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

Judgment of 12 November 1991

In its judgment on the case concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau *v.* Senegal), the Court rejected the submissions of Guinea-Bissau that: (1) the Award of 31 July 1989 is inexistent; (2) subsidiarily, it is absolutely null and void; (3) the Government of Senegal is not justified in seeking to require Guinea-Bissau to apply the Award. The Court then found, on the submission to that effect of Senegal, that the Award was valid and binding for both States, which had the obligation to apply it.

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The Court was composed as follows: *President* Sir Robert Jennings; *Vice-President* Oda; Judges Lachs, Ago, Schwebel, Ni, Evensen, Tarassov, Guillaume, Shahabuddeen, Aguilar Mawdsley, Weeramantry, Ranjeva; *Judges* ad hoc Thierry, Mbaye.

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The full text of the operative part of the Judgment is as follows:

"THE COURT,

"(1) Unanimously,

"*Rejects* the submission of the Republic of Guinea-Bissau that the Arbitral Award given on 31 July 1989 by the Arbitration Tribunal established pursuant to the Agreement of 12 March 1985 between the Republic of Guinea-Bissau and the Republic of Senegal is inexistent;

"(2) By eleven votes to four,

"*Rejects* the submission of the Republic of Guinea-Bissau that the Arbitral Award of 31 July 1989 is absolutely null and void;

"FOR: *President* Sir Robert Jennings; *Vice-President* Oda; *Judges* Lachs, Ago, Schwebel, Ni, Evensen, Tarassov, Guillaume, Shahabuddeen; *Judge* ad hoc Mbaye.

"AGAINST: *Judges* Aguilar Mawdsley, Weeramantry, Ranjeva; *Judge* ad hoc Thierry.

"(3) By twelve votes to three,

"*Rejects* the submission of the Republic of Guinea-Bissau that the Government of Senegal is not justified in seeking to require the Government of Guinea-Bissau to apply the Arbitral Award of 31 July 1989; and, on the submission to that effect of the Republic of Senegal, *finds* that the Arbitral Award of 31 July 1989 is valid and binding for the Republic of Senegal and the Republic of Guinea-Bissau, which have the obligation to apply it.

"FOR: *President* Sir Robert Jennings; *Vice-President* Oda; *Judges* Lachs, Ago, Schwebel, Ni, Evensen, Tarassov, Guillaume, Shahabuddeen, Ranjeva; *Judge* ad hoc Mbaye.

"AGAINST: *Judges* Aguilar Mawdsley, Weeramantry; *Judge* ad hoc Thierry."

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Judge Tarassov and *Judge* ad hoc Mbaye appended declarations to the Judgment of the Court.

Vice-President Oda, *Judges* Lachs, Ni and Shahabuddeen appended separate opinions to the Judgment of the Court.

Judges Aguilar Mawdsley and Ranjeva appended a joint dissenting opinion, and *Judge* Weeramantry and *Judge* ad hoc Thierry dissenting opinions, to the Judgment of the Court.

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I. *Review of the proceedings and summary of facts* (paras. 1–21)

The Court outlines the successive stages of the proceedings as from the time the case was brought before it (paras. 1–9) and sets out the submissions of the Parties (paras. 10–11). It recalls that, on 23 August 1989, Guinea-Bissau instituted proceedings against Senegal in respect of a dispute concerning the existence and the validity of the Arbitral Award delivered on 31 July 1989 by an Arbitration Tribunal consisting of three arbitrators and established pursuant to an Arbitration Agreement concluded by the two States on 12 March 1985. The Court goes on to summarize the facts of the case as follows (paras. 12–21):

On 26 April 1960, an agreement by exchange of letters was concluded 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* established by the constitution of the French Republic of 1958) and the Portuguese Province of Guinea. The letter of France proposed (*inter alia*) that:

> "As far as the outer limit of the territorial sea, 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."

The letter of Portugal expressed its agreement to this proposal.

After the accession to independence of Senegal and Portuguese Guinea, which became Guinea-Bissau, a dispute arose between these two States concerning the delimitation of their maritime areas. This dispute was the subject of negotiations between them from 1977 onward, in the course of which Guinea-Bissau insisted that the maritime areas in question be delimited without reference to the 1960 Agreement, disputing its validity and its opposability to Guinea-Bissau.

On 12 March 1985 the Parties concluded an Arbitration Agreement for submission of that dispute to an Arbitration Tribunal, Article 2 of which Agreement read as follows:

> "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 9 of the Arbitration Agreement provided, among other things, that the decision "shall include the drawing of the boundary line on a map".

An Arbitration Tribunal (hereinafter called "the Tribunal") was duly constituted under the Agreement, Mr. Mohammed Bedjaoui and Mr. André Gros having successively been appointed as arbitrators and Mr. Julio A. Barberis as President. On 31 July 1989 the Tribunal pronounced the Award the existence and validity of which Guinea-Bissau has challenged in the present case.

