SEPARATE OPINION OF JUDGE SHAHABUDDEEN

I agree with the decision reached by the Court. My thought is that, on some aspects, it could have been stronger than it is. On the main issue as to whether the Tribunal should have answered the second question put to it by the Arbitration Agreement, the Court sustains the Award on the ground that, in holding that it was not competent to reply to that question, the Tribunal interpreted the Agreement in a way in which it could have been interpreted without manifest breach of its competence. The Court did not go on to consider whether the Tribunal's interpretation was indeed correct. The explanation lies in the view which the Court took of the scope of its own authority in these proceedings. I give my reasons below for holding, first, that, subject to considerations of security of the arbitral process with respect to finality of awards, the scope of the Court's authority did not preclude it from pronouncing on the correctness of the Tribunal's interpretation; and, second, that the latter was in fact the correct interpretation.

I. Whether It Was Competent for the Court to Pronounce on the Correctness of the Tribunal's Interpretation of the *Compromis*

Guinea-Bissau's chief complaint is that the Arbitration Tribunal failed to accomplish its mission, in that it was required to answer the second question put to it by the Arbitration Agreement but did not do so, and that on this account the Award is a nullity. It appears to me that, the Court having held that it had jurisdiction, the appropriate course was for it to determine, in accordance with the applicable principles of treaty interpretation, whether the Arbitration Agreement did require the Tribunal to answer that question. If the Court's interpretation differed from that of the Tribunal, the next step was to see if the latter was equally plausible with the former. If the two were equally plausible, as being each justified by some legitimate process of interpretation, considerations of security of the arbitral process with respect to finality of awards would suggest that the Court should refrain from substituting its own interpretation for that of the Tribunal. The Court would be justified in making a substitution only where it was satisfied that the Tribunal's interpretation disclosed a compellingly clear and substantial error as to its powers. A marginal or debatable case would not suffice.

I should have thought, with respect, that this approach was reasonably straightforward; that it had the advantage of enabling the Court to resolve

the point of substance, and of obvious concern to Guinea-Bissau, as to whether the Tribunal's interpretation was right or wrong; and that it provided all the safeguards fairly needed to ensure the stability of the international arbitral process.

That has not however been the course followed by the Court. The drift of the Court's reasoning moves, indeed, in the direction of a finding that the Tribunal was right in holding that it was not competent to answer the second question, and the reader of the Judgment (particularly paragraph 56) may well think that this is the natural result. The Court, however, stops short of making a finding to that effect, limiting itself to a holding in these terms:

> "The Tribunal could thus find, without manifest breach of its competence, that its answer to the first question was not a negative one, and that it was therefore not competent to answer the second question." (Judgment, para. 60.)

The Judgment thus stands arrested at the threshold of the issue whether the Tribunal was correct in its interpretation of the *compromis* on the specific point as to whether it was competent to answer the second question. The reason is to be found in the Court's use of the distinction between nullity and appeal in relation to decisions made in exercise of *la compétence de la compétence*. Referring to Guinea-Bissau's argument on the point in question, the Judgment reads:

> "By its argument set out above, Guinea-Bissau is in fact criticizing the interpretation in the Award of the provisions of the Arbitration Agreement which determine the Tribunal's jurisdiction, and proposing another interpretation. However, the Court does not have to enquire whether or not the Arbitration Agreement could, with regard to the Tribunal's competence, be interpreted in a number of ways, and if so to consider which would have been preferable. By proceeding in that way the Court would be treating the request as an appeal and not as a *recours en nullité*. The Court could not act in that way in the present case. It has simply to ascertain whether by rendering the disputed Award the Tribunal acted in manifest breach of the competence conferred on it by the Arbitration Agreement, either by deciding in excess of, or by failing to exercise, its jurisdiction." (Judgment, para. 47.)

The problem with this approach is that, apart from leaving undetermined a question of importance to one of the litigants as to whether the Tribunal's interpretation was in fact correct, it, at least theoretically, leaves open the possibility that the interpretation was not. For, to characterize the Tribunal's interpretation as being merely one which could be placed on the Arbitration Agreement "without manifest breach of its competence" is to leave open the possibility that some other interpretation could also be placed on it "without manifest breach of its competence";

paragraph 47 of the Judgment, quoted above, accepts as much. All of such possible interpretations could not be right.

