SEPARATE OPINION OF JUDGE MBAYE

[Translation]

I have voted in favour of the operative part of the Judgment because I consider, like the majority of the Members of the Court, that Italy's Application for permission to intervene "cannot be granted". I also note with satisfaction that the Judgment emphasizes the inviolability of the principle of consensualism, while providing assurances for the intervening party as to the safeguarding of its rights (para. 42). On this latter point, however, I consider that the Judgment contains arguments which the Court was not compelled to go into at this stage in the proceedings, but which derive from its legitimate concern to exercise full justice, inasmuch as those arguments may allay, if only to some extent, the concern of Italy which is evident in its Application and in the oral arguments of its counsel (paras. 41 and 43).

On the other hand, I do not share the Court's opinion as regards the reasoning on which the refusal to grant the Italian Application should be based.

For the Court, Italy's intervention "falls into a category which, on Italy's own showing, is one which cannot be accepted" (para. 38). In this wording, and despite the caution shown by the Court in using it, I cannot but discern a hint of the true reason for the refusal : "the absence of what the Court in 1981 called 'a valid link of jurisdiction with the parties to the case' (*I.C.J. Reports 1981,* p. 20, para. 36)" (para. 11), that is to say, in this instance, between Italy on the one hand, and Libya and Malta on the other. This unavowed reason makes its presence felt, in spite of the careful language used by the Court, if the Judgment is read along with the whole range of written and oral material produced in connection with the case.

My own view is that Italy has not proved that it has an "interest of a legal nature which may be affected by the decision in the case". In fact, I take the view that the interest in question must not affect Italy and "other States of the Mediterranean region" (para. 41). It must be an individual direct and specific interest. However, in the present opinion I shall not deal with this question. It has not been touched upon by the Court except indirectly.

But this disparity of views as to the reasoning on which the refusal to grant the Application is to be based is not the only point on which I differ from the Judgment.

In fact, I consider that the Court should, without departing from those considerations which are "necessary to the decision which it has to give" (para. 28) take advantage of the excellent opportunity provided by the case before it to breathe life into Article 62 of its Statute, and make a clear

pronouncement on the very important question of the "jurisdictional link" which may or may not be required between the intervening State and the main parties, and in respect of which there are so many queries. The fact that "from the 1922 discussions up to and including the hearings in the present proceedings the arguments on this point have not advanced beyond the stage they had reached 62 years ago" as the Court says (para. 45), does not justify leaving matters as they are. In this respect, I do concede that the Court has dispelled "some of the doubts and uncertainties which surround the exercise of the procedural faculty of intervention under Article 62 of its Statute" (para. 46), particularly when it states that, with regard to intervention, "the opposition of the parties to a case is, though very important, no more than one element to be taken into account by the Court" (para. 46). But was this sufficient ?

The manner in which Italy introduced and supported its application for permission to intervene was unprecedented. For once, as far as the problem of the jurisdictional link is concerned, the Court found itself confronted with a genuine intervention based on Article 62 of its Statute, since the previous cases which it or its predecessor has had to deal with in the context of Article 62 of the Statute were quite different in nature.

The *S.S. "Wimbledon"* case *(Judgments, 1923, P.C.I.J., Series A, No. 1),* submitted under Article 62 of the Statute, was finally admitted on the basis of Article 63. As to the two cases based on Article 62 of the Statute which were brought before the present Court, namely the application by Fiji for permission to intervene in the *Nuclear Tests* cases, and by Malta in the case of the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya),* they were quite different from the present case.

In the *Nuclear Tests* cases, the Court did not decide on Fiji's application for permission to intervene, due to the fact that having found that the claims of the applicant States no longer had any object and that the Court was therefore not called upon to give a decision (*I.C.J. Reports 1974,* pp. 253 and 457), there were no longer "any proceedings before the Court to which the Application for permission to intervene could relate". It then declared that the application lapsed, and that no further action was called for (*ibid.,* pp. 530 and 535).

In the case of the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* the Court, after analysing Malta's Application for permission to intervene, rejected it on the grounds that the nature of the object of the intervention meant that the legal interest invoked by the applicant could not enable the Court to authorize such an intervention under Article 62 of the Statute (*I.C.J. Reports 1981,* p. 20, para. 35 ; see also p. 10, para. 34).

Thus in neither case did the Court have to consider the problem of whether or not a jurisdictional link must exist between the intervening State and the original States parties.

The position is quite different in the present case, where the instigator (Italy) was inspired by past experience, especially by the Judgment of the Court in 1981 in which it stated :

> "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." (*I.C.J. Reports 1981,* pp. 18-19, para. 32.)

Italy seemed to be in the very situation envisaged by the Court in its Judgment.

We can judge this by the following quotations from the Application :

> "Italy seeks to participate in the proceedings to the full extent necessary to enable it to defend the rights which it claims over some of the areas claimed by the Parties, and to specify the position of those areas, taking into account the claims of the two principal Parties and the arguments put forward in support of those claims, so that the Court may be as fully informed as possible as to the nature and scope of the rights of Italy in the areas of continental shelf concerned by the delimitation, and may thus be in a position to take due account of those rights in its decision." (Application for Permission to Intervene by the Government of Italy, para. 16.)

Paragraph 17 of the same Application states :

> "It goes without saying – but it is better that it should be stated expressly to avoid any ambiguity – that the Government of Italy, once permitted to intervene, will submit to such decision as the Court may make with regard to the rights claimed by Italy, in full conformity with the terms of Article 59 of the Statute of the Court."

