SEPARATE OPINION OF VICE-PRESIDENT ODA

1. I concur with the Court's decision to reject the submissions presented by Guinea-Bissau, but my reasons for rejection are much simpler than those expounded by the Court at some length. In my view, Guinea-Bissau simply misinterpreted, first, the declaration appended by the President of the Arbitration Tribunal to the Arbitral Award of 1989, in connection with its first submission that the Award should be held inexistent; secondly, the Arbitration Agreement itself, in connection with its second submission that the Award should be declared null and void. Furthermore, I cannot but point out that the whole procedure employed to settle the real issue in dispute in the mid-1980s between Guinea-Bissau and Senegal (namely, the delimitation of the exclusive economic zones) was, from the outset, ill-conceived. I take these points in order.

I. Inadequate Submissions of Guinea-Bissau

1. Is the 1989 Arbitral Award Inexistent?

2. The ground upon which Guinea-Bissau contended that the 1989 Award was "inexistent" consisted in the alleged fact that:

> "One of the two arbitrators [Mr. Barberis, the President of the Tribunal] making up the appearance of a majority in favour of the text of the 'award' has, by a declaration appended to it, expressed a view in contradiction with the one apparently *adopted by the vote.*" (First submission of Guinea-Bissau in the written proceedings, emphasis added.)

In fact, Mr. Barberis stated in the first paragraph of his declaration that

> "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:
>
> 'The [1960 Franco-Portuguese] Agreement has the force of law in the relations between [Guinea-Bissau and 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'" (emphasis added),

while the 1989 Award itself stated that the 1960 Franco-Portuguese Agreement

> "has the force of law in the relations [between Guinea-Bissau and Senegal] with regard solely to the areas mentioned in that Agreement, namely the territorial sea, the contiguous zone and the continental shelf . . ." (1989 Award, para. 88).

The 1960 Agreement reads as follows:

> "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, . . . 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."

3. What Mr. Barberis had to say in the above-quoted part of his declaration served simply to affirm the conclusion reached by the Award and did not depart from it. As far as concerns the first question put to the Tribunal under Article 2, paragraph 1, of the 1985 Arbitration Agreement (that is, whether the 1960 Agreement had "force of law" in the relations between Guinea-Bissau and Senegal) — a question decided *by a majority vote* under paragraph 88 of the Award — there is no ground for contending, as the first submission of Guinea-Bissau states, that Mr. Barberis "expressed a view in contradiction with the one apparently *adopted by the vote*" (emphasis added). Hence, though the Award came into existence only thanks to the votes cast by Mr. Barberis and Mr. Gros, the contention cannot be sustained that it at once became inexistent because Mr. Barberis's declaration (allegedly) implied withdrawal of the agreement signified by his vote.

4. Mr. Barberis continued to state in the second and third paragraphs of his declaration:

> "This partially affirmative and partially negative reply is, in my view, the exact description of the legal position existing between the Parties . . . [T]his reply would have enabled the Tribunal to deal in its Award with the second question put by the Arbitration Agreement . . .
>
> . . . the Tribunal would have been competent to delimit the waters of the exclusive economic zone or the fishery zone between the two countries . . ."

Mr. Barberis thus seems to have construed the decision taken by the majority vote of the Tribunal — as stated in paragraph 88 of the Award — as potentially implying a "partially affirmative and partially negative reply" to the first question put to it, that is, the question whether the

1960 Agreement had "force of law", and this interpretation of his own led him to state that

> "this reply would have enabled the Tribunal to deal in its Award with the second question put by the Arbitration Agreement [that is, what is the course of the line delimiting the maritime territories . . .?]".

It may therefore be more convincingly argued that Mr. Barberis did hold a view different from what was stated in paragraph 87 of the Award which read:

> "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." (Emphasis added.)

This does not mean, however, that Mr. Barberis "expressed a view in contradiction with the one apparently *adopted by the vote*" (emphasis added), as the Tribunal's decision *adopted by the vote* was *only* related to the first question — Article 2, paragraph 1 — of the Arbitration Agreement (as expressed in paragraph 88 of the Award) but *not* the second question — Article 2, paragraph 2 — which would have required the Tribunal to decide the course of the delimitation line. In this respect, whatever Mr. Barberis stated in the second paragraph of his declaration cannot be considered as "a view in contradiction with the one apparently *adopted by the vote*" (emphasis added), as claimed by Guinea-Bissau.

