

SEPARATE OPINION OF JUDGE SCHWEBEL

I have voted in favour of the Judgment of the Court despite the considerable case made out by Malta in support of its Application for permission to intervene. I have done so for one essential and dispositive reason.

The Court may reasonably interpret the institution of intervention, whose scope neither the Statute nor the practice of the Court makes clear, so as to debar what might be called “non-party intervention”, or, perhaps, “unequal intervention”. Malta proposes to submit its views upon particular issues which may form an essential part of the subject-matter of the *Tunisia/ Libya* case without unreservedly submitting its own, related interests to the Court for decision. The power of decision accorded the Court under Article 62 of the Statute permits it to construe such a form of proposed intervention as one outside the ambit of the Statute. There are significant considerations of judicial policy which suggest that the Court should so decide.

That is not to say that non-party intervention must necessarily and in every case be viewed as beyond the pale of the Statute. To debar non-party intervention on the ground that it gives unequal advantage to the intervenor is to overlook the fact that there is a measure of advantage inherent in the capacity of intervenor. For example, a party that is granted permission to intervene when two others have set out their cases and even committed themselves to certain lines of argument has the advantage of knowing its opponents’ grounds while they have yet to confront those of the intervenor. Possibly cases may in the future arise in which non-party intervention might be justified under the Statute. But, in the circumstances of this case, it is believed that the Court may reasonably decide not to entertain it.

At the same time, the difficulty of the position in which Malta found itself in casting its Application and argument to intervene should be acknowledged. The Court had declined to respond positively to Malta’s request for copies of the pleadings. Accordingly Malta may argue that it could not know in what precise ways its interests might be engaged by the case nor could it responsively advance particular claims. Moreover, as counsel for Malta pointed out, neither Tunisia nor Libya themselves, as far as their Special Agreement reveals, advance particular claims or seek a decision of the Court upon them. It is not clear why Malta, at this juncture, without the benefit of the pleadings, should be held to a higher standard of precision and of commitment than are the principal Parties to the case themselves. And most fundamentally, Malta was obliged to interpret an

article of the Statute which the Court itself heretofore has not had occasion to interpret.

I differ from the Judgment of the Court in so far as it holds that Malta has not shown that it has an interest of a legal nature which may be affected by the decision in the case. In this regard, I wish to draw attention to three points : the meaning of Article 62 of the Statute of the Court ; certain considerations which Malta has advanced or might have advanced to substantiate its conclusion that it has an interest of a legal nature which may be affected by the decision in the case ; and the Court's conclusions in these respects.

THE TEXT OF ARTICLE 62

In its English text, Article 62 specifies that 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. Article 62 does not provide that, should a State consider that "it has an interest of a legal nature which *shall* be *determined* by the decision in the case", it may submit such a request. The State seeking to intervene accordingly need not prove that it has a legal interest that the Court's decision will determine ; it need merely show that it has a legal interest which just "may" be no more than "affected" – prejudiced, promoted or in some way altered. This is not an exigent standard to meet.

As to whether the Court's decision in a case is more than the *dispositif*, as to whether it may embrace as well the reasons and reasoning with which it supports its final conclusions, the jurisprudence of the Court as it may be related to the text of Article 62 may be open to more than one construction. In my submission, it would not be reasonable to maintain that, if the *dispositif* of a decision may not affect an interest of a legal nature of a State seeking to intervene but those interests may be legally affected by other elements of the judgment, that State may not be granted permission to intervene.

MALTA'S LEGAL INTERESTS

Malta's continental shelf claims presumably are in its legal interests. They are not easily distinguished from "an interest of a legal nature". For the reasons set forth by Malta's counsel in the proceedings, which are summarized in the Judgment of the Court, and having particular regard to the contention that Malta sits on the very same continental shelf that is in issue between Tunisia and Libya, it appears that Malta's continental shelf claims "may" well be "affected" by the reasons and reasoning of the Court's holdings that bear upon continental shelf claims of Tunisia and Libya, which may compete at some points with those of Malta.