In their oral arguments, moreover, particularly at the hearings of 25, 26 and 30 January 1984, counsel for Italy clearly stated that Italy intended to become "an intervening party" with the legal consequences that that implied. I shall return to this expression "intervening party".

Thus in the present case, in my opinion, the Court had a duty to tackle the question "whether a jurisdictional link with the parties to the case [was] a necessary condition of a grant of permission to intervene under Article 62 of the Statute". Nobody could reproach it for doing so. I personally regret that it has not done so.

Moreover, I am not convinced that Italy's intervention belongs to a "category which . . . cannot be accepted" by the Court if regard is had solely to the object of the Italian application and the requirements in this case of the principle of consensualism, – which, once more, brings us back to the "jurisdictional link" the absence of which is the very criticism made

of Italy. To reach its conclusion, the Court combed through the details of the oral proceedings for anything which might seem like an attempt by Italy to introduce a new dispute by the method of intervention (para. 33). It then analysed Article 62 of its Statute and arrived at "two approaches" both of which, according to the Court, "must result in the Court being bound to refuse the permission to intervene requested by Italy" (paras. 34, 35, 36, 37 and 38).

On the basis of its interpretation of the statements by counsel for Italy the Court considers that it is being asked to give a judgment on Italy's rights. In its view,

> "While formally Italy requests the Court to safeguard its rights, it appears to the Court that the unavoidable practical effect of its request is that the Court will 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." (Para. 29.)

It decided that :

> "if Italy were permitted to intervene in the present proceedings in order to pursue the course it has itself indicated it wishes to pursue, the Court would 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" (para. 31).

According to the Court, "an additional dispute" cannot be brought before it by way of intervention (para. 37 *in fine*). While fully endorsing this statement, I doubt whether it applies to the present case or is justified by Italy's Application for permission to intervene.

In support of its position, the Court says that

> "There is nothing in Article 62 to suggest that it was intended as an alternative means of bringing a wider dispute as a case before the Court – a matter dealt with in Article 40 of the Statute – or as a method of asserting the individual rights of a State not a party to the case." (Para. 37.)

Thus it does not say that Article 62 forbids intervention by a "non-party" State. For my part, I think that the article does permit it, and that in the present case, Italy was in the position of a "non-party intervener".

In reaching this conclusion, I shall endeavour in my turn to interpret Article 62 of the Statute of the Court, subsequently asking myself into which "category" Italy's intervention actually falls with respect to its object.

While Article 62 does not constitute "an exception to the fundamental principles underlying" the Court's jurisdiction, "primarily the principle of consent, but also the principles of reciprocity and equality of States" (para. 35), it nevertheless permits a limited intervention in the course of which the

intervener does not become a party, but merely informs the Court of its interests of a legal nature in order that they may be safeguarded.

I believe that in its 1981 Judgment on Malta's application for permission to intervene, referred to above, the Court stated that, if the conditions which it had laid down had been fulfilled, it would immediately have dealt with the problem of the jurisdictional link ; which, in that instance, would lead it to one of the three following conclusions :

- proof of the existence of a jurisdictional link is a condition for the admissibility of the intervention ;
- proof of the existence of a jurisdictional link is not a condition for the admissibility of the intervention ;
- proof of the existence of a jurisdictional link is a condition of admissibility in certain cases.

To that I must add the following remark : in expressing itself in the terms used in 1981, the Court was giving a pointer. The wording used in the 1981 Judgment would, in fact, only be meaningful if it signified that, in the Court's view, the problem of the jurisdictional link between an intervening State and the main parties arises for the Court as soon as that State requests permission to submit its legal interest to the Court's decision, and becomes a party.

What is meant by "becoming a party" ? Looking at the matter in the context of intervention, I would say that, if the intervening State becomes a party to the case, this means that it may press its demands or defend itself against other States, and submit its claims to the Court with a view to a decision which will have, in respect of that State and of the main parties, the binding effect produced by Article 59 of the Statute. The "party-intervener" is neither more nor less than a litigant vis-à-vis the main parties. It introduces into the dispute a new dispute which is related to the first one, but does not merge with it. In such a situation, it seems clear to me that the essential condition for issue to be joined in international proceedings, namely the consent of States to the settlement of their dispute by the Court, must of necessity be fulfilled. This therefore means that the acceptance of the application of the "party-intervener" must be subject to the existence of a jurisdictional link with the main parties. For how is it conceivable that the Court would accept that a State may be in litigation with another State (for that is what we are talking about, since the third State may be either applicant or respondent, may submit its claims to the Court for decision, and be bound by the Court's decision) unless the sacrosanct principle of the consent of States on which its jurisdiction is founded is respected ? If the Court were to accept such a situation, it would seriously undermine that principle. It has taken great care not to do so in the past, and has frequently had to mention the point, for example in the cases of *Monetary Gold Removed from Rome in 1943* (*I.C.J. Reports 1954,* p. 32) and the *Aerial Incident of 27 July 1955 (Israel* v. *Bulgaria)* (*I.C.J. Reports 1959,* p. 142). The present Judgment has wisely aligned itself with

this jurisprudence (para. 35), and I must applaud it for doing so, while myself making special mention of the point in the opinion, – but with a reservation so far as the application of the principle to the case of Italy is concerned.

It is no answer to this point to argue, as has in fact been done, especially during the oral proceedings, that in accepting the Court's jurisdiction the States which instituted proceedings also accept the Statute, and Article 62 in particular. This reasoning is open to criticism in more than one respect.

