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Admissibility before the International Courts and Tribunals

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INTRODUCTION

In various domestic legal systems, the legal action and its exercise are subject to special conditions known as admissibility requirements[1], in default of which the jurisdictional recognition of the claim is affected, whether it is a right or a duty (obligation). These legal systems make clear distinction between the admissibility and the merits due to the necessity to adjudicate on the first before addressing the second[1].

In international law, admissibility refers to "the character that an application, a pleading or evidence must present to be examined by the authority it is submitted to"[2]. Its recurrence at international levels indicative of the nature of the international Court or Tribunal, which cannot function without prior consent of States or International Organizations. It differs from domestic Courts.

Moreover, the direct consequence of the opposition of an objection of this nature, by the respondent, is the suspension of the proceedings on the merits.

Admissibility plays an important role when the Court or Tribunal, because constituted prior to the introduction of the proceedings, can be referred to by means of an application. When a claimant asserts a compulsory jurisdiction mechanism, the respondent often tries to escape from it and that is the reason law suits relating to the conditions for the exercise of jurisdiction are numerous at international level[3].

Inadmissibility refers to the character of a request or a claim, authorizing or obliging the body it is submitted to, to reject examination, due to a lack of standing or necessary condition. As for the *objection of inadmissibility*, it comprises the objection called extinctive or interruptive[4].

The aim of this procedure is to have the adjudicating judge not to proceed on the merits because of a lack of prior condition to this examination. The prescription can be raised by one of the parties and by the judge *proprio motu***.** . It shall be introduced at the beginning of the procedure and the ruling rendered is definitive.

The international practice generally uses this notion of "objection to inadmissibility". One must say that the permanent Courts had never been keen on the idea of typification of prescriptions, and even questioning its procedural interest. It feared to introduce, without sufficient experience in international case law, terminologies and wordings taken from domestic procedures. It will gradually do so. It states:

> "The Court may not take into account the diverse procedure systems and legal wordings in use in a country or another. May this submission be an "objection" or may it be "*Fin de non recevoir*", nothing prevents the Court from dealing with it prior to any debate on the merits, given that such debate will depend on its non-admission[5]"

The issue of inadmissibility reveals itself complex. The doctrine and the case law tend to define it by its objectives and its effects on the merits. It, thus, refers to all means through which the respondent denies the applicant the right of action or asserts the non-observance of formal prescriptions and other procedure requirements to this action. The debate is about two matters or two common features of those means: "*relevance*" and the "*non-impact on merits".*

Relevance suggest that the objection can terminate the proceedings on the merits. That is to say, when received, the objection may protect the respondent from any condemnation.

*Non-impact on the merits*suggest that the results can be achieved without examining or prejudging the merits. The inadmissibility can be declared by the judge even when the alleged

obligation exist and *on the contrary* this in admissibility can be dismissed without it presuming the existence of the invoked obligation[6].

The Permanent Court's Case law provides examples that confirm this opinion[7] The other debate on the admissibility is a jurisdictional one. It has two characters that infer the separativity of the subject matter of the objection on the merits of the case. On one hand, *the preliminarity* suggest that admissibility is always subject to debate prior to considering the merits. The international practice submitted to a preliminary hearing, the examination of the pleas taking part to the concept of admissibility, given it is likely to bring about the dismissal of the application without proceedings on the merits. On the other hand, *the specialty* suggests that the plea of admissibility has no impact on the merits, examined during a special procedure[8]. This specialty nature is the consequence of a long practice and appears to be inherent to the preliminarily.

The admissibility is sometimes regarded as the prior character of its subject matter, its logical and primary relationship, or logical priority of the merits hence, the possibility to have a debate prior to the hearings on the merits. As noted "the judge can adjudicate on the merits only after having implicitly or explicitly acknowledged, on one hand that the applicant enjoys the right of action, on the other that he exercised this right according to the prescribed rules, , that is to say on the obligation itself, which is the fundamental subject of the debate"[9].

We will analyze the admissibility of the claim, which is conditional to the fulfillment of the conditions laid down in the acts establishing the Court or Tribunal (Statutes, Rules of Procedures) (I) before analyzing the admissibility of the application or legal proceedings that reflects the right of action and consist of its exercise (II)

ADMISSIBILITY OF THE CONTENTIOUS ACTION

According the new Code of Civil Procedure « "The action is the right of the author of a claim to be heard on its merits so that the judge may declare it well founded or ill founded. For the opposing party, the action is the right to contest the merits of that claim"[10]. It thus appears that the action must be considered, both from the applicant's and from the respondent's point of view. It reflects the legal power, the right conferred on the claimant to refer to the Court or Tribunal, for it to decide on the merits of the claim.

A distinction must be drawn between the right of action and the right invoked on the merits (or substantive right), because the existence of the right of action does not necessarily give rise to the right, which is invoked on the merits and justifies the proceedings. This is the case when the claim is declared admissible but deemed ill founded. It must be recalled that it is the application that materialize the right of action of the applicant, whereas the defense materialize the one of the respondent.

The right of action is also distinct from the application in which it finds its expression. The legal action or application consists in the exercise of the right of action. The right of action can occur without the introduction of any procedural act, precisely because of its optional nature.

The international Court and Tribunal competently referred to on the basis of its jurisdiction must ensure that the action brought before it, is admissible, that is to say it exercises its jurisdictional function of hearing and determining the claims and objections of the parties. It must therefore, review whether the conditions for bringing an action are met, the absence of which causes the proceedings to be irregular and the application declared inadmissible.

The admissibility conditions of the action appear to be numerous, but for the most, they depend on the jurisdictional function and the validity of the Court.

Conditions Relating to the Contentious Jurisdictional Function

The contentious jurisdictional function of Courts and Tribunals cause them to hear disputes, which must be settled on the basis of the law. Meaning that the dispute must exist and be submitted to the Court.

The Existence of Dispute

The exercise of all contentious jurisdictions is subject to the existence of a dispute, which must be established *ab initio* by the seized Court or Tribunal; otherwise, it must declare the application inadmissible.

An international legal dispute refers to "a disagreement on fact or law, a contradiction, an

opposition of legal positions or interests between two individuals"[11]. However, the difference of opinions must, not be abstract. As observed[12], the dispute, in its technical form assigned by the international proceedings, arises from the antithetical positions and attitudes, deliberately adopted by States, the one vis a vis the other, with regard to the settlement of some interests by the international judge. There is dispute, in legal sense, when a State files a claim legally opposed by another State. This is the general practice: the dispute emerges from the open opposition of two points of views, expressly and consecutively declared[13].

In the case related to certain German interests in the Polish Upper Silesia[14], the permanent Court states "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". The international case law[15] suggests that an international dispute be settled objectively, all dispute defining itself through its intrinsic nature and not through the subjective classification the parties define it.

The issue of admissibility is particularly important when the Court or Tribunal is seized by way of an application, as it is for permanent Courts and Tribunals established before the beginning of proceedings.

Although the existence of a dispute is a prerequisite to the exercise of the contentious jurisdiction, it also has to be areal dispute.

The Reality of a Dispute

In legal sense, the real dispute refers to a dispute based on legal grounds so that the judicial resolution of litigation could have an effect on legal positions of the parties. A close bond must be established between the dispute and the exercise of the judicial function.

In the Northern Cameroon case, the International Court of Justice rejected an application for a declaratory judgment, in order to safeguard the "integrity of the judicial function"[16].

In its judgment, the Court recalls that Cameroon is one of Germany's possessions on which it renounced its rights, under the Versailles Treaty and they have been under the control of the League of Nations.

These territories were divided into two mandates, one administrated by France, the other by United Kingdom. The latter divided his territory into Northern Cameroon, ruled as part of Nigeria, and Southern Cameroon ruled as a province distinct from Nigeria. After the creation of the United Nations Organization, both mandates were placed under the International Trusteeship system through a Trusteeship Agreement approved by the General Assembly on 13 December 1946.

The territory under the French administration gained independence as there public of Cameroon on 1 January 1960 and became member of the United Nations on the 20 September 1960. As for, the territory under the British administration, the General Assembly suggested that the administrating authority hold plebiscites in order to ascertain the aspiration of the inhabitants. Consequently, Southern Cameroon joined the Republic of Cameroon on 1 October 1961 and Northern Cameroon joined the Nigerian Federation (independent since 1 October 1960). On the 21st April 1961, the General Assembly endorsed the outcome of the plebiscites and decided that the Trusteeship Agreement for British ruled Cameroon shall end upon the two parts of the territory joining the Republic of Cameroon and Nigeria respectively [resolution 1608 (XV)].

The Republic of Cameroon voted against this resolution, after criticizing the manner the United Kingdom had ruled the Northern Cameroon and organized the plebiscites, maintaining that political evolution of the territory and the normal consultation process had been altered. These criticisms have been developed on a white paper, to which the representatives of United Kingdom and Nigeria have responded. After the adoption of the resolution, the Republic of Cameroon reported to the United Kingdom on 1 May 1961, a dispute relating to the implementation of the Trusteeship Agreement and proposed to conclude a Special Agreement in order to refer this dispute to the International Court of justice. The United Kingdom gave a negative response on 26May 1961. Four days later, the Republic of Cameroon lodged an application before the International Court of justice[17].

The application emphasized the injustice caused by the attachment of Northern Cameroon to another State. Cameroon, however, acknowledged that resolution 1608 (XV) of the United Nations General Assembly had a final legal effect that the Court could not revise or overrule. However, the applicant requested the Court to adjudge and declare, under the Trusteeship Agreement, that the United

Kingdom had violated some of its obligations laid down in the agreement.

The United Kingdom raised an objection of nonexistence of real dispute. The judgment did not accept the objection. The Court rather relied upon the diverse definitions of the dispute given by the permanent Court in the Mavrommat is case[18]. Although, it admits the existence of a dispute "at the date of application"[19], it is under no obligation to adjudicate "during the judgment process[20]". The Court will invoke the absence of legal interest of the application subject matter to dismiss Cameroon request.

In its eagerness to stay in its contentious function, it will set out a position of principle:

> "the function of the Court is to rule on legal matters, but it can only deliver judgments in relevant litigious cases implying a legal conflict of interest between the parties. The judgment of the Court must be of useful effects, given that it affects the existing legal rights or obligations of the parties, dispelling all uncertainties in their legal relationship. In this case, no judgment delivered on the merits could meet the essential conditions of the judicial function[21]".

The reality of a dispute can also be assessed in the light of the direct relationship between the parties. The burden of proof lies with the applicant to the extent of the crystallization of the dispute in its direct relation with the respondent before submitting the document initiating proceedings. This aspect of the dispute can, if need be, have effects on its existence.

In the South West Africa cases, the ICJ stressed that

> "One should note this preliminary question [existence of a dispute] has actually to do with problem of the existence of a dispute between the claimants and respondent, whatever the nature and the subject of the dispute submitted to the Court may be, in the present proceedings[22]".

The difficulty in this case lied in the nature of the relationship between the applicants and the respondent. The United Nations General Assembly and the South African Union held contradictory positions.

Thus, it is as member of the United Nations that the applicants made their opinions known. That is why the third and fourth objections raised by the South African Union highlights the issue of the conditions of existence of the international dispute and the admissibility of the application before justice.

The third objection challenged the existence of a dispute between the applicants and the Union, on the grounds that the dispute must be established prior to the introduction of the application[23]. For the Union, a dispute, under the compulsory jurisdiction provision of Article 7 of the mandate, exist only when a « tangible » interest is at stake, that is to say a personal and direct interest of the Applicant State or his nationals. However, the application had in sight, not interests of this nature, but the non-fulfillment by the South African government of its general obligations as mandatory towards the inhabitants of the territory under the Mandate and towards other ex-Member States of the League of Nations, as well as, its surveillance and control of the League obligations. According to the respondent, such obligations do not grant member of the League any rights of legal interest authorizing an individual to resort to the jurisdictional provision of article 7 of the mandate.

The Court dismissed this third objection. From its view, the objections essentially put forth that the dispute submitted to the Court is not as stated in article 7 of the Mandate.

The Court recalls that article 7 mentions « any dispute, whatever » that arose between the mandatory and another member of the League of Nations. This statement is open, clear and precise and deals with all dispute relating to one or more provisions of the Mandate, whether related to the substantive obligations of the mandatory towards the inhabitants or towards other member of the League of Nations, or whether related to the obligation to stay under the League of Nation supervision or protection, provided for in Article 7. The scope and subject of these provisions indicate that members of the League had a right or a legal interest that the mandatory fulfills its obligations towards the inhabitants as well as towards the League of Nation and its members.