The findings of the Tribunal were summarized by the Court as follows: the Tribunal concluded that the 1960 Agreement was valid and could be opposed to Senegal and to Guinea-Bissau (Award, para. 80); that it had to be interpreted in the light of the law in force at the date of its conclusion (*ibid.*, para. 85); 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 . . .",

but that

> "the territorial sea, the contiguous zone and the continental shelf . . . are expressly mentioned in the 1960 Agreement and they existed at the time of its conclusion" (*ibid.*).

After examining "the question of determining how far the boundary line extends . . . today, in view of the evolution of the definition of the concept of 'continental shelf' ", the Tribunal explained that

> "Bearing in mind the above conclusions reached by the Tribunal and the 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 considered that there was no need to append a map showing the course of the boundary line." (Award, para. 87.)

The operative clause of the Award was as follows:

> "For the reasons stated above, the Tribunal *decides* by two votes to one:
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> "To reply as follows to the first question formulated in Article 2 of the Arbitration Agreement: 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 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." (Para. 88.)

Mr. Barberis, President of the Tribunal, who, together with Mr. Gros, voted for the Award, appended a declaration to it, while Mr. Bedjaoui, who had voted against the Award, appended a dissenting opinion. The declaration of Mr. Barberis read, in particular, as follows:

> "I feel that the reply given by the Tribunal to the first question put by the Arbitration Agreement could have been more precise. I would have replied to that question as follows:
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> " '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 exact description of the legal position existing between the Parties. As suggested by Guinea-Bissau in the course of the present arbitration (Reply, p. 248), this reply 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.

". . ."

The Tribunal held a public sitting on 31 July 1989 for delivery of the Award; Mr. Barberis, the President, and Mr. Bedjaoui were present, but not Mr. Gros. At that sitting, after the Award had been delivered, the representative of Guinea-Bissau indicated that, pending full reading of the documents and consultation with his Government, he reserved the position of Guinea-Bissau regarding the applicability and validity of the Award, which did not, in his opinion, satisfy the requirements laid down by agreement between the two Parties. After contacts between the Governments of the two Parties, in which Guinea-Bissau indicated its reasons for not accepting the Award, the proceedings were brought before the Court by Guinea-Bissau.

II. *Question of the jurisdiction of the Court, of the admissibility of the Application and the possible effect of the absence of an arbitrator from the meeting at which the Award was delivered*
(paras. 22–29)

The Court first considers its jurisdiction. In its application, Guinea-Bissau founds the jurisdiction of the Court on "the declarations by which the Republic of Guinea-Bissau and the Republic of Senegal have respectively accepted the jurisdiction of the Court under the conditions set forth in Article 36, paragraph 2, of the Statute" of the Court. These declarations were deposited with the Secretary-General of the United Nations, in the case of Senegal on 2 December 1985, and in the case of Guinea-Bissau on 7 August 1989. Guinea-Bissau's declaration contained no reservation. Senegal's declaration, which replaced the previous declaration of 3 May 1985, provided among other things that "Senegal may reject the Court's competence in respect of: Disputes in regard to which the parties have agreed to have recourse to some other means of settlement . . .", and specified that it applied only to "all legal disputes arising after the present declaration . . .".

Senegal observed that if Guinea-Bissau were to challenge the decision of the Tribunal on the merits, it would be raising a question excluded from the Court's jurisdiction by the terms of Senegal's declaration. According to Senegal, the dispute concerning the maritime delimitation was the subject of the Arbitration Agreement of 12 March 1985 and consequently fell into the category of disputes "in regard to which the parties have agreed to have recourse to some other method of settlement". Furthermore, in the view of Senegal, that dispute arose before 2 December 1985, the date on which Senegal's acceptance of the compulsory jurisdiction of the Court became effective, and is thus excluded from the category of disputes "arising after" that declaration.

However, the Parties were agreed that there was a distinction between the substantive dispute relating to maritime delimitation, and the dispute relating to the Award rendered by the Tribunal, and that only the latter dispute, which arose after the Senegalese declaration, is the subject of the proceedings before the Court. Guinea-Bissau also took the position, which Senegal accepted, that those proceedings were not intended by way of appeal from the Award or as an application for revision of it. Thus, both Parties recognize that no aspect of the substantive delimitation dispute was involved. On this basis, Senegal did not dispute that the Court had jurisdiction to entertain the application under Article 36, paragraph 2, of the Statute. In the circumstances of the case the Court regarded its jurisdiction as established and emphasized that, as the Parties were both agreed, the proceedings allege the inexistence and nullity of the Award rendered by the Tribunal and were not by way of appeal from it or application for revision of it.

The Court then considers a contention by Senegal that Guinea-Bissau's application is inadmissible in so far as it sought to use the declaration of President Barberis for the purpose of casting doubt on the validity of the Award. Senegal argues in particular that that declaration is not part of the Award, and therefore that any attempt by Guinea-Bissau to make use of it for that purpose "must be regarded as an abuse of process aimed at depriving Senegal of the rights belonging to it under the Award".

