they held that the Act was still in force,[11] and this view was shared by Judge de Castro[12] and by Judge *ad hoc* Sir Garfield Barwick, each of whom appended his own dissenting opinion.[13]

Greece advanced as an alternative basis for the jurisdiction of the Court a joint communiqué issued at Brussels on 31 May 1975 after a meeting of the Prime Ministers of Greece and Turkey. This read as follows:[14]

> 'Au cours de leur rencontre les deux premiers ministres ont eu l'occasion de procéder à l'examen des problèmes qui conduisirent à la situation actuelle des relations de leurs pays.
> Ils ont décidé que ces problèmes doivent étre résolus pacifiquement

10. ICJ Rep 1974 p 253 (*Australia v France*) and ICJ Rep 1974, p 457 (*New Zealand v France*).
11. The four judges were Onyeama, Dillard, Jiménez de Aréchaga and Sir Humphrey Waldock. Their lengthy dissenting opinion is at 312-371 (*Australia v France*) and at 494-523 (*New Zealand v France*).
12. At 372-390 (*Australia v France*) and at 524 (*New Zealand v France*).
13. At 391-455 (*Australia v France*) and at 525-528 (*New Zealand v France*).
14. Herewith the English translation on pp 39-40 of the Court's Judgment:
    'In the course of their meeting the two Prime Ministers had an opportunity to give consideration to the problems which led to the existing situation as regards relations between their countries.
    They decided [ont décidé] that those problems should be resolved [doivent étre résolus] by means of negotiations and as regards the continental shelf of the Aegean Sea by the International Court at The Hague. They defined the general lines on the basis of which the forthcoming meetings of the representatives of the two Governments would take place.
    In that connection they decided to bring forward the date of the meeting of experts concerning the question of the continental shelf of the Aegean Sea and that of the experts on the question of air space.'

> par la voie des négociations et concernant le plateau continental de la mer Egée par la Cour internationale de La Haye. Ils ont défini les lignes générales sur la base desquelles auront lieu les rencontres prochaines des représentants des deux gouvernements.
> A cet égard ils ont décidé d'accélérer la rencontre d'experts concernant la question du plateau continental de la mer Egée, ainsi que celle des experts sur la question de l'espace aérien.'

In view of the frequent practice according to which such persons as heads of government and foreign ministers now issue communiqués after meetings, the views of the International Court of Justice on the legal status of these instruments were awaited with interest.

The origin of the dispute lay in the decision of the Turkish Government, towards the end of 1973, to grant licences to explore for petroleum in submarine areas of the Aegean Sea which Greece considered to be part of her continental shelf. The geographical fact is that many Greek islands such as Samothrace, Limnos, Lesbos, Chios and Samos, and all the islands of the Dodecanese group, lie relatively close to the mainland coast of Turkey, so that if these islands are taken into account for the purposes of delimiting the continental shelf, as Greece naturally contends they should be, only a small fraction of the shelf can be attributed to Turkey. If, however, a median line boundary were drawn down the middle of the Aegean Sea, it would mean that the boundary line would lie to the west of the Greek islands, leaving these islands without any continental shelf and with only such areas of seabed as would be included in the territorial sea. To draw a distinction between her islands and her mainland, relegating her islands to the status of 'second-class territory', is naturally a conception which Greece cannot accept. Notwithstanding that some of these islands are famous as holiday resorts, frequented by tourists from all over the world, they are far from being just appendages of mainland Greece or, as Turkey has called them, mere 'protruberances' on the Turkish continental shelf. In 1971, out of the total Greek population of 8 768 641, the population of the Aegean Islands came to 417 813.[15]

Bearing in mind that distances in the Aegean Sea are not very great, the position from the Greek point of view would not be quite so bad if the Greek islands could be allotted a 12 mile territorial sea, according to the concept which has found favour at the Third United Nations Conference on the Law of the Sea. However, the Turkish Government has on several occasions let it be known that, whatever the general conclusions stemming from UNCLOS III, the Aegean Sea is, in its view, a special case. Any accretion of Greek power in that area, whether by an increase in the breadth of the territorial sea or by acquisition of a larger continental shelf than Turkey might obtain, calls into question, so the Turkish Government contends, the whole political and strategic balance created by the Treaty of Lausanne of 23 July 1923,[16] and thus raises political issues far transcending the legal issues being discussed in general terms at UNCLOS III.

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15. *The Statesman's Year Book* (1975-1976), p 986.
16. 28 LNTS 11.

The case was first heard by the International Court of Justice towards the end of August 1976 in consequence of Greece, simultaneously with the filing of her Application, having requested the Court to indicate interim measures of protection. The Court refused the request in its Order made on 11 September 1976. The Court also declined to accede to the request of the Turkish Government that the case be removed from its list.[17]

The Greek request for interim measures followed a familiar pattern. In the 'cod war' in 1972 the United Kingdom and the Federal Rupublic of Germany had successfully petitioned the Court to indicate interim measures of protection. The measures indicated by the Court included statements to the effect that the Republic of Iceland should refrain from enforcing its 50 mile exclusive fishery limit.[18] This had been followed a year later by Australia and New Zealand obtaining Orders in which the Court stated that 'the French Government should avoid nuclear tests causing the deposit of radioactive fallout on Australian [New Zealand] territory'.[19] In all these cases the Orders indicating interim measures were made before it was established that the Court had jurisdiction to deal with the merits under Article 36 of its Statute, and in the *Nuclear Tests* cases the Court, on the basis of its previous jurisprudence, set forth what appeared to be a definitive statement of its policy as regards indicating interim measures in urgent situations when requests for such measures were made before the Court had had time to establish its jurisdiction on the merits. The Court then stated:[20]

> 'Whereas on a request for provisional measures the Court need not, before indicating them, finally satisfy itself that it has jurisdiction on the merits of the case, and yet ought not to indicate such measures unless the provisions invoked by the Applicant appear, prima facie, to afford a basis on which the jurisdiction of the Court might be founded.'

In *Nuclear Tests* the Court was satisfied that the General Act of 1928, on which Greece was relying in 1976, did 'appear, prima facie, to afford a basis on which the jurisdiction of the Court might be founded',[21] so the statement just quoted was particularly relevant to the Greek Application.

