

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

CASE CONCERNING THE
CONTINENTAL SHELF

(TUNISIA/LIBYAN ARAB JAMAHIRIYA)

APPLICATION BY MALTA FOR PERMISSION TO INTERVENE

JUDGMENT OF 14 APRIL 1981

1981

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE DU PLATEAU CONTINENTAL

(TUNISIE/JAMAHIRIYA ARABE LIBYENNE)

REQUÊTE DE MALTE À FIN D'INTERVENTION

ARRÊT DU 14 AVRIL 1981

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CASE CONCERNING THE CONTINENTAL SHELF

(TUNISIA/LIBYAN ARAB JAMAHIRIYA)

APPLICATION BY MALTA FOR PERMISSION TO INTERVENE

Intervention under Article 62 of the Statute — Legal interest which may be affected by the decision in the case — Object of the intervention.

JUDGMENT

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

In the case concerning the continental shelf,

between

the Republic of Tunisia,
 represented by

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

Professor Sadok Belaïd, Professor agrégé, in the Faculty of Law, Political
 Science and Economics, at the University of Tunis,
 as co-Agent and Counsel,

Professor R. Y. Jennings, Q.C., Whewell Professor of International Law in the
 University of Cambridge,

as Counsel,
 assisted by

Mr. J. P. Carver, Solicitor (Coward Chance),
 Mr. Abdelwahab Chérif, Counsellor at the Tunisian Embassy to the Netherlands,

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

and

the Socialist People's Libyan Arab Jamahiriya,
represented by

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

Dr. Abdelrazeg El-Murtadi Suleiman, Professor of International Law at the University of Garyounis,

as Counsel,

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

Professor Antonio Malintoppi, Professor in the Faculty of Law at the University of Rome,

Mr. Keith Highet, Member of the District of Columbia and New York Bars,

as Counsel and Advocates,

and

Mr. Walter D. Sohier,

Mr. Rodman R. Bundy,

Mr. Richard Meese,

Mr. Michel Vodé,

as Counsel ;

Upon the application for permission to intervene submitted by the Republic of Malta,

represented by

Dr. Edgar Mizzi, Attorney-General of Malta,

as Agent and Counsel,

H.E. Mr. Emanuel Bezzina, Ambassador of Malta to the Netherlands,

as co-Agent,

assisted by

Sir Gerald Fitzmaurice, G.C.M.G., Q.C.,

as Consultant and Co-ordinator,

and by

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

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

Mr. E. Lauterpacht, Q.C.,

as Counsel,

and

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

THE COURT,

Composed as above,

After deliberation,

Delivers the following Judgment :

1. By a letter of 25 November 1978, received in the Registry of the Court on 1 December 1978, the Minister of Foreign Affairs of the Republic of Tunisia notified the Court of a Special Agreement in the Arabic language signed at Tunis on 10 June 1977 between the Republic of Tunisia and the Socialist People's Libyan Arab Jamahiriya, providing for the submission to the Court of a dispute concerning the delimitation of the continental shelf between those two States ; a certified copy of the Special Agreement was enclosed with the letter, together with a translation into French. Pursuant to Article 40, paragraph 2, of the Statute, and to Article 39, paragraph 1, of the Rules of Court, a certified copy of the notification and of the Special Agreement was forthwith transmitted to the Government of the Socialist People's Libyan Arab Jamahiriya. By a letter of 14 February 1979, received in the Registry of the Court on 19 February 1979, the Secretary of Foreign Affairs of the Socialist People's Libyan Arab Jamahiriya made a like notification to the Court, enclosing a further certified copy of the Special Agreement in the Arabic language, together with a translation into English.

2. Pursuant to Article 40, paragraph 3, of the Statute and to Article 42 of the Rules of Court, copies of the notifications and Special Agreement were transmitted to the Secretary-General of the United Nations, the Members of the United Nations and other States entitled to appear before the Court.

3. Since the Court did not include upon the bench a judge of Tunisian or of Libyan nationality, each of the Parties proceeded to exercise the right conferred by Article 31, paragraph 3, of the Statute to choose a judge *ad hoc* to sit in the case. On 14 February 1979 the Libyan Arab Jamahiriya designated Mr. Eduardo Jiménez de Aréchaga, and the Parties were informed on 25 April 1979, pursuant to Article 35, paragraph 3, of the Rules of Court that there was no objection to this appointment ; on 11 December 1979 Tunisia designated Mr. Jens Evensen, and on 7 February 1980 the Parties were informed that there was no objection to this appointment.

4. By a letter of 18 August 1980, the Government of the Republic of Malta, in reliance on Article 53, paragraph 1, of the Rules of Court asked to be furnished with copies of the pleadings in the case, which at that date comprised the Memorials filed on 30 May 1980, and documents annexed thereto. By letters dated as hereafter indicated, the Governments of the following States had previously submitted similar requests : the United States of America (12 June 1980) ; Canada (13 June 1980) ; Netherlands (18 June 1980) ; Argentina (23 June 1980) ; and subsequently, on 8 October 1980, the Government of Venezuela also made a similar request. By letters of 24 November 1980, after the views of the Parties had been sought, and objection had been raised by one of them, the Registrar informed the Government of Malta and those other Governments that the President of the Court had decided that the pleadings in the case and documents annexed would not, for the present, be made available to States not parties to the case.

