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Audience publique

tenue le lundi 12 février 1990, à 15 heures, au palais de la Paix,

sous la présidence de M. Ruda, Président

en l'affaire de la Sentence arbitrale du 31 juillet 1989
(Guinée-Bissau c. Sénégal)

Demande en indication de mesures conservatoires

COMPTE RENDU

YEAR 1990

Public sitting

held on Monday 12 February 1990, at 03 p.m., at the Peace Palace,

President Ruda presiding

in the case concerning the Arbitral Award of 31 July 1989
(Guinea-Bissau v. Senegal)

Request for the Indication of Provisional Measures

VERBATIM RECORD

Présents:

M. Ruda, Président
M. Kéba Mbaye, Vice-Président
MM. Lachs
Elias
Oda
Ago
Schwebel
Sir Robert Jennings
MM. Ni
Evensen
Tarassov
Guillaume
Shahabuddeen
Pathak, juges
Thierry, Juge *ad hoc*

M. Valencia-Ospina, Greffier

Present:

President Ruda
Vice-President Kéba Mbaye
Judges Lachs
Elias
Oda
Ago
Schwebel
Sir Robert Jennings
Ni
Evensen
Tarassov
Guillaume
Shahabuddeen
Pathak
Judge *ad hoc* Thierry

Registrar Valencia-Ospina

Le Gouvernement de la République de Guinée-Bissau est représenté par :

S.Exc. M. Fidelis Cabral de Almada — ministre d'Etat à la présidence du Conseil d'Etat,

comme agent;

Mme Monique Chemillier-Gendreau — professeur à l'Université de Paris VII,

comme conseil;

M. Miguel Galvao Teles — avocat et ancien membre du Conseil d'Etat du Portugal,

comme conseil;

M. Mario Lopes — chef de cabinet du président du Conseil d'Etat de la République de Guinée-Bissau,

comme conseiller;

M. Feliciano Gomes — lieutenant et chef d'état-major de la marine de guerre de la République de Guinée-Bissau,

comme expert;

M. Fali Embalo — conseiller pour les affaires juridiques à l'ambassade de la République de Guinée-Bissau à Bruxelles.

Le Gouvernement de la République du Sénégal est représenté par :

S.Exc. M. Doudou Thiam — *comme agent;*

M. Derek W. Bowett, Q.C. — Whewell Professor at the University of Cambridge [à traduire]

M. Ibou Diaite

M. Tafsir Ndiaye

comme coagents;

M. Amadou Diop — conseiller juridique à l'ambassade du Sénégal auprès du Bénélux.

The Gouvernment of the Republic of Guinea-Bissau is represented by :

H.E. Mr. Fidelis Cabral de Almada — Minister of State attached to the Presidency of the Council of State,

as Agent;

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

as Advocate and Counsel;

Mr. Miguel Galvao Teles — Advocate and former member of the Council of State,

Mr. Mario Lopes — Chef de Cabinet of the President of the Council of State of the Republic of Guinea-Bissau,

as Counsel;

Mr. Feliciano Gomes — Lieutenant and Chief of Staff of the Navy of the Republic of Guinea-Bissau,

as Expert;

Mr. Fali Embalo — Counsellor for Legal Affairs at the Embassy of the Republic of Guinea-Bissau.

The Government of the Republic of Senegal is represented by :

H.E. Mr. Doudou Thiam — *as Agent;*

Mr. Derek W. Bowett, Q.C. — Whewell Professor at the University of Cambridge

Mr. Ibou Diaite

Mr. Tafsir Ndiaye

as Co-Agents;

Mr. Amadou Diop — Legal Adviser of Senegal to the Benelux Countries.

The PRESIDENT: L'audience est ouverte. I give the floor to Professor Bowett.

Mr. BOWETT: Thank you Mr. President. Mr. President, Members of the Court, I have the honour in this case to represent the Republic of Senegal.

The Application by Guinea-Bissau dated 23 August 1989 is not, as such, the matter before the Court today. Yet the Request for an Order of interim measures of protection, which is the subject of today's proceedings, cannot be divorced from that Application.

