SEPARATE OPINION OF JUDGE NI

I agree with the decision of the Court that the Application of Guinea-Bissau should be rejected. I also agree generally with the line of reasoning contained in the Judgment. I feel, however, that certain aspects of the Judgment might call for further elaboration.

The present case involves the following two questions, which will be dealt with successively. They are: (1) whether the Award of 31 July 1989 should be considered inexistent because of the declaration made by the President of the Arbitration Tribunal, Mr. Barberis; and (2) subsidiarily whether the Award should be considered a nullity because the Tribunal failed to answer the second question in Article 2 of the Arbitration Agreement and also failed to append the map provided for in Article 9 of that Agreement, without giving reasons therefor.

1. Alleged Inexistence of the Award

It is to be noted that, of the three members of the Arbitration Tribunal, Mr. Barberis and Mr. Gros voted for the Award, while Mr. Bedjaoui voted against it. If Mr. Barberis's declaration is to be viewed as a dissent from the Award, as alleged by Guinea-Bissau, the Award should, Guinea-Bissau contends, be considered as inexistent because it would no longer be supported by a majority. The declaration of Mr. Barberis has been quoted *in extenso* in paragraph 19 of the Judgment and will not be reproduced here.

On reading Mr. Barberis's declaration one notes that it contains a number of verbal forms in conditional tenses, such as "could have", "would have", "might have", etc. To a large extent it merely sets forth a series of doubts, reservations, suppositions or suggested variations without expressing any clear and decisive opposition to or contradiction with any part of the operative clause of the Award that would enable one to view the declaration as manifesting dissent.

On the contrary, the declaration affirms in substance, as does the Award, that the Agreement concluded by Exchange of Letters in 1960 has the force of law in the relations between the Republic of Guinea-Bissau and the Republic of Senegal. The declaration likewise affirms, as does the Award, that the Agreement is binding on the Parties with respect to the territorial sea, the contiguous zone and the continental shelf. It also indicates, as does the Award, that the Agreement does not bind the Parties with respect to the waters of the exclusive economic zone or the fishery zone.

Since it is an affirmative reply to the first question, the Tribunal was not called upon to answer the second question in Article 2, paragraph 2, of the *compromis*; the reason is the express condition: "In the event of a negative answer to the first question." It was in fact impossible for Mr. Barberis to set off on a quest for the solution of a question which did not arise, for the Tribunal was not confronted with the question of the validity of the 1960 Agreement with respect to the exclusive economic zone or the fishery zone.

Mr. Barberis suggested that the Tribunal would have been competent to delimit the waters of the exclusive economic zone or the fishery zone so as to settle the whole dispute. But the Tribunal could not go beyond its mandate, which only concerned the territorial sea, the contiguous zone and the continental shelf. In fact, Mr. Barberis went no further. He merely suggested a more comprehensive solution, as is clear from his use of the phrase "would have been". But his suggestion stopped there. His declaration cannot therefore be taken to record his dissent, thereby overriding or invalidating his vote. The vote is the most reliable indication as to whether or not he concurred with the Award.

The declaration is not part of the Award. The practice whereby judges attach separate opinions, dissenting opinions or declarations is well established since the days of the Permanent Court of International Justice. The practice is at present embodied in Article 95, paragraph 2, of the Rules of Court, which provides that:

> "Any judge may, if he so desires, attach his individual opinion to the judgment, whether he dissents from the majority or not; a judge who wishes to record his concurrence or dissent without stating his reasons may do so in the form of a declaration . . ."

From the wording of this provision, it is clear that since individual opinions or declarations are *attached* to the judgment, they cannot be a part of it. Since they are individual opinions, whether or not they concur with the judgment (or, in this case, with the Award), they cannot be considered to represent the opinion of the body (whether a court or tribunal) as a whole. They can only represent the views of the individual authors. They are thus attached to the judgment or award, but do not form an integral part thereof. They can explain, interpret, vary, criticize or even differ in certain respects from the judgment or award. But to criticize or to propose variations does not necessarily import dissent. It is the operative part, and in particular the voting, that counts. Unless the operative part is in turn divided into parts and voted upon separately, it is the whole of the operative part that is voted upon.

In fact, this is the only sensible way to look at a judgment or award which is rendered, not by one judge or arbitrator alone, but by a panel. If

the parties were at liberty to assess an individual opinion or declaration by their own viewpoints and thus disregard the voting, the legal order would be thrown into great confusion. Nor can one consider that since the Court has, in the present case, jurisdiction with respect to the Award it is free to disregard the vote by giving its own evaluation of what a declaration by an individual judge or arbitrator amounts to, unless there is clear and unmistakable proof that the facts are such that the declaration can be regarded as a statement of dissent and the voting was flawed by mistake or compulsion. But such is not the case here.

