JOINT DISSENTING OPINION OF JUDGES AGUILAR MAWDSLEY AND RANJEVA

[Translation]

1. While endorsing the decisions and analysis of the Court with respect to both inexistence and the "abuse of legal process", we feel we should explain our disagreement with the interpretation that the Court, by the vote of the majority of its Members, is giving to the rules of law whose application has occasioned the dismissal of the Application alleging the nullity of the contested Award. We are convinced that the Court should have declared the contested Award of 31 July 1989 to be an absolute nullity, as shown by our vote on paragraph 2 of the Operative Part of the Judgment in this case. But since the Court did not share this conviction, nothing stood in the way of an affirmative or a negative vote on paragraph 3, concerning the effects of the validity of the Award.

2. The case is of a particular significance because of the problems of judicial and arbitral method that it raises. It presents some particular difficulties as it is the kind of case in which the solution adopted by the Court depends upon the way in which the problems are tackled. An approach based upon primarily technical considerations will be bound to prove unsatisfactory in so far as it does not enable one to resolve the permanent interactions between the norm and the methods of interpretation of that norm. Indeed, an examination of the nullity/validity or even invalidity of an arbitral award involves a decision on the epistemological validity of the interpretation adopted by the arbitration tribunal.

3. In the present case, it will be seen from the outset that, while validating the Arbitral Award, the Court has quite rightly shown no hesitation about stressing the lacunae and weaknesses of that Award. Moreover, the Parties to the dispute, going beyond their declarations of principle, have announced that they were disposed to make judicial and/or conventional arrangements to cope with the effects of any finding of nullity of the contested Award. Guinea-Bissau has filed a new Application on the merits the submissions of which have been reproduced in the text of the Judgment, whereas Senegal declares that it is ready to envisage either negotiations or recourse to this Court. This convergent will of the Parties to arrive at a definitive solution of the whole of the dispute, on the basis of law, should be approved and given full support. However, from a strictly legal standpoint, one cannot be certain of a definitive solution of the dispute between Guinea-Bissau and Senegal, in spite of proceedings that have already proved unduly lengthy, very complex and excessively costly for

States whose economies, particularly in the case of the Applicant, are dependent upon maritime resources [1].

4. Because of the nature of the Court's jurisdiction, the present proceedings being neither an appeal nor application for cassation but an application for annulment, we shall abstain from criticizing the substance of the findings of the Arbitration Tribunal which are the collective responsibility of that Tribunal. Moreover, because of the new Application filed by Guinea-Bissau, certain questions must, *in petto*, be seen as pending before the Court.

5. However, the International Court of Justice, as the principal judicial organ of the international community, has in our view a specific mission, that of securing the promotion of international peace and security and the development of friendly relations between States — or, in other words, the peaceful settlement, by judicial means among others, of such disputes as arise between the States. On that score, the Court is naturally inclined, because of the way in which judges are recruited and the representation of the principal legal systems, to lend support to arbitral solutions, even though it may be led to cast a critical eye upon arbitral awards, once there has been any question about the arbitrators' respect for procedural law, and to prove exacting with respect to the evident character of authority of an award. This is the price of providing a sounder basis for legal security in international relations and of consolidating the trust placed by States, more particularly by developing States, in this mode of dispute settlement.

6. Three points linked to the problem of the authority of the Arbitral Award of 31 July 1989 lead us to make some critical comments:

I. The authority of the Arbitral Award of 31 July 1989 and *res judicata*;

II. The question of the definitive settlement of the whole of the dispute between Guinea-Bissau and Senegal;

III. The shortcomings of the Arbitration Tribunal and *excès de pouvoir*.

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I. The Authority of the Arbitral Award of 31 July 1989 and *Res Judicata*

7. The failure to resort to the legal concept of *res judicata* is worthy of note. Indeed, the irrebuttable presumption of legal truth that attaches to a judicial decision once it has become final is an institution common to all systems of law and serves as a basis for the binding character of judicial