5. The Counter-Memorials of the Parties to the case, as contemplated by the Special Agreement of 10 June 1977, and in accordance with an Order made by the President of the Court on 3 June 1980, were required to be filed within the following time-limits : for the Counter-Memorial of the Republic of Tunisia, 1 December 1980 ; for the Counter-Memorial of the Libyan Arab Jamahiriya, 2 February 1981. The Special Agreement, however, included a provision for a possible further exchange of pleadings, so that even when the Counter-Memorials of the Parties had been filed, the date of the closure of the written proceedings, within the meaning of Article 81, paragraph 1, of the Rules of Court, would remain still to be finally determined. The Counter-Memorials were each, in turn, filed within the appropriate time-limits, that of the Libyan Arab Jamahiriya being received in the Registry on 2 February 1981.

6. By a letter from the Prime Minister of the Republic of Malta dated 28 January 1981 and received in the Registry of the Court on 30 January 1981, the Government of Malta, invoking Article 62 of the Statute, submitted to the Court a request for permission to intervene in the case. In accordance with Article 83, paragraph 1, of the Rules of Court, certified copies of the Application by Malta for permission to intervene were forthwith communicated to Tunisia and the Libyan Arab Jamahiriya, the Parties to the case, and copies were also transmitted, pursuant to paragraph 2 of that Article, to the Secretary-General of the United Nations, the Members of the United Nations and other States entitled to appear before the Court.

7. On 26 February 1981, within the time-limit fixed for that purpose by the President of the Court as provided by Article 83, paragraph 1, of the Rules of Court, the Government of Tunisia and the Government of the Libyan Arab Jamahiriya submitted written observations on the Application of Malta for permission to intervene, in which they set out their respective reasons for contending that the Application did not satisfy the conditions laid down by the Statute and Rules of Court. The Parties and the Government of Malta were therefore notified by letters of 3 March 1981 that the Court would hold public hearings, in accordance with Article 84, paragraph 2, of the Rules of Court, to hear the observations of Malta, the State seeking to intervene, and those of the Parties to the case, on the question whether the Application of Malta for permission to intervene should be granted.

8. By a letter of 2 March 1981, received in the Registry of the Court on 4 March 1981, the Government of Malta notified the Court that in reliance on Article 31, paragraph 3, of the Statute of the Court it nominated a judge *ad hoc* "for the purpose of the intervention proceedings", and raised questions related to the participation of the two judges *ad hoc* designated by the Parties to the case, suggesting that Tunisia and the Libyan Arab Jamahiriya should be considered as "in the same interest" in the proceedings on the application for permission to intervene. The Court, sitting without the participation of the judges *ad hoc*, decided on 7 March 1981 that, on their face, the matters which were the subject of the letter of 2 March 1981 did not at that time fall within the ambit of Article 31 of the Statute of the Court ; that a State which seeks to intervene under Article 62 of the Statute has no other right than to submit a request to be permitted to intervene, and has yet to establish any status in relation to the case ; that pending consideration of and decision on a request for permission to intervene, the conditions under which Article 31 of the Statute may become applicable do not exist ; and therefore that the letter of 2 March 1981 being in the circumstances

premature, the matters to which it referred could not be taken under consideration by the Court at that stage of the proceedings. By a letter from the Registrar dated 7 March 1981 the Agent of Malta was informed of that decision.

9. On 19, 20, 21 and 23 March 1981 public hearings were held, in the course of which the Court heard oral argument, on the question whether the permission to intervene under Article 62 of the Statute requested by Malta should be granted, by the following representatives :

For the Republic of Malta : Dr. Edgar Mizzi,
Professor Pierre Lalive,
Mr. M. E. Bathurst, C.M.G., C.B.E., Q.C.,
Mr. E. Lauterpacht, Q.C. ;

*For the Socialist People's
Libyan Arab Jamahiriya :* H.E. Mr. Kamel H. El Maghur,
Sir Francis A. Vallat, K.C.M.G., Q.C.,
Professor Antonio Malintoppi,
Mr. Keith Highet ;

For the Republic of Tunisia : H.E. Mr. Slim Benghazi,
Professor Sadok Belaïd,
Professor R. Y. Jennings, Q.C.

10. No formal submissions were addressed to the Court by any of the three States participating in the proceedings ; the principal contentions of these States on the questions raised in the proceedings are however set out below (paragraphs 12-16).

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11. The Application of the Republic of Malta (hereinafter referred to as "Malta") submitting a request to the Court for permission to intervene is based on Article 62 of the Statute of the Court which provides :

"1. Should a State consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene.

2. It shall be for the Court to decide upon this request."

Such an application under Article 62 is required by Article 81, paragraph 2, of the Rules of Court to specify the case to which it relates and to set out :

- "(a) the interest of a legal nature which the State applying to intervene considers may be affected by the decision in that case ;
- (b) the precise object of the intervention ;
- (c) any basis of jurisdiction which is claimed to exist as between the State applying to intervene and the parties to the case".

