

VARIOUS ASPECTS OF DISPUTE IN INTERNATIONAL LITIGATION

—CHIEFLY WITH REFERENCE TO MORELLI'S CONSTRUCTION—†

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1. The International Court of Justice declared in the *Nuclear Tests* case:

...the Court has first to examine a question which it finds to be essentially preliminary, namely the existence of a dispute, for, whether or not the Court has jurisdiction in the present case, the resolution of that question could exert a decisive influence on the continuation of the proceedings...

The Court, as a court of law, is called upon to resolve existing disputes between States. Thus the existence of a dispute is the primary condition for the court to exercise its judicial function; it is not sufficient for one party to assert that there is a dispute, since "whether there exists an international dispute is a matter for objective determination" by the Court.... The dispute brought before it must therefore continue to exist at the time when the Court makes its decision. It must not fail to take cognizance of a situation in which the dispute has disappeared because the object of the claim has been achieved by other means...¹

As clearly stated above by the Court, an existence of a dispute is a prerequisite for the international legal proceedings being duly instituted. This condition acquires a greater importance in case where the proceedings are instituted by means of unilateral application, invoking the obligatory jurisdictional clause.² Prior to the filing of application a dispute must have existed between that party and the other concerning the subject of application.³ Otherwise the application should be declared by a court as inadmissible. Consequently, the existence or not of a dispute is a preliminary question *par excellence*—even preliminary

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† See also my articles "The Notion of International Dispute" in *Sophia Law Review*, 1964, pp. 35 ff; "Various Aspects of International Legal Dispute—Reconsidering Morelli's Construction" in *Hitotsubashi Review*, Vol. LXXXII, No. 5, 1979, pp. 510 ff. The writer's observations here are based on these articles (in Japanese) with some additions, modifications and developments.

¹ *I.C.J. Reports* 1973, pp. 260, 270–271.

² This condition does not stand out in relief in case where a dispute is submitted to a court by means of special agreement between the them. For the mere fact of concluding a *compromis* bespeaks of the occurrence of a dispute between them.

³ The Permanent Court regarded in the *Electricity Company* case the argument of the Respondent Government as well-founded to the effect that a certain part of the claim did not form the subject of a dispute between the two Governments prior to the filing of application. On that score the same part of the claim was held by the Court to be inadmissible. *P.C.I.J. Series A/B*, No. 77, p. 83.

vis-à-vis any jurisdictional issue of a court in the sense that it is precisely in relation to a genuine dispute which is found to have existed, if a question is raised as to the jurisdiction of a court.

Furthermore, since a dispute constitutes the very object of judicial decision, it stands to reason that the dispute must continue to exist at the time of judgment to be rendered. A court is empowered *proprio motu* to pose and examine this pre-preliminary question as the International Court did in the cases submitted to it.

2. Now it must be asked what is the concept of international dispute.⁴ In answering this question, we can adopt as a *prima facie* criterion the well-known definition given by the Permanent Court in the *Mavrommatis* case, namely, "a dispute (*différend*) is a disagreement on a point of law or fact, a conflict of legal views or interests between two persons"⁵. By and large this definition seems to correspond to the common dictionary acceptance of the word. For example, Robert's *Dictionnaire* indicates the meaning of a dispute (*différend*) as "*désaccord résultant d'une différence d'opinions, d'une opposition d'intérêts entre deux ou plusieurs personnes*".

It may be furthermore asked whether the word of a dispute has a deeper or different meaning in law parlance. It would be sufficient here to cite the following definition in *Dictionnaire de la terminologie du Droit international* (1960):

*opposition entre des prétentions ou des intérêts se traduisant dans la vie pratique par l'affirmation respective de vues opposées, la prétention élevée de part et d'autre de les faire prévaloir...*⁶

Apparently, juxtaposition in the above *Mavrommatis* definition lends itself to disjointing a dispute to several species. Despite this and presumably, it does not purport to demur to a common understanding that a dispute is a disagreement, opposition occasioned by the difference of views or conflict of interests. Once a dispute arises, its subject-matter coming to the fore, as the case may be, is a difference of views or conflict of interests.

In sum, the core of the concept is a clash of claims. In law a dispute is a clash of legal claims. A conflict of legal views or interests may set a State against another State, actively opposing and contending in argument. At that moment a dispute exists. The difficulty does not consist in the definition of the word, but the appraisal of a genuinely contentious situation between the States as an objective fact.⁷

⁴ The qualified word "international" means "between subjects of international law". Ordinarily, international dispute is a dispute between States as principal subjects of international law. But international organization as another subject is able to be a party of the international dispute, though devoid of capacity to appear before the Court. As a matter of fact, the British Government contended in the *Northern Cameroons* case that if any dispute did at the date of the Application exist, it was between the Republic of Cameroon and the United Nations or its General Assembly.

⁵ *P.C.I.J. Series A, No. 2*, p. 11.

⁶ See pp. 209-211.

⁷ The Permanent Court recognized in the *Mavrommatis* case that "the suit 'certainly possesses these characteristics' (shown by the above-mentioned definition). This finding was objected by the Dissenting Judges (Lord Finlay, Moore). *P.C.I.J. Series A, No. 2*, pp. 38, 54. The point was somewhat complicated by the circumstances which the initial dispute between a private person and a State was transformed into the State controversies with the step of a Party's diplomatic intervention supporting the cause of its citizen. Later on the International Court in the *South West Africa* cases, referring verbatim to the *Mavrommatis* definition, applied the more pertinent test, i.e. "claim of one party is positively opposed by the other." *I.C.J. Reports 1962*, p. 328.

3. The former Judge Morelli is highly renowned for his distinguished academic writings in the field of international procedural law.⁸ While having participated as a judge in the activities of the International Court of Justice (1961–1970), he wrote a series of opinions dealing with the intricate questions of jurisdiction, and more particularly, gave the finest analysis of the basic notion of a dispute in international litigation.⁹ He said:

After so many years, it is not, in my opinion, possible to keep to that definion [viz. the Mavrommatis definition] in disregard of the thorough analysis to which the concept of an international dispute has since been subjected by writers.¹⁰

Morelli reformulates more succinctly the Mavrommatis definition as “a disagreement on a point of law or fact or of a conflict of interests”, because a conflict of legal views and a disagreement on a point of law is one and the same thing. Throwing doubt on the exactitude of such a reformulated definition, he points out neither a disagreement on a point of law or fact nor a conflict of interests is not the same with a dispute itself.

First, a disagreement on a point of law or fact is commonly present where there is a dispute. But a dispute may extst without this disagreement. At any rate that alone is not sufficient for a dispute to be regarded as existing.

Secondly, a dispute normally presupposes a conflict of interests (real or supposed). But this conflict may likewise exist irrespective of any corresponding dispute. A conflict of interests forms a point of reference with regard to a dispute far from being identified with it.

According to Morelli, a dispute exists when the parties take the opposing attitudes in relation to a given conflict of interests. The attitude of the parties may consist of a manifestation of will (*atteggiamento della volontà*) by which each of the parties requires that its own interests be realized. It is the case of a dispute resulting, on one side, from a claim by one of the parties and, on the other side, of the contesting of that claim by the other party.

In addition to the most typical case consisting of a claim contested, Morelli propounds the view that one of the opposing attitudes of the parties may consist of, not a manifestation of will, but a course of action (*comportamento*) by means of which the party pursuing that course directly achieves its own interests.

Consequently, according to Morelli, it is possible to sub-categorize a dispute in the following types.

The first type is a dispute existing when one of the parties make a claim to the other who rejecting it, takes the attitude of contestation. The second type is a dispute existing when one of the parties make a claim to the other party who instead of contesting it, adopts

⁸ *Fatto e diritto nel processo internazionale; Considerazioni sulla soluzione giudiziaria delle controversie internazionali; Estinzione e soluzione di controversie internazionali; Nozione ed elementi costitutivi della controversia internazionale; Esistenza della controversia e ricevibilità della domanda davanti alla Corte internazionale di giustizia* (the foregoing articles and opinions as the Judge are contained in *Studi sul processo internazionale*, 1963); *Ancora della controversia come condizione di ricevibilità della domanda. Giurisdizione e diritto subbietivo sostanziale; Esperienza giudiziarie sulla nozione di controversia internazionale; Controversia internazionale interpretativa* (the foregoing are contained in *Nuovi studi sul processo internazionale*, 1972); “Controversia internazionale, questione, processo” in *Rivista di diritto internazionale*, 1977, pp. 5 ff.

⁹ Speaking his name, Lachs, ex-President of the International Court said: “parmi ses contemporains, il n'en est aucun qui ait autant réfléchi aux problèmes de la procédure internationale”. *Studi in onore di Gaetano Morelli*, 1975, p. 423.

¹⁰ Dissenting Opinion in *S.W.Africa cases. I.C.J. Reports 1962*, p. 566.

a course of conduct inconsistent with the satisfaction of the claim (*inadempimento*). Chronologically inversed, there is in the first place a course of conduct by one of the parties to achieve its own interests sacrificing those of the other who reacts by making a protest thereto. This is the third type of a dispute.¹¹

Morelli lays stress on the necessity that there is at least a manifestation of will by one party as the constituent element of a dispute without which a dispute cannot arise. At any rate, starting from the critical observations concerning the definition of a dispute in the *Mavrommatis* case, and rejecting the Court's exposition of this many-faced phenomenon, Morelli comes to the conclusion that there are three different types of a dispute by introducing a course of conduct as a relevant element constitutive of a dispute.