It may first be objected that the consent of States in international proceedings must not be presumed. It must be quite unambiguous. The Court has rightly recalled "the basic principle that the jurisdiction of the Court to deal with and judge a dispute depends on the consent of the parties thereto" (para. 34), and has stated that "Recognition of the compulsory jurisdiction of the Court is an important aspect of the freedom and equality of States in the choice of the means of peaceful settlement of their disputes", and that an exception to the fundamental principles underlying its jurisdiction "is not to be presumed, and must be clearly and expressly stated if it is to be admitted" (para. 35). But to say that the consent of the main parties follows from Article 62 of the Statute is to presume that consent, and allow doubt to persist in an area as crucial as that of consensualism. In this case, it does not help to rely on the liberal interpretation of Article 63 given by one party, and recalled by counsel for Italy in the hearing of 25 January 1984 ; for Article 63 refers to a case where the State concerned is not a party to the dispute. Indeed, it illustrates one of the situations where the intervening State does not have to prove the existence of a jurisdictional link. Its interest of a legal nature is presumed, and it is not a party to the dispute because the Statute limits its intervention to stating its own interpretation of the multilateral treaty in question. It submits neither a claim nor a defence. It contents itself with providing information to the Court. Thus it is not required that the existence of a jurisdictional link with the parties be shown. In such a case, the Court does not have to investigate whether or not the applicant State is exempt from showing the existence of a jurisdictional link : but, in my view, this is not the only possible case. Other similar instances may arise with the same features, the only difference being the fact that it is not a question of interpreting a convention. In such cases, contrary to the opinion of the Court in the present Judgment (para. 37), Article 62 must enable a solution to be found comparable to that contemplated by Article 63 of the Statute. But, whereas in those cases to which Article 63 applies the interest of a legal nature is presumed, resulting from the fact that the intervening State is a party to *[a participé à]* the convention to be interpreted, in the other cases the intervening State must furnish proof of its interest of a legal nature, and it is for the Court to decide.

Secondly, the argument referred to above may be criticized on the ground that it starts from a false premise : it presupposes that the existence of Article 62 signifies that a jurisdictional link is not necessary, and that the

States know this at the time when they submit their application. Yet this is precisely the point at issue.

Thus I fully share the opinion of the Court regarding the requirement that an intervening State which introduces a dispute before the Court by the method of Article 62 of its Statute must establish a title of jurisdiction. But there must be an additional dispute.

On the basis of that observation, I shall now attempt to give my own interpretation of Article 62 of the Statute, so as to shed some light on my position in regard to the problem of whether the jurisdictional link must exist as between the intervener and the Parties to the dispute in the present instance. In so doing, I do not believe that an analysis of the 1920 and 1945 *travaux préparatoires* of the two Committees of Jurists who drafted the Statutes of the two Courts can offer any decisive assistance. Like the Court itself (para. 45), I even feel that "the arguments . . . have not advanced". I also share its view that it is of no practical use to examine the *travaux préparatoires* of the Permanent Court of International Justice and the International Court of Justice as regards the drafting or amendment of their respective Rules of Court.

Thus, returning to Article 62, paragraph 2, of the Statute, I think that it should be interpreted in the most straightforward way possible, in the sense that : the Court decides questions of law submitted to it, in every single case. Thus it seems to me that Article 62, paragraph 2, deals not with the Court's jurisdiction, but with its powers. In connection with Article 62 of the Statute, it is necessary to distinguish between three closely allied concepts, which sometimes overlap, but which are distinct in the present instance. These are the *seising* of the Court which is referred to in paragraph 1 of Article 62, the *powers of the Court,* referred to in paragraph 2, and the *jurisdiction,* which is not referred to in the provisions of this article, because it belongs elsewhere.

The ordinary method of seising of the Court is governed by Article 40, paragraph 1, of the Statute. In my view, Article 62, paragraph 1, is a derogation from Article 40, paragraph 1, by providing for a special means of seising it in the case of intervention, but goes no farther than that.

With regard to jurisdiction, Article 62 does not refer to it : it belongs in Article 36 of the Statute. It is surely significant that if Italy, after being granted permission to intervene, failed to appear *[faisait défaut]* (which in theory is quite possible), and if Libya and Malta then asked the Court to decide in favour of their claims, the Court would be obliged to satisfy itself that it had jurisdiction in accordance with Articles 36 and 37. This is required by Article 53 of the Statute, which states :

> "1. Whenever one of the parties does not appear before the Court, or fails to defend its case, the other party may call upon the Court to decide in favour of its claim.
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> 2. The Court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well-founded in fact and law."

Since Article 53 refers only to Articles 36 and 37, how would the Court have been able to extricate itself if it had previously decided that Italy could be a "party intervener" without having to establish a jurisdictional link with Libya and Malta ? Certainly not by referring to Article 62, since Article 53 uses the expression "that it has jurisdiction *in accordance with* Articles 36 and 37", and does not mention Article 62.

Article 62 of the Statute does not state what the intervention which it contemplates should be. In paragraph 2, it leaves the Court the power to decide, not by "any general discretion to accept or reject a request for permission to intervene for reasons simply of policy", as the Court has said (*I.C.J. Reports 1981,* p. 12, para. 17), and as it has now repeated (para. 12), but on legal grounds. Thus it is for the Court to bestow a content on the institution of intervention, while fully respecting its own Statute. For reasons derived from the sound administration of justice, Article 62 enables a State which fulfils the conditions set out therein to seise the Court and to intervene in a case already begun. But such State itself determines its status in the case : and the Court then has the power to draw the legal consequences which arise. The Court makes it clear that :

> "the scope of a decision of the Court is defined by the claim or submissions of the parties before it ; and in the case of an intervention it is thus 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" (Judgment, para. 29).