Whereas, Article 6 of the Mandate contains provisions dealing with the administrative supervision of the League, in fact, Article 7 introduces, with the express approval of the mandatory, the legal protection of the permanent Court. Obviously, the protection of the interests of the members is of high importance, but not more than the wellbeing and the development of

the inhabitants[24]. The Court concludes that, according Article 7, this is an actual dispute and the third preliminary objection shall be dismissed.

A literal interpretation of Article 7 of the Mandate "Any dispute whatever" enabled the Court to use this objection. One should recall that the judgment suggest that the respondent has a legal interest in having the Court adjudicating on the alleged violations of the Mandate. It is a fact that International law itself acknowledges the general interest of humanity, a protection interest of what we could call "International legality".

Article 7 asserts the individual right of action of all members of the League of Nations on the basis of the provisions that the mandatory had expressly convened to. The Court would hold this Mandate as "an international engagement of general interest"[25]. The dismissal of this preliminary objection has been heavily criticized[26]. The fourth South African objection raised the important issue of the actuality of the dispute.

The Actuality of a Dispute

The actuality of a dispute occurs when the claimant makes diplomatic approaches to the respondent prior to the initiation of the proceedings. This is a condition of admissibility on litigious cases, whose aim is to make sure that the dispute is ripe for adjudication. The prior diplomatic negotiations were at the heart of the international arbitral procedure organization. Their role weakened with the advent of permanent Courts, often acting as an express condition of jurisdiction. The rule is set by some international conventions that evoke a diplomatic preliminary. The recognition of the customary practice is however doubtful in respect to international case law.

The fourth South African objection raised the issue of admissibility and challenged the actuality of the dispute. It says that "the alleged dispute or disagreement is, given its progress, unlikely to be settled through negotiations, according to article 7 of the South West Africa Mandate"[27].

Several negotiations had been going on for more than ten years in the United Nations General Assembly and diverse institutions between the applicant and other former members of the League of Nations having the same understanding on one hand, and the respondent on the other, but all of these negotiations stalled due to the attitude of the respondent. The latter argued that: "collective negotiations within the United Nations are different from direct negotiations between the applicant and the respondent and they never engaged in any direct negotiations"[28].

The Court will hear this fourth and last objection only to dismiss it. It stated that the fact that past collective negotiations stalled, which was clearly confirmed by the written and oral pleadings of the parties, leads to the conclusion that there is no hope that future negotiations will lead to a settlement.

As for the fact that were no direct negotiations between the respondent and the applicant, the Court states that "when the mutual interests of States, be they part of an organized body or not, is at stake, there is no reason for any of them to comply with the formalism and the false pretense of a direct negotiation with the State they oppose, considering that they already took fully part in the collective negotiations"[29]. What matters in this case is not the form of the negotiations but the attitude and the position of the parties on the fundamental aspects of the dispute. For the Court, given the nature of circumstances, parliamentary or conference diplomacy have proved to be the more effective in negotiations[30].

This new approach of the Court breaches with the classical interpretation of the prior diplomatic negotiation condition and avoid the direct relationship nature of the parties in the determination of a litigious case. It can cause confusion in the understanding of the legal dispute to the extent that conference diplomacy in full court can embrace political as well as legal issues. States' representatives are all expected to be legal experts[31].

The issue of the actuality of the dispute was also raised before the International Tribunal of the Law of the Sea in the Case Concerning Land Reclamation by Singapore in and around the Straits of JOHOR[32].

In this case, Singapore (the respondent) pretends that Malaysia (the applicant) did not comply with its obligations, under paragraph1 of article 283 of the United Nations Convention on the Law of the Sea of 10 December 1982.

It reads "negotiations between the parties, of which article 283 of the Convention makes it a preliminary to the introduction of the dispute settlement compulsory procedures, defined at

part XV of the Convention, have not taken place"[33].

The respondent asserts that referral to the Arbitral Tribunal (under annex VII of the Convention) by the applicant was premature since no exchange of views had taken place contrary to article 283 of the Convention. In paragraph 1, it reads: "When a dispute arises between States-Parties concerning the interpretation or the application of the Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means". The applicant emphasized that on several occasions it asked for a meeting to be held to examine the concerns of each Party, in order to amicably resolve this dispute. It stated that the respondent, on several occasions, refused to proceed to consultations, demanding the adverse party to prove the relevance of its case, beforehand. There would then be a principle of prior exhaustion of negotiations, hence the *in limine litis* objection that bring about the issue of *actuality* of the dispute.

Difference of opinions arises between the parties on the exchange of views relating to the settlement of the dispute by negotiation or other peaceful means.

In its statement of claims, Malaysia states: "The correspondence demonstrates clearly the existence of a dispute between Malaysia and Singapore concerning the delimitation of territorial waters beyond the Straits of Johor and the impact of the land reclamation activities (at Tuas Reach, Pulau Ubin and Pulau Tekong) on Malaysian waters, coastlines and facilities and on the marine environment.

It further demonstrates that the exchange of views embodied in this correspondence has not produced and cannot be expected to produce a negotiated settlement. Indeed, Singapore even refuses to debate the issues at stake. In these circumstances, there is no point in any further exchange of views between the two States"[34]. Malaysia declares that Singapore has rejected, on several occasion the request for a meeting of senior officials of the two countries be held on an urgent basis to discuss these concerns with a view to amicably resolving the dispute who replied that a meeting" would only be useful if the Malaysian government could provide new facts and arguments to prove this contention", that Singapore thereby sought to be the judge of Malaysia's claims, and failed to show willingness to cooperate and negotiate[35].

On the other hand, Singapore maintains that no substantive negotiations have taken place between the parties. It states that Malaysia filed its Statement of Claim abruptly, without first having given Singapore the opportunity to understand and address its specific concerns, and that Singapore sought particulars of Malaysia's complaints and that Malaysia had repeatedly stated that it would provide Singapore with the details of its complaints. It further points out that it was only on 4 July 2003 that Malaysia provided Singapore with the details of its concerns over the alleged adverse effects of Singapore's reclamation works, that on 17 July 2003 Singapore responded to Malaysia's concerns with substantial documentation relevant to Malaysia's expressed concerns, providing a comprehensive picture of its work projects and summaries of analyses, and expressing its willingness to engage in negotiations with Malaysia concerning any remaining unresolved issues, that the Singapore meeting was the first occasion that the two sides had to consider both Malaysia's concerns and Singapore's response, that this meeting had helped both Singapore and Malaysia to identify the issues that divided them as well as the issues on which their views converged, thus preparing the parties for the substantive stage of negotiations, and that Malaysia's concerns could "be accommodated through the process of negotiation".[36]

It is in this context that the International Tribunal for the Law of the Sea had to examine the issue of prior diplomatic correspondence. The Tribunal recalls that article 283 of the Convention applies "When a dispute arises" and that there is no controversy between the parties as to the existence of a dispute and that this article solely requires an expeditious exchange of views regarding the settlement of the dispute "by negotiations or other peaceful means". It indicates that the obligation to proceed "expeditiously to an exchange of views" applies to both parties to the dispute. After having examined the issues raised by both parties, the Tribunal ascertains that they had not been able to resolve the dispute or agreed on means to achieve it.

In its view - recalling its jurisprudence - that "a State Party is not obliged to pursue procedures under Part XV, section 1, of the Convention when it concludes that the possibilities of settlement have exhausted"[37] and that "a State Party is not obliged to continue with an exchange of views when it concludes that the

possibilities of reaching an agreement have been exhausted"[38].

According to the Tribunal, Malaysia was not obliged to continue with an exchange of views when it concluded that this exchange could not yield a positive result. It recalls the International Court of Justice statement that "neither in the Charter nor otherwise in international law is any general rule to be found to the effect that the exhaustion of diplomatic negotiations constitutes a precondition for a matter to be referred to the Court"[39]. It is on the basis of the above that the Tribunal has rejected the objection raised by Singapore.

In addition to conditions similar to the actuality of the dispute, in that they ensure that the dispute is ripe to be ruled by the international Court or tribunal, there is absence of and related actions. Its application in international law is very rare due to its structure; moreover, the legal nature of this condition is questioned given that it has similarities with the competence in some of its aspects and with the admissibility in others[40].

In its judgment in the case concerning Certain German Interests in Polish Upper Silesia[41], the polish government instituted proceedings before the MixedGerman-Polish Arbitral Tribunal for restitution to a private company of a plant it believed to have unjustly lost, required the Court to suspend its judgment until the rendering of the Arbitral Tribunal.

The Court noted that it was only used in pleadings and presumably for language commodity. However, if we wanted to assess this plea, according to generally admitted principles in lis pendens, the Court should come to the conclusion that it is ill-founded. Whether the lis pendens, whose goal is to prevent a conflict of jurisdiction, can be invoked in international relations, is a highly controversial issue in the jurisprudence of main States, given that judges of a State should refuse to study, in absence of treaty, cases pending before a foreign Tribunal, exactly as they would have the duty to do so if the case was, beforehand, referred to a domestic Tribunal.

According to the Court, this discussion will not be considered in this present dispute, because it is quite obvious that the main constituent elements of the *lis pendens* do not meet, in this case.

The two requests were not the same; the request, still pending before the German Polish Mixed Arbitral Tribunal of Paris pursue the restitution of the factory, unjustly seized, to a private company; on the other hand, the Permanent Court of International Justice's role is to interpret the provisions of the Geneva Convention. The litigants are not the same. Finally, the Mixed Arbitral Tribunals and the Permanent Court of International Justice are not bodies of same order; the same apply between the Court and polish Tribunal of Kattowice.

The objection of lis pendens has also been raised before the International Tribunal of the Law of the Sea by the French government in the "Camouco" case[42]. France representative, M. Dobelle says: « I would like to raise a second issue concerning the examination of the request of admissibility regarding the exhaustion of local remedy. The domestic exhaustion of recourse rule, as laid down in article 295 of the Convention, is generally not a prerequisite to initiate a proceeding, under article 292. However, a domestic legal proceeding is presently pending before the Court of Appeal of Saint Denis de la Réunion and obtains the same results as the ones expected in this present procedure ».

The Tribunal notes that this argument maintains that the applicant therefore, is incompetent to invoke the procedure laid down in article 292 as "a second remedy" against a decision of a national Court and that the application clearly points to a "situation of lis pendens which casts doubt on its admissibility". The respondent points out article 295 of the Convention that deals with exhaustion of loca remedy, while noting, that "the rule of exhaustion of local remedy, laid down in article 295 of the Convention, [should not be] regarded as a necessary prerequisite to initiate an action, under article 292 of the Convention.

In the view of the Tribunal, it is not logical to read the requirement of exhaustion of local remedies or any other analogous rule into article 292. Article 292 of the Convention is designed to free a ship and its crew from prolonged detention on account of the imposition of unreasonable bonds in national Courts or Tribunals, inflicting thereby avoidable loss on a ship owner or other persons affected by such detention. Equally, it safeguards the interests of the coastal State by providing for release only upon the deposit of a reasonable bond or other financial security determined by a Court or

Tribunal referred to in article 292, without prejudice to the merits of the case in the

domestic forum against the vessel, its owner or its crew.

The Tribunal concludes that article 292 provides for an independent procedure and not an appeal against a decision of a domestic Court. No limitation should be read into article 292 that would go against its very subject and purpose. Indeed, article 292 allows the filing of an application for prompt release within a short period from the date of detention and it is not normally the case that local remedies could be exhausted in such a short period[43].

However, with the proliferation of international Courts and Tribunals, "lis pendens cases could be considered between international Courts of same order, the same applies to Courts instituted by a same Convention or by parallel Conventions. There would be reasons to justify objection of lis pendens on one hand, to avoid the useless competition of jurisdictional activities, on the other the necessity to prevent *res judicata* conflict. The applicant must establish the identity of the dispute by revealing the triple identity of the persons, the cause and the subject-matter and request for a review before the judge referred to in the first instance"[44].

Justifiability of a Dispute

The justifiability refers to the ability for a dispute to be ruled according the principles of law[45]. They are disputes related to disagreements on the application or the interpretation of the existing law. This ability of a dispute to be settled on this basis constitutes a condition of admissibility of the litigation.

Article 38 of the ICJ Statute lay down that "the mission of the Court is to rule, in accordance with international law, disputes submitted to it" and article 40 states that "cases are brought before the Court, as the case may be, either by the notification of the special agreement or by a written application addressed to the Registrar; in both cases the subject of the dispute and the Parties must be indicated".