Senegal is not satisfied that the Court has jurisdiction to entertain the main Application: and Senegal is aware that, in order to exercise its powers to order interim measures of protection, the Court must be satisfied that it has, prima facie, jurisdiction.

Nevertheless, today's request is so fundamentally flawed in other respects that Senegal does not wish to broach the issue of jurisdiction over the main Application now. It prefers to await the written pleadings of Guinea-Bissau in which, in due course, Guinea-Bissau will make out its case to support the demand for nullification of the Arbitral Award of 31 July 1989.

So, on the basis that the Court's decision on today's request does not predetermine the issue of jurisdiction over the main Application, I turn, now, to the other reasons why Senegal believes it must oppose this request.

Senegal must oppose this request because it is fundamentally misconceived.

This misconception stems from Guinea-Bissau's view that the rights exercised by Senegal to the north of the 240° line - that is the line of the 1960 Agreement upheld by the Arbitral Tribunal on 31 July 1989 - are *"en litige"*, in dispute before this Court.

Mr. President, they are not. In the first place, they are not *"en litige"* before any Court. The Award of 31 July 1989 is *res judicata*. It is an Award which, by Article 10(2) of the Compromis between the Parties

> "sera définitive et obligatoire pour les deux Etats qui seront tenus de prendre toutes les mesures que comporte son exécution".

Of course, Senegal recognizes that Guinea-Bissau has filed before this Court an application to nullify that Award.

But the assumption that, because of that application, the Award is to be treated already as a nullity, as "non-existent", is quite wrong.

Certainly there is some scope in international law for a theory of "absolute" nullity, a theory of acts so patently null and void that they can be so treated without recourse to a judicial body. That will usually be so where the act plainly contravenes a peremptory norm of international law. Thus an inter-State agreement to commit aggression, or to commit genocide, would be an absolute nullity.

But a binding arbitral award is a very different matter. It cannot be the law that, merely by making an application to nullify, a party can demand that the award be treated as a *nullity*. Indeed, the presumption of law is in entirely the opposite sense. It is a presumption that a binding arbitral award must be so treated - as binding - and enjoys the status of *res judicata*, until such time as it is nullified.

For the award is a final, binding judgment. It is not the same as a judgment which is subject to a right of appeal, and therefore cannot be said to be final and binding. Here there is no right of appeal, and the request for nullification must not be confused with an appeal. It follows, therefore, that both Parties are bound to respect the Award until such time as the Award may be nullified. And acts in conformity with the Award are presumed to be valid - not the reverse.

In Senegal's written response we cited the Court's judgment in the case concerning the *Arbitral Award Made by the King of Spain*. The dictum is apt and accurate, so I will repeat it now.

> "the Award would, in the judgment of the Court, still have to be recognized as valid ... The Court will observe that the Award is not subject to appeal and that the Court cannot approach the considerations of the objections raised by Nicaragua to the validity of the Award as a Court of Appeal."

And it is because of this presumption of validity that one finds, in instruments conferring powers of nullification on a Court, an express, ancillary power in the Court to order provisional measures of protection. This was so, for example, in the Report of the Committee of Five, established by the League of Nations by resolution of the Assembly of the League of 23 September 1929. This produced a draft protocol drawn up in connection with a proposal to give the Permanent Court powers of annulment (C.338.M.138. 1930.V.4, Art. 4(2) of Draft) and it contained an express power to order interim measures of protection.

Or, to take a current example, under Rule 54 and Article 52(5) of the ICSID Convention, the Committee established to consider whether annulment of an award may be granted has power to order a stay of enforcement of the award, provisionally, until the Committee makes its ruling on nullification.

Mr. President, if Tribunals have an express power to stay enforcement of an arbitral award, provisionally, pending the decision on nullification, this must mean that, without such a stay of enforcement, the successful Party is entitled to enforce the award. And that must equally mean that, at least provisionally until nullified, the Award is valid, and the successful Party's rights pursuant to the award are validly exercised.