Guinea-Bissau has criticized Senegal for "taking refuge behind legal formalism". But judges or arbitrators do not vote as a mere matter of formality. They do so in order to express their precise position. They are fully aware of the substantive implications of their vote. The vote is not just a formal gesture. The vote indicates their final decision. If the declaration, as in this case, raises an uncertainty as to whether a judge or arbitrator concurs with or dissents from a judgment or an award, it is the vote that constitutes the authentic expression of his attitude.

For these reasons, Guinea-Bissau's assertion that there was no majority in support of the Arbitral Award of 31 July 1989 and that the Award should be adjudged and declared to be inexistent cannot be accepted.

2. Alleged Nullity of the Award

Guinea-Bissau asks the Court to adjudge and declare, subsidiarily, that the so-called decision is absolutely null and void, as the Tribunal failed to reply to the second question put in the Arbitration Agreement, as it did not decide on the delimitation of the maritime areas, as a whole, by a single line and did not record that delimitation on a map, and as it has not given the reasons on which the Award is based.

Arbitration has been useful in the peaceful settlement of disputes between States. But there have also been abuses which can result in nullities. What is crucial is to have a list of the causes of nullity and also to make provision for the kind of international organ which will be entrusted with deciding on alleged causes of nullity.

It was in 1929 that the Government of Finland made a proposal to examine the question and recommended that the power to pronounce nullities should be vested in the Permanent Court of International Justice. A committee of specialists was appointed by the Council of the League of Nations to study the proposal. In the same year, the Institute of International Law decided to include on the agenda the possible constitution of a body to hear appeals in *cassation* against decisions of international arbi-

tration tribunals. It was the International Law Commission of the United Nations which drafted and submitted in 1958 a set of "Model Rules on Arbitral Procedure", to which the attention of States was drawn.

In the "Model Rules", the following two Articles are pertinent:

"*Article 35*

The validity of an award may be challenged by either party on one or more of the following grounds:

(a) that the tribunal has exceeded its powers;
(b) that there was corruption on the part of a member of the tribunal;
(c) that there has been a failure to state the reasons for the award or a serious departure from a fundamental rule of procedure;
(d) that the undertaking to arbitrate or the *compromis* is a nullity.

Article 36

1. If, within three months of the date on which the validity of the award is contested, the parties have not agreed on another tribunal, the International Court of Justice shall be competent to declare the total or partial nullity of the award on the application of either party."

The concept of nullity has been considered broad enough to cover all serious irregularities in arbitration. However, most publicists are agreed that an arbitral award can be held to be null and void only in cases where the tribunal in question has "manifestly and in a substantial manner passed beyond the terms of submission" (K. S. Carlston, *The Process of International Arbitration*, p. 81, and the authorities quoted by him on pp. 81-84). After citing a number of eminent authorities such as Vattel, Bluntschli, Bonfils, Fauchille, Calvo, Oppenheim, Hall, Hyde, Castberg, Schatzel, Stoykovitch, Weiss, etc., Carlston concluded that

"Claims of nullity should not be captiously raised. Writers who have given special study to the problem of nullity are agreed that the violation of the *compromis* should be so manifest as to be readily established. In order that a tribunal's decision or a jurisdictional issue shall be considered null, it must, in general, be arbitrary, not merely doubtful or arguable." (*Ibid.*, p. 86.)

In the present case, Guinea-Bissau alleged that the Arbitral Award of 31 July 1989 is a nullity because it fails to reply to the second question in Article 2, paragraph 2, of the *compromis*. Guinea-Bissau raises a number of arguments to prove that this was an *excès de pouvoir* and the Award is therefore a nullity. Before going into the merits of this claim, certain points should first be mentioned.

To begin with, the term *excès de pouvoir* means that the Tribunal has exceeded or overstepped the powers which have been attributed to it by the Parties. What Guinea-Bissau now complains of is that the Tribunal has failed to exercise, not that it has exceeded, the powers vested in it (compare the wording of Article 11, paragraph 2, of the Statute of the United Nations Administrative Tribunal). The term "*excès de pouvoir* by omission" is a self-contradictory one. It is also questionable whether, if the Tribunal fails, in whole or in part, to exercise the powers vested in it, the appropriate remedy is to apply for nullification of the Award.

Secondly, the ground of Guinea-Bissau's complaint is the Tribunal's failure to reply to the second question, in Article 2, paragraph 2, of the *compromis*. But Guinea-Bissau makes no reference to the reply of the Award in respect of the first question, in Article 2, paragraph 1, of the *compromis*. No satisfactory reason is given as to why the whole Award must be nullified.

