

CONTINENTAL SHELF: LIBYAN ARAB REPUBLIC v MALTA: REQUEST BY ITALY FOR
PERMISSION TO INTERVENE INTERNATIONAL COURT OF JUSTICE

Oral Proceedings and Judgement

At public sittings held on 25, 26, 27 and 30 January 1984 the Court heard oral argument in the Continental Shelf case between the Libyan Arab Jamahiriya and Malta on the application submitted by the Government of Italy for permission to intervene in the case under Article 62 of the Statute. Representatives of Italy, the Libyan Arab Jamahiriya and Malta addressed the Court.

The Government of Italy was represented as follows:

Agent: H.E. Mr. Roberto Gaja, Ambassador;

Co-Agents: Mr. Riccardo Monaco, Dean of the Faculty of Political Sciences, University of Rome;
Mr. Arnaldo Squillante, Section President in the Council of State, Head of the Diplomatic Legal Service at the Ministry of Foreign Affairs;

Advocates of the Italian State: Mr. Giuseppe Manzari, State Advocate-General;
Mr. Marcello Conti, State Advocate;

Advocates and Counsel: Mr. Gaetano Arangio-Ruiz, Professor at the University of Rome;
Mr. Giuseppe Sperduti, Professor at the University of Rome;
Mr. Michel Virally, Professor of Law, Economics and Social Sciences at the University of Paris;

Counsel: Mr. Giorgio Bosco, Minister Plenipotentiary
assisted by: Mrs. Cristina Antonelli, Counsellor in the Diplomatic Legal Service.

The Government of the Libyan Arab Jamahiriya was represented as follows:

Agent: Mr. Abdelrazeg El-Murtadi Suleiman, Professor of International Law at the University of Garyounis, Benghazi;

Counsels: Mr. Youssef Omar Kherbish, Counsellor at the Secretariat of Justice;
Mr. Ibrahim Abdul Aziz Omar, Counsellor at the People's Bureau for Foreign Liaison;

Counsel and Advocates: Mr. Claude-Albert Colliard, Honorary Dean, Professor of International Law at the University of Paris I;
Mr. Etienne Grisel, Professor of Law at the University of Lausanne;

Sir Francis Vallat, G.B.E., K.C.M.G., Q.C.,
Professor Emeritus of International Law at the University of London;

Consultants:

Mr. Derek W. Bowett, C.B.E., Q.C., LL.D.,
Whewell Professor of International Law in the University of Cambridge;

Mr. Gunther Jaenicke, Professor of International Law at the University of Frankfurt-am-Main;

Counsels:

Mr. Rodman R. Bundy
Mr. Richard Meese
Mr. Henri-Xavier Ortoli
Mr. Walter D. Sohler

The Government of Malta was represented as follows:

Agent and Counsel:

Dr. Edgar Mizzi, Special Legal Consultant;

Counsel:

Mr. Elihu Lauterpacht, Q.C., Director of the Research Centre for International Law and Reader in International Law, University of Cambridge;

Professor Prosper Weil, Professor at the University of Law, Economics and Social Sciences, Paris;

Professor Ian Brownlie, Q.C., D.C.L., F.B.A., Chichele Professor of Public International Law, University of Oxford; Fellow of All Souls College, Oxford.

Judgment of the Court

By 11 votes to 5, the Court found that Italy's request for permission to intervene could not be granted

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The Court was composed as follows: President Elias; Vice-President Sette-Camara; Judges Lachs, Morozov, Nagendra Singh, Ruda, Oda, Ago, El-Khani, Schwebel, Sir Robert Jennings, de Lacharrière, Mbaye, Bedjaoui; Judges ad hoc Jiménez de Aréchaga, Castañeda.

Judges Morozov, Nagendra Singh, Mbaye and Jiménez de Aréchaga appended separate opinions to the Judgment.

Vice-President Sette-Camara, Judges Oda, Ago, Schwebel and Sir Robert Jennings appended dissenting opinions to the Judgment.

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Analysis of the Judgment

Proceedings before the Court (paragraphs 1 to 9)

In its Judgment, the Court recalled that on 26 July 1982, the Governments of Libya and Malta jointly notified to it a Special Agreement concluded between them on 23 May 1976 for the submission to the Court of a dispute concerning the delimitation of the continental shelf between those two countries.

In accordance with the Statute and the Rules of Court, the proceedings took their course having regard to the terms of the Agreement between the two countries. The Memorials of both Parties were filed on 26 April 1983 and the Counter-Memorials on 26 October 1983.

Since the Court did not include upon the bench a judge of Libyan or Maltese nationality, each of the Parties exercised the right conferred by Article 31 of the Statute to choose a judge ad hoc to sit in the case. The Libyan Arab Jamahiriya designated Judge Jiménez de Aréchaga and Malta Judge Castañeda.

