DISSENTING OPINION OF JUDGE WEERAMANTRY

This case arises out of an arbitration which has followed a most unusual course, thereby throwing up a fascinating range of legal issues. Among them are issues concerning the interpretation of arbitral agreements and the nullity of arbitral awards.

Apart from the two issues mentioned, I am in agreement with the Court on the numerous issues which have been argued before us at some length. To the Court's lucid exposition of these issues, there is nothing I can usefully add. Among the matters on which I respectfully share the Court's opinion are its rejection of Senegal's contentions of lack of jurisdiction and of abuse of process by Guinea-Bissau. Likewise, I am in full agreement with the Court's rejection of Guinea-Bissau's contentions that the absence of Arbitrator Gros at the delivery of the Award lessened its authority and that the Award was invalidated by the Tribunal's failure to state its reasons in full and to produce a map showing the boundary line. I associate myself with the Court's succinct and cogent rejection of these contentions.

I regret, however, that the view I have taken on the two matters set out at the commencement of this opinion leads me to a different conclusion on the overall result. The questions on which I differ are sufficiently important in my view to warrant extended consideration.

I shall not burden this opinion with a recital of the facts, which are set out in the Judgment of the Court. I only note the unusual course followed by this arbitration, in that there was a declaration by the President stating his own preference for a form of words "more precise" than the phraseology adopted in the majority decision to which he was a party. He goes on to state that if this "more precise" phraseology had been used, this would have enabled the Tribunal to deal with the second question, which the Tribunal, by a majority decision to which he was again a party, had decided it was not called upon to address. The President also observed that a reply of the kind suggested by him would have enabled the Tribunal to delimit the waters of the exclusive economic zone and the fishery zone, and thus settle the whole of the dispute. The failure to address Question 2 and to settle the whole dispute constitute the gravamen of Guinea-Bissau's complaint. Indeed, the President's declaration so troubled the third arbitrator, Mr. Bedjaoui, as to prompt him to state in his dissenting opinion that the declaration "by its very existence as well as by its con-

tents, justifies more fundamental doubts as to the existence of a majority and the reality of the Award" (para. 161).

Despite these features which cause concern, I am prepared, with the Court, to take the view that it is the President's vote we must have regard to rather than his somewhat inconsistent declaration. We must presume that that vote was cast after due deliberation. I therefore agree that the Award must, for the reasons set out in the Judgment of the Court, be treated in law as a majority award and that the plea of "inexistence" taken by Guinea-Bissau should fail. I would agree further that, despite the President's apparent view that a more precise formulation of the Award would have opened the way for a consideration of Question 2, the decision not to address Question 2 was a majority decision by reason of the President being a party to it. Weakened though it may be by the declaration, that decision is still a majority decision and cannot in law be described as "inexistent" on the basis that the President's declaration destroys his vote.

However, for reasons which will be evident from this opinion, the decision so given is fundamentally flawed by reason of other defects, and is therefore in my view a nullity.

This opinion is structured in two main segments. The first deals with the interpretation of Article 2 of the *compromis* and the second examines whether the findings thus reached result in the nullity of the Arbitral Award. For the reasons set out, I conclude upon the first matter that a proper interpretation of Article 2 did not permit the Tribunal to leave a major portion of its responsibilities undischarged. On the second matter, my conclusion is that the failure to discharge those responsibilities constituted a non-compliance with the *compromis* which was so serious as to nullify the resulting award.

Before entering upon these major questions of law, I should state preliminarily as a matter of fact that the dispute between the two countries was a dispute in relation to their maritime boundary and that there were five maritime spaces which needed to be demarcated — the territorial sea, the contiguous zone, the continental shelf, the exclusive economic zone and the fishery zone. The dispute between the two States would not be at an end so long as any of these important maritime spaces remained undefined.

I. Interpretation of Article 2 of the *Compromis*

The particular clause which arises for interpretation is Article 2 of the Arbitration Agreement of 12 March 1985, which reads as follows:

> "The Tribunal is requested to decide in accordance with the norms of international law on the following questions:

1. Does the Agreement concluded by an exchange of letters on 26 April 1960, and which relates to the maritime boundary, have the force of law in the relations between the Republic of Guinea-Bissau and the Republic of Senegal?