Be that as it may, the thrust of Guinea-Bissau's thesis is that, irrespective of the Tribunal's response concerning the value of the Franco-Portuguese Exchange of Letters, the Tribunal was called upon to proceed to a complete delimitation of the maritime territories. This interpretation is, however, in clear contradiction with the ordinary meaning to be given to the terms of the *compromis*. In the present case, a reply to the second question in Article 2, paragraph 2, of the *compromis* would have been mandatory only if the first question had been answered "in the negative". The obligation to reply to the second question is alternative, not simultaneous. Since the first question was replied to in the affirmative, the Tribunal was not called upon to reply to the second question. This follows from the ordinary and natural meaning of the relevant words. Such an interpretation is in perfect harmony with Article 31, paragraph 1, of the Vienna Convention on the Law of Treaties.

Guinea-Bissau, however, argues that the Tribunal's reply to the first question is partially in the affirmative and partially in the negative; a partially negative reply is nevertheless a negative reply; the Tribunal was therefore under an obligation to give a reply to the second question. It should be recalled that, in the present case, there cannot be any such thing as a "partially affirmative and partially negative answer", since the question put in the *compromis* relates to the maritime boundary, as it existed at the time of conclusion of the Agreement in 1960, not thereafter. Indeed, the Award, in paragraph 85, clearly indicated that the Agreement had to be interpreted in the light of the law in force at the date of its conclusion. Therefore the Tribunal's reply to the first question with respect to the territorial sea, the contiguous zone and the continental shelf is a complete reply to the question put to the Tribunal. The word "solely" merely explains the scope of its decision. It cannot, therefore, be taken as a rejection of a part of the Parties' request and thus as a reason for characterizing the reply to the first question as a partially negative or even as an altogether negative answer.

Guinea-Bissau further argues that since the entire dispute concerns the maritime boundary and since the title of the 1960 Agreement and the Preamble of the *compromis* both refer to the determination of the maritime boundary, it follows that whatever the reply given to the first question, the Tribunal should have proceeded to the second.

It must be pointed out that, in interpreting a treaty, such as the *compromis* in the present instance, whose text is clear and unambiguous, no attempt should be made to change the ordinary and natural meaning of the language used in the text by resorting to other elements and to interpret them as requiring under any circumstance the overall delimitation of the maritime boundary between the two States. It is primarily and clearly in the text of Article 2 of the *compromis* that the objective of the Parties is located. Here the Parties agreed that a reply to the second question is conditioned on a negative answer to the first. It cannot be envisaged that a mention of the delimitation of the maritime boundary in the title of the 1960 Agreement and in the Preamble of the *compromis* can have the effect of changing the meaning of the clear and unambiguous language of the text in Article 2 of the *compromis*.

Guinea-Bissau persistently maintained that it was the intention of the Parties that whatever the answer to the first question (in Article 2 of the Arbitration Agreement) the Tribunal was called upon to delimit the entire maritime boundary between the two States. But this contention does not find any support in the clear language of the *compromis*.

On the contrary, a passage in Guinea-Bissau's own Memorial submitted to the Tribunal reads:

> "The representatives of Senegal ended by *sharing this way of thinking* [my emphasis] and accordingly the Tribunal is requested to carry out a dual task: in the first place, to pronounce itself on the validity of the Franco-Portuguese Exchange of Letters of 16 April 1960 as a means of determining the maritime boundary between Guinea-Bissau and Senegal; *and, should this validity not be recognized* [Senegal's emphasis], to lay down the course of the line delimiting the maritime territories between the two States in accordance with the pertinent norms of positive international law." (Page 35 of Guinea-Bissau's Memorial before the Tribunal; quoted by Senegal on page 34 of its Counter-Memorial before the Tribunal.)

The above passage clearly affirms that it was Guinea-Bissau which proposed that the Tribunal be asked to pronounce on the validity of the 1960 Exchange of Letters and, *should this validity not be recognized*, to lay down the course of the line delimiting the maritime territories between the two States. And *this way of thinking* was *shared* by Senegal. Such has been the result of the negotiations between the two States and they well knew what they were agreeing to.

Although the passage quoted above was followed by a sentence, "In any event, at the conclusion of the arbitration the maritime delimitation between Guinea-Bissau and Senegal will have been effected", this can

only mean the delimitation of those maritime spaces which existed at the time of the conclusion of the 1960 Agreement, because it was the 1960 Agreement which was in dispute. If the Parties had intended that there should be an *ex novo* delimitation of the entire maritime boundary, irrespective of the result of the examination of the validity of the Franco-Portuguese Exchange of Letters of 1960, they would have said so in the *compromis*. Since this was not only a relevant, but a crucial point, they could not have neglected to do so. Negotiations had been carried on for eight years. How could a point of such substance and significance have been overlooked? There is no evidence of any dispute having arisen between the Parties on this point during their negotiations. On the contrary, the 11 prefatory words in Article 2, paragraph 2, were proposed by Guinea-Bissau itself (Senegalese Counter-Memorial in the present proceedings, pp. 29, 33, 38 and 44; also public sitting of 5 April 1991, CR 91/4, p. 45).