Thus if the State seeks to enter into the case but refrains from submitting its own claims to the Court, it deliberately places itself outside the scope of Article 62. This is the conclusion the Court had to come to on the occasion of Malta's intervention in the case concerning the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Application by Malta for Permission to Intervene, Judgment* (*I.C.J. Reports 1981,* pp. 20-21, paras. 34-35). If, on the other hand, the State seeks to make use of the procedure set out in Article 62 to have a dispute settled by the Court, it aspires to become a party to the case, and may be required to furnish proof of the existence of a jurisdictional link between itself and the main parties.

Between these two cases, there is room for an intermediate position, where the intervener is not a party. There is nothing in the Statute, and especially in Article 62, to exclude this interpretation of intervention. This point of view, the distinction between "a request that the Court take account of, or safeguard, its legal interests, and a request that the Court recognize or define" the legal interests of the intervener "which would amount to the introduction of a distinct dispute", has, in the view of the Court, no validity whatsoever "in the context of the task conferred on the Court by the Special Agreement" in this case (para. 32). I shall return to this point.

In my view, intervention is, above all, a rule deriving from the sound administration of justice. It is part of the policy of throwing the maximum light on the circumstances surrounding a case brought before the Court under its contentious jurisdiction, or indeed in advisory proceedings, this being reflected particularly in Articles 40 and 65 of the Statute. It enables the Court to have a wider range of information pertinent to the problem submitted to it, to reach its decision in the light of the fullest possible information, and at the same time to avoid, to some extent, the inevitable but unfortunate consequences of the relative authority of *res judicata.* This was in fact its sole purpose before the adoption of the Statute of the Permanent Court of International Justice (see in particular Article 64 of the Convention of 18 October 1907 on the Pacific Settlement of International Disputes) : to supply the arbitrator with additional information concerning the subject of the dispute. Subsequently (Article 62 of the Statute), intervention made it possible to respond to claims not contained in the document by which the proceedings were instituted. However, it was required by the legislator that the information to be supplied by the intervening State in this connection must be of a special kind. It must consist of specifying an interest of a legal nature which is involved in the dispute. This results from the wording of Article 62 of the Statute which in my view requires, not for the submission of an intervention, but for it to be admitted, that the State should *demonstrate* (subject to verification by the Court) that in the dispute in progress, there is an "interest of a legal nature which may be affected" *[en cause].* Here again we find a difference with Article 63, which *presumes* that the intervening State possesses an interest. Thus intervention was first permitted in a case where the intervening State has an obvious, and indeed presumed, interest, and is not a party. In such a case, it confines itself to giving the Court information, consisting of its own interpretation of the multilateral convention to which it is a party, and which is in question (Art. 63). Intervention was then extended to a case where an interest must be *proved* (Art. 62). If such a proof is supplied, there are then two possibilities :

(1) the intervening State wishes to be a party and formulates a claim. It must be treated as a party and must prove the jurisdictional link with the other parties ;
(2) the intervening State confines itself to informing the Court of its rights, and here we find ourselves in the same position as in Article 63. It does not have to prove the existence of a jurisdictional link with the parties.

Thus, to my mind there are two categories of intervener : the party-intervener and the non-party intervener. The same argument, differently expressed, was advanced by Italy.

This interpretation of Article 62 of the Statute of the Court makes it possible to give a better explanation of certain provisions of the Rules of Court.

In the first place, on this interpretation Article 81, paragraph 2 *(c),* of the

Rules of Court, according to which the application for permission to intervene must specify "any basis of jurisdiction which is claimed to exist as between the State applying to intervene and the parties to the case", becomes wholly compatible with the provisions of the Statute, and especially with Article 62. It has been argued that the Rules of Court could not add to the Statute by imposing on the intervening State conditions which are not provided for in the Statute itself, and this is quite correct. In the light of the proposed interpretation, this objection falls, since the phrase : "the application . . . shall set out : *(c) any basis of jurisdiction* [1] which is claimed to exist as between the State applying to intervene and the parties to the case" is to be understood as intended to enable the Court to verify, *where necessary,* the existence of the basis of jurisdiction which there has to be between the applicant for permission to intervene and the parties. This indeed seems to be the case which the Court had in mind in 1981 when it stated, in connection with the origin of Article 81, paragraph 2 *(c),* that "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" (*I.C.J. Reports 1981,* p. 16, para. 27).

Secondly, it appears that this interpretation enables us to explain both the existence and the wording of paragraph 2 *(c)* of Article 81 of the Rules. In fact, if one holds that the jurisdictional link is never necessary in order for intervention to be permitted it is difficult to see what purpose is served by Article 81, paragraph 2 *(c).* If, on the other hand, one asserts that a jurisdictional link is always necessary for the grant of an application to intervene, there is some difficulty in explaining the wording *"any basis of jurisdiction* [1]" used in the article, especially since Article 38 of the same Rules, in dealing with the legal grounds on which the initial jurisdiction of the Court is based, uses the term *"the jurisdiction* [1] of the Court". To maintain that this distinction between "any basis of jurisdiction" and "the jurisdiction" is of no importance, or was unintentional, is hardly a convincing position.

Thirdly, this interpretation justifies the existence of paragraph 2 *(b)* of Article 81 of the Rules which, by requiring the intervener to state the object of its application, enables the Court, *in limine litis,* to establish in what way the intervening State intends to exercise its intervention (as a party or as a non-party). There is a link between the requirement of a jurisdictional link and the requirement to state the object of the intervention.