4. As was written in my former articles, I cannot share the view of Morelli in so far as a course of conduct on the part of one party is considered as a constituent element of a dispute. In my opinion, a dispute arises where the opposing or confronting claims between the parties are established to exist in regard to a certain subject-matter.¹² In short, it is a "conflict of will" (*contrasto di volontà*) between the subjects of international law.¹³

Thus, if State A lodges a claim to State B, and the latter positively resists to it by the contesting attitude, a dispute arises between these States. In fact the second type of a dispute in the Morelli's definition, that is, a dispute where one party does not take a course of conduct meeting the other's claim, is nothing other than a variant of the ordinary type of a dispute.¹⁴ In this context, a course of conduct taken by one party not satisfying the other's claim is not considered as a conduct *tout court*, but as a conclusive fact manifesting implicitly that party's will to contest the claim.¹⁵

On the other hand, if State A does injury to the interests or right of State B and the latter enters a protest, the injurious conduct of the former may well be a cause giving rise to a dispute, but not a constituent element thereof.¹⁶ In this case, while State B claims against State A to make a reparation (relating to the past) and/or to respect its interests or right (relating to the future), it may occur that the latter does not accede to it. Only then, a dispute is regarded to have arisen between the States concerned.¹⁷

¹¹ *Studi sul processo internazionale*, pp. 163 ff; "Controversia internazionale, questione, processo" in *Rivista*, 1977, pp. 5-6.

¹² "The notion of International Dispute" in *Sophia L. R.* pp. 44 ff.

¹³ Salvioli, "Nascita ed estinzione di controversia internazionale" in *Scritti in onore di Tomaso Perassi*, II, 1967, p. 253.

¹⁴ Arangio-Ruiz, "Controversie internazionali" in *Enciclopedia del diritto*, X, p. 391.

¹⁵ De Visscher points out that the resistance may even take the form of "la forme de la simple enertie". And we can say that there is a dispute if the circumstances allow us to see "dans le silence du destinataire une opposition équivalant à un refus." *Aspects du droit procédural de la Cour internationale de Justice*, 1966, p. 33.

¹⁶ If State A infringes upon the right of State B, and a protest by the latter is refused by the former, a dispute arises between these States. This typical situation may be envisaged from the interpretative viewpoint of the well-known formula limiting the jurisdiction of the Court *ratione temporis*, i.e. to the "disputes which arise on and after a certain date with regard to situations or facts subsequent to the same date". In order to discern the relevant situations or facts as being "the real cause of the dispute", the conduct of A in the above factual context may be reasonably located not as the constituent element of the dispute, but as the situations or facts which constitute the real cause or source of the dispute. *Contra* Morelli, "Nozione and elementi" in *Studi sul processo internazionale*, pp. 133 ff.

¹⁷ A protest-claim may in its turn be resisted by the persisting course of conduct on the part of the defaulting State.

Indeed, assuming that a dispute comes into existence coincidentally with the unilateral step of protest by one party, the procedural requirement that a dispute must preexist objectively before a suit being instituted would become almost a redundancy, since the simultaneous filing of protest and application would be sufficient to create a dispute. Certainly in the above situation, a concrete clash of interests between the parties will grow strained to evoke a dispute. Yet, such a situation should be distinguished from another which has been ripened into an actionable controversy.

In my former article, I mentioned to the following opinion of Judge Moore:

There must be a pre-existent dispute, certainly in the sense and to the extent that the government which professes to have been aggrieved should have stated its claims and the grounds on which they rest, and that the other government should have had an opportunity to reply, and if it rejects the demands, to give its reasons for so doing.¹⁸

In the opinion of Judge Moore, "these propositions, tested by the ordinary conceptions of fair dealing between man and man, should seem to be self-evident". The criterion offered here is practical, rational and reasonable. On that score it may be safely assumed that the conceptions reflect the *communis opinio* of international society.¹⁹

With reference to the definition of international dispute, it is suggested that we should not place ourselves merely on the plane of literal or logical interpretation. A teleological interpretation is required here also, taking into consideration of the *ratio* underlying the adjudication clause. What is then the teleological consideration which usually inspires the drafting of the clauses referring to the conditions of "dispute" and/or "prior negotiation"? The clear exposition is given in the following terms:

...the prestige and interests of States should not be harmed by a summons to appear before an international tribunal and the consequential opening of a long and costly trial when the States concerned could easily have acceded to the demand of the complainant State before being made answerable in court.²⁰

Undoubtedly, the *ratio* thus formulated may cover the condition of the preexistence of a dispute and more appositly, the reference to a dispute which cannot be settled by negotiation. Indeed, in international law States are free to resort to the means of their own choice for the settlement of disputes. As to their priority, however, a direct negotiation is evidently preferred over others at any rate as the first step. International adjudication in its turn counts, so to speak, as an ultimate remedy. More than that, as a matter of feelings, a step

¹⁸ *P.C.J.J., Series A, No. 2, p. 61.*

¹⁹ Arangio-Ruiz also emphasizes that the conflicting attitudes of the parties should be in a state of "a minimum of dialogue". *Enciclopedia del diritto*, X, p. 388.

²⁰ Cassese, "The Concept of «Legal Dispute» in the Jurisprudence of the International Court" in *Il processo internazionale*, p. 176. In a similar vein, it is said that "they are inserted purposely to protect the parties, so far as possible, from international litigation that is unnecessary, premature, inadequately motivated, or merely specious". Joint Dissenting Opinion of Judges Spender and Fitzmaurice in the *South West Africa* cases, *I.C.J. Reports* 1962, p. 563. On the other hand, the Permanent Court in the *Interpretation of Judgements Nos. 7 and 9 referred en passant*: "it would no doubt be desirable that a State should not proceed to take a serious a step as summoning another State to appear before the Court without having previously, with reasonable limits, endeavoured to make it quite clear that a difference of views is in question which has not been capable of being otherwise overcome". *P.C.I.J. Series A, No. 11, pp. 10-11.* Indeed, it is contended that the lack of teleological viewpoint represents a methodological gap in the jurisprudence of the International Court. Cassese, *cit.*, pp. 199-200.

summoning another State to appear before a court is inveterately looked upon as an unfriendly act whether or not with previous caveat. Particular attention may be called to the assertion that a diplomatic negotiation aiming at the agreement of amicable settlement has become a duty enjoined by general international law.²¹

If this proposition is accepted, the condition of prior negotiation in the adjudication clause is reduced to a specific insertion made *ex abundanti cautela*. Apart from the possibility of interpreting the jurisdictional clause in the light of general international law to this effect, the reference to the existence of a dispute simply and solely should be still interpreted in the sense that the aggrieved State must at least afford to the other an opportunity of considering its claim. Whatever teleological considerations may be, a controversy is a form of dialogue and as such, it must have a minimum to develop into forensic confrontation.

In my view, the requirement about the existence of a dispute may be more directly linked with the function of a court. The task of a judicial court is to state the law in the dispute. Being contributory to the peaceful settlement of international disputes, its essential function is to clarify, declare and concretize the law in State controversies.²² In order to have a dispute adjudicated by a court, it is a *sine qua non* that the subject-matter of a dispute (*obiectum litis*) must be defined. Obviously, this is a matter of formulation by the parties. In any event, from this point of view, emphasis is laid on the existence of a legal dispute *qua* clash of legal claims which is actionable. However, the mutual confronting of legal positions could not be possible ascertained without a minimum of official exchanges, which should be of course distinguished from a diplomatic negotiation as a full-scale endeavour to reach an amicable solution of a dispute already existent.

In view of the above considerations, the thesis that a dispute exists merely by one party's entering a protest against the injurious course of conduct of the other cannot be accepted, in so far as an opportunity of response is denied to the responsible party; the mutual conflict of legal views—to the extent that it is not revealed—does not yet give shape to a controversy.²³ From the so-called teleological interpretation, which does not purportedly furnish

²¹ According to Bourquin, "ni Article 36, 2 du Statut de la Cour, ni aucune règle de droit coutumier n'exige que la procédure diplomatique ait précédé la procédure judiciaire". "Dand quelle mesure la recours à des négociations diplomatiques est-il nécessaire avant qu'un différend puisse être soumis à la juridiction internationale?" in *Hommage d'une génération de juristes au Président Basdevant*, 1960, p. 49. *Per contra*, it is propounded by Salvioli that "la clause expresse de négociations diplomatiques doit être considérée comme l'insertion écrite d'une principe devenue désormais de droit international commun". "Problèmes de procédure dans la jurisprudence internationale" in *Recueil des cours*, I, 1957, p. 565. The International Court itself, not having jumped at conclusion in this respect, held in the *Right of Passage* case that "assuming that there is substance in the contention that Article 36(2) of the Statute, by referring to legal disputes, establishes as a condition of the jurisdiction of the Court a requisite definition of the dispute through negotiations, the condition was compiled with to the extent permitted by the circumstances of the case." *I.C.J. Reports* 1957, p. 149.

²² In this connection, the so-called "a heterogeneity of aims" is cogently pointed out in the sense that "debarred from directly acting as an important instrument of peace, the Court has made a tangible contribution to the development and clarification of the rules and principles of international law". Lauterpacht, *The Development of International Law by the International Court*, 1958, p. 5.

