

INTERNATIONAL COURT OF JUSTICE

**CASE CONCERNING THE
ARBITRAL AWARD OF 31 JULY 1989
(GUINEA-BISSAU v. SENEGAL)**

**ANNEX TO THE
APPLICATION INSTITUTING PROCEEDINGS
OF THE GOVERNMENT OF THE REPUBLIC
OF GUINEA-BISSAU**

[TRANSLATION]

23 AUGUST 1989

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The pagination of the present English translation, prepared by the Registry of the International Court of Justice on the basis of the authoritative French text of the Award, has been aligned with the pagination of that French text.

**ARBITRATION TRIBUNAL FOR THE DETERMINATION
OF THE MARITIME BOUNDARY**

GUINEA-BISSAU/SENEGAL

Award of 31 July 1989

President **Barberis**
Arbitrators **Bedjaoui, Gros**
Registrar **Torres Bernárdez**

Geneva, 1989

In the case concerning the determination of the maritime boundary
between
the Republic of Guinea-Bissau,
represented by

His Excellency Mr. Fidélis Cabral de Almada, Minister of Education,
Culture and Sports
as Agent,

His Excellency Mr. Pío Correia, Secretary of State for Transport,
as Co-agent,

His Excellency Mr. Boubacar Touré, Ambassador of Guinea-Bissau to
Belgium, the European Economic Community and Switzerland,

Mr. Joao Aurigema Cruz Pinto, Judge at the Supreme Court,
Lieutenant-Commander Feliciano Gomes, Chief of the Navy General
Staff,

Mr. Mário Lopes, Head of the Office of the President of the Council
of State,

Mrs. Monique Chemillier-Gendreau, Professor at the University of
Paris VII,

Mr. Miguel Galvão Teles, advocate,

Mr. António Duarte Silva, former Assistant at the Faculty of Laws of
Lisbon, former Professor at the School of Law of Guinea-Bissau,
as Counsel,

Mr. Maurice Baussart, geophysicist,
Mr. André de Cae, geophysicist,
as Experts;

and

the Republic of Senegal

represented by:

His Excellency Mr. Doudou Thiam, Advocate at the Court of Appeal,
former President of the Bar Council, member of the International
Law Commission,

as Agent,

Mr. Birame Ndiaye, Professor of Law,

Mr. Ousmane Tanor Dien, diplomatic adviser to the President of the
Republic of Senegal,

Mr. Tafsir Malick Ndiage, Professor of Law,

as Co-agents,

Mr. Daniel Bardonnnet, Professor at the University of Law, Economics
and Social Sciences of Paris, Associate of the Institute of
International Law,

Mr. Lucius Caflisch, Professor at the Graduate Institute of
International Studies of Geneva, Member of the Institute of
International Law,

Mr. Paul De Visscher, Professor Emeritus of the Faculty of Law of
the Catholic University of Louvain, Member of the Institute of
International Law,

Mr. Ibou Diaïte, Professor at the Faculty of Legal and Economic
Sciences of Dakar,

as Counsel,

Mr. Samba Diouf, geologist,

Mr. André Roubertou, hydrographer,

Mrs. Isabella Niang, Assistant Professor at the Faculty of Sciences
of Dakar,

Mr. Amadou Tahirou Diaw, Assistant Professor at the Faculty of
Sciences of Dakar,

as Experts,

THE TRIBUNAL, composed as above,

gives the following Award:

1. On 12 March 1985 at Dakar the Governments of the Republic of Senegal and the Republic of Guinea-Bissau signed an Arbitration Agreement reading as follows:

"The Government of the Republic of Senegal and the Government of the Republic of Guinea-Bissau,

Recognizing that they have been unable to settle by means of diplomatic negotiation the dispute relating to the determination of their maritime boundary,

Desirous, in view of their friendly relations, to reach a settlement of that dispute as soon as possible and, to that end, having decided to resort to arbitration,

Have agreed as follows:

Article 1

1. The Arbitration Tribunal (hereinafter called "the Tribunal") shall consist of three members designated in the following manner:

Each Party shall appoint one arbitrator of its choice;

The third arbitrator, who shall function as President of the Tribunal, shall be appointed by mutual agreement of the two Parties or, in the absence of such agreement, by agreement of the two arbitrators after consultation with the two Parties.

2. The three members of the Tribunal must be nationals of third States.

The arbitrators shall be designated within 60 days from the signature of the present Arbitration Agreement.

3. In the event that the President or another member of the Tribunal should cease to act, the vacancy shall be filled by a new member designated by the Government which appointed the member to be replaced, in the case of the two arbitrators designated respectively by the two Governments, or, in the case of the President, by repeating the procedure set forth in paragraph 1 above.

Article 2

The Tribunal is requested to decide in accordance with the norms of international law on the following questions:

1. Does the Agreement concluded by an exchange of letters on 26 April 1960, and which relates to the maritime boundary, have the force of law in the relations between the Republic of Guinea-Bissau and the Republic of Senegal?

2. In the event of a negative answer to the first question, what is the course of the line delimiting the maritime territories appertaining to the Republic of Guinea-Bissau and the Republic of Senegal respectively?

Article 3

The seat of the Tribunal shall be at Geneva (Switzerland).

Article 4

1. The Tribunal shall take its decisions only in its full composition.

2. The decisions of the Tribunal relating to all questions of substance or procedure, including all questions relating to the jurisdiction of the Tribunal and the interpretation of the Agreement, shall be taken by a majority of its members.

Article 5

1. Each of the Parties shall, within 30 days from the signature of the present Agreement, designate for the purposes of the arbitration an agent and one or more co-agents, and shall communicate the names and addresses of their respective agents to the other Party and to the Tribunal.

2. The Tribunal, as soon as it is constituted, shall appoint a Registrar after consulting the two Agents.

Article 6

1. The proceedings before the Tribunal shall be adversarial. It shall consist of two phases: a written phase and an oral phase.

2. The written phase shall comprise:

- (a) A Memorial to be submitted by the Republic of Guinea-Bissau not later than four months after the setting-up of the Tribunal;
- (b) A Counter-Memorial to be submitted by the Republic of Senegal, not later than four months after the filing of the Memorial by the Republic of Guinea-Bissau;
- (c) A Reply, to be submitted by the Republic of Guinea-Bissau not later than two months after the filing of the Counter-Memorial by the Republic of Senegal;
- (d) A Rejoinder to be submitted by the Republic of Senegal not later than two months after the filing of the Reply by the Republic of Guinea-Bissau.

3. The Tribunal may extend the above time-limits at the request of either of the Parties.

Article 7

1. The written and oral pleadings shall be in the French and/or the Portuguese language; the decisions of the Tribunal shall be formulated in those two languages,

2. The Tribunal shall, so far as necessary, arrange for translations and interpretations and shall be empowered to recruit secretariat staff, to appoint experts, and to take all measures relating to premises and to the purchase or rental of equipment.

Article 8

The general expenses of the arbitration shall be settled by the Tribunal and borne in equal shares by the two Governments; each Government, however, shall bear its own expenses involved in or for the preparation and presentation of its arguments.

Article 9

1. Upon completion of the proceedings before it, the Tribunal shall inform the two Governments of its decision regarding the questions set forth in Article 2 of the present Agreement.

2. That decision shall include the drawing of the boundary line on a map. To that end, the Tribunal shall be empowered to appoint one or more technical experts to assist it in the preparation of such map.

3. The Award shall state in full the reasons on which it is based.

4. The two Governments shall decide whether or not to publish the Award and/or the documents of the written or oral proceedings.

Article 10

1. The Arbitral Award shall be signed by the President of the Tribunal and by the Registrar. The latter shall hand to the Agents of the two Parties a certified copy in the two languages.

2. The Award shall be final and binding upon the two States which shall be under a duty to take all necessary steps for its implementation.

3. The original text of the Award shall be deposited in the archives of the United Nations and of the International Court of Justice.

Article 11

1. No activity of the Parties during the course of the proceedings may be deemed to prejudice their sovereignty over the area the subject of the Arbitration Agreement.

2. The Tribunal shall have the power to order, at the request of one of the Parties and if the circumstances so require, any provisional measures to be taken to safeguard the rights of the Parties.

Article 12

The present Agreement shall enter into force on the date of its signature.

In witness whereof, the undersigned, duly authorized by their respective Governments, have signed the present agreement.

Done in duplicate at Dakar, on 12 March 1985, in the French and Portuguese languages, both texts being equally authentic."

2. Pursuant to Article 1 of the Arbitration Agreement, Mr. Mohammed Bedjaoui was appointed a member of the Tribunal by Guinea-Bissau and Mr. André Gros by Senegal, both within the specified time-limit of 60 days. Pursuant to the same Article of the Arbitration Agreement, Guinea-Bissau and Senegal appointed by mutual agreement Mr. Julio A. Barberis as third arbitrator and President of the Tribunal after one year had elapsed.

3. As soon as it was established, on 6 June 1986, the Tribunal, after consulting the Agents of the Parties, appointed Mr. Etienne Grisel as its Registrar, pursuant to Article 5, paragraph 2, of the Arbitration Agreement. Mr. Etienne Grisel having subsequently resigned, the Tribunal on 6 September 1988, after consulting the Agents of the Parties, appointed Mr. Santiago Torres Bernárdez as Registrar of the Tribunal.

4. Pursuant to Article 5, paragraph 1, of the Arbitration Agreement, the Government of Guinea-Bissau designated as agent His Excellency Mr. Fidélis Cabral de Almada and the Government of Senegal, His Excellency Mr. Doudou Thiam.

5. Geneva having been designated by Article 3 of the Arbitration Agreement as the seat of the Tribunal, an Agreement relating to the status, privileges and immunities of the Tribunal in Switzerland was concluded by the Parties with the host State. This Agreement took the form of an exchange of Notes between the Federal Department of Foreign

Affairs of Switzerland and the Embassy of the Republic of Senegal at Bern and the Embassy of the Republic of Guinea-Bissau at Brussels.

6. The inaugural meeting was held on 6 June 1986 in the presence of the Parties at the International Conference Centre at Geneva.

7. On 14 March 1988, the Tribunal held a special meeting in the Alabama Room in the Town Hall of Geneva where, in the course of a ceremony, the members of the Tribunal and the delegations of the Parties were received by the Council of State of the Republic and Canton of Geneva.

8. The meetings of the Tribunal were held at first in premises placed at its disposal by the Swiss authorities at the International Conference Centre at Geneva and at Villa Lullin at Genthod (Geneva), and subsequently in premises arranged for by the Tribunal itself, in particular at the headquarters of the International Labour Organisation.

9. With regard to the procedure, the Tribunal agreed to draw inspiration as far as possible from the rules of procedure of the International Court of Justice and to adopt supplementary procedural decisions as necessary.

10. The Memorial of Guinea-Bissau was filed on 6 October 1986 and the Counter-Memorial of Senegal on 6 February 1987, within the time-limits set by the provisions of Article 6, paragraph 2, subparagraphs (a) and (b) of the Arbitration Agreement of 12 March 1985. At the request of the Parties

the Tribunal agreed to extend the time-limit specified in Article 6, paragraph 2, subparagraphs (c) and (d) of the Arbitration Agreement for the Reply by Guinea-Bissau and the Rejoinder by Senegal. Guinea-Bissau filed its Reply on 6 June 1987 and Senegal its Rejoinder on 6 October 1987, i.e., within the time-limits as extended by the Tribunal.

11. The case being thus ready for hearing, the Tribunal, after consulting the Agents of the Parties, fixed 14 March 1988 for the opening of the oral proceedings. It was agreed that the representatives of Guinea-Bissau would speak first.

12. In the course of 16 private meetings held at the Villa Lullin at Genthod (Geneva) on 14, 15, 16, 21, 22, 23, 26 and 29 March 1988, the Tribunal heard, for Guinea-Bissau, their Excellencies Mr. Cabral de Almada and Mr. Pio Correia, Lieutenant-Commander Gomes, Mr. Lopes, Mrs. Chemillier-Gendreau, and Mr. Galvão Teles, Mr. Duarte Silva, Mr. Baussart and Mr. de Cae and, for Senegal, His Excellency Mr. Thiam, Mr. De Visscher, Mr. Bardonnnet, Mr. Caflisch, Mr. Diaïte, Mr. Roubertou, Mr. Diouf and Mrs. Niang.

13. Guinea-Bissau called Mr. Grandin as expert. Mr. Grandin made a statement and replied to the questions put to him by counsel for Guinea-Bissau. Senegal did not call any experts other than those forming part of its delegation. Neither of the Parties called any witnesses.

14. Availing itself of the powers vested in it by Article 9, paragraph 2, of the Arbitration Agreement, the Tribunal, after consulting the Agents of the Parties, designated Commander Peter Bryan Beazley as technical expert of the Tribunal.

15. In the written phase of the proceedings, the following submissions were presented by the Parties.

On behalf of Guinea-Bissau, in the Memorial:

"May it please the Tribunal to decide that:

- The rules on the succession of States in respect of treaties (Arts. 11, 13 and 14 of the Vienna Convention of 23 August 1978 on Succession of States in respect of Treaties) do not permit Senegal to invoke against Guinea-Bissau the exchange of letters effected on 26 April 1960 between France and Portugal, which in any case is absolutely null and void and non-existent;
- The maritime delimitation between Senegal and Guinea-Bissau has thus never been determined;
- The delimitation of the territorial seas of the two States shall be made by application of Article 15 of the Convention on the Law of the Sea of 10 December 1982 in accordance with an equidistance line (azimuth 247°) from the baselines of the two States;
- For the delimitation of the continental shelves and exclusive economic zones, since consideration of all the relevant circumstances and enquiry into suitable methods to reach an equitable solution produces similar results lying between azimuths 264° and 270°, the maritime delimitation between the two States should be fixed between these two lines."

The submissions presented in the Reply by Guinea-Bissau reiterate those of the Memorial reproduced above, except that in the first paragraph

the word "concluded" replaces the word "effected" to describe the exchange of letters of 16 April 1960 and that the adverb "absolutely" no longer qualifies the word "null" in the Reply.

On behalf of Senegal in the Counter-Memorial:

"May it please the Tribunal:

To reject the submissions of the Republic of Guinea-Bissau;

To declare and adjudge:

That by the exchange of letters of 26 April 1960 'on the subject of the maritime boundary between the Republic of Senegal and the Portuguese province of Guinea', France and Portugal, in the full exercise of their sovereignty and in conformity with the principles governing the validity of international treaties and agreements, have carried out the delimitation of a maritime boundary;

That this Agreement, confirmed by the subsequent conduct of the contracting Parties as well as by the conduct of the sovereign States which succeeded to them, has the force of law in the relations between the Republic of Guinea-Bissau and the Republic of Senegal."

The submissions in the Rejoinder by Senegal reiterated those set forth in the Counter-Memorial and reproduced above, except for the insertion in the last paragraph of the words "and supplemented" between the word "confirmed" and the words "by the subsequent conduct".

16. In the course of the oral proceedings, the following submissions were presented by the Parties.

On behalf of Guinea-Bissau at the hearing of 26 March 1988,
(afternoon):

"May it please the Tribunal to decide that:

(1) Senegal is not entitled to invoke against the Republic of Guinea-Bissau the exchange of letters of 26 April 1960 between France and Portugal.

The non-opposability of that exchange results from:

- a correct interpretation of the rules of uti possidetis juris, which concern solely land frontiers and do not extend to maritime delimitations;
- the non-publication of the Agreement in Portugal and in Guinea;
- the right of peoples to self-determination and the process of liberation of the people of Guinea-Bissau, which had already begun on the date of the Franco-Portuguese Agreement;
- the principle of permanent sovereignty of every people and every State over its natural wealth and resources, which finds its expression today in Article 13 of the Vienna Convention on Succession of States of 23 August 1978;

The Franco-Portuguese exchange of letters is in addition absolutely void by reason of violation of the principles of ius cogens and is void by reason of non-conformity with the fundamental norm of contemporary law in the matter of maritime delimitation and by reason of manifest violation of rules of internal law of fundamental importance concerning competence to conclude treaties. It is also [legally] non-existent.

Thus, the Agreement concluded by exchange of letters of 26 April 1960 does not have the force of law in the relations between the Republic of Guinea-Bissau and the Republic of Senegal and no maritime delimitation has been effected between them.

(2) The delimitation of the territorial waters between the two States should be made by application of Article 15 of the Convention on the Law of the Sea of 10 December 1982 on a line of equidistance from the baselines of the two States running in the direction of azimuth 247°.

For the delimitation of the continental shelves and the exclusive economic zones, since consideration of all the relevant circumstances and enquiry into appropriate methods to reach an equitable solution produces results situated between the directions of azimuths 264° and 270°, it is between these two lines that the maritime delimitation between the two States should be fixed."

On behalf of Senegal, at the hearing of 29 March 1988 (afternoon):

"May it please the Tribunal:

To reject the submissions of the Government of the Republic of Guinea-Bissau:

To declare and adjudge,

That by the exchange of letters of 26 April 1960 'on the subject of the maritime boundary between the Republic of Senegal and the Portuguese province of Guinea', France and Portugal, in the full exercise of their sovereignty and in conformity with the principles governing the validity of international treaties and agreements, have carried out the delimitation of a maritime boundary;

That this Agreement, confirmed and supplemented by the subsequent conduct of the contracting Parties as well as by the conduct of the sovereign States which succeeded to them, has the force of law in the relations between the Republic of Senegal and the Republic of Guinea-Bissau;

That whatever reply be given by the Tribunal to the question set out in Article 2, paragraph 1, of the Arbitration Agreement, and for the reasons stated by the Republic of Senegal, the maritime boundary between the Republic of Senegal and the Republic of Guinea-Bissau is constituted by the line drawn on azimuth 240° from the lighthouse at Cape Roxo and by its prolongation in a straight line raised to the superjacent water-column.

That the terminal point is situated at the intersection of that same line on azimuth 240° and the 200-nautical-mile limit."

17. By an Order of the Tribunal of 18 January 1989 the Parties were invited to submit by 1 April 1989 a supplementary note on any information that might have come to their knowledge or which they had been able to obtain relating to actual or potential resources in the matter of fisheries and hydrocarbons of the disputed zone, and their geographical

location. In response to that request, Senegal and Guinea-Bissau filed within the specified time-limit notes concerning the information in question.

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18. The dispute submitted to the Tribunal pursuant to the Arbitration Agreement of 12 March 1989 reproduced in paragraph 1 above is a dispute of a legal nature between the Republic of Senegal and the Republic of Guinea-Bissau, i.e., between two adjacent States which occupy that part of West Africa which lies on the shores of the Atlantic Ocean between Mauritania to the north of Senegal and Guinea to the south of Guinea-Bissau, except of course for the part that belongs to Gambia, which is an enclave in Senegal and also has an Atlantic coastline. As such, this dispute could only have emerged after the accession to full sovereignty and independence at the international level of whichever non-autonomous territory was the last to be decolonized. This is admitted both by the Republic of Senegal and by the Republic of Guinea-Bissau.

However, the view of each of those two States as to the meaning and scope to be attributed to certain agreements and actions on the part of their respective predecessor States has played a very important role in the origin of the dispute.

19. Senegal, a French overseas territory since 1946, became on 25 November 1958, by a decision of the Senegalese Territorial Assembly, an autonomous State within the Communauté then instituted by the French Constitution, an option which had been previously accepted on 28 September of the same year by a referendum of the Senegalese people. In January 1959, Senegal formed, still within the Communauté, with French Sudan the Federation of Mali. That Federation became independent on 4 April 1960 and acceded to full sovereignty on 20 June 1960. The Federation of Mali was subsequently dissolved and Senegal became on 20 August 1960, under the name of the Republic of Senegal, an independent and sovereign State separate and distinct from that of the Republic of Mali (the former French Sudan). The Republic of Senegal was admitted to the United Nations on 28 September 1960. As for Guinea-Bissau, its independence was proclaimed on 24 September 1973 by the National People's Assembly, having been until then under Portuguese administration. The independence of Guinea-Bissau has been the outcome of a long struggle for national liberation, at first of a political nature and later, from early 1963 onwards, by the military action of the African Party for the Independence of Guinea and Cape Verde (PAIGC) against Portugal, which at

that time was under the régime of Dr. António de Oliveira Salazar. Under a Treaty concluded at Algiers on 26 August 1974, Portugal recognized Guinea-Bissau as an independent and sovereign State. The admission of Guinea-Bissau to the United Nations took place on 17 December 1974.

20. Prior to the events which led to the international sovereignty and independence of the Republic of Senegal and the Republic of Guinea-Bissau, France and Portugal had concluded certain agreements on the delimitation of their respective possessions in West Africa. Thus, by a convention signed in Paris on 12 May 1886, Portugal and France established a delimitation between Portuguese Guinea (the present Republic of Guinea-Bissau) on the one side and the French Colonies of Senegal (the present Republic of Senegal) to the north and Guinea (the present Republic of Guinea) to the south and east, on the other, by virtue of which the land frontier between Guinea Bissau and Senegal reached the Atlantic Ocean at Cape Roxo. It should also be noted that the convention specified that the following should belong to Portugal:

"all the islands comprised between the meridian of Cape Roxo, the coast and a southern limit formed by a line which shall follow the thalweg of the Cajet River and continue in a south-westerly direction across the Pilots channel to reach 10° 40' north latitude with which it shall merge as far as the meridian of Cape Roxo".

It is not disputed by the Parties to the present dispute that the delimitation effected by that Franco-Portuguese Convention of 1886 defines the land frontier between the Republic of Senegal and the Republic of Guinea-Bissau. The two Parties are also in agreement that the Franco-Portuguese Convention of 1886 does not define the maritime boundary between the Republic of Senegal and the Republic of Guinea-Bissau.

21. But while the Parties to the present dispute are agreed on the meaning and scope of the Franco-Portuguese Convention of 1886, that is far from being the case as regards the Agreement concluded by an exchange of letters on 26 April 1960 between France and Portugal for the purpose of defining the maritime boundary between the Republic of Senegal (at that time an autonomous State within the Communauté) and the Portuguese territory of Guinea. A Portuguese Decree of 26 February 1958 which empowered the Minister for Overseas Affairs to sign a contract granting a concession to the Esso Company gave rise to objections on the part of France. There followed negotiations at Lisbon from 8 to 10 September 1959 for the purpose of arriving at an agreed delimitation of the territorial sea, the contiguous zones and the continental shelf. On 10 September 1959 the negotiators established "recommendations" which were submitted to the two Governments. The first of these "recommendations" is the source of the content of the Agreement of 26 April 1960. That Agreement was published in the Official Journal in France as well as in those of the

Communauté and of the Federation of Mali, but not in the Official Journal of Portugal or that of its Province of Guinea, nor was it registered with the Secretariat of the United Nations either by France or by Portugal.

22. The Republic of Guinea-Bissau considers that the Franco-Portuguese exchange of letters mentioned above is void and legally non-existent, and that, in any case, it is not opposable to it. According to the Republic of Senegal, on the other hand, the Franco-Portuguese Agreement of 26 April 1960 has the force of law in the relations between it and the Republic of Guinea-Bissau with regard to their maritime boundary. It follows that, for the Republic of Guinea-Bissau, there is no maritime delimitation between it and the Republic of Senegal so that such a delimitation will have to be effected ex novo, whereas for the Republic of Senegal a maritime delimitation already exists, corresponding to that resulting from the Franco-Portuguese Agreement of 26 April 1960. These divergent positions of the Parties explain why Article 2 of the Arbitration Agreement of 12 March 1985 requests the Tribunal to reply, in the first place, to the question whether the Agreement of 26 April 1960 has the force of law in the relations between the Republic of Senegal and the Republic of Guinea-Bissau, and requests also the Tribunal, in the event of a negative answer to that question, to say what is the course of

the line delimiting the maritime territories appertaining to the Republic of Senegal and the Republic of Guinea-Bissau respectively.

23. The Republic of Guinea-Bissau contends that when, in September 1977, negotiations between the Parties were, on its initiative, begun for the purpose of settling the question of the determination of the maritime boundary between them, Guinea-Bissau was not even aware of the existence of the Franco-Portuguese exchange of letters of 26 April 1960, and it was only from 1978 on that the Republic of Senegal invoked it in the course of the negotiations. Senegal asserts that it had always been aware of the Franco-Portuguese negotiations which culminated in the Agreement of 26 April 1960, since the French delegation included a Senegalese member, that it has constantly relied on the 240° maritime boundary defined by the 1960 Agreement, and that Guinea-Bissau has also respected the Agreement, that for many years it has not protested against it and that the proclamation of independence of Guinea-Bissau, in its reference to the boundaries of the territorial waters, tacitly recognized the 240° limit.

24. It should also be mentioned here that the disagreement between the Parties to the present dispute regarding the Franco-Portuguese exchange of letters of 26 April 1960 does not concern only the period after the independence of Guinea-Bissau or the period after the commencement of the negotiations in 1977 mentioned above. The

disagreement extends also to the question of the application of the 1960 Agreement before those dates. For example, Guinea-Bissau maintains that when in 1963 the Portuguese authorities authorized the exploration for hydrocarbons in the area, they did so without any regard for a maritime boundary, thus proving that they considered such a boundary as non-existent. Senegal on the other hand emphasizes that the 1960 Agreement has been applied by all those concerned and that, despite the incidents that took place in and after 1963 between it and Portugal, the latter country never disputed the Agreement, and observed it. Senegal maintains that there was a mistake in a reply given by its administration to the Italian Embassy, which was corrected a month later, and asserts that it had always exercised its State jurisdiction in the area (granting of fishing licences or permits for the exploration or exploitation of hydrocarbons, protests against violations, etc.) in reliance on the maritime boundary established by the Franco-Portuguese Agreement of 1960.

25. A number of other events marked the genesis of the dispute: some incidents occurred at sea, in particular in 1977, in 1978 and again in 1984, when Senegal authorized the construction of drilling platforms in the disputed zone, which prompted a protest on the part of the Government of the Republic of Guinea-Bissau. Moreover, in 1985 a law enacted by the

Republic of Guinea-Bissau concerning a new system of straight baselines for that country gave rise to a protest by Senegal lodged with the Secretary-General of the United Nations.

26. These events did not however prevent the continuation of the negotiations between the Parties that had begun in 1977; as from 1982, those negotiations dealt essentially with the conclusion of an Arbitration Agreement. On 12 March 1985, that Arbitration Agreement was concluded and, by 7 April 1986, the three arbitrators had been selected.

27. The sole object of the dispute submitted by the Parties to the Tribunal accordingly relates to the determination of the maritime boundary between the Republic of Senegal and the Republic of Guinea-Bissau, a question which they have not been able to settle by means of negotiation. The case is one of a delimitation between adjacent maritime territories which concerns sea areas situated in the Atlantic Ocean off the coasts of Senegal and Guinea-Bissau. In their written documents as well as in the pleadings, the Parties have not failed to draw the Tribunal's attention to a whole series of geographical, geological and morphological data relating to the area concerned by the delimitation as well as to their coasts, in order to enlighten the Tribunal in its task. At the present stage of the discussion, the Tribunal sees no need to give a precise definition of the area in which the delimitation of the maritime boundary is to be effected,

or to say what, in the Tribunal's view, would be the effect of the various special features, geographical in particular, on the legal position.

28. Guinea-Bissau, the coast of which is considerably broken up by the estuaries of waterways, and off which lie the islands of the Bijagós Archipelago, stretches from the boundary of Guinea-Bissau with Guinea to Cape Roxo. Senegal lies to the north of Guinea-Bissau, and its coasts extend first from Cape Roxo to the frontier with the south of the Gambia, then from the frontier with the north of the Gambia to the boundary with Mauritania. According to Senegal, the Franco-Portuguese Agreement of 1960 has the force of law between the Parties, and the maritime boundary is accordingly constituted by a line drawn at azimuth 240° from the lighthouse of Cape Roxo and by its prolongation in a straight line seaward. In the view of Guinea-Bissau, on the other hand, the delimitation of the territorial waters between the two countries should follow the course of an equidistance line corresponding to azimuth 247° from the baseline of the two States; and the further line relating to the delimitation of the continental shelf and the exclusive economic zones would lie between azimuths 264° and 270° , the latter corresponding to a parallel of latitude.

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29. According to Article 2 of the Arbitration Agreement, the Tribunal must first reply to the following question:

"Does the Agreement concluded by an exchange of letters on 26 April 1960, and which relates to the maritime boundary, have the force of law in the relations between the Republic of Guinea-Bissau and the Republic of Senegal?"