Guinea-Bissau also asserts that the various components of the maritime areas are indivisible. But this alleged indivisibility, even if the Parties had so intended would not have removed the condition which the Parties expressly laid down in Article 2, paragraph 2, of the *compromis*. Whether or not the line is divisible is a question of how the line is to be drawn, arising if the first question is answered in the affirmative. It does not change the fundamental relationship between the two questions put in Article 2, which is that the reply to the second one is conditioned on the first question being answered in the negative.

It is to be noted that both Parties emphasized that they wanted a single line of delimitation, but they viewed this concept differently. For its part, Guinea-Bissau wished to have the continental shelf and the exclusive economic zone re-aligned, by means of a synthetic line, on the basis of equitable principles. As for Senegal, it wished to have the existing 240° line raised to divide the exclusive economic zone. The argument of indivisibility, which seeks to identify the various components of the maritime boundary and make them coincide, cannot therefore be used to support Guinea-Bissau's thesis that whatever the reply to the first question, the Tribunal should have proceeded to the *ex novo* delimitation in accordance with the second question.

Nor can it be said that the Tribunal's *task* is indivisible. The Tribunal was asked to determine, if it answered the first question in the negative, the course of the line forming the maritime boundary. The first question was answered in the affirmative, and there the task of the Tribunal ended. Guinea-Bissau cannot now claim that something was left undone. This "something" did not and cannot form the object of arbitration because it did not exist at the time of the conclusion of the 1960 Agreement.

It is true that in the preambular part of Article 2 and also in Article 9,

paragraph 1, of the *compromis*, the word "question" was used in the plural. But such details of drafting cannot be relied upon to contradict the meaning of the instrument as a whole, since at the time of its conclusion it was not known whether both questions might have to be answered or not.

Guinea-Bissau has further contended that the Tribunal failed to exercise its power under the *compromis* to make a decision on the course of a single line delimiting all the maritime spaces and to indicate the boundary line on a map. Since, as has been said before, the Tribunal was not called upon to answer the second question, there was no occasion to delimit such a boundary line and it naturally followed that no map could have been appended.

As to the question of whether or not there has been sufficiency of reasoning, it is important not to base oneself solely on paragraph 87 of the Award. Paragraph 87 only reaches a reasoned conclusion from what has been discussed. The reasons in support of the conclusion arrived at in paragraph 87 were, to a large extent, given earlier in the Award. The principal point is the affirmation of the validity of the 1960 Agreement, as a consequence of which the second question did not have to be answered. And since no *ex novo* delimitation of the maritime boundary was to take place, a map could not have been produced. All these points are interrelated. The reason is self-evident. There is no basis for regarding the question of the map as an independent matter and saying that no adequate reason is given for its omission.

The line of reasoning that led the Tribunal to the conclusion in paragraph 87 is clear. After analysing the question of the validity of the 1960 Agreement, the Tribunal, in paragraph 80 of the Award, observes that "the 1960 Agreement is valid and can be opposed to Senegal and to Guinea-Bissau". In paragraph 85 of the Award, the Tribunal states that the 1960 Agreement must be interpreted in the light of the law in force at the date of its conclusion. Then it concludes in the same paragraph that the Agreement does not delimit the maritime spaces which did not exist at that date, whether they be termed "exclusive economic zone", "fishery zone" or whatever.

It is also to be noted that paragraph 87 and paragraph 88 are intimately linked to each other. In paragraph 88 the Tribunal found that the 1960 Agreement had the force of law in the relations between Guinea-Bissau and Senegal with regard to the areas mentioned in that Agreement. Consequently, by the terms of Article 2 of the Arbitration Agreement, the Tribunal did not have to answer the second question. Such was the conclusion of paragraph 87 of the Award. When the Tribunal adopted paragraph 88 by two votes to one, it necessarily endorsed the reasoning behind paragraph 87.

On the basis of such analysis and conclusions, the Tribunal then concluded that it was not called upon to reply to the second question. The decision on the question of the map follows that on delimitation of the maritime boundary. Since the first question put in Article 2 of the *compro-*

mis was answered in the affirmative, no *ex novo* delimitation took place. Consequently, no map was called for. The reasoning is succinct, but it is sufficiently clear for the purposes of the Award.

For the foregoing reasons, Guinea-Bissau's subsidiary submission that the Award of 31 July 1989 should be declared a nullity cannot be sustained.

(Signed) Ni Zhengyu.