SEPARATE OPINION OF JUDGE LACHS

I would like to stress at the outset that, despite the Court's dismissal of the Applicant's submissions, there can be no suggestion that Guinea-Bissau committed an abuse of procedure in challenging the 1989 Award before this Court. It is the inherent right of any party to proceedings, let alone a government with a nation's permanent interests to defend, to seek to have the result declared a nullity if it is convinced that the decision taken is basically flawed. This is so even in respect of decisions characterized as final, inasmuch as a decision so vitiated can be viewed as stillborn, a mere semblance of a decision or, to use the term employed by the present Applicant, as inexistent. In any case Guinea-Bissau stressed, and Senegal concurred, that the present proceedings had not been instituted by way of appeal.

The Court, in order to avoid any suggestion of acting like a court of appeal, has limited itself to establishing whether there was any basis for Guinea-Bissau's submissions, by taking the Applicant's specific criticisms quite separately, one by one.

Yet an application asserting that a judgment or award is "inexistent" or "absolutely null and void" implies a claim that all the efforts of the court or tribunal in question to administer justice and resolve a dispute have come to nothing. Such a claim can only be directed at some alleged flaw or flaws of a vital character, since it is no mere challenge to a decision, but amounts to a repudiation of the entire process traversed by the tribunal in its deliberations. As such, it calls for exceptional scrutiny.

In this regard, the Court's exercise of its competence to deal with the specific submissions did not, in my view, prevent it from proceeding to closer analysis, without in any way encroaching upon the substance of the issues which it had been for the Arbitration Tribunal alone to decide. A complaint of nullity does not in itself debar the court dealing with it from lifting the veil on matters of competence and substance, provided they are germane to the issue of validity, since the handling of such matters, as distinct from procedural issues of a purely formal nature, may in fact lie at the heart of the complaint. The Court was not precluded from making comments in keeping with its position as a guardian of the standards of judicial decision-making, and thus performing a signal service to the sister institution of arbitration.

Among the elements subjected to analysis is a document which the Court found could not be ignored, namely the declaration of the President

of the Arbitration Tribunal. However correct it may be to conclude that this declaration did not undo the vote by which President Barberis enabled a majority to be created for the operative clause, it certainly expresses an approach to the competence of the Tribunal which is at variance with that enshrined in the Award itself. This approach is couched in cautious terms of what the Tribunal "could" rather than "should" have done, but the sole motive behind the negative corollary attached to the Award's operative provision in the President's reformulation was clearly to convey his opinion that the Tribunal's competence had been broader than the Award allowed. This is particularly clear from the second half of the declaration. One can only note that the Award does not disclose whether any vote was taken on the important issues covered in paragraph 87 of the Award.

Now the Court could enter into the scope of the Tribunal's competence to the extent required to determine whether the Tribunal's own interpretation of it, as disclosed by the Award, was not manifestly untenable. For that purpose it had to rely on the wording of the Special Agreement and of paragraph 87 of the Award, there lying the focus of the matter. But, analytically speaking, there is no doubt that, far from being manifestly untenable, what the Tribunal said contains nothing to sustain an assertion of invalidity, even supposing that failure to exhaust jurisdiction would be sufficient to justify a finding in that sense.

The declaration of President Barberis therefore casts doubt on whether paragraph 87 really is "the opinion of the Tribunal". Had that paragraph *in fact*, rather than just formally, belonged exclusively to the reasoning of the Award, this would not have been a crucial matter: as instanced by the very opinions appended to the present Judgment, there is no necessity for the member of a tribunal to agree with every part of the reasoning before he can vote in favour of the decision. But paragraph 87 undeniably contains not merely reasoning but two decisions, including one of major importance. Hence it is an understatement for the Court merely to have pointed out that the structure of the Award was "open to criticism".