30. Before proceeding to examine this question, it is appropriate to define the competence of the Tribunal in this regard. The Tribunal was established by an international treaty concluded between the Republic of Guinea-Bissau and the Republic of Senegal for the purpose of deciding, in the first place, whether the Franco-Portuguese Agreement of 26 April 1960 has the force of law between them. It might be questioned whether an arbitration tribunal is competent to examine the validity of a treaty concluded by two States which have not consented to that examination and which have not participated in the arbitral proceedings. Similarly, the question could be raised whether a country which was not a party to a treaty can assert its validity or its nullity.

31. It should be pointed out that the present case is not one in which two States have established a tribunal to decide on the validity or the nullity of an agreement concluded between other countries which are totally unrelated to them, as would be the situation, for instance, if the present Tribunal were asked to pronounce on the validity or nullity of an Agreement concluded between Norway and Uruguay.

The present dispute concerns an Agreement between two countries, of which the Parties are the successor States. Senegal and Guinea-Bissau

are, respectively, the successor States of France and Portugal. Although Guinea-Bissau declared tabula rasa as regards the application of treaties concluded by Portugal, the two Parties have recognized the principle of the African uti possidetis proclaimed by the Organization of African Unity, and they have reiterated it expressly in the present arbitration.

In addition, from the conduct of the Republic of Guinea-Bissau and the Republic of Senegal in the present arbitration, it can be inferred that they are acting as the successors of Portugal and France respectively, i.e., as States which, by the operation of the succession of States, have replaced Portugal and France in the responsibility for the international relations of the territories of Guinea-Bissau and Senegal respectively. The very fact of invoking before the Tribunal grounds of non-existence or nullity of the 1960 Agreement, or to claim before it entitlement to rights derived from that Agreement, implies acknowledgement of the status of successor of one of the States which concluded that Agreement.

32. The two countries admit that they are the successors of the States which concluded the 1960 Agreement, but their views diverge regarding the rules governing succession between States. Thus, while Senegal asserts that succession operates for the 1960 Agreement, Guinea-Bissau maintains the contrary.

33. A successor State can invoke before a tribunal all grounds of claim or objection which could have been invoked by the State to which it has succeeded. Consequently, Guinea-Bissau, as a successor State, is entitled to invoke before the Tribunal all the grounds of nullity which could have been raised by Portugal regarding the 1960 Agreement. Guinea-Bissau can also submit to the Tribunal any reasons for non-opposibility to it of the Agreement, which in its view exclude succession to that Agreement. Similarly, Senegal can likewise invoke before the Tribunal all the grounds which, in its view, support the existence and validity of the Agreement and its effect in the present case.

34. The Tribunal will therefore proceed to analyse the 1960 Agreement, in so far as it may be the subject of a succession of States, and with regard to its effects in the relations between Guinea-Bissau and Senegal. The validity of that Agreement in the relations between Portugal and France and the effects which it might still have between those two countries are not affected by the present Award, which will obviously have effect only as between the Parties to the arbitration.

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35. Guinea-Bissau has stated the various reasons on which it relies to assert that the 1960 Agreement does not have the force of law in its relations with Senegal. From a legal point of view, these reasons may be classified into four categories: (I) grounds of non-existence and nullity; (II) grounds of non-opposability; (III) non-registration of the Agreement with the Secretariat of the United Nations; and (IV) existence of a right of verification or review. The Tribunal will analyse separately each of the reasons thus invoked.

I. GROUNDS OF NON-EXISTENCE AND NULLITY INVOKED BY GUINEA-BISSAU

36. In a number of passages of its Memorial (for example, pp. 117, 129, 130, 158, 164 and 246) and of its Reply (pp. 203 and 339), Guinea-Bissau refers to the 1960 Agreement as having no existence. The competence of this Tribunal is based on the Arbitration Agreement on which its existence is based, and the limits of its jurisdiction are there defined. The first question to be answered by the Tribunal is the following: "Does the Agreement ... have the force of law in the relations between the Republic of Guinea-Bissau and the Republic of Senegal?" That question implies the existence of a treaty. If, on the other hand, the question had been "Is there an Agreement relating to the maritime boundary ...?", the problem would be different. On the latter hypothesis,

the State which claimed the existence of the Agreement would have had to prove it. In view, however, of the wording of the first question contained in Article 2 of the Arbitration Agreement, the 1960 Agreement is presumed to exist, and a claim that it is void would have to be proved. Consequently, as regards the burden of proof, the grounds for non-existence put forward by Guinea-Bissau will be treated by the Tribunal as grounds of nullity.

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A. INCOMPATIBILITY OF THE 1960 AGREEMENT WITH THE INTERNATIONAL RULES
OF JUS COGENS

37. The first ground of nullity invoked by Guinea-Bissau is that the Agreement of 26 April 1960 is allegedly incompatible with certain international legal norms of jus cogens. In this regard, Guinea-Bissau states in its Memorial that the rule which enshrines the right of peoples to self-determination has the character of a peremptory norm. In its turn, that norm is allegedly "accompanied by corollaries" having also the character of belonging to peremptory international law (p. 140). These corollaries are stated to include the principle of permanent sovereignty

over natural resources, a principle which according to Guinea-Bissau (PV/3, p. 131) is no more than the "logical development" of the principle of self-determination of peoples.

In the view of Guinea-Bissau, the violation in the present case of the norms of jus cogens concerning the right of peoples to self-determination and permanent sovereignty over natural resources takes two different forms: (i) in the first place, there would be a contradiction between such norms and the 1960 Agreement, because that Agreement constituted an alienation of territory, and as such was contrary to the principle of permanent sovereignty over natural resources; (ii) in the second place, the process of liberation is claimed to have been already under way at the time of the signature of the Agreement, thereby rendering it incompatible with the principle of the right of peoples to self-determination.

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38. The rule of permanent sovereignty over natural resources has been spelled out in resolutions 1803 (XVII) and 2158 (XXI) of the General Assembly of the United Nations. Paragraph I, 1, of resolution 1803 (XVII) concerns the "right of peoples and nations to permanent sovereignty over their natural wealth and resources" and

paragraph I, 1, of resolution 2158 (XXI) reaffirms "the inalienable right of all countries to exercise permanent sovereignty over their natural resources". The rule contained in these resolutions of the United Nations General Assembly guarantees to every State the right to exploit its own resources and recognizes the right of each of them to nationalize assets found on its territory which are being exploited by foreign enterprises.

39. The application of the principle of permanent sovereignty over natural resources presupposes that the resources in question are to be found within the territory of the State which invokes that principle. In the present case, the 1960 Agreement determined what was the territory of each State, i.e., it establishes what belongs to each of them. Before the Agreement, the maritime boundaries had not been determined, and consequently neither of the two States could assert that a particular portion of the maritime area was "its own". From a logical point of view, Guinea-Bissau cannot assert that the norm which determined the extent of its maritime territory (the 1960 Agreement) has taken away from it part of the maritime territory which was "its own". That assertion could only make sense if there had been a pre-existing legal norm which had attributed that territory to Guinea-Bissau, which has not been demonstrated in the course of the present arbitration. Any State claiming to have been deprived of part of its territory or natural resources must first demonstrate that they belonged to it.

It follows from the foregoing that the principle of permanent sovereignty over natural resources is not applicable in the present case.

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40. Guinea-Bissau asserts that the signing of the 1960 Agreement was in conflict with a corollary which follows from the principle of self-determination of peoples, whereby once a process of liberation is initiated, the colonial State cannot conclude treaties relating to essential elements of the right of peoples. This norm, since it is only a corollary, is said to derive its legal existence and its peremptory character from the above-mentioned fundamental principle. Accordingly, in the view of Guinea-Bissau, the principle of self-determination of peoples entails as a logical consequence a restriction of the jus tractatus of the colonial State as from the initiation of a process of national liberation. In addition, that limitation is claimed to have the character of a rule of jus cogens.

41. Contemporary writers on international law have dwelt at length on jus cogens, particularly since the 1969 Vienna Convention on the Law of Treaties. Some of those writers present jus cogens as consisting of norms of a superior hierarchical order. The studies on the notion of jus cogens

and on the identification of rules having that character have often been influenced by ideological conceptions and by political attitudes. From the point of view of the law of treaties, ius cogens is simply a peculiar feature of certain legal norms, namely that of not admitting derogation by Agreement.

42. Respect for the principle of equal rights and self-determination of peoples is mentioned in paragraph 2 of Article 1 of the Charter of the United Nations as one of the Purposes of the Organization, and this principle has subsequently been the subject of reformulations - in full or in part - in certain international instruments and documents, in particular certain resolutions of the General Assembly of the United Nations such as those concerning the "Declaration on the Granting of Independence to Colonial Countries and Peoples" (res. 1514 (XV)) of 1960, which has been invoked on several occasions by Guinea-Bissau during the present arbitration (see for example Memorial, Vol. I, pp. 139, 141 and 145; PV/1, pp. 113 and 122; PV/13, pp. 112 and 113), and the "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations" (res. 2625 (XXV) of 1970).

43. Guinea-Bissau claims that the rule whereby ius tractatus undergoes a restriction as from the initiation of a process of national liberation is a corollary of the principle of the right of peoples to

self-determination. In the view of the Tribunal, the relation between these two propositions is not that of a corollary in which the soundness of one proposition can be inferred from that of the other by a simple operation of formal logic. Guinea-Bissau has not put forward any evidence or any demonstration to show that the logical relation existing between the two rules is that of a corollary. The mere assertion that there is a certain logical relationship between two propositions is not sufficient. The rule invoked by Guinea-Bissau has a content which cannot be inferred from the right of peoples to self-determination. It constitutes a legal norm independent of the principle of self-determination and one which is connected more with the principle of effectiveness and the rules governing the formation of States in the international sphere.

44. A State born of a process of national liberation has the right to accept or to reject any treaties concluded by the colonial State after the initiation of that process. In this field, the newly-independent State enjoys a total and absolute freedom and there is no peremptory norm obliging it to declare null and void the treaties concluded during that period, or to reject them.

Guinea-Bissau has not established in the present arbitration that the norm invoked by it has become a rule of jus cogens either by custom or by the formation of a general principle of law.

45. In the present case, Guinea-Bissau alleges that France, by signing the 1960 Agreement, committed a breach, to the detriment of

Senegal, of a corollary of the principle of self-determination of peoples, according to which a colonial State could not conclude, after the initiation of a process of national liberation, treaties bearing on essential elements of the right of peoples. According to Guinea-Bissau, that Agreement is null and void and, since a norm of jus cogens is involved, Senegal has no right to confirm the treaty. The norm relied upon by Guinea-Bissau exists in international law but, as stated in the previous paragraph, it is not one of jus cogens. Senegal had therefore total and absolute freedom to accept or reject the 1960 Agreement. By virtue of that faculty, Senegal has accepted it and now invokes its application before the Tribunal. As for Guinea-Bissau, it is not entitled to request the Tribunal to declare null and void the 1960 Agreement on the ground of a breach of the asserted norm committed by France to the detriment of Senegal.

46. Guinea-Bissau also claims that Portugal has violated, to its detriment, the same rule mentioned above, which is alleged to be a corollary of the principle of self-determination of peoples. More specifically, it asserts that Portugal in 1960 did not have the necessary competence to sign the Agreement: "Neither of the colonial powers still retained in 1960 the necessary full sovereignty to conclude an Agreement" (PV/3, p. 133).

47. With a view to proving that this rule is applicable in the present case, Guinea-Bissau has sought to demonstrate that in April 1960,

the date of the Franco-Portuguese Agreement, the process of national liberation in Guinea had already started.

Both in its Reply and during the hearings, Guinea-Bissau has dealt in particular with the evolution of the process of national liberation in the Portuguese province of Guinea. According to the evidence adduced, the period from 1955 to 1960 was marked by the foundation, in Guinea or abroad, of a number of associations, some of them clandestine, whose declared ultimate objective was the independence of their country. Thus, in 1955 the Movement for the National Independence of Portuguese Guinea (MING) was set up at Bissau consisting of a group of merchants, public officials and students - a movement which was to disappear again the following year. In September 1956 the African Independence Party (PAI) was founded at Bissau; as from October 1960, it was renamed PAIGC. In 1958 the Anti-Colonial Movement (MAC) appeared; it was the outcome of the activities of a small study group which had met in Paris in November 1957 to examine the situation and the prospects of a struggle in the Portuguese Colonies. In 1959 the Liberation Front of Guinea and Cape Verde (FLGCV) was set up. In 1960, PAIGC and the People's Movement for the Liberation of Angola (MPLA) created the FRAIN (African Revolutionary Front for the Independence of the Portuguese Colonies). That entity lasted only one year, and was replaced in 1961 by the Conference of Nationalist Organizations of the Portuguese Colonies (CNGP).

During that period, and more precisely on 3 August 1959, the repression of the workers at Pidjiguiti took place, in the course of which 50 persons were killed. That event became the symbol of the struggle for national liberation.

On 3 August 1961 PAIGC proclaimed the change-over from political struggle to national insurrection. A few acts of sabotage were then committed, which provoked a large number of arrests. The armed struggle in Guinea began only in January 1963 (Reply, Vol. I, p. 213; PV/3, p. 64).

48. As far as Portugal was concerned, its policy was to deny the existence of its own Colonies. It regarded itself as a unitary State constituted by provinces situated in several continents. During the 1960's, Portugal continued to represent its overseas provinces both in the United Nations and in other international organizations. In 1972, the General Assembly of the United Nations, in its resolution 2918 (XXVIII) confirmed "that the national liberation movements of Angola, Guinea (Bissau) and Cape Verde and Mozambique are the authentic representatives of the true aspirations of those territories" but without designating those movements by name. Resolution 3113 (XXVIII) reiterated that statement, and finally resolution 3294 (XXIX) reaffirmed that the "Frente Nacional para a Liberação de Angola, the Movimento Popular de Liberação de Angola, the Partido Africano da Independência da Guiné e Cabo Verde, the

Frente de Libertação de Moçambique and the Movimento de Libertação de São Tomé e Príncipe ... are the authentic representatives of the peoples concerned". Until 1973 Portugal exercised in the United Nations the representation of the Overseas Province of Guinea. On 17 December 1973, by its resolution 3181 I (XXVIII), the General Assembly approved the credentials of the representatives of Portugal solely for the State existing within its frontiers in Europe and denied them all powers of representation for Mozambique, Angola and Guinea-Bissau. That resolution was but the logical consequence of resolution 3061 (XXVIII) of 2 November 1973 whereby the General Assembly had welcomed the accession to independence of Guinea-Bissau.

49. Senegal claims that the principle of self-determination of peoples appeared after 1960 and cannot be applied retroactively. As for the corollary which Guinea-Bissau derives from that principle, whereby a colonial State could not conclude certain treaties concerning its colonial territory from the moment when a process of liberation had begun, Senegal accepted it in its pleadings (PV/9, p. 62) but contended that the situation in Guinea in 1960 could not be considered as that of the initiation of a process of that kind.

50. In any process of national liberation, there is always at the outset a small group of determined men who organize themselves and who gradually develop their intellectual, political and military activity until the independence of their country is obtained. The duration of this

process and the methods to be applied depend on a number of factors, among which may be mentioned the policy of the colonial State and the assistance which the liberation movement receives from abroad. In the process of liberation a stage is reached in which the aspirations of the movement are defined and it requires an institutional organization. Once it has a structure, the movement can begin to act, and comes out into the open. The action taken is not necessarily guerrilla activity; it may be only a political activity. It must be stressed, however, that the decisive element for the success or failure of a liberation movement is always popular support.

51. In this process of formation of a national liberation movement, the legal problem is not that of identifying the precise moment in which the movement as such is born. The important point to be determined is the moment from which its activity acquired an international impact.

As pointed out by Senegal, there exists today in western Europe and in other parts of the world a number of independence movements. It is not possible to assert that the activity of one or other of those movements has an international impact merely because it has constituted itself as an organization, or has held a number of public events.

Such activities have a bearing at the international level from the moment when they constitute, in the institutional life of the territorial

State, an abnormal event which compels it to take exceptional measures, i.e., when in order to control, or try to control events, it is obliged to resort to means which are not those used normally to deal with occasional disturbances.

In the case of what was then Portuguese Guinea, the Tribunal does not have to examine whether the process of national liberation had, or had not, started in April 1960; what must be ascertained is whether the activities whereby that process manifested itself in April 1960 had an international impact or not.

52. Guinea-Bissau has stated in this connection in its Memorial (p. 62) with reference to the period when the Agreement of 26 April was signed: "In 1959/1960, it could not yet be said that there was any encroachment on the integrity of the Portuguese powers at the territorial level." In addition, in the present arbitration, there have been repeated statements confirming the assertion in the Arbitral Award of 14 February 1985 between Guinea and Guinea-Bissau to the effect that the war of liberation only began in 1963 in Portuguese Guinea (Reply, Vol. I, p. 213; PV/3, p. 64). As for the United Nations, it was only in November 1973, i.e., after the proclamation of the independence of Guinea-Bissau, that a resolution was adopted to the effect that Portugal no longer represented that country. No evidence has been adduced in the

present case to establish that in 1960 the institutional life of what was then Portuguese Guinea had experienced such upheavals that the State had been obliged to resort to extraordinary measures to ensure the normal conduct of civil activities and to guarantee public security.

For all these reasons, the norm which limits the capacity of the State to conclude treaties upon the initiation of a process of liberation is not applicable to the situation which existed in 1960 in Portuguese Guinea.

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B. BREACH OF INTERNAL LAW

53. Guinea-Bissau claims that the Agreement concluded by exchange of Notes on 26 April 1960 is null and void because, by signing it, both Portugal and France committed a breach of norms of internal law of fundamental importance.

With regard to Portuguese law, at the time of the signature of the 1960 Agreement, the Constitution of 11 April 1933 was in force, Article 2 of which specified that the State could not alienate any part of the national territory without the consent of the National Assembly. Moreover, Article 91, paragraph 9, specified that the National Assembly had the power to "define the limits of the territories of the Nation ("definir os limites dos territórios da Nação")". As to the conclusion of

agreements, the procedure was indicated in Articles 81, paragraph 7, Article 91, paragraph 7 and Article 102, paragraph 2. According to those Articles, the National Assembly's approval was necessary for international conventions and agreements concluded by the Government, except in cases of urgency. The Constitution of 1933 did not contemplate the system of agreements in simplified form. Nevertheless, that practice was accepted by Portugal and was used for agreements relating to subjects which were not of the competence of the National Assembly (Memorial, p. 112). From an analysis of those provisions, Guinea-Bissau concludes that, according to the Portuguese Constitution of 1933, the 1960 Agreement should have been submitted for approval to the National Assembly. That breach of constitutional law was of a "manifest" character and, in accordance with the rule codified in Article 46 of the Vienna Convention on the Law of Treaties, the Franco-Portuguese Agreement was, it is claimed, null and void.

Senegal does not share this view. Its arguments are based on a different interpretation of the constitutional texts, as well as on the fact that, in addition to the written text of the Constitution, consideration has to be given to "a whole body of customs and practices which have appreciably altered the original meaning of the constitutional texts" (Counter-Memorial, p. 40). In particular, Senegal asserts that the competence conferred upon the National Assembly by Article 91 of the Constitution was not exclusive, and could be delegated to the Government (Art. 91, para. 13). In support of that assertion, it relies on the fact

that Chapter III, Title III of Part Two of the Constitution in force in 1960 concerning the powers of the National Assembly draws a distinction between those indicated in Article 91 and those mentioned in Article 93. For the latter, the Constitution specifies that they are "matters of the exclusive competence of the National Assembly" ("matéria da exclusiva competencia da Assembleia Nacional"), whereas Article 91 says nothing on this subject. This circumstance, combined with what is stated in paragraph 13 of Article 91, make it possible to infer that for the matters mentioned in that Article delegation was possible. Similarly, Senegal maintains that Article 2 does not apply to the 1960 Agreement because that Agreement does not embody an alienation of territory but a territorial delimitation. Senegal gives in addition an account of international case-law and diplomatic precedents relating to the nullity of treaties on grounds of the violation of internal law. On that question, it reaches the conclusion that the 1960 Agreement did not involve any manifest violation of Portuguese internal law. It states in this respect:

"The 1960 Agreement was concluded by an exchange of notes effected, on the Portuguese side, by a man who combined the offices of Head of Government, Minister for Foreign Affairs and strongman of the political régime of Portugal and on this basis alone such a commitment enjoys absolute presumption of validity." (Counter-Memorial, p. 131.)

Senegal further asserts that:

"The 'constitutional deviation' experienced by Portugal for over 35 years under the authoritarian régime established by President Salazar had the effect of reducing to a symbolic role the authority of the National Assembly and, in particular, the functions entrusted to it by the Constitution in the matter of approval of international treaties." (Counter-Memorial, p. 131.)

In its Reply, Guinea-Bissau reiterates that, in accordance with the 1933 Constitution, the competence vested in the National Assembly by Article 91 was not capable of delegation (p. 144). Guinea-Bissau points out that none of the Agreements in simplified form subscribed by Portugal concerned delimitation (p. 38). As for the real constitutional situation obtaining during the régime of Dr. António Oliveira Salazar, the Reply states that "the Constitution of 1933 never became a nominal Constitution, especially with regard to rules of competence and form" (p. 166). Further on, the Reply adds: "The Portuguese Constitution of 1933 had binding force and the rules on separation of powers and on questions of form established by it had to be respected." (P. 168.)

Senegal's Rejoinder confirms that State's position regarding the régime in force in Portugal in 1960, and the international validity of the Agreement signed that year. As for the Portuguese practice in the matter of delimitation, the Rejoinder points to two Agreements concluded by exchange of letters with the United Kingdom in 1936/1937 and in 1940.

In their oral argument, the two Parties developed the arguments put forward in the written phase of the proceedings.

54. Before examining the question of the possible nullity of the Franco-Portuguese Agreement by reason of manifest violation of internal law, it is first necessary to determine the applicable law in the matter.

There is a general principle that the law to be applied to a given situation must be the law in force at the time when it arose (see Island of Palmas case in UNRIIAA, Vol. II, p. 845). Consequently, the present case must be examined in the light of international law in force in 1960. The Tribunal will therefore not spend time analysing the 1969 Vienna Convention on the Law of Treaties, nor on the question, discussed in the present proceedings whether or not one of its clauses, in particular Article 46, does or does not constitute the codification of a rule of general international law.

55. The question whether a State was, or was not acting in conformity with its internal law when it signed an international treaty, and the importance of that issue from the standpoint of international law, were not governed by any general treaty in 1960. The applicable norms were those of customary law. As for the practice of international courts and arbitral tribunals, there was no precedent of a treaty being declared null and void because one of the contracting states had violated its own

internal law in signing it. Diplomatic precedents were not uniform but, in general, it could be deduced from them that only a grave and manifest violation of internal law could justify a treaty being declared null and void.

The Tribunal considers that its decision on that subject must be governed by the principle of good faith. That principle was undoubtedly the rule observed by States in 1960 with regard to the conclusion of international agreements.

56. The question whether a treaty has been concluded in conformity with the internal law of a State must be examined in the light of the law in force in that country, i.e., that law as actually interpreted and applied by the organs of the State, including its judicial and administrative organs.

57. To this end, it is first of all necessary to examine the political Constitution of the Portuguese Republic of 1933, which was in force in 1960. According to that Constitution, the President of the Republic represented the Nation, directed foreign policy and was empowered to "conclude international conventions" ("ajustar convenções internacionais") (Art. 81, para. 7). The exercise of that constitutional power of the President was attributed in 1938 to the Minister for Foreign Affairs by Legislative Decree No. 29319. Article 91, paragraph 7, specified that the National Assembly was competent to "approve, under the terms of No. 7 of Article 81, international conventions and treaties" ("aprovar, nos termos do No. 7º do artigo 81º, as convenções e tratados internacionais"). Furthermore, paragraph 9 of the same Article conferred

upon the National Assembly the competence to "define the limits of the territories of the Nation" ("definir os limites dos territórios da Nação"). In addition, Article 81, paragraph 7, already quoted specified that treaties signed by the President had to be submitted by the Government for approval to the National Assembly.

These clauses show that the normal process for concluding an international agreement according to the Portuguese Constitution was as follows: signature authorized by the President of the Republic, presentation by the Government to the Assembly, and approval by that Assembly. The Constitution provided also that the Government could "in cases of urgency, approve international conventions and treaties" ("em casos de urgência, aprovar as convenções e tratados internacionais") (Art. 109, para. 2).

58. In practice, the competence of the National Assembly became restricted for two main reasons. In the first place, in Portugal, as in most countries, the practice developed of concluding agreements by exchange of letters. In the second place, the Government eventually invoked grounds of urgency regularly in order to approve international treaties itself in place of the Assembly. The fact that the Government systematically invoked reasons of urgency meant that, in the words of a commentator, "Parliamentary approval had almost disappeared" ("quase tivesse desaparecido a aprovação parlamentar") (Marcello Caetano, Manual de Ciencia Política e Direito Constitucional, 6th edition, Lisbon, 1972, Vol. II, p. 617).

According to Guinea-Bissau, agreements by exchange of letters dealt with subjects which were not within the competence of the National Assembly.

The practice of that period, however, shows matters in a different light. Thus, the National Assembly did not take action to approve the Charter of the United Nations, or the 1943 and 1971 Agreements with the United States of America on the Azores Islands base, or the frontier Agreements of 11 May 1936/28 December 1937 and 29 October 1940 with the United Kingdom.

Guinea-Bissau asserts that the 1960 Agreement was void for lack of Parliamentary approval. In the text of that instrument, the Portuguese Minister for Foreign Affairs ad interim gave his co-signatory, the French Ambassador, to understand that the Agreement entered into force at the time of its signature. When two countries conclude by exchange of letters an agreement which, for constitutional reasons, requires the approval of the Parliament of one of them, it is customary to mention that fact in the text or during the negotiations. That was not done in the present case.

59. If account is taken of the Agreement of 26 April 1960, the sporadic character of the National Assembly's interventions in the approval of international conventions, of the fact that certain instruments as important as the Charter of the United Nations were not approved by that Assembly, and of the fact that the Agreement was signed by Dr. António Oliveira Salazar, undisputed head of the authoritarian

régime which existed at the time in Portugal, it may be concluded that the French Government had good reason to believe in all good faith that the treaty which had been signed was valid.

60. Guinea-Bissau also argues, as evidence of the nullity of the 1960 Agreement, that France had allegedly violated its internal law on its conclusion. The only State which could invoke such grounds of nullity is Senegal. Guinea-Bissau has no standing to submit that claim to the Tribunal.

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II. THE GROUNDS OF NON-OPPOSABILITY ADVANCED BY GUINEA-BISSAU

61. In addition to the grounds of nullity already mentioned, Guinea-Bissau claims that the Agreement concluded between France and Portugal on 26 April 1960 is not opposable to it, i.e., that even supposing the Agreement to be valid, State succession would not operate in the present case, and the rules of succession would therefore not apply in the relations between Senegal and Guinea-Bissau.

The question of succession of States in the matter of boundaries acquired a very special importance in America during the 19th century, because of the accession to independence of the States born of the Spanish

colonial empire. In certain cases, the new States decided by common agreement that the international limits of their respective territories would be those which already existed to mark the administrative subdivisions of the colonial period. In other cases, the States claimed as part of their national territory what had previously corresponded to a Vice-royalty, an Audiencia or a Captaincy-General. In all those cases, the ancient colonial law ("derecho de Indias") was invoked to determine the international boundaries between the new States. This method of determining international boundaries is known under the name of uti possidetis or uti possidetis juris.

In Africa, on the other hand, uti possidetis has a broader meaning because it concerns both the boundaries of countries born of the same colonial empire and boundaries which during the colonial era had already an international character because they separated colonies belonging to different colonial empires.

62. In the present case, the Parties are agreed on the fact that boundary treaties signed during the colonial period continue to be valid as between the new States. For this reason, the tabula rasa proclaimed by the People's Assembly of Guinea-Bissau on 24 September 1973 for the treaties concluded by Portugal is not applicable to treaties dealing with frontiers. Accordingly, Senegal and Guinea-Bissau recognize that their

land frontier is determined by the Franco-Portuguese Convention of 12 May 1886. In addition, it is material to recall that the Organization of African Unity, of which both Parties are members, adopted on 21 July 1964 in Cairo a resolution whereby "all Member States pledge themselves to respect the borders existing on their achievement of national independence" (doc. AHG/Res. 16 (I)).

Although both Parties are agreed on the fact that succession is the rule in the realm of boundary treaties, they differ with regard to the extent of the content of that norm. Senegal maintains that there has been succession in the present case, whereas Guinea-Bissau asserts that various exceptions operate which have the effect that there was no succession for the 1960 Agreement.

The Tribunal will analyse below the exceptions to the rule of succession in the matter of boundary treaties which have been put forward by Guinea-Bissau.

* * .