As stated by the Court, "the existence of a dispute is the first condition to exercise its judicial function"[46]. This shows the importance of the characterization the dispute, which is a prerequisite, whatever the motivations of the Parties before bringing a procedure before the seized Court. In the case relating to the Border And Cross Border Armed Conflicts[47], the Court points out that under Honduras's first objection to the admissibility, Nicaragua's application is a «politically-inspired, artificial application which the Court should not entertain consistently with its judicial character"; Honduras contends that Nicaragua is attempting to use the Court, or the threat of a litigation before the Court, as a mean to exert political pressure on the other Central American States.

In respect to the first aspect of this objection, the Court is aware that political aspects may be present in any legal dispute brought before it. The Court, as a legal organ, is however only concerned to establish, first, that the dispute submitted to it is a legal dispute, in the sense of a dispute likely to be by the application of principles and rules of international law, and secondly, whether the Court has jurisdiction to deal with it, and whether the jurisdiction is not fettered by circumstances, rendering the application inadmissible. The purpose of referral to the Court is the peaceful settlement of such disputes.

The Court's judgment is a legal pronouncement, and it cannot concern itself with the political motivation, which may lead a State at a particular time or in particular circumstances, to choose judicial settlement. Honduras'objection, based on an alleged political inspiration of the proceedings, cannot therefore be upheld.

The existence of a legal dispute is determined after examinations of the positions of both Parties. Through bilateral or multilateral diplomatic talks, their respective pleadings, interpretation of the qualifications, previous jurisdictional acts or relevant circumstances of the case, given that the Court always seeks to, objectively, determine the existence or not of a dispute, to exercise or not its judicial function.

The issue of justifiability of a dispute was frontally raised by the ICJ in the Military and Paramilitary Activities In and Against Nicaraguacase[48].

The Court considers it appropriate to deal with the preliminary issue relating to the justifiability of a dispute, referred to by Nicaragua. In its counter memorials on jurisdiction and admissibility, the United States has raised several questions in order to have the Court declare the application inadmissible.

It considers, notably, that complaint about the use of armed forces is of another judicial body exclusive jurisdiction and particularly, the Security Council, under the UN Charter and general practice; and the Court could not determine effectively the "ongoing armed

conflict" with the use of the armed forces in violation of the UN Charter, without falling outside of normal judicial activity. In its judgment of 26 November 1984, the Court examined and rejected the claims, and the United States that did not take part to the proceedings, did not come with new arguments. It appears, however, that after the Court's examination on the merits, circumstances may exist that could cause the dispute or issues of use of force and collective self-defense, to be non-justifiable.

In first instance, it was argued that the present dispute should be declared non-justifiable because it does not constitute a "Legal dispute" under article 36, paragraph 2 of the statutes. It is clear that under this provision, the jurisdiction of the Court is limited to « Legal dispute », having as subject any listed matters. The issue of knowing whether a dispute between two States constitutes or not a « legal dispute » can itself bring about a dispute between the two States. If this is the case, the Court has to adjudicate, as laid down in paragraph 6 of article 36. On this particular issue, the Parties seem to agree upon.

During the procedure related to the jurisdiction and admissibility issues, the United States have raised several issues in order to bring the Court to conclude that it had no jurisdiction or the application was inadmissible. They relied upon the reservations on their own declaration of acceptance of the jurisdiction, under article 36, para 2, without ever raising the strongest argument that the declaration is non-applicable because the dispute Nicaragua referred to is not a "legal dispute" under this paragraph. As for the admissibility, the United States have raised an objection against the application of article 36, paragraph 2, not on the grounds that this is not a "legal dispute" but on the issues that Nicaragua requests are of political organs, under the UN Charter, which the Court expressly rejected in its judgment of 26 November 1984[49].

Moreover, if the United States contended that the nature of judicial function prevents the Court to examine the merits of Nicaragua's allegations – arguments rejected by the Court[50] – they did not question the relevance of the international law or its applicability to a dispute of this nature.

In short, there is no reason for the Court, according to the United States, to consider this present dispute out of the "Legal dispute" category, under article 36, paragraph 2 of the statutes. It must then consider the Nicaragua's application, in light of applicable international law.

The issue of use of force and collective self-defense raised in the proceedings are, without a doubt, ruled by international customary law, as well as the treaties and particularly the UN Charter. It was however, asserted, for another reason, that issues of this nature are non-justifiable and not of the matters dealt with by the Court. The argument of collective self-defense raised as justification of their actions towards Nicaragua, would oblige the Court to determine if the United States had the right to use force to counter a foreign intervention in El Salvador.

To achieve this, the Court should express its views on the military and political aspects but not on an issue that could be, by nature of those likely to be usefully dealt with by the Court.

As the Court further exposes, in the circumstances alleged by the United States, it is the exercise of a collective self-defense that is questioned. The issue of the legality of a reaction to the threat of an armed aggression that has not yet occurred has also been raised. The Court must determine whether the aggression actually occurred, if this is the case, were the measures taken as argument of self-defense, a reaction justified by the collective self-defense. To answer the first question, it is not necessary for the Court to determine whether the United States or the attacked State was pushed to retaliate.

If it decides that an armed attack occurred, and in order to rule on collective self-defense issues and the type of reaction, it will not be necessary to give military appreciations. Therefore, the Court can, in this regard, come to the conclusion, that self-defense issues fall within its jurisdiction and is capable to rule. It appears that Court has jurisdiction to determine the judicial aspects of a dispute likely to present multiple facets and would only stick to the legal examinations and appreciations.

CONDITIONS RELATING TO THE VALIDITY OF THE PROCEEDINGS

The admissibility conditions are related to the judicial organization. The jurisdiction requirements, forms and delays, or those related to the claim are sometimes subject to inadmissibility, which affect the proceedings due to the non-observance of principles or the rules of the procedure. It is the formal

conditions of admissibility and conditions of admissibility of international complaints for illegal acts.

General Formal Conditions: Forms and Time Limits

Forms

The formal condition of admissibility depends on each Court or Tribunal[51]. They are part of the proceedings, initiated before the body, whose goal is to assert a challenged right. They are successive procedural steps, from the introduction of a request to the rendering of judgments or orders for removal in case of a withdrawal of action.

The international proceedings are not formalistic and admissibility requirement are not of decisive importance. Indeed, "it is not necessary for the Court having international jurisdiction to give forms the same importance as in municipal law"[52].

Under article 40, paragraph 1 of the ICJ statutes, disputes brought before the Court are instituted either by written application or by notification of a special agreement written to the Registrar, in either case, the subject of the dispute and the parties must be indicated. The provisions of forms are related to the referral through means of application.

Article 38 of the ICJ regulations states that:

> "When proceedings before the Court are instituted by means of an application addressed as specified in Article 40, paragraph1, of the Statute, the application shall indicate the party making it, the State against which the claim is brought, and the subject of the dispute.
>
> The application shall specify as far as possible the legal grounds upon which the jurisdiction of the Court is said to be based; it shall also specify the precise nature of the claim, together with a succinct statement of the facts and grounds on which the claim is based"[53]

It must be recalled that the Court has not yet refused to examine the merits of a dispute on form reasons. It has not also received to this day, an objection relating to an irregular act of procedure. In the case of Northern Cameroon, it states:

"The Court cannot be indifferent to any failure, whether by applicant or respondent, to comply with its rules which have been framed in accordance with Article 30 of its Statute. The Permanent Court of International Justice in several cases felt called upon to consider whether the formal requirements of its rules had been met. In such matters of form it tended to "take a broad view". (The "Société Commerciale de Belgique", P.C.I. J., Séries A/B, No. 78, p. 173.) …. if there were no other reason which in its opinion would prevent it from examining the case on the merits, it would not refuse to proceed because of the lack of what the Permanent Court in the case of the Interpretation of the Status of the Memel Territory, called a "convenient and appropriate method in which to bring the difference of opinion before the Court" (P.C.I. J., Series A/B, No. 49, p. 311).[54]

Moreover, the Court can ignore the form imperfections of acts submitted to it as indicated in previous judgments[55].

Time-Limits

The issue of time limits regards, for the most, pleadings during a procedure. The procedure of permanent Courts does not impose a time limit for the submissions of the document instituting proceedings[56]. However, time limit is set for a series of acts and incidental proceedings. These texts suggest that the Courts and Tribunals set time limits for the introduction of some procedural acts: particularly, those relating to the written proceedings. This is because the Courts and Tribunals determine the way they exercise their functions. They organize their proceedings as prescribed by their respective status[57].

As regards to time limits, the international jurisdictional procedure is also not formalistic. The equality of parties is guaranteed by the Courts or Tribunals without frills.

In the Losinger and Co case, the applicant, Switzerland, invoked "the invalidity, for reasons of forms of the document submitting the Yugoslav government's objection":

> only one copy of the document submitting the objection was filed within the prescribed time-limit; fifty printed copies were not filed till after the expiry of the time-limit ; hence, the Yugoslav Government failed to comply with the provisions of Article 40, paragraphs I and 4, of the Rules of Court now in force ;
>
> The Yugoslav Government's objection was not submitted within the time-limit originally prescribed for the filing of the

> Counter-Memorial, but only within the time-limit as fixed after two extensions had been granted by the Court at the request of the said Government ; the latter thus acted in conflict with the spirit of Article 38 of the Rules of Court in force prior to 11 March, 1936, and of Article 62, paragraph I, of the Rules now in force; when the period within which a preliminary objection must be filed was defined in those Articles, what was meant was only the time-limit originally fixed by the Court and the definition did not cover "extensions subsequently granted by the Court to a party"[58] ;

Whereas, as a matter of fact, the document submitting the objection was accepted by the Court and formed the subject of an Order made by the President, followed by written and oral proceedings ;

whereas the question raised by the Swiss Government is one that concerns the organization and internal administration of the Court, rather than the rights of the parties; and whereas, in any case, the Court would have power under paragraph 4 of Article 37 of its Rules to decide, in certain circumstances, that "a proceeding taken after the expiration of a time-limit shall be considered as valid" ;

Specifically, in regard to the first of the reasons advanced by the Swiss Government, both the consistent practice of the Court and the history of Article 40 of the Rules point to the conclusion that the words "document of the written proceedings" as used in this Article refer only to the Memorial, Counter-Memorial, Reply and Rejoinder (Art. 43 of the Statute; Art. 41 of the Rules), and do not cover documents instituting proceedings, whether applications or special agreements ; this interpretation is also deducible from the context (Art. 39, para. 4, of the Rules) and from the position of Article 40 in the Rules; and whereas, in the Court's practice and in accordance with the principles laid down for keeping the General List (Art. 20 of the Rules), documents submitting preliminary objections are, for the present purpose, assimilated to documents instituting proceedings;

As to the second reason adduced by the Swiss Government, a time-limit which has been extended is, in principle, for all purposes the same time-limit as the time-limit originally fixed;

Conditions of Admissibility of International Claims for Illegal Actions

Nationality of The claimant

Diplomatic protection can be extended to any physical or moral person having the nationality of the Claimant State. This is specified in the Panevezys-Saldutikis case: “in taking up the case of one of its nationals, by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right, the right to ensure in the person of its nationals respect for the rules of international law. This right is necessarily limited to intervention on behalf of its own nationals because, in the absence of a special agreement, it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection”[59].

Each State has the sovereignty to determine the conditions for subjects of law under its authority, to acquire or lose nationality. This is an exclusive competence. As stated by the permanent Court “In international law, issues of nationality are in the view of the Court, under the exclusive competence of the State”[60].

This opinion was confirmed by the International Court of Justice in the Nottebohn case: “international law leaves it to each State to lay down the rules governing the grant of its own nationality”[61]. However some objections are raised in the exclusive competence principle.

First, the control of the judge verifying if the claimant actually possesses the nationality he claims to possess. The International court of justice decided on this aspect that:

“In order to decide upon the admissibility of the application, the Court must ascertain whether the nationality conferred on Nottebohm by Liechtenstein by means of a naturalization which took place in the circumstances which have been described, can be validly invoked as against Guatemala, whether it bestows upon Liechtenstein a sufficient title to the exercise of protection in respect of Nottebohm as against Guatemala and therefore entitles it to refer to the Court a claim relating to him. The Court decided on the sole issue that whether the nationality given to Mr. Nottebohm, can be invoked against Guatemala to justify the present procedure. It must resolve this issue on the basis of international law, which is in accordance with the nature of the issue and the mission of the Court”[62].

Then, the exclusive competence of the State regarding the attribution of the nationality has another objection, in that a State is not bound to recognize a nationality granted in violation of international customary law, particular Conventions or principles agreed upon , in this matter[63].