²³ The Permanent Court declared in *Certain German Interests* case, referring to Article 23 of the Geneva Convention: "Now a difference of opinion does exist as soon as one of the Governments concerned points out that the attitude adopted by the other conflicts with its own views. Even if, under Article 23, the existence of a dispute were necessary, this condition could at any time be fulfilled by means of unilateral action on the

any pretense for protractive negotiation, the requirement is derived that there should be some formal manifestation of will such as "due warning" or "*mise en demeure*" on the part of the aggrieved State which in its turn is rejected or disregarded by the defaulting State.²⁴ The "warning" or "*mise en demeure*" will be commonly attendant upon an actionable dispute. But this fact, if it is not proper to take the statement in a formalistic way, will not permit the flexible concept to be transformed into the rigid criterion.

In this connection, we may recall the *Right of Passage* case. In this case Portugal instituted the proceedings against India before the International Court, as it were, by surprise. The Court concluded that the filing of application by Portugal was not contrary to Article 36 of the Court's Statute nor infringed upon the right of India based on its declaration of acceptance under the same Article. Moreover, the Court found that a dispute was already existent between the parties which was defined as a legal dispute concerning the question of right of passage over Indian territory.²⁵ The behaviour of the applicant party may be criticized as inconsistent with the rule of fair dealing, but as a matter of law, a surprise suit does not *per se* carry with it the irregularities in instituting the proceedings, let alone with the non-existence of a well-defined dispute.

As said above, I do not agree with the opinion of Morelli in its entirety. Nevertheless, he deserves great credit for giving the clear formulation technically comprehensive of the multifarious appearances of international disputes in the *fons et origo*. It seems to me that its intrinsic merit was the most significantly evaluated and confirmed, when Judge Fitzmaurice supporting the view of Judge Morelli, his colleague, amplified the schema tersely put by the following exhaustive formula:

...This minimum is that the one party should be making, or should have made, a complaint, claim, or protest about an act, omission or course of conduct, present or past, of the other party, which the latter refutes, rejects, or denies the validity of, either expressly, or else implicitly by persisting in the acts, omissions or conduct complained of, or by failing to take the action, or make the reparation, demanded. If these elements exist, then as Judge Morelli said, it does not matter whether the claim comes first, the rejection (in terms or by conduct) coming afterwards, or whether the conduct comes first, followed by a complaint, protest or claim that is not accepted.²⁶

part of the applicant Party. And the Court cannot allow itself to be hampered by a mere defect of form, the removal of which depends solely on the Party concerned". *P.C.I.J. Series A*, No. 6, p. 14. According to Morelli, this "difference of opinion" is an improper expression of a dispute which corresponds to that arising from a protest in his schema. *Studi*, p. 124. However, this finding of the Permanent Court is thoroughly criticized in the following points: (1) The Court presumably reached the above-mentioned conclusion concerning Article 23 which did not call for the prior negotiation, not having fully realized the difference between the two requisite conditions, viz. the existence of a dispute and diplomatic negotiations. (2) Were the Court's conclusion right, i.e., were the subjective assessment of the existence of differing opinions sufficient to substantiate the prerequisite condition, the latter would be meaningless. Cassese, *op. cit.*, pp. 183-189; Abi-Saab, *Les exceptions préliminaires dans la procédure de la Cour internationale*, 1967, pp. 129-130. The Permanent Court confirmed the above position also in *Interpretation of Judgements Nos. 7 and 8* (The Chorzów Factory). At length it was recognized in the *Electricity Company* case that before the filing of the Application, a dispute must have arisen between the Governments.

²⁴ *Supra*, n. 20.

²⁵ *I.C.J. Reports* 1957, pp. 145-149..

²⁶ *I.C.J. Reports* 1963, pp. 109-110. Under this formula, it should be noted that a protest *tout court* does not give rise to a dispute (...a complaint, protest or claim *that it is not acceded*). Concerning the indispensable addendum—in the opinion of Judge Fitzmaurice—for the existence of a dispute in the legal sense, see *infra*, p. 15.

5. As a general principle, it is a legal dispute (*différend juridique*) which constitutes the subject of international adjudication. What is a legal dispute? According to the definition given by Morelli, it is a dispute with regard to which the parties are in conflict by invoking the legal reason. When a State makes a claim or contests the other's claim, it usually puts forth the reason for so doing—asserting that its attitude is in conformity with a given criterion. This criterion may be composed of the legal rules. Then the reason is legal and a dispute contestable on the basis of the legal reason is qualified as a legal dispute.

As mentioned above, Morelli takes the view that although a legal dispute is commonly accompanied with a disagreement on a point of law or a conflict of legal views, such a disagreement or conflict cannot be identified with a dispute itself. In support of this thesis, the following points are analytically elucidated; (1) a “question” as distinct from a dispute; (2) a dispute and a question in international litigation; and (3) the difference in effect attached to the settlement of a dispute or a question.²⁷

In the first place, a “question” may cover any point open to doubt. A query whether the reason of a claim or its refusal is well-founded or not, involves questions in so far as they are doubtful, as to which a disagreement or conflict of views may arise.

To decide whether the reasons are right or wrong may depend upon a certain number of points. If these points are doubtful, the same number of questions arise. The legal reason is a complex affirmation that a claim or its contestation is respectively in conformity with the legal rules. Individual affirmations on a point of law or fact are nothing more than the elements of the legal reason. And these points, if open to doubt, create a series of questions of law or fact. In the last analysis, therefore, the global question, viz. the legal reason is resolved into a certain number of questions of law or fact. However, it must be noticed that the questions of law or fact do not necessarily co-exist with the global question. If a point of fact is beyond any doubt, only legal questions are presented to be solved and a point of law, vice versa.

At any rate, according to Morelli, the questions of law and fact are related to the legal reason, in respect of which a disagreement or conflict of views arises. Hence a disagreement or conflict is one thing, a dispute is another.

Secondly, a legal question is raised either connectedly or unconnectedly with a dispute. When, for instance, a legal question is related *ex hypothesi* to a certain—concrete or abstract—rule of international law, a disagreement of views may arise concerning the question of its interpretation on the part of the States concerned. This disagreement is presented either connectedly or inconnectedly with a given dispute. Granting that there is some connection, the disagreement of views as such cannot be identified with a dispute. Notwithstanding, in some cases, it can be regarded as equivalent to a dispute correspondingly to the formulation of a claim or its contestation on the part of the States concerned. This special type of dispute is termed by Morelli as “interpretative dispute” (*controversia interpretativa*).²⁸

²⁷ Morelli, “Controversia internazionale, questione, processo” in *Rivista*, pp. 6–12.

²⁸ The notion of “interpretative dispute” is constructed on the assumption that the dispute and question coincide in their scope. Such a coincidence does not exist when a legal relationship dependent upon an abstract norm contemplating a certain type of conflict of interests is invoked as the reason in the dispute concerning a single conflict of interests. On the contrary, the dispute and question coincide in their scope when a concrete norm creative directly of a legal relationship is invoked in the dispute concerning a single conflict of interests, or an abstract norm contemplating a certain type of conflict of interests is invoked in the dispute

Where there is a dispute, it is possible on the basis of special agreement that the proceedings should be instituted not to secure a decision of the dispute as a whole, but solely to resolve a question of law or fact which will be necessary for the settlement of the dispute (by means of treaty or adjudication).

According to Morelli, such a type of the proceedings can be instituted not only by the special agreement, but by the filing of unilateral application. Article 36 of the Statute of the Court envisages the possibility of creating the jurisdiction of the Court concerning a certain category of "questions" through the medium of optional clause (paras. 2-4). Paragraph 2 of that Article refers to "b. any question of international law" (question of law) and "c. the existence of any fact which, if established, would constitute a breach of an international obligation (question of fact). Either category of these questions does not *per se* constitute a dispute. But in order to submit the question to the Court, it must have a certain relationship with the dispute in the sense that the settlement of the latter depends upon the answer to be given to the former. The relationship—though a terminology is not the most appropriate—is indicated by the words "in all legal disputes *concerning*" (*les différends d'ordre juridique ayant pour objet*). It would be correct to speak of a question constituting the subject of the proceedings. It is less correct to say that a question constitutes the subject of a dispute. Referring to, for instance, the question of fact in c. of paragraph 2, the subject of a dispute is the reparation claimed; the existence of any fact mentioned there is the subject of a question. On the other hand, the legal dispute concerning "a. the interpretation of a treaty" is regarded as involving the question of interpretation the solution of which is necessary for the settlement of the dispute, not merely the genuine interpretative dispute as termed by Morelli, since the question of law or fact is mentioned in b. and c. of paragraph 2.²⁹

Thus, according to Morelli, the question may constitute the subject of the proceedings—not of the dispute—and the dispute in its turn is a prerequisite to the international proceedings.

Thirdly, a dispute is not only a prerequisite of the proceedings, but the very subject thereof. *Res judicata* is objectively limited to the decision of a dispute. With reference to the questions of law or fact the solution of which is necessary for the purpose of arriving at the decision of the dispute, *res judicata* is not formed. Such is also the case with the question of law which is presented as the sole subject of the proceedings. For instance, *res judicata* does not exist concerning the interpretation of a rule in the sense that the interpreted rule is binding between the parties as regards all the possible conflicts of interests contemplated by the same rule.

concerning a certain type of conflict of interests which may arise in the future. On the assumption of such a coincidence, if the parties formulate a claim and its contestation as directly referential to a legal norm, a disagreement of views concerning its interpretation can be identified with the dispute rather than the reason of a claim and its contestation. This is the "interpretative dispute". It may be difficult to ascertain whether the subject of the proceedings is the interpretative dispute or question. This point should be decided on the actual terms of *compromis* or application instituting the proceedings. *Nuovi studi*, pp. 115 ff.