A. THE DELIMITATION OF MARITIME FRONTIERS .

63. Guinea-Bissau maintains that State succession does not apply to maritime boundaries.

An international frontier is a line formed by the successive extremities of the area of validity in space of the norms of the legal order of a particular State. The delimitation of the area of spatial validity of the State may relate to the land area, the waters of rivers and lakes, the sea, the subsoil or the atmosphere. In all cases, the purpose of the relevant treaties is the same: to determine in a stable and permanent manner the area of validity in space of the legal norms of the State. From a legal point of view, there is no reason to establish different régimes dependent on which material element is being delimited. The Judgment of the International Court of Justice in the case concerning the Aegean Sea Continental Shelf constitutes a precedent to this effect (I.C.J. Reports 1978, pp. 35-36. See also the case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya), I.C.J. Reports 1982, pp. 98 and 131; case concerning the Delimitation of the Maritime Boundary in the Gulf of Maine Area, I.C.J. Reports 1984, pp. 246 et seq.).

64. One of the arguments invoked by Guinea-Bissau is the absence of cases in which the question of succession has arisen in respect of maritime boundaries. The law of the sea, except for questions of navigation and for some others concerning fishing, has only taken shape in comparatively recent times, and one cannot expect to find precedents going back to the last century, the period when the States of Latin America acceded to independence. An analysis of the disputes which have occurred in that part of the world and which relate to frontiers shows that the

question of maritime boundaries arose in only two cases: that of the Beagle Channel and that of Fonseca Bay. The first case concerned the interpretation of the Boundary Treaty between Argentina and Chile of 1881 and consequently the uti possidetis rule was not applied. In the Fonseca Bay case, on the other hand, the Central American Court of Justice decided that the limits with the high seas which the Crown of Castile had established in that Bay had devolved in 1821 on the Federal Republic of Central America and subsequently to El Salvador, Honduras and Nicaragua (Anales de la Corte de Justicia centroamericana, Vol. VI, Nos. 16-18, pp. 100 and 131).

Another precedent which may be cited is the Anglo-Danish Convention of 24 June 1901 concerning fisheries limits, which remained applicable to Iceland by succession from Denmark until 1951; reference was made thereto by Sir Humphrey Waldock in his separate opinion in the case concerning Fisheries Jurisdiction, (I.C.J. Reports, 1974, pp. 106 et seq.).

Lastly, it is possible to refer to a number of cases of succession in the matter of maritime boundaries in Asia, in consequence of the decolonisation which followed the Second World War. The geographical maps of Malaysia, Philippines and Brunei, for example, show as maritime boundaries lines the origin of which goes back to the colonial era. While

it is true that there are not many cases of State succession to maritime boundaries, it is equally true that Guinea-Bissau, for its part, has not been able to invoke any precedent in which the tabula rasa rule was applied to a maritime boundary established in the colonial era.

65. Another argument put forward by Guinea-Bissau as constituting a distinction between land frontiers and maritime frontiers is that the latter establish limits only for certain matters, such as fisheries or the exploitation of natural resources. Land frontiers, on the other hand, it is claimed, determine jurisdictional limits which are valid for all activities or in all fields. In reality, that is not the case. There are many examples of land frontiers between two countries which are not constituted by a single line but by several different lines. Examples would be where boundaries on the surface of the land do not coincide with the limits established for the subsoil, generally when the exploitation of mines is involved. Where a river separates two States, there is sometimes one limit for the division of islands and another different limit for the waters. The town where this Tribunal has its seat is itself separated from France by two different delimitation lines.

The fact that a frontier establishes a delimitation for all kinds of jurisdiction or only for some of them does not constitute a valid reason for establishing different legal régimes.

66. The contention put forward by Guinea-Bissau in the course of the present arbitration is not compatible with the attitude it has hitherto maintained. In the Note 3032/CNE/SG/77 addressed on 4 November 1977 by the Comissariato de Estado dos Negocios Estrangeiros to the Embassy of Senegal, it was stated that the maritime boundary between the two States was determined by the 1886 Franco-Portuguese Convention (Memorial, Ann. 6bis). The same position was maintained in the Note of 3 April 1979 addressed by the representative of Guinea-Bissau to the Special Representative of the Secretary-General of the United Nations to the Third Conference on the Law of the Sea (Reply, Ann. 3). Although later, and in consequence of the Arbitral Award of 14 February 1985 in the case of the Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau, it was acknowledged that the 1886 Convention had defined only the land frontiers, the above-mentioned notes show that Guinea-Bissau accepted State succession in the matter of maritime boundaries. The Arbitration Agreement of 18 February 1983 signed by Guinea-Bissau and Guinea invokes "the solemn declaration of the Meeting of Heads of State and Government of the Organization of African Unity held in Cairo from 17 to 21 July 1964 by which the Member States pledge themselves to respect the borders existing on their achievement of national independence". Since that Arbitration Agreement concerned only the delimitation of a maritime boundary, the

reference quoted means that the two Parties recognized that that principle was applicable to boundaries of that category. In oral argument also in that same Arbitration, Guinea-Bissau also acknowledged that succession of States operates in respect of treaties on maritime boundaries (Pleadings, verbatim record No. 8, pp. 76 and 77).

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B. DURATION OF THE AGREEMENT

67. The question of the age of the Agreement is dealt with from two viewpoints by Guinea-Bissau. In the first place, it maintains that international treaties concluded by a colonial State with respect to a dependent territory are null and void if the process of liberation has begun and the treaties in question relate to essential elements of the right of peoples to self-determination. In the second place, it asserts that only international treaties of a certain duration - the length of which it does not specify - can be invoked against the successor State. Thus, in its Memorial Guinea-Bissau refers to the uti possidetis principle and declares that "the logic and the bases of the principle require that it should apply only to treaties concluded a long time back" (p. 87). Further on, it stresses "the need to distinguish ancient delimitations

from recent ones, which must then be removed from the scope of application of the uti possidetis rule" (p. 89).

68. The Tribunal has already indicated that the 1960 Agreement was signed 13 years before the independence of Guinea-Bissau, and at a time when the process of liberation of Portuguese Guinea had no effects at the level of international law. The agreements relating to boundaries signed by a colonial State before the process of liberation had an international impact do not have to fulfil any special condition of antecedence for them to be validly invoked against the successor State. Guinea-Bissau has not been able to establish in the course of the present arbitration the existence of any norm of international law imposing such a condition.

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C. NON-PUBLICATION OF THE AGREEMENT

69. The question of the publication of the 1960 Agreement has been raised in various manners in the course of the arbitral proceedings.

In its Memorial, Guinea-Bissau states that the Agreement of 26 April was not the subject of any publication in Portugal. It explains in that connection that the obligation to publish it was laid down in Article 81,

paragraph 9, and Article 150, paragraph 2, of the 1933 Portuguese Constitution. The latter Article relates to the publication of instruments which were to enter into force in the Overseas Provinces, and was later strengthened by the Organic Law on the Overseas Provinces of 27 June 1953 and 25 May 1955. It is claimed that this total absence of publication resulted in the 1960 Agreement being unknown to the authorities of Guinea-Bissau at the time of independence. In support of that thesis, Guinea-Bissau describes its position at the time of the declaration of independence. It had just emerged from a long war of liberation which had exhausted its people and had plunged it deeper into poverty. In addition, the population was for the most part illiterate and of a low cultural level (Memorial, p. 64).

70. Relying on these facts, Guinea-Bissau maintains that the 1960 Agreement is not opposable to it because it was unknown to it, and also asserts that the failure to observe the constitutional provisions concerning publication involved a manifest violation of internal law, thereby giving rise to nullity of the Agreement (Memorial, pp. 150 and 152).

Senegal, for its part, has put forward several pieces of evidence to show that the 1960 Agreement was to some extent made public and was in some measure known in international circles.

71. Non-publication has thus been invoked in the Guinea-Bissau

Memorial as a ground of nullity for manifest violation of internal law and as grounds for treating the Agreement as not opposable to Guinea-Bissau.

That approach was abandoned in the oral argument, when Guinea-Bissau declared that it was not claiming "that the Agreement was not internationally valid by reason of its non-publication" but rather that "publication and the internal effectiveness of a treaty in a colony are a condition of the succession to that treaty for the newly independent State" (PV/14, p. 164).

72. The Agreement of 26 April 1960 was not concluded in secret and, at the time of the independence of Guinea-Bissau (1973), it had already been the subject of some publication. Its text was published in the Official Journal of the French Republic of 30-31 May 1960, in the Official Journal of the Communauté of 15 June 1960 and in the Official Journal of the Federation of Mali of 20 August 1960. In addition, the Agreement appears in the compilation of treaties and agreements of France (Vol. II, pp. 12-14) published in 1966, as well as in the Revue générale de droit international public (Vol. 64, 1960, pp. 891-892). The Agreement was also invoked by the Parties to the dispute in the North Sea Continental Shelf cases, and was mentioned by Judge Fouad Amoun in his separate opinion attached to the Judgment of the Court in those cases (I.C.J. Reports 1969, p. 126). It was also mentioned in Volume IV of Whiteman's Digest of International Law (1965), in the book by J. Lang entitled "Le plateau

continental de la mer du Nord" (Paris, 1970, p. 114) and in the commentary published in the Annuaire français de droit international (1969, p. 236).

73. Guinea-Bissau's argument is based on the idea that because of the absence of publication, the 1960 Agreement could not be relied on against the population of Portuguese Guinea under the legislation then in force. Starting from that point, Guinea-Bissau asserts that, since the treaty was not opposable to the population of the Portuguese Colony, it was not opposable to the successor State in that territory either (PV/3, p. 21).

74. It must be stressed from the outset that the obligation of Portugal to publish the Agreement in its African province of Guinea was a matter exclusively for Portuguese internal law. Similarly, any obligation which might have been incumbent upon Portugal to publish that Agreement officially in Lisbon was also an obligation of Portugal's internal law. The non-fulfilment of that obligation cannot therefore be considered as a non-compliance by Portugal with an obligation imposed upon it by international law. The only aspect of the publication of treaties which is the subject of international regulation is the registration of treaties, in particular with the Secretariat of the United Nations, a question which will be examined by the Tribunal below.

75. That said, to return to Guinea-Bissau's argument mentioned in paragraph 73: according to that reasoning, independence resulted in a

succession between Portuguese Guinea and Guinea-Bissau. From the stand-point of international law, that point of departure is incorrect, for the succession of sovereignty was from Portugal to Guinea-Bissau. A succession of States always takes place between States - Portugal and Guinea-Bissau in this instance - and not between part of a State, as Portuguese Guinea was in 1960, and a new State created on the same territory. Any breach of internal law consisting in a failure by Portugal properly to publish the 1960 Agreement in its former African Colony cannot be invoked by its successor, on the international level, as grounds for claiming that that Agreement is not opposable to it. Still less can that claim be made in relation to a third State which had duly published the Agreement. It must be added also that, as indicated in paragraph 72, the 1960 Agreement was not a secret treaty. The concepts of unpublished agreement and secret agreement are in no way synonymous.

76. Guinea-Bissau states also that it did not receive any notification from Portugal relating to the 1960 Agreement, that it even requested clarifications on the subject but never received a reply (PV/1, p. 92). The question of notifications between Portugal and Guinea-Bissau regarding the 1960 Agreement, and any responsibility that might possibly

arise therefrom, concern the relations between those two countries and does not fall within the competence of this Tribunal.

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III. FAILURE TO REGISTER THE 1960 AGREEMENT WITH THE SECRETARIAT OF THE UNITED NATIONS

77. In addition to the grounds already examined on which Guinea-Bissau maintains that the 1960 Agreement is void and not opposable to it, it claims (Memorial, pp. 152-156 and 159) that since that Agreement was not registered with the Secretariat of the United Nations (Article 102 of the Charter), it cannot be invoked in the present arbitration.

78. On this point, it must be stressed that the Tribunal is not an organ of the United Nations and consequently Article 102, paragraph 2, of the Charter is not applicable.

In addition, it should be pointed out that it does not seem logical for a claim that the 1960 Agreement cannot be invoked before this Tribunal to be made by a country which has concluded an Arbitration Agreement attributing to this same Tribunal competence to decide specifically whether that Agreement has the force of law between the Parties. The non-registration of the Agreement of 26 April 1960 does not

therefore constitute a valid reason to debar the Parties from invoking it in the present arbitration.

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IV. EXISTENCE OF A RIGHT OF VERIFICATION OR REVIEW

79. Guinea-Bissau also maintains that, even if the 1960 Agreement were opposable to it, it

"would be entitled to require that the equitable character of the line resulting from that Agreement be verified, and that too in the context of a possible application of that Agreement" (Reply, p. 274).

According to Guinea-Bissau, that right of verification or review of the Agreement exists whenever a treaty concluded under the régime of the 1958 Geneva Conventions governs, by the operation of a succession, the relations of a State which has never been a Party to those conventions but which is a Party to the 1982 Montego Bay Convention.

This claim has been submitted by Guinea-Bissau as a subsidiary one (Reply, pp. 273-274) in the event that the 1960 Agreement is held to be opposable to it. The main thesis of that country is that the 1960 Agreement is not opposable to it, because it deals with a maritime boundary for which succession does not operate (see above, paras. 63-66).

The right of verification or review invoked by Guinea-Bissau could originate either in treaty law or in unwritten law. With regard to treaty law, Guinea-Bissau relies on the Montego Bay Convention, in particular Articles 74 and 83. The Tribunal would merely note on this point that the 1982 Convention does not apply in the present case because it has not yet entered into force. That does not of course mean that the Tribunal interprets Articles 74 and 83 of that Convention so as to recognize the existence of a right of review or verification. As for the unwritten law, there does not exist at present in positive international law any customary norm or any general principle of law that would authorize States which have concluded a valid treaty concerning maritime delimitation, or their successors, to verify or review its equitable character.

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V. THE SCOPE OF SUBSTANTIVE VALIDITY OF THE 1960 AGREEMENT

80. The analysis made by the Tribunal in the above sections I, II, III and IV of the present Award leads to the conclusion that the 1960 Agreement is valid and can be opposed to Senegal and to Guinea-Bissau.

With regard to the maritime boundary, that Agreement provides as follows:

"As far as the outer limit of the territorial seas, the boundary shall consist of a straight line drawn at 240°, from the intersection of the prolongation of the land frontier and the low water mark, represented for that purpose by the Cape Roxo lighthouse.

As regards the contiguous zones and the continental shelf, the delimitation shall be constituted by the prolongation in a straight line in the same direction of the boundary of the territorial seas."

This text clearly determines the maritime boundary as regards the territorial sea, the contiguous zone and the continental shelf. Those three domains constituted the law of the sea in 1960, date of the signature of the Agreement. Senegal, however, has argued before the Tribunal that the 1960 Agreement must be interpreted as applying also to the delimitation of the exclusive economic zones and it has put forward a number of arguments to this effect, which the Tribunal will examine one by one.

81. The first argument is stated in the Counter-Memorial (p. 316, note 534) and refers to the Arbitration Agreement. Senegal points out

that the Parties, albeit for different reasons, interpret Article 2 of the Arbitration Agreement as meaning that a single maritime boundary should be arrived at. This would mean, according to Senegal, that if the Tribunal arrives at the conclusion that the 1960 Agreement has the force of law, the boundary set by that Agreement must apply to the whole extent of the continental shelf and also to the exclusive economic zones.

The Arbitration Agreement of 12 March 1985 is the treaty which has set up the Tribunal and which determines its competence, the powers delegated by the Parties and the main rules governing its constitution, but it does not contain any particular rule on the substantive law to be applied to the questions which the Tribunal is called upon to answer. Article 2 of the Arbitration Agreement says simply that the Tribunal must decide "in accordance with the norms of international law". There are in the Arbitration Agreement no provisions setting forth special substantive rules applicable to the case. With regard to the merits of the case, the 1985 Arbitration Agreement does not therefore contain any specific norm and does no more than call upon the Tribunal to decide in accordance with the law of nations.

82. A second argument has been put forward by Senegal during the oral argument (PV/10, p. 213). According to this argument, to interpret the 1960 Agreement so that it applies only to certain territories and not to a whole body of maritime areas would be tantamount to saying, by

implication, that this Agreement is partially valid and partially void, which would be contrary to certain rules on the divisibility of treaty provisions.

The question here is not one of nullity. The Tribunal has already stated clearly in the present Award that the 1960 Agreement is valid, wholly valid. The question which the Tribunal has now to resolve concerns solely the interpretation of that Agreement and not its validity or its nullity. The interpretation of the meaning and scope of the text of a treaty is a legal operation which must not be confused with that of declaring the nullity of a treaty or of one of its clauses.

83. Senegal also considers that practice subsequent to the 1960 Agreement, and the acquiescence of each of the two States to the legislation of the other on the seaward reach of the various maritime areas, have given rise to a tacit agreement, or to a bilateral custom, fixing as the limit for the waters of the exclusive economic zone or the fishery zone the very line of the 1960 Agreement (Rejoinder, pp. 183 et seq.; PV/11, pp. 34, 41 and 42).

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.

84. Lastly, Senegal maintains that the 1960 Agreement must be interpreted taking into account the evolution of the law of the sea. The maritime boundary established by the Agreement should therefore be prolonged and enhanced in keeping with functional requirements, which are altogether essential to maintain good neighbourly relations and relations of security. A delimitation agreement should not have any gaps, and such should be filled up in the light of good sense and the nature of things (PV/11, p. 42).

85. The Tribunal considers that the 1960 Agreement must be interpreted in the light of the law in force at the date of its conclusion. It is a well established general principle that a legal event must be assessed in the light of the law in force at the time of its occurrence and the application of that aspect of intertemporal law to cases such as the present one is confirmed by case-law in the realm of the law of the sea (International Law Reports, 1951, pp. 161 et seq.; The International and Comparative Law Quarterly, 1952, pp. 247 et seq.).

In the light of the text, and of the applicable principles of intertemporal law, the Tribunal considers that the 1960 Agreement does not delimit those maritime spaces which did not exist at that date, whether they be termed "exclusive economic zone", "fishery zone" or whatever. For example, it was only very recently that the International Court of Justice has confirmed that the rules relating to the "exclusive economic zone" can be considered as forming part of general international

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law in the matter (I.C.J. Reports 1982, p. 74; I.C.J. Reports 1984, p. 294; I.C.J. Reports 1985, p. 33). To interpret an agreement concluded in 1960 so as to cover also the delimitation of areas such as the "exclusive economic zone" would involve a real modification of its text and, in accordance with a well-known dictum of the International Court of Justice, it is the duty of a court to interpret treaties, not to revise them (I.C.J. Reports 1950, p. 229; I.C.J. Reports 1952, p. 196; I.C.J. Reports 1966, p. 48). We are not concerned here with the evolution of the content, or even of the extent, of a maritime space which existed in international law at the time of the conclusion of the 1960 Agreement, but with the actual non-existence in international law of a maritime space such as the "exclusive economic zone" at the date of the conclusion of the 1960 Agreement.

On the other hand, the position regarding the territorial sea, the contiguous zone and the continental shelf is quite different. These three concepts are expressly mentioned in the 1960 Agreement and they existed at the time of its conclusion. In fact, the Agreement itself specifies that its object is to define the maritime boundary "taking into account the Geneva Conventions of 29 April 1958" elaborated by the first United Nations Conference on the Law of the Sea, and these codification conventions define the notions of "territorial sea", "contiguous zone" and "continental shelf". As regards the continental shelf, the question

of determining how far the boundary line extends can arise today, in view of the evolution of the definition of the concept of "continental shelf". In 1960, two criteria served to determine the extent of the continental shelf: that of the 200-metre bathymetric line and that of exploitability. The latter criterion involved a dynamic conception of the continental shelf, since the outer limit would depend on technological developments and could consequently move further and further to seaward. In view of the fact that the "continental shelf" existed in the international law in force in 1960, and that the definition of the concept of that maritime space then included the dynamic criterion indicated, it may be concluded that the Franco-Portuguese Agreement delimits the continental shelf between the Parties over the whole extent of that maritime space as defined at present.

With regard to that question there only remains to determine the meaning and scope of the expression "a straight line drawn at 240°" in the 1960 Agreement.

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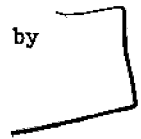
86. With regard to the expression just mentioned, Guinea-Bissau has pointed out (Reply, p. 252) that there is no such thing as a "straight

line" on the globe of the Earth, and that this involves a technical inaccuracy which would make the Agreement inapplicable, since it is not indicated precisely whether the line in question is a loxodromic line or a geodesic line. At a distance of 200 miles off the coast, lines of these two types would be several kilometres apart.

Does the 1960 Agreement really contain a technical inaccuracy on this point which would render it inapplicable? In order to reply to that question, one must determine the exact meaning of the expression "a straight line drawn at 240° " in the 1960 Agreement. It is clear that the words "straight line" can relate to a line which could be drawn just as well on a map employing the Mercator projection as on a map using another system. Nor can there be any doubt that a straight line drawn on a Mercator projection map becomes curved when it is transferred on to a different nautical chart, just as a straight line drawn on a map which uses a projection other than the Mercator projection becomes curved when transposed to a map prepared according to the latter system.

The 1960 Agreement, however, does not refer only to a "straight line"; it also mentions a "line ... drawn at 240° ". This makes it possible to rule out any geodesic line, because such a line would not satisfy the condition of following a direction of 240° , since it has the peculiarity of not intersecting the meridians and parallels at a constant angle.

The only line which could fulfil that condition would be a loxodromic line. Moreover, on the sketch included in the preparatory work of the 1960 Agreement, the line at 240° appears as a loxodromic line. It can therefore be concluded that the "straight line drawn at 240°" mentioned by the 1960 Agreement is a loxodromic line.

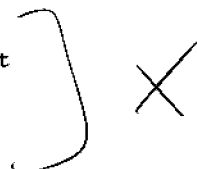


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87. Bearing in mind the above conclusions reached by the Tribunal and the actual wording of Article 2 of the Arbitration Agreement, in the opinion of the Tribunal it is not called upon to reply to the second question.

Furthermore, in view of its decision, the Tribunal has not judged it expedient to append a map showing the course of the boundary line.



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88. For the reasons stated above, the Tribunal decides by two votes to one:

To reply as follows to the first question formulated in Article 2 of the Arbitration Agreement: The Agreement concluded by an exchange of letters on 26 April 1960, and relating to the maritime boundary, has the force of law in the relations between the Republic of Guinea-Bissau and the Republic of Senegal with regard solely to the areas mentioned in that Agreement, namely the territorial sea, the contiguous zone and the continental shelf. The "straight line drawn at 240°" is a loxodromic line.

In favour: Mr. Julio A. Barberis, President,
Mr. André Gros (Arbitrator)

Against: Mr. Mohammed Bedjaoui (Arbitrator)

Done at Geneva, on the thirty-first day of July one thousand nine hundred and eighty nine, in duplicate, in the French and Portuguese languages, the French text being authentic. The two originals shall be

deposited with the archives of the Secretariat of the United Nations and of the International Court of Justice.

(Signed) Julio A. Barberis

President

(Signed) Santiago Torres Bernárdez

Registrar

Mr. Julio A. Barberis, President, appends a declaration to the Award.

Mr. Mohammed Bedjaoui, Arbitrator, appends a dissenting opinion to the Award.

(Initialed) J.A.B.

(Initialed) S.T.B.

DECLARATION OF MR. JULIO A. BARBERIS

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I feel that the reply given by the Tribunal to the first question put by the Arbitration Agreement should have been more precise. I would have replied to that question as follows:

"The Agreement concluded by an exchange of letters of 26 April 1960, and relating to the maritime boundary, has the force of law in the relations between the Republic of Guinea-Bissau and the Republic of Senegal with respect to the territorial sea, the contiguous zone and the continental shelf, but does not have the force of law with respect to the waters of the exclusive economic zone or the fishery zone. The 'straight line drawn at 240°' mentioned in the Agreement of 26 April 1960 is a loxodromic line."

This partially affirmative and partially negative reply is, in my view, the correct description of the legal position existing between the Parties. As suggested by Guinea-Bissau in the course of the present arbitration (Reply, p. 248), a reply of this kind would have enabled the Tribunal to deal in its Award with the second question put by the Arbitration Agreement. The partially negative reply to the first question

would have conferred on the Tribunal a partial competence to reply to the second, i.e., to do so to the extent that the reply to the first question would have been negative.

In that case, the Tribunal would have been competent to delimit the waters of the exclusive economic zone¹ or the fishery zone between the two countries. The Tribunal thus could have settled the whole of the dispute, because, by virtue of the reply to the first question of the Arbitration Agreement, it would have determined the boundaries for the territorial sea, contiguous zone and the continental shelf, as the Award has just done and, by its answer to the second question, the Tribunal could have determined the boundary for the waters of the exclusive economic zone or the fishery zone, a boundary which might or might not have coincided with the line drawn by the 1960 Agreement.

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¹I refer to the "waters" of the exclusive economic zone and I think it necessary to be as specific as this, because it sometimes occurs that the notion of this zone covers also the continental shelf as, for example, in Article 56 of the 1982 Montego Bay Convention.

DISSENTING OPINION OF MR. MOHAMMED BEDJAOUI

1. I regret that I cannot share with the view of my two colleagues on the Tribunal. They have been able to deal with important problems such as the norms of jus cogens regarding the right to self-determination of peoples and the permanent sovereignty over natural wealth and resources. Concerning the latter, paragraph 39 of the Award lays down that:

"The application of the principle of permanent sovereignty over natural resources presupposes that the resources in question are to be found within the territory of the State which invokes that principle ... Before the Agreement [of 1960], the maritime boundaries had not been determined and, consequently neither of the two States could assert that a particular portion of the maritime area was 'its own'."

I am afraid that the Award creates here a confusion between the "right" of every State to a maritime domain and the actual "exercise" of that right through a concrete operation of delimitation of the maritime boundary. The International Court of Justice had considered that the right of each State over "its" continental shelf (i.e., over the areas of that shelf which must belong to it) is an "inherent" right, and later the Montego Bay Convention also endorsed that right in the same spirit.

The reasoning in paragraph 39 of the Award thus overlooks the "inherent" right which every people has over "its" maritime domain, even if not yet in fact delimited. One of the great innovations in the contemporary law of the sea is that it recognizes a right to a maritime territory which exists independently of, and prior to, any delimitation.

This paragraph of the Award adds that

"From a logical point of view, Guinea-Bissau cannot assert that the norm which determined the extent of its maritime territory (the 1960 Agreement) has taken away from it part of the maritime territory which was 'its own'".

It seems to me that there is here a fundamental error in reasoning.

Guinea-Bissau in fact denies that the 1960 Agreement could represent "the norm which determined the extent of its maritime territory", and that is the reason why its contention is precisely that that Agreement is null and void. The norm for Guinea-Bissau is not the 1960 Agreement but the "inherent" right of every coastal State.

2. But was it necessary for the Tribunal to embark on this course which has led it to controversial solutions? For my part, in order to express my opinion in the present dispute, I need only examine the question whether the exchange of notes between France and Portugal of 26 April 1960 was opposable to Guinea-Bissau, in priority to that of the

validity of that exchange. The first point to be determined appears to me to be whether Guinea-Bissau is or is not bound by the Agreement. It is only after having ascertained that an agreement is opposable to a State that there is any point in examining its validity; otherwise such an examination is of purely academic interest.

3. The present dissenting opinion is in two parts. I have reached the conclusion that the Agreement of 26 April 1960 is not opposable to Guinea-Bissau; therefore I need not pronounce on the validity of that Agreement. It is thus my duty to explain, in my first part, how I reached this conclusion. In view of that conclusion, I will then be bound to proceed - and that will be my second part - to an ex novo delimitation of the maritime areas appertaining to each of the two Parties.

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4. In the first part, the problem which arises as a starting point is that of the legal position of the Republic of Guinea-Bissau with respect to the exchange of letters between France and Portugal of 26 April 1960. Portugal and France, the States which had at the time responsibility for the international relations of Guinea-Bissau and Senegal respectively, negotiated on 8, 9 and 10 September 1959 two

"recommendations", the first of which was the subject on 26 April 1960 of an exchange of letters constituting an Agreement in simplified form.

Both at the time of the negotiation and at that of the signature of that Agreement, Portugal was still the administering power of Guinea-Bissau. The liberation of Guinea-Bissau brought about a succession of States by decolonization and it can be said that Portugal had the status of a predecessor State and Guinea-Bissau that of a successor State. I make no finding upon the exact, or even approximate, date at which each of them acquired such status - a point on which there was considerable argument between the two Parties. I confine myself to noting the fact.