[1] A reference to Article 33, paragraph 1, of the Charter of the United Nations by analogy with Article 279 of the United Nations Convention on the Law of the Sea, would have been welcome.

decisions. In our preliminary observations, we mentioned that the Court has criticized the Award. Moreover, the arbitral proceedings were punctuated by various regrettable facts. We refer, in particular, to the method and excessively lengthy duration of the arbitral proceedings, the Tribunal's technique of work, the unjustified absence of one arbitrator, the declaration made by the President of the Tribunal, and the incomplete character of the delimitation after the Tribunal had done its work. Taken separately, these criticisms may not suffice to justify, in strict law, a finding of nullity. However, if considered cumulatively, those objections do constitute a set of facts which, on the one hand, are such as to give rise to a very serious doubt directly affecting the intrinsic value of a judicial decision while, on the other hand, producing effects that undermine the very authority of the Award and its capacity to serve as a basis for dispute settlement.

8. As a matter of legal technique, the Court would have had no difficulty in rejecting the Applicant's request by invoking against it, firstly, the provisions of Article 10 of the Arbitration Agreement and, secondly, the rule of *res judicata* with its consequences in law. Such a response would have been acceptable from the standpoint of legal formalism and would have had the virtue of simplicity. However, the approach adopted is open to criticism on the grounds that the Court, having observed that the Tribunal had correctly accomplished its mission, then proceeds to its own analysis of the nature of the relationship between the first and second questions in Article 2 of the Arbitration Agreement.

In our view, the Court should have followed up on that approach by giving prominence to the interaction between the complaints against the Award and its attendant circumstances, on the one hand, and the authority of *res judicata*, on the other. Indeed, the value of the Tribunal's decision does not depend solely upon the intrinsic qualities of its arguments; account must also be taken of the whole set of elements surrounding the contested Award.

9. We would maintain that the concept of *res judicata* which underlies the very authority of any judicial decision, goes beyond the framework of the axiomatic bases of the law. It is a consequence of a whole set of phenomena (acts, rules, conduct, attendant circumstances . . .) which have to be taken into consideration as they contribute to the reinforcement of the *convictio juris*. The judicial approach and technique should not be exposed to criticism derived from a strategy conditioned by mistrust. We accordingly consider it necessary for an arbitration tribunal, while adopting a specific form of procedure, to use, in order to develop its reasoning, a number of different techniques of argument so as to support and validate its own method and conclusions. In the absence of an enforcement mechanism, judicial conclusions can only command intellectual support, *convictio juris*, if they rely at once upon what is likely, what is plausible, and what is probable. Indeed, in a different sphere, logic was able to undergo a significant development when, abandoning purely scholastic

techniques, it resorted to other methods of demonstration and argument and, more particularly, to mathematics.

10. A judicial discussion is in fact a confrontation between two formal systems of logic, with a view to showing that one's adversary's logic is incompatible with the norm and rule of law. Under those circumstances, the judge has to go beyond the techniques of formal logic in order to settle the dispute, as that technique of argument is bound to lead, in the end, to "the ridiculous and the terrifying". Only the intervention of factual considerations such as the experience of daily life, the sense of the uncertain, provisional or aleatory, can break the vicious circle of this universe of forms. This means that dialectical logic is invaluable in judicial argument, as the solution thus arrived at may more reasonably be accepted as the least unsatisfactory of possible solutions, even if it is not the best. It is indeed highly desirable that a judicial decision may be seen as reasonable and just, thanks to a pedagogical comprehension of the way in which it has been reached. Unfortunately it is unusual for formal logic to respond immediately to those considerations.

11. While an arbitration tribunal is bound to act on that imperative need of authority, account must also be taken of the parties' right to expect justice to be properly administered. Indeed, international adjudication derives the whole of its authority from the trust placed in it by the parties, and it is only fair that that trust should be neither shaken nor impaired.