Malta's Application to be permitted to intervene in the present case set out its contentions with respect to the matters specified in each of those three subparagraphs, and those contentions were further explained and de-

veloped in the oral argument addressed to the Court by its representatives at the hearings. The Republic of Tunisia (hereinafter referred to as "Tunisia") and the Socialist People's Libyan Arab Jamahiriya (hereinafter referred to as "Libya"), in written observations on the Application of Malta, gave their respective reasons for maintaining that Malta's request for permission to intervene did not satisfy the conditions set out in the Statute and Rules of Court ; and their views were further explained and developed in the oral argument of their representatives at the hearings. The positions taken in the written and oral proceedings on these matters by the three States concerned may be summarized as follows.

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12. Malta maintains that no condition is prescribed by the Statute as necessary to found a request for permission to intervene under Article 62 other than that the State seeking to intervene should "consider that it has an interest of a legal nature which may be affected by the decision" to be given in a case. It points to the absence of any mention in Article 62 of the existence of a basis of jurisdiction between a State seeking to intervene and the parties to a case as a condition of intervention. While noting and complying with the provision in Article 81, paragraph 2 (c), of the Rules requiring the Application to set out any basis of jurisdiction claimed to exist as between the applicant State and the parties to the case, Malta stresses that this provision did not figure in any earlier version of the Rules. That provision of the Rules, Malta contends, cannot have created a new substantive condition of the grant of permission to intervene. The Court's rule-making power, it argues, cannot be employed for the purpose of introducing a requirement not expressed, and not to be found by any process of necessary implication, in Article 62 of the Statute, which it considers must prevail. Malta also calls attention to its declaration in paragraph 22 of its Application that it is not its object to obtain from the Court by way of the intervention any form of ruling or decision concerning Malta's own continental shelf boundaries with either or both of the parties to this case. Counsel for Malta emphasized that it did not seek to be admitted as a veritable "party" to the proceedings having a status on a footing of complete equality with the Parties to the case, but was seeking the procedural position of a "participant" by way of intervention. Since the intervention for which it has applied would not seek any substantive or operative decision against either Party, Malta further maintains that "no question of jurisdiction in the strict sense of the word could arise" as between Malta and the Parties to the *Tunisia/Libya* case.

13. The interest of a legal nature which Malta claims to possess in the *Tunisia/Libya* case and considers may be affected by the decision is the interest that, according to Malta, it has in the legal principles and rules for determining the delimitation of the boundaries of its continental shelf. Malta observes that "the continental shelf rights of States are derived from law, as are also the principles and rules on the basis of which such areas are

to be defined and delimited”, and it contends that it has a “specific and unique interest” in the present proceedings which arises out of its “involvement in the facts” of the *Tunisia/Libya* case. It is involved in the facts of that case, it argues, by virtue of its geographical location vis-à-vis the two Parties to the case. The effect of this would be, it urges, that any pronouncement made by the Court in the context of the dispute between Tunisia and Libya may “prove relevant in one way or another . . . to Malta’s own legal situation” and thus “inescapably . . . affect this situation”. It would do so, according to Malta, by reason of the process of “the identification and assessment of local or regional factors”, required for the delimitation of the boundary between Libya and Tunisia. In Malta’s view there can be little doubt that the *Tunisia/Libya* case, “considered in legal and physical terms, meshes closely with the continental shelf interests of the Republic of Malta”. Stressing that the Statute requires only that the interest be capable of being “affected”, without any demonstration of its being impaired or compromised being necessary, Counsel for Malta pointed to a number of ways in which the interest of Malta would be so affected. Amongst examples Counsel gave were the impact on a possible equidistance line that might be drawn between Malta and the North African mainland of the adoption in the delimitation between Libya and Tunisia of any special baselines along their respective coasts; or the identification, in such delimitation, of any particular geographical or other factors found to be relevant either as constituting “special circumstances” or as a matter of the application of equitable principles. Malta, moreover, contends that its interests will necessarily be affected by the Court’s decision in the case notwithstanding the fact that, as stated in Article 59 of the Statute, “the decision of the Court has no binding force except between the parties and in respect of that particular case”. It considers that its interests might be affected not only by the formal operative part of the Court’s decision in the case, but by the “effective decision contained in the Court’s reasoning”, which is bound to contain substantive elements that in content must inevitably have, or at any rate are likely to have, an impact upon subsequent relations between Malta and Libya and Tunisia.

14. The precise object of Malta’s intervention in the *Tunisia/Libya* case is stated in the Application to be to enable Malta to submit its views to the Court on the issues raised in the pending case before the Court has given its decision in that case. At the hearing, Counsel for Malta explained that what Malta seeks is “to make its submissions on those issues in the case which subsequent examination of the pleadings might indicate could affect Malta’s interests”. Malta however stresses that it is not its object “by way, or in the course, of intervention” in the *Tunisia/Libya* case, “to obtain any form of ruling or decision from the Court concerning its continental shelf boundaries with either or both of those countries”. It draws attention to the fact that the very purpose of that case, as defined in the Special Agreement of 10 June 1977, is to secure a statement from the Court of what the appropriate law is, not to formulate claims on which the Parties ask the Court to reach judgment. It argues that there is accordingly no justification

