DECLARATION OF JUDGE MBAYE

[Translation]

The present case is a "first". It marks the first time that a State, as an applicant, invokes before the Court the nullity of an arbitral award on the sole basis of declarations made by the Parties to the case under Article 36, paragraph 2, of the Statute of the Court [1]. The Court was therefore confronted with a serious question of jurisdiction. It situated the question clearly and settled it prudently. The Court analysed in detail the declarations deposited with the Secretary-General of the United Nations on 2 December 1985 by Senegal and on 7 August 1989 by Guinea-Bissau. It then noted that, in the instant case, Guinea-Bissau had accepted its jurisdiction and Senegal had not contested it. And it is on the basis of these "circumstances", taken as a whole, that the Court considered its jurisdiction to have been founded. This is a judicious attitude that in no way prejudges the Court's future position. For, as pointed out by Eugène Borel ("Les voies de recours contre les sentences arbitrales", *Collected Courses of the Hague Academy of International Law*, Vol. 52, 1935, p. 75), it does not appear possible to consider that Article 36, paragraph 2, subparagraphs *(a)* and *(b)*, "already provides a legal basis, sound and indisputable, for the jurisdiction of the Court". Many other authors have asked themselves whether it does and some have responded in the negative. I share their view. I fail to see why the International Court of Justice should automatically constitute itself as a *cour de cassation* for all States having made declarations under Article 36, paragraph 2, of its Statute, with respect to all arbitral awards in cases to which those States are parties, even if the Court were each time to take care not to act as a court of appeal or as one revising the award. That the need to decide a "question of international law" has been raised is surely not sufficient justification for such an inroad into another means of settlement of disputes between States. To deny this would be to embark on an adventure which would have disastrous consequences not confined to arbitral decisions. The Court has fortunately refused to take this path.

(Signed) Kéba MBAYE.

---

[1] The Application of the Government of Honduras in the case concerning the *Arbitral Award Made by the King of Spain* (*I.C.J. Reports 1960*, pp. 194 *et seq.*) had as its object to enforce an arbitral award and Nicaragua (the defendant) had, in particular, pleaded the nullity of the award. In that case the Washington Agreement concluded by the two States on 21 July 1957 resolved any jurisdictional problem.