12. These considerations are sources of obligations for the tribunal and the arbitrators. By way of an enunciation, some of them may be called to mind in the context of this case: i.e., courtesy of the members of the tribunal; transparency of the judicial method adopted; reflexive and demonstrative approach; definitive settlement of the whole of the dispute submitted for adjudication, in accordance with the terms, object and purpose of the Arbitration Agreement; celerity of the deliberation. The arbitration tribunal and its members are imperatively required to ensure that the decision has the full authority of *res judicata.* This is why we are convinced that a decision whose authority is strongly contested loses a very large measure of its legal value; its being "called into question" deprives it of the authority of *res judicata.*

II. The Question of the Definitive Settlement of the Whole of the Dispute between Guinea-Bissau and Senegal

13. In paragraph 66 of the Judgment, the Court makes a point of fundamental importance for the practice and the future of arbitration. The exercise of its jurisdiction led the Tribunal to forgo a complete settlement of the dispute that, at the time of signature of the Arbitration Agreement, existed between the Parties with respect to the delimitation of the maritime areas appertaining to each one of them. We shall not dwell on the particularly serious consequences of such a result for two developing

countries. The Arbitration Tribunal was under an obligation to settle the dispute submitted to it definitively and completely, in accordance with the terms of the Arbitration Agreement in general, of which Article 2 is no more than one element. By way of a mere reference to various national legal systems, we would mention the system known as that of procedural economy, which is more compelling. This principle requires that judges to whom a problem has been submitted should seek for the means enabling the whole of the dispute to be resolved, at the earliest possible date and at the lowest possible cost to the parties. Given the very complex nature of international litigation, it appears to us advisable that the international judge should take these practical ideas into consideration.

14. For the Court the result of the Award contested is directly linked to the drafting of the Arbitration Agreement. We believe that it is not for the Court to confirm or reject the reasoning of the Arbitration Tribunal as to the quality of the drafting of the Agreement the Parties concluded: it is the duty of the Court to ascertain that the Tribunal has made a correct and satisfactory application of the rules concerning the interpretation of treaties, in this instance of the Arbitration Agreement. Consequently, the question is whether an interpretation based exclusively on a literal analysis of the prefatory words of the second question put to the Tribunal suffices to bring out the content of the common will of the Parties. We subscribe fully to the points made by Judge Weeramantry with respect to the rules governing the interpretation of international conventions. It is incumbent on the court seised of a dispute to take simultaneously into account the three constitutive elements of an international agreement: the letter, the object and the purpose of the agreement. The difficulty inherent in the interpretation of the Arbitration Agreement results from the dual nature of this instrument: as a diplomatic act, that Agreement is an element introducing new factors into the negotiations between the Parties; but, as a legal act, it determines the elements structuring the object of the dispute. For these reasons we consider a mere literal analysis to be insufficient.

To recall to the Tribunal the rule of syncretic or symbiotic interpretation of the three above-mentioned elements does not amount to an attempt to give the Agreement another meaning; all it does is to respect fully the will of the Parties, a difficult exercise if ever there was one.

15. In the present case of the Arbitral Award, the Court notes, as did the President of the Arbitration Tribunal, Mr. Barberis, that the Award did not delimit the whole of the maritime areas appertaining respectively to Guinea-Bissau and Senegal. Moreover, the Court accepted the line of argument of the Tribunal whereby it reduced the terms of the problem to a question of State succession: maintenance in force of the Franco-Portuguese Exchange of Letters of 1960. To be sure, we have no difficulty in subscribing to the principle that there does not exist for the international judge an obligation analogous to that laid down by Article 4 of the French Civil Code, a principle recalled by the Arbitral Tribunal set up by Egypt and Israel in the *Taba* case: "The Tribunal has not the task to determine

the course of the boundary from BP 91 to the shore and beyond" (*International Legal Materials*, Vol. 27, No. 4, p. 82). But, without having to substitute its own reasons for those of the Arbitration Tribunal, the Court has, from our point of view, an obligation to take into account the silence of the Arbitration Tribunal over the obvious and immediate contradiction between the results of the Award and a number of observations of a literal, unquestionable nature, such as:

(1) The title of the Tribunal

TRIBUNAL ARBITRAL	TRIBUNAL ARBITRAL
POUR LA DÉTERMINATION	PARA A DETERMINAÇÃO
DE LA FRONTIÈRE MARITIME	DA FRONTEIRA MARÍTIMA
GUINÉE-BISSAU/SÉNÉGAL	GUINÉ-BISSAU/SENEGAL

(2) The Preamble of the Arbitration Agreement of 12 March 1985 — the purpose of the Treaty:

> "Recognizing that they have been unable to settle by means of diplomatic negotiation the dispute relating to the determination of their maritime boundary,
>
> Desirous, in view of their friendly relations, to reach a settlement of that dispute as soon as possible and, to that end, having decided to resort to arbitration".

(3) The object of the dispute according to the Arbitration Tribunal in the Award:

> "27. The sole object of the dispute submitted by the Parties to the Tribunal accordingly relates to the determination of the maritime boundary between the Republic of Senegal and the Republic of Guinea-Bissau, a question which they have not been able to settle by means of negotiation."

The silence the Tribunal observed with regard to these simple elements is open to criticism and one can without requiring another interpretation of the convention call the Award into question over the validity of the linear, and additionally unilateral mode of reasoning and its intrinsic coherence. Contrary to the view expressed by the Court in paragraph 55, we consider that it is the conclusion that must be read in the light of the title of the Tribunal, the purpose of the treaty and the definition of the dispute, not the other way round.

16. That the conditional proposition of Question 2 should have been a source of difficulties for the interpretation of the convention is perfectly obvious; but the fact appears to have been forgotten that the prefatory words are the diplomatic price paid for the settlement of the dispute by arbitration. Furthermore, it was incumbent upon the Tribunal to ensure a coherent presentation of all the elements of the dispute within the framework of a correct and complete interpretation of the treaty. Moreover, all that is required in order that the work of the Tribunal should result in a

frontier line is said and given in the Arbitration Agreement. The failure of the Arbitration Tribunal to perform its mission is a sufficiently serious factor prejudicial to arbitration as an institution. We therefore consider that the Court should have taken it upon itself to carry its analysis to its conclusion by drawing the appropriate legal conclusion from the omission and the failure of which it took note.

III. The Shortcomings of the Arbitration Tribunal and *Excès de Pouvoir*

17. Contrary to the majority of the Members of the Court, we believe that the Arbitration Tribunal was under a legal obligation to give an explicit answer, and to do so by a separate vote, to the second question of Article 2 of the Arbitration Agreement, on the basis of a full statement of its reasons.

18. The observations of the Court concerning the normal practice of arbitral tribunals disregard the legal nature of that practice by confining it within the area of facts. In law a judge seriously fails to perform his mission whenever he decides not to answer a question. For the question lays down the terms of the difficulty that the judge is asked to resolve; the question thus constitutes the legal cause of the litigation, whether it be judicial or arbitral. On the diplomatic plane the formulation of the question underlines the importance of the problem raised. The doctrinal position is that "the Tribunal must adjudicate every point referred to in the *compromis*, even if in its opinion it does not arise to be considered" (cf. A. Balasko, *Causes de nullité de la sentence arbitrale en droit international public*, Paris, Pedone, 1938, p. 200, whose opinion is shared by P. Fauchille, *Traité de droit international public*, Paris, 1926, Part I, Vol. III, p. 548). This is supported by the following observations of the International Court of Justice in its Judgment on the Merits in the *Corfu Channel* case:

> "In the first question of the Special Agreement the Court is asked:
>
> (i) Is Albania under international law responsible for the explosions and for the damage and loss of human life which resulted from them, and
> (ii) is there any duty to pay compensation?
>
> This text gives rise to certain doubts. If point (i) is answered in the affirmative, it follows from the establishment of responsibility that compensation is due, and it would be superfluous to add point (ii) unless the Parties had something else in mind than a mere declaration by the Court that compensation is due. It would indeed be incompatible with the generally accepted rules of interpretation to admit that a provision of this sort occurring in a special agreement should be devoid of purport or effect. In this connection, the Court refers to the views expressed by the Permanent Court of Interna-

> tional Justice with regard to similar questions of interpretation. In Advisory Opinion No. 13 of July 23rd, 1926, that Court said (*Series B, No. 13*, p. 19): 'But, so far as concerns the specific question of competence now pending, it may suffice to observe that the Court, in determining the nature and scope of a measure, must look to its practical effect rather than to the predominant motive that may be conjectured to have inspired it.' In its Order of August 19th, 1929, in the Free Zones case, the Court said (*Series A, No. 22*, p. 13): 'in case of doubt, the clauses of a special agreement by which a dispute is referred to the Court must . . . be construed in a manner enabling the clauses themselves to have appropriate effects'." (*Corfu Channel, Merits, I.C.J. Reports 1949*, pp. 23-24.)

This obligation to give a reply to each question put weighs, in our view, more heavily on an arbitral tribunal than on a judicial one to the extent that the latter is subjected to a pre-codified procedural *corpus*, whereas the arbitral judge is, on the contrary, bound body and soul to the will of the States Parties to the dispute.

The observations made by the Court and the case-law it cites in paragraph 50 of the Judgment are inadequate to justify the decision not to reply to the second question, even though certain factual elements can be considered to have a bearing on the present case: the existence of a condition precedent to the reply to a subsequent question. In the first place, before deciding, in its Advisory Opinion on the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Second Phase*, not to reply to the second question, the Court noted a default; for it observed that it would commit an *excès de pouvoir* were its decision to be substituted for the will of the Parties (*I.C.J. Reports 1950*, p. 230), while, in the case of the *Interpretation of the Greco-Bulgarian Agreement of 9 December 1927*, the Permanent Court did not fail to note the possible incidence of a failure to reply to the second question on the questionnaire before it, as a whole (*P.C.I.J., Series A/B, No. 45*, p. 87). Now we have noted lacunae of this nature in the Award: the possibility of there being, regard being had to the reply to the first question, an *excès de pouvoir* in the event of a reply to the second one, should have been the subject of explanatory comments by the Tribunal, whereas the effects of the reply to the first question on the Arbitration Agreement as a whole were passed over in silence by the arbitrators, which we do not consider proper. But, in the second place, as regards the obligation to answer each question, the case-law cited by the Court is of scant relevance. The three cases cited are advisory, not contentious ones. Article 65 of the Statute of the Court is permissive. It gives the Court the power to examine whether the circumstances of the case are such as should lead it to decline to answer the request (*I.C.J. Reports 1950*, p. 72), and that in so far as "the object of the Request is . . . more limited. It [the Request] is directed solely to obtaining from the Court certain clarifications of a legal nature . . ." (*ibid.*, p. 70). This difference in nature makes

clear the limits of the transposition of the advisory procedure into the setting of a contentious one, the object of which is to sanction a right.

19. Contrary to the position of the majority of the Members of the Court, we are convinced that by deciding *infra petita* and opting for not replying to the second question, the Tribunal committed an *excès de pouvoir* through omission and did so without stating its reasons.