5. The contention that the Arbitral Award is inexistent for the reason spelled out in the first submission of Guinea-Bissau is groundless since Mr. Barberis, in his declaration, simply corroborated the view *adopted by the vote* of the Tribunal. In fact, even if the declaration *had* contradicted the finding for which President Barberis had *voted* (which is not the case), it could at most have been regarded as an example of "second thoughts", as a *post facto* change of mind incapable of affecting the existence of the *collective* judicial act to which he had given not only his vote but also his signature.

2. Is the 1989 Award Null and Void?

6. To turn to the second submission of Guinea-Bissau in the written proceedings, that is, the subsidiary contention by which Guinea-Bissau claims that the 1989 Award is "absolutely null and void", Guinea-Bissau gives the following reasons, among others, that:

> "the Tribunal failed to reply to the second question raised by the Arbitration Agreement, whereas its reply to the first question implied a need for a reply to be given to the second"

and

> "it did not comply with the provisions of the Arbitration Agreement by which the Tribunal was asked to decide on the delimitation of the maritime areas as a whole, to do so by a single line and to record that line on a map".

It is of course a fact that the Tribunal did not "reply to the second question raised by the Arbitration Agreement". Nor did it "decide on the delimitation of the maritime areas as a whole", or "[to] do so by a single line and [to] record that line on a map".

7. In its submissions to the Arbitration Tribunal, Guinea-Bissau requested it to consider that:

> "— The rules on the succession of States in respect of treaties . . . do not permit Senegal to invoke against Guinea-Bissau [the 1960 Franco-Portuguese Agreement] 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;
>
> . . . . . .
>
> — For the delimitation of the continental shelves and exclusive economic zones . . . the maritime delimitation between the two States should be fixed between [azimuths 264° and 270°]",

while Senegal, in its submissions, requested the Arbitration Tribunal to declare and adjudge:

> "That by the [1960 Agreement] France and Portugal . . . have carried out the delimitation of a maritime frontier;
>
> 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 [Guinea-Bissau and Senegal]."

In the light of the submissions of Guinea-Bissau presented to the Arbitration Tribunal it is apparent that the Arbitration Agreement had not been drafted along the lines which Guinea-Bissau found to be in its interest.

8. The fundamental questions originally to be put to the Arbitration Tribunal had been converted into those concerning the effect of a treaty in a case of State succession, and the Tribunal was asked under Article 2, paragraph 1, simply whether that 1960 Agreement would "have the force of law in the relations between [Guinea-Bissau and Senegal]". The Arbitration Agreement simply required the Tribunal to define "the course of the line delimiting the maritime territories" *only* "in the event of a negative answer" to the question of whether the 1960 Agreement concluded between the two colonial States, Portugal and France, had force of law in the relations between Guinea-Bissau and Senegal. I add "only" in this

instance, because, though the word "only" does not appear in the Arbitration Agreement, there is no escaping its having been implied, as the Judgment has fully expounded (para. 50). The meaning of Article 2, paragraph 1, is so clear that there does not seem to be any call to refer for its interpretation to the Vienna Convention on the Law of Treaties.

9. The Arbitration Tribunal, *by its majority vote* (including the vote of Mr. Barberis), answered that question categorically and unequivocally in the affirmative. Here ended the plain task of the Tribunal, and this surely cannot be subject to any doubt whatsoever. The consequences that would ensue from the application of this Agreement were *not* within the Tribunal's mandate. Even so, the Arbitration Tribunal in 1989 qualified its own decision, and limited its scope, by stating that the "force of law" of the 1960 Franco-Portuguese Agreement would be limited "solely to ... the territorial sea, the contiguous zone and the continental shelf" and Mr. Barberis, as I stated in paragraphs 3 and 4 above, affirmed and strengthened the Tribunal's position by stating that the "force of law" would not apply to "the waters of the exclusive economic zone or the fishery zone".

10. The Award could have been delivered without either of the phrases as quoted above, thus leaving room for different interpretations. Yet the Tribunal tried to avoid such ambiguity, and Mr. Barberis further spelled out the already unequivocal decision of the Tribunal in his declaration. Well may he have argued therein for an interpretation whereby the Tribunal's reply to the first question above could be seen as "partially negative". The very fact that, to support this argument, he had to rephrase the Tribunal's findings serves to underline the exclusively affirmative character of the actual reply. In any case, his personal interpretation could not have affected the Tribunal's categorical decision, taken by the majority vote (in which Mr. Barberis's vote was naturally included) on paragraph 88 of the Award, that the 1960 Agreement had "force of law" in the relations between Guinea-Bissau and Senegal. In sum, the second submission of Guinea-Bissau does not stand, because the Award fully responded in the affirmative by the majority vote to the question concerning the "force of law" of the 1960 Franco-Portuguese Agreement, and no reply to the second question was thus called for.