It is for exactly the same reason - the presumption of validity - that even if nullification is granted, the nullification does not operate retroactively, so as to render illegal acts performed by the successful Party in relying on the award. As Guggenheim explained in his Hague Lectures in 1949 on *La validité et la nullité des actes juridiques internationaux*

> "La doctrine est aussi d'accord de ne pas attribuer des effets rétroactifs à l'annulation. La nullité est ainsi une nullité *ex nunc* et non *ex tunc*." (P. 209.)

And so, Mr. President, Members of the Court, the premiss from which we start is that there is an award, that Senegal is entitled to exercise its sovereign powers to the north of the 240° line, the line upheld in that award, and that Guinea-Bissau has, *at this point in time*, no rights which have been disregarded by Senegal in arresting vessels licensed by Guinea-Bissau and fishing illegally to the north of that line.

The premiss is not that the award does not now exist. It is not that the boundary is in dispute. It is not that Senegal has acted illegally.

But now I must turn to the second aspect of this misconception. The Applicant assumes, not only that the boundary is in dispute, but that it is in dispute *before this Court*.

Now the issues before this Court, as explained in the Guinea-Bissau's main Application, are essentially three: first, whether the Arbitral Award of 31 July 1989 is invalid because not supported by a majority of the Tribunal. Second, whether the Award is invalid because the Tribunal has not answered the double question posed by the Compromis and third, whether Senegal is entitled to

invoke the Award against Guinea-Bissau.

All three issues centre on the validity of the Award. Moreover Guinea-Bissau's attack on the Award is directed at the reality of the majority of the arbitrators - whether there was in fact a majority of two - and at the Tribunal's answer to the questions posed in the Compromis i.e., whether the Tribunal fully answered the question, a form of allegation of *détournement de pouvoir*.

In its Application Guinea-Bissau does not and cannot attack the reasoning of the Tribunal or the Tribunal's substantive decision that the line agreed in the 1960 Accord is, in law, the binding maritime boundary, the *frontière en mer* to use the Parties' own description in Article 2 of the Compromis.

I say cannot attack the reasoning of the Tribunal, and therefore *cannot* attack the maritime boundary determined by the Tribunal because, if Guinea-Bissau were to make a direct attack on the Tribunal's reasoning, or the resultant maritime boundary, this would transform Guinea-Bissau's case into an appeal. And, as Guinea-Bissau rightly recognizes, an appeal would be irreceivable by this Court: for the Award is final and so, inescapably, Guinea-Bissau is confined to challenging the Award by way of an application to nullify, it is a *recours en annulation.*

From that it follows, Mr. President - and this is the important point I wish to make - that the delimitation line, the maritime boundary, and all the questions of the validity of the exercise of their sovereign rights on their respective sides of the boundary - Senegal to the north, Guinea-Bissau to the south - are not, and cannot be, in issue before this Court.

As the Agent for Senegal has already pointed out, Guinea-Bissau accepts that the Arbitral Award did not regulate the fisheries, or the Exclusive Economic Zone boundary - indeed that is one of Guinea-Bissau's complaints. Yet this morning we heard an argument of some ingenuity. This was that although the Arbitral Tribunal made no decision on the delimitation of the fishery zone, it ought to have done so and therefore if the Tribunal had fully discharged its duty, the delimitation of the fishery zone would have been in the Award and therefore a link would exist between the main application to this Court and the present request for interim measures of protection.

Mr. President, the argument is flawed because even if the Arbitral Tribunal had established a

fisheries delimitation, what is in issue before this Court is not the delimitation. This Court is asked to decide whether the Award is a nullity. It is not concerned with the delimitation and in effect Guinea-Bissau seeks to turn the proceedings before this Court into a form of appeal against the Award. Again and again this morning we heard statements which simply assumed that the Court is hearing an appeal against the delimitation. Now that is not the Court's task and that is why in truth there is no link between the main Application and the present request the rights, the issues involved, are totally different.

The point I make is crucial to the question now at issue, namely whether the Court can entertain a request for interim measures where the Court is asked to direct the Parties on how they may, or may not, exercise their sovereign rights in relation to fisheries on their respective sides of the maritime boundary.