Despite the precedents of 1972 and 1973 the Court refused Greece's request for interim measures. The reason given was that the Court was not satisfied that Turkey's seismic explorations on the seabed of the Aegean Sea constituted a risk of 'irreparable prejudice' to Greece's

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17. ICJ Rep 1976, p 3. See Gross L, 'The Dispute between Greece and Turkey concerning the Continental Shelf in the Aegean', (1977) 71 AJIL 31 and Diplock J, 'Interim Relief in Cases of Contested Jurisdiction', (1977) 8 Sydney L Rev 477.
18. ICJ Rep 1972 p 12 *United Kingdom v Iceland*; ICJ Rep 1972 p 30 *Federal Republic of Germany v Iceland.*
19. ICJ Rep 1973, p 99 *Australia v France*; ICJ Rep 1973 p 135 *New Zealand v France.* In the case of New Zealand the prohibition extended to possible fall-out on the Cook Islands, Niue and the Tokelau Islands as well as New Zealand itself.
20. Para 13 of the *Australia v France* Order; para 14 of the *New Zealand v France* Order.
21. Para 17 of the *Australia v France* Order; para 18 of the *New Zealand v France* Order.

rights. The Court conceded that 'seismic exploration of the natural resources of the continental shelf without the consent of the coastal State might, no doubt, raise a question of infringement of the latter's exclusive right of exploration', but went on to say that, if the alleged breach by Turkey of the exclusive rights claimed by Greece were established, it was 'one that might be capable of reparation by appropriate means'.[22]

This reasoning is not convincing and, taken together with certain statements made by Members of the Court in their individual opinions, invites the suspicion, confirmed by the Judgment of 1978, that the Court already had doubts whether it would eventually find that it had jurisdiction on the merits and did not wish to get itself once again into a situation in which it would have indicated interim measures of protection without being able eventually to affirm its jurisdiction to deal with the merits.[23] For example, Vice-President Nagendra Singh felt it 'necessary to emphasize the primordial importance which the jurisdictional issue would have acquired, had the Court found that the circumstances warranted the indication of interim measures'.[24] Judge Ruda, while admitting that he had reached a conclusion 'only on a prima facie and provisional basis', nevertheless asserted that he had 'not found, prima facie, that the provisions and instruments invoked by the Applicant, appear to afford any basis on which the jurisdiction of the Court might be founded'.[25] Judge Mosler was even more explicit. Referring specifically to the General Act of 1928, to the Greek reservation and to the Brussels Communiqué, he said that the Greek request must 'be rejected for the sole reason that the jurisdiction of the Court is not sufficiently established'.[26] Judge Tarazi referred to 'the complexity and ambiguity of the problems confronting the Court' which required the Court to undertake 'a more thoroughgoing examination'.[27] This seems to be another way of saying that the instruments put forward by Greece did not appear, prima facie, to afford a basis on which the jurisdiction of the Court might be founded.

This increasing preoccupation of the Court with jurisdictional questions, when confronted with requests for the indication of interim

22. At pp 10-11 of the Order.
23. This situation occurred in 1951-1952 in the *Anglo-Iranian Oil Company* case. The Court indicated interim measures of protection in an Order made on 5 July 1951 (ICJ Rep 1951, p 89). However, in its Judgment of 22 July 1952 (ICJ Rep 1952, p 93), the Court found that it had no jurisdiction to deal with the case and accordingly declared that the 1951 Order 'ceases to be operative upon the delivery of this Judgment and that the Provisional Measures lapse at the same time'. Similarly in the *Nuclear Tests* cases, when in 1974 the Court declared that the claims of the Applicants no longer had any object, it added the statement that the 1973 Order, in which interim measures had been indicated, 'ceases to be operative upon the delivery of the present Judgment' (para 61 of the *Australia v France* Judgment; para 64 of the *New Zealand v France* Judgment).
24. ICJ Rep 1976, at 17.
25. At 23.
26. At 25.
27. At 32.

measures, suggests that the Court has become afraid that, if such requests are too readily granted before it has established that it has jurisdiction to deal with the merits, the principle that 'the consent of States, parties to a dispute, is the basis of the Court's jurisdiction in contentious cases',[28] will be eroded. The argument, one must suppose, is that Applicant States, realising how difficult it often is to establish the Court's jurisdiction to deal with the merits, and how risky are the chances of success actually on the merits, will content themselves with making requests for the indication of interim measures which were beginning to look as if they might be relatively easy to obtain. The argument would be more convincing if it could be shown, which unfortunately it cannot, (a) that there is general agreement that provisional measures indicated by the Court are legally binding and (b) that, on the assumption that these measures are legally binding, they are enforceable. In practice, all the measures recently indicated by the Court were successfully defied by the parties to whom they were principally addressed (Iran 1951; Iceland 1972; France 1973).

Be that as it may, three days after rejecting Greece's request for the indication of interim measures, the Court made an Order[29] fixing the time-limits for the next written proceedings in the case. In this Order, as already foreshadowed in the previous Order, the parties were instructed to concentrate on 'the question of the jurisdiction of the Court to entertain the dispute'.

The Court's Judgment in 1978

After recounting the background, including a record of the various attempts of the parties to settle the dispute by negotiation,[30] the Court referred to a letter it had received from the Ambassador of Turkey to the Netherlands stating that Turkey's view was that the dispute should be settled by 'frank and serious negotiations' and that the necessary conditions for such negotiations were 'not reconcilable with the continuation of international judicial proceedings'. On 11 September 1978 Greece requested the Court to postpone the oral hearings in the case set for 4 October. Turkey objected to this, saying 'the discontinuance of the

28. *Peace Treaties* case, ICJ Rep 1950, p 65 at 71.
29. ICJ Rep 1976, p 42.
30. There were several such attempts, eg meeting of Foreign Ministers (Rome, 17-19 May 1975); meeting of Prime Ministers (Brussels, 31 May 1975); meetings of experts (Berne, 31 January to 2 February 1976, and 19-20 June 1976); meeting of Foreign Ministers (New York, 1 October 1976); meeting of representatives of the two governments (Berne, 2-11 November 1976); meeting of Foreign Ministers (Brussels, 11 December 1976); meeting of Foreign Ministers (Strasbourg, 29 January 1977); meeting of Foreign Ministers (Strasbourg, 28 April 1977); meeting of experts (Paris, beginning of June 1977); meeting of Foreign Ministers (Brussels, 9 December 1977); meeting of experts (Paris, mid-February 1978); meeting of Prime Ministers (Montreux, 10-11 March 1978, and Washington, 29 May 1978); meetings of senior Foreign Ministry officials (Ankara, 4-5 July 1978; Athens, beginning of September 1978); meeting of Foreign Ministers (New York, 28 September 1978). This list renders rather bizarre the repeated assertions of the Turkish Government that the controversy should be settled by negotiation and indeed that, because there had been insufficient negotiations between the parties, there was no justiciable dispute between them.

proceedings and the removal of the case from the list of the International Court of Justice would be more conducive to the creation of a favourable political climate for an agreed settlement'.