The foundation of the Court's approach lies in the concept of *la compétence de la compétence.* Certain aspects of the scope and basis of this power may be briefly noticed for present purposes.

First, as to the scope of the power. This is indeed wide. But, wide as is the power, its exercise is, of course, limited by the consideration that its purpose is to ensure that the mission authorized by the *compromis* does not fail for want of power to interpret the latter, as historically it was once feared possible; the purpose is not to permit the Tribunal, through possible misinterpretations, to endow itself with an original jurisdiction materially different from that contemplated by the Parties. This, if it happened, would be ruinous to the older and even more fundamental principle *extra compromissum arbiter nihil facere potest.* As observed by one commentator, recalling the position taken by the United States commissioner in *The Betsey*, "La règle de la compétence de la compétence et l'excès de pouvoir ne se concevaient pas l'un sans l'autre: mieux ils s'expliquaient l'un par l'autre" (Georges Berlia, "Jurisprudence des tribunaux internationaux en ce qui concerne leur compétence", *Collected Courses of the Hague Academy of International Law*, Vol. 88, p. 109, at p. 129). In the words of another, "si l'arbitre est juge de sa compétence, il n'en est pas le maître" (Charles Rousseau, *Droit international public*, Vol. 5, 1983, p. 326, para. 312). That the two principles referred to are in tension has been noticed in the literature (R. Y. Jennings, "Nullity and Effectiveness in International Law", in *Cambridge Essays in International Law, Essays in Honour of Lord McNair*, 1965, p. 64, at p. 83). In the present case, that general tension surfaces as a specific legal problem needing to be addressed and resolved by the Court. In short, *la compétence de la compétence* being not absolute but qualified, the question here, as in all cases, is not whether the Tribunal has exercised the competence *simpliciter*, but whether the Tribunal has exercised it within the bounds to which it is always and necessarily subject.

Next, as to the basis of the power. The question has been discussed in the books as to whether the finality of an arbitral award rests on the treaty of submission or on the authority which international law attaches to decisions of tribunals vested with jurisdiction to decide with obligatory force, or indeed on both (see, *inter alia*, Louis Cavaré, "L'arrêt de la CIJ du 18 novembre 1960 et les moyens d'assurer l'exécution des sentences arbitrales", in *Mélanges offerts à Henri Rolin*, 1964, p. 39, at pp. 41-42; and J. C. Witenberg, *L'organisation judiciaire, la procédure et la sentence internationales*, 1937, pp. 352-353). That the treaty of submission does have a role is, however, generally admitted. Hertz connected the two ideas this way:

qui serait elle aussi une interprétation qui pouvait être retenue sans qu'il y ait « méconnaissance manifeste de sa compétence »; le paragraphe 47 de l'arrêt, cité ci-dessus, admet ces conclusions. Or, toutes les interprétations possibles ne sauraient être justes.

La démarche de la Cour s'appuie sur le concept de la compétence de la compétence. Certains aspects de la portée et du fondement de ce pouvoir méritent qu'on s'y arrête brièvement.

Pour ce qui est de la portée de ce pouvoir, elle est certes très large. Mais aussi large fût-elle, son exercice est évidemment limité par une considération relative à son but, qui est de faire en sorte que la mission que le compromis confie au Tribunal n'en vienne pas à échouer par absence de compétence à interpréter le compromis — comme, historiquement, on l'a craint — et non de permettre au Tribunal, par d'éventuelles fausses interprétations, de s'arroger une compétence originelle sensiblement différente de celle envisagée par les Parties. Si tel était le cas, ce serait la fin d'un principe plus ancien et plus fondamental encore, celui qu'exprime l'adage *extra compromissum arbiter nihil facere potest.* Comme l'a fait observer un commentateur, en rappelant la position prise par le délégué des Etats-Unis dans l'affaire *The Betsey*: « La règle de la compétence de la compétence et l'excès de pouvoir ne se concevaient pas l'un sans l'autre: mieux ils s'expliquaient l'un par l'autre. » (Georges Berlia, « Jurisprudence des tribunaux internationaux en ce qui concerne leur compétence », *Recueil des cours de l'Académie de droit international de La Haye*, t. 88, p. 129.) Ou, comme l'a dit un autre auteur: « si l'arbitre est juge de sa compétence, il n'en est pas le maître » (Charles Rousseau, *Droit international public*, vol. 5, 1983, p. 326, par. 312). L'antagonisme existant entre ces deux principes a été relevé par la doctrine (R. Y. Jennings, « Nullity and Effectiveness in International Law », dans *Cambridge Essays in International Law, Essays in Honour of Lord McNair*, 1965, p. 83). En cette instance, cet antagonisme général constitue le problème juridique spécifique que la Cour se doit d'examiner et de résoudre. Bref, la compétence de la compétence n'est pas absolue, mais qualifiée; la question qui se pose dans cette affaire, comme dans toute affaire, est non de savoir si l'arbitre a exercé sa compétence *simpliciter*, mais s'il l'a exercée dans les limites auxquelles cette compétence est toujours et nécessairement soumise.