5. The relationship between France and Senegal is somewhat more complex. The independence of Senegal undoubtedly also brought about a situation of succession of States by decolonization and Senegal is legally a successor State of France, which is legally a predecessor State. But what was the status of Senegal at the precise date of the conclusion of the 1960 Agreement? On 26 April 1960, or at any rate on 8 September 1959, the date at which the negotiations began, Senegal was no longer legally an "overseas territory" of France, i.e., a territory still dependent upon it. Unlike Guinea-Bissau, which never emerged as a

State during the phase of negotiation and conclusion of the Agreement, Senegal was already present as a State. Thus the maritime territory to be delimited concerned, according to the actual terms of the Agreement, the "Republic" of Senegal on the one side and the "Portuguese Province" of Guinea on the other. On the one side we find a delegation from "Portugal", which made known that it considered itself a unitary State, and on the other a delegation stated to be from the French "Communauté". In the Agreement Portugal declared that it was acting on its own behalf with respect to "its" "Province" of Guinea, while France stated that it was acting "on behalf of the French Republic and of the Communauté".

6. It is however necessary to be even more precise on this subject, for it does not appear, that, at that final date of the independence process of Senegal, France could have undertaken any action whatsoever in the region on its own "behalf". Moreover, although the formal legal requirements connected with the birth of the French Communauté of 1958 made it actually necessary for France to act on behalf of the "Communauté", other texts, and first and foremost the Agreement itself, specified more exactly that it was acting "on behalf of the Republic of Senegal". The internal note of 26 April 1960, No. 941.1, from Mr. Franco Nogueira states in paragraph 2 that the French Government concluded the Agreement "on its own behalf and on behalf of the Republic of Senegal". A French Overseas Law specialist, Professor François Luchaire, considers that, in the eyes of the French Constitution of 1958, the African

countries under French administration had to be considered as having legally obtained their independence on the day on which, in September 1958, their populations were called upon to vote on their future status. Their vote whether they wanted or not to stay in the French Communauté constituted a genuine self-determination vote; the option of complete and immediate independence was offered, as was that of becoming a member of the French Communauté; both were equally open. Incidentally Conakry Guinea took advantage of that option¹.

7. In fact, the Republic of Senegal, i.e., the State which that Republic necessarily implies, was created following that vote on self-determination. Likewise and a fortiori Senegal was in 1960 autonomous at the time of the conclusion of the Agreement. There is therefore no doubt that it is not possible to consider Senegal as having acceded to the Agreement by way of succession. Moreover it was clear

¹Frontier Dispute (Burkina Faso/Republic of Mali), Judgment of 22 December 1986, I.C.J. Reports 1986, p. 653, Separate Opinion of Judge ad hoc François Luchaire:

"the colonial process must be regarded as finally over once the inhabitants of a colony have been able to exercise [their] right of self-determination. So far as the French overseas territories are concerned * [...] this means that the colonial phenomenon disappeared on 28 September 1958 when, by an act of self-determination - accomplished through a referendum the authenticity of which has not been challenged by anyone -, those territories chose their status." (Emphasis added.)

This is how Senegal chose the status of "member State of the Communauté" in 1958 and "As from this date, the French overseas territories could therefore no longer be considered as colonies".

* Senegal was a French overseas territory.

from the terms used that Senegal had "participated" in the negotiation and conclusion of the Agreement. It even participated in a dual capacity since, on the one hand, the delegation which negotiated and concluded the Agreement was that of the "Communauté" of which Senegal was a member, and on the other hand, it was stated by Senegal in the present dispute that one of the members of the delegation, Mr. Latrihle, was a Senegalese national. It thus seems obvious that Senegal did not succeed to the Agreement but participated in it. In addition, Senegal has during the present dispute produced to the Tribunal diplomatic correspondence from the French Foreign Minister to the Prime Minister of Senegal informing the latter of the opening of the negotiation in Lisbon and asking him to appoint a representative for that negotiation. Senegal is thus in a hybrid situation. It is obviously not a party to the 1960 Agreement by way of succession, because it was an original contracting party, both by way of State representation and through direct participation as a member of the Communauté and as an effective participant. It must be considered first as having given powers of representation to France and, secondly, as a direct and effective participant through one of its nationals.

8. If the foregoing analysis is correct, the legal position with regard to the Agreement of the two Parties to the present case was radically different: Senegal was a State party to the Agreement, whereas Guinea-Bissau was a third-party State in relation to it. Before we come to this position of Guinea-Bissau, it is worth noting that Guinea-Bissau's criticism of Senegal for not having made a declaration of succession to the Agreement appears totally unfounded. Senegal was not a successor to the Agreement but a real State party which had no need whatsoever to make such a declaration.

9. Thus, regarding the particular issue of the "actors" in the succession of States, it must be taken as duly established in the first place that Senegal was not a successor State but actually a State party to the Agreement, both as having participated in it and as having ensured that it was represented to that end, and in the second place that France was not a predecessor State, but rather a State party itself, or at least a State acting on behalf of another with powers of representation. If France considered that it acted on behalf of Senegal, the matter is then one of representation and powers, and not a question of succession of States. In the Portugal/Guinea-Bissau relationship on the other hand, Portugal was in 1958 and 1960 a unitary State responsible for its "Province of Guinea" and was therefore a State party to the Agreement,

whereas upon its independence Guinea-Bissau could be considered as a third-party State to the Agreement, following the general declaration of non-succession made by the People's Assembly of Guinea-Bissau on 24 September 1973. In other words, the law of the succession of States may not be invoked as a law applicable to this particular case, neither because of the presence of France nor that of Portugal, both incidentally strangers to the present litigation, nor that of Senegal, but only because Guinea-Bissau is involved, - which anyhow quickly caused the force of that law to be spent by declaring itself a third-party State with respect to the Agreement.

10. Moving now from the question of "actors" in the succession of States, on to that of the "subject-matter of the succession", it will be noted that the 1960 exchange of letters between France and Portugal was a treaty-instrument, which can be termed "bilateral" in order to simplify the complex, hybrid and ambiguous relationships which it established between Portugal on the one side, and France, the Communauté and Senegal on the other; in this respect, let us say that:

1. it is a treaty (without specifying further the number of participating States);
2. it is a boundary treaty, and
3. it is a maritime boundary treaty.

11. On the first point regarding the formal content of the instrument, Guinea-Bissau has adopted a clear and consistent stand. Through the application of the tabula rasa principle, it rejected all succession to the exchange of letters between France and Portugal of 26 April 1960, since it repudiated all the treaties signed by Portugal and applicable to the Province of Guinea. On the basis of the above-mentioned general declaration of 1973, as well as United Nations practice and customary law on succession of States, a successor State is, according to the tabula rasa principle, especially in the case of succession as a result of decolonization, a "third-party" State with respect to all the agreements and treaties for which it has not expressly made an act of succession. The tabula rasa principle clearly defines the particular legal condition in which the successor State finds itself. Non-succession constitutes the rule, except in the case of a tacit or explicit contrary decision of the State concerned. With regard both to multilateral treaties and to bilateral agreements, the successor State starts with a non-succession situation, making it a third-party State to the agreements as from the starting point of the tabula rasa. The essential idea underlying the Vienna Convention on Succession of States in respect of Treaties of 23 August 1978 is that the successor State, save in exceptional cases specified in the Convention, does not automatically become a party to the treaties signed by its predecessor

for the transferred territory. Article 16 of the above-mentioned Vienna Convention specifies that in the case of decolonization:

"A newly independent State is not bound to maintain in force, or to become a party to, any treaty by reason only of the fact that at the date of the succession of States the treaty was in force in respect of the territory to which the succession of States relates."

A circumstance which should also be noted as a complete bar in this case is that the 1960 Agreement does not seem to have been put into force at all by the administrative power of the so-called Portuguese Guinea. Moreover, in its report to the General Assembly, the International Law Commission, transmitting to the Assembly the draft which was to become the Vienna Convention, declared that "a newly independent State begins its international life free from any obligation to continue in force treaties previously applicable with respect to its territory²" (emphasis added). In the present case, Guinea-Bissau did not merely invoke, for a specific case, or in a particular circumstance, the tabula rasa principle for a given treaty; it went much further by making a general declaration of non-succession. This is a fact which it would be difficult legally to leave out of account.

12. This means, incidentally, that it is not possible to concur with the statement in paragraph 31 of the Award where it is said that

²Doc. A/9610 in Yearbook of the International Law Commission, 1974, Vol. II, Part One, pp. 166-280 (see para. (b) of the commentary to Art. 15).

"the very fact of invoking before the Tribunal grounds of non-existence or nullity of the 1960 Agreement ... implies acknowledgement of the status of successor of one of the States which concluded that Agreement" (emphasis added). The reasoning behind paragraph 31 would have been unimpeachable if Guinea-Bissau had itself "invoked" the benefit of the Agreement. This is not the case. On the contrary, it is resisting its application. Moreover, Guinea-Bissau does not plead merely the non-existence or nullity of the Agreement, but claims above all that it is not opposable to it - a plea which is its main submission, a fact which is worth stressing and which paragraph 31 seems unfortunately to have overlooked. This plea that the Agreement is not opposable to it indisputably implies that Guinea-Bissau is not a successor to that Agreement. It would be a paradoxical situation to consider a general declaration of non-succession to treaties as implying as a starting point ... a succession to one of them. The tabula rasa principle cannot "imply" its opposite³.

³That being said, a subsidiary point is that the status of successor State does not necessarily depend upon the position adopted by the State regarding a particular agreement. This is in the first place because a State not having the status of successor State may well invoke in a particular litigation the benefit of a treaty while remaining a third party to it, if its case falls within the exceptions to the principle of the relative effects of treaties. That mere fact of invoking the treaty can not confer upon it the general status of a successor State. Conversely, the position of being a successor State is not exclusively conditioned either by the succession to treaties or by the succession to one of them, in particular the 1960 Agreement. Succession of States embraces other treaties than the 1960 Agreement and matters other than just treaties. Even when a State invokes the total application of the tabula rasa principle, it can still remain a successor State regarding other matters. This is the case of Guinea-Bissau, which is a successor State of Portugal, but certainly not due to the notion, inaccurate in any case, that it has "invoked" the 1960 Agreement.

13. If one considers the indisputable fact of the declaration of non-succession, the situation appears as having two facets:

- (a) Guinea-Bissau, as was its right, has rejected any succession to all agreements except where a contrary intention is manifest. There has been no such manifestation regarding the 1960 Agreement, of the existence of which it was in fact unaware. It must therefore be considered, as a point of departure and according to the norm of the tabula rasa principle with respect to succession of States, that Guinea-Bissau is a third-party State in relation to the 1960 Agreement.
- (b) It should be ascertained whether, through this or other State succession mechanisms, in spite of its general declaration of non-succession, Guinea-Bissau can nevertheless be bound by such an agreement, in particular because of its nature.

14. It remains to be determined whether, due to its substantive content as a "boundary" treaty, and a "maritime" boundary treaty, the 1960 exchange of letters has a specific nature such that it can negate the tabula rasa principle, which is a principle of international law regarding succession of States. This is the second point to be examined. In fact, the tabula rasa principle does comport an exception

for boundary treaties and régimes. I will refrain for the time being from further specifying its nature.

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15. The following first stage in the argument is necessary:

First and foremost the question must be asked whether Guinea-Bissau adheres to the idea of automatism in the succession to boundary treaties. This question is not superfluous because the uti possidetis principle for land frontiers has right from the start been under attack by certain African States. It must therefore be ascertained whether Guinea-Bissau was one of them and whether in the present case, it has shown some diffidence towards this exception to the tabula rasa principle in the case of boundary treaties.

16. The Organization of African Unity (OAU) has admitted the principle of uti possidetis, endorsed indirectly in its Charter of May 1963 and more directly in its Cairo Resolution of 1964. As stated in the Judgment of the Chamber of the International Court of Justice in the case concerning the Frontier Dispute (Burkina Faso/Republic of Mali):

"The elements of uti possidetis were latent in the many declarations made by African leaders in the dawn of independence. These declarations confirmed the maintenance of the territorial status quo at the time of independence, and

stated the principle of respect both for the frontiers deriving from international agreements, and for those resulting from mere internal administrative divisions. The Charter of the Organization of African Unity did not ignore the principle of uti possidetis, but made only indirect reference to it in Article 3, according to which member States solemnly affirm the principle of respect for the sovereignty and territorial integrity of every State. However, at their first summit conference after the creation of the Organization of African Unity, the African Heads of State, in their Resolution mentioned above (AGH/RES.16(I)), adopted in Cairo in July 1964, deliberately defined and stressed the principle of uti possidetis juris contained only in an implicit sense in the Charter of their organization⁴."

17. Guinea-Bissau did not show any hostility towards this principle, as did other States, such as Morocco and Somalia. It may therefore be taken as established that it is bound by this principle, since it has never denied its compulsory nature, either during its struggle for national liberation, or since its independence. In addition, it has never at any time pleaded, in the present case, against the uti possidetis principle, which it was open to it to do. One of the points of agreement between the Parties to the present dispute is precisely their respect for the uti possidetis principle. The point on which they disagree is the scope of this principle and not its existence and binding nature.

⁴Judgment of 22 December 1986, I.C.J. Reports 1986, pp. 565-566, para. 22.

18. Consequently, there is absolutely no need, for purposes of the present case, to dwell any further on the general and mandatory character of the uti possidetis principle. Any reserve, hesitation, argument or questioning regarding that principle is irrelevant here, whether founded on the principle of self-determination which has appeared as conceptually contradictory with uti possidetis, or on any other consideration, since, in the present case, both Parties have clearly stated their concurrence with this principle. To my mind, this is an element of applicable law agreed to by the Parties, beyond any other consideration of general international law which might justify and impose the application of the principle in question.

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19. In the Award, reference is made to a uti possidetis principle regarded as specifically African. In particular, in paragraph 61, the Award tries to draw a distinction between, on the one hand, the experience of Latin America in the 19th century, where only the colonial administrative boundaries, such as those of the Spanish Crown, had been erected into intangible international frontiers, and, on the other hand, the experience of Africa in the 20th century, where all boundaries, whether they had existed between two colonial empires or within one and

the same colonial empire, were erected into international and equally intangible frontiers. Does this mean that the uti possidetis principle does not protect frontiers previously established between two colonial empires in Latin America, and inherited for instance at present both by Brazil, which was formerly Portuguese, and by its neighbours, former Spanish, English, French or Dutch Colonies? in any event, I do not think that any distinction should be drawn between a Latin-American uti possidetis and a uti possidetis which would be truly and specifically "African": this seems to me to be unfounded. No such distinction is made anywhere in the writings of jurists. The Award introduces here an innovation which could have unforeseen consequences and of no proven usefulness.

20. It is, however, striking to observe, for purposes of what follows, that the Award thus draws a distinction, presumably for legal purposes, thus with a view to establishing differentiated legal régimes for land boundaries according to whether they separate two former colonial empires or exist within the context of one and the same former colonial empire. By doing so, the Award seems to set out in two conflicting directions, pressing, by implication, for differentiation of legal régimes for land boundaries, while asserting a unity of régime for land and maritime boundaries. If one finds sufficient reasons to

distinguish between different land boundary régimes, a fortiori: should one refrain from attributing the same legal régime to both land and maritime boundaries?

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21. The question now to be examined is whether maritime delimitations give rise, from the legal standpoint, to real frontiers, similar to land frontiers. Guinea-Bissau has maintained that it is not legitimate to equate maritime delimitations to land frontiers so that the uti possidetis principle, the binding character of which it does not deny for land frontiers, does not, in its view, apply to maritime delimitations. Senegal, which holds the opposite view, has accordingly accused Guinea-Bissau of trying to deny that maritime limits have the character and status of frontiers.

22. On this point, I am of the opinion that maritime delimitations to produce genuine "frontiers" [frontières]. The extent of State jurisdiction is undoubtedly different for maritime limits and for land frontiers. This difference, however, is one of degree and not one of kind, even if certain maritime limits do not "produce" an exclusive

and complete State jurisdiction. However, even if the difference were one of kind it would not prevent in any way, to my mind, a maritime limit from being considered as equivalent to a "frontier" if the term is understood as meaning a line the function of which is to separate the domain of exercise of the competences of the State from the areas under the jurisdiction of another State. It is true that the law of the sea, at least in its present stage of development, has attributed a series of competences to the coastal State which it would be difficult to assimilate in all cases to a State sovereignty, i.e., to the full and exclusive competence of the State enjoying them. This, however, is not sufficient to create so fundamental a difference between maritime limits and land frontiers as to suggest that these limits do not constitute frontiers; particularly since even in the realm of land frontiers, a certain diversification of régimes can be observed.

23. In any case, I believe that Senegal is not interpreting the position of Guinea-Bissau correctly. It does not seem to me that Guinea-Bissau has maintained that maritime limits are not frontiers. It has simply contended that those limits, which are frontiers also, are governed by a legal régime which is distinct and more recent, and which distinguishes them from land frontiers to such an extent that, according

to Guinea-Bissau, there must be a difference in treatment regarding the application of uti possidetis. This is the question that will be examined now.

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24. In an effort to ascertain the meaning of the words by applying the rules of interpretation codified in the 1969 Vienna Convention on the Law of Treaties, the Parties have engaged in semantic considerations all of which seem to me both secondary and superfluous. Guinea-Bissau has referred to numerous texts, including the 1958 Geneva Conventions and the 1982 Montego Bay Law of the Sea Convention, which apparently go so far as to avoid using the French term "frontière" to designate maritime "delimitations". Guinea-Bissau, while not denying that maritime delimitations "produce" lines of separation which constitute real frontiers, points out that the ordinary meaning of the term "frontière", and chiefly its legal meaning, confine its use to land and that uti possidetis is applicable only to land frontiers. This is not the view of Senegal, which considers that maritime delimitations cannot be excluded from the category of frontiers governed by uti possidetis merely

because those delimitations are not mentioned in the relevant texts relating to uti possidetis, nor in the preparatory work nor in legal writings.

25. A. Thomas in his Dictionnaire général de la langue française du commencement du XVIIe siècle à nos jours (1890-1900), defines a limite as the "partie extrême où s'arrête un territoire, un domaine" [extreme portion where a territory or a domain comes to an end], and a "frontière" as the "limite qui sépare le territoire d'un Etat de celui d'un Etat voisin" [limit which separates the territory of one State from that of a neighbouring State]. The Arbitration Tribunal of the two Guineas, in its Award of 14 February 1985, considered that "le terme 'limite' ... n'a pas le sens juridique précis de frontière mais un sens plus large" [the term 'limit' does not have the precise legal meaning of frontier, but a broader meaning]. It is not possible to go any further on the plane of semantics, and it is necessary to appreciate the very relative significance of any consequences one attempts to draw from the use of all these terms⁵.

26. At the same time, it is an indisputable fact - and one that is in no way contested by the Parties - that the relevant texts relating to the uti possidetis principle do not indicate anywhere that the expression

⁵It may be simply noted that after the Chamber of the International Court of Justice in its Judgment concerning the Gulf of Maine had used the expression "frontière maritime"/"maritime frontier", a formula which it took from the text of the Arbitration Agreement concluded by the two Parties in that case, in another case the Court itself prudently decided no longer to follow the formula used by the Parties. The case now pending, which was entitled at first "Maritime Boundary in the Area between Greenland and Jan Mayen" has thus now become "Maritime Delimitation in the Area between Greenland and Jan Mayen".

"frontier" covers also maritime frontiers. The Parties, however, draw diametrically opposite conclusions from that fact. Guinea-Bissau concludes that the principle does not extend to that category of frontiers (Reply of Guinea-Bissau, p. 88), whereas Senegal infers from the fact that the texts are silent simply that they do not establish any distinction between land and maritime frontiers (Counter-Memorial of Senegal, p. 162). The legal interpretation of silence is in fact always difficult and sometimes hazardous. In the present case, I consider that silence means implied exclusion rather than implied inclusion. The obligation to succeed to frontier treaties does not apply to maritime delimitations because the authors of the texts in question did not at any time have that particular category of treaties in mind, and in any case there existed no treaties on maritime limits that could be transmitted to a successor State. In fact, I do not personally know of any example of an agreement of that kind being imposed upon a successor State through the application of the uti possidetis principle.

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27. There are no "travaux préparatoires" which might shed light on the intentions of the authors of the Charter of the Organization of African Unity and the resolution adopted in Cairo in 1964 by the Heads of African States when they referred, implicitly in the Charter, and

explicitly in that resolution, to the principle of the intangibility of the frontiers inherited from colonization. Nevertheless, since I was myself involved quite closely in one capacity or another in African concerns in the 1960s, I am in a position to offer my personal testimony. When endorsing the uti possidetis principle, the African leaders had exclusively in mind the question of the intangibility of land frontiers. Following the achievement of independence in close succession by one African country after another in the 1960s, a situation arose in which, on the one hand, several ethnic groups coexisted in one and the same State (poly-ethnic State) and, on the other hand, one and the same ethnic group found itself extending over two or more States (multinational ethnic group). It was only the fear of the newly-independent African States that that potentially explosive situation might cause the break-up of States that were still fragile after the colonial withdrawal which led the African leaders to proclaim the intangibility of land frontiers and to take the prudent step of a sort of renewal "ratification" of the General Act of Berlin which, by its partition of Africa, was historically the origin of that situation. At no time was there any thought for maritime frontiers, which could only relate to a different horizon, namely the water environment, where ethnic problems by definition did not arise.

28. It should also be noted that nowhere in the travaux préparatoires - which are available - of the Vienna Convention on

Succession of States in respect of Treaties and the Vienna Convention on Succession of States in respect of State Property, Archives and Debts - both of which recognized at the international level the principle of the intangibility of the colonial heritage in respect of frontier treaties and régimes - is there any trace in the declarations of the participating delegations of any reference to maritime frontiers; yet this was a time (1978 and 1983) when the 1982 Convention on the Law of the Sea was very much in everyone's mind. All these travaux préparatoires - were part of my life, in my fourfold capacity of member of the International Law Commission, Special Rapporteur on succession of States in respect of State Property, Archives and Debts, Head of delegation at the Conference of Plenipotentiaries at Vienna in 1978 and Expert Consultant of the United Nations at the 1983 Vienna Conference.

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29. It is also necessary not to lose sight of a fact which is simply a matter of common sense; for a heritage to be protected, it is first of all necessary that it should exist! There would be no point in creating a rule for a category which does not exist. It was the less likely that the founding fathers of the African political institutions could have

thought of legislating for the intangibility of maritime boundaries since those boundaries practically did not exist. In fact, there was simply no colonial heritage to preserve in the matter of maritime boundaries! It is therefore inaccurate to assert that the African leaders (and even the plenipotentiaries at Vienna in 1978 and 1983) had maritime frontiers in mind when they legislated on the question of the intangibility of frontiers inherited from colonization.

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30. It is also necessary to bear in mind that the claim to extend today the scope of application of uti possidetis to maritime boundaries is being made at a time when the application of that principle to land frontiers themselves is encountering some resistance⁶. It is possible to observe in recent writings renewed criticisms of the uti possidetis principle in Africa, and at least one of the learned counsel for Senegal, who now defends before the Tribunal the extension of that principle to maritime boundaries, has in his academic works questioned the solidity

⁶See, among the abundant writings on the subject, the recent work by Marie-Christine Aquarone, Les frontières du refus. Six séparatismes africains, Paris, C.N.R.S. edition 1988.

and the validity of the same principle even for land frontiers. Frontier disputes have actually broken out in Africa; and whenever uti possidetis is mentioned, it is always with the reminder that it applies to frontiers otherwise described - with renewed insistence at present - as "unjust", "artificial" and designed to serve the interests of colonial empires. This increases still more impatience with what is certainly regarded as law, but "unjust" law, and this threatens the solidity of the whole edifice. A new political discourse on African land frontiers is developing, to such an extent that regional bodies try to take every possible opportunity to confirm the validity of the principle thus threatened - without however ever thinking of extending it to maritime boundaries. It is a fact that in this new discourse, repeated reference is made to the "arbitrary" character of the (land) frontiers because they enclose States within spatial frameworks which do not coincide with, among other things, the ethnic and historical realities of the African peoples. This approach is not at all calculated to favour the maintenance of the status quo, i.e., the respect due to the uti possidetis juris principle; particularly since this discourse, in an awareness of the economic crisis and the scourge of underdevelopment, at present more severe than ever on the African continent, no longer hesitates to contrast the "favoured" countries (those having a great

territorial extent, rich subsoil and soil, outlets to the sea ...) and the "disadvantaged" countries (those that are small or poor in resources, enclosed on all sides ...), a cleavage made worse by the colonial partitions, through the way in which frontiers were drawn.

31. Yet it is precisely in this period when the uti possidetis principle is receiving dire strokes and maintaining only with difficulty its integrity for a sound application to colonial land frontiers, that attempts are being made to extend the scope of application of that principle to maritime limits. The least that can be said on this point is that the proposal for a spatial extension of the principle runs counter to the trends of a certain African public opinion.

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32. It must however be observed that Senegal has denied that it seeks purely and simply to assimilate the two types of frontiers. It recognizes the existence of specific characteristics proper to each of them and maintains that today the concept of frontier has become gradually diversified with the discovery of new spaces by man. This

seems to me perfectly correct. At the same time, what is not so correct is to take that fact as a starting point in order to justify an automatic alignment of the legal status of the delimitation of those new spaces with that of land territories. It would be more natural to envisage the exact opposite, namely that the diversification of the concept of frontier should involve a corresponding diversification of the various régimes. Later developments will indicate whether a unification of régimes is called for, on the grounds of, for example, a certain identity of object and purpose for those various limits and frontiers. Those developments will indicate also how far that unification can go. To take unification as a starting point, on the basis of an unverifiable postulate, would however prejudge those developments and would at the same time assimilate, by analogies which are fragile, if not dubious, spaces which differ by their very nature. The law, in its processes of norm creation, does not proceed in that manner. I fail to see, in the present state of the law, what principle could be invoked to justify the automatic application of uti possidetis to two different types of space, and to do so for a principle which, like uti possidetis, constitutes an exception to tabula rasa and to State sovereignty, and which must therefore be interpreted restrictively.

33. In other words, the two Parties are, if not in agreement, at least not very far removed from each other, regarding the fact that the rules applicable in international law to land frontiers cannot all be

transposed to maritime boundaries, if only because of the physical difference between the two spaces and the different nature of the two environments. Hence, the problem is whether the uti possidetis principle is one of those rules which cannot be transposed from one category of frontier to the other. Guinea-Bissau has dwelt at length on the different nature of the spaces concerned, on the radically different ways in which each is linked with the populations concerned, and on the different nature of the rights which the State exercises in each case. Senegal does not dispute the differences in legal status between the two institutions, since manifestly each of them is governed by certain rules which are peculiar to it. However, it does not go so far as to recognize that the uti possidetis principle is one of those norms which must remain specific to land frontiers, and extends it to maritime boundaries mainly because it considers that the two institutions have a similar objective, namely to avoid conflicts and to maintain peace among peoples.

34. I take the view that the differences of environment are obvious and irreducible; that the concept of sovereignty and its consequences such as that of territorial inviolability do not have, or do not as yet have, a place in maritime areas, so that a foreign State can carry out certain activities in those spaces which are placed under the

jurisdiction of another State; that similarly it is at present more difficult to give effect to another concept, namely that of effectivity, in maritime spaces than in land spaces; and lastly that, unlike land frontier agreements, which are freely negotiated without having to obey a pre-established logic, maritime delimitation agreements are today governed by a general principle of equity. Above all, however, in view of the existence of these and other rules which differentiate them, it seems to me all the more unwise to align these two institutions, unless there is some imperative reason to do so, and to apply to both of them indiscriminately a norm such as uti possidetis, which is a very strong and very "weighty" principle - so much so that it holds in check the sacrosanct principle of State sovereignty. If, at the present stage of development of the law of the sea, the legal status and régime of maritime delimitations do not attribute sovereignty to the coastal State, as I have already pointed out, I do not see how it is logically possible to assert that an agreement by which those maritime delimitations are established can be assimilated to a land frontier treaty which, for its part, establishes State sovereignty.

35. In consequence, there can, it seems to me, be no doubt that maritime limits constitute frontiers, but frontiers of a different nature or category. For this reason alone, they have, and must have, a legal

régime and status which that very difference has imposed already with regard to the procedures for concluding agreements establishing them. For this reason alone, they do not necessarily call for the application of the uti possidetis principle.

36. The Award does of course rightly observe in paragraph 63 that "the delimitation of the area of spatial validity [of the norms of a State's legal order] may relate to the land area, the waters of rivers and lakes, the sea, the subsoil or the atmosphere". It goes on to say that "From a legal point of view, there is no reason to establish different régimes dependent on which material element is being delimited." I am afraid I cannot agree with the Tribunal. In the matter of frontiers, air law, space law and the law of the sea do not comply with the same principles, rules and patterns as the law of land frontiers. It is perfectly true to say that in all cases the purpose of the delimitation is the same, namely to determine in a stable and permanent manner the area of spatial validity of a State's legal norms. Nevertheless, the rules applicable to achieve such delimitations must necessarily be adapted to the environment to which they will apply and to the material element specific to that environment. The law is not an abstract construction totally detached from the reality which it is intended to govern. The difference between the material elements quite

naturally calls for a difference in legal régimes; if this is not so in certain cases, because one and the same legal construction is occasionally sufficiently flexible to be adapted partially to two different material elements, this is merely an exception which confirms the rule.