The Court refused Greece's request for a postponement and was equally firm in rejecting the Turkish contention that the Court should decline to exercise jurisdiction because negotiations were in progress. The Court said that 'the fact that negotiations are being actively pursued during the present proceedings is not, legally, any obstacle to the exercise by the Court of its judicial function'.[31] The Court's firm handling of this matter is to be welcomed, as is its rejection of the Turkish submission that the Court should decline jurisdiction because the controversy was 'of a highly political nature'.

The Court next dealt with the question whether the General Act of 1928 was still in force. It pointed out that, in a letter to the Secretary-General of the United Nations dated 10 January 1974, the French Government had reaffirmed its view that the Act was no longer in force and that, should that view be wrong, that letter was to be taken as constituting a denunciation of the Act in conformity with Article 45 thereof; that on 8 February 1974 the United Kingdom Government in a letter to the Secretary-General had informed him of its denunciation of the Act; and that on 15 September 1974 the Government of India had informed the Secretary-General that it had never regarded itself as bound by the Act since its independence, whether by succession or otherwise. Even so, said the Court, 'a considerable number of other States, listed by the Secretary-General as at 31 December 1977 as having acceded to the Act, have not up to the present date taken steps to denounce it nor voiced any doubts regarding the status of the Act today'.[32]

Consequently, said the Court, 'it is evident that any pronouncement of the Court as to the status of the 1928 Act, whether it were found to be a convention in force or to be no longer in force, may have implications in the relations between States other than Greece and Turkey'.[33] This was so notwithstanding the provision in Article 59 of the Statute of the Court that the 'decision of the Court has no binding force except between the parties and in respect of that particular case'. It is obvious that, whatever Article 59 may say, the Court could not hold the 1928 Act, or any other multilateral treaty about whose continued viability there is controversy, to be in force in one case and not in force in another case shortly thereafter. This creates for the Court a dilemma and, more important, for an Applicant State a disadvantage. For there is a danger that the Court, in seeking to avoid its dilemma, will be unduly tempted to find some other reason for declining jurisdiction. It is submitted that this is what happened in this case.

Accordingly the Court next turned its attention to the Greek reserva-

31. ICJ Rep 1978, at 12.
32. At 16.
33. At 17.

tion (b).[34] The first point to be determined here was whether Turkey had enforced this reservation, as provided for in Article 39(3) of the General Act.[35] She had certainly attempted to do so, because in August 1976 she had sent to the Court some 'observations' in which she expressly stated that she opposed reservation (b). The question, however, was whether this could be said to be an 'enforcement' of the reservation seeing that Turkey had not filed a preliminary objection in conformity with Article 67 of the Rules of Court. Nor, maintained Counsel for Greece, could the Court, when applying Article 53 of the Statute[36] and deciding on the question of its jurisdiction *proprio motu*, actually 'enforce' the reservation on Turkey's behalf. So was raised once again the issue of what the Court should do when a party fails to comply with the normal procedures but, without formally appointing an Agent, contents itself with sending various communications to the Court, normally via its ambassador in The Hague. So far the Court has treated such communications with leniency, and on this occasion, repeating the formula already employed in *Fisheries Jurisdiction* and *Nuclear Tests*, the Court contented itself with saying: 'it is to be regretted that the Turkish Government has failed to appear in order to put forward its arguments on the issues arising in the present phase of the proceedings'.[37]

Sir Gerald Fitzmaurice in *Fisheries Jurisdiction* had commented adversely on the practice of placing non-appearing Iceland 'in almost as good a position as if she had actually appeared in the proceedings, . . . while on the other hand enabling her, in case of need, to maintain that she does not recognize the legitimacy of the proceedings or their outcome'.[38] Sir Garfield Barwick too, in *Nuclear Tests*, had referred to this matter although he said that, being but a judge *ad hoc*, he would not express himself as to the desirability or undesirability of the reception of communciations from parties who had not fully complied with the Court's procedures.[39] The implication of his remarks quite clearly is, however, that the Court should be wary of granting cognizance to such communications and, in the opinion of the present writer, Sir Garfield was justified in that view. The leniency of the Court in this respect had had the inevitable consequence of encouraging Respondents not to appear, thus further lowering the prestige of the Court.

To revert to the present case, it was not, as Counsel for Greece pointed out, analogous to the situation in which a State accepts as compulsory the

34. For the terms of this reservation, see fn 8, above.
35. For the terms of this paragraph, see fn 7 above.
36. Article 53 of the Statute of the Court reads as follows:
    '1. Whenever one of the parties does not appear before the Court, or fails to defend its case, the other party may call upon the Court to decide in favour of its claim.
    2. The Court must before doing so, satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well founded in fact and law.'
37. ICJ Rep 1978, at 7.
38. ICJ Rep 1973, p 35.
39. ICJ Rep 1974, p 401.

jurisdiction of the Court under Article 36(2) of the Statute of the Court, because that paragraph specifically provides that the acceptance is 'in relation to any other State accepting the same obligation'. In other words, the principle of reciprocity is built into the system of Article 36(2), whereas in the case of jurisdiction under 'treaties and conventions in force', as mentioned in Article 36(1), that is not so. It is for each treaty or convention to make its own arrangements, and the General Act had provided that, in order for a party to rely on a reservation made by another party, it must 'enforce' it.

The Court, however, dismissed this formal objection raised by Greece in the following words:[40]

> 'In the procedural circumstances of the case it cannot be said that the Court does not now have before it an invocation by Turkey of reservation (b) which conforms to the provisions of the General Act and of the Rules of Court.'

The Court referred to the fact that in a communication to the Court on 25 August 1976 the Turkish Government had drawn attention to reservation (b) and maintained that it could not be said that the Court would be substituting itself for the Turkish Government if it were to take cognizance of that reservation. The Court considered that 'it would not discharge its duty under Article 53 of the Statute if it were to leave out of its consideration a reservation, the invocation of which by the Respondent was properly brought to its notice earlier in the proceedings'.[41]

On paragraph (b) the Greek Government's main contention was that the reservation was designed to exclude 'disputes concerning questions which by international law are solely within the domestic jurisdiction of States' and that the delimitation of maritime boundaries is not such a question. Reliance was placed on the statement of the Court in the *Fisheries* case between the United Kingdom and Norway to the effect that the 'delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State'.[42] Greece maintained that the remaining words in paragraph (b)—ie 'and in particular disputes relating to the territorial status of Greece, including disputes relating to its rights of sovereignty over its ports and lines of communication'—were merely particular examples of disputes concerning questions solely within her domestic jurisdiction which she wished to exclude. Reliance was placed on this meaning of the expression 'in particular', or rather '*et, notamment*', because the reservation was made in French. Various authorities on the French language were cited, including Robert's *Dictionnaire alphabétique et analogique de la langue française* (Vol IV), the *Grand Larousse de la langue française*, Littré's *Dictionnaire de la langue française* and even the *Dictionnaire de l'Académie française*. The Court, however, declined to be overawed by this grammatical evidence, maintaining that, if this interpretation were correct, 'the integration of