Quant au fondement de ce pouvoir, la question a été posée dans de nombreuses études de savoir si le caractère définitif d'une sentence arbitrale repose sur le compromis ou sur l'autorité que le droit international confère aux décisions des tribunaux investis du pouvoir de rendre des décisions obligatoires, ou encore sur les deux (voir, entre autres, Louis Cavaré, « L'arrêt de la CIJ du 18 novembre 1960 et les moyens d'assurer l'exécution des sentences arbitrales », dans *Mélanges offerts à Henri Rolin*, 1964, p. 41-42, et J. C. Witenberg, *L'organisation judiciaire, la procédure et la sentence internationales*, 1937, p. 352-353). Il est cependant généralement admis qu'un rôle revient au compromis. Hertz met en rapport ces deux idées comme suit:

From the point of view of the scope and basis of *la compétence de la compétence*, the juridical problem which arises may therefore be expressed thus: when the parties invest an arbitrator, whether expressly or by implication of law, with competence to interpret the *compromis*, within what limits, if any, are they to be understood as thereby engaging to be bound by an exercise of the competence by the arbitrator which results in a misinterpretation by him of the *compromis* concerning his powers? In the present case, the question would be whether it was the will of the Parties that they should be bound by a misinterpretation — if there was any — of the *compromis* on the important and major issue as to whether the second question was required to be answered. Conceivably, in the larger interests of securing a resolution of their dispute, the Parties might be understood as having undertaken to be bound by decisions made within some tolerable margin of appreciation as to competence in minor matters even though erroneous. Should they be understood as having undertaken to be likewise bound by erroneous decisions as to the powers of the Tribunal going to the substance of its mission? Scarcely so. But then, when such a question arises, as it in effect arises here, how is it to be answered unless the Court can say whether, as a matter of treaty interpretation, the Tribunal's decision was indeed correct? It is not clear why the Court must instead regard the matter as concluded by the fact that the Tribunal has placed on the *compromis* an interpretation which could have been placed on it without manifest breach of its competence. That way of putting it leaves open the possibility that, while such an interpretation might well be right, it could, at least in theory, be also wrong.

It may be useful to consider two cases involving contentions of nullity of an arbitral award, namely, the *Orinoco Steamship Co.* case and the case of the *Arbitral Award Made by the King of Spain on 23 December 1906.*

In the *Orinoco Steamship Co.* case the Permanent Court of Arbitration made the point that "the appreciation of the facts of the case and the interpretation of the documents were within the competence of the umpire" and that —

> "his decisions, when based on such interpretation, are not subject to revision by this tribunal, whose duty it is not to say if the case has been well or ill judged, but whether the award must be annulled; that if an arbitral decision could be disputed on the ground of erroneous appreciation, appeal and revision, which the Conventions of the Hague of 1899 and 1907 made it their object to avert, would be the general rule" (*The Hague Court Reports*, ed. J. B. Scott, 1916, p. 226, at p. 231).

These remarks, particularly about "the appreciation of the facts of the case and the interpretation of the documents" being "within the competence of the umpire", related to decisions made by him on the merits of the case, not to decisions made by him in exercise of *la compétence de la*

compétence, the point being that a challenge of nullity against a decision of the latter kind does not entitle the reviewing forum to revise the Tribunal's appreciation of the facts and documents leading to its decision on the merits. As to decisions made in exercise of *la compétence de la compétence* (relating in the particular case to a duty under the *compromis* to apply absolute equity), it would seem that the Permanent Court of Arbitration proceeded directly to consider whether the decision made by the umpire as to his powers, or the way they should be exercised, was correct.