This interpretation also has the merit that it respects the principle of optional jurisdiction, since, whenever the intervening State is a party to the proceedings, i.e., when intervention gives rise to a dispute, it will, if its intervention is to be admitted, have to furnish proof of the jurisdictional link between itself and the main parties. On the other hand, when the purpose of the intervention, voluntarily defined by the third State, is not to give rise to a dispute, and to make the intervening State a party, proof of the

[1] Emphasis added.

jurisdictional link is not necessary. In the latter case, the States parties have no grounds for complaint, since they are not compelled to be in dispute with another State, in the sense of Article 36 of the Statute. Thus the principle of the consent of States is not infringed. The only obligation imposed on the States parties would be (as in the case of Article 63) to tolerate the presence of a third State ; this seems quite reasonable and normal to me. States which have taken the initiative of bringing a case before the Court with a view to a decision which may adversely affect the interests of a third State (whether they do so wittingly or unwittingly makes no difference), are no more deserving of protection against compulsory jurisdiction than the third State itself. Moreover, the third State is not present in the proceedings to formulate claims against the parties, but in order to provide information for the Court, and to ensure that the latter, in its decision, does not adversely affect its direct and specific individual interests.

A final advantage of this interpretation is that it avoids distorting Article 62 of the Statute of the Court by lending it a meaning which, at the very least, it does not clearly convey. It also enables us to dispense with the argument whereby this provision is seen as conferring jurisdiction on the Court, or as a derogation from the principle of consensualism. Thus the true function of the article is restored, a procedural function consisting solely of providing another means of seising the Court, namely by intervention. The article should therefore be classified among the rules for the seising of the Court, not the rules of jurisdiction. Other provisions of the Statute, and the Court itself, can therefore be left to settle the problems which are raised by the various aspects of the intervention procedure in general, and in particular by the question of the jurisdictional link.

As I have already said, there would thus be two types of interveners : the "party intervener" and the "non-party intervener".

In both cases, the intervening State must demonstrate that it possesses an interest of a legal nature, that this interest may be affected by the decision, and that the source of its involvement is to be found within the dispute (the Court being responsible for verifying whether these conditions are fulfilled).

A State which is a "party intervener" must also furnish proof of the basis of jurisdiction which exists between itself and the other parties, just as in an ordinary case.

A State which is a "non-party intervener", on the other hand, does not have to supply such proof. Its aim, in co-operating to ensure the sound administration of justice, is to inform the Court of the nature of the rights which it claims to possess and which are at issue *[en cause]* in the dispute, to such an extent that the decision to be made might adversely affect them. But in so doing, the State concerned does not ask the Court to find that it has any specific right : nor does it ask for a finding that the parties have a particular obligation. The aim in view is simply that the Court, once in full possession of the facts regarding the existence and the soundness of the rights of this third State, should take account of them in the decision which

it ultimately makes. In such a situation, the Court is by no means compelled to recognize or reject the rights of the intervener, wholly or in part. And there is nothing in the present case to prevent it from ensuring, were the intervention to be permitted, that these rights were not affected. This is however all on the understanding that any decision on the points raised by the intervention is binding upon the intervener as in the circumstances set out in Article 63 of the Statute.

In this light, as I have said, it is apparent that Article 63 is a privileged case of intervention, in which the intervener is a "non-party" by virtue of the Statute itself, and is exempt from furnishing proof of its interest, the latter being a legal presumption. The intervener confines itself to informing the Court of its interpretation of the convention, and is not obliged to furnish proof of the jurisdictional link between itself and the parties.

Of course, it might be objected that this proposed interpretation, recognizing the existence of a form of intervention where the intervener is a non-party, is pointless, since by virtue of Article 59 of the Statute, the Court's decision in respect of any third State, and specifically of Italy in the present instance, is *res inter alios acta.* One counsel for Italy did not fail to observe that

> "if Article 59 always provides adequate protection for third States and if the protection which it affords is such as to prevent the interest of the third State from being genuinely affected in a pending case, then . . . Article 62 no longer has any point whatsoever, nor any sphere of application" (Hearing of 30 January 1984, morning).

There are three arguments which might be sustained against the objection which minimizes the function of Article 62 because of the existence of Article 59 of the Court's Statute.

The first argument is that the objection tends to contradict the very existence of Article 62 of the Statute, which is unacceptable.

Secondly, this objection cannot be reconciled with the existence of Article 63 of the Statute, the scope of which seems to be beyond controversy. In the cases envisaged by Article 63, it might also be argued that Article 59 already offers sufficient protection for the interests of the intervening State. Moreover, in the Convention of 18 October 1907 mentioned above, intervention seems to have been intended, at least in part, to mitigate the impact of the relative authority of arbitral judgments, by increasing the number of States bound by the decision.

The third argument is linked to the principle of the sound administration of justice. When a third State takes no initiative, though well aware that its interests are at issue *[en cause]* in a dispute, it is protected by Article 59. But that does not deprive it of its right under Article 62 to intervene in order to protect its rights. If these rights seem to it to be involved in the dispute to such a degree that it must intervene to safeguard them, and if it makes use of this option, its diligence cannot be the subject of criticism. This is the general sense of the Court's Judgment (para. 42). Moreover, there may be a situation in which Article 59 of the Statute offers only an

imperfect protection of the interests of the State, having regard to the nature of the rights at issue and the possible consequences of the Court's decision ; for there are circumstances in which the Court's decision might cause irreparable harm to a third State. This, for example, would be the case if the decision attributed specific rights to one or other of the parties.