40. ICJ Rep 1978, at 20.
41. Ibid.
42. ICJ Rep 1951, at 132.

"disputes relating to territorial status" within the category of disputes concerning matters of "domestic jurisdiction", largely deprives the former of any significance'. The Court persuaded itself that these grammatical arguments were not 'compelling'; reminded itself that in any event 'the Court cannot base itself on a purely grammatical interpretation of the text', and sought to turn the tables on the eminent French-speaking lawyers to be found in the Greek delegation,[43] by suggesting that, if such had been the intention of the Greek Government in 1951, it would have been better to use the words '*y compris*' (including) rather than '*et, notamment*' (in particular). The Court noted that the words '*y compris*' had been used later on in paragraph (b), and accepted that the expression 'disputes relating to the territorial status of Greece' included 'disputes relating to its rights of sovereignty over its ports and lines of communication'. But the Court insisted that paragraph (b) comprised two reservations, one of disputes concerning questions of domestic jurisdiction and the other a distinct and autonomous reservation of 'disputes relating to the territorial status of Greece, including disputes relating to its rights of sovereignty over its ports and lines of communication'. It was in vain that a Greek member of his country's delegation sought to show that the Greek law approving the accession of Greece to the General Act included an expression synonymous with the French expression '*et, notamment*'.[44]

In arriving at these conclusions the Court examined at some length the preoccupations which caused the Greek Government to make the reservation contained in paragraph (b), and a similar, though not identical, reservation formulated when Greece made a declaration, on 12 September 1929, recognizing as compulsory the jurisdiction of the Permanent Court of International Justice under Article 36(2) of the Statute of that Court. In fact the Court paid particular attention to the fact that in the 1929 declaration the exclusion of 'disputes relating to the territorial status of Greece' was put forward as a separate reservation, not tacked on to the reservation excluding disputes concerning matters of domestic jurisdiction. The record shows clearly what the Greek preoccupations were. They arose from a fear that Bulgaria, which in the Treaty of Neuilly of 27

43. M. Roger Pinto, Professor in the Faculty of Law and Economics, University of Paris; M. Paul de Visscher, Professor in the Faculty of Law, University of Louvain; and M. Prosper Weil, Professor in the Faculty of Law and Economics, University of Paris.

44. ICJ Rep 1978, at 21-23. The Greek jurist concerned was M. Constantin Economides, Legal Adviser and Head of the Legal Department of the Greek Ministry of Foreign Affairs. In the *Anglo-Iranian Oil Co* case (ICJ Rep 1952, p 93 at 107) the Court admitted into evidence an Iranian law, drafted of course in the Persian language, for the purpose 'of throwing light on a disputed question of fact, namely the intention of the Government of Iran at the time when it signed the Declaration', made in the French language, accepting the compulsory jurisdiction of the Permanent Court of International Justice under Article 36(2) of the Court's Statute. In a separate opinion (at 121) Judge McNair said of this Iranian law: 'I should have preferred that it should be excluded from the consideration of the Court. Its admissibility in evidence is open to question, and its evidentiary value is slight'. The extent to which governments may seek to rely on texts in their own language as evidence of their intentions when they accept obligations drafted in recognised international languages is an important, and very difficult, question.

November 1919, had renounced all her rights and titles over areas of Thrace, might revive her claim to access to the Aegean Sea and might command some support for such a claim from the Principal Allied and Associated Powers. The record also shows how the famous Greek jurist, Nicholas Politis, who incidentally happened to be the Rapporteur for the drafting of the General Act, also put forward a variety of drafts designed to meet the Greek Government's requirements.

The Court, however, failed to find anything in the record to disturb its view that two separate reservations were involved and accordingly decided that it must examine the expression 'disputes relating to the territorial status of Greece' as an autonomous reservation. On this point the arguments were once again partly grammatical and partly historical. Greece maintained that the expression '*statut territorial*' ('territorial status') referred to territorial situations and regimes established by the peace treaties at the end of World War I. However, in the Court's view, the term 'did not have the very specific meaning attributed to it by the Greek Government' but was rather to be 'understood as a generic term denoting any matters properly to be considered as comprised within the concept of territorial status under general international law, and therefore includes not only the particular legal regime but the territorial integrity and the boundaries of a State'.[45]

Having got this far, the next question for the Court to consider was whether a dispute concerning the delimitation of the continental shelf could be said to be a dispute concerning the territorial integrity and the boundaries of the States concerned. There were two aspects to this problem. The first was whether the continental shelf is part of a State's territory. The second was whether, even if it is now accepted that the continental shelf is part of a State's territory, or that it relates to the territorial status of a State, the draftsmen of the General Act in 1928 could be said to have contemplated that possibility, and in particular whether the Greek Government could be said to have contemplated the exclusion of disputes relating to the continental shelf when it made the reservation in 1931, at a time when the doctrine of the continental shelf was still unknown. Counsel for Greece naturally pointed to the fact that in *Petroleum Development (Trucial Coast) Limited v Sheikh of Abu Dhabi*[46] the arbitrator, Lord Asquith, had held that, when the Sheikh granted to an oil company in 1939 the sole right 'to search for discover drill for and produce mineral oils' in 'the whole territory subject to the Ruler of Abu Dhabi and its dependencies, and all its islands and territorial waters', that expression did not include the right to obtain oil from the continental shelf of Abu Dhabi. The Court, however, was not impressed by this argument and said:[47]

> 'While there may well be a presumption that a person transferring valuable property rights to another intends only to transfer the rights

45. ICJ Rep 1978, at 31-32.
46. (1951) ILR 144 at 152 (Case No. 37);(1952) 1 ICLQ 247.
47. ICJ Rep 1978, at 32.

> which he possesses at that time, the case appears to the Court to be quite otherwise when a State, in agreeing to subject itself to compulsory procedures of pacific settlement, excepts from that agreement a category of disputes which, though covering clearly specified subject-matters, is of a generic kind. Once it is established that the expression "the territorial status of Greece" was used in Greece's instrument of accession as a generic term denoting any matters comprised within the concept of territorial status under general international law, the presumption necessarily arises that its meaning was intended to follow the evolution of the law and to correspond with the meaning attached to the expression by the law in force at any given time.'