II. Errors in Referral of the Dispute to the Dispute-Settlement Procedure

11. From the outset, owing to inadequate handling by the diplomatic authorities of Guinea-Bissau and Senegal of the real issues and problems between these two countries, the whole procedure for bringing their dis-

pute to the Arbitration Tribunal in 1985 and then the present case before this Court in 1989 was ill-starred.

1. Background to the Dispute

12. The delimitation of the exclusive economic zones, in view of the fishery interests of both States, has been at issue since the late 1970s. Senegal and Guinea-Bissau had gained independence from France and Portugal in 1960 and 1973 respectively. Senegal, by its *Act of 2 July 1976, establishing a sea fishery code, as amended by the Law of 8 February 1985*, claimed "the right to fish . . . in an exclusive economic zone of 200 nautical miles in breadth, . . . waters under Senegalese jurisdiction". On 19 May 1978 Guinea-Bissau enacted *Law on the extension of the territorial sea and exclusive economic zone*, under which the exclusive economic zone was claimed as extending "within the national maritime borders to 200 miles" where Guinea-Bissau claimed "exclusive rights over exploration and exploitation of the living and natural resources of the sea". The same claim was restated by Guinea-Bissau in the *Act of 17 May 1985 concerning the delimitation of the continental shelf*. The line of the delimitation of the exclusive economic zone with the neighbouring States was not specified in the domestic legislation of either State. Yet it was clear that the claims of Senegal and Guinea-Bissau to exclusive economic zones were overlapping in some areas, and various incidents involving conflicts between the fishery interests of the two States occurred. Diplomatic negotiations were continued between the two States.

2. The Inappropriate Drafting of the 1985 Arbitration Agreement

13. In March 1985 Guinea-Bissau and Senegal, having been unable to settle their dispute by negotiation, decided to refer to arbitration "the dispute relating to the determination of their maritime boundary" (Preamble to the Arbitration Agreement). It is obvious that both Parties, when referring to "the maritime boundary", meant to include in that definition the delimitation of the exclusive economic zones. Yet the matter of the determination of maritime boundaries was not even referred to in the primary and basic question which was actually asked of the Arbitration Tribunal. The Tribunal was in fact simply requested to decide, in accordance with the norms of international law, whether the 1960 Agreement between the colonial powers (Portugal and France) which related to the delimitation of the territorial seas, the contiguous zones and the continental shelf had force of law in the relations between the two States which had gained independence. Only in the event of a negative answer to that question was the

Tribunal requested to decide what would be the course of the line delimiting the maritime territories appertaining to both States respectively. In view of the real issue in dispute between the two States, it is obvious that the Agreement was drafted in an inappropriate manner. The Parties should have asked a question to cover the situation of a positive answer to the first question being given by the Arbitration Tribunal.

14. In the diplomatic negotiations between Guinea-Bissau and Senegal, their representatives were certainly aware of the 1960 Agreement which, if it possessed force of law, had defined the delimitation of the continental shelf as the 240° azimuth line. They seem also to have proceeded on the premise that there ought to be a single line of delimitation for both the exclusive economic zone and the continental shelf, a line which might be called the maritime boundary. They must further have taken for granted, it would appear, a second premise: namely that a line of delimitation for the exclusive economic zones (a new concept of international law) ought to coincide with any existing line of delimitation for the continental shelf (a concept which had been in existence for several decades). The combination of these two premises apparently induced Guinea-Bissau to believe that, if it wished to secure a line of delimitation for the exclusive economic zones with a bearing between 270° and 264°, it had first to make sure that the 240° line stipulated in 1960 was precluded through negation of the 1960 Franco-Portuguese Agreement. Senegal, on the other hand, satisfied that the 240° line would also apply to a line of delimitation for the exclusive economic zones, seems to have concluded that it had simply to depend on the force of law of that Agreement. It was thus natural and inevitable for both Parties to highlight the question of the validity of the 1960 Agreement. But the actual terms of the Arbitration Agreement only make sense on the assumption that, whether a continental shelf line already existed or not, the above premises underlay — expressly or implicitly — the two Governments' negotiating positions intended to achieve the drawing of a delimitation line for the exclusive economic zones.