The decision of this Court in the case concerning the *King of Spain's Award* likewise did point out "that the Award is not subject to appeal and that the Court cannot approach the consideration of the objections raised by Nicaragua to the validity of the Award as a Court of Appeal" (*I.C.J. Reports 1960*, p. 214, and paragraph 25 of the Judgment in this case). However, it is difficult to see this consideration at work when the Court came to deal with what appeared to be a challenge to an exercise of the arbitrator's *compétence de la compétence*. The Court did dispose of one branch of the arguments by taking the view that certain possible interpretations of the articles of the Gámez-Bonilla Treaty relating to the procedure for appointing the arbitrator were interpretations which could have been placed on those provisions in exercise of the power of the two national arbitrators to interpret them; but this concerned the constituent "power of the [two national] arbitrators to interpret and apply the articles in question in order to discharge their function of organizing the arbitral tribunal" (*ibid.*, p. 206), and not the functions of the tribunal after it had been set up. As regards these functions, one question which did arise was whether the adjudicating arbitrator misconstrued the *compromis* in assuming that it gave him power to grant compensations in order to establish a well-defined natural boundary line. It does not appear that the Court approached the problem on the basis that the only question before it was whether the interpretation made by the arbitrator was one which could have been made by him without manifest breach of competence; it determined that the interpretation made by him was in fact correct, and it did so after carrying out its own "examination of the Treaty" and making its own interpretation (*ibid.*, p. 215). My understanding is that when the Court said that it was not a Court of Appeal and added that it "is not called upon to pronounce on whether the arbitrator's decision was right or wrong" (*ibid.*, p. 214), the decision of the arbitrator to which it was there referring was his decision on the merits of the case, not his decision interpreting the *compromis* as to his powers when dealing with the merits. As mentioned above, my impression is similar as regards the corresponding remark by the Permanent Court of Arbitration in the *Orinoco Steamship Co.* case.

In both of the two cases mentioned, the references by the reviewing forum to the distinction between appeal and nullity seemed intended by it as a reminder to itself that in a case of nullity it should not stray into a re-assessment of the merits of the decision being challenged, the only issue before it being whether the decision resulted from a valid exercise of

adjudicating power, not whether, if it did, it was correct on the merits. Without dogmatically excluding the possibility of other interpretations, I do not understand either of the two cases to be suggesting that, where a case of nullity is based on a challenge to the correctness of an interpretation made by the tribunal of the *compromis* concerning its powers, the reviewing forum is confined to asking merely whether the interpretation made by the tribunal was one which could have been made by it without manifest breach of its competence and is excluded from pronouncing on the correctness of the interpretation where this is held to be one which could have been so made. In the exercise of such powers of adjudication as it may in fact have, a tribunal undeniably has powers of appreciation over the factual and documentary material laid before it for evaluation and decision. So also, to some extent, where the competence of the tribunal depends on its appreciation of some matter in its relationship to the jurisdictional provisions of the *compromis* (*Interpretation of the Greco-Turkish Agreement of 1 December 1926 (Final Protocol, Article IV), Advisory Opinion, 1928, P.C.I.J., Series B, No. 16*, pp. 19-22; and J. L. Simpson and Hazel Fox, *International Arbitration, Law and Practice*, 1959, p. 252). But such powers of appreciation are of a significantly different order from powers of appreciation as to what powers of adjudication are in the first instance conferred on the tribunal by the *compromis* itself.