²⁹ As to the compromissory clause, i.e. the clause referring to the disputes arising out of the interpretation or application of the treaty, it should be considered that it comprehends not only the genuine interpretative dispute, but the questions the solution of which are necessary for the settlement of the dispute. Because it envisages the disputes arising out of the application of the treaty, i.e. all the disputes where the rules of the treaty are invoked as the reason of a claim or its contestation. *Nuovi studi*, pp. 127-128.

Nevertheless, the decision with which the proceedings are concluded, having the question of law as its sole subject (e.g. the question of interpretation), even if not endowed with the authority of *res judicata*, still produces the limited effect in that it furnishes in a binding manner the necessary elements for the subsequent settlement of the dispute (by means of treaty or adjudication).³⁰

Thus a clear-cut distinction is drawn in legal effect between the decision of the dispute and that of the question—even if it constitutes the sole subject—in international litigation.

When a claim of one party and its contestation by the other with regard to a given subject is respectively formulated as in conformity with rules of international law, it is safe to assume that there exists an international legal dispute.³¹ To put it differently, a legal dispute is a clash of legal claims, i.e. antithesis of two competing claims on the basis of law. In a similar vein, the formula “disputes with regard to which the parties are in conflict as to their respective rights” is also widely employed. Of necessity and plainly, such a dispute manifests itself in the form of a conflict of legal views, without which we cannot speak of a legal dispute. Hence a conflict of legal views is the very hall-mark of a legal dispute. I, for one, maintained this position so far. And it seems that the position is in line with the jurisprudence of the International Court.³²

Notwithstanding, this does not mean that the Court denies the possibility of separating divergent views from a dispute in the handling of actual cases. The Court observed in the *Nambia* case:

The fact that, in the course of its reasoning, and in order to answer the question submitted to it, the Court may have to pronounce on legal issues upon which radically divergent views exist between South Africa and the United Nations, does not convert the present case into a dispute....³³

Furthermore, the Court in the *Nuclear Tests* case explicitly distinguished a dispute from legal questions forming a means necessary for its settlement:

While the judgment of the Court which Australia seeks to obtain would in its view have been based on a finding by the Court on questions of law, such finding would be only a means to an end, and not an end itself.³⁴

³⁰ The authority of *res judicata* is attached to the judgment of the Court confirming a certain interpretation of the rule in the genuine interpretative dispute. *Nuovi Studi*, p. 123.

³¹ See Joint Dissenting Opinion of Judges Onyeama, Dillard, Aréchaga and Waldock in the *Nuclear Tests* case: “. . . the claims submitted to the Court in the present case and the legal grounds advanced in support of them appear to us to be based on rational and reasonable grounds. Those claims and legal contentions are rejected by the French Government on legal grounds. In our view, these circumstances in themselves suffice to qualify the present dispute as a ‘dispute in regard to which the parties are in conflict as to their legal rights’ and as a ‘legal dispute’ . . .” *I.C.J. Reports* 1974, p. 366.

³² “their opposing attitudes relating to the performance of the obligations of the Mandate by the Respondent as Mandatory” (*I.C.J. Reports* 1962, p. 328); “the opposing views of the Parties as to the interpretation and application of relevant Articles of the Trusteeship Agreement” (*I.C.J. Reports* 1963, p. 27); “a situation in which the two sides hold clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations” (*I.C.J. Reports* 1950, p. 74); “‘the conflict of legal views’ between Parties which the Permanent Court of International Justice in the case of the *Mavrommatis Palestine Concessions* . . . includes in its definition of a dispute” (*I.C.J. Reports* 1960, p. 34); “certain sovereign rights being claimed by both Greece and Turkey, one against the other” (*I.C.J. Reports* 1978, p. 13).

³³ *I.C.J. Reports* 1971, p. 24.

³⁴ *I.C.J. Reports* 1973, p. 263.

On the other hand, judicial experiences show that the States concerned may agree to submit for decision to the Court not a dispute as a whole, but legal questions the solution of which are necessary for the subsequent settlement of a dispute. In the *North Sea Continental Shelf* cases, the special agreement between the parties requested the Court to decide the questions concerning principles and rules of international law applicable to the delimitation as between the parties of the areas of the continental shelf in the North Sea.³⁵

Apart from the construction of various terms used in the Statute and Rules of the Court such as "the subject of the dispute," "the claim", "statements of the facts and grounds on which the claim is based," "submissions," etc.,³⁶ I would like to offer some remarks in order to clarify my position in connection with hard and fast distinctions theoretically established by Morelli.

In the first place, according to Morelli, a dispute and a conflict of legal views are different things. The latter is exclusively concerned with questions conceptually distinct from a dispute. As a general proposition we can say that not a question, but a dispute must exist.³⁷ But a point is whether a conflict of legal views on a question can constitute a dispute in itself or not.³⁸ It is argued that a conflict of views may have a certain relationship with a dispute, but a dispute does not arise out of a conflict of views assuming that it cannot be the object of a dispute. However, it is problematical to make too rigid distinction between these two concepts, difference being only relative and not absolute as suggested by the expressions such as "the disputed question," "the questions at issue" and so on. The term of "question" has a broad meaning—e.g., as defined by Robert's *Dictionnaire*: "*sujet qui implique des difficultés à résoudre*"—and so there is no reason why the possibility of a dispute being configured as a conflict of views concerning a question must be *a priori* excluded, if a view of one party is positively controverted by the other. Such a type of dispute is contemplated in Article 60 of the Statute referring to "dispute (*contestation*) as to the meaning or scope of the judgment". Admittedly, this dispute is posed as a conflict of views concerning the meaning of the judgment.³⁹ Not only that, a dispute may likewise arise from the interpretation of a treaty. To be sure, a mere divergence of opinion is not sufficient for a dispute being regarded to exist in the matter of treaty interpretation. However, if both parties are in conflict concerning the interpretation of a treaty—whether or not it bears on a dispute elsewhere—a legal dispute *qua* contending in argument exists between the parties, which comes within the purview of the Statute's formula: "a legal dispute concerning the interpretation of a treaty". Again, this is attested by the admitted category of an "interpretative dispute" in the definition of Morelli, though it is configured as distinct from a question of interpre-

³⁵ *I.C.J. Reports* 1969, p. 6.

³⁶ For instance, as stated by Judge Basdevant, the subject of the dispute and the subject of the claim are explicitly differentiated in the Rules of Court. *I.C.J. Reports* 1959, p. 30.

³⁷ Judge Gros affirmed in the *Nuclear Tests* case: "But it is not sufficient to put a question to the Court, even one which as presented is apparently a legal question, for there to be, objectively, a dispute". *I.C.J. Reports* 1980, p. 277.

³⁸ See the opinion of Bourquin, *op. cit.*, p. 51: "Pour que le différend existe, il suffit donc qu'il y ait désaccord sur un point de droit ou de fait. Les conditions dans lesquelles ce désaccord s'accuse importent peu: c'est son existence qui est requise, non une certaine façon de la révéler".

³⁹ "Obviously, one cannot treat as a dispute . . . the mere fact that one Party finds in the judgment obscure when the other considers it to be perfectly clear. A dispute—in the sense of Article 60 of the Statute—requires a divergence of views between the parties on definite points". *I.C.J. Reports* 1950, p. 403.

tation on the basis of intricate reasoning, but in any event a dispute consists in the interpretation of a treaty.

Secondly, if we place ourselves on the broad and non-rigid plane as above-mentioned, it is no longer necessary to resort to exigetic reconstruction of Article 36, paragraph 2 of the Court's Statute. Indeed, it is pointed out that the four classes of legal disputes mentioned in the said paragraph and disputes with regard to which the parties are in conflict as to their respective rights "have to all intents and purposes the same scope"⁴⁰. Hence, when there arises a clear-cut opposition of views concerning a question of international law with a certain subject, e.g. the performance or non-performance of certain obligations imposed by international law, it may be brought before the Court as a dispute and it is immaterial for the Court in its turn to analyse whether it is a dispute or disputed question. A dispute concerning the existence of constituting a breach of an international obligation may be also made the subject of a binding decision by the Court independently of another action on the claim of reparation. I cannot see why this workable test tried in the judicial experiences must be replaced by more logical, but more artificial criterion.

Thirdly, it is propounded that a decision of the "question" submitted to the Court produces not the authority of *res judicata*, but merely the limited effect in the total context of dispute-settlement. Under the principle generally accepted, decisions on an incidental or preliminary question which have been rendered with the sole object of adjudicating upon the merits of the case do not constitute *res judicata*. However, in case where the legal question *qua* question is put as the principal object of a suit, it is beyond doubt that the decision of the Court constitutes *res judicata* in the sense of Article 59 providing that the decision of the Court has binding force "in respect of that *particular case*" (*dans le cas qui a été décidé*), and also in its effect that the parties are precluded to request the re-examination of the case which has been decided (*ne bis in idem*).

A legal dispute is brought before the Court as the mutual confronting of legal claims or in other words, as the conflict of views concerning the existence of legal relationships favourable to a claim or its contestation.⁴¹ As seen above, Morelli's sharp scalpel of logic

⁴⁰ Joint Dissenting Opinion of Judges Onyeama, Dillard, Aréchaga and Waldock. *I.C.J. Reports 1974*, pp. 358-359.