It is submitted that this method of applying the intertemporal law is correct, and the Court delivered a shrewd blow at the Greek Government when it pointed out that the Government could not have it both ways. If the interpretation of 'territorial status' was to be restricted to the conditions prevailing in 1928/1931, the same should apply to the term 'rights' in Article 17 of the General Act. On that basis Greece would have had no 'rights' to the continental shelf in 1928/1931, and especially would that have been so in respect of the Dodecanese group which were only ceded to Greece under the Peace Treaty of 1947.[48]

More questionable is the Court's rejection of the Greek argument based on the proposition that the continental shelf is not part of the territory of a State. This argument was based on the proposition that, when President Truman issued his famous proclamation on 28 September 1945, he did not annex the continental shelf as such but confined himself to stating that 'the Government of the United States regards *the natural resources* of the subsoil and seabed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control'.[49]

Unfortunately the Court itself had already contributed to some confu-

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48. At 33.
49. 10 Federal Register 12303 (1945); 59 Stat 884. The present writer has italicised certain words so as to emphasize that the President was claiming rights over resources rather than sovereignty over territory. Moreover, although the Geneva Convention on the Continetal Shelf 1958, ratified by Greece but not by Turkey, uses in Article 2 the expression 'sovereign rights', these rights do not amount to full sovereignty and are still limited 'for the purpose of exploring it [the continental shelf] and exploiting its natural resources'. Moreover, Article 1 defines the term continental shelf 'as referring (a) to the seabed and subsoil of the submarine areas adjacent to the coast but *outside the area of the territorial sea*, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands' (italics added). Likewise the Informal Composite Negotiating Text, issued by UNCLOS III on 15 July 1977 (A/Conf 62/WP.10), says, in Article 55, of the 200 Mile Exclusive Economic Zone that it is 'an area *beyond and adjacent to the territorial sea*', and, in Article 76, of the Continental Shelf of a coastal State that it 'comprises the seabed and subsoil of the submarine areas that *extend beyond its territorial sea* . . .' (italics added).

sion on this aspect of the case. In the *North Sea Continental Shelf* cases[50] it had said of Article 1 of the Geneva Convention on the Continental Shelf, on which the Greek contention was largely based, that it was one of a series of articles which were then (ie in 1958) 'regarded as reflecting, or as crystallizing, received or at least emergent rules of customary international law relative to the continental shelf',[51] whilst elsewhere in the same cases it had said 'what confers the *ipso jure* title which international law attributes to the coastal State in respect of its continental shelf, is the fact that the submarine areas concerned may be deemed to be actually part of the territory over which the coastal State already has dominion—in the sense that, although covered with water, they are a prolongation or continuation of that territory, an extension of it under the sea'.[52] It never has been clear what the Court meant by this sentence, which appears to contradict what it said in respect of the Geneva Convention. In the submission of the present writer, the Court did not mean that the continental shelf was part of the territory of the coastal State in the sense that the coastal State had sovereignty over it. It is significant that in the English text of the Judgment, which was the authoritative text, the word 'sovereignty' was not used, but rather the much vaguer word 'dominion'; and that the Court's own translators used the expression '*veritablement partie du territoire sur lequel l'Etat riverain exerce déjà son autorité*' (but not '*souveraineté*').

Be that as it may, the Court on this occasion showed reluctance to become involved in so fundamental an aspect of the law of the sea. It chose rather to say that Greece was proceeding on the wrong assumption. 'The question', it said, 'is not, as Greece seems to assume, whether continental shelf rights are territorial rights or are comprised within the expression "territorial status". The real question for decision is, whether the dispute is one which *relates* to the territorial status of Greece'.[53] And the Court considered that the expression 'territorial status' is 'a generic expression which comprises within its meaning various legal conditions and relations of territory'.[54]

The Court maintained that the dispute was not solely one about delimitation of boundaries but that it involved also a more basic question, which was 'whether or not certain islands under Greek sovereignty are entitled to a continental shelf of their own'.[55] The delimitation of the boundary was only a secondary question but, even looked at in that light, the Court said, 'it would be difficult to accept the broad proposition that delimitation is entirely extraneous to the notion of territorial status'.[56] The reason for this given by the Court was that 'any disputed delimitation of a boundary entails some determination of entitlement to the areas to be

50. ICJ Rep 1969, p 3.
51. At 39.
52. At 31.
53. ICJ Rep 1978, p 34 (italics in the original).
54. Ibid.
55. At 35.
56. Ibid.

delimited'.[57] Another point made by the Court was that 'legally a coastal State's rights over the continental shelf are both appurtenant to and directly derived from the State's sovereignty over the territory abutting on that continental shelf'.[58] Therefore a dispute regarding rights over the continental shelf, 'would . . . appear to be one which may be said to "relate" to the territorial status of the coastal State'.[59]

The Court then turned to the question whether the Brussels Communiqué of 31 May 1975 constituted a sound basis for the jurisdiction of the Court. The Court paid little attention to a Turkish objection that the agreement in Brussels, if there was one, had not been ratified by Turkey, saying, on 'the question of form, the Court need only observe that it knows of no rule of international law which might preclude a joint communiqué from constituting an international agreement to submit a dispute to arbitration or judicial settlement'.[60] The Court, however, considered that the communiqué 'was not intended to, and did not, constitute an immediate commitment by the Greek and Turkish Prime Ministers, on behalf of their respective Goverments, to accept unconditionally the unilateral submission of the present dispute to the Court'.[61]

Another possible formal objection to the right of Greece to invoke the communiqué lay in Article 102(2) of the Charter of the United Nations which provides that parties to international agreements which have not been registered with the Secretariat of the United Nations may not invoke such agreements 'before any organ of the United Nations', which would of course include the Court itself. However, in answer to a question from one of the judges at the beginning of the oral hearing on 9 October 1978, Counsel for Greece informed the Court, at the session on 17 October, that the agreement had been registered with the Secretariat on 11 October.[62] From the failure of the Court to pronounce on the matter, its seems reasonable to conclude that, had the question arisen, the Court would not have made an issue of the late registration.[63]

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57. Ibid.
58. At 36.
59. Ibid.
60. At 39.
61. At 44.
62. Counsel seems to have implied that, notwithstanding the terms of Article 102, strict adherence to that provision is not necessary. He pointed out that the purpose of Article 102 is to prevent secret agreements. The agreement of 31 May 1975 had been made public from the beginning.
    It had also been communicated to the Court together with the Greek Application and that had assured it the necessary publicity with Members of the United Nations. Counsel also stressed that this method of communication resulted in much more prompt publicity than registration with the Secretariat. Because of the lack of finance and skilled staff the Secretariat was about five years in arrears as regards publishing in the *United Nations Treaty Series* international agreements registered with it. In any case, as Counsel pointed out, the agreement of 31 May 1975 was an oral agreement and it was the practice of the Secretariat not to register oral agreements, although apparently it does so if the parties concerned insist (see the remarks of M. Roger Pinto at the oral hearing, 17 October 1978).
63. Article 102 only requires agreements to be registered 'as soon as possible'. Also the

The Separate and Dissenting Opinions

Space does not permit of a thorough examination of the separate and dissenting opinions, so attention will be concentrated only on a few of the more important points that emerge.