15. In any event, while having clearly rendered its Award in response to the actual terms of the Arbitration Agreement, the Arbitration Tribunal in 1989 did not settle the real issue between the two States. That is to say, it did not define the course of the line delimiting the exclusive economic zones appertaining to Guinea-Bissau and Senegal respectively. The failure of the Award to refer to this line should certainly not be held against the Arbitration Tribunal. It would rather seem, in brief, that the deplorable aspects of the present case are traceable to the fact that the representatives of the two countries who were responsible for drafting the Arbitration Agreement embarked upon their task without sufficient grasp of what they had taken for granted as premises in the light of some essential concepts of the law of the sea, particularly those concerning the interrelation between the exclusive economic zone and the continental

shelf. They put to the Arbitration Tribunal a question which drifted away from the genuine issues, which concerned the law of the sea, in order to focus upon a narrow preliminary issue of treaty interpretation.

3. Insufficient Object of the Present Proceedings before the Court

16. Guinea-Bissau may have assumed too hastily that it was, as counsel for Guinea-Bissau defined it, the "losing party" at the Arbitration Tribunal. In fact Guinea-Bissau was certainly not the "losing party", even though it did not, as it clearly wished to do, secure a line between the bearings of 270° and 264° for the delimitation of the exclusive economic zones; Senegal (certainly not to be considered the "winning party") was not, for its part, assured that the 240° line, as defined in the 1960 Agreement for the continental shelf, would apply to the exclusive economic zone. Having viewed the Arbitral Award as an outright defeat, the competent authorities of Guinea-Bissau were further misguided in bringing a case in 1989 before this Court asking for a ruling on the validity of the Award. Guinea-Bissau found it appropriate to put to the Court a question as to whether the 1989 Award (which in any event did not settle the dispute) was existent or not, valid or null and void. But whatever judgment might have been given by the Court in the present case (in fact the submissions of Guinea-Bissau are rejected in the present Judgment) — in other words, even if the Court had declared the Arbitral Award non-existent or null and void —, the positions of Guinea-Bissau and Senegal, or their interests and rights relating to the boundary of the exclusive economic zones, could not have been affected.

17. It seems to me therefore that, from the time of its presentation to the present Court, this litigation lacked any meaningful object. The past six-year period since the break-up of diplomatic negotiations for drawing a line of delimitation of the exclusive economic zones, the object of which had been primarily to settle the fishery disputes between them, seems to have simply been wasted. The issues in dispute between these two neighbouring States left unsettled were sent back to the starting point and remain in 1991 the same as they were in 1985. One should not, however, overlook the fact that one positive element was clarified in the Award, that is, that there now exists between Guinea-Bissau and Senegal a loxodromic line of 240° azimuth for the delimitation of the continental shelf and that this point is upheld in the present Judgment. The present issue between the two States, unlike the issue in 1985, should be concerned with the drawing of a line of delimitation for the exclusive economic zones in a situation where a line of 240° for the continental shelf has been confirmed as already in existence.

III. Conclusions

1. Dualism of the Exclusive Economic Zone and the Continental Shelf

18. The new concept of the exclusive economic zone gives to the coastal State

> "sovereign rights for the purpose of exploring and exploiting . . . the natural resources, whether living or non-living . . . of the sea-bed and its subsoil" (1982 United Nations Convention on the Law of the Sea, Art. 56, para. 1),

while under the already established existing concept of the continental shelf, the coastal State exercises "sovereign rights for the purpose of exploring [the continental shelf] and exploiting its natural resources" (1958 Convention on the Continental Shelf, Art. 2, para. 1; 1982 United Nations Convention, Art. 77, para. 1). Bearing in mind that the subject (that is, the exploring of the sea-bed and its subsoil and the exploitation of its natural resources, covered by the concept of the continental shelf) is now completely superseded by or even absorbed in the new concept of the exclusive economic zone, a uniform maritime area for the exclusive economic zone and the continental shelf may certainly be desirable, and it is to be recommended that a single line of delimitation between the neighbouring States be institutionalized in order to avoid conflicts in the exercise of jurisdiction by different coastal States over the same maritime area, depending on whether this is the exclusive economic zone or the continental shelf. However, the question concerning the uniform régime for the exclusive economic zone and the continental shelf certainly did not receive an affirmative answer in the 1982 United Nations Convention on the Law of the Sea, as reflected in the provisions of that Convention allowing the co-existence of the parallel régimes of the exclusive economic zone and the continental shelf. It should be noted that the Arbitration Tribunal constituted in 1985 by Guinea-Bissau and Senegal preferred, as implied in the Arbitral Award and directly expressed in Mr. Barberis's declaration, not to depart from the basic concept entertaining parallel régimes for the exclusive economic zone and the continental shelf.