The Court considers that Guinea-Bissau's application has been properly presented in the framework of its right to have recourse to the Court in the circumstances of the case. Accordingly it does not accept Senegal's contention that Guinea-Bissau's application, or the arguments used in support of it, amounts to an abuse of process.

Guinea-Bissau contends that the absence of Mr. Gros from the meeting of the Tribunal at which the Award was pronounced amounted to a recognition that the Tribunal had failed to resolve the dispute, that this was a particularly important meeting of the Tribunal and that the absence of Mr. Gros lessened the Tribunal's authority. The Court notes that it is not disputed that Mr. Gros participated in the voting when the Award was adopted. The absence of Mr. Gros from that meeting could not affect the validity of the Award which had already been adopted.

III. *Question of the inexistence of the Award*
(paras. 30–34)

In support of its principal contention that the Award is inexistent, Guinea-Bissau claims that the Award is not supported by a real majority. It does not dispute the fact that the Award was expressed to have been adopted by the votes of President Barberis and Mr. Gros; it contends however that President Barberis's declaration contradicted and invalidated his vote, thus leaving the Award unsupported by a real majority. In this regard Guinea-Bissau drew attention to the terms of the operative clause of the Award (see p. 4 above) and on the language advocated by President Barberis in his declaration (*ibid.*).

The Court considers that, in putting forward this formulation, what President Barberis had in mind was that the Tribunal's answer to the first question "could have been more precise"—to use his own words—, not that it had to be more precise in the sense indicated in his formulation, which was, in his view, a preferable one, not a necessary one. In the opinion of the Court, the formulation discloses no contradiction with that of the Award.

Guinea-Bissau also drew attention to the fact that President Barberis expressed the view that his own formulation "would have enabled the Tribunal to deal in its Award with

the second question put by the Arbitration Agreement" and that the Tribunal would in consequence "have been competent to delimit the waters of the exclusive economic zone or the fishery zone between the two countries", in addition to the other areas. The Court considers that the view expressed by President Barberis, that the reply which he would have given to the first question would have enabled the Tribunal to deal with the second question, represented not a position taken by him as to what the Tribunal was required to do but only an indication of what he considered would have been a better course. His position therefore could not be regarded as standing in contradiction with the position adopted by the Award.

Furthermore, even if there had been any contradiction, for either of the two reasons relied on by Guinea-Bissau, between the view expressed by President Barberis and that stated in the Award, the Court notes that such contradiction could not prevail over the position which President Barberis had taken when voting for the Award. In agreeing to the Award, he definitively agreed to the decisions, which it incorporated, as to the extent of the maritime areas governed by the 1960 Agreement, and as to the Tribunal not being required to answer the second question in view of its answer to the first. The Court adds that as the practice of international tribunals shows, it sometimes happens that a member of a tribunal votes in favour of a decision of the tribunal even though he might individually have been inclined to prefer another solution. The validity of his vote remains unaffected by the expression of any such differences in a declaration or separate opinion of the member concerned, which are therefore without consequence for the decision of the tribunal.

Accordingly, in the opinion of the Court, the contention of Guinea-Bissau that the Award was inexistent for lack of a real majority cannot be accepted.

IV. *Question of the nullity of the Award* (paras. 35–65)

Subsidiarily, Guinea-Bissau maintains that the Award is, as a whole, null and void, on the grounds of *excès de pouvoir* and of insufficiency of reasoning. Guinea-Bissau observes that the Tribunal did not reply to the second question put in Article 2 of the Arbitration Agreement, and did not append to the Award the map provided for in Article 9 of that Agreement. It is contended that these two omissions constitute an *excès de pouvoir*. Furthermore, no reasons, it is said, were given by the Tribunal for its decision not to proceed to the second question, for not producing a single delimitation line, and for refusing to draw that line on a map.

1. *Absence of a reply to the second question*

(*a*) Guinea-Bissau suggests that what the Tribunal did was not to decide not to answer the second question put to it; it simply omitted, for lack of a real majority, to reach any decision at all on the issue. In this respect Guinea-Bissau stresses that what is referred to in the first sentence of paragraph 87 of the Award as an "opinion of the Tribunal" on the point appears in the statement of reasoning, not in the operative clause of the Award; that the Award does not specify the majority by which that paragraph would have been adopted; and that only Mr. Gros could have voted in favour of this paragraph. In the light of the declaration made by President Barberis, Guinea-Bissau questions whether any vote was taken on paragraph 87. The Court recognizes that the structure of the Award is, in that respect, open to criticism. Article 2 of the Arbitration Agreement put two questions to the Tribunal. The latter was, according to Article 9, to "inform the two Governments of its decision regarding the questions set forth in Article 2". Consequently, the Court considers that it would have been normal to include in the operative part of the Award both the answer given to the first question and the decision not to answer the second. It is to be regretted that this course was not followed. Nevertheless the Court is of the opinion that the Tribunal, when it adopted the Award, was not only approving the content of paragraph 88, but was also doing so for the reasons already stated in the Award and, in particular, in paragraph 87. It is clear from that paragraph, taken in its context, and also from the declaration of President Barberis, that the Tribunal decided by two votes to one that, as it had given an affirmative answer to the first question, it did not have to answer the second. The Court observes that, by so doing, the Tribunal did take a decision: namely, not to answer the second question put to it. It concludes that the Award is not flawed by any failure to decide.