"Naturalization was asked for not so much for the purpose of obtaining a legal recognition of Nottebohm's membership in fact in the population of Liechtenstein, as it was to enable him to substitute for his status as a national of a belligerent State that of a national of a neutral State, with the sole aim of thus, coming within the protection of Liechtenstein but not of becoming wedded to its traditions, its interests, its way of life or of assuming the obligations, other than fiscal obligations, and exercising the rights pertaining to the status thus acquired. Guatemala is under no obligation to recognize a nationality granted in such circumstances. Liechtenstein consequently is not entitled to extend its protection to Nottebohm vis-à-vis Guatemala and its claim must, for this reason, be held to be inadmissible[64]".

Regarding the moment the nationality of the applicant can be appreciated for the claim to be admissible. A local application must be national when initiated from the outset, which is to say that the applicant must possess the nationality of the Applicant State at the date of occurrence of the illegal act[65].

As for the continuity of the nationality, even if it is sufficient to link the admissibility of the claim to its endorsement of the Claimant State before the international Court or Tribunal, the uninterrupted possession of nationality rule, from the illegal act to the final decision or the closure of debate, is raised[66].

Exhaustion of Domestic Remedies

The purpose of this rule is to balance between the sovereignty of States and the requirements of international law. The diplomatic protection is an exceptional mean that can initiate an international procedure but only after exhaustion of domestic remedies. The rule is an objection of admissibility at the disposal of the Claimant State, which can be invoked in *limine litis* at the beginning of the proceedings.

That is to say that the applicant can apply for protection from his State only if, beforehand, the entire domestic remedies, at his disposal, in the judicial system of the State, he is seeking reparations, have been exhausted.

In the ELSI case, the International Court of Justice draws out the intrinsic character of the rule. It states: "… the local remedies rule does not, and indeed cannot, require that a claim be presented to the national Courts in a form, and with arguments, suited to an international Tribunal, applying different law to different parties: for an international claim to be admissible, it is sufficient if the essence of the claim has been brought before the Tribunals having jurisdiction and pursued as far as permitted by local law and procedures, and without success"[67]. The prior exhaustion of domestic remedies is, thus, regarded as a condition for the admissibility of the application.

The Behavior of the Claimant in Domestic Law

The foreigner has right to the national legislation of the country of residence. However, he must abide by the rule and law of that country. The violation of the rule and law by the foreigner would be the cause of an inadmissibility of its claim. His behavior must not contribute to the damages he suffered and for which he is trying to get reparations: ignorance of the domestic legislation; negligence; interference into the affairs of the welcoming State; political unrest, holding of a political office abroad, etc[68].

These are the essential conditions of admissibility of a contentious action, which is a legal power, granted to subjects of law, to refer the judge. However, his holder must fulfill the procedural conditions to which the application is subjected to.

ADMISSIBILITY OF THE APPLICATION

The application or legal action is a procedural act by which a State refers to the international Court or Tribunal to seek from it the enforcement of a right, which is denied. The initiation of proceedings has two closely related aspects that, nevertheless, have to be distinguished.

On one hand, there is the *instrumentum*, which is a written document, subject and giving effect to predetermined prescriptions of form such as, the Claimant party and the Respondent party; the subject-matter of the dispute; signature of the original application by the agent or diplomatic representative in the country having jurisdiction; the enrolment of the application, etc. It shall obtain the trace of the agreement of goodwill, which is the results of compromise and the manifestation of goodwill of the State

initiating proceedings in the case of a unilateral referral to the Court, by means of an application.

On the other, the application is also a *negotium*, which is the core substance of the act. It is the agreement of goodwill between the parties to a compromise or the manifestation of goodwill of the State initiating proceedings in the case of a unilateral referral to the Court. "Application" or claims that the parties or the Claimant submits to the decision of the judge are contained in the *negotium.* The law claims of the parties seeking from the judge the enforcement of a right are recorded in their respective reports laying down the positions of the parties, and on the basis of which the Court adjudicate on the dispute. The distinction between the *instrumental* and the *negotium* is of great importance for the interpretation of the jurisdictional act[69].

In a procedure introduced by means of an application, it is the submissions of the parties that give the judge the terms of reference to adjudicate.

However, in the case of a referral to Court through notification of a special agreement, "it is rather to the terms of this agreement than to the submissions of the Parties that the Court must have recourse in establishing the precise points which it has to decide"[70].

To be admissible, the application is subject to conditions of existence of the right to initiate legal action and the exercise of it.

THE CONDITIONS OF EXISTENCE OF RIGHT OF ACTION

The general conditions of the right of action are the interest, the standing and the diplomatic preliminaries under the traditional presentation.

Actionable Interest

The necessity of an interest is a traditional requirement in domestic law. One can cite these famous sayings: "Interest measures action" or "No interest, no action". In the legal system, the admissibility of a legal action is subject to the existence of an interest.

However, the nature of the interest required to support the application, particularly in international law has been a matter of controversy [71].

The interest has sometimes been perceived as having a purely procedural nature, which is to obtain from the Courta decision on the merits. If the interest plays a key role in domestic law, where it constitutes a condition to initiate the legal action, it is because domestic legal systems do not use the notion of dispute, which is fundamental in the international jurisdictional procedure[72].

According to judge Morelli, the International Court of Justice:

> "This Court cannot exercise its function in contentious proceedings if a dispute does not exist between the parties … However, in the case of an international dispute, if such a dispute exists - and it has already been said that the existence of a dispute constitutes in itself a condition on which the possibility of a decision on the merits is subordinate - 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 international proceedings"[73].

There is no doubt that the existence of a dispute is a preliminary condition to the exercise of all contentious jurisdictions in the international procedure. However, the conception of the interest of the eminent judge reveals confusion between the action and its condition of existence.

Admittedly, the interest is the primary condition of admissibility of the application before the international Courts and Tribunals, as it is before the domestic Tribunals. The applicant must, therefore, establish the existence of the interest to be protected so that the Court can take its decision on the merits. In that, the interest is an important requirement of admissibility of the action in the international procedure.

Neither the statutes, nor the ICJ rules mention the interest to act as a condition of admissibility of the application. It is the jurisprudence of the Court that sets the regime.

In the Northern Cameroon case (preliminary objections), the United Kingdom asserted that a member of the United Nations, not taking part to the Trusteeship Agreement on Cameroon has no "legal interest" to introduce an action against the manner which the United Kingdom fulfilled its obligations others than those particularly specified in the Trusteeship Agreement in favor of a third State and its nationals[74]. Cameroon, for its part, asserted that it, not only had

sufficient legal interest to proceed in Court as a member of United Nations but also had "a more personal, direct and infinitely more precise interest than any States of Europe, Africa, Asia and America would have"[75].

The Court admitted the admissibility of Cameroon application after having recognized its individual interest, particularly that " the indisputable fact that if the results of the plebiscite in the Northern Cameroons had not favored joining the Federation of Nigeria, it would have favored joining the Republic of Cameroon…[76]"

However, the Court refused to adjudicate on the merits of Cameroon's application. It has not accepted the argument that the interest invoked by the applicant was a legal interest, likely to give a judicial decision. In the South West African case (preliminary objections), the South African Union invoked the absence of actionable interest to contest the admissibility of the applications introduced by Ethiopia and Liberia.

Its third objection asserted that the dispute submitted to the Courts, because of its nature and content, not a 'dispute' as envisaged in Article 7 of the Mandate for South West Africa, more particularly in that no material interests of the Governments of Ethiopia and/or Liberia or of their nationals are involved therein or affected thereby[77]"

The Court will decide that this constitutes a dispute as stated in article 7 of the Mandate and that the objection must be rejected[78]. In its decision on the merits of the same case, it says:

> "…States can appear before the Court only as litigants in a dispute with another State, even if they only seek to obtain a declaratory judgment. The moment they so appear however, it is necessary for them, even for that limited purpose, to establish, in relation to the defendant party in the case, the existence of a legal right or interest in the subject-matter of their claim, such as to entitle them to the declarations or pronouncements they seek: or in other words that they are parties to whom the respondent State is answerable under the relevant instrument or rule of law[79]".

Thus, the Court will refuse to give effect to the Ethiopian and Liberian applications. It will precise, in addition, that the existence of a dispute does not prevent the applicant from the justification of a right or a legal interest, in regard to the subject of the application, even if this dispute, as it is, is of those the Court has jurisdiction, set out by a clause of jurisdiction. The existence of a dispute, according to the Court, simply establishes, in this case, that it has jurisdiction. It does not necessarily give evidence that the applicant has sufficient interest for it to decide on the merits[80].

The settlement of this South West Africa case reveals a contradiction from its part.

In its judgment of 21 December 1962, it rejected the third objection after a summary examination on the merits which dealt with the existence of substantive rights that the applicant pretended to have as a former member of the League of Nations, in regards to the subject of their applications. Indeed, referring to article 7 of the South West Africa Mandate of the League of Nations, the Court stated in 1962 that: "the manifest scope and subject 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 Mandated Territory, and toward the League of Nations and its Members"[81].

In the 18 July 1966 judgment (merits), the Court concludes: " In the light of these various considerations, the Court finds that the Applicants cannot be considered to have established any legal right or interest appertaining to them in the subject-matter of the present claims, and that, accordingly, the Court must decline to give effect[82]".

To justify its position, the Court in its 1962 judgment simply found that it had jurisdiction to adjudicate upon the merits and did not decide on the admissibility of the application[83]. It will distinguish the standing of the applicant from their capacity to refer to the Court. Examining the issue of the standing, it will state that "it remained for the Applicants, on the merits, to establish that they had this right or interest in the carrying out of the provisions which they invoked, such as to entitle them to the pronouncements and declarations they were seeking from the Court"[84].

The Court, in that respect, decided that the system of Mandates bases the right of action of Member States of the League of Nations only on their direct and personal interests but not on the general interest to the fulfillment of these obligations imposed to the mandatory. One can

understand why the ICJ courtroom has been deserted for years after this judgment.

As for the appreciation of the interest of the applicant in intervention[85], it is very different."In under any form, the interest of the intervention is submitted to the authority of the Court. The nature of the intervention is an incidental procedure that implies the interference of a third in the ongoing proceedings, which can only be justified by the existence of connexion between the subject of the main proceedings and the interests of the one requesting intervention[86]". Article 62 and 63 of the Statutes and articles 81 and 82 of the Rule of the ICJ admit the procedure of intervention before the Court and set out two distinct cases of intervention.

In the first case, the applicant "believes that a legal interest is at stake in this dispute". In the second case, the procedure of intervention is open to all States that took part to the dispute adherent to the Convention, the interpretation of which is questioned. This intervention constitutes a right.

In the S.S Wimbledon case, Germany having rejected the Claimant's right to refer to the Court against it, they replied that "the four powers who submitted the application should enjoy the right of free passage through the Kiel Canalas well as the fulfillment of the Treaty of Versailles provisions".

Regarding the admissibility of the application in the terms submitted to the Court – the respondent relied on his own interpretation – the permanent Court welcomes it without hesitation. It states:

> "The Court has no doubt that it can take cognizance of the application instituting proceedings in the form in which it has been submitted. It will suffice to observe for the purposes of this case that each of the four Applicant Powers has a clear interest in the execution of the provisions relating to the Kiel Canal, since they all possess fleets and merchant vessels flying their respective flags. They are therefore, even though they may be unable to adduce a prejudice to any pecuniary interest, covered by the terms of Article 386, Paragraph I of which is as follows:
>
> "In the event of violation of any of the conditions of Articles 380 to 386, or of disputes as to the interpretation of these articles, any interested Power can appeal to the jurisdiction instituted for the purpose by the League of Nations[87]."

As for the international Court of justice, it rejected most of the intervention requests for lack of legal interest of the States concerned[88]. However, in the Haya de la Torre case, where the Cuban government referred an intervention application to the Court that was highly challenged on the grounds that this is a remedy attempt against the judgment of the Court related to the Asylum case of 20 November 1950.

The application was accepted. The Cuban government justified his application by the necessity for the Court to interpret a new aspect of the Havana Convention that was not taken into account in the 20 November 1950 judgment. The Court decided that, within these limits, the intervention of the Government of Cuba conformed to the conditions of Article 63 of the Statute, and the Court having deliberated on the matter, decided to admit the intervention in pursuance of paragraph 2 of Article 66 of the Rules of Court.[89].

Locus Standior Capacity to Bring Action

In the international procedure, the quality is a legal title that enables a subject of law to bring an action to justice. It is the *Jus Standi in Judicio* or else the *Locus Standi*.