for suggesting that “the object of Malta in seeking to intervene must be more exact, more precise, more operative in formal terms” than the object of the Parties. Nor would it be correct, the Agent of Malta emphasized, to conclude from Malta’s insistence that it does not seek any ruling or decision of the Court against either Tunisia or Libya, that Malta does not accept to be bound by the decision of the Court. Pointing out that the extent to which an intervening State is bound by the decisions of the Court is independent of acceptance or non-acceptance by that State, he declared that by its Application to intervene Malta submits itself to all the consequences and effects of intervention, whatever these may be. He further maintained that the pertinence of Malta’s request for intervention could in no way be affected by the possibility that Malta might appear before the Court as a principal party in parallel proceedings against one or both of the Parties to the present case, since any decision given in such proceedings would be bound to be rendered considerably later than that in the current *Tunisia/Libya* case.

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15. Libya, in its observations, has opposed the application of Malta on the ground that the jurisdiction of the Court is governed by Article 36 of the Statute, and contends that Malta does not possess any jurisdictional link with both Parties within the meaning of that Article. It argues that Article 62 of the Statute does not confer an independent title of jurisdiction upon a State seeking to intervene, that an intervention cannot be admitted unless the Court is satisfied that there exists a valid jurisdictional link between the parties and the intervening State, and that Article 81, paragraph 2 (c), of the Rules of Court is simply an accurate interpretation of the meaning and scope of Article 62 of the Statute in respect of jurisdiction. Libya moreover contends that, in any event, for intervention to be possible under Article 62 the legal interest invoked must be so related legally to the subject-matter of the proceedings that, whatever the decision of the Court, the legal interest will be affected, and that for the purposes of Article 62, the “decision” of the Court referred to in the English text of that Article does not include the *consideranda* of the judgment. Libya argues that Malta does not in fact have any interest of a legal nature which might be affected by the decision, inasmuch as the Special Agreement does not contemplate a delimitation of the continental shelf by the Court, but by the Parties, nor does it contemplate any delimitation of any continental shelf areas other than those appertaining to Libya and Tunisia. Any interest of Malta in respect of the delimitation of its continental shelf would, in Libya’s view, be safeguarded by the Court in delivering its judgment, and would be adequately protected by Article 59 of the Statute. Furthermore, having regard to Malta’s indication of the object of its intended intervention, Libya also questions whether what Malta is seeking is an intervention at all within the meaning of Article 62 of the Statute, since it considers that the purpose of intervention in contentious proceedings must be more than to

“submit views”. To comply with Article 81, paragraph 2 (b), of the Rules of Court, a State seeking to intervene must, Libya maintains, go further than a mere assertion ; it must state the precise object, the purpose of its intended action, and not merely the means by which it intends to achieve that object. If Malta is merely preoccupied with the principles and rules of law which may hereafter be stated in the Court’s judgment, this does not constitute a proper or sufficient justification for intervention under Article 62.

16. Tunisia, for its part, considers that for Malta to be able to intervene and be heard before judgment is rendered, it would be necessary for the Government of Malta to prove the existence of a basis of jurisdiction between it and the Parties to the case. Article 62 of the Statute must, according to Tunisia, be read subject to the provisions of Article 36, governing the jurisdiction of the Court ; and, in its view, from the overriding principle of international law that jurisdiction is based upon consent it follows that a basis of jurisdiction must always be a requirement of intervention, at least where the State seeking to intervene wishes in any degree to be a party. Referring to the English text of Article 62, Tunisia further maintains that for the purposes of that Article the interest asserted must be such as to be affected by the “decision” in the case, that is to say the operative clause, constituting *res judicata* between the parties, and not the reasoning in the judgment. It maintains that the Special Agreement would not permit the Court to adjudicate upon the extent of the continental shelf boundaries of any State other than the Parties thereto ; therefore, while conceding that Malta, in common with other States, has an interest of a legal nature that might be “touched”, but not “affected”, by the decision in the case, Tunisia argues that Malta’s interest is not sufficient to justify intervention under Article 62. The effect, in Tunisia’s view, of a decision by the Court on the principles and rules of international law concerning continental shelf boundaries cannot of itself be a good reason for intervention ; all factors taken into account in such a decision are relative, and not necessarily applicable to other delimitations even in the same geographical region, since the relevant circumstances must vary in accordance with the differing geographical relationships. Tunisia also observes that, on the basis of the object of the intervention as explained by Malta, the Application amounted to a request to intervene in a case in order to argue points of general law, simply because the resulting judgment might form an important precedent as a subsidiary means for the ascertainment of the law ; and this Tunisia considers to be inadmissible, the more so if Malta, as seemed to be its intention, does not propose to be bound in any way by the precedent. Tunisia, indeed, suggests that the avowed object of Malta has in fact already been achieved by the hearings on the question of intervention, in view of the explanations Malta has there been able to give of its preoccupations.