(*b*) Guinea-Bissau argues, secondly, that any arbitral award must, in accordance with general international law, be a reasoned one. Moreover, according to Article 9 of the Arbitration Agreement, the Parties had specifically agreed that "the Award shall state in full the reasons on which it is based". Yet, according to Guinea-Bissau, the Tribunal in this case did not give any reasoning in support of its refusal to reply to the second question put by the Parties or, at the very least, gave "wholly insufficient" reasoning. The Court observes that in paragraph 87 of the Award, referred to above, the Tribunal, "bearing in mind the . . . conclusions" that it had reached, together with "the wording of Article 2 of the Arbitration Agreement", took the view that it was not called upon to reply to the second question put to it. The reasoning is brief, and could doubtless have been developed further. But the references in paragraph 87 to the Tribunal's conclusions and to the wording of Article 2 of the Arbitration Agreement make it possible to determine, without difficulty, the reasons why the Tribunal decided not to answer the second question. The Court observes that, by referring to the wording of Article 2 of the Arbitration Agreement, the Tribunal was noting that, according to that Article, it was asked, first, whether the 1960 Agreement had "the force of law in the relations" between Guinea-Bissau and Senegal, and then, "in the event of a negative answer to the first question, what is the course of the line delimiting the maritime territories" of the two countries. By referring to the conclusions that it had already reached, the Tribunal was noting that it had, in paragraphs 80 *et seq.* of the Award, found that the 1960 Agreement, in respect of which it had already determined the scope of its substantive validity, was "valid and can be opposed to Senegal and to Guinea-Bissau". Having given an affirmative answer to the first question, and basing itself on the actual text of the Arbitration Agreement, the Tribunal found as a consequence that it did not have to reply to the second question. The Court observes that that statement of reasoning, while succinct, is clear and precise, and concludes that the second contention of Guinea-Bissau must also be dismissed.

(*c*) Thirdly, Guinea-Bissau challenges the validity of the reasoning thus adopted by the Tribunal on the issue whether it was required to answer the second question:

(i) Guinea-Bissau first argues that the Arbitration Agreement, on its true construction, required the Tribunal to answer the second question whatever might have been its reply to the first. In this connection, the Court would first recall that in the absence of any agreement to the contrary an international tribunal

has the right to decide as to its own jurisdiction and has the power to interpret for this purpose the instruments which govern that jurisdiction. In the present case, the Arbitration Agreement had confirmed that the Tribunal had the power to determine its own jurisdiction and to interpret the Agreement for that purpose. The Court observes that by its argument set out above, Guinea-Bissau is in fact criticizing the interpretation in the Award of the provisions of the Arbitration Agreement which determine the Tribunal's jurisdiction, and proposing another interpretation. However, the Court does not have to enquire whether or not the Arbitration Agreement could, with regard to the Tribunal's competence, be interpreted in a number of ways, and if so to consider which would have been preferable. The Court is of the opinion that by proceeding in that way it would be treating the request as an appeal and not as a *recours en nullité*. The Court could not act in that way in the present case. The Court has simply to ascertain whether by rendering the disputed Award the Tribunal acted in manifest breach of the competence conferred on it by the Arbitration Agreement, either by deciding in excess of, or by failing to exercise, its jurisdiction. Such manifest breach might result from, for example, the failure of the Tribunal properly to apply the relevant rules of interpretation to the provisions of the Arbitration Agreement which govern its competence. The Court observes that an arbitration agreement is an agreement between States which must be interpreted in accordance with the general rules of international law governing the interpretation of treaties. It then recalls the principles of interpretation laid down by its case-law and observes that these principles are reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, which may in many respects be considered as a codification of existing customary international law on the point. The Court also notes that when States sign an arbitration agreement, they are concluding an agreement with a very specific object and purpose: to entrust an arbitration tribunal with the task of settling a dispute in accordance with the terms agreed by the parties. In the performance of the task entrusted to it, the tribunal must conform to those terms.