For practical purposes, the difference between the Court's view and that offered here may well be one of approach, rather than one of result. But perhaps some importance may be attached to the approach. I agree with the view, underlying the Court's decision, that its authority to review the Tribunal's interpretation of the *compromis* is limited, but I differ as to the basis of the limitation. I regard the limitation not as one which in principle precludes the Court from pronouncing on the correctness of the Tribunal's interpretation, but as one which requires a certain measure of caution on the part of the Court when so pronouncing: I would link the limitation directly and firmly to considerations of stability of the arbitral process with respect to finality of awards, and to the consequential need for the Court to observe appropriate standards of cogency in determining whether its own interpretation of the *compromis* is so convincingly clear as to warrant displacement of the Tribunal's, should the two be different. I believe this view conforms to the tendency of such jurisprudence as there is on the point. I do not see the limitation as being linked to any idea that, as seems implied by paragraphs 47 and 60 of the Judgment of the Court, because these are not appeal proceedings, the Tribunal should be regarded by the Court as having an unreviewable freedom to select any of a number of possibly different interpretations of the *compromis* as to the substance of its mission, provided they are interpretations which could be made "without manifest breach of its competence".

With respect, then, I am not persuaded that it is a satisfactory approach to a challenge of nullity to seek to determine it by merely asking whether

the tribunal's interpretation of the *compromis* as to its powers was one which could have been made without manifest breach of its competence. More particularly, I consider that there was nothing in law to prevent the Court from pronouncing on the issue whether the Tribunal in this case was correct in interpreting the Arbitration Agreement to mean that it was not called upon to reply to the second question put to it.

II. Whether the Tribunal Was Correct in Interpreting the *Compromis* to Mean That It Was Not Called Upon to Answer the Second Question

I am of opinion that the Tribunal was correct in interpreting the *compromis* to mean that it was not called upon to reply to the second question.

Guinea-Bissau's contention that recourse should have been had to the second question is based on its argument that the overriding object and purpose of the Arbitration Agreement, particularly as suggested by the Preamble, was that there should in any event be a delimitation by a single line of all the maritime spaces of the Parties which were the subject of the dispute between them. This was the premise on which learned counsel for Guinea-Bissau put its case when he said:

> "the first and second questions asked in Article 2 were the parts of an overall question: what is the maritime boundary, namely the boundary of all the maritime spaces? If it derived from the exchange of letters, the reply to the overall question would stem from that to the first question; otherwise, it would stem from the reply to the second." (Public sitting of 9 April 1991 (afternoon), CR 91/7, p. 58, Professor Galvão Teles.)

This interpretation of the two questions, founded on the desideratum of a comprehensive delimitation, is attractive; some support for it may indeed be claimed from the jurisprudence which, in several well-known cases, warns of the limitations of a narrow grammatical approach which, by inhibiting the Court from ascertaining what the parties really did mean when they used the words falling to be construed, could result in the defeat of the true object and purpose of a treaty.

But, taking full account of the flexibility of that jurisprudence, is Guinea-Bissau's reading of the two questions reasonably reconcilable with their actual formulation? Without any necessity to call upon the *travaux préparatoires*, I would grant that the Arbitration Agreement itself does indicate a general desire of the Parties for a comprehensive settlement of their dispute. Yet, it appears to me that the operative provisions of the Agreement demonstrate a specific intention not fully congruent with that general desire, in the sense that the intention, as so demonstrated, was indeed to realize that desire, and to realize it through the arbitration provided for, but only subject to a condition precedent which, as it turned out,

was not satisfied. It is this partial discrepancy between apparent wish and specific machinery which constitutes the special legal problem in this case. How is the problem to be resolved?

The key provisions of the Arbitration Agreement, as set out in Article 2, put two questions to the Tribunal, stated in such a way as to make it clear that, while the first question had to be answered in any event, the second had to be answered only "[i]n the event of a negative answer to the first question . . .". Thus, the very structure of the provision contemplated the distinct possibility that only the first of the two questions might require to be answered. This being so, to make good the argument that the Tribunal was obliged to produce a comprehensive delimitation in any event, it would have to be shown that the Tribunal was both competent and bound to produce such a delimitation by way of answer to the first question if, for any reason, that question alone fell to be answered. However, it seems clear (and this aspect is revisited below) that a comprehensive delimitation could in no circumstances be produced by way of answer to the first question. It being also clear that that question could nevertheless be the only question requiring to be answered, it follows that the argument that the Tribunal was obliged in any event to produce a comprehensive delimitation fails. With that failure, the conceptual foundation of Guinea-Bissau's case is removed. And the case ends.