Vice-President Nagendra Singh made some interesting remarks on the proper limits of the judicial function, a matter which has caused the Court much difficulty.[64] He vigorously defended the decision of the Court to examine the Greek reservation (b) before considering whether or not the General Act of 1928 was still valid. However, as regards the communiqué of 31 May 1975, he said: 'If the Court could not on its own go so far as to conclude that the Brussels Communiqué constitutes a legal obligation on both States to proceed to complete the agreement on the modalities necessary for the submission of the case to the Court, it could, nevertheless, consistent with its judicial character, point to the need for further negotiations to be undertaken by both sides in good faith and in the interests of peaceful resolution of the dispute. To proceed to pronounce thus far would be consistent with the basic role of the Court in the international community'.[65]

Judge Lachs too thought that the Court should have taken a more positive view of the Brussels Communiqué. He considered that 'an obligation to negotiate had been established'.[66] This view was shared by Judge Tarazi.[67] Judge Morozov, however, would have had no hesitation in holding that the General Act of 1928 'was an inseparable part of the structure and machinery of the League of Nations, and after the demise of the League it became invalid as a whole'. So, in his view, the extensive analysis of the Greek reservation (b) was unnecessary.[68]

Judge de Castro, whose departure from the Court is much to be regretted,[69] repeated the view he had already expressed in *Nuclear Tests* that the General Act of 1928 is still valid. He went on to say, with respect to the Greek reservation (b), that 'a rigorous application of the appropriate rules for interpretation should have been adopted'.[70] When Greece acceded to the General Act in 1928, and Turkey did so in 1934, both parties were 'totally unaware that there could be problems relating to the continental shelf'.[71] Therefore it could not have been their common will to

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Court said as long ago as 1924: 'The Court, whose jurisdiction is international, is not bound to attach to matters of form the same degree of importance which they might possess in municipal law' (*Mavrommatis* case, PCIJ Ser A, No 2, at 34).

64. See *Northern Cameroons* case (ICJ Rep 1963, p 15) and *Nuclear Test* cases (ICJ Rep 1974, p 253 and p 457). See also Gross, 'Limitations upon the judicial function', (1964) 58 AJIL 415.
65. ICJ Rep 1978, p 47.
66. At 52.
67. At 59.
68. At 54.
69. Judge de Castro's term of office expired on 5 February 1979. To the present writer, his opinions both in the *Aegean Sea* case and in *Nuclear Tests* appear as models of legal reasoning.
70. ICJ Rep 1978, p 62.
71. At 63.

exclude such disputes. He thought that far too wide a meaning had been given to the term 'territorial status'. It was as if the Court had interpreted a clause in a will, saying 'I bequeath all my vehicles to my former chauffeur', as meaning that the testator bequeathed to the beneficiary not merely his Cadillac but also the locomotives and trucks of the railway company of which he was the proprietor as well as any aircraft he might own.[72] 'Territorial status', in Judge de Castro's view, had to do with sovereignty, and it was quite clear that under international law the coastal State did not have sovereignty over the continental shelf. The Court had offended against the well-established principle that reservations should be interpreted strictly.[73]

Judge *ad hoc* Stassinopoulos considered that the Court should have dealt with the question of the validity of the General Act and should have pronounced the Act to be still valid. Unlike the Geneva Protocol of 1924, the General Act had been so drafted as to have 'no institutional or structural connection with the League of Nations'.[74] He also made the point that, by stating that Turkey had 'enforced' reservation (b) 'within the meaning of, and in conformity with Article 39, paragraph 3, of the Act', the Court had itself applied the General Act.[75] Also, 'the Vienna Conference on the Law of Treaties deliberately avoided mentioning desuetude in the 1969 Convention as a cause of extinction of States' international obligations'.[76] Although much publicity had been given to the General Act recently, and some States had denounced it, many more (including Greece and Turkey) had not. In the case of declarations accepting the jurisdiction of the Court under the General Act, reciprocity was not a mechanism that operated automatically. Turkey, by failing to raise an objection 'in accordance with the procedures and within the time-limits laid down', had failed to 'enforce' reservation (b) and, whatever view might be taken of the Brussels Communiqué, at the very least it meant that 'Turkey has renounced its right to enforce the reservation: one cannot, even in principle, give consent to the submission of this case to the Court and at the same time retain the right to invoke a reservation which (in Turkey's view) excludes that very case from the Court's jurisdiction. To hold otherwise would be to permit a flagrant self-contradiction, one inadmissible in international relations'.[77]

Examining reservation (b) itself, Judge *ad hoc* Stassinopoulos, relying on both historical and grammatical evidence, explained that the intention of Greece had been to exclude from the Court's jurisdiction not two categories of dispute (domestic jurisdiction and territorial status) but 'one single category of disputes, namely those which by international law are

72. At 65, fn 1.
73. At 69-70. The principle that a reservation to a grant of jurisdiction 'does not . . . lend itself to an extensive interpretation' was laid down in the case of the *Nationality Decrees in Tunis and Morocco* in 1923 (PCIJ Ser B, No 4, p 25).
74. ICJ Rep 1978 at 73.
75. At 72.
76. Ibid.
77. At 74-75.