The Court observes that, in the present case, Article 2 of the Arbitration Agreement presented a first question concerning the 1960 Agreement, and then a second question relating to delimitation. A reply had to be given to the second question "in the event of a negative answer to the first question". The Court notes that those last words, which were originally proposed by Guinea-Bissau itself, are categorical. It goes on to examine situations in which international judicial bodies were asked to answer successive questions made conditional on each other or not. The Court notes that in fact in the present case the Parties could have used some such expression as that the Tribunal should answer the second question "taking into account" the reply given to the first, but they did not do so; they directed that the second question should be answered only "in the event of a negative answer" to that first question. Relying on various elements of the text of the Arbitration Agreement, Guinea-Bissau nevertheless considers that the Tribunal was required to delimit by a single line the whole of the maritime areas appertaining to one or the other State. As, for the reasons given by the Tribunal, its answer to the first question put in the Arbitration Agreement could not lead to a comprehensive delimitation, it followed, in Guinea-Bissau's view, that, notwithstanding the prefatory words to the second question, the Tribunal was required to answer that question and to effect the overall delimitation desired by both Parties.

After recalling the circumstances in which the Arbitration Agreement was drawn up, the Court notes that the two questions had a completely different subject-matter. The first concerned the issue whether an international agreement had the force of law in the relations between the Parties; the second was directed to a maritime delimitation in the event that that agreement did not have such force. Senegal was counting on an affirmative answer to the first question, and concluded that the straight line on a bearing of 240°, adopted by the 1960 Agreement, would constitute the single line separating the whole of the maritime areas of the two countries. Guinea-Bissau was counting on a negative answer to the first question and concluded that a single dividing line for the whole of the maritime areas of the two countries would be fixed *ex novo* by the Tribunal in reply to the second question. The two States intended to obtain a delimitation of the whole of their maritime areas by a single line. But Senegal was counting on achieving this result through an affirmative answer to the first question, and Guinea-Bissau through a negative answer to that question. The Court notes that no agreement had been reached between the Parties as to what should happen in the event of an affirmative answer leading only to a partial delimitation, and as to what might be the task of the Tribunal in such case, and that the *travaux préparatoires* accordingly confirm the ordinary meaning of Article 2. The Court considers that this conclusion is not at variance with the circumstance that the Tribunal adopted as its title "Arbitration Tribunal for the Determination of the Maritime Boundary: Guinea-Bissau/Senegal", or with its definition, in paragraph 27 of the Award, of the "sole object of the dispute" as being one relating 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 . . .". In the opinion of the Court, that title and that definition are to be read in the light of the Tribunal's conclusion, which the Court shares, that, while the Tribunal's mandate did include the making of a delimitation of all the maritime areas of the Parties, this fell to be done only under the second question and "in the event of a negative answer to the first question". The Court notes, in short, that although the two States had expressed in general terms in the Preamble of the Arbitration Agreement their desire to reach a settlement of their dispute, their consent thereto had only been given in the terms laid down by Article 2 of the Arbitration Agreement. The Court concludes that consequently the Tribunal did not act in manifest breach of its competence to determine its own jurisdiction by deciding that it was not required to answer the second question except in the event of a negative answer to the first, and that the first argument must be rejected.

(ii) Guinea-Bissau then argues that the answer in fact given by the Tribunal to the first question was a partially negative answer and that this sufficed to satisfy the prescribed condition for entering into the second question. Accordingly, and as was to be shown by the declaration of President Barberis, the Tribunal was, it is said, both entitled and bound to answer the second question.

The Court observes that Guinea-Bissau cannot base its arguments upon a form of words (that of President Barberis) which was not in fact adopted by the Tribunal. The Tribunal found, in reply to the first question, that the 1960 Agreement had the force of law in the relations between the Parties, and at the same time it defined the substantive scope of that Agreement. Such an answer did not permit of a delimitation of the whole of the maritime areas of the two States, and a complete settlement of the dispute between them. It achieved a partial delimitation. But that answer was nonetheless both a complete and an affirmative answer to the first question. The Tribunal could thus find, without manifest breach of its competence, that its answer to the first question was not a negative one, and that it was therefore not competent to answer the second question. The Court concludes that in this respect also, the contention of Guinea-Bissau that the entire Award is a nullity must be rejected.

2. *Absence of a map*

Finally Guinea-Bissau recalls that, according to Article 9, paragraph 2, of the Arbitration Agreement, the decision of the Tribunal was to "include the drawing of the boundary line on a map", and that no such map was produced by the Tribunal. Guinea-Bissau contends that the Tribunal also did not give sufficient reasons for its decision on that point. It is contended that the Award should, for these reasons, be considered wholly null and void.

The Court considers that the reasoning of the Tribunal on this point is, once again, brief but sufficient to enlighten the Parties and the Court as to the reasons that guided the Tribunal. It found that the boundary line fixed by the 1960 Agreement was a loxodromic line drawn at 240° from the point of intersection of the prolongation of the land frontier and the low-water line, represented for that purpose by the Cape Roxo lighthouse. Since it did not reply to the second question, it did not have to define any other line. It thus considered that there was no need to draw on a map a line which was common knowledge, and the definitive characteristics of which it had specified.