⁴¹ It may be mentioned in passing that besides a legal dispute, there is a non-legal (political) dispute between the States. In this category of dispute, the parties contend against one another by invoking a non-legal reason, i.e. political, economic or military considerations. If both of the parties resort to a non-legal reason, there is a political dispute pure and simple. But if one party *ex hypothesi* puts forth a legal claim and the other resists it by invoking a political reason, the dispute will assume a Janus-faced aspect: legal and political. For the assumption of the jurisdiction by the Court, therefore, a preliminary question may be raised as to the characterization of the dispute. Under the clause having previously accepted the jurisdiction of the Court, a solution of this preliminary question is dependent upon the nature of the applicant's claim, which should be provisionally decided on the basis of apparently legal character of a claim (*fumus boni juris*). It is sensibly propounded that "the issue of 'legal or political dispute' is to be determined not on the basis of whether the applicant's claim is right but exclusively on the basis of whether it discloses a right to have the claim adjudicated". Joint Dissenting Opinion of four Judges, *I.C.J. Reports 1974*, p. 364. On the other hand, the International Court in the *United States Diplomatic and Consular Staff case*, authoritatively declared: "... legal disputes between sovereign States by their very nature are likely to occur in political contexts, and often form only one element in a wider and long-standing political dispute between the States concerned. Yet never has the view been put forward before that, because a legal dispute submitted to the Court is only one aspect of a political dispute, the Court should decline to resolve for the parties the legal questions at issue between

puzzlingly analyses to the nail a complicated admixture of *lis* into the conflict of interests, opposition of views, questions, legal reasons, etc. all of which must be strictly distinguished from the dispute itself. However, in the actual dispute, these conceptually distinct elements merge into the contending claims by the parties on the plane of positive law. To objectively ascertain a genuinely contentious situations between the States is a precondition for the international legal proceedings being duly instituted and for the exercise of judicial function on the part of a court of law. The thing that matters is not the last analysis, but to construct the feasible concepts consonant with the spirit and requirements of international proceedings. It may be feared that the excessive finess of the technical construction, though it is an academic contribution in itself, cannot give useful play to its value within the international procedural system which is not formalistic.⁴²

6. Once the existence of a dispute is established, is the dispute *ipso facto* entertainable by the Court for its adjudication? The International Court, while having recognized in the *North Cameroons* case the existence of a dispute at the date of the Application, found that it could not adjudicate upon the claim of the Applicant. In reaching this decision, the Court said:

The function of the Court is to state the law, but it may pronounce judgment only in connection with concrete cases where there exists at the time of adjudication an actual controversy involving a conflict of legal interests between the parties. The Court's judgment must have some practical consequence in the sense that it can affect existing legal rights or obligations of the parties, thus removing uncertainty from their legal relations. No judgment on the merits in this case would satisfy these essentials of the judicial function.⁴³

Notwithstanding the statement that the Court did not find it necessary to explore the meaning of "interest" (*intérêt*), it would seem for the Court virtually to have raised *ex officio* the question of interest in the sense of inquiring whether any actual interest or right deserving of judicial protection was involved or not.⁴⁴

them. Nor can any basis for such a view of the Court's functions or jurisdiction be found in the Charter or the Statute of the Court; if the Court were, contrary to its settled jurisprudence, to adopt such a view, it would impose a far-reaching and unwarranted restriction upon the role of the Court in the peaceful solution of international disputes." *I.C.J. Report* 1980, p. 20.

⁴² For example, in the opinion of Morelli, Article 63 of the Statute concerning the intervention presupposes the pendency of the so-called "interpretative dispute", inasmuch as the construction of a convention given by the judgment will be equally, i.e. equally with the original parties, binding upon it. *Nuovi studi*, pp. 128 ff. Contrary to this logico- restrictive interpretation, Scerni asserts the view that even in case where the pending proceedings are concerned with the concrete application of conventional rule to the specific relationships between the parties, and as such, not with the abstract ascertainment of conventional rule, other parties of the convention are in a position to take action for the ascertainment of conventional rule independently of the original proceedings. This possibility is said to be consonant with the *ratio* of Article 63 which intends to protect the certainty of law consisting in the uniformity of interpretation of multilateral conventions. "Di una figura speciale d'intervento nella procedura della Corte Permanente di Giustizia Internazionale" in *Scritti giuridici in onore di Santi Romano*, 1940, III, pp. 112 ff.

⁴³ *I.C.J. Reports* 1963, pp. 33-34.

⁴⁴ This case was indeed a singular occurrence. The dispute concerned the interpretation and application of the Trusteeship Agreement which was terminated, and no longer in force. Moreover, the Applicant did not make any claim of reparation.

In international adjudication, the question of interest may be raised in the following aspects: objectively, whether any legally protectible interest—as such, different from a mere academic interest—is at stake; subjectively and on the reverse of the coin, whether a party who demands a court to adjudicate has a standing as a veritable holder of such an interest or right.

It is generally admitted that the existence of a legal interest in the above sense constitutes one of the conditions of admissibility (*recevabilité*) of the claim in international procedural law.⁴⁵ This condition is said to have the same basis with national legislation forbidding the action *ad provocandum*. In international relations, it magnifies the importance in that it will serve to prevent a misuse of the right of seising the Court for introducing the disguised political litigation.

The question of interest or standing may be raised *in limine* as a preliminary question, in so far as it concerns the conditions of admissibility of the claim. However, since the question involves that of legal interest or right and as such, is connected with the merits of the case, it must be considered by a summary survey if the question can be decided at the preliminary stage of the proceedings without prejudging the questions pertaining to the merits.⁴⁶ Apart from the existence *vel non* of a dispute as a pre-preliminary question, the further question concerning the legal or non-legal character of a dispute may touch upon the merits of the case. It is evident, however, that the question of interest is more closely connected with the merits of the case, inasmuch as it involves a point of international substantive law in deciding whether a claimant is a holder of its own right in the subject-matter of the claim.

On the other hand, the same question is posed at least partially as to the characterization of a dispute. Besides the ordinary issue of legal or political dispute, it is furthermore inquired whether there exists a genuine legal dispute or legal dispute properly so-called. Again it is questioned whether a dispute falls under the jurisdictional clause in the sense that a party asserts a right of its own deriving from the provisions of a treaty. The former is intermingled with the question of interest objectively considered and the latter with that of “substantive standing” of a party. In any event, the questions of interest or standing or legal dispute just specified above may be raised on a whichever basis. In this we can find the explanation of apparent lack of coherence in the Court’s procedural handling and separate treatment by the judges of the jurisdictional issues in the *North Cameroons* case and the *South West Africa* cases.

In the former case, while in passing the Court referred to the necessity of “an actual controversy involving a conflict of legal interests”, the Court seemed to have decided basically as a preliminary question of interest seeing that it declared that “any judgment which the

⁴⁵ President Winiarski said in the *South W.A.* cases: “... the Applicant State must have the capacity to institute the proceedings, that is to say, a subjective right, a real and existing individual interest which is legally protected. ‘No interest, no action’: this old tag expresses in a simplified, but, on the whole, correct form the rule of all municipal law, but also of international law.” *I.C.J. Reports* 1962, p. 455. See also Bos, *Les conditions du procès en droit international*, 1957, pp. 214–221.

⁴⁶ According to Salvioi, it is affirmed that “pour «l’intérêt à agir» il suffit que d’un examen préliminaire de l’acte d’instance, il résulte que quelques éléments de preuve, même partiels, existent pour admettre la conclusion provisoire que a) le demandeur peut être titulaire du droit subjectif qu’il fait valoir; b) que ce droit peut avoir été violé ou devenir l’objet d’une probable violation”. “Problèmes de procédure dans la jurisprudence internationale” in *Recueil des cours*, I, 1957, p. 560.

Court might pronounce would be without object"⁴⁷. In a more confusing procedural ambience of the latter case, while at the first phase of the proceedings, the Court rejected the Respondent's contention that the conflict or disagreement did not concern any legal right or interest of the Applicants, the Applicants' claims were finally rejected at the second phase for the very reason of lack of any legal right or interest on their part.⁴⁸

In the *North Cameroons* case Judge Fitzmaurice stated in his Separate Opinion:

However, while this [Judge Morelli's] definition embodies the minimum, and is also adequate to cover the great majority of cases, it does not bring out quite clearly what is, to me, the essential ingredient of the existence of a dispute, the only element necessary in order to establish objectively, and beyond possibility of argument, that there exists a legal dispute properly so-called;... According to this definition... there exists, properly speaking, a legal dispute (such as a court of law can take account of, and which will engage its judicial function), only if its outcome or *result, in the form of a decision of the Court*, is capable of affecting the *legal* interests or relations of the parties, in the sense of conferring or imposing upon (or confirming for) one or other of them, a legal right or obligation, or of operating as an injunction of a prohibition for the future, or as a ruling material to a still subsisting legal situation.⁴⁹

Thus, in lieu of the notion of interest, Judge Fitzmaurice refines the concept of a legal dispute in the form of a "legal dispute properly so-called." The essential ingredient is added to emphasize that every legal dispute to be brought before a court of law must possess such an element of inherency in order to engage its judicial function. Consequently, the existence of a legal dispute in this sense is a prerequisite for the international legal proceedings equally with the existence of a dispute *tout court*. However, it does not concern plausible arguability of legal grounds as usually presented in the issue of legal or non-legal dispute. It matters whether any actual legal interest is at stake. To put it otherwise, the notion of a legal dispute properly so-called is composed of a dispute plus legal interests, which as such, may be a source of perplexity. On the other hand, even if the objective aspect of interest is incorporated into the definition of a legal dispute, the subjective aspect, i.e. the standing of a party is left unabsorbed.