By appending his declaration, Mr. Barberis ensured that he would appear to the reader in two distinct personalities: the arbitrator who voted for the decision as it stood, and the arbitrator who would have preferred, not an entirely different decision, but the inclusion of a further decision or decisions on matters concerning which the Award had remained silent. Mr. Barberis was consequently faced with a serious dilemma, and one can sincerely sympathize with him in that respect; but as a distinguished jurist he must have realized the difficulties in store for him, and the risk of his being, as a judge, in no position to justify himself if criticized. As was wisely said some eighty years ago:

> "The mouth of the judge is sealed; he is not permitted to deny or refute the allegations made against him, whatever may be their falsity or whatever his reputation as a just and impartial judge . . .!" (*State of Delaware* v. *Glascow*, US District Court, 1912.)

(How incomparably more serious was the situation of a judge once blamed — by some alleged authorities — not for what he had done, or even for what he could not have done, but simply for the policy of the then government of his country! Faced with such an attack, a judge may be helpless.)

Nevertheless, despite the unusual relationship between the Award and the presidential declaration, the fact remains that the latter is simply an appendix added after the Award had come into being with the casting of votes. It cannot be regarded as controlling or modifying the sense of the Award. It is reasonable to assume that judicial declarations or opinions may shed some light on aspects of the cases considered. They may sometimes help in the interpretation of the decisions to which they are attached. However, while the appended text may prompt a doubt and even a challenge, it cannot undo the decision itself.

The arguments of Guinea-Bissau disclose, however, a more general dissatisfaction with the treatment given by the Tribunal to the dispute between the Parties, and it is indeed difficult to avoid the impression that the result was not commensurate with the time spent in arriving at it. The expectations of Guinea-Bissau were clearly aroused by the presentation of the Tribunal as one concerned to deal with "the determination of the maritime boundary", a comprehensive expression encompassing, it might be thought, the whole scope of the dispute which had been the object of negotiations between the two States for a considerable number of years. Those negotiations having failed, they proceeded to draw up the Arbitration Agreement. But it was in the drafting of this treaty that diplomacy appears to have nodded, by conferring upon the tribunal to be formed a competence which, in certain conditions, might not be found adequate to the object and purpose of settling the whole dispute. Hence I agree with the present Judgment in finding that the germ of the problem lay less in the Award itself than in the Arbitration Agreement under which it was given.

However, the way the reply was framed is open to serious objections. The Court finds that the reasoning of the Award was "brief, and could doubtless have been developed further". I would add, that while brevity is a virtue, excessive brevity may suggest lack of adequate consideration, hence the imperative need to explain the decision: it is not a flood of words which is called for but convincing reasoning and adequate explanations. A clear exposition of the grounds of the decision constitutes an indispensable part of any judgment or award. As has been pointed out, once submitted to a court or to arbitration a dispute becomes a "persua-

sive conflict", hence requires a *"persuasive decision"*. Not necessarily one which will persuade everybody, but one sufficiently plausible.

Moreover, there is one other point to which I wish to address myself, namely the Applicant's claim that Article 9, paragraph 2, of the Arbitration Agreement imposed upon the Tribunal an obligation in any circumstances to "include the drawing of a boundary line on a map".

The Tribunal was not, in my opinion, relieved of this obligation by its decision not to reply to the second question put to it. The language of the Agreement is clear and imperative: the implementation of Article 9, paragraph 1, is not conditioned nor is it irrational. If the possibility of limiting the reply to one question only was envisaged, it is difficult to conclude that this released the Tribunal from the obligation enshrined in the Article. Admittedly, from a common-sense point of view, it is arguable that, as "a loxodromic line", the boundary was clear and required no graphic illustration. I can therefore agree with the Judgment that the absence of a chart did not constitute "such an irregularity as would render the Award invalid". Yet it was not proper to belittle the obligation as the Tribunal did. Elementary courtesy required that the matter be dealt with in a different way.

Arbitration as a secure means of settling with finality difficult disputes has from time immemorial enjoyed great prestige in the setting of municipal law. Long before the existence of any permanent international judiciary, arbitration between States had likewise become one of the most highly respected, valued and effective means for the peaceful settlement of international disputes. A heavy responsibility rests upon arbitral tribunals to contribute towards the maintenance of this status and assist the institution to develop more effectively in a world where the changing relationship of States and the ever-increasing areas of contact between their interests are bound to create new problems. Thus one cannot but regret that the Tribunal did not succeed in producing a decision with the cogency to command respect.

(Signed) Manfred LACHS.