It's crucial because the Court is now asked to exercise an ancillary jurisdiction, to order interim measures. And the principle is clearly established in the jurisprudence of this Court that the Court cannot order interim measures *unless it be for the protection of rights which will be subject to the Court's decision in due course*.

The authority for this is well-known. In Senegal's written response we cited the Court's Order of 5 July 1951 in the *Anglo-Iranian Oil Co.* case and also the Permanent Court's Order of 2 August 1932 in the *South-Eastern Territory of Greenland* case.

But these are not isolated dicta. The same principle is repeated in the Court's Orders of 17 August 1972 in the *Fisheries Jurisdiction* case, paragraph 21, and the Order of 11 September 1976 in the *Aegean Sea Continental Shelf* case. I cite from the latter at paragraph 25:

> "Whereas the power of the Court to indicate interim measures under Article 41 of the Statute pre-supposes that irreparable damage should not be caused *to rights which are the subject of dispute in judicial proceedings and that the Court's judgment should not be anticipated* by reason of any initiative regarding the matters in issue before the Court."

Now clearly, the legality or otherwise of Senegal's arrest of vessels for unlawful fishing is not the subject of dispute before this Court in the annulment proceedings: it is not a matter "in issue".

When Guinea-Bissau, in its written request for interim measures, says that Senegal's arrest of

these vessels is

> *"préjugeant de la décision qui doit être rendue au fond par la Cour et de la délimitation maritime qui interviendra par la suite",*

Guinea-Bissau, in my submission, simply misapprehends the Court's task.

The Court's decision in due course on the merits will not be concerned with the validity of Senegal's exercise of powers of arrest over these vessels. And a maritime delimitation will not ensue, following the Court's decision.

The truth of the matter is that there are two possibilities. Either this Court will nullify the Award, or it will not.

If it does not nullify the Award, then, clearly, the entirety of Guinea-Bissau's case collapses. Guinea-Bissau must then proceed to implement the award.

If, hypothetically, the Court does nullify the award, then that is the limit of the Court's judgment. It is inconceivable that the Court will make any ruling, either on the delimitation as such, or on the powers of jurisdiction claimed by either Party. And certainly no new delimitation will follow from the Court's judgment.

What would then have to occur, I suppose, is that the Parties would have to agree on a new arbitration, before a new tribunal. And it might well be within the powers of such a new tribunal to order the kind of interim measures Guinea-Bissau now seeks, as an interim measure of protection. Because that new tribunal, unlike this Court, will be seized with jurisdiction to determine the maritime boundary.

But that is not the task of this Court. And consequently, Mr. President, Senegal submits that this Court has no power to make the kind of order which Guinea-Bissau now seeks.

I hope that this does not sound as though Senegal is relying on a jurisdictional technicality, and otherwise has no merit in its position. I would venture to speculate that if ever this same request were to come before a tribunal with competence, such a tribunal would find

First, that Senegal is entitled to proceed on the basis that the 1960 Agreement, and the 240° line, are valid;

Second that Senegal's powers of control to the north of that line is valid;

Third that to obviate further difficulties pending its final decision, both Parties should refrain from fishing or similar unlicensed activities on the other Party's side of the 240° line.

Mr. President, the whole of my argument so far is directed to showing that the request of Guinea-Bissau is inadmissible. It is, in a sense, a jurisdictional argument.

But now, if I may, I would like to take the argument a step further. For I want to show that, even if the request were admissible, it should still not be granted. And this for the reason that Guinea-Bissau has failed to show that, in the absence of an Order, its legal rights will suffer irreparable damage.

The requirement of irreparable damage to the rights of the Claimant State.

The principle which lies behind this requirement has been stated by the Court in the following terms, and I cite from the Order in the *Fisheries Jurisdiction* case of 17 August 1972:

> "Whereas the right of the Court to indicate provisional measures as provided for in Article 41 of the Statute has as its object to preserve the respective rights of the Parties pending the decision of the Court and presupposes that irreparable prejudice should not be caused to rights which are the subject of dispute in judicial proceedings and that the Court's judgment should not be anticipated by reason of any initiative regarding the measures which are in issue." (*Fisheries Jurisdiction, Interim Measures, Order of 17 August 1972*, para. 21.)