2. *In the event of a negative answer to the first question*, what is the course of the line delimiting the maritime territories appertaining to the Republic of Guinea-Bissau and the Republic of Senegal respectively?" (Annex to the Application Instituting Proceedings of the Government of the Republic of Guinea-Bissau, Award, p. 5; emphasis added.)

The crucial words are "In the event of a negative answer to the first question", on the interpretation of which considerable effort was expended by both Parties at the hearing before us. On the interpretation of those words depends the issue whether the Arbitration Tribunal was under an obligation to proceed to answer Question 2. If the Tribunal was entitled to leave Question 2 unanswered, the matter is at an end and we need enquire no further. If, on the other hand, the Tribunal was obliged to answer Question 2 and failed to do so, grave issues arise. They touch the status and validity of an award which left major portions of the arbitrators' responsibilities undischarged, thereby leaving major portions of the boundary dispute unresolved. The words quoted offer the key to the resolution of this central question.

Focusing even more finely on the clause under consideration, what is the meaning of the phrase "negative answer"? Those two words are naturally incapable of construction except in context — the context of the paragraph in which they occur and the context of the entire document. The conclusion, which to me seems inevitable on any of the available methods of interpretation as set out in this opinion, is that the "negative answer" referred to was a negative answer to the question whether the 1960 Agreement was binding in regard to the subject-matter of the dispute — not any one or more component elements thereof but the disputed boundary considered as one integral problem, the desire to settle which was the driving force leading the Parties to the Arbitration Tribunal.

An incomplete settlement, dealing only with discrete parts of that boundary, would only compound problems and was clearly not the object and purpose of the Arbitration Agreement, in the total context of which alone particular clauses are to be construed. The different elements of the boundary question were not, on any reasonable construction, to be the subject of a later arbitration or arbitrations aimed at mopping up the component elements left undetermined by the first arbitration. Partial answers and piecemeal solutions were furthest from the object and purpose of the *compromis*. The interlinked nature of those component elements, which can-

not fairly be determined in isolation from each other, lends strength to the view that both Parties were clearly seeking such a comprehensive settlement of their common problem in one arbitration.

I proceed to set out the reasons for my view that a complete delimitation was the subject-matter of Question 1.

Question 1 — to which it was crucial whether the answer was negative or not — asked whether the Agreement of 26 April 1960 had the force of law in the relations *(dans les relations)* between Guinea-Bissau and Senegal. It is true the expression "the relations" is a very simple phrase. Interpreted in isolation, it can be given many meanings, extending from all relations between the States to maritime boundary relations and, within the latter category, to a wide spectrum of relations ranging from all the disputed maritime boundary questions to any one or more components of them or, indeed, to any portion of any one component. Context and objects and purposes will tell us where in that vast spectrum our choice will fall. Indeed, without reference to these factors, we cannot give the phrase a meaning sufficiently intelligible or definite for the momentous legal consequences to ensue which follow inevitably from our choice.

Question 1 was not, in my view, a theoretical question referring only to the binding nature of the 1960 Agreement. It was a question on which grave practical issues turned — namely whether the boundary followed the line determined in that Agreement. The boundary line lay at the heart of that question as it lay at the heart of Question 2 which, together with Question 1, I have described in this opinion as an interlocking pair.

We can straightaway dismiss the wider construction extending "the relations" to all relations between the States, for clearly the document was set firmly in the context of the relations concerning the maritime boundaries, as the internal evidence even within Question 1 indicates. The crucial question is however whether the expression relates to all the maritime boundary questions or to any one or more constituent elements of this group. On this matter it seems clear that, whether one regards the context of the document or its objects and purposes, it was never in doubt that "the relations" covered all five elements of the maritime boundary.

If the view is correct that the question was whether the Agreement was binding in regard to the entire maritime boundary, an answer that it was binding, not in regard to the entirety but only in regard to parts of it, was clearly a negative answer, upon which the door to Question 2 immediately swung open. This made it obligatory for the Tribunal to enter upon a consideration of the important issues awaiting it under that question — issues that represented a substantial part of the Tribunal's total undertaking. The failure by the Tribunal to address a crucial part of its responsibilities

under the *compromis* raises the further issue whether the Award is vitiated for non-compliance with the *compromis*.