The areas to be delimited pursuant to the Court's holdings in this case are said to be situated in a common basin. Malta appears to be located inside that basin, 184 nautical miles from the nearest point on the Libyan coast and 155 nautical miles from the closest point on the Tunisian coast. Malta apparently maintains that there is one and the same continental shelf to be ultimately delimited among three or four States : Tunisia, Libya, Malta and Italy. In view of the fact that the recent definition of the continental shelf provisionally agreed upon in Article 76 of the Draft Convention on the Law of the Sea establishes as a minimum limit for the continental shelf of any coastal State the breadth of 200 nautical miles, Malta arguably may maintain that it has an interest of a legal nature which may be affected by the proceedings in the current case. This is especially so because Article 1 of the Special Agreement between Tunisia and Libya requests the Court to take account of "the recent trends admitted at the Third Conference on the Law of the Sea".

Moreover, under the Special Agreement the Court is requested "to specify precisely the practical way" in which the principles and rules it decides upon "apply in this particular situation". It would be perfectly possible, in pursuance of this request, for the Court to decide, for example, on a method of delimitation which involves drawing a bay-closing line in a fashion which may affect the extent of the continental shelf which an opposite State like Malta might be entitled to claim.

Having regard to the foregoing considerations, I do not share the conclusion – which in my view the Court did not have to reach in order to sustain its Judgment – that Malta does not have an interest of a legal nature which may be affected by the decision in this case. In my respectful submission, the Court could have essentially confined the ground of its decision to Malta's failure to seek a form of intervention consistent with the Statute, that is, to submit a proper "request to the Court to be permitted to *intervene*". The fact that that request to intervene does not unreservedly submit the relevant Maltese interests of a legal nature to the Court for decision nevertheless is relevant to the judgment of whether Malta has an interest of a legal nature which may be affected by the decision in the case.

THE COURT'S CONCLUSIONS

In paragraph 33 of the Judgment, the Court draws particular conclusions which I do not fully share. It states that : "Malta's interest is of the same kind as the interests of other States within the region" (the previous sentence of the Judgment refers to the "central Mediterranean region"). Italy's interests may well be very much in point, but whether there are interests of the same kind of other States than Malta and Italy in the continental shelf in question – other, of course, than Tunisia and Libya – is not quite clear. Moreover, even if other third States do enjoy the same kind of interest as does Malta, it does not follow that this is a ground supporting rejection of Malta's Application.

Paragraph 33 of the Court's Judgment proceeds to refer to the case brought before the Court by the terms of the Special Agreement, noting that Tunisia and Libya "put in issue their claims" with respect to the matters covered by it. It points out that, while Malta seeks permission to intervene on the assumption that it has a legal interest in issue in the case, it nevertheless 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 Tunisia and Libya. The Court concludes :

"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."

Where I differ from the foregoing analysis of the Court is in this. While it is true that Malta has maintained that it has not put in issue its own continental shelf claims vis-à-vis Tunisia and Libya, this is not the same as saying that it has not put in issue the views it seeks permission to submit with respect to the applicable principles and rules of international law.

The Attorney-General of Malta declared in the Court's public sitting of 23 March 1981 :

"Malta is not seeking a settlement of its delimitation issues with either Libya or Tunisia through the back door of intervention. Malta is genuinely concerned that the Court may, or more likely would, in the course of the *Libya/Tunisia* proceedings decide specific issues directly concerning the region in which Malta is placed and thereby affect one or more of her interests of an undoubtedly legal character."

And, in response to the contention that Malta had in effect indicated that it would not be bound by the Court's judgment, he declared : "By its application to intervene Malta submits itself to all the consequences and effects of intervention – whatever these may be." Counsel for Malta amplified this statement by observing that :

"Malta has never asserted that it will not be bound by the decision of the Court . . . What Malta has said is that it does not seek an order or a remedy against Libya and Tunisia. But that is not the same thing as saying that Malta will not be bound by the decision of the Court . . . What the Court says the law is, is the law and it will bind Malta . . . And in so far as the Court says what the law will be in relation to the continental shelf features of the central Mediterranean Sea, Malta has a legal interest which specially and uniquely will be affected by the Court's decision."