What, however, is the position if this conclusion is wrong? As has been seen, Guinea-Bissau's argument was this — that a comprehensive delimitation was necessary in any event, and that, accordingly, if the answer of the Tribunal to the first question did not in fact produce such a delimitation, it was necessary to pass to the second question in search of one. This argument might seem to imply that Guinea-Bissau was taking the position that the first question did embrace the possibility of establishing a comprehensive delimitation under it. However, it has to be recalled that, in the arbitral proceedings, Guinea-Bissau resisted, and successfully resisted, a contention by Senegal that an answer to the first question, upholding the 1960 Agreement, could produce a comprehensive delimitation. Senegal, for its part, accepted the Tribunal's decision on this point. Before this Court neither side took the position that it was possible, even theoretically, for a comprehensive delimitation of any kind to be produced by any conceivable answer to the issue raised in that question as to whether the 1960 Agreement had the force of law in the relations between the Parties. That question was simply not directed to the establishment of a comprehensive delimitation of any kind. Thus, although it is perfectly true, as repeatedly emphasized by Guinea-Bissau, that the Tribunal's answer to the first question did not in fact produce a comprehensive delimitation, there is no point in saying so if, to begin with, that question was not directed to the establishment of any such delimitation. There would be no point in saying so because the statement would be based on a non-existent premise. Accordingly, the fact that no such delimitation was effected

under the first question did not in logic provide a reason for having recourse to the second question.

It may be argued that, although, for the reasons given by the Tribunal, the 1960 line could not constitute a comprehensive delimitation, this did not mean that the first question could not be construed as asking the Tribunal to say whether that line, if upheld, constituted such a delimitation, and that the answer which the Tribunal gave amounted to a partially negative answer to the question thus understood. It is difficult, however, to discover in the wording of the question the ingredients of such a construction. A possible argument is that the reference in the question to "the relations" between the Parties was a reference to their relations in respect of the boundary throughout all of the existing maritime spaces, and not merely those maritime spaces which existed in 1960, with the result that the Tribunal, if it upheld the 1960 Agreement, would be required to consider whether the Agreement governed all of their relations in this comprehensive sense. My difficulty with the argument is that it seems necessary to distinguish "the relations" between the Parties from the subject-matter of the relations. The word "relations" by itself means the "various modes in which one country, state, etc., is brought into contact with another by political or commercial interests" (*The Shorter Oxford English Dictionary*, 3rd ed., 1984, p. 1796), or "the connections between . . . nations" (*Webster's New Dictionary and Thesaurus, Concise Edition*, 1990, p. 459). It appears to me that these "connections" may concern a variety of interests and that a reference to the former does not by itself suffice to identify the latter. Accordingly, the reference in the first question to "the relations" between the Parties does not by itself identify the particular maritime spaces which those relations concern. These are to be collected from the reference in the question to the 1960 Agreement, which of course concerned only some of the existing maritime spaces of the Parties. In effect, in asking whether the 1960 Agreement had the force of law in the relations between the Parties, the first question was asking whether the Agreement had such force as regards the boundary delimiting the maritime spaces referred to in the Agreement, and not also as regards maritime spaces not therein referred to. There is nothing in the question which supports the view that it was asking the Tribunal to say whether the 1960 line, if upheld, was to have an extended application throughout all of the existing maritime spaces of the Parties.

It may be said that this conclusion does not represent the Tribunal's own interpretation of the first question. Having held that the 1960 Agreement had the force of law in the relations between the Parties, the Tribunal passed on to consider the spatial application of the Agreement. Senegal had contended that, by reason of certain factors, the line laid down by the 1960 Agreement applied to all of the maritime spaces of the Parties as now known to international law, and was accordingly no longer restricted to the spaces specified in the Agreement itself. Speaking in this connection, the Tribunal said:

> "The Tribunal is not attempting to determine at this point whether there exists a delimitation of the exclusive economic zones based on a legal norm other than the 1960 Agreement, such as a tacit agreement, a bilateral custom or a general norm. It is merely seeking to determine whether the Agreement in itself can be interpreted so as to cover the delimitation of the whole body of maritime areas existing at present." (Award, para. 83.)

Do these remarks mean that the Tribunal understood the first question to be asking it to say whether the delimitation effected by the 1960 Agreement, if upheld, governed all of the maritime areas existing at present? If so, the answer which it gave — that the Agreement applied only to the territorial sea, the contiguous zone and the continental shelf — may well be regarded as a negative answer to the first question and as therefore requiring recourse to the second.