On 24 October 1983, the Registry received from the Italian Government an Application for permission to intervene under Article 62 of the Statute. The Governments of the Libyan Arab Jamahiriya and Malta submitted written observations on this Application on 5 December 1983, within the time-limit fixed for that purpose. Objection having been raised to Italy's application to intervene, the Court, in accordance with Article 84 of its Rules, held sittings between 25 and 30 January 1984 to hear the Parties and the State seeking to intervene on the question whether the Italian Application for permission to intervene should or should not be granted.

Provisions of the Statute and Rules of Court concerning intervention (paragraph 10)

Article 62 of the Statute, invoked by Italy, provides as follows:

"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."

Under Article 81, paragraph 2, of the Rules of Court, an application for permission to intervene under Article 62 of the Statute shall specify the case to which it relates, and shall 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."

Formal admissibility of the Italian Application for permission to intervene (paragraphs 10-12)

Noting that the Italian Application complied formally with the three conditions set out in Article 81, paragraph 2, of the Rules and that it was not filed out of time, the Court concluded that it had no formal defect which would render it inadmissible.

Statement of the contentions of Italy and of the two Parties (paragraphs 13-27)

The Court summarized the contentions advanced by Italy in its Application and oral argument (paragraphs 13-17). It noted in particular that the legal interest invoked by Italy was constituted by the protection of the sovereign rights which it claimed over certain areas of continental shelf en cause in the case between the Libyan Arab Jamahiriya and Malta. It also noted that the object of the intervention was to permit Italy to defend those rights, so that the Court should be as fully informed of them as possible, and so that it might be in a position to take due account of them in its decision and provide the Parties with every needful indication to ensure that they do not, when they conclude their delimitation agreement pursuant to the Court's Judgment, include any areas over which Italy has rights. Finally, the Court noted that, according to Italy, Article 62 of the Statute afforded a sufficient basis of jurisdiction in this case, which did not need to be complemented by a special jurisdictional link between itself and the Parties to the case.

The Court then summarized the arguments put forward by the Libyan Arab Jamahiriya (paragraphs 18-24) and by Malta (paragraphs 25-27), both in their written observations on the Italian Application and in their Counsel's oral argument.

Interest of a legal nature and object of the intervention (paragraphs 28-38)

In order to determine whether the Italian request is justified, the Court had to consider the interest of a legal nature which, it was claimed, might be affected, and to do this it had to assess the object of the Application and the way in which that object corresponds to what is contemplated by the Statute, namely to ensure the protection of an "interest of a legal nature", by preventing it from being "affected" by the decision.

The Court recalled that in the case of an intervention, it is normally by reference to the definition of its interest of a legal nature and the object indicated by the State seeking to intervene that the Court should judge whether or not the intervention is admissible. It

had nonetheless to ascertain the true object of the claim. In this case, taking into account all the circumstances as well as the nature of the subject-matter of the proceedings instituted by Libya and Malta, it appeared to the Court that, while formally Italy was requesting the Court to safeguard its rights, the unavoidable practical effect of its request was that the Court would be called upon to recognize those rights, and hence, for the purpose of being able to do so, to make a finding, at least in part, on disputes between Italy and one or both of the Parties. Italy was in fact requesting the Court to pronounce only on what genuinely appertains to Malta and Libya. But for the Court to be able to carry out such an operation, it would first have to determine the areas over which Italy has rights and those over which it has none. It would therefore have to make findings as to the existence of Italian rights over certain areas, and as to the absence of such Italian rights in other areas. The Court would thus be called upon, in order to give effect to the intervention, to determine a dispute, or some part of a dispute, between Italy and one or both of the principal Parties, which would involve it in adjudicating on the legal relations between Italy and Libya without the consent of Libya, or on those between Italy and Malta without the consent of Malta. Its decision could not be interpreted merely as not "affecting" those rights, but would be one either recognizing or rejecting them, in whole or in part.

The consequences of the Court's finding, that to permit the intervention would involve the introduction of a fresh dispute, could be defined by reference to either of two approaches to the interpretation of Article 62 of the Statute.

According to the first approach, since Italy was requesting the Court to decide on the rights which it had claimed, the Court would have to decide whether it was competent to give, by way of intervention procedure, the decision requested by Italy. As already noted, the Italian Government maintained that the operation of Article 62 of the Statute was itself sufficient to create the basis of jurisdiction of the Court in this case. It appeared to the Court that, if it were to admit the Italian contention, it would thereby be admitting that the procedure of intervention under Article 62 would constitute an exception to the fundamental principles underlying its jurisdiction: primarily the principle of consent, but also the principles of reciprocity and equality of States. The Court considered that an exception of this kind could not be admitted unless it were very clearly expressed, which was not the case. It therefore considered that appeal to Article 62 should, if it were to justify an intervention in a case such as that of the Italian Application, be backed by a basis of jurisdiction.