In view of the wording of Articles 2 and 9 of the Arbitration Agreement, and the positions taken by the Parties before the Tribunal, the Court notes that it is open to argument whether, in the absence of a reply to the second question, the Tribunal was under an obligation to produce the map envisaged by the Arbitration Agreement. The Court does not however consider it necessary to enter into such a discussion. In the circumstances of the case, the absence of a map cannot in any event constitute such an irregularity as would render the Award invalid. The Court concludes that the last argument of Guinea-Bissau is therefore also not accepted.

V. *Final observations* (paras. 66–68)

The Court nonetheless takes note of the fact that the Award has not brought about a complete delimitation of the maritime areas appertaining respectively to Guinea-Bissau and to Senegal. It would however observe that that result is due to the wording of Article 2 of the Arbitration Agreement.

The Court has moreover taken note of the fact that on 12 March 1991 Guinea-Bissau filed in the Registry of the Court a second Application requesting the Court to adjudge and declare:

> "What should be, on the basis of the international law of the sea and of all the relevant elements of the case, including the future decision of the Court in the case concerning the arbitral *'award'* of 31 July 1989, the line (to be drawn on the map) delimiting all the maritime territories appertaining respectively to Guinea-Bissau and Senegal."

It has also taken note of the declaration made by the Agent of Senegal in the present proceedings, according to which one solution

> "would be to negotiate with Senegal, which has no objection to this, a boundary for the exclusive economic zone or, should it prove impossible to reach an agreement, to bring the matter before the Court".

Having regard to that Application and that declaration, and at the close of a long and difficult arbitral procedure and of these proceedings before the Court, the Court considers it highly desirable that the elements of the dispute that were not settled by the Arbitral Award of 31 July 1989 be resolved as soon as possible, as both Parties desire.

SUMMARY OF DECLARATIONS AND OPINIONS APPENDED TO THE JUDGEMENT OF THE COURT

Declaration by Judge Tarassov

Judge Tarassov begins his declaration by stating that he voted for the Judgment bearing in mind that its sole purpose is to solve the dispute between the Republic of Guinea-Bissau and the Republic of Senegal relating to the validity or nullity of the Arbitral Award of 31 July 1989, and that the Court did not examine—and was not asked by the Parties to examine—any of the circumstances and evidence relating to the determination of the maritime boundary itself. From a procedural point of view, he agrees with the analysis and conclusions of the Court that the submissions and arguments of Guinea-Bissau against the existence or validity of the Award are not convincing.

He then points out that the Award contains some serious deficiencies which call for strong criticisms. In his view, the Arbitration Tribunal did not accomplish the main task entrusted to it by the Parties, inasmuch as it did not definitively settle the dispute about the delimitation of all adjacent maritime territories appertaining to each of the States. The Tribunal should have informed the Parties of its decision with respect to the two questions put in Article 2, and its contention in paragraph 87 of the Award that it was not called upon to reply to the second question because of "the actual wording of Article 2 of the Arbitration Agreement" does not suffice to substantiate the decision taken on such an important issue.

The Tribunal also did not state whether the straight line drawn at 240° provided by the 1960 Agreement might or might not be used for the delimitation of the economic zone. Judge Tarassov considers that all these omissions, together with the Tribunal's refusal to append a map (in contradiction with Article 9 of the Arbitration Agreement), did not help to solve the whole dispute between the Parties and merely paved the way to the new Application by Guinea-Bissau to the Court.

Declaration by Judge Mbaye

In his Declaration Judge Mbaye expresses serious doubts over the jurisdiction of the Court to entertain, on the sole basis of the provisions of Article 36, paragraph 2, of its Statute, an application contesting the validity of an arbitral award. This is why he is pleased that the Court, taking note of the position of the Parties, considered its jurisdiction to be established only in view of "the circumstances" of the case, thus avoiding a precedent that could bind it in future.

Separate Opinion of Vice-President Oda

In his separate opinion, Vice-President Oda expresses the view that the submissions of Guinea-Bissau could have been rejected on simpler grounds than those set forth at length in the Judgment. In the first place, Guinea-Bissau's contention that the Award was inexistent because the President of the Tribunal, in his declaration, "expressed a view in contradiction with the one apparently adopted by the vote" was untenable because the declaration corroborated the substance of the decision voted upon in paragraph 88 of the Award, and any difference of view disclosed by it related solely to paragraph 87. Secondly, Guinea-Bissau's allegation of nullity, based on the facts that the Tribunal did not answer the second question put to it, and neither delimited the maritime area as a whole nor recorded a single line upon a map, simply reflected the fact that the Arbitration Agreement had not been drafted in terms which Guinea-Bissau found to be in its interest. The allegation could not be sustained, because the Tribunal had given a fully affirmative answer to the first question put to it, as was shown by the very fact that President Barberis had had to rephrase that answer in order to suggest that it could be seen as partially negative. Hence no answer to the second question had been required.