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17. The Court will now examine the legal problems involved in Malta's request for permission to intervene in the present continental shelf case between Tunisia and Libya. Certain objections have been raised to Malta's request by each of the Parties in relation to all three matters specified in Article 81, paragraph 2, of the Court's Rules. One objection is that Malta has not succeeded in showing the existence of "an interest of a legal nature which may be affected by the decision in the case" within the meaning of Article 62 of the Statute. Another is that the object of Malta's request, as declared and defined in its Application, falls altogether outside the scope of the form of intervention for which Article 62 provides. The objection has further been made that, even if not expressly mentioned in Article 62, a link of jurisdiction between the States seeking to intervene and the parties to the case has necessarily, under Article 36 of the Statute, to be considered an essential condition of the grant of permission to intervene, more especially when the case is submitted to the Court by special agreement ; and that Malta has not established any such jurisdictional link in the present instance. The Court observes that under paragraph 2 of Article 62 it is for the Court itself to decide upon any request for permission to intervene under that Article. The Court, at the same time, emphasizes that it does not consider paragraph 2 to confer upon it any general discretion to accept or reject a request for permission to intervene for reasons simply of policy. On the contrary, in the view of the Court the task entrusted to it by that paragraph is to determine the admissibility or otherwise of the request by reference to the relevant provisions of the Statute.

18. In the present case, if any one of the objections raised by the Parties should be found by the Court to be justified, it will clearly not be open to the Court to give any further consideration to the request. As the questions of the interest of a legal nature which Malta alleges may be affected by the Court's decision in the present case and of the object of Malta's intervention are closely connected, the Court will examine these two questions together.

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19. The interest of a legal nature invoked by Malta does not relate to any legal interest of its own directly in issue as between Tunisia and Libya in the present proceedings or as between itself and either one of those countries. It concerns rather the potential implications of reasons which the Court may give in its decision in the present case on matters in issue as between Tunisia and Libya with respect to the delimitation of their continental shelves for a subsequent delimitation of Malta's own continental shelf. In particular, as the Court has previously indicated, Malta says that its legal interests may be affected by the Court's appreciation of certain geographical and geomorphological features in the area and by its assessment of their legal relevance and value as factors in the delimitation of areas of the continental shelf which, it says, are adjacent to its own continental shelf, as well as by any pronouncements by the Court on, for

example, the application of equitable principles or special circumstances in regard to that area. The object of its intervention, Malta explains, would be to enable it to submit its views on issues raised in the present case of the kind just mentioned before the Court has given its decision in the case. At the same time, however, Malta is at pains in paragraph 22 of its Application to stress that :

“it is not Malta’s object, by way, or in the course, of intervention in the *Libya/Tunisia* case, to obtain any form of ruling or decision from the Court concerning its continental shelf boundaries with either or both of those countries”.

Moreover, to leave no doubt whatever on this point, Malta again underlines in paragraph 24 of its Application that the intervention for which it requests permission “would not seek any substantive or operative decision against either party”.

20. The limited object of the intervention which Malta seeks has already been referred to by the Court. Malta has explained that, in applying for permission to intervene in the *Tunisia/Libya* proceedings it “is not seeking to appear as a plaintiff or claimant against either of those States, or to assert any specific right against either of them as such”. “Malta”, its Counsel said, “is not seeking to take sides” in the *Tunisia/Libya* case, or “to obtain from the Court a decision on the continental shelf boundary” between itself and Tunisia and Libya. Such a determination, Malta recognized, would not be the proper object either of the present Application or of the intervention if it were allowed.

21. The limit thus placed by the Government of Malta on the scope of the intervention which it seeks, and the very character of that intervention, raise both the question whether its Application is really based on an interest of a legal nature which may be affected by the decision in the *Tunisia/Libya* case, and the question whether the form of intervention for which Article 62 of the Statute provides includes the intervention that is the object of Malta’s Application. The Statute of the Court provides for two different forms of intervention : one under Article 62 which allows a State to request permission to intervene if it should consider itself to have “an interest of a legal nature which may be affected by the decision in the case” ; and the other under Article 63 which gives parties to a convention the construction of which is in question in a case “the right to intervene in the proceedings”. The two Articles with their two forms of intervention, the records show, were taken into the present Statute directly from the corresponding Articles 62 and 63 of the Statute of the Permanent Court of International Justice and with only minor changes of language.

22. Article 62 had no forerunner in State practice in 1920, being introduced into the draft Statute by the Advisory Committee of Jurists in the course of their consideration of what is now Article 63. The Committee had before it, *inter alia*, a plan for the Court previously worked out by a Conference of Five Neutral Powers, paragraph 1 of Article 48 of which

read : "Whenever a dispute submitted to the Court affects the interests of a third State, the latter may intervene in the case." When the Advisory Committee began its consideration of Article 63 of the Statute, the suggestion was made that it should be completed by the addition of Article 48 of the Five Powers plan. The point having been made that "the interests affected must be legitimate interests", the President of the Advisory Committee, Baron Descamps, proposed :

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

This formula was adopted by the Committee, subject to revision, and it was decided to make the new provision a separate article inserted immediately before Article 63. In the French text – the text established by the Committee – it was sought to make the phrase "un intérêt d'ordre juridique le concernant est en cause" more precise by revising it so as to read "un intérêt d'ordre juridique est *pour lui* en cause". In the English text, the corresponding phrase "interest of a legal nature which may be affected by the decision in the case" was at the same time completed by adding the words "as a third party". What was intended to be the precise significance of that addition is not stated in the Committee's records. However, when the words "as a third party" added to the English text are read together with the revised wording of the French text "est pour lui en cause", it becomes clear that the interest of a legal nature to which Article 62 was intended to refer was an interest which is in issue in the proceedings and consequently one that "may be affected by the decision in the case".