37. The Award, in paragraph 65, rejects Guinea-Bissau's argument that maritime boundaries only establish limits for certain matters, such as fisheries or the exploitation of natural resources, whereas land frontiers determine jurisdictional limits for all matters. On the contrary, the Award stresses that "There are many examples of land frontiers between two countries which are not constituted by a single line but by several different lines." It is true that examples can be given of boundaries on the surface of the land which do not coincide with the limits established for the subsoil, generally when the exploitation of mines is involved. The Award, however, does not directly meet Guinea-Bissau's argument; Guinea-Bissau rightly points out that the residual rules governing maritime boundaries and those governing land frontiers differ materially in that the first set of rules are special law and the second general law. Although in actual fact there are also special régimes among land frontiers, this is only an exception which

confirms the rule. This exception, however frequent it might be, is no more than a specific adaptation by treaty - something which is always possible but which still remains extraneous to the general rule governing land frontiers.

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38. I cannot agree with Senegal when it claims that

"the distinction which Guinea-Bissau is making between maritime delimitation agreements and land delimitation agreements from the standpoint of their form and that of their status with regard to the rules of State succession is not supported by any rule of positive international law. On the contrary, all the learned writers are agreed in saying that there is no difference regarding the object or the authority between treaties in solemn form and treaties in simplified form."
(PV/9, p. 21.)

It is indeed true that the two categories of treaties have legally the same authority; there is nevertheless an essential difference in that their mode of conclusion is justified by the fact that treaties in solemn form go through a cumbersome procedure because they are considered politically more important. Senegal has pointed out that the Munich Agreement of 29 September 1938 which involved a transfer of territory was concluded in simplified form. This is precisely the example to be

avoided because many authors have held that that Agreement was null and void. If it is true, as Senegal claims, that the stability of land frontiers is justified on grounds connected with the peace of the populations occupying the territories concerned, that ratio legis is in itself sufficient to justify non-assimilation for maritime spaces which cannot be occupied in the same manner by the populations.

39. I can discern another argument to reject the thesis put forward by Senegal: it invokes the view of Judge Gilbert Guillaume who, at the time when he was Director of Legal Affairs at the French Ministry for Foreign Affairs, wrote as follows: "Neither the exclusive economic zone nor the continental shelf can be assimilated to territory within the meaning of Article 53 of the French Constitution", i.e., the Article which governs cessions of territory. This means that, at least with regard to the manner in which they were treated in the French Constitution, maritime limits possess a specificity of their own and cannot be assimilated to land territory. Is this not just what Guinea-Bissau sought to prove? This observation entails sufficient reasons to regard it as anything but self-evident that the uti possidetis principle should be applied automatically, by transposing it without any precaution and as a simple and irresistible mechanism, from the case of land frontiers to that of maritime limits.

40. Clearly, it is necessary to exercise caution since it must not be forgotten that the uti possidetis principle constitutes an exception to the relativity of the effects of treaties and hence an exception which restricts the principle of State sovereignty. Now, in sound legal doctrine, an exception must be interpreted restrictively. It is not permissible to extend automatically an exception which imposes upon a successor State a land frontier treaty, by applying it to a maritime delimitation. In the future, maritime boundaries may perhaps come to be equated with land frontiers, if there is an evolution in that sense. It does not, however, seem legitimate at the present time to effect an automatic mixing of régimes.

41. It must be pointed out that, in taking this approach, Senegal is ultimately advancing a somewhat selective legal régime for maritime limits. It is contending that maritime delimitation agreements constitute fundamental instruments for the peace of peoples and must therefore be protected by a rule of intangibility which is aptly provided by an extension of the initial scope of application of the uti possidetis principle. At the same time, however, it is asserting that those agreements, however fundamental and high-ranking they may be, can be concluded by resorting to the most casual and least formalistic procedure of international law, i.e., that of agreements in simplified form which

do not require on the side of either party the control and approval of the representatives of the people, when it is precisely the peace and security of peoples which it is sought to safeguard.

42. I fear that by finding the 1960 Agreement to be opposable to Guinea-Bissau against its will as manifested in 1973 and unchanged today, this Tribunal has introduced a major legal innovation with important consequences. One of its implications would be that maritime spaces are subject to the full and exclusive competence of the coastal State, i.e., to its full sovereignty, a result which would upset the present law of the sea as just codified by the international community in the Montego Bay Convention. That consequence is difficult to avoid: one cannot for example claim that maritime limits must be equated with land frontiers governed by the uti possidetis principle, without at the same time asserting that all the rules of international law applicable to land frontiers can be transposed to maritime frontiers. The need for consistency forbids an opportunist selection of rules on the basis of ill-determined criteria.

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43. According to Senegal, Guinea-Bissau, which maintains before this Tribunal that uti possidetis is not applicable to maritime limits, has itself asserted the contrary in other circumstances. Senegal recalls that in the past, Guinea-Bissau "itself has made no distinction between land and maritime frontiers with regard to the uti possidetis principle" (Counter-Memorial of Senegal, p. 158). Thus the Permanent Representative of Guinea-Bissau to the United Nations at New York, Ambassador Gil Fernandez, declared in his letter of 30 April 1979 that

"The Government of the Republic of Guinea-Bissau, faithful to the principles of the Organization of African Unity (OAU), reaffirms its commitment to respect the borders inherited from colonization. In consequence, the only legal instrument which we recognize as valid for the delimitation of the territorial waters and continental shelf between our country and the Republic of Senegal is the 1886 Franco-Portuguese Convention" (PV/9, p. 32),

on the basis of which the second recommendation of 10 September 1959 had been formulated by the negotiators of the subsequent Agreement of 1960. The Tribunal has adopted this Senegalese argument (para. 66 of the Award). I cannot agree. It cannot be denied that this letter would have been an admission by Guinea-Bissau of the application of uti possidetis to maritime boundaries if the 1886 Convention had really established a maritime boundary. But this is not so, as will be seen from the Arbitral

Award rendered on 14 February 1985 by the Arbitration Tribunal in the Guinea/Guinea-Bissau case.

44. Following a similar line of approach Senegal has recalled another event, with regard to which the Tribunal has upheld its argument (para. 66 of the Award). By a note of 4 November 1977 protesting against the boarding of the trawler Ilha de Fogo, at the parallel of Cape Roxo, Guinea-Bissau stressed the grave consequences which would, it said, result from "any attempt at a unilateral revision of the 1886 Franco-Portuguese Treaty with regard to the intangibility of the frontiers inherited from colonization" (PV/9, pp. 33-34/40). As is well known, according to the Award of 14 February 1985, the 1886 Convention drew a polygon surrounding the islands of Guinea-Bissau and delimiting what Portugal regarded as "its internal waters" in its colony. A polygon of this kind does not constitute a maritime boundary.

This Tribunal observes that the Arbitration Agreement concluded on 18 February 1983 between Guinea-Bissau and Guinea refers to the principle of the intangibility of frontiers inherited from colonization. The Tribunal draws the conclusion that

"Since that Arbitration Agreement concerned only the delimitation of a maritime boundary, the reference quoted means that the two Parties recognized that that principle was applicable to boundaries of that category." (Para. 66 of the Award.)

This view of the position is unfounded. In the case cited, Guinea/Guinea-Bissau, the 1886 Convention in question determined the land frontiers, and that is enough to explain the reference to the 1964 Declaration on the intangibility of colonial frontiers.

45. In the same spirit, Senegal has argued - and the Tribunal has held - that Guinea-Bissau's contention is the less worthy of belief in that it had itself maintained a radically contrary view in the case between Guinea and Guinea-Bissau (PV/9, p. 33). The International Court of Justice has laid down the conditions under which estoppel may be invoked (Barcelona Traction, Light and Power Company, Limited, Preliminary Objections, I.C.J. Reports 1964, p. 23; North Sea Continental Shelf cases, I.C.J. Reports 1969, p. 26, para. 30 and chiefly Delimitation of the Maritime Boundary in the Gulf of Maine Area, I.C.J. Reports 1984, paras. 130 to 146). In legal writings, estoppel has been seen as a unilateral expression of intention by a State which has been formulated on an earlier occasion and which it cannot go back on without infringing the fundamental principles of good faith and equity. For the Court, "estoppel is linked to the idea of preclusion" (Delimitation of the Maritime Boundary in the Gulf of Maine Area, para. 130) rather than to that of acquiescence. "Preclusion is in fact the procedural aspect and estoppel the substantive aspect of the same principle." (Ibid.) A State cannot do today what it challenged yesterday.

In the present case, however, I cannot accept the Tribunal's conclusions (para. 66 of the Award). In the first place, it is necessary to take a more circumstantial view of the facts: the successive viewpoints of Guinea-Bissau, from one set of proceedings to the other, were far from being as contradictory as has been suggested here. It is not enough to refer to pages 76 and 77 of the record of its argument in the earlier proceedings. If one reads in full pages 75, 76, 77 and 78 of the record it becomes apparent on the contrary that Guinea-Bissau has very firmly and very clearly disputed the applicability of uti possidetis to maritime limits. In the second place, it is clear that, in accordance with the principle of the relative authority of res judicata, each case constitutes a "unicum" independent of those before and those after it. Then the Parties are free as to their strategy, which can vary from one case to another. The Parties are in no way bound by an approach previously adopted by them; a fortiori a tribunal is always completely free and sovereign, not only in relation to the decision of another arbitration tribunal but also, and more so, with regard to the strategy adopted by a party, whether in a case submitted to it, or, and yet more so, in an earlier case before a different adjudicating body. Lastly and chiefly - and even assuming that Guinea-Bissau had pleaded in the earlier case the application of uti possidetis to maritime boundaries, which it did not - the fact that Guinea-Bissau had a mistaken belief does not

warrant the Tribunal imperatively endorsing the mistake. An error remains an error even if the Party denouncing it today had itself committed it yesterday, as was the case with Guinea-Bissau.

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46. Lastly, there is the case-law of the International Court of Justice to which both Parties in the present case have turned in an effort to find support for their respective positions. This Tribunal has alluded to it (para. 63 of the Award) and, in doing so, has endorsed the Senegalese point of view. In truth, that case-law boils down to one single Judgment, namely that rendered by the International Court of Justice in the Aegean Sea Continental Shelf, (I.C.J. Reports 1978, para. 85), in which there is a passage reading as follows:

"Whether it is a land frontier or a boundary line in a continental shelf that is in question, the process is essentially the same, and inevitably involves the same element of stability and permanence, and is subject to the rule excluding boundary agreements from fundamental change of circumstances."

The two Parties in the present case give different interpretations of that ruling. Turkey, in order to challenge the jurisdiction of the Court, had of course invoked the reservation entered by Greece to the 1928 General Act for the Pacific Settlement of International Disputes, (General Act of Arbitration), a reservation purporting to exclude disputes on territorial status. The Court could only uphold Turkey's objection by including among disputes of this kind those which related

to the geographical extent of the continental shelf, thereby attracting severe criticisms from learned writers. Langavant points out that the Court, in that Judgment, has given to the concept of continental shelf a retroactive effect, since that concept was legally unknown in 1928.

47. Nor should it be overlooked that this isolated Judgment, which perhaps turned on its own facts, must be seen in proportion. The Court would have been the last to deny that maritime spaces constitute "territories". As such, they had therefore to be covered by the Greek reservation to the 1928 General Act of Arbitration, a reservation concerning disputes relating to "territorial" status. The Judgment in addition refers to "fundamental change of circumstances". Senegal in the present case assimilates a succession of States to a fundamental change of circumstances, a proposition which is not altogether unwarranted. It may however be wondered whether this circumstance should not be capable of being invoked only by the original contracting State, on the basis of any upheaval occurring within it, since the successor State is a third State, not concerned by the treaty or by any such change. Be that as it may, this 1978 case-law is clearly based on a "territorial" and geographical conception of the continental shelf, relying on the notion

of natural prolongation, and has accordingly been superseded now by the legal definition of the continental shelf which allows considerable scope to the criterion of distance.

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48. The extension of uti possidetis to maritime boundaries cannot be considered as self-evident, since maritime boundaries have appeared only recently in the modern law of the sea. It is precisely for this reason that this Tribunal has only been able to find two cases - and it acknowledges this (para. 64 of the Award) - in which maritime boundaries have been at stake in Latin America, the uti possidetis continent par excellence⁷. Furthermore the first case, that of the Beagle Channel,

⁷At most might one add, really as a marginal case, the dispute between Nicaragua and the United Kingdom concerning the sovereignty of Nicaragua over "the coast of the Mosquitos", settled by an Arbitral Award rendered by the Emperor of Austria Francis-Joseph I. In that case, the uti possidetis principle, which was well established on dry land, was taken to its extreme limit, in a manner of speaking, when it reached the coast of the Mosquito Indians and the free port of San Juan del Norte, without ever venturing beyond into the sea. The memorial submitted by the Government of Nicaragua ("Exposé par le gouvernement de Nicaragua des faits relatifs aux points en discussion avec le gouvernement de Sa Majesté britannique", Paris, Typographie Georges Chamerot, 1879, in French) specified that "the port of San Juan del Norte and the Mosquito coast have from all time belonged to the sovereignty of Spain, to whose rights Nicaragua has succeeded" (p. 24). Still applying an exclusively land approach to uti possidetis, the same memorial added: "All the territorial rights of Spain over its ancient possessions have reverted to the States which have formed later and must be considered as belonging

is not at all relevant, since the uti possidetis rule was not applied therein, as the Tribunal itself indicates. There remains therefore only one isolated and atypical case, that of Fonseca Bay, in which the problem at stake was rather that of the territorial sea and a historic bay, a case in which the Central American Court of Justice decided, according to this Tribunal, that the limits of the high seas which the Crown of Castile had established in that bay had devolved in 1821 on the Federal Republic of Central America and subsequently on El Salvador, Honduras and Nicaragua.

49. This case is a very specific one which concerns a gulf bordered by three States, Honduras, El Salvador and Nicaragua and regarded as a

⁷(continued) to those same States ..." (Ibid., p. 59.) The United Kingdom had not even accepted the idea that the coast had become Nicaraguan by State succession, and still less any portion of the maritime space. The submissions in the United Kingdom counter-memorial contain a point 15 reading as follows:

"15. That the limits of the port of Greytown [this is the port of San Juan del Norte] described in the decree of 20 February 1861 [a decree by Nicaragua], as extended three miles to the East and three to the West, from the central point of the city should be revised, and that the southern limits of the port should be defined."

(All the documents concerning this case, writings of the parties and Award of the Emperor of Austria, have been assembled, some of the documents being manuscripts in Spanish or in German gothic, in a recent work "Der Wiener Schiedsspruch von 1881: e. Dokumentation zur Schlichtung d. Konfliktes zwischen Grossbritannien u. Nicaragua um Mosquitia (eingeleitet u. hrsg. von Günter Kahle unter Mitw. von Barbara Potthast. - Köln; Wien: Böhlau, 1983)".)

"historic bay", like the "Chesapeake and Delaware bays in the United States or the Conception, Chaleur and Miramiche bays in Canada", as stated in the judgment of the Central American Court. The Gulf of Fonseca was discovered in the XVith century by the Spaniards, and on the emancipation of Central America, possession was transferred undivided to the patrimonium of the Central American Federal Republic consisting of five States. In reality, the Gulf of Fonseca constituted a territorial sea held in common. If uti possidetis had really been applied to the maritime boundary between that bay and the high seas of the Pacific Ocean, all five federated States, and not merely the three coastal States (Honduras, El Salvador and Nicaragua) would each have been entitled (and I really do not know in what manner) to a portion of that undivided bay. Later, when the Federal Republic was dissolved it was not the three coastal States but only two of them - Honduras and Nicaragua - which concluded in 1960 a treaty partitioning the bay. Their respective rights were determined by that treaty and not by uti possidetis. The Convention on the delimitation of the frontiers between Nicaragua and Honduras established in 1900 the land frontiers between the two countries as well as a dividing line for the waters of the Gulf of Fonseca, considered as territorial waters of a historic bay.

50. I therefore see nothing in the judgment of the Central American Court of 9 March 1917, rendered in this very special case of the Gulf of Fonseca, the waters of which were traditionally and entirely assimilated to land territory, to indicate clearly that the Central American Court of San José de Costa Rica intended to endorse the application of the uti possidetis principle to maritime boundaries proper.

51. Going over to another continent, the Award of this Tribunal invokes "another precedent" (para. 64) said to have been established by the Anglo-Danish Convention of 24 June 1901 concerning fisheries limits which, by succession from Denmark, remained applicable to Iceland until 1951. The Award gives somewhat excessive weight to the separate opinion of Sir Humphrey Waldock (I.C.J. Reports 1974, p. 106). The case would have been one of the application of uti possidetis to maritime boundaries if, in that case, the Anglo-Danish Convention of 1901 had been automatically imposed upon Iceland. That was not however the case. Iceland, having become independent, negotiated directly with the United Kingdom a new treaty in the form of an exchange of letters dated 11 March 1961. This enabled the United Kingdom to keep, albeit for a short period of time, its traditional fishing activity in the waters close to Iceland, and this not by virtue of uti possidetis but by agreement between the two Parties.

52. As for the reference to maritime boundaries in Asia (Malaysia, Philippines and Brunei) made by this Tribunal (para. 63 [sic: 64] in fine), it is absolutely irrelevant. It is of no avail to assert that "geographical maps of Malaysia, Philippines and Brunei, for example, show as maritime boundaries lines the origin of which goes back to the colonial era". It would be essential to prove that the lines in question were imposed upon those newly-independent States by application of an alleged rule entailing the obligation to succeed to colonial treaties of maritime delimitation. The reply to that question is a categorical negative. These limits were accepted by the States concerned by means of treaties.

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53. I shall dwell only very briefly on the question raised by Guinea-Bissau according to which a frontier treaty, to be inherited by a successor State in virtue of uti possidetis, must as a general rule be of a certain age. The Award, (para. 68 in fine) rules on this point that "Guinea-Bissau has not been able to establish in the course of the present arbitration the existence of any norm of international law imposing such a condition" (the condition of "duration" of the agreement for it to be opposable). This statement is mistaken. In the first

place, Guinea-Bissau has never alleged before the Tribunal "the existence of a norm of international law". It relies not on a norm but rather on the logic of the institution. Moreover, and although adopted subsequently to the 1960 Franco-Portuguese Agreement, resolution 2625 (XXXV) voted unanimously by the United Nations General Assembly on 24 October 1970, and embodying a Declaration on seven "Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations", is applicable in the case because it merely codified principles of customary international law. That declaration twice emphasized that the territory of a colony was "separate and distinct" from that of the Administering Power and remained separate and distinct so long as that territory had not obtained its independence. It is thus clear that, under the Charter of the United Nations, an Administering Power has no authority to dispose of the territorial status of a colony, particularly in the so-called "suspect" period when it had difficulties with a movement for independence, as was the case in Guinea-Bissau in 1960.

The 1960 Agreement thus appears to have disposed of the territorial status of a non-self-governing territory which was entitled to an "inherent" right to a maritime space. A right of that kind is pre-existent to any delimitation.

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54. The fundamental principle that the effects of a treaty are relative obviously means that those effects can only operate as between the contracting Parties, save for those exceptions which are exhaustively specified by the law. Guinea-Bissau did not exist as a State in 1960, the date of the conclusion of the Agreement under consideration here, and it is therefore clear that it was not a State party to that instrument. Accordingly, its status can only be that of a third State with respect to the Agreement in question. That status is moreover a logical one under the international law of State succession, whose tabula rasa principle must mean that the successor State faces the succession ex nihilo, and accepts an agreement only through the expression of its will to succeed to it. Guinea-Bissau is indisputably a third State from that point of view.

55. On this basis it would be a third State even if the Agreement in question had been previously "received" in a regular manner into the colonial law in force in the Portuguese Province of Guinea. That was not in fact the case, and Guinea-Bissau did not even know of the existence of the 1960 exchange of letters. For the Agreement to be valid in, and opposable to, what was then a dependent territory, it had to fulfil a formal condition: its publication in Guinea-Bissau by the Portuguese administrative authorities. The Parties in the present case have had a number of passages of arms on the question whether the 1960 Agreement

was known to or published by the various States or entities concerned. Many of the arguments submitted on that point appear to me to be superfluous or irrelevant. It matters little that the Agreement in question was published by France both in its Journal officiel and the Journal de la Communauté or by Senegal in the Journal officiel de la Fédération du Mali⁸. The sole issue here is whether, in one way or another, the Agreement in question became known or was the subject of publication on Guinean territory.

56. From that point of view, the only one which should concern the Tribunal on the question, the position is both clear and instructive. In the first place, it is not disputed by Senegal that the exchange of letters was not the subject of any official publication at Lisbon on the part of the Portuguese contracting party. This fact is in itself somewhat inexplicable, even assuming some deviation from the Constitution. A formal condition was thus not complied with. I am recording this fact without pronouncing on the domestic or international legal consequences of that formal legal defect. I mention it simply

⁸It will be noted moreover that even that publication at Dakar did not prevent the Senegalese authorities themselves from being unaware of the existence of that Agreement when they replied officially to the Italian Embassy on that point as follows: "There does not exist any international agreement; the two countries accept for the time being the course of the maritime boundary inherited from the colonial period, namely: the 272° line from the terminus of the the land frontier." (Counter-Memorial, Vol. II A: Annex 3.)

because Lisbon is one of the indispensable stages through which the Agreement had to pass in its progress from the metropolitan legal order to that of the Portuguese Province of Guinea. This "metropolitan" stage or support point is non-existent.

57. But even if it had existed, it would not have sufficed by itself to make the Franco-Portuguese Agreement enter the colonial legal order then in force in Guinea-Bissau. For traditionally - and on this point the Portuguese legal system resembles French overseas law - a law adopted or a treaty concluded by the Administering Power could not be extended automatically to a colony or overseas territory, since otherwise the inhabitants of the metropolis and those of the colony would have had exactly the same rights and the same duties, a result which would have been contrary to the philosophy of the colonial system. For a text to become applicable in a non-autonomous territory, it had to be expressly introduced into the law of that territory, not just by a mere publication of that text in the territory but by an appropriate decision of the metropolitan authorities. To sum up, the non-self-governing territory was subject to what was known as the principle of legislative speciality and the principle of conventional speciality; the very title of those principles suffices to illustrate the very special legislative and conventional régime of a non-autonomous territory.

58. Alongside that non-existence of the metropolitan "stage" there is the absence of any application decision in Guinea-Bissau, as well as of any publication whatsoever, so that the 1960 Agreement concluded at Lisbon was legally "retained", as it were, in that capital, as though it did not concern in any way the Guinean territory which was nevertheless its basis, or more accurately as though the Administering Power intended, contrary to its own law, to assert that the application of the Agreement did not concern the people and territory of Guinea but was a matter exclusively for the central authorities at Lisbon. This is so much the case that Portugal not only did not publish the Agreement in Guinea-Bissau, or take any regulatory or legislative decision to declare it applicable to that territory, but also appears to have done everything possible to make that Agreement truly "alien" to Guinea-Bissau.

59. It was thus that the Portuguese Decree of 22 November 1963, which would have provided an ideal and exceptional opportunity to concern Guinea-Bissau in the Agreement, since it defined or redefined the territory of that Portuguese Province, nevertheless completely ignored that Agreement. Unless one were to consider that Portugal had a conception of territory which was confined to land territory and excluded

completely maritime territory (this would provide an additional and unexpected justification for the distinction between land frontiers and maritime boundaries for the purpose of excluding the application of uti possidetis to the latter!), one is bound to conclude that the Administering Power appeared to have had a conception peculiar to itself regarding the ultimate addressee of the Agreement. For Portugal, that instrument expressed its international sovereignty and its international responsibility, and the territory of Guinea-Bissau constituted merely a base or support for that sovereignty.

60. Similarly, the Government of Portugal does not appear to have made any attempt to take advantage of the adoption of its Legislative Decree of 27 June 1967 determining the straight baselines of Guinea-Bissau in order to refer to the exchange of letters of 26 April 1960. There is not the slightest trace of it even in the preamble of the Legislative Decree. And yet, even if the 1963 Decree could be considered, by stretching a point, as dealing exclusively with land territory, the same cannot be said of the Legislative Decree of 1967.

61. It is not for me to look for an explanation of that conduct on the part of Portugal. I simply take note of it. Similarly, I shall merely note that after the regulatory texts of 1963 and 1967 which concern directly Guinea-Bissau, Portugal enacted legislation concerning

one of its central organs - the General Staff of the Portuguese Navy - without mentioning the 1960 Agreement either. I am referring to the instructions issued by the Central Government at Lisbon to its Navy and entitled "Confidential Military Instructions" dated 1971 which - somewhat strangely - mention the two "recommendations" of 10 September 1959 as though neither of them had been embodied in the Agreement of 26 April 1960. The position is enigmatic, and to all appearances there was a disregard of that instrument which goes beyond non-publication, as if amounting to a denunciation of the Agreement in question.

62. Whatever the explanation for that behaviour, the fact remains - and this is what matters - that Portugal did not officially publish the Agreement either with regard to its metropolitan territory (for purposes of the application of the Agreement by its central organs) or with regard to its overseas province directly concerned. I cannot but conclude from that situation that the Agreement of 26 April 1960 is legally inchoate. This is sufficient to block, with regard to that instrument, the mechanism of State succession triggered in 1974 by the accession of Guinea-Bissau to independence.

63. What is more, in addition to the non-existence of the legal "stage" of Lisbon and of the other stage in the colonial province, there was no stage established by independent Guinea-Bissau. The latter was the successor State of Portugal, but was a third State in relation to the particular Agreement of 1960, which in any case had never entered its colonial domestic law, and by the general declaration of non-succession formulated by the People's Assembly on 24 September 1973, it applied the principle of tabula rasa, which implies the cancelling on its territory of all previous treaties. Besides, on that point, Guinea had no difficulty in erasing the 1960 Agreement, which it could not recognize since it did not even know of its existence and since, as has been noted, there was, by the will of Portugal, no trace of it there.

64. Subsequently, Guinea-Bissau had requested Portugal to furnish it with a list of the agreements concluded by it concerning the former colonial province. Guinea has explained, and Senegal has not disputed, that on 3 January 1978 Guinea-Bissau requested from Portugal information on the international commitments of Portugal concerning Guinea-Bissau (PV/1, translation, p. 5). In particular, Guinea-Bissau, which had had conversations with Senegal four months before, in September 1977, on the maritime delimitation between the two countries, requested Portugal to inform it as to the existence or otherwise of a treaty on this matter,

the legal validity of the recommendations of 10 September 1959 as well as the Portuguese domestic procedures governing signature, ratification and publication of the treaty (if any) on maritime delimitation. Portugal gave no reply to these requests (PV. 1, p. 6, translation, and p. 74/113 of the original text) until the end of the oral proceedings in the present case in March 1988.

65. This silence by Portugal is in line with its behaviour in 1963, 1967 and 1971: the Administering Power appeared to ignore the 1960 Agreement for unknown reasons. Such silence seems to fit in well with the logic of this earlier conduct. It amounts to a set of coherent elements of which the inevitable result was to prevent the automatic triggering of the phenomenon of State succession. That blocking of succession as a result of the conduct of Portugal then links up with the voluntary act of non-succession decided in full sovereignty by Guinea-Bissau. That non-consent to be bound by the 1960 Agreement was manifested significantly in three ways: in a general way in 1973 when the People's Assembly of Guinea-Bissau declared the application of the tabula rasa principle to all treaties prior to independence; in a specific way, when the leaders of the new State proclaimed its independence without mentioning the maritime limits of the new State, although its declaration of independence had defined precisely its

territorial scope; lastly in an equally specific way, when the Government of Guinea-Bissau requested the Government of Portugal to inform it particularly on the possible existence of an Agreement on maritime delimitation and did not receive any reply.

66. In their declaration of independence, the leaders of Guinea-Bissau carried precision to the extent of giving figures for the area of their territory; surely they would have been equally precise, and would not have overlooked or forgotten the 1960 Agreement on maritime limits with Senegal if they had known of its existence and had accepted succession to it. The territory, says the declaration, "covers a land surface of 36,125 km², plus the territorial waters, corresponding to the area designated in the past as the colony of Portuguese Guinea". However much the territorial waters may be equated to land territory because of the full exercise of sovereignty throughout their extent, the mention of the "territorial waters" in that declaration nevertheless testifies to the evident concern of the leaders of Guinea-Bissau not to neglect the maritime environment. In that connection they could have referred to the maritime boundary with Senegal if they had been aware of

it and had the intention of succeeding to it. Bound as they were by their general tabula rasa declaration, they would have had to make a clear and express exception to it if they had "known" and "recognized" the Agreement.