I have not myself taken up in this respect the argument which the Court has borrowed from counsel for Italy, and apparently endorsed, that the usefulness of Article 62 would lie in the fact, in particular, that an application for permission to intervene makes possible a "procedural economy of means" *[moyens]* (the expression is that of the Court – paragraph 42). The reason is that, while I appreciate that, as emphasized by numerous writers, intervention is in practice, in the internal procedural law of States, a "procedural economy" to the extent that it makes it possible for a litigant to adopt the contentions *[moyens]* of a party to the proceedings already on foot, or for a plaintiff to sue several defendants employing the same contentions *[moyens]* and in the same proceedings, I do on the other hand find it difficult to see how in the procedure before the Court the submission of an application for permission to intervene is a "procedural economy of means". The State which intervenes either confines itself to informing the Court as to its legal interests without becoming a party, or brings a dispute before the Court and becomes a party. In the first case, the procedure on the merits has to be broached, and in the second case the intervener should institute proceedings against one or the other of the main parties. The Court, without rejecting the distinction made by Italy between

> "a request that the Court take account of, or safeguard, its legal interests, and a request that the Court recognize or define its legal interests, which would amount to the introduction of a distinct dispute"

considers that it is not valid "in the context of the task conferred on the Court by the Special Agreement". This is tantamount to saying that as a result of the nature of the dispute submitted to the Court, any distinction between a "party intervener" and a "non-party intervener" ceases to be relevant. This is the conclusion derived from paragraph 32 of the Judgment. The Court stipulates that if it is to fulfil the task entrusted to it by the Special Agreement

> "and at the same time to safeguard the legal interests of Italy (more than would result automatically, as will be explained below, from the operation of Article 59 of the Statute), then when giving any indication of how far the Parties may extend their purely bilateral delimitation, it must take account, so far as appropriate, of the existence and extent of Italian claims".

It seems to me that this is indeed the purpose of the intervention of a State which is not a party. It could hardly be better summarized, and I see

nothing in the present case which could prevent the Court from applying this formula.

Moreover, there was nothing to prevent the Court, having admitted the Italian intervention, and once the latter had stated its claims and indicated the reasons used to justify them, from giving a judgment which would not recognize their validity, expressly or implicitly, but would in fact merely limit itself to ensuring that they were not prejudiced.

In this instance the principle of consensualism would not be infringed, and therefore I believe that the intervener could not be required to furnish proof of a jurisdictional link between itself and the States parties to the dispute.

Apart from certain legal writers who exclude *a priori* all possibility of recourse to intervention in the context of proceedings on certain matters (a view which, for my part, I do not share), it is in this way that Article 62 may make it possible to safeguard, further than is guaranteed by Article 59, the rights of a State which is not a party to the dispute constituting the subject-matter of a case.

Italy, I consider, was in this very category of non-party States. Its intervention was limited to the provision of information concerning its rights.

Admittedly, Libya and Malta opposed the granting of the Italian application, on the grounds of the absence of a jurisdictional link between Italy and the original Parties.

But this opposition is not in itself decisive : it is not sufficient to render the application inadmissible. It cannot, of course, be ignored ; but it must merely serve to enable the Court to weigh up the circumstances of the case. Other elements of the case might play the same role : indeed, this is what the Court rightly says (para. 46).

In the present case, it was of the first necessity to focus, as the Court has done, on the object of the application, in order to establish whether Italy intended to submit the whole of its claims to the Court for decision and, constituting itself as a party to the case, to accept the binding effects of that decision. But I think that it must also be asked whether, on the contrary, Italy, exercising its intervention as a non-party, merely hoped to inform the Court of the existence of its rights, simply asking the Court, to refrain, in its decision, from prejudicing them. The position of Italy has had to be analyzed in a concrete manner, with reference both to its application and to the oral proceedings, looking beyond the terminology employed, but also, above all, without distorting the specific object of the application for permission to intervene. The Court was in fact right to recall that it is its duty, as it had previously had to state in the *Nuclear Tests* cases, to ascertain the object of the application (para. 29). In this respect it does not seem decisive to me that counsel for Italy stated that Italy is an "intervening party". I think that the distinction to be drawn lies within the intervention itself, between the State party and the State not a party. I prefer to speak here not of an "intervening party" and a "party", but rather of a "party intervener" and a "non-party intervener". The Italian position

had thus to be interpreted with a view to establishing whether, in this instance, the application could be admitted despite the absence of a jurisdictional link.

To this end, it is relevant to compare the application by Malta for permission to intervene in the case of the *Continental Shelf (Tunisia/ Libyan Arab Jamahiriya)* with the application giving rise to the present proceedings. In its application, Malta contented itself, having emphasized that "it . . . cannot be known whether any legal interest of Malta will in fact be affected by [the] decision or not" (paragraph 4 of the Application), with asking the Court to permit it to state "its views" on the theoretical issues which would have to be raised in the course of the proceedings. It stipulated that its object was not

> "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" (*ibid.*, para. 22).

But it went no further than that.

Faced with such an Application, in which the intervener invoked no direct and specific individual interest, and where it simply sought to state "its views" on principles and rules of international law such as those set out in paragraph 13 of the said Application, the Court had no choice but to state that the conditions of Article 62 of the Statute were not fulfilled.

To the foregoing must be added that in its Application, Malta had not stated that it intended to subject itself to the binding effect of the decision to be made, even though that deficiency was remedied during the oral proceedings. It was in fact as though Malta's proposal was to offer the Court a series of hypothetical reflections by way of information, without accepting that its position would be affected by the decision of the Court. Thus it was quite correct, in my opinion, for the Court to reject its application.