23. When the Permanent Court began, in 1922, to consider its rules of procedure for applying Article 62 of the Statute, it became apparent that different views were held as to the object and form of the intervention allowed under that Article, and also as to the need for a basis of jurisdiction vis-à-vis the parties to the case. Some Members of the Permanent Court took the view that only an interest of a legal nature in the actual subject of the dispute itself would justify the intervention under Article 62 ; others considered that it would be enough for the State seeking to intervene to show that its interests might be affected by the position adopted by the Court in the particular case. Similarly, while some Members of the Court regarded the existence of a link of jurisdiction with the parties to the case as a further necessary condition for intervention under Article 62, others thought that it would be enough simply to establish the existence of an interest of a legal nature which might be affected by the Court's decision in the case. The outcome of the discussion was that it was agreed not to try to resolve in the Rules of Court the various questions which had been raised, but to leave them to be decided as and when they occurred in practice and in the light of the circumstances of each particular case.

24. In the event, the Permanent Court was confronted with intervention under Article 62 in only one case, the S.S. "Wimbledon" case, in which

Poland's application to intervene had been framed on the basis of that Article. In the application, however, Poland had referred to its participation in the Treaty of Versailles, the provisions of which regarding the Kiel Canal were the subject-matter of the case ; and at the suggestion of one of the Parties to the case it supplemented the basis of its application by also invoking Article 63, before the Court came to pronounce upon it. As to the Parties to the case, they did not raise any objection to Poland's intervention. The Permanent Court decided to uphold the application simply on the basis of Article 63 and found it unnecessary to consider whether the intervention might equally have been "justified by an interest of a legal nature, within the meaning of Article 62 of the Statute" (*P.C.I.J., Series A, No. 1*, pp. 11-14). Thus when the Permanent Court revised its Rules it had not had any real experience of the operation of Article 62 in practice ; and in consequence its further debates on the Rules do not throw a great deal of new light on the problems involved in the application of that Article. For present purposes it is enough to say that in these debates the differences of view as to the precise object or objects of intervention contemplated by Article 62 and as to the need for a jurisdictional link with the parties to the case still remained to be decided. At the same time, it seems to have been assumed that a State permitted to intervene under Article 62 would become a "party" to the case. That was only to be expected as the English text of Article 62 then spoke specifically of permission to intervene "as a third party".

25. When the present Statute was drafted, a change was made in the English text of paragraph 1 of Article 62 : the words "as a third party", which had no corresponding expression in the French text, were omitted. This was done in the Committee of Jurists responsible for preparing the new Statute on the basis of a proposal from its drafting committee which considered the phrase to be "misleading". The Rapporteur of the Committee at the same time underlined in his report that no change had been found necessary in the French text and that the elimination of the phrase "as a third party" from the English text was not intended to "change the sense thereof".

26. The present Court was first led to address itself to the problems of intervention in 1951 in the context of Article 63 of the Statute when Cuba, as a party to the Havana Convention of 1928 on Asylum, filed a declaration of intervention in the *Haya de la Torre* case (*I.C.J. Reports 1951*, pp. 74, 76-77). In that case the Court stressed that, under Article 63, intervention by a party to a convention the construction of which is in issue in the proceedings is a matter of right. At the same time, however, it also underlined that the right to intervene under Article 63 is confined to the point of interpretation which is in issue in the proceedings, and does not extend to general intervention in the case. Intervention under Article 62 of the Statute was brought briefly, if very indirectly, to the Court's notice three years later in the case concerning *Monetary Gold Removed from Rome in 1943* (*I.C.J. Reports 1954*, p. 32). Subsequently, these and other problems involved in the application of Articles 62 and 63 of the Statute were

studied within the Court and its Committee for the Revision of the Rules of Court.

27. In 1974 one of the fundamental questions raised in connection with Article 62 – the question whether or not a link of jurisdiction with the parties to the case is necessary – was directly raised when Fiji applied for permission to intervene in the *Nuclear Tests* cases. These cases having become moot, the court did not itself make any pronouncement on that aspect of Fiji's application for permission to intervene under Article 62. A number of Judges, on the other hand, drew attention to it in declarations appended to the Court's Orders in the matter (*I.C.J. Reports 1974*, pp. 530, 535) emphasizing its importance. Afterwards, on the completion in 1978 of the revision of the Rules, the Court introduced, in Article 81, paragraph 2, thereof, a new subparagraph (c) requiring an application for permission to intervene under Article 62 of the Statute to specify : "any basis of jurisdiction which is claimed to exist as between the State applying to intervene and the parties to the case". This it did in order to ensure that, when the question did arise in a concrete case, it would be in possession of all the elements which might be necessary for its decision. At the same time the Court left any question with which it might in future be confronted in regard to intervention to be decided on the basis of the Statute and in the light of the particular circumstances of each case. Accordingly, it is on the basis of the applicable provisions of the Statute and in the light of the particular circumstances of the present case that the Court will now examine whether the interest of a legal nature in the case invoked by Malta and the stated object of Malta's intervention are such as to justify the granting of its request for permission to intervene.