According to the view of Judge Morelli, once the existence of a dispute has been established, there is no point in raising the question of whether the Applicant has an interest by reference to the principle recognized in municipal law. The international proceedings are based on the concept of a dispute. A dispute implies a reference to a conflict of interests and hence to substantive ones possessed by the parties, but these interests are distinct from the procedural interest consisting in securing a decision on the merits. Judge Morelli observed:

In the case of an international dispute, if such a dispute exists... it is clear that in any case each party has an interest in the settlement of the dispute. The interest in securing a decision on the merits is *in re ipsa*, because it is a necessary consequence of the very existence of a dispute. It is thus apparent that the concept of interest in bringing an action has no place of its own in the field of international proceedings.⁵⁰

⁴⁷ *I.C.J. Reports* 1963, p. 38.

⁴⁸ *I.C.J. Reports* 1966, p. 51.

⁴⁹ *I.C.J. Reports* 1963, p. 110

⁵⁰ *I.C.J. Reports* 1963, p. 132.

Apart from the explicit reference to "an interest of a legal nature" as the condition of admissible intervention in Article 62 of the Statute, the condition of interest in the international proceedings is a question of positive law, not of logic. I cannot see why an interest of a legal nature expressly mentioned in the Statute or the Rules of the Court—though in a specific context—is totally absorbed into the concept of a dispute as regards the ordinary filing of the claim to lose any independent relevancy. It is believed that for the orderly administration of justice, the International Court should have unhampered freedom to resort to the notion of interest, as occasion demands. It is said that the interest in securing a decision on the merits is a necessary consequence of the very existence of a dispute. If were true, *cadit quaestio*. Yet, it would not be useless to inquire if the claim put forward discloses the existence of a legal interest deserving of judicial protection. This inquiry would have the significance of its own. Certainly it could not be displaced by a cursory application of the formula of a conflict of interests which is in itself a concept of theory, not of positive law.

Despite this, Judge Morelli was of opinion that the Court should have declared that it had no jurisdiction in this case. Because, for a dispute to be regarded as covered by the jurisdictional clause which contemplates a dispute relating to the interpretation or application of the Trusteeship Agreement, it must be possible for a party to reply on a subjective right deriving from the provisions of the Agreement. However, in his view, these provisions confer no subjective right on the States Members of the United Nations considered individually. On that score, in his view, the dispute was not within the ambit of the jurisdictional clause. However, the conclusion that the Court had no jurisdiction in this case, it would be almost on a par with the decision on the merits, since it was based on the finding that any subjective right did not appertain to the Applicant in the subject-matter of the claim.

At the first phase of the proceedings in the *South West Africa* cases, the International Court admitted the existence of the dispute which was the subject of the Applications. And the Court rejected the Respondent's preliminary objection to the effect that the dispute brought before the Court was not a dispute envisaged by the jurisdictional clause of the Mandate (Art. 7). In what a sense was it contended that the dispute was not of a nature such as provided in the jurisdictional clause? The gist of the Respondent's argument was that the Members of the League had no legal interest or right individually vis-à-vis the Mandatory in the observance by the latter of its duties to the inhabitants in the Mandatory Territory. Thus the Respondent's objection was apparently formulated as against the jurisdiction of the Court, but its main purport was to raise the question of legal interest or standing of the Applicants in the sense that they had no stake in this case as holders of a legal right calling for the observance by the Respondent of its obligations. This point might go into the merits of the case.

The jurisdictional clause, through such an interpretative filter, brings the substantive elements into relief, which does not figure in the ordinary cases. Even in this case, such an interpretation, according to the view of the Court, runs counter to the natural meaning of the provisions of Article 7. The Court upheld its jurisdiction, having indicated that Article 7 referred to "any dispute whatever" arising between the Mandatory and another Member of the League of Nations relating to the interpretation or application of the provisions of the Mandate. In the opinion of the Court, the clear language of "any dispute whatever" relating to the provisions of the Mandate, obviously means all or any provisions thereof.

The Court went on to say:

For the manifest scope and purport of the provisions of this Article indicate that the Members of the League were understood to have a legal right or interest in the observance by the Mandatory of its obligations both toward the inhabitants of the Mandate Territory, and toward the League of Nations and its Members.

...Protection of the material interests of the Members of their nationals is of course included within its compass, but the well-being and development of the inhabitants of the Mandated Territory are not less important.⁵¹

Hence it is manifest that the Court decided the question of a legal interest or standing raised by the Respondent as the jurisdictional issue in the affirmative, presumably having based the procedural standing of the applicants on the general interest of securing the proper conduct of the sacred trust.

It is common knowledge that a complete *volte-face* was made in the decision of the Court at the second phase of the proceedings. The Court found that the Applicants could not be considered to have established any legal right or interest appertaining to them in the subject-matter of the claims.

Having reached such a conclusion, the Court was not in a position to deny the jurisdiction in this case. Accordingly, the Court resorted to the vindication that in the operative part of the previous judgment simply found that it had jurisdiction to adjudicate upon the merits. The Court did not think that "any question of the admissibility of the claim, as distinct from that of its jurisdiction arose". However, such an explanation does not seem to hold water, seeing that there was a clear ruling in terms on a legal right or interest of the Applicants in this case. The Court posed *ex novo* the question of legal right appertaining to the Applicants, having relied on a universal principle of procedural law establishing a distinction between the right to activate a court and the plaintiff party's legal right in respect of the claims. And a legal right or "substantive standing" of the Applicants was finally denied at the second phase of the proceedings.

At the stage of preliminary objections, the very existence of a dispute was negated by some judges. Judge Morelli was of opinion that there was not a dispute between the Applicants and the Respondent in this case. In his view, the existence of a dispute presupposes a conflict of interests, which in its turn does a party's assertion of its own interest (real or supposed). But the attitudes taken by the Applicants in the organs of the United Nations were not guided by their individual interests but what they considered to be the interest of the Organization. Between the parties, therefore, there was not a conflict of interests out of which a dispute might arise.⁵²

Another version of the same view was formulated by Judges Spender and Fitzmaurice in the terms that the real dispute over South Africa was between the Respondent State and the United Nations Assembly, and the Applicant States were in fact appearing in a representational capacity to bring proceedings which the Assembly cannot bring for itself. In other words, there was no real dispute between the Respondent State and the Applicant States in their individual capacities.⁵³

If the statement of these Judges were correct, the Applicants would have no standing from

⁵¹ *I.C.J. Reports* 1962, pp. 343–344.

⁵² *I.C.J. Reports* 1962, pp. 571–572.

⁵³ *I.C.J. Reports* 1962, pp. 547–548.

the start as the proper parties to institute the proceedings.

In my opinion, however, when a clash of claims or contending in argument is regarded to exist between the parties, it would be safe for the Court to take cognizance of the existence of a dispute. The lack of formality in a party's claiming on its own behalf nor the presence of the other Members contending with the common adversary State is not *per se* sufficient for the Court to declare the non-existence of a dispute once and for all.

Apparent inconsistency in the procedural handling of the jurisdictional issues by the Court might have been caused by the ambiguous formulation of a preliminary objection by the Respondent. The jurisdictional question concerning the nature of a dispute was intermixed with the substantive point relating to a legal right or interest of the Applicants. Notwithstanding, the decision of the Court at the first phase of the proceedings was clear in the sense that the dispute was within the compass of the Court's jurisdiction and the standing of the Applicants was affirmed on the foundation of common interest at stake.

By the same token, the Court did not attach any decisive weight on the existence of a dispute and the necessity of prior negotiation on the *inter se* basis. The Court called attention to the fact that "though the dispute in the United Nations and the one now before the Court may be regarded as two different disputes, the questions at issue are identical". Furthermore, it pointed out that "it is not much the form of negotiation that matters as the attitude and views of the Parties on the substantive issues of the question involved"⁵⁴. The system of judicial protection established Article 7 of the Mandate introduces, so to speak, an international *actio popularis* "clearly in the nature of implementing one of the 'securities for the performance of trust,' mentioned in Article 22, paragraph 1" of the Covenant, within which the Applicants *qua* Members of the League have standing as proper litigants. The ruling was demolished by the subsequent decision having taken a turn for interpreting Article 7 as the mundane type of the jurisdictional clause which was the basis of the Respondent's argument at the first phase of the proceedings.⁵⁵

7. The object of advisory proceedings in the International Court of Justice is not a dispute, but a question. It is confined to a category of "legal question" (*question juridique*) with regard to which the advisory opinion of the Court may be requested and given (Art. 96 of the Charter, Art. 67 of the Statute). Now a most keen observation is made by Morelli also in reference to the theme of dispute and question in the advisory proceedings.⁵⁶

⁵⁴ *I.C.J. Reports* 1962, pp. 345, 346.

⁵⁵ The term of "substantive standing" (*qualité substantielle*) as understood by Judge Morelli, means "the possession by one person rather than another of the substantive right relied on in the proceedings". Being the substantive and not procedural standing, it follows that lack of such standing must necessarily entail rejection of the claim on the merits and not a finding of inadmissibility. *I.C.J. Reports* 1966, p. 65. The question of standing in the substantive sense may be posed and examined as the question concerning the admissibility of the claim, though in the nature of things it is closely connected with the merits of the case. In reality Judge Morelli arrived at the conclusion in the *North Cameroons* case that the lack of substantive standing of the Applicant should have entailed the declaration of incompetence. The similar finding in the *South W.A.* cases evidently incurs a contradiction with the decision of the Court at the preliminary proceedings. Consequently, the question of standing as originally raised *qua* jurisdictional issue by the Respondent was transformed into the substantive question, which was decided independently of but in inconsistent manner with affirmative decision of the Applicants' procedural standing within the international litigating framework comparable to an *actio popularis* laid down in Article 7 of the Mandate.