In the case of Italy's application, it begins by agreeing to submit its legal interests to the judgment of the Court in the light of Article 62 of its Statute and Article 81 of its Rules. But it is stipulated in the Application, as in that of Malta in 1981, that the intervener is not seeking to have the Court proceed to delimit its continental shelf. This has been amply explained in the course of the oral proceedings. And it is on this very point that I cannot share the contrary opinion of the Court (para. 31). For Italy, the purpose of its intervention was to ensure

> "the defence before the Court of its interests of a legal nature, so that those principles and rules and, in particular, the practical method of applying them, are not determined by the Court without awareness of that interest".

Moreover, Italy states in its Application that it is asking

> "to participate in the proceedings to the full extent necessary to enable it to defend the rights which it claims over some of the areas claimed by the Parties, and to specify the position of those areas, taking into account the claims of the two principal Parties and the arguments put forward in support of those claims, so that the Court may be as fully informed as possible as to the nature and scope of the rights of Italy in the areas of continental shelf concerned by the delimitation, and may thus be in a position to take due account of those rights in its decision" (Application for Permission to Intervene by the Government of Italy, para. 16).

And in paragraph 17 of that same Application, Italy emphasizes that such decision as the Court may make with regard to the rights it claims will be fully applicable to it, in conformity with the terms of Article 59 of the Statute of the Court. These statements have been confirmed by the oral arguments of counsel for Italy, who have specified on several occasions that once the application for permission to intervene was granted, Italy would become an "intervening party".

Thus it is clear that there are fundamental differences between Malta's 1981 application and the present application by Italy. Italy did intend to submit specific claims to the Court and to accept, in respect of those claims, the binding effect of the decision to be made.

The same could not be said of Malta in 1981. However, on close examination of the Application, and after hearing the oral arguments of counsel for Italy, it appears that Italy did not intend to be a party to the proceedings in the sense of the Statute of the Court and in the sense to which I have referred. It described itself as an "intervening party", with the power of making submissions. But Italy has clearly explained what it understands the term "intervening party" to mean. It did not have the intention of asserting its rights against Libya and Malta.

One counsel for Italy stated during the oral hearing of 30 January 1984 (afternoon) :

> "In regard to sovereign rights over maritime areas, to assert rights means to obtain recognition of those specific geographical sectors over which these rights are exercised. Everyone knows that Italy has sovereign rights over areas of continental shelf extending seaward of its coast. No one contests this. What is at issue is the geographical extension of those rights, the surfaces over which they are exercised ; hence what delimits them.
>
> Once again, Italy does not request a delimitation of the areas of continental shelf appertaining to it. In the areas remaining outside the delimitation determined by the Court between Malta and Libya, the delimitation still remains to be established : by negotiation and agreement, or by some other means agreed between the parties."

One can hardly be clearer than Italy has been. It has requested, not a delimitation of its continental shelf, like the main Parties or, more accu-

rately, a statement of the principles and rules for such a delimitation, but simply that it should be permitted to give the Court information concerning the existence and substance of its rights over the areas concerned, so that they may not be prejudiced in the decision to be made. It did not formulate any claim against the Parties, nor raise any objection against them. The only purpose of the oral arguments of counsel for Italy, including the passages quoted by the Court, was to confirm this position, whether more or less appositely.

The Court, has however interpreted some of those arguments as meaning that Italy was in fact asking it 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". To support its argument the Court refers, especially in paragraph 33 of its Judgment, to the following passages from the oral arguments of counsel for Italy :

> "Italy is asking the Court, when carrying out its task under the Special Agreement, to
>
> > 'provide the two Parties with every needful indication *to ensure that they do not* [1], when they conclude their delimitation agreement pursuant to the Court's judgment, include any areas which, *on account of the existence of rights possessed by Italy, ought to be the subject* either of delimitation between Italy and Malta or of delimitation between Italy and Libya, or the delimitation agreement as between all three countries.' (Emphasis added.)"
>
> "Italy desires nothing more than that which, through appropriate procedures, will be recognized as its legal due."
>
> "the Court could decide that, in the areas within which it will be indicating to the main Parties how they should proceed with the delimitation, Italy is not entitled to claim any rights . . .".
>
> "If . . ., after hearing Italy's presentation, the Court decides that there are grounds for proceeding to a delimitation between Malta and Libya, it will decide, implicitly or explicitly, that Italy has no rights in the areas concerned, despite any claims which it may make to the contrary."

These quotations are far from convincing. One might produce numerous others in support of the unambiguous drift of the application, showing that Italy did not intend to submit a dispute to the Court, and was certainly not asking for a judgment upon it. Let me quote just a few :

> "Italy does not ask you to establish a delimitation between itself and Malta or itself and Libya. Italy asks the Court not to reach a decision on areas which would involve its legal interest. At the same time, it considers itself bound, if admitted to the present proceedings,

[1] My emphasis.

to recognize fully the binding nature of the decision to be given by the Court on all the points raised within the framework of its intervention." (Statement of Mr. Gaja, Agent of Italy, at the hearing of 25 January 1984, morning.)

"In so far as the Court will perform the task of delimiting submarine areas in dispute between Libya and Malta, it will be bound to cut through areas which Italy claims pertain to her by law. Italian rights would thus be affected in the most direct and unique fashion by the operative part of the decision. It follows, in so far as legal interests may be affected, that Italy should not fail to be enabled to defend its rights on the matter." (Oral statement of Mr. Arangio-Ruiz during the hearing of 25 January 1984, morning.)

"1. Italy is not requesting the Court to determine the course of the delimitation line dividing the areas of continental shelf appertaining to Italy from the areas appertaining respectively to Malta or Libya.