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28. The Court has earlier in this Judgment (paragraphs 13, 14, 19 and 20) set out the contentions by which Malta seeks to justify its request for permission to intervene in the present case between Tunisia and Libya. As appears from that summary, the interest of a legal nature which Malta invokes consists essentially in its possible concern with any findings of the Court, identifying and assessing the relevance of local or regional, geographical or geomorphological factors in the delimitation of the Libya/Tunisia continental shelf, and with any pronouncements made by the Court regarding, for example, the significance of special circumstances or the application of equitable principles in that delimitation. Any such findings or pronouncements, in Malta's view, are certain or likely to affect or have repercussions upon Malta's own rights and legal interests in the continental shelf, whenever there may be similarities or analogies between their basic factors and those of the rights and legal interests on which the Court has pronounced. Malta points to a number of specific geographical and geomorphological features as possible subjects of findings or pronouncements of the Court which might have repercussions on Malta's legal interest in regard to the continental shelf ; and it maintains that, given the

particular geography of the area, Malta would have a continental shelf boundary with both Libya and Tunisia and that the boundaries between all three States would converge at a single, as yet undetermined, point.

29. Thus, what Malta fears is that in its decision in the present case the reasoning of the Court regarding particular geographical and geomorphological factors, special circumstances or the application of equitable principles may afterwards have a prejudicial effect on Malta's own legal interests in future settlement of its own continental shelf boundaries with Libya and Tunisia. At the hearing Malta underlined that it is only elements in the *Tunisia/ Libya* case of such a kind that are the object of its request for permission to intervene, and also that it is not concerned with the choice of the particular line to delimit the boundary as between those two countries. It further underlined that it is not concerned with the laying down of general principles by the Court as between Libya and Tunisia.

30. In order to determine the precise implications of Malta's request for permission to intervene, the Court must have regard to the description which has been given by Malta of the nature of its legal interest and the object of its intervention. The Court notes that Malta does not base its request for permission to intervene simply on an interest in the Court's pronouncements in the case regarding the applicable general principles and rules of international law. In its Application and at the hearing Malta has laid heavy emphasis on the fact that it bases its request on quite specific elements in the *Tunisia/ Libya* case. It described these elements in its Application only in general terms, and then gave the following as examples of what it has in mind :

- “(1) the question of the particular factors, equitable or other, which determine the character of boundaries in the seabed bordered by Libya, Tunisia and Malta ;
- (2) the question of whether equidistance as a principle or method of delimitation gives effect to such factors in accordance with international law ;
- (3) the effect of any geomorphic features of the relevant seabed areas that separate Malta from the African coasts ;
- (4) the question of applicable base-lines, including bay-closing lines ;
- (5) the question of whether there is a concept of coastline proportionality which a State may validly invoke as a method of delimiting its seabed boundaries with other States”.

These specific elements on which Malta bases its request were further particularized at the hearing, when its Counsel spelt them out for the Court point by point. Coast by coast, bay by bay, island by island, sea area by sea area, Counsel for Malta indicated local and regional factors which it claimed as having possible relevance in determining the continental shelf

boundaries of the States concerned. He also referred to various drilling concessions that have been granted in the region, and to correspondence between Malta and Libya and Malta and Tunisia regarding their respective continental shelf claims. He further referred to the existence of a Special Agreement between Libya and Malta for the purpose of bringing their differences concerning their continental shelf claims before the Court, which now remains to be notified to the Court.

31. Malta thus makes it plain that the legal interest which it alleges and on the basis of which it seeks to justify its request for permission to intervene would concern matters which are, or may be, directly in issue between the Parties in the *Tunisia/Libya* case. These matters, as Malta presents them, are part of the very subject-matter of the present case. Yet, Malta has at the same time made it plain that it is not the object of its intervention to submit its own interest in those matters for decision as between itself and Libya or as between itself and Tunisia now in that case. In its Application and at the hearing, as has already been stated, Malta underlined that it is not its object “by way, or in the course, of intervention in the *Libya/Tunisia* case, to obtain any form of ruling or decision from the Court concerning its continental shelf boundaries with either or both of those countries”. However, even while thus disavowing any intention of putting its own rights in issue in the present case, Malta emphasized that its “object and interest in intervening does relate to the general area in which those two States also claim continental shelf rights”. In short, Malta’s position in its argument before the Court assumes existing rights of Malta to areas of continental shelf opposable to the claims of the two States Parties to the dispute before the Court. In effect, therefore, Malta in its request is asking the Court to give a decision in the case between Tunisia and Libya which in some measure would prejudge the merits of Malta’s own claims against Tunisia and against Libya in its separate disputes with each of those States.