20. In exercising the *compétence de la compétence*, did the Tribunal, which, in our opinion, failed to justify fully its refusal to reply to the second question, effectively perform, in a lawful manner, the mission entrusted to it? The Court declares itself satisfied with the statement of reasoning, succinct but judged to be sufficient, by which the Tribunal justified its decision. Concision and clarity are indeed rare qualities, but the problem is not quantitative — it is not a question of appreciating the length and the literary and artistic qualities of a line of reasoning — but epistemological. What is the validity of recourse to the logical conclusion to justify the absence of a reply to the second question, a decision which did not take explicit shape in a vote or an express operative provision?

21. The argument based on the logical conclusion is conceivable if the causal relationship between the two propositions is ineluctable in nature. But, in the present case, this is by no means clearly established. Taken in isolation, the dissenting opinion of the third Arbitrator, as well as the declaration of the President of the Tribunal, calls into question the conclusions that may be drawn from the proposition adopted by the Tribunal. For Mr. Barberis's declaration is in contradiction with the text of the Award in so far as the declaration recognizes that the Tribunal failed to exercise its jurisdiction even though it was under an obligation to perform its task fully.

22. Generally speaking, the demonstrative value of the logical conclusion is easily conceivable in relationships of causality. But legal logic has more to do with relations of imputability. This being so the logical conclusion may appear to be pertinent whenever in law the object is to ensure the effectivity, the consolidation of a right already created. On the contrary, it is altogether insufficient to justify the rejection of an application that aims to bring about respect for a right; in as much as it refuses purely and simply to pay due regard to other premises, it constitutes an affirmation of principle and does not appear to be a technique for demonstrating. In the case of the rejection of an application, the logical conclusion is the equivalent of a failure to give reasons. This is why we consider that the absence of a reply to Question 2 of the Arbitration Agreement and the refusal to annex a map to the Award reflect an absence of reasons. Does this default on the part of the Tribunal constitute an *excès de pouvoir* through omission?

23. Article 35 of the Model Rules on Arbitral Procedure elaborated by the International Law Commission brought to an end the theoretical debate as to whether *excès de pouvoir* on the part of the tribunal constitutes a ground of nullity of an arbitral award. To put the matter simply, the *excès de pouvoir* can be described as the transgression committed by a compe-

tent tribunal of the legal framework of its mission. It "consists in any violation, any disregard, any overstepping of or non-compliance with the provisions of the Arbitration Agreement . . ." (Balasko, *op. cit.*, p. 153). In an arbitration the *compromis* sets forth the decisions and acts that the tribunal must take or decree. The provisions of the *compromis*, its preamble and its body, determine in a mandatory manner the jurisdiction of the arbitral tribunal; on the other hand, the latter enjoys discretionary powers to ascertain, in an explicit fashion, the modalities by which the arbitrator reaches those decisions, and that in order to guard against any suspicion which might impair the authority of the award. This being so, *excès de pouvoir* can be committed by the arbitrators through acts or omissions. If the tribunal fails to adjudicate on a point referred to in the *compromis*, there is *excès de pouvoir infra petita.* The present case of the Award of 31 July 1989 involves one of these exceptional cases.

24. *A contrario,* we consider that it was incumbent on the Tribunal to demonstrate how an *excès de pouvoir* could result from its completion of the determination of the single line of the maritime boundary between Guinea-Bissau and Senegal, regard being had in this respect to the reply to the first question put in Article 2. This omission is, in our opinion, a serious failure by the Tribunal to perform its mission.

25. The refusal to include a map manifestly constitutes another violation of the provisions of the Arbitration Agreement, for the same reasons as in respect of the decision not to reply to the second question. If the Tribunal did in fact consider it unnecessary to prepare a map in the absence, on the one hand, of a reply to the second question and, on the other, of a global delimitation of the maritime spaces as a whole by a single boundary line, the Court should, in our opinion, having regard to this omission, have called into question the soundness of the Award inasmuch as the necessary respect for the right of the Parties to a proper administration of international justice was at stake.

(Signed) Andrés AGUILAR MAWDSLEY.

(Signed) Raymond RANJEVA.