⁵⁶ *Controversiea internazionale, questione. . .*" pp. 12-16.

Schematically speaking, in the view of Morelli, when a question put to the Court concerns a legal situation dependent upon a concrete norm of international law, hence identified with the norm itself, it constitutes *ipso facto* a legal question for the very reason that it poses the question of a legal norm.

Conversely, in cases where a question involves a legal situation dependent upon an abstract norm of international law, the question is legal exclusively to the extent that it concerns the norm, i.e. the norm constituent a major premise of a syllogism. The question which globally concerns a concrete legal question—a question corresponding to a conclusion of a syllogism—cannot be considered as a legal question which forms the object of advisory opinion by the Court. The conclusion hinges on a question of fact as a minor premise of a syllogism, which in its turn is not within the compass of advisory functions.

Standing on this logical basis, Morelli criticizes the following ruling of the Court in the *Namibia* case as lacking of clear determination on the notion of a legal question. The Court said:

In the view of the Court, the contingency that there may be factual issues underlying the question posed does not alter its character as a “legal question” as envisaged in Article 96 of the Charter. The reference in this provision to legal questions cannot be interpreted as opposing legal to factual issues. Normally, to enable a court to pronounce on legal questions, it must also be acquainted with, take into account and, if necessary, make findings as to the relevant factual issues.⁵⁷

It is argued that if Article 96 of the Charter does not oppose a question of law to that of fact, it cannot be seen why the said Article poses a legal character of question as the necessary condition so that it may form the object of advisory opinion—not opposing the question of a legal character to the question as distinct from it (viz. question of fact).

The statement that a question involving the factual issues does not alter its character as a legal question is equally open to doubt. It would be tantamount to saying that the question is a global one concerning a specific legal situation, for the solution of which a series of legal and factual issues must be decided. Inasmuch as the advisory jurisdiction of the Court is strictly limited to a legal question, it is a natural consequence that a global question should be divided into the two categories of questions: legal and factual ones.

Another point which is raised by Morelli is concerned with the interpretation of “a legal question actually pending between two or more States” in Rules of Court (Art. 102). Indeed, this is a precondition for the Court to apply in the advisory proceedings the provisions of the Statute and Rules concerning the contentious proceedings (inclusive of Article 31 of the Statute providing for the appointment of a judge *ad hoc*).

Now, according to Morelli, the above-mentioned formula which refers to a legal question pending, seems to envisage the situation where there is a difference of opinion on a legal question between two or more States. From the literal point of view, however, the concept of pendency is not very apposite with regard to a question, though it is the reverse as concerns a dispute. Moreover, from the substantial point of view, while the statutory assimilation of advisory and contentious proceedings cannot be justified by the presence of a mere divergence of opinion between States, it would be warrantable if another element, i.e. a dispute—a *sine qua non* of the contentious proceedings—is added on. In reality the

⁵⁷ *I.C.J. Reports* 1971, p. 27.

formula of Rules of Court is eclectic in its composition. Admitting that the sole possible object of advisory opinion is a legal question, it is only right that the formula refers to a question. Since, on the other hand, the term of pendency implies a reference to a dispute, the formula should be interpreted to indicate a legal question concerning a dispute actually pending between two or more States.

As to the first point, I cannot agree with the view of Morelli. Bearing in mind the spirit of the institution concerned,⁵⁸ it is not proper to consider that a reference to a legal question lends itself to logico-restrictive interpretation concerning the advisory jurisdiction of the Court.⁵⁹ As was declared by the Permanent Court in the *Status of Eastern Carelia* case, "there is not an absolute rule that the request for an advisory opinion may not involve some enquiry as to facts"⁶⁰. Nor the circumstance that the question posed involves some factual issues is regarded in itself as a compelling reason which should lead the Court to decline to reply to a question of an intrinsically or predominantly legal nature.⁶¹ The logical distinction between a global question and a legal question is a relative yardstick in dealing with the request of opinion actually formulated by the competent organs. Accordingly, I share the view of the Court reiterated in the *Western Sahara* case:

It is true that, in order to reply to the question, the Court will have to determine certain facts, before being able to assess their legal significance. However, a mixed question of law and fact is none the less a legal question within the meaning of Article 96, paragraph 1, of the Charter and Article 65, paragraph 1, of the Statute.⁶²

In spite of logical analysis of Morelli, a legal question does not cease to be so simply because that the question involves factual issues. For the purpose of the relevant provisions of the Charter and the Statute, the Court has the jurisdiction to reply to such a question. However, the power of the Court to give an advisory opinion is permissive, and the Court as a judicial body is bound to remain faithful to the requirements of its judicial character even in giving an advisory opinion. To deal with the factual issues, therefore, must be consistent with the canon of judicial property. The judgement in this respect should be left to the Court itself, but it is to be noticed that the Court in the *West Sahara* case referred to "whether the Court has before it sufficient information and evidence to enable it to arrive at a judicial conclusion upon and disputed questions of fact the determination of which is necessary for it to give an opinion in conditions compatible with its judicial character"⁶³.

As to the second point, I am in agreement with a lucid exposition of Morelli. However, another point is raised in reference to the application of the formula of Rules. It concerns whether it is necessary that a dispute between two or more States is actually pending before the organ requesting an advisory opinion. This point assumes considerable im-

⁵⁸ "By lending its assistance in the solution of a problem confronting the General Assembly, the Court would discharge its functions as the principal judicial organ of the United Nations". *I.C.J. Reports 1975*, p. 21.

⁵⁹ "... the reference to 'any legal question' . . . are not to be interpreted restrictively". *I.C.J. Reports 1975*, p. 20.

⁶⁰ *P.C.I.J. Series B, No. 5*, p. 28.

⁶¹ "The questions submitted by the General Assembly have been framed in terms of law and raise problems of international law. . . . These questions are by their very nature susceptible of a reply based on law; they are scarcely susceptible of a reply otherwise than on the basis of law. In principle, therefore, they appear to the Court to be questions of a legal character". *I.C.J. Reports 1975*, p. 18.

⁶² *I.C.J. Reports 1975*, p. 19.

⁶³ *I.C.J. Reports 1975*, pp. 28-29.

portance for the appointment of a judge *ad hoc*.

It is indicated that this condition is not written in the provision, which merely refers to a "question (*rectius*, dispute) pending between two or more States"⁶⁴. The fact that a dispute is pending means that a dispute has not been extinguished, and as such, it subsists. It follows that even if a dispute is not actually pending before the organ, a party can exercise the power conferred by Article 31 of the Statute to choose a judge *ad hoc*, provided that a dispute remains unresolved.⁶⁵

The Court ruled in the *Namibia* case that South Africa was not entitled to appoint a judge *ad hoc*. In this connection, the Court said:

Nor does the Court find that in this case the Security Council's request relates to a legal dispute actually pending between two or more States. It is not the purpose of the request to obtain the assistance of the Court in the exercise of the Security Council's functions relating to the pacific settlement of *a dispute pending before it* between two or more States. The request is put forward by a United Nations organ with reference to its own decisions and it seeks legal advice from the Court on the consequences and implications of these decisions (emphasis added).⁶⁶

In support of the position taken by the Court, it is indicated that since the organ is not authorized to formulate a request concerning a question pending in the other organ, a dispute must be pending before the requesting organ at the moment of a request for an advisory opinion. Furthermore, it is pointed out that the definition of the original draft of the Permanent Court referred to "an actual litigation which the Council or the Assembly after ineffectually trying to adjust it in a conciliatory way should send to the Court for advice." Finally, it is also mentioned that in the interpretation of procedural norms, if it is possible to read several ways, the technical meaning must always prevail.⁶⁷ To these pertinent consideration, it may be added, in my opinion, that the addressee of an advisory opinion is not the States concerned, but the requesting organ itself. Hence it is not sufficient that a dispute remains outstanding between the States concerned. Since an advisory opinion is addressed to the organ which is confronted with the difficult question, and on that account requests an opinion of the Court, it stands to reason that a dispute involving legal issues should be pending before the organ at the moment of notice of the request for an advisory opinion.

8. A dispute arises at a given moment, continues to exist for some period of time, and comes to an end.

A dispute is extinguished at the same time with the disappearance of one of its constituent elements. Thus, if one or the other party abandons or withdraws a claim or its contestation, a dispute no longer exists. Certainly, there is a possibility that a dispute bearing resemblance to the extinct one recurs in some form or other.

According to the view of Morelli, the occurrence of a dispute is *per se* a fact. In a

⁶⁴ Morelli, "Controversia internazionale", p. 16.

⁶⁵ The same view was adopted by Judge Fitzmaurice in the *Namibia* case. According to his view, the word "pending" should be interpreted in the ordinary meaning, i.e. as indicating "not yet decided", "remaining unsettled" or "still outstanding". *I.C.J. Reports 1971*, p. 313.

⁶⁶ *I.C.J. Reports 1971*, p. 24.

⁶⁷ Costantino, "Il giudice *ad hoc* nell'attività consultativa della Corte Internazionale di Giustizia" in *Il processo internazionale*, pp. 262-265.

similar vein, the extinction of a dispute is a pre-judicial concept. Undoubtedly, it is not precluded that particular norm of international law confers a specific effect to the extinction of a dispute. Nevertheless, the fact causing the extinction of a dispute is not a legal fact, but belongs to the domain of empirical phenomena. Withdrawal of a claim or its contestation may be realized in the form of manifesting will, which receives the appraisal by law in a certain manner. Hence a claim is given up through the abandonment of a right, and its contestation is ended through the recognition of the other's right. But even in this case, the extinction of a dispute is a historical event brought about as a result of a certain act by one or the other party. It is by no means a legal effect stemming from the act of abandonment or recognition.