I want to concentrate on the requirement that the Claimant must *prove* a real risk of *irreparable damage* or prejudice to its rights.

The practice of the Court shows that the test is a strict one. If one examines the cases in which an Order has been made, then the strictness of the test is apparent, for example in the 1951 - *Anglo-Iranian Oil Co.* case, given that the title to the oil was in issue, the removal and sale of the oil would irrevocably and irreparably have prejudiced the rights of the company, claiming to own that oil. And so an Order of protection was made. Or take the 1972 - *Fisheries Jurisdiction* case it is clear that, if British and German vessels were excluded from the Icelandic fishing zone by the contested Icelandic Fishery Regulations, not only would that year's catch have been lost irretrievably, but the economic loss suffered by the fishing fleets might well put them out of business entirely.

And so, again, an Order was made.

Or take the 1973 - *Nuclear Tests* case. It was clear that because of the long-lasting effects of nuclear radiation from fall-out, any damage suffered might, if suffered, be ireparable. So an Order was made.

Or the 1979 - *United States Diplomatic and Consular Staff in Tehran case*

By which the Court itself, in its Order of 15 December 1979, referred to "danger to life and health and thus to a serious possibility of irreparable harm". Again an Order was made.

Or the 1984 - case concerning the *Military and Paramilitary Activities in and against Nicaragua ((Nicaragua v. United States of America)*. The Order of the Court of 10 May 1984 recited the Nicaraguan claim that

> "the lives and property of Nicaraguan citizens, the sovereignty of the State and the health and progress of the economy are all immediately at stake".

And so the Court ordered cessation of the mining of Nicaraguan ports and that the United States should respect Nicaraguan sovereignty by abstaining from the use of force.

Thus, the Court's practice in making Orders is to require not only a very high level of risk but, moreover, a risk of damage or injury that is truly irreparable.

And that means that it must be damage which could not be adequately compensated by an award of pecuniary damages as part of the Court's judgment on the merits.

We see in the Order of 11 September 1976 in the Aegean case, the Court noted that the conduct of seismic testing by Turkey in the disputed area could not confer any rights on Turkey or cause irreparable damage to Greece. The Court accepted that if it should ultimately decide, on the merits, that the areas of shelf in question belonged to Greece, then

> "in the event that the Court should uphold Greece's claim on the merits, Turkey's activity in seismic exploration might then be considered an infringement and invoked as a possible cause of prejudice to the exclusive rights of Greece ..." (para. 31).

So, where the damage is not truly irreparable, the time and place for allocating fault, and requiring reparation if necessary, is at the Merits stage and an application for an Order of Interim Measures and Protection is simply out of place.

I would add that proof or urgency, or risk of irreparable damage, gains nothing from allegations of the risk of "incidents". This much is clear from the Court's Order in the Aegean case at paragraphs 34 to 42. And Senegal would draw to the attention of the Court the phrase in Guinea-Bissau's written request, to the effect that, if the Court does not grant protection, Guinea-Bissau will have no option *"que de procéder de son côté à un contrôle des activités dans la région"*. Now that is an unnecessary and unfortunate threat. It is virtually a threat to provoke incidents and it does nothing to strengthen Guinea-Bissau's request.

Now in the light of that established practice, what can one say of the present Application?

Guinea-Bissau alleges only that two fishing vessels have been arrested. But *where* were they arrested? Mr. President, I have asked that each of the Judges and our colleagues on the other side should be given a copy of a small map* which we have prepared to assist the Court. And if I can invite the Court now to look at that map, you will see that the arrests were made to the north of the 240° line. The crosses - there are two crosses marked on the map - those are the arrests made by Senegal and the black dot is the area in which Guinea-Bissau made arrests. And I can add at this stage that my information is that both sites of arrest by Senegal were in fact outside the contiguous zone beyond 24 miles from the baseline.

Now, having identified the locality in which these arrests were made, let me return to what I said earlier about the presumption of validity. That 240° line derives from a 1960 Agreement upheld by the Arbitral Tribunal. It therefore enjoys a presumption of validity, and so does Senegal's exercise of powers of arrest to the north of that line.