> The first paragraph of article 34 of the Statute of the International Court of Justice states, "Only States may be Parties in cases before the Court". As for, Article 20 of the Statute of the International Tribunal for the Law of the Sea, it states:
>
> "Access to the Tribunal
>
> The Tribunal shall be opened to States Parties.
>
> The Tribunal shall be opened to entities other than States Parties in any case expressly provided for in Part XI (of the United Nations Convention of the Law of the Sea) or in any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case".

Furthermore, the paragraph 2 of article 292 of the United Nations Convention on the Law of the Sea dealing with the procedure of "Prompt release of vessels and crews" states that "The application for release may be made only by or on behalf of the flag State of the vessel"

It must be noted that these different provisions relate to the standing and conception underlying both, rather deal with the general competence *ratione personae* of these two international bodies. They are conditions set by the parties regarding the competence, that is to say the exercise of the judicial powers of these organs: States access or opening up to other entities[90]. These provisions do not deal with the issue of the admissibility of the application.

The conditions of admissibility relating to the *Locus standi* have the purpose to ensure that the claim appertains to the Claimant party or its representative. One should, indeed, avoid that a subject of law take action when the interests of another is at stake; with the exception legal representation, whose mutability at international level is more and more obsolescent. In this case, the *Locus standi* has conventional basis. It is as a condition of admissibility of an application that is distinct from the direct and personal interest[91].

As for, the general international law, it recognizes the capacity to assert international claims for illegal acts. These are the nationality conditions in the diplomatic protection[92].

The standing, as a condition of admissibility of an application is difficult to grasp. It can only be exercised in very rare or disappearing hypothesizes. It is rarely an autonomous condition of the right of action. Indeed, the actionable interest appears as the real right of action requirement.

Preliminary Diplomatic Negotiations

This condition and that of the existence of a dispute are related[93]. It reveals that a dispute is ripe to be settled by the international Court referred to. The condition of preliminary diplomatic negotiations is a remnant from previous arbitral law that survived the institution of nowadays permanent Courts, to which sovereign States generally refer to, seeking a special agreement or compromisory provision. When this condition has been raised before the Court, in accordance with the title of competence, it gave it effect, pointing out its subjective character[94].

The permanent Court already praised the importance of preliminary diplomatic negotiations as a mean to determine the subject matter of a dispute. It states: "The Court realizes to the full the importance of the rule lying down that only disputes which cannot be settled by negotiation should be brought before it. It recognizes, in fact, that before a dispute can be made the subject of an action at law, its subject matter should have been clearly defined by means of diplomatic negotiations[95]". However, the Court indicated that it would adjudicate on the merits in the event of lack of the condition of diplomatic negotiation, viewed as a condition of form even if it was laid down in the title of competence[96].

The preliminary diplomatic negotiations were regarded as a condition of international remedies exhaustion by analogy with the exhaustion local ones that would oblige the applicant to give a formal notice to the respondent before the initiation of an international procedure. If this rule exists in some international Conventions, its customary consecration is still to be completed[97].

In the case concerning Right Of Passage Over Indian Territory[98], the government of this country raised a preliminary objection, in order to have the action rejected because Portugal "did not comply with the rules of international customary law», thus being under the obligation, before filing of application "to engage into diplomatic negotiations and to pursue until it was useless to continue them longer"[99]. The rule would be compulsory under the general international law and would require not only the resort to prior diplomatic negotiations, but also the continuation of the process until its term. As observed:

> "The exhaustion of diplomatic negotiations is a concept essentially relative, which cannot be locked up a priori within precise limits. For example, the notion of the exhaustion of local remedies, which, as we know, plays a considerable role in the field of international responsibility because of damage to private persons, is quite different. This is a much more flexible and far more empirical procedure referred to as "diplomatic negotiations". The Court accepts that the diplomatic prerequisite, where it is expressly provided for by treaty law, is far from specific requirements and that the negative attitude of one party may be sufficient to allow the other to bring the case before the court, even if the exchange of views was only of very short duration[100].

Therefore, it appears that the resort to legal procedure is not subjected to preliminary diplomatic negotiations and that cases could be

validly referred to an international Court or Tribunal, without the parties having exhausted the ongoing process. The determination of the conditions of existence of a right of action enables its exercise.

THE EXERCISE OF A RIGHT OF ACTION

The exercise of a right of action brings about applications and defenses.

The Applications

The application is a legal act by which a subject of law refers a legal claim to the Court or Tribunal. The principal application or initial application is different from the incidental one. The first, also called application initiating proceedings is when a subject of law takes the initiative to introduce an international procedure by submitting to the judge its claims.

The latter intervenes while the procedure is already initiated. They must meet certain conditions before grafting itself in the ongoing process. Their admissibility is subject to their attachment to the initial application through a sufficient connection or a legal interest at stake. It is the counter application, additional request and intervention.

Cases are submitted to the Court, as the case may be, either by notification of a special agreement or by written application, addressed to the Registrar. In either case, the subject of the dispute and the parties shall be indicated[101]. When proceedings before the Court are instituted by means of an application, it shall:

> "1) …. indicate the party making it, the party against which the claim is brought and the subject of the dispute.
>
> 2) The application shall specify as far as possible the legal grounds upon which the jurisdiction of the Tribunal is said to be based; it shall also specify the precise nature of the claim, together with a succinct statement of the facts and grounds on which the claim is based[102]."

In the Phosphates in Morocco case, The French Government raised an objection to draw the attention of the Court to certain obscurities relating to the nature of the claim pointing out that the Royal Italian Government "has not stated the nature of its claim within the degree of precision and clearness requisite for the administration of justice and prescribed by Article 32, paragraph 2, and Article 42 of the Rules of the Court[103].

In response, the Court being rather liberal stated, "the precisions provided during the oral and written procedure, allow the Court to have a sufficient clear idea of the subject of the claim of the Italian government application[104]."

The legal action allows the Court or Tribunal to rule. In the exercise of its judicial function it can decide on the lack of jurisdiction or that, the procedure is irregular, which oblige the Court to declare the application inadmissible, or adjudicate on the merits of the case.

To this end, it is the application that sets the scope of its decision, given that the Court must adjudicate only on cases referred to it and not beyond. It should be recalled that the judge must, in this regard, take into account the initial application and possibly incidental applications filed after the opening of the proceedings.

In addition, the judge must set himself at the time of application in order to assess it. Objections to this rule can be raised in private claims to take into account the *lucrum cessans* or the *damnum ermergens*.

Regarding the Asylum case, to the question: should the judgment of 20 November 1950 be understood in a sense that the legal effects to the qualification of the offence attributed to Haya de la Torre made by the Ambassador of Colombia in Lima? The Court notes that this issue has not been raised by the parties: the Court had to adjudicate only on the submissions formulated by Colombia, in broad and abstract terms. This made the Court to declare:"the principle, must be recalled, that the Court is under the obligation to respond to the parties' request as they are expressed in the final submissions and also, to abstain from adjudicating on issues not examined, expressed in the request[105].

In contrary, the Court is under no obligation to respond on fact and law reasons that parties may raise to argue their case. The Court made a clear distinction between the reasons or mechanism invoked to their cause and the request, believing it can base its decision onto reasons deemed relevant and appropriate[106].

This decision is rendered based on the parties' final conclusions that can be subject to modification during the proceedings. However, the principle of immutability of the proceedings requires not modifying these conclusions, in a way that could modify the nature of the dispute – but not the request- as laid down in the document instituting proceedings. Therefore, the Court may adjudicate, based on the final

conclusions of the Parties when it believes that the amendments made during the written or oral proceedings.

Defenses

Defense on the merits and preliminary objections shall be examined.

Defense on the Merits

Defense on the merits refers to the direct challenge, by the Respondent, that the applicant's claim is ill founded. Its aim is to have the claim rejected, as non-justified after examination on the merits. Defense on the merits can be invoked, at different stages, until the closure of the hearings.

The issue of procedure raised by these defenses related to the connection that may exist between the defense on the merits arguments and those invoked for the preliminary objection. The Permanent Court, thus, had this difficulty. It had to rule that, although an objection challenging the domestic character of a private claim may be considered, in principle, as a preliminary objection, it could not be regarded as such, in this respect, because the grounds of this objection cannot be separated from the rights he was claiming on the merits and that, in these circumstances, it was impossible to adjudicate without going to the merits[107].

This, sometimes, causes the judge[108] to join an objection on the merits to take into account this connection, which can be considered in two ways.

> "They may, first, be a connection of facts. The elements "materials" that the Court uses are; it seems, common in the objection, and on the merits… the joining requirement can also come from the connection on solutions. The answer to the procedure issue can involve directly or indirectly he answers to certain question on the merits: This can precisely come from the fact that the debate on the proceedings and on the merits have the same source of arguments and that the information are identical. By adjudicating on the objection, the judge may prejudge the merits at a time when only the competence of the Court has been discussed. These two requirements, "positive" (a need to examine the merits, on one hand) as well as "negative" (lest the merits be prejudged, on the other) are very closely interconnected[109].

Preliminary Objections

The preliminary objection refers to a "plea invoked in the first phase of a procedure and its purpose is to obtain from the Court a decision on a preliminary issue before examining the merits the case[110],,

This plea can have the procedure declared irregular or terminated and the challenge of the procedure has an impact on it. The paragraph 3 of article 79 of the rules of the ICJ states that upon receipt by the Registry of a preliminary objection, the proceedings on the merits shall be suspended and the Court shall fix the time-limit within which the other party may present a written statement of its observations and submissions.

The preliminary objection gives, thus, rise to an incidental procedure and, after hearing the parties, the Court shall give its decision in the form of a judgment, by which it shall either uphold the objection, reject it, or declare that the objection does not possess, in the circumstances of the case, an exclusively preliminary character. If the Court rejects the objection or declares that it does not possess an exclusive preliminary character, it shall fix time-limits for further proceedings[111]. These objections must be raised before any other defense plea, failing which they shall be inadmissible.

The adjective "preliminary" attached to the objection can have several meaning. It designates the moment the objection was raised but also the substance of it in its logical relationship and prior to the merits of the case, against which the exclusive preliminary character or not of the objection is determined.

Numerous objections have been raised before the PCIJ, as well as the ICJ[112]. They were dealt with great flexibility, motivated by the desire not to introduce conceptions inspired by domestic procedure in the international case law.

Regarding a preliminary objection related to the admissibility of an application in the case concerning Certain German Interests in Polish Upper Silesia[113] , the permanent Court raised the question, as to whether this is "one of the defenses on the merits, aiming to avoid examination by the judge, that is usually; as in the French law; declared inadmissible? Or is this rather the case of an actual objection opposing … not the application itself and the law it is based upon, but the examination of the legal action?"

The Court will respond that it is under no obligation to consider the various proceedings systems and legal terminologies, used in different countries. According to the Court "Whether this conclusion is classified as "objection" or "inadmissibility", it is sure that neither the statutes and the rules, nor the general principles of the law, prevents the Court to deal with the case and prior to any hearings on the merits, since a potential hearing depends on its inadmissibility[114] The Court will gradually realize a typification of preliminary objections[115] that has been cautiously exanimate.

As for "one of the defenses on the merits", noted by the Court, there was some preliminary objections on the merits[116].

The admissibility appears to be a notion, refractory to systemization and whose application is sometimes inconclusive. It is a matter of species – even though the legal instruments identify the genus –because the conditions and effects related to it are prolific and difficult to comprehend. It is determined according to the circumstances of each case. What is, however, constant, is that before the examination of the claim, the judge must make sure that the applicant is entitled to file a legal action, the procedure is regularly initiated, the prescribed forms are respected and that no legal obstacle can hinder its action.

CONCLUSION

The question of admissibility reveals the conscientiousness of the sovereign State, always wanting to be the master of its initiatives and its own judge. The initiation of proceedings through means of an application results, very often, in the challenging of its admissibility. The pleas are numerous: non-existence of a dispute; dispute without subject matter; dispute on a non-existent right; or that the dispute is not a legal , under the statutes; the decision do not have a practical effect or affects the judicial function of the Court or Tribunal; the applicant lacks standing; or has no legal interest ; the dispute is not real because the applicant did not exhaust the negotiations; the aggrieved individual, protected by the applicant do not have its nationality; or he did not exhaust local remedies in country of the residence; or he has no "clean hands"; or finally that the essential provisions of the statutes or the rules have been violated.

It has even been asserted that the multiplicity of objections is the cause of "the desertion of international courtrooms" and contributed to the undermining of international judicial system[117].

At that time – and still current – in order to stem the loss of interest of the international Court and Tribunal, the doctrine raised the question as to whether to submit unresolved disputes between States to the legal rules.