solely within the domestic jurisdiction of the States'.[78] The reservation had been expressly designed to meet possible Bulgarian demands on Thrace. These demands were revisionist in nature and went beyond treaty provisions. It had to be remembered that the General Act 'included, in addition to judicial procedures designed for legal disputes, procedures for conciliation and arbitration capable of leading to settlements *ex aequo et bono* for questions of a political nature'.[79] It had not been the intention of the Greek Government to exclude all disputes concerning territorial status. Indeed, except where matters solely within the domestic jurisdiction were involved, Greece had deliberately accepted the jurisdiction of the Court over such disputes 'in order to contribute towards the atmosphere of appeasement prevailing at the time and to the generalized application, as far as possible, of the peaceful settlement of disputes'.[80] In any case the concept of territorial status did not include the status, still less the delimitation, of the continental shelf. 'Status', he said 'is one thing, delimitation another. Status is the legal situation, the legal condition, the whole set of rules defining a legal situation, whereas delimitation merely concerns the correct application of those rules of international law in order to draw the boundaries of the continental shelf'.[81] Finally, Judge *ad hoc* Stassinopoulos maintained that the *decision* of the two Prime Ministers at Brussels that the continental shelf problem should be *resolved* by the International Court of Justice amounted to 'a full and complete declaration of intention, which gives rise to international obligations and which is not, moreover, made subject to any condition'.[82] He appealed to the general principles of law, and in particular to the French expression '*le juge peut maîtriser la loi*', as authority for the International Court of Justice to 'incline towards the broader scope of its jurisdiction, and the effectiveness of its mission'.[83] In international law the role played by such general principles was much more important than in municipal law and, in the event of doubt, the Court should apply the most liberal solution '*in dubio, pro libertate*'.[84]

Conclusions

1. Whatever else this case demonstrates, it is quite clear that the maxim *in dubio, pro libertate* holds little attraction for the Court. Although three members of the majority felt that the majority might at least have urged the parties to go on negotiating with a view to concluding a special agreement by which, in the spirit of the Brussels Communiqué, they might jointly refer the case to the Court, the Judgment as a whole is marked by a restrictive attitude as regards the Court's own jurisdiction.

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78. At 77.
79. At 78.
80. Ibid.
81. At 79.
82. At 81.
83. At 83.
84. Ibid.

So much so that it is reasonable to ask whether the Court still adheres to the principle laid down in the *Chorzow Factory* case as follows:[85]

> 'it has been argued repeatedly in the course of the present proceedings that in case of doubt the Court should decline jurisdiction. It is true that the Court's jurisdiction is always a limited one, existing in so far as States have accepted it; consequently, the Court will, in the event of an objection—or when it has automatically to decide the question—only affirm its jurisdiction provided that the force of the arguments militating in favour of it is preponderant. The fact that weighty arguments can be advanced to support the contention that it has no jurisdiction cannot itself create a doubt calculated to upset its jurisdiction. When considering whether it has jurisdiction or not, the Court's aim is always to ascertain whether an intention on the part of the Parties exists to confer jurisdiction upon it. The question as to the existence of a doubt nullifying its jurisdiction need not be considered when, as in the present case, this intention can be demonstrated in a manner convincing to the Court.'

It is submitted that in this passage the Court sought to achieve a nice balance and a middle way between the liberal and restrictive schools of interpretation in the matter of its own jurisdiction.[86]

That a doubt concerning the Court's jurisdiction existed in the *Aegean Sea Continental Shelf* case may be conceded: the question is, though, whether this doubt should have been set aside by 'preponderant' and 'convincing' arguments in favour of jurisdiction.

2. The first question to be considered related to the continuing validity of the General Act of 1928. In *Nuclear Tests* six judges had formed the opinion that the Act was still valid. No convincing argument has been advanced against that view. It seems therefore reasonable to conclude that the General Act is still in force. At the same time it is only wise to conclude that the Court is most unlikely ever to bring itself to saying so, and is therefore likely, when confronted with Applications seeking to base the jurisdiction of the Court on the General Act, to find one pretext or another for deciding against jurisdiction on another ground. To that extent the regrettable conclusion has to be drawn that the General Act is now a dead letter.

3. It is to be regretted too that the Court failed in this case to grasp the nettle of how to deal with States who fail to appear. Turkey undoubtedly was treated leniently in being allowed to 'enforce' the Greek reservation without having appointed an Agent and without having filed a preliminary objection in accordance with the Rules of Court. However, the Court seems to have made a move in the right direction when it adopted its revised Rules of Court to take effect in relation to proceedings instituted after 1 July 1978. Article 40(1) of the new Rules provides that, with a single exception, 'all steps on behalf of the parties after proceedings have

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85. PCIJ Ser A, No 9, p 32 (1927).
86. Lauterpacht H, 'Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties' (1949) 26 BYBIL 48.

been instituted shall be taken by agents'. The exception, set out in Article 38(5), occurs 'when the applicant State proposes to found the jurisdiction of the Court upon a consent thereto yet to be given or manifested by the State against which such application is made'. This is reasonable enough.

4. As already indicated,[87] the Court is to be congratulated on bringing on the oral hearing despite the request of Greece for a postponement. The Court has been criticised often enough for delays which were not of its making.

5. The Court is equally to be congratulated for rejecting the Turkish view that the judicial proceedings should be suspended simply because negotiations were in progress and even that the Court should not exercise jurisdiction at all because the controversy was 'of a highly political nature'.

6. As regards the Greek reservation (b), it is not easy for the present writer, whose native language is not French, to express a view on the precise meaning of the expression '*et, notamment*'.[88] Suffice it to say that the Court's reluctance to base itself on 'purely grammatical' interpretation of a text is not easy to reconcile with its view, expressed in *Competence of the General Assembly for the Admission of a State to the United Nations*,[89] that 'the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur'. It is true that, in the *Competence* case, the Court went on to say that 'if . . . the words in their natural and ordinary meaning are ambiguous or lead to an unreasonable result, then, and then only, must the Court, by resort to other methods of interpretation, seek to ascertain what the parties really did mean when they used these words'.[90] The interpretation of '*et, notamment*' suggested by Greece certainly did not lead to an ambiguous result. Whether the result was 'unreasonable' naturally is a more subjective matter and possibly did justify the Court in examining the historical evidence to try to discover what Greece's intention in 1931 really was. Less certain, however, is it that the Court interpreted the historical evidence correctly. The Court made much of the difference between the terms in which Greece accepted the compulsory jurisdiction of the Permanent Court of International Justice in 1929 and the terms in which it acceded to the General Act in 1931. The Greek Government sought to explain the difference by referring to an improvement in the political situation in the Balkans—a notoriously difficult matter to assess—during those two years.

7. The Court's conclusion that a dispute about the boundary of the

87. Above p 316.
88. The imposing array of French-speaking counsel in the Greek delegation has already been referred to. Of course there is no lack of competence in French among members of the Court, although it is interesting that, despite the fact that the case turned largely on the interpretation of French words, the majority chose to render in English the authoritative text of the Judgment.
89. ICJ Rep 1950, p 4 at 8.
90. Ibid.

continental shelf related to the territorial status of Greece is not convincing. In the first place, it is surely the case that, as Judge *ad hoc* Stassinopoulos put it, 'status is one thing, delimitation another'. The Court of course maintained that it would first be necessary for Greece to show that its islands were entitled to a continental shelf at all and that its arguments on this point would relate to the 'territorial status' of Greece. If this be so, however, it raises the question whether the Court should have declined jurisdiction on that ground at that stage. In a dispute about continental shelf boundaries, the question whether islands are entitled to a continental shelf at all, or perhaps only to a lesser extent of continental shelf than that attaching to mainland territory,[91] is surely a question appertaining to the merits. In the *Case concerning certain German interests in Polish Upper Silesia* the Court, in a well-known passage, said this:[92]

> '. . . the Court cannot in its decision on this objection in any way prejudge its future decision on the merits. On the other hand, however, the Court cannot on this ground alone declare itself incompetent; for, were it to do so, it would become possible for a Party to make an objection to the jurisdiction . . . have the effect of precluding further proceedings simply by raising it in *limine litis*; this would be quite inadmissible.'