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67. This means, for all the reasons given above, that I am to my regret unable to accept the point of view expressed in paragraphs 70 to 76 of the Award. These paragraphs contain an extensive description of the publicity received by the 1960 Agreement in "international circles" as well as in France, Mali and Senegal. These arguments are strictly irrelevant, for:

(a) "The publicity and internal entry into force of the treaty in a colony are a condition of succession by the newly-independent State to that treaty" (PV/14, p. 164). It is precisely for that reason that the treaty is "not opposable". This means that the issue is not whether the Agreement was known by "international circles" (para. 70 of the Award) or by France, Senegal or Mali (para. 72 of the Award) but whether it was known by Guinea-Bissau, against whom that Agreement is being invoked. On that point, however, the Award does not bring, and cannot bring, proof that the treaty was known by

Guinea-Bissau, because it was not published in that territory (apart from the fact that it had not been published on metropolitan territory).

(b) Guinea-Bissau has never claimed that "the Agreement of 26 April 1960 was ... concluded in secret" (opening words of para. 72 of the Award). It asserts, as is the fact, that the conduct of Portugal (absence of publication both in Lisbon and in Bissau; carefully avoiding mention of the Agreement at least on two important occasions in two fundamental texts where it should have normally appeared, and which concerned Guinea-Bissau) has had the result of shrouding that Agreement in great discretion on the Portuguese side, both in Portugal and in the colony.

(c) The references given in paragraph 72 are therefore irrelevant and should have been omitted from the Award. Besides, the acts of publication mentioned took place in foreign countries and in languages alien to Guinea-Bissau.

68. It is of course clear that Portugal had no obligation under international law to publish the 1960 Agreement in Lisbon and in Bissau (see para. 74 of the Award). It is true that this obligation existed solely under Portuguese domestic law. If Guinea-Bissau had introduced proceedings against Portugal asserting its responsibility for that violation, the Arbitration Tribunal would have been entitled to reject it, because the obligation involved is not an obligation under

international law. The position here, however, is totally different; Guinea-Bissau is not claiming anything from Portugal; it is merely defending itself in legal proceedings and protecting itself against an instrument which Portugal refrained from making known to it and which is being invoked against it by a third State. It is not right to seek to deal in the same manner with those two different situations.

Guinea-Bissau has not requested the Tribunal to make a finding against Portugal, either of violation of an obligation under international law (no such obligation in fact exists), or of failure to observe an obligation of Portuguese domestic law (for which also the Tribunal lacks jurisdiction). What it does seek from the Tribunal is that it treat that violation of Portuguese domestic law at least as a fact and, having noted that simple fact, to draw from it the obvious consequence of non-opposability of the Agreement (not that it is null and void or non-existent). I fail to see how it would be possible to get round the fact of the ignorance of the Agreement by Guinea-Bissau, and not to take into account that element, of capital importance in this case.

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69. I must now consider whether the non-opposability to Guinea-Bissau of the exchange of letters of 26 April 1960 which to my mind results both from the non-applicability of the uti possidetis principle to maritime delimitations and from the absence of publicity, is or is not confirmed by State practice subsequent to the Agreement in question. Since I do not examine the problem of the validity of the Agreement as between all the contracting Parties, I shall not examine the question of the confirmation of that validity by the subsequent conduct of France, Portugal or Senegal. Accordingly, my study here should be confined to the practice of Guinea-Bissau, the only one relevant since the sole question is that of the opposability of the 1960 Agreement to that State.

70. Before examining this point, however, I would like to give the following summary of the legal context and the spirit in which it seems to me that that analysis of the practice of Guinea-Bissau must be undertaken.

(a) It is abundantly evident that a State cannot unilaterally impose a territorial delimitation upon another State (Continental Shelf (Tunisia/Libyan Arab Jamahiriya), I.C.J. Reports 1982, paras. 87, 90, 92 and 95; Delimitation of the Maritime Boundary in the Gulf of Maine Area, I.C.J. Reports 1984, paras. 81 and 112). The Tribunal in the Guinea/Guinea-Bissau case held that the decrees whereby the

President of the Republic of Guinea, Mr. Sékou Touré, claimed to determine the international maritime boundary between his country and Guinea-Bissau, by following parallels of latitude, contrary to international law and non-opposable to Guinea-Bissau. Referring to another, albeit less radical, case, I cannot however agree with the separate opinion of Judge Ago in the 1982 Continental Shelf case between Tunisia and Libya, who considered that the regulations adopted on 16 April 1919 by the Italian Government in Tripolitania and Cyrenaica delimited the maritime boundary between Tunisia and Libya simply because Tunisia had not voiced an objection. Where the issue concerns a frontier - whether a maritime boundary or a land frontier - and one which is officially recognized as such, the requirements must necessarily be more strict because of the political importance of the operation. In any case, the establishment of a frontier must be the result of an agreement, and not be based on the fragile element of the absence of opposition on the part of one of the parties.

(b) When making a careful assessment of the subsequent practice of States, it must be stressed that in no case can practice lead to creating effectivities in the maritime domain, as might be the case in the land domain.

(c) As stated by the International Court of Justice in its 1969 Judgment in the cases concerning the North Sea Continental Shelf, acquiescence presupposes a "clearly and consistently evidenced acceptance"

(I.C.J. Reports 1969, p. 26, para. 30). The practice of a State

generates rights and obligations only to the extent that it proves sufficiently uniform, constant and non-contradictory to warrant the existence of an explicit agreement.

(d) Lastly, sometimes we may think we are applying a rule of law when all we are in fact doing is setting a background which is striking in its surrealism. There is in particular a risk of doing this if the same criteria are applied to identify and analyse the practice of two States which are as different from each other as a developed State and an underdeveloped State. Practice really expresses a choice, an intention and a rational will when it is the practice of a developed State in command of its arsenal of legal argument, perfectly aware of the state of its international commitments and possessing the appropriate material and technological means for it to adopt a line of conduct in full awareness of the facts. On the other hand, can one be certain that practice really reflects a choice and an act of free will when it is that of a State crushed by underdevelopment in all fields, sometimes not even having a government legal department, however modest or nominal, often not in possession of the colonial archives, without sufficient officials with the necessary qualifications, and still more deprived of the material or technical means for it to be aware of its rights and to exercise them in conformity with its interests? In this factual context, I was not at

all surprised, for example, that Guinea-Bissau should have never known the text of the 1960 Agreement. Similarly, I have never at any time had the slightest doubt as to the perfect good faith of Senegal throughout its successive attitudes, when at first it appeared to be unaware of the 1960 Agreement - both in 1977 during the first negotiations with Guinea-Bissau and later in its contradictory correspondence with the Italian Embassy - and lastly, when it discovered, and invoked against Guinea-Bissau, the existence of that Agreement. These few examples illustrate certain realities of many developing countries which, confronted with severe difficulties of all kinds, act on a daily case-by-case basis more to assure their precarious survival than to claim the full extent of rights or to create other rights by the proper means. In face of these realities, great caution, and indeed marked restraint, should be observed in accepting practice as a source of law in such circumstances. A rule of law would be a very fragile one if it relied exclusively on a practice observed under those conditions.

71. It is in the light of the foregoing observations that I propose to examine the subsequent practice of Guinea-Bissau. It is particularly striking that, according to every indication, Guinea-Bissau never knew of the existence of the 1960 Agreement until Senegal invoked it against it and until Guinea-Bissau addressed a note to Portugal in 1978 requesting

information on any negotiations regarding it. Accordingly, any examination of the practice of Guinea-Bissau from the proclamation of its independence and up to its first negotiations with Senegal (1973-1977) seems to me to be automatically ruled out, as is also any examination of the period after the date when the dispute crystallized (1985 to the present date). The conduct of Guinea-Bissau must therefore be examined from the autumn of 1977 to the spring of 1985. It is clearly apparent, and this is no surprise since it could have been expected, that nothing in the conduct of Guinea-Bissau supports the idea that it accepted the line drawn at azimuth 240° established by the 1960 Agreement.

72. Senegal has, however, argued that Guinea-Bissau respected that line during the said period and regards that fact as a recognition of the 1960 Agreement. That is a dangerous argument. If one were to accept it, it would mean that good faith can never exist as between States and must never be presumed in international relations. And yet, can anything be more normal, or at least more commendable, than this duty of a State to abstain from anything which might prejudice a forthcoming negotiation or judicial decision? I see no reason - and Senegal has not put forward

any - to suspect Guinea-Bissau of conduct contrary to that incumbent upon any State bound in good faith to respect the disputed area pending the outcome of the settlement proceedings.

73. I can only regard Guinea-Bissau's attitude as irreproachable when, throughout the said period, it abstained from any activity in the disputed area pending the outcome of the dispute. That attitude was not only irreproachable but also perfectly consistent for, during the same period, Guinea-Bissau entered protests whenever it became aware that Senegal, for its part, was carrying out activities in that area. These two attitudes on the part of Guinea-Bissau complement and explain each other. By respecting the 240° line, that State did not acquiesce in the 1960 Agreement, since it made representations to Senegal in respect of activities in the disputed area.

74. The Parties have engaged in lengthy arguments and counter-arguments on numerous points relating to subsequent practice but these do not seem to me to be relevant. I shall refer to some of them solely ex abundanti cautela. Senegal has in particular maintained that "the conduct of the predecessor State can also bind the successor State" (PV/9, p. 104), interpreting the Island of Palmas Award of 4 April 1928 and the Award of the Tribunal in the Guinea/Guinea-Bissau case of

14 February 1985. In other words, a successor State which has duly expressed its refusal to succeed to a particular agreement nevertheless remains bound by that agreement because of the practice of its predecessor, itself based on that agreement! This is in the first place to undermine the tabula rasa principle, which is one of the fundamental principles of the law of State succession in respect of treaties; for, on this approach, the successor State, whatever it does, will never be able to rid itself of an agreement concluded by its predecessor: if, by a declaration of non-succession, it ejects the agreement by the front door, it will return through the window, by way of enforced succession based on the subsequent practice of the predecessor State. The position would actually be the same, according to Senegal, if the agreement had not existed at all: "Even if the 1960 Agreement had not existed, Guinea-Bissau would have been bound by the 240° maritime boundary from Cape Roxo solely because of the notorious conduct of Portugal" (PV/9, p. 104). This contention cannot be accepted, because it leads to an absurd result, and for many other reasons, the least of which is the dictum "qui peut le plus peut le moins" (he who can do more can do less); if the successor State is entitled to invoke the tabula rasa principle to set aside an agreement, it is not evident how it could be bound by a mere practice, or by any other consequence of that agreement.

75. Furthermore, that would be making too much in the circumstances of the erratic, incoherent and meagre practice of Portugal, which has in any case never invoked the Agreement in its international relations, and whose relevant texts of colonial law relating to Guinea-Bissau were enacted in ignorance or in disregard of that Agreement. While it is true that international law derives, albeit with considerable caution, legal consequences from the practice of States, that operation can only be legitimate in so far as it concerns the States which are the direct actors and authors of that practice. Otherwise, and in particular where successor States are involved, the inevitable result will be to create absurdities.

76. Senegal has thus referred, among other matters, to Guinea-Bissau's practice in petroleum matters, in which it discerns two successive phases. During the first phase (1973-1977), the new State remained silent, and that silence is interpreted by Senegal as an acquiescence in the conduct of the former Administering Power. That argument has already been refuted, but it must also be pointed out that the interpretation of silence for legal purposes is hazardous and that, in the case of practice relating to a boundary treaty, that silence seems to me insufficient. During the second phase, Senegal considers that the respect shown by Guinea-Bissau for the 240° line in petroleum contracts (Petrominas Agreement of 9 February 1984) is a confirmatory practice.

That argument, which disregards the principle of good faith required of a State, so as to respect the disputed area pending the settlement of the dispute, has also already been answered.

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77. Having concluded this analysis, it seems to me that the Franco-Portuguese exchange of letters of 26 April 1960 is a treaty in respect of which Guinea-Bissau has not expressed its consent to be bound. It follows, first, that it cannot be invoked against it as a "treaty". Secondly, it seems to me that as a treaty which establishes a "maritime boundary" it cannot be taken to be governed by the uti possidetis juris principle, and therefore cannot be the subject of an automatic and compulsory succession by Guinea-Bissau, constituting an exception to the principles of State sovereignty, free consent to be bound by a treaty, and the relative effects of treaties.

78. Having thus reached the conclusion that the Franco-Portuguese exchange of letters of 1960 is not opposable to Guinea-Bissau, and cannot therefore have the force of law between it and Senegal for the delimitation of their maritime boundary, I must now proceed to that delimitation ex novo.

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79. The first question which arises is that of the applicable law for carrying out that operation. Since the 1960 Agreement is not opposable to Guinea-Bissau, neither that Agreement nor the legal sources to which it refers are relevant in the matter. Consequently, and in particular, no account can be taken of the

"principles contained in the report of the Commission on Maritime Law of the United Nations and the texts of Articles 1, 2 and 4 of the Convention on the Territorial Sea and the Contiguous Zone concluded at the Conference on the Law of the Sea held at Geneva in 1958⁹".

That passage designated the law applied for the conclusion of the 1960 Agreement and not the law applicable to the present dispute which is now unrelated to that Agreement. The rejection of the 1960 Agreement entails the rejection of the law which governed its conclusion¹⁰. In any case, the Agreement could not relate to the

⁹Minutes of the conversations of 10 September 1958, prepared by the Portuguese Minister for Foreign Affairs, point II, paragraph A.

¹⁰It will no doubt be observed that the law referred to by the two contracting Parties to the 1960 Agreement is constituted not by all the 1958 Geneva Conventions, but solely by the Convention on the Territorial Sea and the Contiguous Zone, a fact which would confirm that the Parties not only did not have in mind the exclusive economic zone, unknown at the time, but wished at the outset to delimit by treaty solely the territorial sea and the contiguous zone.

exclusive economic zone which was unknown at the time. Moreover, Senegal, which ratified the 1958 Geneva Conventions, has first denounced, on 9 June 1971, the above-mentioned Convention on the Territorial Sea and the Contiguous Zone, and subsequently, on 1 March 1976 the Convention on the Continental Shelf, while Guinea-Bissau has never acceded to any of those conventions, so that both Parties to the present dispute are excluded from this international treaty law.

80. As for the Montego Bay Convention of 10 December 1982 on the Law of the Sea, it has been ratified by both Guinea-Bissau and Senegal but it has not yet entered into force. It is, however, clear that this fact does not exclude the application to them of that Convention. It is effective for them, not as a body of international treaty rules (since these have not yet entered into force), but as a body of rules accepted by them. In the present case, the two Parties are of course not in Agreement, and challenge each other's right to invoke one or other rule, or to claim exemption from it. Nevertheless, the act of ratification of the Convention by each of the two Parties means that each of them is prepared to apply it to any other party which accepts to do the same.

Ratification represents a final and definitive commitment which, in all good faith, makes it incumbent upon the two States to consider themselves bound with respect to each other by the Convention.

81. In order to cut short any discussion on that point, however, it must be pointed out that Senegal and Guinea-Bissau have requested this Tribunal to decide the present dispute "in accordance with the norms of international law". This obviously warrants taking into account customary rules and all that has become custom in the international treaty law of the sea, both that of 1958 and that of 1982, and this regardless of the particular position or specific legal status of each party with respect to one or other convention. As long ago as 30 June 1977 in the Arbitration between the United Kingdom of Great Britain and Northern Ireland and the French Republic on the Delimitation of the Continental Shelf, the Court of Arbitration declared in its Decision of that date that it should "take due account of the evolution of the law of the sea" [UNRIAA, Vol. XVIII, p. 37, para. 48]; and the International Court of Justice, in the case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya), considered that it "would have had proprio motu to take account of the progress made by the Conference even if the Parties had not alluded to it in their Special Agreement" (which had in fact requested the Court to take it into account). International judicial and arbitration bodies have thus taken into account proprio motu the customary rules of the law of the sea in its "evolution" through the "progress" of the Conference.

A fortiori must account be taken of the definitive text, which is the outcome of that "progress", and gives shape to that evolution, whenever the text reflects a customary rule.

82. It follows that there is no need to pronounce upon questions raised by one or other of the Parties which have, from that standpoint, become secondary. It thus appears superfluous to examine the question whether or not there is a right of unilateral denunciation by a State of a multilateral treaty where the treaty itself has made no provision for such denunciation, as is the case of the 1958 Geneva Conventions.

83. In conclusion, since the Tribunal has been requested to decide in accordance with the norms of international law, the applicable law is indeed customary international law as applied, interpreted and developed by judicial and arbitral decisions. Ultimately, both Parties to the present dispute are on the whole in agreement as to the applicable law, for one of them considers that it amounts to the "search for an equitable solution by means of equitable principles, equidistance being one method among many others to arrive at such a solution" (Counter-Memorial of Senegal, para. 330) and the other Party fully agrees with that statement (Reply by Guinea-Bissau, p. 275).

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84. The area in dispute must be determined as simply as possible.

It seems to me quite naturally marked out by the claims of the Parties embodied in their respective submissions: to the south, the limit is the line drawn at 240° starting from the Cape Roxo lighthouse and taken from the Franco/Portuguese exchange of letters of 26 April 1960, as claimed by the Republic of Senegal; to the north, the limit is a line starting from Cape Roxo running in the direction of the parallel of 270°, as the Republic of Guinea-Bissau appears to be claiming. It is within this triangle representing the area in dispute that the line separating the respective maritime domains of the two Parties will have to be drawn.

85. The area in dispute is that lying between the lines at azimuths 270° and 240° which mark the maximum claims by the two Parties, starting from Cape Roxo¹¹. The dividing line which I have to draw will thus be

¹¹Senegal's claims are well defined: the line drawn at 240° laid down by the 1960 Franco/Portuguese Agreement. Those of Guinea-Bissau are necessarily undetermined, since it demands an ex novo delimitation and it is the Tribunal which it expects to determine a line. Nevertheless, Guinea-Bissau's conception of an equitable result for the delimitation has led it to propose to the Tribunal figures which, as the arguments proceeded, lay within a range between 262° and 270° without ever reaching the latter maximum figure, which corresponds to a parallel. I take it here as the extreme limit, by way of guideline.

necessarily situated within the angle formed by those two lines: azimuths 270° and 240°. But it may then seem strange and even inequitable for the position of the line to be thus enclosed in advance within a triangle defined by the Parties, i.e., that it should be "predetermined" when I am invited to proceed to an ex novo delimitation the result of which cannot be known either to the Parties or to myself even before the equitable principles have been applied to the relevant circumstances of the case. This approach would seem to amount to guiding the arbitrators in their choice of line, or dictating their solution, and such limitation of their freedom of judgment and assessment would be incompatible with the function of adjudication. If a line "produced" by the application of equitable principles of the modern law of the sea were to lie either short of 240° or beyond 270°, that result would be embarrassing both for the arbitrators and for the Parties. A conflict would then ensue between the requirements of equity, which in this case would demand a line outside that 240°/270° angle, and the respective claims of the Parties, beyond which the arbitrators cannot go without infringing the ultra petita principle. In this situation it is necessary not to lose sight of the fact that an arbitrator is bound by the terms of the arbitration agreement and of the submissions of the parties. It is these which formulate and determine his mission, without

which there can be neither equitable delimitation nor indeed any kind of delimitation.

86. Nevertheless, before considering whether the conflict envisaged in the embarrassing hypothetical case mentioned above can be resolved and if so how, it is necessary to determine whether such a conflict can actually occur in reality. For each of the two Parties considers that its own solution is equitable, either on the basis of the 1960 Agreement, or through the application of appropriate principles and methods. It is therefore highly reasonable to assume that the equitable solution to be arrived at by the arbitrators in total independence of judgment will necessarily lie somewhere between the extreme claims of the two Parties and not elsewhere. The two Parties have worked before the Tribunal under the critical and vigilant observation of each other. It is reasonable to believe that they have marked out all the possible courses open to the arbitrators. The fact nevertheless remains that the judge's or arbitrator's scope of appreciation of the equitable character of a solution is in fact limited by the will of the Parties themselves.

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87. Of course, the area in dispute to which I must confine my examination does not at all coincide with the much larger body of maritime domains of the two Parties. That of Guinea-Bissau extends between a line as yet undetermined and situated somewhere in the disputed area and a second line to coincide with azimuth 236° and starting from the terminus of the land frontier between Guinea-Bissau and Guinea (frontier drawn by the Arbitral Award of 14 February 1985).

88. As for the maritime domain of Senegal, it has the peculiarity of consisting of two quite distinct spaces, one situated short of the maritime boundary to the south of Gambia and representing all or part of the disputed zone according to the Award of this Tribunal and the other corresponding to another area stretching beyond the maritime boundary to the north of Gambia and extending until the as yet undetermined maritime boundary between Senegal and Mauritania¹².

¹²Senegal maintains that it has established the maritime boundary separating the two States by a treaty with Mauritania. The document produced by Senegal to the Tribunal, apart from being a "new" document from the procedural point of view and being in places illegible, is in reality merely the minutes of a ministerial meeting held in January 1971 at Saint-Louis du Sénégal and continued at Nouakchott. In section VI of these minutes, dealing with the "determination and the delimitation of the maritime boundary" one finds: "The maritime boundary shall be determined by the perpendicular to the coast of the Atlantic Ocean starting from the marker defined above". The marker in question is the one provided for by the French Decree of 8 December 19.. (33 or 35?, figures illegible) which had to be constructed on the site of the ruins of the "G.. House" (name illegible). It must therefore be pointed out:

This situation of Senegal with two quite distinct maritime domains separated by the domain of another State is quite exceptional in the world, although not unique. In the Caribbean Sea, the maritime domain of the Netherlands (in respect of the Islands of Aruba, Curaçao and Bonaire) bisects that of Venezuela as well as that of the Dominican Republic; a similar situation can be observed between the French West Indies and the Dominican Republic; in the Arab-Persian Gulf, the maritime domain of the Emirate of Ajman bisects that of the Emirate of Sharja; in the Atlantic Ocean, the Portuguese maritime domain divides into two that of Spain; in the Mediterranean, the maritime domain of the Principality of Monaco interrupts that of France; the same is true of all enclaves such as Hong Kong, Singapore, Gibraltar or Ceuta. It is indisputable, however, that the case of Senegal is undoubtedly the most classic and the most striking, because the maritime boundaries of Gambia consist of two parallel lines which cut neatly through the maritime spaces of Senegal.

12(continued)

- (i) that the document is not a treaty;
- (ii) that these mere (illegible) minutes are not even signed and may well have constituted simply a draft for a negotiation which did not succeed;
- (iii) that in any case the document contains a paragraph 4 specifying that "after the approval of these conclusions, the two Governments shall appoint a commission of experts which will give concrete shape on the site to the proposed course, at a date the choice of which is left to the initiative of the Government of Senegal"; and
- (iv) that Senegal has not adduced any proof of the "approval" of that "proposed" course by the two Governments.

89. In contradiction with these facts, Senegal has argued that its maritime territory constitutes a unity and the maritime domain of Gambia an enclave, apparently in the first place in order to make it more acceptable for the Tribunal to take into account the whole length of the Senegalese coastline and, in the second place, in order to give greater support to the equitable character of the line drawn at 240° on the basis of the relationship between the length of the coastlines and the maritime areas. It has thus maintained that "the Gambian economic zone is a complete enclave in that of Senegal and clearly ... the economic zone of Senegal is a continuous one and (...) the presence of Gambia does not produce any interruption that cannot be circumvented" (Reply of Guinea-Bissau, p. 329) (PV/12, p. 211).

90. This approach seems to me unfounded. The maritime space which prolongs that of Gambia seaward beyond the 200-mile limit cannot be attributed to Senegal so as to enable it to link its two maritime domains to the north and south of Gambia. If Senegal is in fact referring to the exclusive economic zone, the space in question lying to seaward beyond the 200 miles does not belong either to Gambia or to Senegal; it is either part of the high seas or of the economic zone of the opposite State, namely Cape Verde, since the width of the exclusive economic zone cannot exceed 200 miles. And if the reference is to the continental shelf, that same space situated beyond 200 miles in prolongation of the

Gambian domain cannot belong to Senegal either. It would either belong to Gambia if its continental shelf can geologically extend beyond 200 miles (assuming of course that the rights of the State opposite, namely Cape Verde, permit it), or it would belong to the international sea-bed area which constitutes the common heritage of mankind. Accordingly, whether it is the exclusive economic zone or the continental shelf which is in question, it is not apparent what basis there could be for a legal title for Senegal. Thus the Gambian maritime space represents a complete barrier which divides the Senegalese maritime domain into two parts.

91. In any case, even if Senegal's maritime space were continuous, this would not be a material circumstance for taking into account the whole length of the Senegalese coastline for the solution of the present dispute. As I shall explain later, the appropriate course is to take account only of the relevant coastline in the case under consideration, and in the present case this is the coastline of Casamance. Moreover, in order to verify a posteriori the equitable character of the result obtained, it is not necessary to refer to the total area of the two maritime spaces of Senegal north and south of that of Gambia. The area of the southern area is the only relevant one for that purpose, for the requirements of equity demand only that one kilometre of coast of Senegal

should have approximately the same power to generate continental shelf area as a similar kilometre of coast of Guinea-Bissau.

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92. The determination in paragraphs 79 to 83 of the applicable law provides, in the matter of maritime delimitation, only a few basic principles aimed at an essential purpose, namely "to achieve an equitable solution" (Arts. 74 and 83 of the Montego Bay Convention). This is what the 1977 Court of Arbitration between France and the United Kingdom, and later the Chamber of the International Court of Justice in the case concerning the Gulf of Maine termed the "fundamental norm". The applicable rules are those which make it possible to consider that certain portions of the sea-bed adjacent to the coasts of a State form part of the continental shelf of that State (rules governing legal title), and those which, in the presence of competing legal titles put forward by neighbouring States, make it possible to effect a delimitation between those States (rules of delimitation proper). The factors to be taken into consideration to carry out that delimitation are no longer described expressly as "equitable", since what is involved is not an intrinsic quality but a character which is verified in a given context. The adjective "equitable" thus appears to be reserved for the result, so

much so that the view has been expressed that equity has ceased to be an element of the means, to become an element of the result.

93. This development has been the subject of severe criticism in legal writings, curiously enough more often addressed to judges or arbitrators than to the legislator, although it is he who is really responsible for it. Regret has been expressed that "the gains represented by the legal edifice of 1958, the 1969 Judgment and the 1977 Decision have been destroyed by ... 'the use of an empty formula'¹³". Elsewhere reference has been made to the "legal impressionism" attributed to the Court in the case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya)¹⁴. The intuitive and arbitrary character of its Judgments has at times been deplored¹⁵. But it is the international

¹³Dissenting opinion of Judge Gros in the case concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area, I.C.J. Reports 1984 p. 365, para. 9.

¹⁴Decaux, in Annuaire français de droit international, 1982, p. 358; Elizabeth Zoller, "Recherche sur les méthodes de délimitation du plateau continental", in Revue générale de droit international public, 1982, p. 655.

¹⁵Dissenting opinion of Judge Koretsky, in North Sea Continental Shelf cases, I.C.J. Reports 1969, p. 166; dissenting opinion of Judge Gros in the case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya), I.C.J. Reports 1982, pp. 150, 152 and 156 and in the case concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area, I.C.J. Reports 1984, pp. 377, 379 and 382; dissenting opinion of Judge Oda [and of Judge Schwebel (sic)], I.C.J. Reports 1982, pp. 161, 181 and 183; Elizabeth Zoller, op. cit., pp. 677-678; Eric David "La sentence arbitrale du 14 février 1985 sur la délimitation de la frontière maritime Guinée - Guinée-Bissau", in Annuaire français de droit international, 1985, p. 365; Queneudec, "L'affaire du plateau continental entre la France et le Royaume-Uni", in Revue générale de droit international public, 1979, pp. 74-75.

legislators themselves who have conferred upon the judge and the arbitrator such latitude of judgment, by providing him, as a tool for the purpose, with this norm which hardly deserves the name of "fundamental" norm, in that it is almost empty of content. As one author points out, "la liberté d'appréciation dont jouissent les juges reflète très fidèlement leur situation d'un droit dont les tensions et les mouvements contradictoires qui le parcourent en tous sens débouchent sur des compromis où la souplesse confine parfois à la vacuité¹⁶". [The freedom of assessment enjoyed by the judges reflects very closely their position in a law whose tensions and contradictory movements in all directions lead to compromises where flexibility sometimes borders on inanity.] To this comparative inanity of the norm must be added the fluidity of the concept of equity, and even the impossibility of apprehending it, which led me, together with President Jiménez de Aréchaga and President José María Ruda to defend the Court and to urge learned writers not to be surprised at a certain "praetorian subjectivism" which the "finest legal dissertations on equity will never succeed in completely eliminating ...¹⁷".