However, reading the quoted statement in context, I do not think it shows that the Tribunal understood the first question to be asking it to say whether the 1960 line applied comprehensively. In response to Senegal's contention, the Tribunal carefully differentiated between the delimitation effected by the 1960 Agreement itself and any possible additional delimitation subsequently effected on the basis of "a legal norm other than the 1960 Agreement, such as a tacit agreement, a bilateral custom or a general norm". The Tribunal held that the first question was confined to the 1960 delimitation and raised no issue about any other possible delimitation. Consequently, the Tribunal was concerned under the first question only with the spatial application of the delimitation effected by the 1960 Agreement itself, and not also with the spatial application of any possible additional delimitation subsequently effected on a basis other than that Agreement. It was precisely because the Tribunal understood the first question in this limited way that it rejected Senegal's contention that the 1960 Agreement applied to all existing maritime spaces. That was a negative answer to a question raised by Senegal; it was not a negative answer to the first question presented by the Arbitration Agreement.

Nor could the Tribunal's answer be regarded as a partial answer to the first question. The non-applicability of the 1960 Agreement to maritime spaces not referred to in it does not mean that the Agreement was not wholly in force. How far the Agreement had the force of law in the relations between the Parties was to be measured by reference to the maritime spaces to which it referred, not by reference to maritime spaces to which it did not refer. The Agreement was in force between the Parties to the entire extent visualized by its own terms; it was fully in force.

There could be argument — and such argument was in fact advanced by Senegal — that the Tribunal's task was merely to say whether the

1960 Agreement had the force of law "in the relations between the" Parties, and that it was not required to determine the field of application of the Agreement, if upheld. I do not pursue that question, because even if the Tribunal was so required, the answer which it gave, both as to the applicability and the scope of the Agreement, could not, in my opinion, be regarded as a negative answer so as to require recourse to the second question.

For the reasons given, it appears to me that the two questions were not directed to the achievement of the same thing. They were both concerned with the same general subject, but they were addressed to different aspects of it. I agree with the Court that the first question was concerned with the issue whether the 1960 Agreement had the force of law in the relations between the Parties, while the second was directed to the making of a maritime delimitation in the event that the Agreement did not have such force. The Tribunal was indeed required to undertake a delimitation of all the maritime areas of the Parties, but only on condition that it first found that the 1960 Agreement did not have the force of law in the relations between them. As this condition — a condition precedent — was not satisfied, the duty to undertake such a delimitation was never triggered off. To hold otherwise is effectively to say that the Tribunal was bound to answer the second question whatever was its answer to the first — a proposition needing only to be stated to be dismissed.

It may be said that there is little to recommend a method of interpretation which is so strict as to lead to a construction of the Arbitration Agreement "according to which it would . . . fail entirely to enunciate the question really in dispute . . ." (see remarks of the Permanent Court of International Justice in the *Free Zones of Upper Savoy and the District of Gex, P.C.I.J., Series A/B, No. 46*, p. 96, at p. 139). Since the actual dispute between the Parties in this case extended to all of their existing maritime spaces, it may be contended that any interpretation which excluded the possibility of a comprehensive settlement through recourse to the second question is an interpretation which fails to enunciate the question really in dispute. On the other hand, to require recourse to be had to the second question notwithstanding the Tribunal's affirmative answer to the first is so palpable a disregard of the preclusive words with which the second question begins as to invite attention to other applicable considerations.

In his earlier capacity as a Member of this Court, Judge André Gros, one of the two arbitrators who voted for the Award, had occasion, first in 1974 and then again in 1984, to refer to the following passage from Charles De Visscher (*Problèmes d'interprétation judiciaire en droit international public*, 1963, at pp. 24 and 25):

> "The function of interpretation is not to perfect a legal instrument with a view to adapting it more or less precisely to what one may be tempted to envisage as the full realisation of an objective which was logically postulated, but to shed light on what was in fact the will of the Parties." (*Fisheries Jurisdiction (United Kingdom* v. *Iceland),*

I.C.J. Reports 1974, dissenting opinion, p. 149; and, *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), I.C.J. Reports 1974*, dissenting opinion, pp. 238-239. See likewise the *Delimitation of the Maritime Boundary in the Gulf of Maine Area, I.C.J. Reports 1984*, dissenting opinion, p. 388, where the English translation is slightly different.)