Consequently, Guinea-Bissau's alleged right to fish, without licence from Senegal, enjoys no such presumption. Indeed, the presumption is to the contrary, it is a presumption of invalidity.

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* See map attached as annex.

So, in effect, the Court is being asked by Guinea-Bissau to protect rights which are presumptively *invalid*.

If you look at the location of the arrests by Guinea-Bissau, the Senegalese vessels arrested were also north of the line, and so from that one can see that Guinea-Bissau's own conduct is patently illegal. It is a direct challenge to the finality of the arbitral award, and a challenge by executive action, not by judicial recourse.

In essence, therefore, it ought to be Senegal that complains, and not Guinea-Bissau. We do not complain to this Court, Mr. President, only because we believe such a complaint is inadmissible, for reasons I have just explained.

Then there is the question of whether Guinea-Bissau has demonstrated, has proved to the Court, that it risks irreparable damage. This morning we had an argument that there is a risk of irreparable damage which no award of damages can compensate but we were offered no proof, merely an argument. Now, Mr. President, is it likely that Senegal is now set on a course designed to destroy its own off-shore fisheries? In terms of value, for the economy of Senegal, fishing ranks second as its second-most important resource after minerals. These fisheries are vital to the well-being of the Senegalese people. Why would Senegal wish to deplete and destroy such a resource? In fact Senegal, together with all other coastal States, has a legal duty to conserve fisheries within its economic zone. Guinea-Bissau asks the Court, without a shred of evidence or proof, to assume that Senegal is in breach of that duty, to assume that the consequential damage is suffered by Guinea-Bissau, not Senegal, and then to assume that the damage is irreparable. Now this sequence of assumptions is no substitute for proof and Senegal has every confidence that the Court will make no such assumptions. The Court will note the total absence of proof of irreparable damage or the risk of such damage by Guinea-Bissau.

And so to conclude, Mr. President, I must formally request the Court to dismiss this request by Guinea-Bissau as inadmissible and without foundation. Now I would only add, on the instructions of the Agent for Senegal, that the Court has the assurance of Senegal that until such time as this unfortunate dispute is resolved, Senegal, for its part, will use all diplomatic means available

to it to negotiate with Guinea-Bissau, an arrangement which will preclude incidents prejudicial to a peaceful resolution of the matter. Thank you, Mr. President.

The PRESIDENT: Thank you Mr. Bowett. Would any of the Judges like to put a question? I would like to put a question as a Member of the Court, if you will allow me, Mr. Bowett?

If you read the operative part of the Award of the Arbitral Tribunal, you will see there the following:

> "Vu les motifs qui ont été exposés, le Tribunal décide par deux voix contre une:
>
> De répondre à la première question formulée dans l'article 2 du compromis arbitral de la façon suivante : l'Accord conclu par un échange de lettres, le 26 avril 1960, et relatif à la frontière en mer, fait droit dans les relations entre la République de Guinée-Bissau et la République du Sénégal en ce qui concerne les seules zones mentionnées dans cet Accord, à savoir la mer territoriale, la zone contiguë et le plateau continental. La 'ligne droite orientée à 240°' est une ligne loxodromique."

Now, in your argument and the map that we have before us, you have a line here of 200 miles beyond what used to be, at the time of the agreement of 1960, the extent of the territorial sea and the contiguous zone. How is it that you extend this line to 200 miles under the Award?

If there are no other questions?

Je remercie les agents et les conseils des Parties. Je prie MM. les Agents des Parties de bien vouloir rester à la disposition de la Cour de façon à pouvoir nous fournir toutes les informations complémentaires dont elle aurait le cas échéant besoin. Je déclare close, sous toutes réserves, la procédure orale afférente à la demande en indication de mesures conservatoires présentée par la République de Guinée-Bissau dans la présente affaire.

La Cour rendra rapidement sa décision sur cette demande sous la forme d'une ordonnance qui sera lue en séance publique. Merci Madame, merci Monsieur.

L'audience est levée à 15 h 45.