Vice-President Oda continued by analysing the background to the dispute and the drafting of the Arbitration Agreement, pointing out that the two States had had opposite reasons for highlighting the question of the validity of the 1960 Agreement while each intending to achieve a delimitation for their exclusive economic zones as well as other maritime areas. The Arbitration Agreement had not however been drafted in such a way as to guarantee that result, a deficiency for which the Tribunal could not be blamed. It was rather the representatives of the two countries who had displayed insufficient grasp of the premises of their negotiation in the light, particularly, of the interrelation of the exclusive economic zone and the continental shelf.

Vice-President Oda further doubts whether the introduction of proceedings in the Court had any meaningful object, since the positions of the Parties in relation to the principal object of their dispute—namely, the delimitation of their exclusive economic zones—would have remained unaffected even if the Court had declared the Award inexistent or null and void. The present issue between the two States should be the delimitation of those zones in a situation where the existence of a loxodromic line at 240° for the continental shelf has been confirmed. Accordingly, and without prejudice to the interpretation of the new Application presented to the Court, Vice-President Oda points out, finally, that in any further negotiation the two States must proceed on one of two assumptions, either that separate régimes for the continental shelf and exclusive economic zone may co-exist, or that they intend to arrive at a single line of delimitation for both; in the latter case, however, there would be room for negotiation only on the assumption that the now established continental shelf boundary may be subject to alteration or adjustment.

Separate Opinion of Judge Lachs

Judge Lachs, in his separate opinion, stresses that while not acting as a court of appeal, the Court was not barred from dealing with the entire process traversed by the Tribunal in its deliberations, which has shown serious flaws. The declaration of the President of the Tribunal created a serious dilemma and a challenge. He finds the way the reply was framed open to serious objections. It is not only too brief but inadequate. The absence of a chart did not constitute "such an irregularity as would render the Award invalid" but elementary courtesy required that the matter be dealt with in a different way. He regrets that the Tribunal did not succeed in producing a decision with the cogency to command respect.

Separate Opinion of Judge Ni

Judge Ni states in his separate opinion that he agrees generally with the line of reasoning in the Judgment but he feels that certain aspects call for elaboration. He thinks that the question of the exclusive economic zone constituted no part of the object of the arbitration and that Mr. Barberis's declaration attached to the Award did not override or invalidate his vote for the Award. Judge Ni thinks that a reply by the Arbitration Tribunal to the second question in Article 2, paragraph 2, of the Arbitration Agreement would have been mandatory only if the first question had been answered in the negative. This is not only clearly stated in the Arbitration Agreement, but also confirmed by the negotiations which preceded the conclusion of the Arbitration Agreement. Since the first question was answered in the affirmative, no *ex novo* delimitation by a single line of all the maritime spaces was to take place, no new line of the boundary would be drawn and consequently no map could have been appended. All these are interlinked and the reasoning in the Arbitral Award is to be viewed in its entirety.

Separate Opinion of Judge Shahabuddeen

In his separate opinion, Judge Shahabuddeen observed that, on the main issue as to whether the Tribunal should have answered the second question put to it by the Arbitration Agreement, the Court sustained the Award on the ground that, in holding that it was not competent to reply to that question, the Tribunal interpreted the Agreement in a way in which it could have been interpreted without manifest breach of competence. He noted that the Court did not go on to consider whether the Tribunal's interpretation on that point was indeed correct. This was because the Court, in reliance on the distinction between nullity and appeal, took the view that it was beyond its authority to do so. Judge Shahabuddeen considered, first, that that distinction did not preclude the Court from pronouncing on whether the Tribunal's interpretation was correct, provided that in doing so the Court took account of considerations of security of the arbitral process with reference to the finality of awards; and, second, that the Tribunal's interpretation was indeed correct.

Joint Dissenting Opinion of Judges Aguilar Mawdsley and Ranjeva

Judges Aguilar Mawdsley and Ranjeva have appended a joint dissenting opinion that primarily centres upon an epistemological criticism of the approach adopted by the Arbitration Tribunal. The problem of the nullity/validity or invalidity of an arbitral award involves more than an assessment resting exclusively on the axiomatic foundations of law. The authority of *res judicata* with which any judicial decision is

vested performs its function fully when that decision is subscribed to by the *convictio juris*.

Confining themselves to the Court's jurisdiction to exercise control over arbitral awards once they have become final, Judges Aguilar Mawdsley and Ranjeva refrain from substituting their own way of thinking and interpretation for those of the Arbitration Tribunal but take exception to its method—which is, moreover, recognized by the Court as being open to criticism. How, indeed, can one justify the Tribunal's complete failure to explain the absence of a complete delimitation resulting, on the one hand, from the affirmative reply given to the first question and, on the other, from the decision to refuse to answer the second? Contrary to the opinion of the Court, the authors of the joint dissenting opinion take the view that the Arbitration Tribunal, by declining to give an answer to the second question has committed an *excès de pouvoir infra petita* or through omission—a hypothesis hardly ever encountered in the international jurisprudence. The Tribunal should have simultaneously taken into account the three constitutive elements of the Arbitration Agreement, namely, the letter, the object and the purpose, in order to interpret that Arbitration Agreement when it came to restructure the dispute. Recourse to a technique of argument by logical conclusion as a basis for the reasoning leading to the dismissal, firstly, of an application aimed at the recognition of a right and, subsequently, of a request for the compilation of a map constitutes, in the view of Judges Aguilar Mawdsley and Ranjeva, an *excès de pouvoir*, in as much as the logical conclusion is conceivable only if the relations of causality between the two propositions are ineluctable in nature, which is manifestly not the case with the contested Award, given the declaration of Mr. Barberis, the President of the Tribunal, and the dissenting opinion of one arbitrator, Mr. Bedjaoui.