The position of Pr. Virally to this respect is instructive:

> "The answer to this question can only be a negative one. This does not mean that the institution of international justice is inconclusive or we should disengage from its future. On the contrary, as already said earlier, the international justice proved its worth and they are very convincing. Today, like yesterday, efforts needs to be made to strengthen its development and enable it to have a growing importance in the settling of international dispute. Nevertheless, we must face the facts and accept that it is not destined to acquire monopoly of domestic legal systems, even in disputes on "international issue". By refusing to do so, experience showed that there could be serious risks: of proposing to the States the commitment to submit to international Courts or Tribunals, going far beyond what they can politically accept. The result is well known: the States refuse to engage themselves or they express some reservations that cancel their commitments or they renounce as soon as they have to face it. However, the States were not proposed more moderate and limited engagements, but acceptable, which would result in genuine progress.[118]"

The mechanism of disputes settlement referred to the World Trade Organization (WTO), who recorded hundreds of disputes between States, is striking. This important contribution of the "Uruguay Round" must be considered, even if this is not an international commercial Court or Tribunal. Indeed, the States must be reassured and make themselves justifiable before the international Courts or Tribunals that they, themselves, created, the credibility of which depends mainly on what they make of it. With the constant desire to say the law in the interest of justice and peace; with the nature of the law they apply and with the representation of main legal systems of the world, these Courts and Tribunals are ready to fulfill the assigned missions.

To sum up, the international Court or Tribunal may exercise its judicial power only within the limits of the jurisdiction attributed to it; on the contrary, having jurisdiction may not suffice to examine the action brought before the Court or Tribunal; it, still, must be admissible, that is to say, it enters the jurisdictional function of the international Court or Tribunal to hear the claims of the parties and to adjudicate on them. Inadmissibility, as in the case of lack of jurisdiction, plays a significant role only when the Court or Tribunal, because constituted prior to the initiation of the proceedings, can be seized by means of an application. However, an inadmissibility objection can be raised propriomotu by the Court or Tribunal itself, which has to determine, on a preliminary basis, whether they have the power to examine the case, under their statute.

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[1] CH. De Visscher. *Aspects récents du droit procédural de la CIJ* Paris, Pédone, 1966, 219p.R.J. Dupuy, "The Reform of the ICJ Rules", AFDI, 1972, pp. 265-283; G. Guyomar *Commentary on the ICJ Rules*. Paris. Pedone. 1983, 760p: G Abi Saab. *Preliminary Objections in the Proceedings of the International Court*. Paris, Pédone. 1967.281p.; M. Dubisson,*The International Court of Justice*, Paris. LGDJ.1964.471 p,: J. C. Witenberg. "Admissibility of Claims Before International Courts", Rdc. Vol.41.1932 (III). pp.5-135. M. Mabrouk. *Procedural Objections in International Jurisdictions, Paris,* LGDJ, Library of International Law, Vol.XXXV, 1966. 351p,; J. Lang, "The Junction on the Merits of Preliminary Objections to the PCIJ and the ICJ". JDI. 1968 pp. 5-45; Sperduti, "The Admissibility Of Preliminary Objections On The Merits In The International Lawsuit", Riv.Dir.Int., Vol. LIII, 1970, pp. 461-490: M. Virally. "The Operative Field of International Judicial Settlement" .RGDIP.1983, pp.281-314: SFDI. Permanent International Jurisdiction (Lyon Symposium) .Paris Pédone 1987: Sh.Rosenne. *The Law and Practice of the International Court*, 1920-1996. 3rd edn. Vol.II. Jurisdiction. The Hague / Boston / London, Martinus Nijhoff Publisher. 1999. pp.517-603: J. Combacau .S on. Public international law 4th edition. Paris, Montchrestien. 1997: P.M. Dupuy, Public International Law, 4th edition. Paris, Dalloz.1998; Daillier. A Pellet. Public international law, 7th editions, Paris, LGDJ, 2002 / Ch. Rousseau, Public International Law, Vol V,Conflict Reports, Paris Sirey. 1983

[2] In domestic law, admissibility includes objections whose merely dilatory effect is to suspend the proceedings: nullity of procedure, objection of incompetence; a plea of inadmissibility, the effect of which, if granted, will be to have the application finally dismissed; (a) means from the expiry of a period such as expiry of proceedings or delays in filing an appeal; b) means from the merits such as lack of interest, lack of standing, new appeal request or cassation complaint, the prescription, pre-established time limits, res judicata; see the new French Code of Civil Procedure, instituted by decree N° 75-1123 of 5 December 1975.

[3] Dictionary of International law terminologies, Paris Sirey, 1960, 750 p., p504.

[4] As judge M Bedjaoui states « in the case of an introduction of proceedings through means of an application, the respondent, in most cases, begins by challenging the jurisdiction of the Court, objection often related to the admissibility of the application", dans"Le droit international au service de la paix, de la justice et du dévelopment", Melanges Michel Virally, Paris Pédone. 1991, pp. 87-107,spec. p.89. In addition, an objection of admissibility can be raised *Proprio motu* by the Court or Tribunal itself, figuring out whether out of its statute or the interpretation made, It has capacity to adjudicate on the claim.

[5] *Extinctive exceptions*: foreclosure exception, exception due to prescription, exception of withdrawal, res judicata, exception of lis pendens, exception of nationality, exception of lack of "clean hands", exception of nullity, exception of related actions, estoppel; *Interruptive exceptions*: exception due to non-existence of a dispute, exception due to lack of exhaustion of domestic remedies, lack of diplomatic negotiations, exception against remedies.

[6] PCIJ, case related to Certain German Interests in the Polish Upper Silesia, judgement of 25 August 1925, Series A, N°6. P.19.

[7] See J.C. Wittenberg, op. cit. (note 1), p.16: "In this regard, Case law is by far the riches source. Claims referred to on the basis of sometimes concise … could not foresee the particular circumstances of each of them, the international Tribunals, master of their method, most of the time, master of their procedure, are used to discriminate, among questions raising relevant cases submitted to it, the common to all and those requiring preliminary examination. This is how the notion of admissibility shifted from domestic law to international law".

[8] See Panevezys-Saldutiskis Railway Case, PCIJ. S2RIE A: B. No 76, p.22 "The second exception being present in order to exclude the Court's examination of the merits of the case, and the Court may rule on the said exception without pronouncing in any way on the merits of the case, the exception must be regarded as preliminary in the sense of Rule 62 ": or even the dissenting opinion of Judge Anzilotti in the case of the Electricity Company of Sofia and Bulgaria, PCIJ. S2RIE A / B. No. 77, p. 95 where he speaks of the "exception the purpose and effect of which is to prevent the trial before the Court without prejudice to the question whether the right by the plaintiff exists or not".

[9] This second aspect is tempered by the question of the "factual background". This, because there is no issue of admissibility that can be appreciated without a certain examination of the facts. In referring to the documentation confined to essential texts, Bedjaoul J. observes that "this remark does not, however, retain its full value if the question of jurisdiction is complicated by a challenge to the admissibility of the application, because to debate of this one, it is often necessary to tackle questions of merits ", in Mélanges Virally, op. cit. p. 89; the other attenuation of the specialty proceeds from the possible junction of the exception and the merits or joinder.

[10] Witenberg. Op. cit. (Note 1). pp. 8-9; Sur la séparabilité des exceptions préliminaires du fond, voir G. Abi-Saab, op. cit (note 1), pp 179-204.

[11] Article 30 of the new French Code of Civil Procedure, instituted by decree N° 75-1123 of 5 December 1975, entered into force the 1 January 1976.

[12] PCIJ, judgment of August 30, 1924, in the case of Mavrommatis, Publications of the Court. Series A.No 2, p, 11. This definition has been taken up by The Hague Court in a number of its cases: Case of Serbian Loans, PCIJ. Series A No. 20, (1929), pp. 16-18, Case concerning the Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Phase, ICJ Reports 1950, p. passage on Indian territory (preliminary objection), ICJ Reports 1957, pp. 148-149; Case of Right of Passage over Indian Territory (merits), ICJ Reports 1969, p. 34, South West Africa Case (Preliminary Objections), ICJ Digest 1969.p 319

[13] Charles de Visscher, op. cit., p.32

[14] See South West Africa case cited above, ICJ. Judgment of 21 December 1962. P.328: "It is not sufficient either that the interests of the two parties to such a case are in conflict. It must be shown that the claim of one of the parties meets the obvious opposition of the other "

[15] Judgment of 25 August 1925, PCIJ

[16] See the Report of the Franco-Siamese Conciliation Commission of 27 June 1947: Advisory Opinion of the International Court of Justice of 30 March 1950 in the Case for the Interpretation of Peace Treaties, ICJ Reports 1950.p.74 where it says: There has thus been a situation in which the views of both parties as to the performance or non-fulfillment of certain treaty obligations are clearly opposed. In the event of such a situation, the Court must conclude that international disputes have occurred ". In addition, "the existence of an international dispute requires to be established objectively. The mere fact that the existence of a dispute is challenged does not prove that this dispute does not exist "Ibid. The Court recognizes the contrary view in the cases of South West Africa when it says that "the mere affirmation is not sufficient to prove the existence of a dispute, just as the mere fact that the existence of a dispute is challenged does not prove that this difference does not exist "ICJ Reports 1962.op.cit, .p.328

[17] The Northern Cameroon case, preliminary objections, judgment of 23 December 1963. ICJ Reports 1963, p. 15.

[18] See <www.icj-cij.org> for the orders

[19] Aforesaid case, *supra* note 12.

[20] Northern Cameroon case, op. cit. p. 27.

[21] Ibid, pp. 34.

[22] Ibid, pp. 33-34.

[23] South West Africa case, op. cit. (note 12), p.328.

[24] PCIJ, The Electricity Company of Sofia and Bulgaria case, series A/B, N° 77 p. 83.

[25] See supra note 18

[26] South West Africa case, op. cit., p.332: In the case of the Barcelona Traction Light and Power Co. The Court said in an obiter dictum: "an essential distinction must be drawn in particular between the obligations of States towards the international community as a whole and that which is born vis-à-vis another State within the framework of the diplomatic protection. By their very nature. The first concern all states. In view of the importance of the rights at issue, all States may be regarded as having a legal interest in the protection of these rights: the obligations in question are "*erga omnes*" obligations, ICJ Reports 1970.p.32. By these words, the Court accepts the notion of actio popularis in international law; the notion that it found in the second phase of the South West African case when it said: "Moreover, if viewed

from another angle, this argument amounts to saying that the Court should admit some sort of *actio popularis*, or a right for each member of a community to bring an action in defense of a public interest. However, while it is possible for certain systems of domestic law to know this concept, international law as it currently stands does not know it and the Court cannot regard it as one of the general principles of law mentioned in the article. 38 (1) (c) of its Statute '. South West Africa affairs. Second Phase, 18 July 1966, ICJ Reports 1966.p.47

[27] See the joint dissenting opinion of Judges Spender and Fitzmaurice and Judge Morelli; see also Ch. de Visscher, op. cit (note1), p.22, where the author says: "Where the judgment appears to deviate from the rules of procedure, it is when a general right to action concludes the existence of a justiciable dispute and the admissibility of the claim. The right to action is in itself only a legal power which remains in a state of simple virtuality as long as its owner has not fulfilled the procedural conditions to which the claim is subject. Among these conditions is first and foremost the manifestation of the antithetical attitudes of the parties to the proceedings, attitudes which can only be inferred from the direct confrontation characterized by the classical opposition of Claim and challenge ".

[28] Above mentioned cases, note 12.

[29] Ibid

[30] Ibid

[31] On the notion of "parliamentary diplomacy" or "conference diplomacy", see the separate opinion of Judge C. Jessup in the same judgment (ICJ Reports 1962, pp. 433-436) which now explains a clause relating to prior recourse to diplomatic negotiations must be interpreted as "understanding what has been called parliamentary diplomacy, that is, the negotiation of solutions to international problems within the framework and through the channels of an organized institution, acting in accordance with established rules, as in the United Nations General Assembly, with its permanent missions and its special committees, are now part of the normal means of diplomacy, that is, of negotiation. "For a contrary view , see the joint dissenting opinion of Judges Sir Percy Spender and Sir Gerald Fitzmaurice (ibid., p.562). According to these judges, "These discussions are necessarily too general and too vague to constitute negotiations between the parties themselves, who then present themselves before the Court on a specific dispute separating them as States".