By contrast, the solution or settlement of a dispute is a concept falling within the ambit of law. The settlement of a dispute is embodied in the appraisal given by rules of international law to a conflict of interests underlying a dispute. This appraisal of law resolving a dispute is characterized by its being posed after the occurrence of a dispute and particularly in relation to that dispute.

As has been indicated above, the extinction and settlement of dispute are entirely different things, which should be kept separate from each other. Consequently, there may be the extinction of a dispute without its any settlement. The settlement of a dispute is usually accompanied by its extinction, but this is not necessarily the case.

When a dispute is settled by means of agreement between the parties, their very acts to agree represent *in se* the respective attitudes of the parties overcoming the preexistent disagreement, which inevitably results in the disappearance of the dispute. Notwithstanding, the extinction of a dispute is not a normative effect which agreement produces as a legal act in international law. It is a historical event which is identified with the mutual attitudes of the parties derivable from their participation in agreement.

Similarly, the settlement of a dispute through the medium of international judgment by a court does not always bring it to an end. It may be that the party defeated regards the decision as unjust and maintains its claim which was decided to be ill-founded by a court. Under the same circumstances, it is possible that the party persists in its denial of the other's claim which was decided to be well-founded by a court. To be sure, international judgment *qua* legal fact in international law produces legal effects, but it cannot decide the course of a dispute. International judgment is one of the factors affecting the factual termination of a dispute.⁶⁸

A dichotomy set up between the settlement and extinction of a dispute—a point which did not attract almost any attention of international legal doctrine thus far—was referred by Judge Morelli in the *North Cameroons* case in the following terms:

...the settlement of a dispute as a legal operation produces legal effects for the parties which must no doubt be taken into account by any court subsequently seised of a request for the resolution of the same dispute. But the settlement of a dispute has not in itself any direct influence on the existence of the dispute as a factual situation in which two States may find themselves. In this connection the relevant concept is something other than the legal settlement or resolution of a dispute; it is the very concept of extinction or *de facto* cessation of the dispute...⁶⁹

⁶⁸ *Studi sul processo internazionale*, pp. 48 ff.

⁶⁹ *I.C.J. Reports* 1963, p. 137.

To my thinking, it would be needless for international law to concern itself for the extinction of a dispute in so far as it remains to be a historical fact pure and simple. The extinction of a dispute as such is not a matter of concern for international law. The task of international law is to provide for the legal means practically capable of putting an end to a dispute. Admittedly, in international relations the States parties assume the decisive role for the cessation of their dispute. Nonetheless, it is true that the resolution or settlement of a dispute aims at the extinction of a dispute between the parties (*ut sit finis litium*). In this sense the settlement of a dispute is in no wise an operation *in vacuo* devoid of any teleological import. Hence the extinction of a dispute is such an event as to be located, so to speak, at a point of contact between law and fact, i.e. between the legal solution and the attitude of the parties. Once a dispute is legally—in other words, in a binding and final manner—settled, international law needs to care no longer eventualities of the still adamant attitude jointly taken by the States parties.

Bearing in mind the basic tenet commonly held adverse to the needless continuance of international controversies,⁷⁰ mention will be made of the following typical cases where a dispute is settled and extinguished therewith.

In the first place, a dispute is settled by means of a unilateral act of one or the other party and it comes to an end. The relevant act is a promise, abandonment or recognition in international law. For instance, if a party abandons its claim, a dispute no longer exists in fact. Not only that, a dispute is finally disposed of for good in the sense that a claim or subjective right as its root is extinguished in law. The International Court, having recognized that “declarations made by way of unilateral acts concerning legal or factual situations, must have the effect of creating legal obligations”, held in the *Nuclear Test* cases:

...the Court having found that the Respondent has assumed an obligation as to conduct concerning the effective cessation of nuclear tests, no further judicial action is required. The Applicant has repeatedly sought from the Respondent an assurance that the test would cease, and the Respondent has, on its own initiative, made a series of statements to the effect that they will cease. Thus the Court concludes that, the dispute being disappeared, the claim advanced by Australia no longer has any object. It follows that any further finding would have no *raison d'être*.⁷¹

Secondly, a dispute can be settled by means of agreement between the parties and disappears therewith. In cases where agreement is reached to resolve a dispute through negotiation, whether expressly or impliedly, there is a joint act which is composed of identical expressions of intentions by the parties to regard the dispute as terminated between themselves.⁷² As a matter of fact a dispute becomes blurred at the commencement, and disappears at the conclusion of negotiation, but a principle of international law attaches legal effects to the

⁷⁰ The Court said in the *Nuclear Tests* case: “while judicial settlement may provide a path to international harmony in circumstances of conflict, it is nonetheless true that the needless continuance of litigation is an obstacle to such harmony”. In a similar vein Judge De Castro pointed out that “An element of conflict (*lis*) is endemic in any litigation, which it seems only wise, *pro pace*, to regard as terminated as soon as possible.” *I.C.J. Reports 1974*, pp. 271, 273.

⁷¹ *I.C.J. Reports 1974*, p. 271. This conclusion was vigorously controverted by the joint dissenting opinion of four judges who *per contra* considered that the legal dispute subsisted unsolved between the parties. *I.C.J. Reports 1974*, pp. 312 ff.

⁷² Cf. Giuliano, “Considerazioni sulla «via diplomatica» per la soluzione pacifica di controversie tra Stati” *Il processo internazionale*, pp. 371 ff.

agreement, to be exact, the joint act of the parties which registers their mutual intentions to bring the dispute to an end.⁷³

Thirdly, a dispute is settled by means of international judgment by a court. In this case, it is asserted that a dispute may continue in fact despite its legal resolution, if one party does not accept the judgment of a court. The party maintains the original claim or its contestation, and the same dispute, even if legally resolved, subsists between the parties.

Undoubtedly, the jurisdiction of a court to decide international dispute is *in concreto* derived from the consent of the parties concerned. But the principle of consensual jurisdiction in international adjudication does not exclude the existence of a general principle imposing a duty upon the parties to accept and observe the judgment of a court as a binding and final settlement of a dispute.⁷⁴ Indeed, as was declared by the International Court, "according to a well-established and generally recognized principle of law, a judgment rendered by such a judicial body is *res judicata* and has binding force between the parties concerned". Hence international judgment is *ex lege* binding and final in its effect. The coming into effect of a judgment rendered by a court is by no means dependent on the subsequent acceptance by both of the parties.

It is evident that the States parties go to court in order to bring the dispute to an end through its legal resolution. Consequently, if one of the parties accepts the judgment as *res judicata*, it is safe to assume that international law entitles the party to regard the dispute ended once and for all. The intention of the party must be given practical effect, his proper course of conduct being protected from the default of the other party. Otherwise the cost in lengthy proceedings would be to no purpose. A principle of law also forbids the party to avail himself of his own non-fulfilment of international obligation.

The nub of the contrary argument is that resolution is a legal operation and extinction is a fact. Of course, the party has the freedom to forgo the advantage of *res judicata* and continue the dispute on his own volition.

However, it is also true that with the judgment being rendered, the contentious situation between the parties completely changes and enters a new phase. It is now needless for a winning party to continue the dispute any more. If the party accepts the judgment in his behalf, and therewith expresses his will to put an end to the dispute, the original claim or its contestation, if not abandoned, loses its *raison d'être* in so far as it presupposes the outstanding dispute.⁷⁵ Should the other party not comply with the judgment, that party would not be entitled to continue the dispute in defiance of the contrary will of the conforming party. Such a course of conduct merely creates an illegal situation, so far from postponing the old dispute. Thus the original claim is transformed into another claim requiring the other party to fulfil the judgment. At least in the ordinary cases, therefore, the dispute in that phase, if any, is factually modified with the natural replacement in the constituent

⁷³ Though a "discontinuance" of the proceedings, as was held by the International Court in the *Barcelona Traction* case, a neutral act having simply a procedural effect of putting an end to the pending proceedings, a view is advanced that the order of the Court taking note of the amicable agreement reached between the parties, and taking into consideration the terms thereof, has not only the effect of removing the case from the list, but some authority of *res judicata* to the extent of bringing the dispute to an end. Cf. Giardina, "Arrangements amiables ed estinzione del processo di fronte alla C.I.J." in *Il processo internazionale*, pp. 337 ff.

⁷⁴ *I.C.J. Reports* 1954, p. 53.

⁷⁵ Cf. Salvioli, "Nascita ed estinzione" in *Scritti in onore di Tomaso Perassi*, II, 1967, pp. 257 ff.

element of the dispute. This factual condition corresponds to the situation, of *res judicata* created by law. Thus a cessation of a dispute is, so to speak, a catalysis occasioned by its legal resolution at a contact point of law and fact⁷⁶.

⁷⁶ It may be contended that the dispute concerning the U.S. diplomatic staff in Teheran was not put to an end by the judgment of the International Court. Certainly, the dispute would have continued as such, if the actual intention held by the U.S. Government was simply to make use of the Court so that it may obtain the legal justification in this dispute additional to the resolutions of the UN Organs. But it may be more reasonably presumed that with the judgment of the Court the stance of the U.S. Government would have been to pursue the redress of the situation now definitely declared as illegal—but still overshadowed by a political dispute—by the Court, i.e., the release of the hostages through all possible means.