32. Thus, the intervention for which Malta seeks permission from the Court would allow Malta to submit arguments to the Court upon concrete issues forming an essential part of the case between Tunisia and Libya. Malta would moreover do so, not objectively as a kind of *amicus curiae*, but as a closely interested participant in the proceedings intent upon seeing those issues resolved in the manner most favourable to Malta. Nor would it be the object of Malta’s intervention at the same time to submit its own legal interest in the subject-matter of the case for decision as between itself and Libya or as between itself and Tunisia in the present proceedings. Malta, in short, seeks permission to enter into the proceedings in the case but to do so without assuming the obligations of a party to the case within the meaning of the Statute, and in particular of Article 59 under which the decision in the case would hereafter be binding upon Malta in its relations with Libya and Tunisia. If in the present Application Malta were seeking permission to submit its own legal interest in the subject-matter of the case for decision by the Court, and to become a party to the case, another

question would clearly call for the Court's immediate consideration. That is the question mentioned in the *Nuclear Tests* cases, whether a link of jurisdiction with the parties to the case is a necessary condition of a grant of permission to intervene under Article 62 of the Statute. Indeed, it was suggested by Libya and Tunisia that the limit placed by Malta on the object of its intervention is to be explained by its desire to avoid, or minimize, the question of a need for a jurisdictional link with the Parties.

33. Clearly, as Malta asserts, it has a certain interest in the Court's treatment of the physical factors and legal considerations relevant to the delimitation of the continental shelf boundaries of States within the central Mediterranean region that is somewhat more specific and direct than that of States outside that region. Even so, Malta's interest is of the same kind as the interests of other States within the region. But what Malta has to show in order to obtain permission to intervene under Article 62 of the Statute is an interest of a legal nature which may be affected by the Court's decision in the present case between Tunisia and Libya. This case has been brought before the Court by a Special Agreement between those two countries under which the Court is requested to decide what are the principles and rules of international law which may be applied and to indicate the practical way to apply them in the delimitation of the areas of continental shelf appertaining to Libya and Tunisia. That is the case before the Court and it is one in which Tunisia and Libya put in issue their claims with respect to the matters covered by the Special Agreement. Accordingly, having regard to the terms of Article 59 of the Statute, the Court's decision in the case will certainly be binding upon Tunisia and Libya with respect to those matters. Malta now requests permission to intervene on the assumption that it has an interest of a legal nature that is in issue in the proceedings in that case. It seeks permission to submit its views with respect to the applicable principles and rules of international law, not merely from the point of view of their operation as between Libya and Tunisia but also of their operation as between those States and Malta itself. Yet Malta attaches to its request an express reservation that its intervention is not to have the effect of putting in issue its own claims with regard to those same matters vis-à-vis Libya and Tunisia. This being so, the very character of the intervention for which Malta seeks permission shows, in the view of the Court, that the interest of a legal nature invoked by Malta cannot be considered to be one "which may be affected by the decision in the case" within the meaning of Article 62 of the Statute.

34. Likewise, it does not appear to the Court that the direct yet limited form of participation in the subject-matter of the proceedings for which Malta here seeks permission could properly be admitted as falling within the terms of the intervention for which Article 62 of the Statute provides. What Malta in effect seeks to secure by its application is the opportunity to argue in the present case in favour of a decision in which the Court would refrain from adopting and applying particular criteria that it might otherwise consider appropriate for the delimitation of the continental shelf of Libya and Tunisia. In short, it seeks an opportunity to submit arguments to

the Court with possibly prejudicial effects on the interests either of Libya or of Tunisia in their mutual relations with one another. To allow such a form of "intervention" would, in the particular circumstances of the present case, also leave the Parties quite uncertain as to whether and how far they should consider their own separate legal interests vis-à-vis Malta as in effect constituting part of the subject-matter of the present case. A State seeking to intervene under Article 62 of the Statute is, in the view of the Court, clearly not entitled to place the parties to the case in such a position, and this is the more so since it would not be submitting its own claims to decision by the Court nor be exposing itself to counter-claims.

35. Malta has voiced the preoccupations which it has regarding possible implications for its own interests of the Court's findings and pronouncements on particular elements in the present case between Tunisia and Libya. The Court understands those preoccupations ; even so, for the reasons which have been set out in this Judgment, the request for permission to intervene is not one to which, under Article 62 of the Statute, the Court may accede. The Court at the same time thinks it proper to state that it has necessarily and at all times to be sensible of the limits of the jurisdiction conferred upon it by its Statute and by the parties to the case before it. The findings at which it arrives and the reasoning by which it reaches those findings in the case between Tunisia and Libya will therefore inevitably be directed exclusively to the matters submitted to the Court in the Special Agreement concluded between those States and on which its jurisdiction in the present case is based. It follows that no conclusions or inferences may legitimately be drawn from those findings or that reasoning with respect to rights or claims of other States not parties to the case.

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

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37. For these reasons,

THE COURT,

Unanimously,

Finds that the Application of the Republic of Malta, filed in the Registry of the Court on 30 January 1981, for permission to intervene in the proceedings under Article 62 of the Statute of the Court, cannot be granted.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this fourteenth day of April, one thousand nine hundred and eighty-one, in four copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of Tunisia, the Government of the Socialist People's Libyan Arab Jamahiriya, and the Government of the Republic of Malta, respectively.

(Signed) Humphrey WALDOCK,
President.

(Signed) Santiago TORRES BERNÁRDEZ,
Registrar.

Judges MOROZOV, ODA and SCHWEBEL append separate opinions to the Judgment of the Court.

(Initialled) H.W.
(Initialled) S.T.B.