2. Neither is Italy requesting the Court to indicate what are the principles and rules of international law applicable to the delimitation of the areas of continental shelf appertaining to Italy on the one hand and the areas of continental shelf appertaining, on the other hand, to the Republic of Malta and the Libyan Arab Jamahiriya respectively, nor how, in practice, those principles and rules might be applied in the present case in order that the Parties concerned may without difficulty delimit those areas by agreement.

. . . . . .

4. Italy, if its request for permission to intervene is granted by the Court pursuant to Article 62, paragraph 2, of the Statute, that is to say when it has been authorized to participate in the proceedings on the merits, will give a more complete definition of the areas over which it deems that it has rights and will enlarge upon the grounds of law and fact upon which its claims are based." (Oral statement of Mr. Monaco during the hearing of 25 January 1984, afternoon.)

I will also quote the following passages from the oral statement of Mr. Virally during the hearing of 26 January 1984 :

"even though it relates to concrete rights and not to the interpretation of rules or principles . . . In other words, Italy is not pressing a claim against the Parties in the proceedings, or against either one of them separately.

The object of the Italian intervention is more limited. Italy is only asking that the Court, when setting forth the principles and rules of international law held to be applicable to the delimitation of the respective areas of continental shelf appertaining to Malta and Libya, and when indicating how these principles and rules can be applied in

> practice by the Parties in the present case so as to delimit those areas without difficulty, should give all the indications needed to ensure that this line is not drawn in such a way as to disregard Italy's rights, and does not include areas over which Italy has rights in the areas falling to one or the other Party.
>
> In other words, Italy requests that no delimitation should be effected between Malta and Libya, pursuant to the decision of the Court, in sectors where, legally, delimitation should take place as between Italy and Malta, or as between Italy and Libya."

And even in the passage of oral argument quoted by the Court in paragraphs 17 and 33 of the Judgment, mentioned above, counsel for Italy was careful to begin by saying that

> "Italy is asking that the Court, when it accomplishes the mission entrusted to it by the Special Agreement of 23 May 1976, that is to say, when it answers the questions put to it in Article I of that Special Agreement, to take into consideration the interests of a legal nature which Italy possesses in relation to various areas claimed by the main Parties, on certain parts of those areas, . . ."

before going on to add : "to provide the two Parties with every needful indication to ensure that they do not . . . include . . .", etc.

These long quotations clearly show that counsel for Italy simply tried to remain within the limits of intervention. It seems to me that they can hardly be reproached with having to introduce a dispute before the Court, and having asked the latter to resolve it.

I am well aware that, as the Court has recalled, it has the "duty to isolate the real issue in the case and to identify the object of the claim" (*I.C.J. Reports 1974,* p. 262, para. 29, and paragraph 29 of the present Judgment) and that "the Court must ascertain the true object and purpose of the claim" (*ibid.,* p. 263, para. 30, and paragraph 29 of the present Judgment). But this power which it rightly claims is not a discretionary power. The Court cannot, on this basis, make a State voice an opinion which it obstinately refuses to express. Italy has repeatedly said that it was not seeking a delimitation of its continental shelf. Nothing in the statements by its counsel offers any clear and specific contradiction of this position.

It is true that intervention requires of a State which has recourse to it that it furnish proof of its "interest of a legal nature", viz., that it should show in this instance that it possesses rights which are liable to be affected by the Court's decision. It is also required that the State concerned should unambiguously show its intention of bowing to the Court's decision to the extent of the claims which it has stated. This is not the same as submitting a dispute to the Court : it is compliance with the conditions required by the intervention procedure.

Feeling that it might be reproached with having misconstrued the clearly expressed intention of Italy, the Court states that "The fact that Italy has disclaimed any intention of asking the Court to settle such a dispute is

immaterial" (para. 31). But I am not certain that the reasoning subsequently pursued by the Court (paras. 32-37), and the examples it chooses to demonstrate the contrary, are sufficiently convincing.

In my view, the sole purpose of the arguments put forward by counsel for Italy, and invoked by the Court as showing the intention of the intervener to submit a dispute to the Court for settlement, was to defend Italy against the argument that it lacked an interest of a legal nature. To judge by the Court's case-law in the matter, which fortunately is extremely limited, those who institute intervention proceedings have to strike a very delicate balance. If they specify rights proving that they possess an interest of a legal nature, and ask that this interest should not be prejudiced, they may be accused of submitting a dispute to the Court (as in the present instance). If they refrain from so doing, it may be argued against them that they have no interest of a legal nature (Malta's intervention in 1981). Surely this is tantamount to condemning the institution of intervention, provided for in Article 62 of the Statute, to a wasting death ?

Having read and re-read Italy's Application, and the oral arguments of its counsel, I have formed the conviction that the purpose of the intervention brought before the Court made Italy a "non-party intervener". Italy has specified the areas of continental shelf over which it considered itself to possess sovereign rights, the preservation of which it was requesting, accepting in advance the effect of the decision which would be made on the matter which it was "submitting" to the Court for information purposes. It has not asked for the Court to delimit those areas, or to recognize any rights which it might possess there. In so doing, did Italy commit the error of envisaging now, on the supposition that the Court acceded to its request, that in those areas which the Court would as a consequence exclude from its decision, there would be a delimitation, by treaty or by judicial means, between itself and one or both of the Parties ? I do not think so. Moreover, does Article 62 of the Court's Statute forbid such a limited intervention ? Again, I do not think so.

In conclusion, I believe that Italy's Application could not be admitted for the reason which I gave at the beginning of this opinion. But I also believe that in view of its object, it could not be rejected for the sole reason that the consent of the Parties was lacking. The Court has given an opposite opinion on this latter point. I regret that I do not share this view even though I have endorsed the operative part of the Judgment.

(Signed) Kéba MBAYE.