According to the second approach, in a case in which the State requesting the intervention asked the Court to give a judgment on the rights which it was claiming, this would not be a genuine intervention within the meaning of Article 62. That Article would not derogate from the consensualism which underlies the jurisdiction of the Court, since the only cases of intervention afforded by that Article would be those in

which the intervener was only seeking the preservation of its rights, without attempting to have them recognized. There was nothing to suggest that Article 62 was intended as an alternative means of bringing an additional dispute as a case before the Court, or as a method of asserting the individual rights of a State not a party to the case. Such a dispute may not be brought before the Court by way of intervention.

The Court found that the intervention requested by Italy fell into a category which, on Italy's own showing, is one which cannot be accepted. That conclusion followed from either of the two approaches outlined above, and the Court accordingly did not have to decide between them.

Since the Court considered that it should not go beyond the considerations which were in its view necessary to its decision, the various other questions raised before the Court in the proceedings as to the conditions for, and operation of, intervention under Article 62 of the Statute did not have to be dealt with by the Judgment. In particular the Court, in order to arrive at its decision on the Application of Italy to intervene in the present case, did not have to rule on the question whether, in general, any intervention based on Article 62 must, as a condition for its admission, show the existence of a valid jurisdictional link.

Protection of Italy's interests (paragraphs 39 to 43)

Italy had also urged the impossibility, or at least the greatly increased difficulty, of the Court's performing the task entrusted to it by the Special Agreement in the absence of participation in the proceedings by Italy as intervener. Whilst recognizing that if the Court were fully enlightened as to the claims and contentions of Italy, it might be in a better position to give the Parties such indications as would enable them to delimit their areas of continental shelf without difficulty (even though sufficient information for the purpose of safeguarding Italy's rights had been supplied during the present proceedings), the Court noted that the question was not whether the participation of Italy might be useful or even necessary to the Court; it was whether, assuming Italy's non-participation, a legal interest of Italy would be en cause, or was likely to be affected by the decision.

The Court considered that it was possible to take into account the legal interest of Italy - as well as of other States of the Mediterranean region - while replying to the questions raised in the Special Agreement. The rights claimed by Italy would be safeguarded by Article 59 of the Statute, which provides that "The decision of the Court has no binding force except between the parties and in respect of that particular case". It was clear from this that the principles and rules of international law found by the Court to be applicable to the delimitation between Libya and Malta, and the indications given by the Court as to their application in practice, could be relied on by the parties against any other State. Furthermore, there could be no doubt

that the Court would, in its future judgment in the case, take account, as a fact, of the existence of other States having claims in the region. The judgment would not merely be limited in its effects by Article 59 of the Statute; it would be expressed, upon its face, to be without prejudice to the rights and titles of third States.

Interpretation of Article 62 (paragraphs 44-46)

Reverting to the question as to whether or not an intervener has to establish a jurisdictional link as between it and the principal Parties to the case, the Court recalled that it had already made a summary of the origin and evolution of Article 62 of the Statute of the Court in its Judgment of 14 April 1981 on the Application of Malta for permission to intervene in the Tunisia/Libya case. The Court had found it possible to reach a decision on the present Application without generally resolving the vexed question of the "valid link of jurisdiction" (see above), and no more needed to be said than that the Court was convinced of the wisdom of the conclusion reached by its predecessor in 1922, that it should not attempt to resolve in the Rules of Court the various questions which have been raised, but leave them to be decided as and when they occurred in practice and in the light of the circumstances of each particular case.

Operative clause (paragraph 47)

For these reasons, the Court found that the Application of the Italian Republic for permission to intervene under Article 62 of the Statute of the Court, could not be granted.

In favour: President Elias, Judges Lachs, Morozov, Nagendra Singh, Ruda, El-Khani, de Lacharrière, Mbaye, Bedjaoui; Judges ad hoc Jiménez de Aréchaga and Castañeda.

Against: Vice-President Sette-Camara, Judges Oda, Ago, Schwebel and Sir Robert Jennings.

This analysis has been prepared by the Registry to assist the press and does not commit the Court in any way. It cannot be quoted against the actual text of the Judgment and does not constitute an interpretation of it.

The printed text of the Judgment will become available within the next few weeks (enquiries should be addressed to the Sales Section, United Nations, 1211 Geneva 10; the Sales Section, United Nations, New York, N.Y. 10017; or any suitable bookseller).