[32] The conclusion of the joint dissident opinion of Sir Percy Spender and Sir Gerald Fitzmaurice (ibid p.563) should be considered. It reads: “We shall conclude by pointing out that requirements about "disputes" and "negotiations" are not mere technicalities. They appear in one form or another in virtually every adjudication clause that has ever been drafted, and for good reason. They are inserted purposely to protect the parties, so far as possible, from international litigation that is unnecessary, premature, inadequately motivated, or merely specious. Without this measure of protection, countries would not sign clauses providing for compulsory adjudication. This is an aspect of the matter to which we feel insufficient attention has been given”.

[33] Case Concerning Land Reclamation By Singapore In And Around The Straits Of Johor (Malaysia v. Singapore), order of 10 September 2003, ITLOS reports 2003, p.4; pp. 18-21; See also the separate opinions of judges Ndiaye pp.48 and following and Chandrasekhara Rao, p.36 and following; see also the Counter Memoirs of Singapore, Chapter 3 [Competence and Admissibility], p.23 and following, as well as the pleadings of Professor Riesman, ITLOS/PV, 03/02, 25 September 2003, p.m., available on the Tribunal website: www.itlos.org or www.tidm.org, case N° 12.

[34] See Reply, paragraph 6.

[35] See Statement of claims of 4 July 2003, paragraph 20.

[36] Following the submission of the statements of claim on 4 July 2003, there was a further exchange of correspondence between the parties [reproduced in Annex B to Malaysia's request for provisional measures]. There was also a further exchange of views at the Singapore meeting held on August 13 and 14, 2003, at the end of which, Malaysia informed Singapore in a note dated August 22, 2003, of the following: "At the end of the meeting held on August 13 and 14, the Malaysian delegation reserved the right to request the International Tribunalfor the Law of the Sea (ITLOS). Malaysia is nevertheless willing to attempt once again to settle the issues under consideration through consultation. To do this, however, it is essential that Singapore agree to postpone the continuation and completion of the reclamation works, particularly near Pulau Tekong. The Ministry of Foreign Affairs strongly believes that there can be no real negotiations on this point if, at the same time, Singapore is hastily completing the land reclamation, whatever their impact on Malaysia”.

[37] Singapore further recalled the assurance given to Malaysia in its diplomatic note of 2 September 2003: "If the evidence were

conclusive, Singapore would seriously review its work and consider taking any necessary and adequate measures, including suspension, to remedy the harmful effect in question '

[38] Southern Bluefin Tuna case (Australia vs Japan ; New Zealand vs Japan), order of 27 august 199, paragraph 60 ; see website of the Tribunal : www.itlos.org.

[39] Mox Plant case (United Kingdom vs Ireland), order of 3 December 2001, paragraph 60: <www.itlos.org>

[40] Case Concerning the Land and Maritime Boundary between CAMEROON AND NIGERIA (CAMEROON/NIGERIA) preliminary objections, judgment, ICJ reports 1998, p. 303. Indeed, although the rule of prior exhaustion of negotiations exist in certain treaties, it is not compulsory in general international law. The international court of justice refused on several occasions to admit it. It even found, based on the States practice, that the application could be referred to the court it is submitted to while negotiations were still ongoing. In the Aegean Sea Continental Shelf case, the Court stated: "The Turkish Government's attitude might thus be interpreted as suggesting that the Court ought not to proceed with the case while the parties continue to negotiate and that the existence of active negotiations in progress constitutes an impediment to the Court's exercise of jurisdiction in the present case. The Court is unable to share this view. Negotiation and judicial settlement are enumerated together in Article 33 of the Charter of the United Nations as means for the peaceful settlement of disputes. The jurisprudence of the Court provides various examples of cases in which negotiations and recourse to judicial settlement have been pursued. Several cases, the most recent being that concerning the Trial of Pakistani Prisoners of War (I. C.J. Reports 1973, p. 347), show that judicial proceedings may be discontinued when such negotiations result in the settlement of the dispute. Consequently, the fact that negotiations are being actively pursued during the present proceedings is not, legally, any obstacle to the exercise by the Court of its judicial function". (judgment, ICJ reports 1978, p.12, paragraph 29); See also case concerning military and paramilitary activities in and against Nicaragua; competence and admissibility, judgment, ICJ, Reports 1984, p. 440, paragraphs 106 and 108.

[41] As noted by Prof. Abi-Saab, op. cit., p.116: "Lis pendence is similar to jurisdiction insofar as it has its origin in the judicial organization, presuming a competing jurisdiction of two or more Courts. In French law, lis pendens and interconnection belong to the same type (declinatory) but not to the same kind as the objections to incompetence, because they all relate to the judicial organization. This has led some authors to consider the objection of lis pendens as an objection of incompetence. On the other hand, lis pendens are similar to admissibility, particularly in international law, given the absence of a judicial organization in this area, because it does not present itself as a limit to the scope of the activity. In general or in a particular case, but rather as a condition for the exercise of this judicial activity ". See also, G. Tenekides, "the exception of lis pendens before international organizations", RGDIP, Vol. 36 (1929), pp. 505-527.

[42] Case related to Certain German Interests in Polish Upper Silesia (competence), judgment of 25 august 1925, PCIJ, Serie A N°6, pp. 19-20

[43] The « Camouco » case (Panama vs France), prompt release, judgment of 7 February 2000, ITLOS Report 2000, Vol 4, pp. 10-76, see also ITLOS/PV.002 of 27 January 2000, lines 1-8.

[44] Ibid. pp. 28-29

[45] Ch. de Visscher, op. cit., p 175.

[46] Arbitrability refers to the compliance of a dispute with a compulsory arbitration undertaking. Max Huber describes as an arbitrable dispute, a dispute "subject to a decision on the basis of international law"; Prof. Max Huber's Arbitration Report dated April 27, 1924 in the case of claims for damages caused to British subjects in the Spanish zone of Morocco, RSA, Vol. II, p. 632.

[47] See Nuclear Tests Cases, Judgment of 20 December 1974 (Australia v. France), ICJ Reports 1974, p.271, paragraph 55.

[48] Case concerning Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction of the Court and Admissibility of the Application, Judgment of 20 December 1988, ICJ Reports 1988, p.91, paragraphs 51-52.

[49] Military and paramilitary activities in and against Nicaragua case (Nicaragua vs United States of America), merits, judgment of 27 June 1986. P.14, pp. 26-28, paragraphs 32-35.

[50] ICJ Reports 1984, pp. 431-436.

[51] Ibid. pp. 436 – 438

[52] See for instance, The European Convention on Human rights: art.2; Rules of the Human Rights Commission: art. 47, paragraph 1, International Law Commission, articles on international responsibilities project (2001 version): Art 45.

[53] Mavrommatis Palestine Concessions Case, op. cit. p. 34.

[54] See also the Statutes of ITLOS, article 24, paragraph 1 and the articles 54 and following of the rules.

[55] Northern Cameroon case, op. cit., pp. 27-28.

[56] Mavrommatis Palestine Concessions Case, op. cit. p. 34. ; Certain German Interests in the Polish Upper Silesia case, op. cit. p.14; the interpretation of judgments N° 7 and 8, PCIJ, series A N° 13 (1927), p.16.

[57] Appeals from the judgments of the Hungaro-Czechoslovak Mixed Arbitral Tribunal is the unique case brought before the Court PCIJ where a preliminary objection of inadmissibility based on the non-observance of the prescribed time limit to introduce an appeal. Due to the withdrawal of the claimant, Tchekoslovakia, the Court could not adjudicate on this objection. See, PCIJ, series A/B, N°56 (order of 12 may 1933), p. 162

[58] See regarding ITLOS, the United Nations Convention for the Law of the Sea: art. 290 (provisional measures); art 292 (prompt release); Statutes: art. 16; art. 27; adopted on 28 October 1997: art. 46; art. 54; art. 59; art. 61; art. 69; art. 89; art. 90; art.96; art. 97; art. 98; art. 99; art. 103; art.110; art. 111; art. 112.

[59] Losinger and Co case, preliminary objection, order of 27 June 1936, PCIJ, Series A/B, N° 67 (1936), p.22.

[60] The Panevezys-Saldutikis case, order of 28 February 1938 (Estonia vs Lithuania), PCIJ, Series A/B, N°74, p.28.

[61] Advisory opinion of 7 February 1923, related to the Nationality Decrees (of Tunis and Morocco) Case, PCIJ, Series B, N°4, p.24.

[62] The Nottebohm case, second phase, judgment of 6 April 1955, ICJ Reports 1955, p.23 ; the Arbitral Tribunal entrusted with deciding the dispute concerning the Filleting within the Gulf of St. Lawrence recalled " that the right for a State to determine through its legislation, the conditions of registration of vessels and fishing boats in particular, is under the exclusive competence of this State". Award of 17 July 1986, paragraph 27; see also the "SAIGA" case (N°02) (Saint Vincent and the Grenadines v. Guinea), judgment of 1 July 1999, ITLOS Reports 1999, pp. 47-48, paragraphs 103-109; See also the dissident opinion of judge Tafsir Malick Ndiaye of the same case, pp. 234-257.

[63] Above mentioned Nottebhom case, ICJ Reports 1955, pp. 16-17.

[64] In the opinion related to the acquisition of the polish nationality, the Permanent Court indicated that the principle « are only applicable subject to the conventional commitments" subscribed by the State: see PCIJ, opinion of 15 September 1923, Series B, N°7, p.16; the same rule is enounced in article 1 of the Hague Convention of 12 April 1930 related to certain questions on conflicts of nationality law: "Each states determines by its legislation who are its nationals. This legislation must be accepted by other States, provided that it complies with international Conventions, the international customary law and the general principles of nationality laws."

[65] The Nottebohm case, op. cit. p.26

[66] The above mentioned Panevezys-Saldutikis Railways case.

[67] In the case of British claims for damages in the Spanish zone of Morocco, the arbitral award rendered on May 1, 1925, by Prof. Max Huber, states: "It is a well-established principle of international jurisprudence that a complaint must be national from the point of view of the Claimant State from the outset until it is presented as a claim under international law. By presentation, one must understand not only the first presentation through the diplomatic channel, but all the acts by which the claim is sustained on the basis of international law. It follows that the national character of the claim must exist up to the time of judgment or at least until the close of the proceedings". RSA, Vol. II, p.706. With regard to the change of nationality, and the question of legal persons, see Ch. Rousseau, op. cit. (Note1), pp. 121-15.

[68] The case concerning ELETTRONICA SICULA S.p.A. case (ELSI), United States of America v. Italy), judgment of 20 July 1989, p.46, paragraph 59; See also the "SAIGA" case (N°2), op.cit., pp 43-47, paragraph 89 to 102. See also, the second report of the Special Rapporteur of the ILC, J. Dugard on diplomatic protection, Doc. A/CN, 4/514, 53rd session (April-August 2002).

[69] There are other factors that affect the admissibility of claims in the bringing into play of international responsibility for injured individuals. First, the waiver which means the will to abandon a claim. It must emanate from the State alone the holder of the right of action. The disclaimer appears as a variant of the waiver in that it terminates the proceeding by the plaintiff's will or action by him. Then there is the transaction, often conventional, the object of which is to amicably settle the dispute and extinguish the complaint thus rendering the action of the plaintiff inadmissible. The transaction can occur before the opening or during the course of the procedure. After that, there is res judicata between the parties to the settled dispute which is binding on the nationals of the States in question and which would

therefore render inadmissible an action for diplomatic protection for the case in which the rule is applicable and on the points decided by the definitive jurisdictional decision. Finally, there is the extinctive or discharging prescription which arises when a long time elapses between the moment of the occurrence of the damage and that of the presentation of the claim. The question of whether the extinctive or terminating prescription of the international action for damages must apply or not falls within the discretion of the judge. This is why the principle has given rise to numerous and varied jurisprudential solutions but also to very scholarly doctrinal controversies.

[70] See Brierly, Report on the law of Treaties, doc. A / CN4 / 32, ILCYB, 1950, Vol. II, p.298, paragraph 30 where the author comments on the distinction. He says: « A certain linguistic difficulty must, therefore, inevitably pervade the framing of rules for conclusion of treaties. This is specially the case when the term "treaty" is used primarily to connote the instrument or document emboying a binding agreement than the agreement itself … It is innocuous provided that it does not obscure the real nature of treaty which is legal act or transaction rather than a document".In the same vein, see Sir Gerald Fitzmaurice, Report on the law of treaties, Doc. A / CN4 / 101ILCYB, 1956, Vol.II, art.14, comment No.24: "considered as a text, the treaty is a document rather than a legal act or transaction. This ambiguity appears every time we talk about treaties because a treaty is both a document that states an agreement and that agreement is itself. In the first sense, it may have been dealt with, even if the treaty is not in force or has ceased to be in force (that is, although there is no agreement as a legal agreement). Nevertheless, in order ultimately to ensure the validity of the agreement, it is essential that it be drafted, established and authenticated by the proper means and forms. Indeed, if in law the text does not itself constitute the agreement, it is at least the indispensable and generally unique proof of the content of the agreement. The primary value of the text of a treaty only in itself, therefore, is its value as proof. The text must therefore prevail and, for that reason, fulfill certain conditions in terms of form and method ".