Counsel for Malta further emphasized that what Tunisia and Libya themselves seek in these proceedings is not the decision of the Court on their respective claims but the identification by the Court of the principles and rules of international law and the precise specification of the way in which those principles and rules are to be applied in the delimitation of their respective areas of continental shelf. Counsel for Malta particularly stressed that Malta's action was founded on the view that a decision of the Court relating to the specific features of the area would inevitably bind Malta in her relations with Tunisia and Libya simply as a statement of law.

As far as Malta could judge, on the basis of its access not to the pleadings but only to the Special Agreement, Tunisia and Libya do not put in issue claims against one another. Indeed, all that is apparent from the Special Agreement is that the object of the case is essentially limited to "the principles and rules of international law which may be applied and . . . the practical way to apply them in the delimitation of the areas of continental shelf appertaining to Tunisia and Libya" (Judgment, para. 33).

But what is critical to a showing by Malta that it has a legal interest which may be affected by the decision in the case is not the object of the case as it may be stated in the Special Agreement or otherwise but the subjects of the case as the Court may treat them. What is key is the probability, or at any rate the possibility, that Tunisia and Libya are seeking the Court's support for positions which, if sustained (whether in the *dispositif* or other passages of the Court's Judgment), may actually affect Malta's particular legal interests – despite Malta's not submitting claims against Tunisia and Libya for delimitation.

Accordingly, I do not wholly share the conclusion which the Court reaches in the last sentence of paragraph 33. In my submission, the very character of the intervention for which Malta seeks permission does not show 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. The character of the proposed intervention is open to challenge, as I see it, not on the ground that Malta's actual legal interest "may" not be "affected" by elements of the decision in the case. Rather, precisely its very character is open to challenge on the ground that Malta – however understandably in the circumstances – refrains from endeavoring to join as a party to the suit and seeks to join as what might be termed a "non-party". To the extent it comes in, it does not propose to come all the way in. As submitted above, the Court may reasonably exercise the power of decision expressly accorded it by paragraph 2 of Article 62 of the Statute to deny it permission to intervene in this way.

At the same time, as I acknowledge above, the fact that Malta's request to intervene does not unreservedly submit the relevant Maltese interests of a legal nature to the Court for decision nevertheless is relevant to the

judgment of whether Malta has an interest of a legal nature which may be affected by the decision in the case. That is why I say no more than that I do not “wholly” share the conclusion which the Court reaches in the last sentence of paragraph 33.

A JURISDICTIONAL LINK IS NOT REQUIRED

The Court’s Judgment rightly takes no position on whether a State, in order to intervene under Article 62, must demonstrate a title of jurisdiction beyond that which Article 62 of itself may be argued to provide. Nor does Article 81, paragraph 2 (c), of the Rules of Court take a position on this complex question : its intention was merely to draw attention to the point and to ensure that a State which could indicate such a title of jurisdiction should so inform the Court. However, because some Judges of the Court have recorded their views on this question, I should like to indicate provisionally the essence of mine.

I am inclined to believe that the better view is that the State seeking to intervene need not establish that it has jurisdiction to litigate with the parties to the principal case in the absence of recourse to Article 62. I so submit because, among other reasons :

- the terms of Article 62 make no reference to jurisdiction, either in their original version or – it is instructive to recall – as amended in 1945 ;
- Article 36 of the Statute, in endowing the Court with jurisdiction in all matters “specially provided for . . . in treaties and conventions in force”, may be read as referring to Article 62, which is part of such a treaty ;
- to read into Article 62 an additional requirement of jurisdiction would in practice confine the institution of intervention to marginal limits, a fact which suggests that the “plain meaning” of Article 62 which makes no mention of jurisdiction is correct ; and
- Article 63 apparently does not require a demonstration of jurisdiction even where the party invoking the treaty under construction has not acceded to the Court’s jurisdiction to decide disputes over that treaty’s interpretation or application ; why such jurisdiction should be required in the complementary case of Article 62 accordingly is the less clear.

Admittedly, a substantial argument to the contrary may be made out, but, on balance, I do not now find it persuasive.

(Signed) Stephen M. SCHWEBEL.