94. Consequently, I have all the less hesitation in expressing regret at the International Court of Justice's conception of the "fundamental norm", which, already emptied of content by the legislator,

¹⁶Eric David, *op.cit.*, p. 365.

¹⁷Separate opinion of Judges Ruda, Bedjaoui and Jiménez de Aréchaga, in the case concerning Continental Shelf (Libyan Arab Jamahiriya/Malta), I.C.J. Reports 1985, p. 90.

has been further eviscerated, and to no purpose, by the Court's case-law. The International Court of Justice took a stand on this question in the case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya). It considered that the formula according to which "the result of the application of equitable principles must be equitable", is simply a form of words "which is generally used [but] is not entirely satisfactory because it employs the term equitable to characterize both the result to be achieved and the means to be applied to reach this result". The Court then went on to state:

"It is, however, the result which is predominant; the principles are subordinate to the goal. The equitableness of a principle must be assessed in the light of its usefulness for the purpose of arriving at an equitable result. It is not every such principle which is in itself equitable; it may acquire this quality by reference to the equitableness of the solution. The principles to be indicated by the Court have to be selected according to their appropriateness for reaching an equitable result. From this consideration it follows that the term 'equitable principles' cannot be interpreted in the abstract; ... It is a truism to say that the determination must be equitable, rather is the problem above all one of defining the means whereby the delimitation can be carried out in such a way as to be recognized as equitable¹⁸".

95. Although it is true that, as stated by the Court "not every principle is in itself equitable", the statement that the principles (and not only the result) must be equitable is not devoid of meaning. This

¹⁸I.C.J. Reports 1982, para. 70.

means therefore that the judge should discard principles which are not equitable. Thus it is apparently necessary to assert that the new wording of Article 83 of the Montego Bay Convention was not intended to promote recourse to any principle whatever provided the final result was equitable. That Article must in reality be interpreted more strictly, so as to make it compulsory to verify the equitable character both of the principles employed and of the result obtained. Article 83 should thus call for a dual operation and a dual assessment. Only by this means can the law of maritime delimitation be rescued from arbitrariness.

96. Moreover, the passage quoted above from the 1982 Judgment of the Court does not seem to have really taken into account the circumstances in which the expression "equitable principles" was ultimately dropped from the final text of Article 83. That deletion was the result of a compromise whereby the expression "equitable principles" was deleted only in exchange for the removal of the wording "employing, where appropriate, the median or equidistance line" as well.

97. It is true that the 1982 Convention, a monumental work which includes many compromises, has, in the difficult quest for a general consensus, cut down to a minimum the "fundamental norm". This however is no reason for international courts to reduce it still further. In a

first stage, the Court stated in 1982, in the case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) quoted above, that the expression "equitable principles" had to be construed ignoring the adjective "equitable". Two years later, in a second stage, the Court, through its Chamber in 1984, considered that even the "principles" in question did not yet exist (I.C.J. Reports 1984, p. 290, para. 81) and that it would be desirable to describe them more modestly as "criteria" (I.C.J. Reports 1984, p. 292, para. 89). This is a somewhat unfortunate judicial deviation, with the disappearance one after the other of the equitable character of the principles and then of the principles themselves, retaining in the end only the result. A judge or arbitrator cannot be given discretionary powers as to the choice of the principles to be applied. He must bring out principles which are in themselves equitable. The test of equitableness must in consequence be applied at two different levels: that of the means employed and that of the result obtained with those means.

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98. The present case poses a problem of essentially lateral delimitation between two adjacent States, even though part of the coasts of Guinea-Bissau is to some slight extent opposite to the coasts of Senegal. The rules governing the legal title of a State to its

continental shelf are distinct from the norms applicable to an operation of delimitation, and the problem therefore arises of ensuring consistency between those two series of rules, chiefly when proceeding to a frontal delimitation. Since the present case, however, involves a lateral delimitation, that question of consistency is less pressing.

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99. Let us now examine the relevant geographical factors in the present case. They are three in number: the configuration of the coastline, the general direction of the coastline and its length. In order to apprehend these three natural characteristics and to make a comparison which, in certain instances, must be expressed in figures, man is obliged to carry out operations, to make certain constructions and to effect certain measurements, none of which can do more than conform approximately with nature. This is the case with an evaluation in figures of the length of a coastline, islands included; the maritime front is "smoothed out" to arrive at an arithmetic expression of the general direction of the coasts; also, normal or straight baselines are drawn for purposes of delimitation. The evaluations thus furnished by States through their legislation, or through their counsel in the course

of litigation, are for this reason rarely convergent, in a field in which however geography provides irreducible and inescapable physical elements of a reality which should impress itself indisputably upon all. Equity must therefore remain vigilant at this first stage already, in the face of these approximations which are undoubtedly necessary for human understanding, but are sometimes too readily influenced by him in his attempts to correct nature for his benefit.

100. Indeed, the two Parties do not have the same vision of geographical reality; they have two different approaches to a question which is nevertheless a purely factual one. Each has its own viewpoint and has made its own pictures, according to the distance at which the object to be examined is seen. In order to settle these disagreements between one-sided positions, it is my duty not to take too distant a view of the whole western coast of Africa. I cannot, at least at the present stage of identification of and allowance for the relevant geographical factors, look from still further up, as if from a satellite, at the whole map of Africa. This is no more material than to contemplate the Earth from Sirius and to observe, in a detached manner, that it is round and convex. What is relevant is the coast, or more exactly the portion of the coast of each of the two States who have requested the delimitation of their maritime boundary. These coastlines must be envisaged and

considered as they are and in their real configuration, with what they comprise, neither more nor less.

101. For all those reasons, to the greatest possible extent I shall only use the raw data of nature, and I shall resort to human extrapolations only to the strict minimum extent. In particular, I do not wish to make use here of the straight baselines which the two Parties have discussed so learnedly and at such great length.

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102. Adhering to this line of conduct, the equitable search for geographical factors, I observe the following:

in the first place, an overall look at the two countries shows a situation which combines the commonplace and the most visual. Senegal and Guinea-Bissau are two adjacent countries whose geographical position with respect to each other creates a relationship of adjacency between them and therefore calls for a lateral delimitation.

One of these adjacent States, however, namely Senegal, has four special features:

- (i) its coastline has a "commonplace" configuration, especially in the south, where the coast is strikingly rectilinear;

- (ii) it has opposite to it a third State, Cape Verde, at a distance of less than twice 200 miles;
- (iii) its coastline is interrupted by another third State, Gambia, with which it concluded in 1975 an Agreement on maritime delimitation indicating two parallels as maritime boundaries; and lastly
- (iv) it has not produced any relevant document establishing that a delimitation has taken place with Cape Verde to the west and Mauritania to the north.

The second State party to the present arbitral proceedings, Guinea-Bissau, has for its part three special features:

- (i) it has a maritime front which is not at all commonplace, first because of its particularly indented and broken coastlines and, on the other hand, the presence of a large "bulwark" of islands which give to that front a marked convexity;
- (ii) for these reasons part of its coasts is very partially and very slightly opposite to the coasts of Senegal; and
- (iii) it has obtained, by an Arbitral Award of 14 February 1985, a maritime boundary with Guinea-Conakry constituted by a broken line adopting a direction of 236°.

103. The coastline of Senegal has a configuration which has been smoothed out by nature itself over most of its length. The coast does not have a rugged outline. It does not break out into islands, islets

and rocks. The relevant portion of that coast to be taken into consideration in the present case is that which is bounded by southern Gambia. This approach seems to be entirely justified at this first stage, when the microdimensional method must prevail, taking into account the length of the relevant coasts, namely those which, in all equity, have the power to generate areas of continental shelf without the risk of creating enclaves, buffers or screens for other stretches of coast, or a too little justified divergence. From this point of view, the Senegalese coast of Casamance seems to me to constitute equitably the "relevant" coastline for the purposes of the present delimitation. This relevant coastline of Casamance is practically rectilinear and "smooth" with one exception, that of the coast between Cape Roxo and Cape Skirring, which in any case is only 5 miles long. Nature comes here to the rescue of man, avoiding the need to resort to hazardous extrapolations to determine either the general direction of that relevant coast or its length. Senegal has been endowed on that side by nature with a coastline which is neither convex nor concave but actually rectilinear, and running virtually in a general north-south direction, at approximately azimuth 358°, according to the statement of an independent expert who estimates its length at 44 miles.

104. In all delimitation operations, whether frontal or lateral, international judicial opinion generally takes into consideration only the length of "relevant" coastlines. It sets aside those portions of the geographical coast which are extraneous to the delimitation operation to be carried out¹⁹.

¹⁹In actual fact, there are international judicial precedents for a whole spectrum of solutions, ranging from those which take into account only a portion of the coastline of each party to those which allow for the length of third States (neighbouring States), not forgetting those which take into account the totality of the coastlines of the two Parties to the dispute. The last two solutions, however, concern particular cases; the only solution which seems to me to have a firm permanent case law behind it is the resort to the concept of a portion of the coastline of the two States in dispute which is described as "relevant". The Arbitration Tribunal in the Guinea/Guinea-Bissau case took into account the whole length of the coastline of the two Parties from Cape Roxo to the Sallatouk Point because the Parties had based their arguments on the coastline as thus understood (para. 92 of the Award of 14 February 1985). That same Arbitration Tribunal went even further when it allowed for the length of the coastlines of neighbouring States because of its concern to distribute with utmost equity the "divergence" factor; it framed the concept of "long coastline" which it contrasted with that of "short coastline". It thus ignored the viewpoint of Judge Koretsky according to which "All 'macrogeographical' considerations are entirely irrelevant, except in the improbable framework of a desire to redraw the political map of one or more regions of the world." (North Sea Continental Shelf cases, I.C.J. Reports 1969, p. 162.) To me, however, it seems legitimate to resort, so far as may be needed, to macrogeography, but only a posteriori and merely in order to verify the equitable character of the result obtained by the microgeography of the "relevant" coastlines and only when the circumstances lend themselves to it. It is only under those conditions that this dual successive approach would be valid.

In many other cases, it was the logical notion of the "relevant" coasts which has been applied by the international courts. It will suffice to mention the case concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta), (I.C.J. Reports 1985) or again that of the Continental Shelf (Tunisia/Libyan Arab Jamahiriya), (I.C.J. Reports 1982, paras. 131 and 132).

105. I shall revert further on at greater length to this question when it comes to verifying the equitable character of a delimitation by taking into account the relationship of proportionality between the lengths of coastline and the maritime areas attributed. For the time being, I shall confine myself to the following remarks. In the case concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta), counsel for Malta had expounded a doctrine described as that of "radial projection" (or multidirectional projection) from the coasts of Malta so as to take into account, in the case in question, the major part of the length of the coasts of Malta as compared to the more extensive coasts of Libya. The Court did not hesitate to set aside that doctrine of projection in all directions from the coasts and took into account only the portions of the Maltese coasts which were strictly opposite those of Libya. It preferred the doctrine of frontal projection to that of multidirectional projection. The same is true in the case of a lateral delimitation concerning two adjacent States, when the Court takes into account the length of only those portions of the adjacent coasts which it considers "relevant", i.e., necessary for the delimitation operation. A geographical relationship between the coasts of two States cannot give rise to a legal relationship capable of creating maritime spaces unless that geographical relationship is a possible one, which is only the case if it is established between portions of the coast which are appropriate or relevant. In a delimitation between France and Italy or Spain, a

judge would not take into consideration the length of all the French coasts, including those of the Channel and the Atlantic. The latter coasts have no geographical relationship with the Mediterranean coasts of Italy or Spain capable of producing legal effects. They are unrelated to each other. Moreover, the judge would not even take into consideration the whole length of the French Mediterranean coast, but no doubt only the length of the coasts of the Golfe du Lion for a delimitation with Spain and that of the coasts of the Gulf of Genoa for a delimitation with Italy.

106. Moreover, in the present case, the delimitation between Gambia and Senegal creates a very special legal situation, already described above, which leads to the existence of two distinct maritime spaces appertaining to Senegal. Only the Senegalese coastline of Casamance which generates a maritime space and continental shelf in the south is relevant to the present case. The delimitation between Senegal and Gambia is a circumstance productive of an interruption in the Senegalese coastline as a whole which a court cannot but take into account. No relationship can be established between the Senegalese coast to the north of Gambia and the coasts of Guinea-Bissau but only between the latter and the Senegalese coastline, adjacent to it, to the south of Gambia. The interruption in question "cannot be circumvented".

107. Lastly, it should be observed in passing that Senegal's request that the whole length of its coastline be taken into account could not carry conviction when at the same time it proposed to the Tribunal to take into consideration a five-mile long portion between Cape Roxo and Cape Skirring the influence of which in the context of an equidistance line would be felt as far as 200 miles off the coast, thereby nullifying any other influence of the remainder of the Senegalese coastline which it claimed had to be taken into account.

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108. The coastline of Guinea-Bissau, on the other hand, displays to the geographer, the expert and the jurist an originality which is so marked that it cannot go unnoticed. The coastline of Guinea-Bissau, with its large islands, islets, rocks and fragments of land masses, has the indisputable peculiarity of protruding out into the sea. It is a "bulwark" of land presented to the breakers by some gigantic Neptune. That body of islands is of the same material as the land mass and constitutes a part of the coastline which in many places is under water. The sea has invaded the land, leaving parts of that coastline visible in the form of islands. The presence of islands constitutes a most striking feature

of the country: it is precisely the identifying characteristic of Guinea-Bissau. The capital of that State is itself situated on an island, and the very name of the country is taken from an island. The insular character of part of Guinea-Bissau, including the capital, is indeed a relevant circumstance, to a degree rarely encountered. Moreover, there exists a close relationship between the sea and the land, and such close intimacy between the two, that one can no longer tell an arm of the sea from an arm of the land. Saint-John Perse's description of the Giens peninsula as a privileged spot where "la terre accompagne l'homme à la mer" ("the land accompanies man to the sea") applies perfectly to Guinea-Bissau.

109. If in imagination one were to visualize that territory uncovered by the waters in which it is now submerged, the land would be seen to continue to slope very gently at 0.4 per cent, i.e., 4 metres per kilometre, up to a distance of nearly 100 kilometres seaward. If, still in imagination, we remove that thin layer of water, we will see that the country has a prolongation which fully deserves to be described as "natural". The maritime front of Guinea-Bissau does not consist of distant islands isolated from the land and far apart from each other. The real position, on the contrary, is that those islands constitute a projection of the land territory, articulated with the mass of that territory. All of them together form the territorial base that emerged after the flooding of the continent. The waters around them are very

shallow: less than 20 metres for some of them and less than 10 metres for most. Some of the islands, like Bolama, which are close to the continent, can be reached by animals at low tide, as pointed out by President Grant of the United States in his Arbitral Award of 21 April 1870²⁰.

110. This effort of the imagination to remove the thin layer of water in order to discover that spectacle of nature is in fact not really necessary: nature does it every day. The phenomenon of the tides displays this extraordinary intimacy between the land and the sea, because some 8,000 square kilometres, i.e., one-quarter of the land territory of Guinea-Bissau, is every day uncovered and covered by the sea with the incessant ebb and flow of the tides. It is rare to find a comparable country one-quarter of whose territory disappears and reappears every day. There can be no more relevant circumstance than that bulwark of islands of "semi-insular" Guinea.

111. It is therefore not possible to ignore those islands, which constitute the real coastline of Guinea-Bissau. Since the maritime front consists of all the land bordering on the sea and the coastline is the

²⁰Moore, History and Digest of International Arbitrations to which the United States has been a Party, Washington, 1898, Vol. II, p. 1921.

limit of the land or the points of junction or contact of the land with the sea, then unquestionably what constitutes the coastline of Guinea-Bissau is that dense bulwark consisting of a multitude of islands, in the form of a gigantic goose-foot or of hippopotami drowsing in the water. It is not an archipelagic State within the meaning of the Montego Bay Convention or in the ordinary geographical sense, but it is undoubtedly a semi-insular State, the islands of which are of great importance for the determination of the curvature of the maritime front of the country, of the general direction of that front and of the length of its coastline.

112. Consequently, the geographical facts thus examined confer - and this could not be otherwise - on the maritime front of Guinea-Bissau an indisputably convex general shape. The length of the Guinean coastline, taking into account the islands and using a weighted method, is, in the view of an independent expert, 154 miles.

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113. At the same time, the natural data to be taken normally into account in delimitation are not exclusively those revealed by the coastal geography of the two Parties to the present dispute. The question arises whether the geological and geomorphological data must also be considered,

as being relevant elements for purposes of delimitation. My reply to that question, which will be given in two stages: first, I shall draw on those theoretical considerations which, following a rapid evolution, have moved away from solutions reached by decodifying the mysterious folding and unfolding of geological and geomorphological sites; and secondly, I shall refer to purely practical considerations which, in the present case, show that these geological and other factors are of very limited relevance and, all in all, of no assistance in the search for a solution.

114. The idea of "natural boundaries" formed by mountains, waterways or various accidents of nature, has never been able to commend itself to States for purposes of delimitation of their land frontiers, although these limits are visible to the naked eye. Legal science is unlikely to accept for maritime spaces what it rejects for land spaces and to confer legal standing on those "natural boundaries" constituted by an important and significant geological feature when that boundary is not even visible to the naked eye. Having always shunned land relief despite the fact that it is visible, man cannot but shun still more underwater relief which is out of his sight.

115. This is perhaps the reason why the notion of "natural prolongation" has offered so weak a resistance to the advance of

the concept of "distance" which tends to eclipse geological and geomorphological factors. This is also the reason why lawyers have given a legal definition of the continental shelf which is quite unrelated to that of geologists and geographers. This also explains why geological and geomorphological factors have been of practically no importance at all in the treaty practice of States²¹. Lastly, this is the reason why international case-law has not taken into account either the "Norwegian Trough" (North Sea Continental Shelf cases, I.C.J. Reports 1969, paras, 4 and 45), or the "Hurd Deep" (Court of Arbitration between the United Kingdom and France on the Delimitation of the Continental Shelf, 1977, United Nations Reports of International Arbitral Awards, Vol. XVIII, p. 63, para. 107), or the "Tripolitanian Furrow" (Continental Shelf (Tunisia/Libyan Arab Jamahiriya), I.C.J. Reports 1982, para. 66), or the "Northeast Channel" (Delimitation of the Maritime Boundary in the Gulf of Maine Area, I.C.J. Reports 1984, paras. 51 and 56) or, lastly, the "rift zone" (Continental Shelf (Libyan Arab Jamahiriya/Malta), I.C.J. Reports 1985, para. 25).

116. At the same time, it must be pointed out that, at the present stage of the evolution of the law of the sea and of the relevant international case-law, it would undoubtedly be hazardous to assert that geological and geomorphological factors have completely lost all

²¹The delimitation Agreement between Colombia and the Dominican Republic did not take into account the Aruba trough although it is 4,600 metres deep; the prodigious trough of the Cayman Islands (2,900 metres deep, 1,700 metres in length and 100 kilometres in width) does not appear to have counted for much in the Cuba-Haiti Agreement.

relevance and that they generate no legal consequences. The rulings of the International Court of Justice in the North Sea Continental Shelf cases in 1969 and of the Court of Arbitration in the Arbitration between the United Kingdom of Great Britain and Northern Ireland and the French Republic on the Delimitation of the Continental Shelf of 1977 are perhaps not altogether clear on that point. But in the case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya), I.C.J. Reports 1982, paragraph 80, and the case concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area, I.C.J. Reports 1984, paragraph 51), the Court in the first case, and a Chamber of the Court in the second, clearly indicated that if the "Tripolitanian Furrow" in the first case and the "Northeast Channel" in the second case had clearly marked an interruption in continuity, they would have considered that geological factor as relevant. Thus, international jurisprudence has never stated expressly that those geological factors must always and as an absolute rule be set aside, whatever the circumstances. The fact that jurisprudence has not taken geology into account would appear to be explained, not by the irrelevance of that factor in itself, but by the inadequacy of the scientific evidence put forward in one or other particular case. It is the absence of a given relevant geological phenomenon, or the doubt whether it is present, which has led jurisprudence not to take geology into account.

117. In the case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya), the International Court of Justice even went so far as to declare that it

"does not necessarily exclude the possibility that certain geomorphological configurations of the sea-bed, which do not amount to such an interruption of the natural prolongation of

one Party with regard to that of the other, may be taken into account for the delimitation, as relevant circumstances characterizing the area" (I.C.J. Reports 1982, p. 58, para. 68).

118. In reality, the Court, whose function is to apply the law and not to create it, has not itself decreed the eclipse of geological factors, which is due rather to the action of international legislation. The fate of geological factors is necessarily linked to that of the concept of natural prolongation. The Montego Bay Convention of 10 December 1982 recognized the legal title of the coastal State over its continental shelf by the operation of a concept of "distance" as a complement to, and sometimes a substitute for, that of "natural prolongation". In fact, the 1982 Convention, without at all neglecting the concept of "natural prolongation" (its Article 76 refers to it in its very first paragraph), has nonetheless introduced in a spectacular manner another criterion, namely that of distance.

119. This comparative effacement of the concept of natural prolongation in relation to that of distance could not but result in the eclipse of geological and morphological considerations. The International Court of Justice which, in its 1969 Judgment in the North Sea Continental Shelf cases, stressed the concept of natural

prolongation, has itself held it to be an essentially relative principle. The fact that the legal notion of the continental shelf and the physical reality of that shelf do not coincide, the absence of any imperative and necessary link between the basis of the coastal State's title to its continental shelf and the principles of delimitation, the fact that the Court has the duty to cause equity to prevail as a result, rather than the principle of natural prolongation which sometimes does not contribute to it, and lastly the new trends of the law of the sea expressed in Articles 76 and 83 of the Montego Bay Convention, - all these have contributed to this comparative effacement of the institution of natural prolongation and, consequently, of geological and geomorphological factors.

120. I have not observed any fundamental disagreement at the theoretical level between Guinea-Bissau and Senegal regarding either the concept of natural prolongation or the geological and geomorphological factors. The two Parties have more or less minimized or neglected the theoretical considerations and analyses in the jurisprudence referred to above and have thus both been led to resort to geology. They agree on the legitimate character of this reference to underwater physical factors as well as on the place of the concept of natural prolongation (Counter-Memorial, paras. 319 and 322; Reply, pp. 286-287). Each of the Parties, however, has attempted to derive from these physical characteristics of the zone elements favourable to its own thesis. According to Guinea-Bissau, the structure of the sea-bed of the region

and its sediments imprint upon the faults to be found in that region an east-west direction which would justify a line drawn at azimuth 270° as delimitation between the maritime spaces of the two States (Reply, p. 287; PV/5, pp. 153-154). For Senegal, on the other hand, the relief and the geological structures of the sea-bed of the region run in a northeasterly direction (Counter-Memorial, paras. 319 and 322; *ibid.*, paras. 19 to 49 and anns. 7 and 8; Rejoinder, paras. 434-454; PV/11, pp. 153, 154/60, 161 and 251).

121. I am not prepared to follow either of the two Parties on to that ground. First, for the reasons I have indicated above, which demonstrate sufficiently, by means of an analysis of international jurisprudence, the comparative disfavour attaching to the relief and structure of the sea-bed. "Geography yes, geology no." Secondly, because, in the view of the two Parties themselves, the submarine geology of the region shows no exceptional or major features. Guinea-Bissau has admitted that "these faults ... are not important", even though they are "not negligible". The geological and morphological differentiations in the sea-bed opposite Senegal and opposite Guinea-Bissau do not appear sufficient to constitute natural boundaries for their respective maritime domains. It must be remembered also that the present case concerns not only the delimitation of the continental shelf but also the drawing of

a single lateral boundary as the dividing line that establishes the exclusive economic zone, a task for which the geological or morphological structure of the sea-bed is strictly irrelevant. At most, the geological or morphological indicators, however discrete, may constitute supporting elements for verifying a posteriori the equitable character of the delimitation obtained by a combination of other factors.

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122. It is now necessary to devise a method of delimitation capable of obtaining a line, i.e., an intellectual construction which, applied to the relevant factors already identified, will produce an equitable solution. Unlike a rule, a method is by definition not compulsory.

Since proximity concerns the legal nexus existing between the outline of the coastal front of a State and the maritime surfaces generated by it, the traditional method of applying the proximity rule is, quite naturally, to resort to the equidistance method. No point on the line obtained by that method of delimitation may be closer to the coast of one State than to that of the other, throughout the whole length of that line.

But the baselines chosen by the Parties may be fairly decisive in the present case. If one chooses, for example, one of the three baselines of Guinea-Bissau and relates it to the normal low water-line of Senegal, the result, according to Guinea-Bissau, will be not one but three equidistance lines showing a difference of 20,000 square kilometres between the extreme cases (PV/6, p. 183).

123. Furthermore, in the present case, the equidistance method is liable to produce certain "perverse" effects. For example, if one were to calculate distances from the coast of the continent without taking into account the existence of the Bijagos Islands which form a vast archipelago, it would mean ignoring a substantial geographical reality of Guinea-Bissau. On the other hand, if one were to treat as a point on the coast an isolated islet far away from the archipelago, this would involve the drawback of creating a fictitious coastline. If one were to rely on a salient on the coast which is close to the starting point of the delimitation but which diverges from the general direction of the coast, the result would also be to create a very unreal coastline. This is what happens with the headland formed by Cape Skirring, which acts as a buffer in the equidistance mechanism and prevents the line obtained from expressing the whole outline of the coast concealed by it. In this manner only five miles of the coast of Senegal would be taken into account (the distance between Cape Roxo and Cape Skirring), although

the equidistance line is intended to produce its effects as far out as 200 miles. And if one were to take salient points close to each other for purposes of determining the equidistance points, the position of those points would become increasingly uncertain as one moved away from the coast, a situation which is liable to result in considerable margins of error. An equidistance line as far out as 200 miles is liable to be very inequitable if it is predetermined by taking into account points on Cape Skirring and Cape Roxo situated only five miles from one another.

In brief, equidistance, which is not in itself at all inequitable, produces, once a certain distance from the coast is reached (50 to 100 miles), an uncertainty which renders arbitrary the course of the equidistance line, with all the risk of unfairness involved (Reply, p. 304). Since moreover the mechanism used for drawing only takes into account certain critical points on the coastline, curvatures or salients of the coast, it does not ensure equity in the attribution of surfaces.

124. In view of these and other drawbacks of the equidistance method in the present case, Guinea-Bissau has suggested the application of other modes of delimitation, one of them being that of the "median curve [courbe médiane]". This has been defined as a series of points at sea situated at the same curvilinear distance from the frontier point as two associated points on each coastline and situated at an equal distance from those two points (Memorial, p. 225). This method is claimed to have

the merit of "overcoming the opacity of the buffer points", of remaining "unaffected by accidental features of the coastline whatever they may be" and of "taking into account the whole coastline of each of the two neighbouring States" (*ibid.*). This method would produce, according to Guinea-Bissau, a line drawn at azimuth 264°.

125. Senegal considers that this method may prove useful in very complex situations but is not suited to simple configurations or to those which comport straight baselines. It describes it as "perfectly arbitrary" since its result will depend on the distance chosen between, on the one hand, the terminus of the land frontier (Cape Roxo) and, on the other hand, the points on which the baselines are constructed. The result of that method would thus be dependent upon the baseline used by Guinea-Bissau and disputed by Senegal. The latter adds that the median curve proposed by Guinea-Bissau would result in

"a complete frontier constructed for the greater part on two geographical elements only: on the side of Senegal, a portion of the coast very close to the southern frontier of Gambia; on the side of Guinea-Bissau, only the Rio Grande Banks. In both cases, there would be a perfect buffer to mask completely the geography of the two countries" (PV/12, p. 184).

In short, Senegal's criticisms of the method are, essentially, first, that it would give a limited effect to the Cape Roxo-Cape Skirring segment and, secondly, that it takes into account in their entirety the straight baselines adopted by Guinea-Bissau on 17 May 1985 connecting Cape Roxo with the Rio Grande Banks (PV/12, p. 213; Counter-Memorial, paras. 447-448; Rejoinder, para. 433).