Judge Anzilotti is on record as observing that, were the Permanent Court of International Justice to confine itself to answering only part of the question "which has been put to it", the Court would be committing "an abuse of its powers" (*Customs Régime between Germany and Austria, Advisory Opinion, 1931, P.C.I.J., Series A/B, No. 41*, p. 37, at p. 69). However, to avoid a *petitio principii*, it must first be determined what is the question requiring to be answered (*Free Zones of Upper Savoy and the District of Gex, P.C.I.J., Series C, No. 58*, at pp. 445, 610-613, Professor Logoz, for Switzerland, *arguendo*). Thus, although a *compromis* may show that the parties desire an answer to all of certain questions, the way in which the questions are actually framed can conceivably prevent the tribunal from dealing with all of them. Treating of a case of this kind, in which it held that one of certain questions could not be answered because of the way it was constructed, the Permanent Court of International Justice seemed unmoved by the circumstance that the Court was expressly required by the *compromis* to answer all of the questions "by a single judgment". Nor did it yield to argument that —

> "the conclusion of the Special Agreement represented a compromise between the opposing views of the Parties — one of the two States being particularly interested in the legal question submitted to the Court in Article 1, and the other in the subjects dealt with in Article 2 — and that to give judgment only on the question of law submitted by Article 1 was unjust, as it destroyed the balance between the two Parties" (*Free Zones of Upper Savoy and the District of Gex, Judgment, 1932, P.C.I.J., Series A/B, No. 46*, p. 96, at p. 163).

That argument, it may be thought, carries a certain analogical force in this case. However, without entering into the reasons why it failed in that case, I take the view that it would fail equally in this case; reflections about possible difficulties created by the Award for the completion of a comprehensive delimitation, though deserving of consideration, are not decisive. Referring to the way the particular question had been formulated in the *Free Zones* case, the Permanent Court of International Justice said:

> "If the obstacle to fulfilling part of the mission which the Parties intended to submit to the Court results from the terms of the Special Agreement itself, it results directly from the will of the Parties . . ." *(Ibid.)*

It seems to me that in the case at bar such an obstacle is presented by the will of the Parties themselves as expressed by them in the prefatory words of the second question. Moreover, those words having been introduced at the instance of Guinea-Bissau itself, there is a sense in which it is apposite to bear in mind that, as was once said by Judge Anzilotti, "it is only fair that a government should bear the consequences of the wording of a document for which it is responsible" (*Polish Agrarian Reform and German Minority, P.C.I.J., Series A/B, No. 58*, p. 175, dissenting opinion, at p. 182). The controlling words in this case are clear. Every effort to put a gloss on them founders on Professor Rolin's remark, "la Cour estimera sans doute qu'il faut lire ce qui est écrit" (*I.C.J. Pleadings, Anglo-Iranian Oil Co.*, p. 486).

The international arbitral process provides a useful procedure of peaceful settlement. The international community rightly values the process. Clearly, its utility must be protected against open-ended challenges to the finality of awards. Equally clearly, it would be misconceived to seek to protect the system by suffering any serious fault in its operation to remain remediless: the preservation of the system and the vindication of its credibility are interlinked. In my opinion, however, the complaint in this case has not been made out. True, the Award of the Tribunal did not result in a delimitation of all the maritime areas in dispute. However, this is a comment not on the Award, but on the way the Parties chose to frame the questions put to the Tribunal. As to why they framed the questions in the way they did, a court of law need not look beyond the words of Charles De Visscher:

> "Il n'est pas rare qu'il faille considérer comme adéquate une interprétation qui n'assigne au traité qu'une efficacité restreinte, à première vue peu conforme à ce qui, en bonne logique, pourrait apparaître comme son but. Cette inefficacité partielle peut s'expliquer, en fait, par la volonté réfléchie des contractants de ne pas s'engager au-delà d'un certain point." (De Visscher, *op. cit.*, p. 77.)

(Signed) Mohamed SHAHABUDDEEN.