19. Much controversy still surrounds the question *de lege ferenda* whether the delimitation of exclusive economic zones ought to be identical to that of the continental shelf or, more fundamentally, whether the new concept of the exclusive economic zone ought to take the place of or to absorb the traditional concept of the continental shelf (except for the offshore distance, it being impermissible for an exclusive economic zone to extend beyond 200 miles from the shore, whereas a State's continental shelf, depending on the interpretation of the famous "exploitability" criterion in the 1958 Convention on the Continental Shelf, may extend fur-

ther), or whether the two régimes of the exclusive economic zone and the continental shelf would remain existing in parallel between neighbouring States, but with different lines of delimitation. If the two régimes are to be merged in a case where the régime of the continental shelf has already effectively existed, a further question will still have to be answered, that is, whether or not an existing line of delimitation for the continental shelf should dictate the line for the new régime of the exclusive economic zone, or a new line of delimitation to be agreed upon for exclusive economic zones should automatically entail reconsideration of the existing line for the continental shelf. A uniform régime covering both the exclusive economic zone and the continental shelf will remain to be settled.

20. Without taking any position on the question whether the United Nations Convention on the Law of the Sea is already to be regarded as existing international law or not, I must point out that that Convention separately provides practically identical provisions concerning the delimitation of the areas concerned between the neighbouring States for both the exclusive economic zone and the continental shelf in parallel, stating that

> "[t]he delimitation of [the exclusive economic zone] [the continental shelf] between States with . . . adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution" (United Nations Convention on the Law of the Sea, Arts. 74 and 83).

One is led to conclude that the delimitation of the line of the exclusive economic zones or of the continental shelf between neighbouring States, or both, is, in the first place, a matter for negotiation between the States concerned. What would be an equitable solution may well be different for the respective delimitations of the exclusive economic zones and of the continental shelf.

2. Alternatives Now Faced by Guinea-Bissau and Senegal

21. Guinea-Bissau and Senegal are certainly free to follow, as a basis for their negotiations, the thesis (which was entertained in the 1982 United Nations Convention and followed by the 1989 Arbitral Award) that a separate régime for the exclusive economic zone can exist in parallel with that of the continental shelf, and that a line of delimitation for their exclusive economic zones may be drawn in the light of various factors leading to an equitable solution for that purpose, independently of the existing line of 240° azimuth for the continental shelf.

22. Yet they are also free jointly to prefer another thesis, namely that

there should be a single line for the exclusive economic zones and the continental shelf. In that event, it should first be understood that, if a line to delimit the exclusive economic zones is to be identical to the existing line for the continental shelf, there will remain little or no room for negotiation. In the framework of this thesis, negotiation on a new line for the exclusive economic zones would be meaningful only on the understanding that the existing continental shelf line may be subject to alteration or adjustment, depending on the new line agreed for the exclusive economic zones. Guinea-Bissau and Senegal should be aware that they now face a situation which is quite different from those in the *North Sea Continental Shelf* cases (1969) (in which "principles and rules of international law . . . applicable to the delimitation as between [Germany and the Netherlands; Germany and Denmark] of the areas of the continental shelf . . ." were sought) and the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* case (1982) (in which the delimitation of "the area of the continental shelf" between these two States was sought), or the situation in the case of *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (1984) (in which Canada and the United States gave a Chamber of the Court *carte blanche* to provide them with an equitable "course of the single maritime boundary" where there did not exist any line of delimitation for the continental shelf).

23. That being understood, and without prejudice to the interpretation of the new Application to the present Court of 12 March 1991, I hope that Guinea-Bissau and Senegal eventually engage in a definitive attempt to draw a line of delimitation of their respective exclusive economic zones with a clear picture of every element to be taken into account, and bearing in mind that the line for the continental shelf already exists. To repeat, it falls within the matters to be negotiated by the Parties whether parallel régimes for the exclusive economic zones and the continental shelf will prevail, thus producing two co-existent lines or, in the case of drawing a single line, what influence upon it the existing line for the continental shelf should retain, or whether the latter should even be adjusted or renegotiated.

(Signed) Shigeru ODA.