[71] The « LOTUS » case, judgment of 7 September 1927, PCIJ, Series A, N°10, p.12

[72] See G. Abi-Saab, op. cit., pp. 130-145.

[73] See the separate opinion of judge Morelli in the Northern Cameroon case, op. cit., pp. 131-132.

[74] Ibid

[75] ICJ, Reports of Memoirs, 1963, p.56 and following.

[76] Ibid. P. 346.

[77] Northern Cameroon Case, op. Cit., judgment, p.28

[78] South West Africa case, op. cit., Reports 1962, p.327.

[79] Ibid. P.343. See Supra, first part, paragraph 1 on the existence of a dispute and the Court's reasoning.

[80] Judgment of 18 July 1966 (merits), ICJ Reports 1966, p.34.

[81] Ibid. pp. 37-42.

[82] ICJ Reports 1962, p.343.

[83] ICJ Reports 1966, p.51.

[84] Ibid. pp. 42-43.

[85] Ibid. P.38,Where it has been argued that States may request that a general principle be observed and that they may have a legal interest in claiming before the Court respect for a principle of international law in the absence of any pecuniary damage, the Court will retort that: "without seeking to discuss to what extent and in what circumstances this may be true, it will suffice to point out that if the Court finds in this case that the plaintiffs could not have had legal rights or interests in with regard to the provisions of the Mandate relating to special interests, it is not for the sole reason that their object is concrete and tangible. Similarly, if the Court finds that the claimants do not individually have as States any legal rights or interests in the management provisions, it is not because such rights or legal interests would not have tangible concrete object. The Court simply holds that these rights or legal interests can only exist if they have been clearly conferred on those claiming them by a text, an instrument or a rule of law, and that in the present case there has never been conferred on individual Members of the League, either by one of the relevant instruments or within the general framework of the system of mandates or otherwise ". see ICJ Reports 1966, pp.32-33.

[86] As stated by the permanent Court, « it is based on the legal interest alleged by the intervenor; and the Court may welcome it only if it believe the existence of this interest is justified". The "Wimbledon" case (judgment of 28 June 1923), PCIJ, Series A, N°1, p.12.

[87] Ch. de Visscher, op. cit. (Note 1), p.66.

[88] PCIJ, Series A, N° 1 (17 August 1923), p.20.

[89] It is the case of Malta in the Tunisia-Libya continental shelf case, judgment of 14 april

1981, ICJ Reports 1981, p.19; as well as Italy in the Libya-Malta Continental Shelf case, judgement of 21 March 1984, ICJ Reports 1984, pp. 1-28; also El Salvador in the Military And Paramilitary Activities In And Against Nicaragua case; claim deemed inadmissible at this stage, order of 4 October 1984, ICJ Reports 1984, p.215; and finally it is the case of Philippines in the Sovereignty on Pulau Ligitan and Pulau Sipadan case, judgment of 23 October 2001, pp. 2-33, paragraphs 1-95.

[90] Haya de la Torre case (judgment of 13 June 1951), ICJ Reports 1951, pp.76-77.

[91] See the « Grand Prince » case (Belize v. France), Prompt release request, judgment of 20 april 2001, ITLOS Reports 2001, paragraphs 62 to 94; see also the separate opinion of Judge Anderson in the same case and the one of Judge Wolfrum.

[92] See the Case Concerning Rights of Nationals of the US in Morocco, ICJ Reports 1951, p. 109 and following. The issue of direct and personal interest has been developed in it by the ICJ in the South West Africa case. See the commentaries of G. Abi-Saab, op. cit., pp. 136-145.

[93] See supra, section I, 2, b.

[94] See supra, section I, a, (ii).

[95] The Mavrommatis Palestine Concessions Case, op. cit., Where the Court states: "the importance and chances of success of diplomatic negotiations is essentially a relative one". P.13; moreover "in applying this rule, the Court cannot disregard, amongst other considerations, the views of the States concerned, who are in the best position to judge as to political reasons which may prevent the settlement of a given dispute by diplomatic negotiation.

[96] Ibid. p.15, this case was referred to the Court through special Agreement.

[97] Case concerning Certain German Interests in the Polish Upper Silesia, op. cit., p.14. The Court indicates: "the absence of diplomatic negotiations proving the existence of the difference of opinion which is required under Article 23 of the Convention cannot prevent the bringing of an action in the present case. Moreover, such absence would be of no practical importance, for even if the application were on this ground declared premature, the German Government would be free to renew it immediately afterwards". P.22.

[98] The Hague Convention related to the peaceful settlement of international conflicts of 29 July 1899: article 16; the Hague convention I related to the peaceful settlement of international conflicts of 18 October 1907: article 14; Covenant of the League of Nations of 28 June 1919: article 13 paragraph 1, General Act of Arbitration [Geneva agreement, peaceful settlement of international disputes] of 26 September 1928: article 39, paragraph 2.

[99] Case concerning the right of Passage over the Indian Territory (preliminary objections), judgment of 26 November 1957, ICJ Reports 1957; see also the Written and Oral Pleadings, Vol. 1, p. 117.

[100] Ibid.

[101] See M. Bourquin, "to what extent resort to diplomatic negotiations is necessary before submitting a dispute to international Courts and Tribunal?", in *Hommage D'une Génération De Juristes Au Président Basdevant*, Paris, Editions A. Pédone, 1960, pp. 43-55, spec. pp. 47-48, see also note 40 supra.

[102] Article 40 paragraph 1 of the statutes of the International Court of Justice; see also article 24 paragraph 1 of the statutes of the International Tribunal for the Law of the Sea.

[103] Article 38, paragraphs 1 and 2 of the rules of the ICJ; see also article 54, paragraphs 1 and 2 of the Rule of ITLOS.

[104] In the case concerning Phosphates in Morocco, PCIJ, Series A/B, N° 74, p.16.

[105] Ibid. p.21; In the Northern Cameroons case, the Court had to consider a preliminary objection of the United Kingdom based on the alleged non-compliance with Article 32 (2) [current Article 38 (2)] of the Regulation, which provides that If a case is brought before the Court, the request must contain as far as possible a precise indication of the subject of the request and a statement of the reasons by which the request is purportedly justified. Endorsing the opinion of the Permanent Court of International Justice, the Court considers that, exercising international jurisdiction, it is not bound to attach to considerations of form the same importance as they might have in domestic law. It finds that the application complied sufficiently with Article 32 (2) of the Rules and that this preliminary objection is therefore unfounded; Case of Northern Cameroons, op. cit., ICJ Reports 1963, pp. 27-28.

[106] Case of 27 November 1950 interpreting the judgment of 20 November 1950 (case of the right of asylum), ICJ Reports 1950, p. see also the case of the right of passage over Indian territory mentioned above and the views of President Klaestad on the question of the timing of the request for the assessment of the latter, Reports 1960, p. 47; In the case of Northern

Cameroons, although the Court accepted the existence of a dispute "at the date of the application", it did not consider that it was required to give a ruling "on the date of the application". Judgment ", op. cit., pp.27 and 34.

[107] Nottebohm case, op. cit., p.16: Examining the United Kingdom's conclusions in the fisheries case, the Court also distinguished between the conclusions and "a set of proposals which, in the form of definitions, principles or rules, tend to justify certain claims and are not the precise and direct statement of a claim ". Fisheries case, judgment of 18 December 1951, ICJ Reports 1951, p.126.

[108] PCIJ, the Railways Case, op. cit. p 17.

[109] The Permanent Court has decided, for example, in the cases: Pajzscsaky, Esterhazy, May 23, 1936, PCIJ, Series A / B No. 66: Losinger and Co., SA, June 27, 1936, Series A / B No. 75. The International Court of Justice had recourse to joinder on the merits in the case concerning certain Norwegian loans, 6 July 1957, ICJ Reports 1957, p. in the case of the Right of Passage on Indian Territory, 26 November 1957, ICJ Reports p.125; and in the Barcelona Traction Light and Power Company Limited case, 24 July 1964, ICJ Reports 1964, p.

[110] J. Lang. Op. cit. (Note 1), pp. 5-45, spéc. P.10.

[111] Dictionnary of International Law terminologies, Paris, Sirey, 1960, 750, p.273.

[112] See article 79, paragraph 7 of the Rules of the ICJ ; see also, article 97 of ITLOS rules, besides Abi-Saab, G. Guyomar, Com*mentaire du Règlement de la CIJ*, Paris, Pédone, 1983, 760, pp. 496-518.

[113] Ibid, p. 501; 13 cases for the PCIJ and 19 cases for the ICJ in 1983.

[114] PCIJ, Series A, N°6, p.19.

[115] Ibid:See also Wittenberg, op.cit. (Note 1), p. 12 which establishes a *ratio legis* of preliminary objections in the interest of a good administration of justice arguing that "before approaching the examination of the claims of the claimant, one attaches to control whether he has the right to take legal action, whether he has complied with the prescribed forms and whether there is no legal obstacle to paralyze his action ".

[116] Railway Case, op. cit., p. Ambatielos case, where the Court distinguishes between "the jurisdictional exception" and two "pleas seeking the admissibility of the claim", ICJ Reports 1953, pp. 22-23; the Nottebohm case, where the Court has jurisdiction to "examine all aspects, whether they concern jurisdiction, admissibility or merits"; ICJ Reports 1953, p. Interhandel case where the Court says "Since the Fourth Preliminary Objection of the United States relates to jurisdiction, in this case the Court will consider it before the third objection, which is a plea of inadmissibility", ICJ Reports 1959, pp. . 23-24; Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) on "Jurisdiction of the Court and Admissibility of the Application", in which the Court said in paragraph 84: “The Court now turns to the question of the admissibility of the Application of Nicaragua. The United States of America contended in its Counter-Memorial that Nicaragua's Application is inadmissible on five separate grounds, each of which, it is said, is sufficient to establish such inadmissibility, whether considered as a legal bar to adjudication or as "a matter requiring the exercise of prudential discretion in the interest of the integrity of thejudicial function"Some of these grounds were in fact stated in terms suggesting that they were more competence or jurisdictional rather than admissibility; however, this, in this respect does not appear to be of decisive importance. The Court will examine its grounds; ICJ Reports 1984, p.429; see further pp.429-441, paragraphs 84-108 for the examination of thegrounds.

[117] See G. Sperdutti "the admissibility of preliminary substantive objections in the international lawsuit", Riv. Dir. Int., Vol. III (1970), pp. 461-490. The author writes: "It seems to us perfectly normal for a State to be able to resort to the radical means of defense when that State, called to answer to justice for certain actions or omissions alleged to be unlawful, considers it unnecessary respond to such conduct on the ground that it considers the law of law, which is invoked against it, as not likely to be infringed by such conduct because of the limitations of the applicability of the norm. The plea in question qualifies from the point of view of the general theory of the trial, a preliminary objection. However, according to the current interpretation of Article 62 of the Rules of Court, which deals with "preliminary objections", this article applies only to formal exceptions, also known as procedural exceptions, namely the only exceptions whose purpose and effect are, to prevent the trial before the Court, without prejudging the question whether the right claimed by the plaintiff exists or not ", pp.463-464. The preliminary objection of substance thus reached is very close to a "plea of inadmissibility", that is to say of any means tending to cause the plaintiff to be declared inadmissible at his request, without examination on the merits, for default right to act, such as lack of standing, lack of interest, prescription or res judicata. It is classic to emphasize the mixed nature of the “

fin de non recevoir". It is close to the procedural exception in the sense that when it is opposed, its examination by the Court does not presuppose examining the merits of the case. On the other hand, when it is accepted, its effects bring it closer to the defense on the merits, which gives rise to inadmissibility. In a word, the defendant who objects to the plaintiff's objection to the plaintiff challenges his right of action. What is contested is no longer the admissibility of the claim in the proceedings, but the law on which the claim is based.

[118] V.M. Mabrouk, procedural objections, op. cit. (Note 1), p.309.

[119] M. Virally, « foreword », p.5 in G. Malinverni, *Le règlement des différends dans les organisations internationales économiques,* Genéve-Leiden, IUHEI-Sijhoff, 1974, p. 251.