126. The expert appointed by the Tribunal has analysed the median curve method and its application in the present case. The results of that method appear to depend to a considerable degree on the distances adopted. In other words, the method appears to contain an element of subjectivity. When applied to real coastlines, it can, depending on the intervals selected, benefit one or other of the Parties. Furthermore, where straight lines are involved (straight baselines or general direction of the coast), the use of this method becomes a special case of the application of equidistance which consists of taking the bisector of the angle formed by the lines considered. The proposed method does not eliminate altogether the negative effects that would result from the application of traditional equidistance nor, in the present case, remedy them.

127. Guinea-Bissau proposes a second method, namely that of the "average distance curve [courbe de la distance moyennel]" which it defines as follows: "At each point at sea all the distances are calculated to

every visible point on the coastline and the average of those distances is taken; the curve will consist of the loci of the points of an equal average distance" (Memorial, p. 225). This method would, according to Guinea-Bissau, result in a line drawn at azimuth 265°.

Senegal admits that this method makes it possible to correct two perverse effects of the traditional equidistance method: the first is that in certain cases the whole of a maritime boundary may be determined by a very small number of points on the coast of a particular country, or indeed by only one point; the second is that equidistance can result in attributing to islands a weight which is disproportionate to their importance (Counter-Memorial, para. 366).

128. Senegal recognizes also that the method proposed does not give excessive weight to any point on the coast. It notes, however, that it does not give to those points an equitable value, and this, in its view, leads to unacceptable results. The method would, in particular, penalize States having a long visible coast, and favour States having short coasts. It would also increase the drawbacks of the traditional equidistance method with regard to islands. In fact, if the visible insular coast were to be taken into account, the average distance would be shorter on the side of the State exercising sovereignty over the islands in question and the maritime space masked by the coasts of the islands would be treated as though it were dry-land territory (Counter-Memorial, p. 366).

129. Senegal gives the following more compact summary of its criticisms of the average distance method:

- (i) it favours a State whose visible coastline is less extensive;
- (ii) it favours a State possessing islands situated off its coast.

Furthermore, Guinea-Bissau avails itself not only of the sector of an island visible from a point at sea but also from its invisible sector or its "own shadow" (Reply, pp. 308-309), the result of which is to push northward the points situated at sea at an equal average distance;

- (iii) in its calculation for purposes of proportionality, Guinea-Bissau has taken into account the only relevant coastline of Senegal, namely that of Casamance, but this restriction is omitted for purposes of the application of the average distance method (PV/12, pp. 214 et seq.).

130. In its Reply, Guinea-Bissau has recognized with great candour some of the drawbacks of the average distance method which it proposes:

"Since it partakes of the search for proximity, the average distance curve retains the defects inherent in any introduction of the concept of distance from the coastline, in particular its uncertainties when that distance increases. Accordingly, it has not been proposed to the Tribunal as being capable of constituting in itself a means of delimitation." (Reply, p. 310.)

In view of this declaration and of the disadvantages of this method which have been already pointed out, there is no point in examining here any further whether it might be useful in the present case.

131. Lastly, Guinea-Bissau has proposed a third method of delimitation, namely the somewhat original one of "iso-distance" (Memorial, p. 226). This method is explained as follows:

"According to both natural and legal logic, the coastline does not constitute a frontier but a transition curve between two zones pertaining to the same jurisdiction. The coastline is where the level of the sea stops today; it could have stopped at a higher or lower level, and might do it in a few centuries' time. The coastline is accordingly only one among many curves. The line of the coast is nothing other than a curve at land level zero altitude, i.e., isobath zero, and has no more significance than the other curves at land or underwater level." (PV/6, p. 211.)

Bearing this in mind, "the iso-distance curve can be defined, starting from the limit of territorial waters, as the equidistance line of successive isobaths or as the perpendicular to those isobaths" (PV/6, p. 193). "As the equidistance curve of the successive coastlines which would be uncovered by a gradual withdrawal of the Ocean, iso-distance constitutes a synthesis of the equidistance method and of the present essential characteristics of the continental shelf in its physical sense" (PV/6, p. 194/200). Iso-distance would thus integrate in effect the

two criteria of natural prolongation and distance from the coast (PV/6, p. 201).

132. Since it is thus based on the underwater relief, this technique appears to run counter to the evolution of contemporary international law, marked by the decline of geological and geomorphological factors and in particular of the notion of natural prolongation. This method, however, cannot be rejected solely for that reason. Senegal considers that "its originality is equalled only by the absence of all basis in practice and in case-law" (PV/12, p. 251). Nevertheless, the fact that the method has not been enshrined in the practice of States or in case-law is not decisive, for that is what it is - a method that is still new. Another objection, and one that carries greater weight, is that iso-distance seems capable of "being applied only to geographies that are fairly smooth ... all of whose disturbing elements capable of generating perverse inequitable effects have been previously eliminated by processes which are necessarily alien to the method itself" (PV/12, p. 201), and "which accordingly deprive it of all objectivity" (PV/12, p. 203).

133. This overview of methods of delimitation, equidistance and its improved versions (median curve, average distance curve and iso-distance

curve) suggests that it is impossible to take into account any of them in the present instance.

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134. In the present case, manifestly the most characteristic geographical factor is the presence of a large bulwark of islands in Guinea-Bissau. That country has described itself as semi-insular, or even as amphibious, because of the striking intimacy existing between the land and the sea in Guinea-Bissau. Accordingly, the major problem which arises is that of determining what treatment for these islands can be recommended and produced on the basis of equity. This amounts to evaluating their exact importance in relation to Guinea-Bissau's mainland domain (surface, population, economic activity) and their degree of linkage to it (distance, expanse of land uncovered at low tide, brackish waters). These islands, most of which have been traditionally grouped under the name of "Bijagos Archipelago" (arquipélago dos Bijagós), are in fact a decisive factor, as has already been seen, for assessing the nature of the coastline of Guinea-Bissau and the general configuration of its coasts. Guinea-Bissau would not be what it is without the Bijagos. In the present instance, the presence of the Bijagos Archipelago is a decisive factor both for the purpose of calculating the length of the coasts and for that of establishing the lateral delimitation. Whatever the method or process of delimitation applied, due regard must be had

for this essential feature of the coastal front of Guinea-Bissau constituted by the presence of these islands and their close connection with the continent, a feature which cannot but have a bearing on the establishment of the general direction of Guinea-Bissau's coast.

135. In the Guinea/Guinea-Bissau case, the Tribunal drew a distinction between three categories of islands:

- (i) coastal islands, which are close to the mainland and which are often connected with it at low tide, are "considered as an integral part of the continent";
- (ii) the Bijagos Islands, the furthestmost of which is 37 miles from the continent and the closest 2 miles from it and which are in no case more than 5 miles apart from one another;
- (iii) the islets scattered further to the south among low-tide elevations²².

136. In the present instance, the third category of islands excludes itself automatically. All those existing beyond the large island of Orango towards the south can have no influence on the present delimitation. Only the first two categories of islands will be taken into consideration here. In that respect, the problem however arises of

²²Award of 14 February 1985, para. 95.

how far one must go westward and seaward, and this raises first the question whether to take into account the group named "Baixos do Rio Grande" (Rio Grande Banks, with their drying shoals, their rocks, their other natural elements and their lighthouse), and secondly that of the island of Unhocomo with its extreme southwest point of Anqueiêramedi. Guinea-Bissau has contended that the Rio Grande Banks and the lighthouse must be taken into account, arguing that unless this is done the line drawn at 240° would become inequitable because it would be closer to those Banks than to the Senegalese coast.

137. Both Parties have discussed at great length the "Baixos do Rio Grande", in the process of defending their respective systems of baselines. The law of the sea permits under certain conditions the use of low-tide elevations as supporting points for drawing baselines. According to Article 13 of the Montego Bay Convention, which defines low-tide elevations, the low-water line on such an elevation may be used as the baseline if that elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland, i.e., 12 miles. Now, the distance separating that lighthouse (built on that low-tide elevation) from the island of Caravela, - a coastal island as indicated by the Arbitration Tribunal in the case of the two Guineas - is 11.3 miles.

138. Article 7, paragraph 4, of that same 1982 Convention on the Law of the Sea specifies that low-tide elevations may not be used as end-points for the drawing of straight baselines "unless lighthouses ... have been built on them". Senegal maintains that the straight baselines adopted by Guinea-Bissau under its Act of 17 May 1985 cannot be invoked against it, chiefly ratione temporis, first of all because they were introduced after the Arbitration Agreement of 12 May 1985 whereby Guinea-Bissau and Senegal constituted this Tribunal and referred the case to it, and secondly because they rely on a low-tide elevation which, at the time of their introduction, had no lighthouse or any other similar installation built on it.

139. There is no doubt that the project for building a lighthouse on the Rio Grande Banks goes back to the late fifties, that this project was mentioned during the Franco-Portuguese negotiations of 1959 (reports of Captain de Boavida), and that the lighthouse was finally built by the authorities of Guinea-Bissau in 1984, i.e., before the date of the Arbitration Agreement and before the Act of 17 May 1985 whereby Guinea-Bissau re-defined its baselines. One of the functions of an arbitration agreement is to prevent a party from modifying an existing situation unilaterally for its own benefit. Guinea-Bissau's Act of 17 May 1975 did not, properly speaking, modify the situation to the

benefit of that country by creating a right. That right had been created previously, when in 1984 Guinea-Bissau built the lighthouse, an operation which had been intended, ever since 1959, to permit the banks of the Rio Grande to be taken as a supporting point for a straight baseline. Besides, if the baselines established in 1985 were to be discarded, one would have to fall back on those drawn in 1978, which are still more favourable to Guinea-Bissau.

140. However that may be, and however well founded Guinea-Bissau's position with regard to the shoals of the Rio Grande, it seems to me neither necessary nor advisable to continue to examine the arguments exchanged by the Parties regarding their respective baseline systems. I have stated above my resolve to avoid wherever possible resorting to man-made concepts based on natural data. Baseline systems, which are the product of human artifice, have given rise in many places to thrusts in a seaward direction which learned writers have deplored, and which have been only partly incorporated into the new law of the sea.

141. There remains the problem of the island of Unhocomo which a representative of Senegal has described as the "forward sentinel of the Bijagos archipelago" (PV/12, pp. 205/110). It is quite a small island,

rather far away from the coast, so that there is no very strong reason to take it into consideration.

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142. An indication should now be given of the effect which equity requires to be given to these islands. Disregarding the islands, the general direction of the coasts of Guinea-Bissau may be calculated to be 132° , but this result is not equitable because it does not take into account the islands, and the line for the general direction thus obtained actually goes so far as to exclude Bissau, the capital of the State that is situated on an island, behind which that proposed general direction would pass. An orientation for the general outline of the coast that would take into account the more relevant islands (Caravela at its extreme southwest point of Acudama, Uomo and Orango at its extreme southwest point) would give a general direction of 160° for the coast of Guinea-Bissau.

143. Accordingly if, as indicated above, the islands to the south of the Bijagos archipelago as well as the small island of Unhocomo at the western extremity of that archipelago are disregarded, the general direction of Guinea-Bissau's coastline will be given by a line drawn at azimuth 160° from Cape Roxo to Acudama, which is the westernmost point of the main islands of the archipelago. This simplification makes it

possible to avoid giving an unwarranted importance to the exiguous and desolate island of Unhocomo. As for the general direction of the mainland coast of Guinea-Bissau, it can be represented by a line drawn from Cape Roxo to the coast of Catunco Island situated to the north of Rio Cumbija. This general direction of the coast, as far as the southern extremity of the major elements of the Bijagos Archipelago, is represented, as already indicated, by azimuth 132°.

144. Senegal has maintained that the present trend in State practice and international case-law favours giving only a partial effect to island territory. The Court of Arbitration in the case between France and the United Kingdom on the delimitation of the continental shelf gave only half-effect to the coastal archipelago of the Scilly Isles, which are only 21 miles distant from the British coasts. The International Court of Justice attributed only half-effect to the coastal archipelago of Kerkennah in the case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya), even though that group of islands is only 11 miles away from the mainland coast, from which it is separated by an arm of the sea the depth of which exceeds 4 metres only in certain channels and furrows. Moreover, that archipelago is surrounded by low-water elevations which form around it a belt 9 to 27 kilometres wide (I.C.J. Reports 1982, para. 128). The Chamber of the Court in the case concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area gave only half-effect to

Seal Island situated off the coast of Nova Scotia (I.C.J. Reports 1984, para. 222) and the Court itself gave only quarter-effect to the islands of Malta (case concerning Continental Shelf (Libyan Arab Jamahiriya/Malta), I.C.J. Reports 1985, para. 73).

145. The western front of the archipelago, represented by a line drawn from Acudama point on Caravela Island to Ancumbe point on Orango Island, is, according to the expert appointed by the Tribunal, approximately 33 miles long. This length is on the whole comparable to the relevant coast of Senegal (Casamance) which is 44 miles long, and does not possess any islands. It would not be equitable to give to the western front of the archipelago, stretching from Acudama to Ancumbe, the same importance for the purpose of delimitation as to the continental coast of Senegal. This is why a half-effect should be sufficient.

146. Accordingly, the appropriate course is to draw for that purpose a line which bisects the angle having as its apex Cape Roxo and as one of its sides the general direction of the western front of the Bijagos Archipelago (Roxo-Acudama, 260°), and as its other side the general direction of the mainland coast (Roxo-Catunco, 132°). This produces a line drawn at azimuth 146° , thereby giving half-effect to the islands.

147. The Republic of Senegal has maintained that the Republic of Guinea-Bissau has accepted a line lying at azimuth 140° for the determination of the territorial sea of each of the two States. If this is the case, the delimitation to be effected by the arbitrator for the maritime spaces other than the territorial sea has to take as its starting point a point situated at the outer limit of that territorial sea defined by a line drawn at 240°. An arbitrator cannot of course decide ultra petita. In fact, however, I see no indication anywhere of an acceptance by Guinea-Bissau of azimuth 240° for its territorial sea. In its submissions, which are binding upon it and also upon the Tribunal, it has requested the application of the law of the sea, i.e., the rule of equidistance which, contrary to the 1960 Agreement, gives azimuth 247° for the territorial sea. For the rest, neither in the pleadings of the Republic of Guinea-Bissau nor in its oral argument has azimuth 240° been accepted by it up to 12 miles, either expressly or tacitly. Consequently, the question of ultra petita does not arise. The line to be drawn will accordingly necessarily start from Cape Roxo without taking into account azimuth 240°.

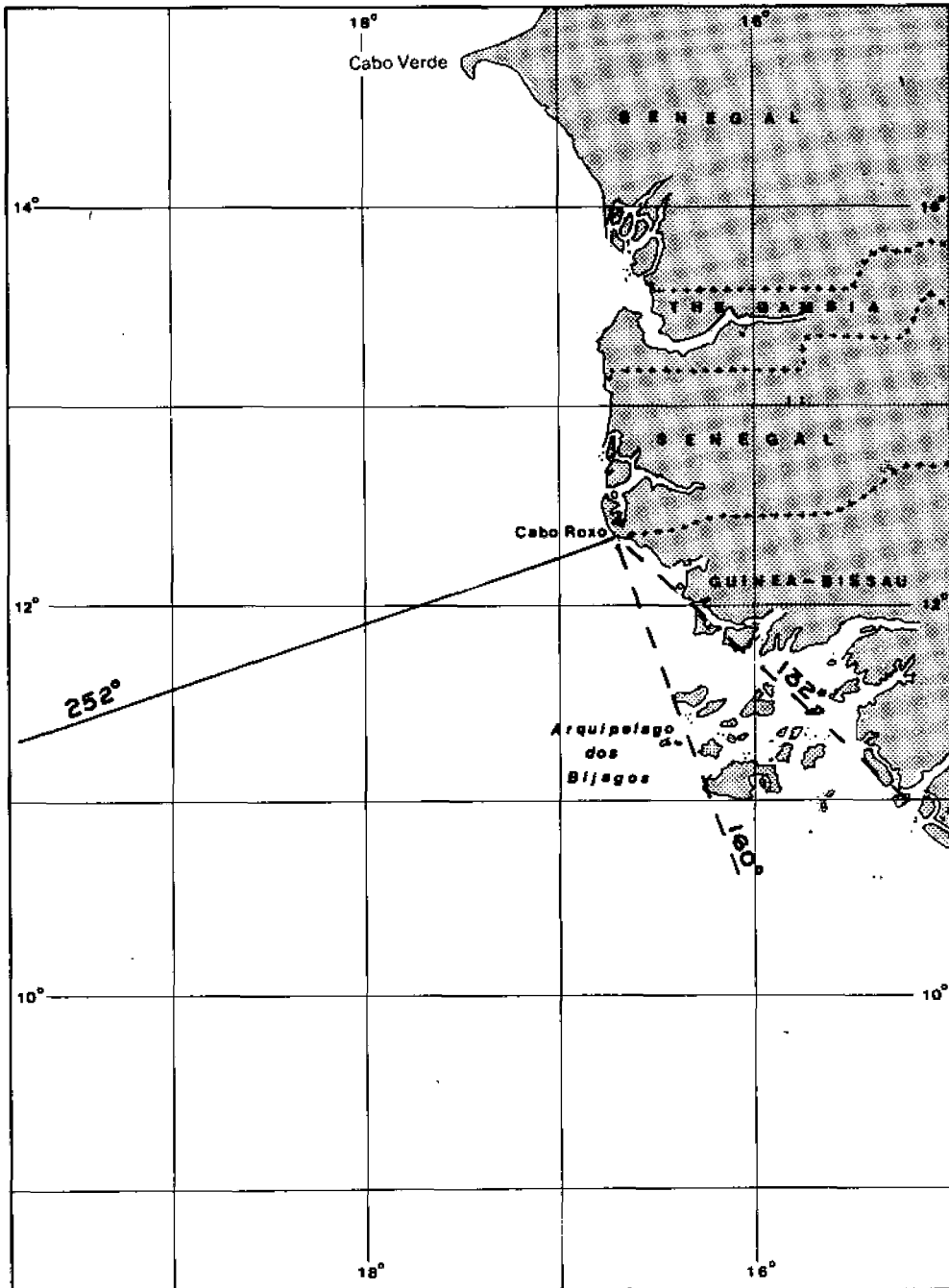
148. It is now possible to draw the line which, in this ex novo delimitation, constitutes the maritime boundary between the Republic of Guinea-Bissau and the Republic of Senegal. The line thus taken will

bisect the angle having as its apex Cape Roxo and as one of its sides the general direction of the maritime front of Guinea-Bissau obtained after giving half effect to its main islands (146°), and as the other side the general direction of the relevant Senegalese coast (358°). This produces a line drawn at azimuth 252°.

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Maritime boundary between
the Republic of Guinea Bissau
and the Republic of Senegal
(252°)

149. The equitableness of the result thus obtained must now be verified. The notion of "length of coasts" is a physical fact the use of which in international case-law has hitherto been confined to employment a posteriori as an element for the purpose of verifying the equitableness of a proposed delimitation, by legally translating this physical fact into a criterion of "proportionality" to be observed between the length of the coasts and the maritime areas generated by them. International courts continue to adopt "proportionality" as a subsidiary criterion or secondary element.

150. I shall also adopt it here as an element for purposes of verification, since no other use would be justified in the present instance. Before doing so, however, I would like to point out that this physical factor should be considered as something more than that, namely as a criterion of delimitation like the rest, especially moreover in a frontal delimitation like the one effected by the International Court of Justice in the case concerning Continental Shelf (Libyan Arab Jamahiriya/Malta). It is of course clear that this factor of proportionality has no place in the basis of the legal title, for the "fundamental norm" of Article 83 of the 1982 Convention nowhere mentions it. The fact is, however, that the fundamental norm barely mentions the other principles, which are nevertheless applied. It does no more than require an equitable result. There are very strong reasons for keeping

that principle because "that element of a reasonable degree of proportionality is indeed required by the fundamental principle of ensuring an equitable delimitation" (Continental Shelf (Tunisia/Libyan Arab Jamahiriya), I.C.J. Reports 1982, p. 75, para. 103). Thus, a powerful reason for doing so can be found in the close links that this principle quite naturally has, with the notion of equity, itself contained in the fundamental norm.

151. There is a logical need to take into account, and not only at the stage of a posteriori testing, the factor of the length of the coasts expressed as a "ratio of proportionality", because it is this ratio which expresses quantitatively the power to generate maritime zones. That power depends, among other things, on the length of the coasts. Since every coastal State has an equal entitlement over maritime spaces, its coasts can be taken to have the same power to generate a domain of maritime jurisdiction. It is in this sense that one can speak here of the principle of the equality of States. As has been stated by the Court, it is the coast, and hence its length, which "is the decisive factor for title to submarine areas adjacent to it" (I.C.J. Reports 1982, para. 73). Clearly, it is not the natural fact of adjacency which creates the legal title to the continental shelf (case concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), I.C.J. Reports 1984, para. 103). The factor which creates that title is in fact the existence of a legal rule

which establishes a logical link between the territorial sovereignty of the State and the rights to be enjoyed by that same State over the continental shelf and the maritime areas adjacent to it. At the same time, one must not go too far in juggling with abstractions for the sole purpose of refusing to recognize the role of the length of the coasts. Territorial sovereignty makes it possible for rights over maritime spaces to be generated, but it is wholly powerless to give "concrete" shape to those rights, to quantify the extent of the surfaces, or to carry out a delimitation. The territorial sovereignty of the State confers only a "vocation" to the continental shelf. The extent and the limits of that shelf are determined in concrete terms by the maritime front, in relation to the geography of that front, a geography which includes all the physical characteristics, among them the length of the coast. The maritime coastline is a parameter which permits the utilization of the sea; it is a means (a more or less extensive means) of access to the sea; for that reason, it is expressed in units of measurement.

152. Territorial sovereignty generates rights over maritime spaces because of the coastline (proof of this is the fact that it cannot give rise to them in the case of a State without that maritime front). This coastline generates a certain area of maritime space because of its length, among other things. Since sovereignty creates the legal title but can only give it material form by means of the coastal "support",

it is that support which becomes the decisive factor for determining in concrete terms the area of the zone attributed. That support is to be defined by all its constitutive elements, length included.

153. In any maritime delimitation case, the physical fact of the length of the coasts is one of the elements of the "coastal geography" which make it possible to establish the "ratio of the coasts" of two States for that purpose. That ratio is represented by the sum of the characteristics of the relevant coasts of the two States, and it can only be converted and translated into a legal relationship by integrating all the elements capable of individualizing those coasts: their configuration, their curvature, their general direction, their projection (radial or frontal), the change in direction of certain of their segments, their indentations, their salients, their irregularities, their "normal" or "special" characteristics, their "non-essential" or "unusual" features, their relations as adjacent or opposite coasts, etc. It would of course be surprising and abnormal not to take into account also their respective lengths.

154. In fact, international judicial decisions have not ruled out the coastal length factor in any case: it is as though it had, more than other factors, a certain permanence. I shall quote only the case concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area, in which

the Chamber of the International Court of Justice stressed particularly that, in its view, it was "impossible to disregard the circumstance, which is of undeniable importance in the present case, that there is a difference in length between the respective coastlines of the two neighbouring States ... Not to recognize this fact would be a denial of the obvious." (I.C.J. Reports 1984, para. 218.) The same occurred in the case concerning Continental Shelf (Libyan Arab Jamahiriya/Malta), in which the lengths of the coasts of the two Parties were so disproportionate.

155. As the International Court of Justice had already indicated in 1969, the proportionality test is not based on a mathematical ratio but rather calls for "a reasonable degree" of proportionality (I.C.J. Reports 1969, p. 54). For the difference in length of the coasts to become embodied in an equitable legal criterion, it is necessary to avoid expressing it as an arithmetical ratio rendered blind by its automatism and rigidity. The quest for an equitable result requires the difference in the lengths to be taken into account in a flexible and manageable formula which reflects, in a reasonable measure, the manner in which the ratio of those lengths corresponds to that of the surfaces attributed.

156. The effect of the principle of the equality of States is to support, and not to destabilize, the proportionality criterion as thus defined. In the first place, a delimitation is not a sharing-out; it is a legal operation. The equality of States means that the sovereignty of

Guinea-Bissau and that of Senegal are legally of equal value and equal scope and that they are therefore both capable of generating zones of continental shelf by their respective projections seaward. The principle of the equality of States does not however require every State to be entitled to a continental shelf equal in extent to that of another State. Legal equality can only be attained by giving different treatment to two physical elements which are themselves different: the length of the coasts.

157. The sovereignty of Guinea-Bissau is no more "intense" in quality than that of Senegal, and vice versa. Its translation into concrete and material terms, however, is quantitatively different. The power to generate maritime surfaces with an equal "intensity" for each State depends concretely upon physical factors with which the States are not equally endowed. The legal equality of the two States is satisfied if the coasts of each of them produce appreciably the same effects, and therefore if each kilometre of the one or the other produces the same effect for either State and generates the same maritime area. As a result, it is the equitable criterion of proportionality which best satisfies the principle of the equality of States.

158. In order to verify, by reference to the lengths of the coasts of the two Parties, the equitableness of the delimitation carried out ex novo, it is necessary to define the maritime spaces which are going to be related to those lengths. The area in question is neither the disputed area, defined by the 240°/270° angle bounded by the lines of the extreme claims of the two Parties, nor the total area of each of the maritime domains of the two States.

159. The northern limit of the relevant zone can be identified without any difficulty. It is constituted by the southern maritime boundary between Senegal and Gambia. The length of this parallel, has however to be determined: it is the length which the line establishing an exclusive economic zone would have, i.e., 200 miles, for it is highly probable that the title of the State opposite, i.e., Cape Verde, cannot compete with that of Senegal and Gambia.

To the south, the maritime spaces of the southern part of the Bijagos Archipelago cannot in any case overlap those of Senegal; for this reason, those areas must be excluded from the relevant zone to be determined for purposes of the proportionality test. In consequence, the southern limit of that zone must start from the intersection of the 200-mile limit with the boundary line defined by the Arbitration Tribunal

in the case between Guinea-Bissau and Guinea. The limit is therefore determined by the Ponta Ancumbe point.

Furthermore, it was of course provided in the Franco-Portuguese Convention of 12 May 1886 that the following belonged to Portugal:

"All the islands comprised between the meridian of Cape Roxo, the coast and a southern limit formed by a line following the thalweg of the River Cajet and running next in a south-westerly direction through the pass of the Pilotes so as to reach 10° 40' north latitude which it then follows until the meridian of Cape Roxo."

The maritime spaces within the polygon thus defined accordingly constitute internal waters appertaining to Guinea-Bissau and excluded from any delimitation. It would therefore be unreasonable to include those areas in the determination of the relevant zone.

For consistency with that approach, the evaluation of the expanses of water in the relevant zone must exclude all the internal waters as well, of course, as the territory of the islands and the drying shoals uncovered at low water.

160. The coastal lengths are, in the case of Senegal, the direct distance from Cape Roxo to the southern frontier with Gambia, namely 44 miles and, in the case of Guinea-Bissau, the distance from Cape Roxo to Ponta Ancumbe, i.e., 85 miles, according to expert opinion. The ratio of the relevant coasts is therefore 33 to 67. The maritime surfaces

appertaining to each of the two Parties with the limit of azimuth 252° are, according to the expert, for Senegal 52,260 km² and for Guinea-Bissau 103,176 km², which gives a ratio virtually identical to that between the lengths of the coasts.

If however the maritime front of Guinea-Bissau is taken as being the relevant mainland coast (from Cape Roxo to Catunco island) its length would then be 111 miles and the ratio would be 28 to 72. That ratio is not disproportionate either.

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161. I would not wish to end this opinion without making a final comment with regard to the exact scope of the mission entrusted to the Tribunal by the Arbitration Agreement. The Parties have entrusted the Tribunal with the task of deciding their dispute in a complete and definitive manner, by establishing a single line of delimitation for the whole body of their respective maritime spaces. It does not seem to me that the Award meets that desire. The Award has given a partially positive answer to the first question put by the Arbitration Agreement, in so far as it has decided that the 1960 Agreement has the force of law between the Parties for the territorial sea, the contiguous zone and the continental shelf, but not for the exclusive economic zone, an

institution which was unknown at the date of the conclusion of that Agreement. The Award which has been rendered is therefore partial in that, in accordance with its own logic, it has neither established a line for the exclusive economic zone, nor found a solution - which would in fact be impossible - to the new problem facing it, namely the existence of two lines where the Parties, in their justifiable concern to avoid all risk of future conflict between them, wanted a single line. The Declaration by the President of the Tribunal shows to what an extent the Award is incomplete and inconsistent with the letter and spirit of the Arbitration Agreement with regard to the single line desired by the Parties. Since it emanates from the President of the Tribunal himself, that Declaration, by its very existence as well as by its contents, justifies more fundamental doubts as to the existence of a majority and the reality of the Award.

(Signed) Mohammed BEDJAOUI