These remarks were made in relation to an objection raised by Poland, the respondent State. There would seem to have been less reason why the Court itself should have raised such an objection at the preliminary stage. Unfortunately, the Court's attitude on this point may be used by certain parties to support the propositions (a) that the continental shelf is part of the territory of a State and (b) that islands are not entitled to a continental shelf. Both these propositions are believed to be incorrect.[93]

8. The Court's attitude to the Brussels Communiqué was positive and is to be welcomed. It would have been difficult for the Court to interpret the Communiqué as amounting to an actual submission to the jurisdiction by Turkey, and also of course by Greece. There is some merit in the suggestion of Judge *ad hoc* Stassinopoulos that the agreement in Brussels at least amounted to a pledge by both parties not to invoke any reservations to acceptance of the jurisdiction that had already been made, although it is not surprising that the majority were not prepared to go as far as that. There is some merit also in the suggestion of some judges that

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91. This question was dealt with in the decision handed down by the arbitrators in the *Anglo-French Continental Shelf* case on 30 June 1977, Cmnd 7438. See Colson DA, 'The United Kingdom-France Continental Shelf Arbitration', (1978) 72 AJIL 95; and 'The United Kingdom-France Continental Shelf Arbitration: Interpretive Decision of March 1978', (1979) 73 AJIL 112; McRae DM, 'Delimitation of the Continental Shelf between the United Kingdom and France' (1977) 15 Can YBIL 173: Blecher MD, 'Equitable Delimitation of Continental Shelf', (1979) 73 AJIL 60; and Brown ED, 'The Anglo-French Continental Shelf Case', (1979) 16 San DLRev 461.

92. PCIJ Ser A, No 6, pp 15-16.

93. Article 121 of the ICNT assimilates islands to other land territory for the purpose of entitlement to continental shelf rights, except in the case of 'rocks which cannot sustain human habitation or economic life of their own'. See also fn 49 above.

the Court should have declared that the parties were under a duty to negotiate a reference of the dispute to the Court. In 1953 the Court found that the United Kingdom was 'under an obligation to submit to arbitration' a difference between itself and Greece as to the validity under an Anglo-Greek commercial treaty of the claim of a Greek national,[94] and an arbitration did eventually take place.[95] It is also relevant to point out that the Brussels Communiqué was not the only occasion on which the Turkish Government showed signs of being willing to submit the dispute to the Court. It had already done so in a Note to the Greek Government dated 6 February 1975 and, on the strength of this, negotiations were held in Rome in May 1975 for the purpose—at least the Greek Government so thought—of drafting a special agreement submitting the dispute to the Court. It is interesting to speculate how the late Judge Lauterpacht would have approached a matter like this. Might not his fertile mind have seen an analogy between the present case and the *Admissibility of Hearings of Petitioners* case?[96] In that case he concluded that the Opinion given on the *International Status of South-West Africa*[97] by the Court in 1950 'cannot be deprived of its effect by the action of the State which has repudiated it'; that, where a gap had occurred in the system of supervision evisaged by the Opinion, it is 'consistent with that Opinion to interpret it in a manner which authorizes the filling of that gap'; and that judicial caution, if exaggerated, 'may amount to unwillingness to fulfil a task which is within the orbit of the functions of the Court as defined by its Statute'.[98]

9. Finally this case demonstrates once again how hazardous it is to institute proceedings in the International Court of Justice by way of unilateral Application. The Applicant State has to steer its way through the minefields represented by (i) problems of the jurisdiction of the Court; (ii) problems of the admissibility of the claim and the judicial function of the Court; and (iii) matters said to have an antecedent character even when the Court is considering the merits of the case, before it can persuade the Court actually to deliver a Judgment on the substance of the dispute. Once the dispute reaches that stage, the Applicant State may of course still fail; and even if it is successful on the merits, it may still suffer the frustration of being unable to enforce the decision. In fact, in the thirty-two years of the Court's existence, only in one or two cases have States, instituting proceedings by way of unilateral action, obtained what they would be likely to consider adequate satisfaction from the exercise, despite the considerable time, toil, trouble and expense involved.[99] Is it

94. *Ambatielos* case ICJ Rep 1953, p 10 at 23.
95. *Ambatielos Claim, Award of the Commission of Abritration*, (1956) 12 UNRIAA 83; 23 ILR 306.
96. ICJ Rep 1956, p 23.
97. ICJ Rep 1950, p 128.
98. ICJ Rep 1956 at 49, 50, 57.
99. Probably the most successful State instituting proceedings by unilateral application during this period was Cambodia in the *Temple of Preah Vihear* case ICJ Rep 1961, p 17; ICJ Rep 1962 p 6. A government may of course, for internal or external political reasons, decide to refer a case to the Court even if it is not entirely confident of being successful.

any wonder then that such actions before the Court are rare, and are getting rarer?

By coincidence, the only case currently before the International Court of Justice concerns another dispute relating to the delimitation of the continental shelf. This dispute, which concerns the boundary of the continental shelf between Libya and Tunisia, was referred to the Court on 1 December 1978 by Tunisia, acting however in pursuance of a special agreement between the two countries which was signed on 10 June 1977 and which entered its force on the exchange of instruments of ratification on 27 February 1978. It is to be hoped that in this case, which should not be marred by any jurisdictional controversies, the Court will be able to clarify certain matters concerning the delimitation of maritime boundaries. The Court's own Judgment in the *North Sea Continental Shelf* cases[1] was a useful beginning, and the Award of the arbitrators in the *Anglo-French Continental Shelf* case[2] took the matter further. However, since this seems to be a problem defying a general solution at UNCLOS III, it is most desirable that, in those situations where negotiations have led to no result, there be a flow of cases to international tribunals. A corpus of jurisprudence could then be built up which would ease the task of negotiators in future situations, leading hopefully to fewer disputes in this area of the law.

1. ICJ Rep 1969 p 3.
2. See fn 91 above.