In the judgment of the authors of the joint opinion, since the Court was not acting as a court of appeal or of cassation, it was under a duty to be critical of any arbitral awards with which it might deal. Among the tasks comprising the mission of the principal judicial organ of the international community is that of guaranteeing both respect for the rights of parties and a certain quality of reasoning by other international courts and tribunals. The members of the international community are indeed entitled to benefit from a sound administration of international justice.

Dissenting Opinion of Judge Weeramantry

Judge Weeramantry, in his dissenting opinion, expressed his full agreement with the Court's rejection of Guinea-Bissau's plea of inexistence of the Award and of Senegal's contentions of lack of jurisdiction and abuse of legal process.

However, he disagreed with the majority of the Court on the interpretation of the Arbitration Award and on the question of its nullity. While it is important to preserve the integrity of arbitral awards, he stressed that it was also important to ensure that the award complied with the terms of the *compromis*. Where there was a serious discrepancy between the award and the *compromis*, the principle of *compétence de la compétence* did not protect the award.

In his view, the Award in this case departed materially from the terms of the *compromis* in that it did not answer Question 2 and left the work of the Tribunal substantially incomplete by not determining the boundaries of the exclusive economic zone and the fishery zone. An interpretation of the *compromis* in the light of its context and its objects and purposes led necessarily to the conclusion that what was referred to the Tribunal for determination was one integral question relating to the entire maritime boundary. This made it imperative for the Tribunal to address Question 2 without which its task was not discharged. The Tribunal was thus not entitled to decide not to address Question 2 and the decision not to do so constituted an *excès de pouvoir*, thereby rendering the Award a nullity.

Furthermore, the interlinked nature of the boundaries determined by the Award and those left undetermined was likely to cause serious prejudice to Guinea-Bissau in a future determination of the remaining zones so long as the boundaries of the territorial sea, the contiguous zone and the continental shelf remained fixed by the present Award. Consequently, the finding of nullity extended also to the determinations made in answer to Question 1.

Dissenting Opinion of Judge Thierry

Judge *ad hoc* Thierry sets out the reasons for which he is unable to concur with the Court's decision. His dissent focuses on the legal consequences of the fact, recognized by the Court, that the Arbitral Award of 31 July 1989:

> "has not brought about a complete delimitation of the maritime areas appertaining respectively to Guinea-Bissau and to Senegal" (para. 66 of the Court's Judgment).

In the opinion of Judge Thierry, the Arbitration Tribunal, established by the Arbitration Agreement of 12 March 1985, did not settle the dispute, concerning the determination of the maritime boundary between the two States, that was submitted to it.

As provided in the Preamble and Articles 2, paragraph 2, and 9 of that Agreement, the Tribunal was to determine the "maritime boundary" between the two States by a "boundary line" to be drawn on a map to be included in the Award.

As it did not perform these tasks, the Arbitration Tribunal failed to accomplish its jurisdictional mission. This defect should have led the Court to declare the Award of 31 July 1989 null and void.

In the view of Judge Thierry, the Tribunal's failure to carry out its mission could not be justified by the terms of Article 2, paragraph 2, of the Arbitration Agreement. This provision sets out two questions put to the Tribunal by the Parties. The first, concerning the applicability of the Franco-Portuguese Agreement of 1960, received an affirmative reply, but, relying on the phrase "In the event of a negative answer to the first question", at the beginning of the second question, the Tribunal implicitly decided not to answer this question, which concerned the course of the boundary line, thereby leaving unresolved the essential part of the dispute, including the delimitation of the exclusive economic zone.

Judge Thierry is of the opinion that the Tribunal should have interpreted Article 2 in the light of the object and purpose of the Arbitration Agreement, consistently with the rules of international law applicable to the interpretation of treaties, and should have answered the second question accordingly, seeing that the reply to the first question could not by itself bring about the settlement of the dispute, which was the Tribunal's primary task and its *raison d'être*.

Judge Thierry nevertheless concurs in the points made in paragraphs 66 to 68 of the Court's Judgment with a view to the settlement of "the elements of the dispute that were not settled by the Arbitral Award of 31 July 1989". What is necessary is, in his opinion, to bring about an equitable determination of the maritime boundary between the two States in conformity with the principles and rules of international law.