Bearing in mind throughout this exercise that we are not entitled to reconstitute the questions formulated by the Parties, but only to interpret them exactly as formulated, we must satisfy ourselves further that, in all the circumstances, this is the necessary and only interpretation at which the arbitrators could reasonably arrive when examining them for the purpose of determining their arbitral responsibilities.

These considerations are important as we are not sitting as a Court of Appeal seeking to determine whether to nullify an award that would otherwise be valid. We have jurisdiction only for the purpose of making a declaration as to whether the award is null and void from its inception in consequence of some fundamental flaw. An interpretation manifestly contrary to accepted principles of interpretation and leading to action manifestly contrary to the *compromis* would constitute such a vitiating factor. This opinion proceeds on the basis that no less a standard than this would be required if the Court is to grant to Guinea-Bissau the declaration of nullity which it seeks.

It is vitally important that when arbitrators examine, as in every case they must, with the utmost care, the substance of their mandate and the limits of their authority, their interpretation must be anchored to the realities of the context. Words and phrases in the *compromis* are not to be treated as though they exist in isolation, to be given a meaning they are literally capable of bearing but which is unrelated to the exercise in which the arbitrators are engaged.

In this case, the phrase "negative answer" was of the utmost importance and called for anxious scrutiny. Yet there is nothing to indicate that the Tribunal has given to this key phrase the scrutiny its importance demanded, and all we have on this matter is the observation in paragraph 87 of the Award that, bearing in mind its conclusions (on the applicability of the 1960 Agreement) and "the actual wording" of Article 2, "in the opinion of the Tribunal it is not called upon to reply to the second question". What factors weighed with them we are not told, beyond the fact that this was their opinion. It would not be unreasonable to describe this as inadequate — certainly inadequate to convey to an objective observer the impression that anxious consideration had been given to construing this profoundly important question in its contextual and practical setting.

The analysis of this phrase, which assumes a pivotal role in the matter before us, takes us into the realm of treaty interpretation, the *compromis* being of course a treaty. The discussion which immediately follows analyses the relevant portions of the *compromis* in the light of accepted principles of treaty interpretation.

Sir Gerald Fitzmaurice, in his well-known discussion of treaty interpretation [1], refers to the existence of three principal schools of thought upon the subject — the "intentions of the parties" school, the "textual" school and the "teleological" school [2]. The term "teleological" is used by Fitzmaurice *(loc. cit.)* in the sense of "aims and objects" of the treaty.

I shall in this opinion apply these approaches to the problem before us, mindful that a hierarchy cannot be established among them [3].

Having referred to the three principal schools of interpretation and the radically divergent results that could ensue from their application, Fitzmaurice observes (at p. 43) that "all three approaches are capable, in a given case, of producing the same result in practice". In this case we are, in my view, in the happy situation alluded to by Fitzmaurice, where all three approaches concur in leading us to the same conclusion. I shall use these three methods in the ensuing discussion without placing them in any hierarchical order. As Judge Elias [4] points out, none of these by itself may be sufficient to supply the solution to a problem of treaty interpretation and there may sometimes be a simultaneous resort to all three factors, as indicated by the Permanent Court of International Justice in the *Factory at Chorzów* case (*P.C.I.J., Series A, No. 9*, p. 24).

A. The "Textual" Approach

That words should be given their ordinary meaning is of course a much-used rule of interpretation. As this Court stated in its Advisory Opinion in *Competence of the General Assembly for the Admission of a State to the United Nations:*

> "The Court considers it necessary to say that the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur." [5]

The Permanent Court of International Justice has observed:

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[1] Fitzmaurice, *The Law and Procedure of the International Court of Justice*, Vol. 1, p. 42.

[2] See, also, T. O. Elias, *The Modern Law of Treaties*, 1974, p. 72.

[3] Commentary on the Draft Articles on the Law of Treaties by the International Law Commission at its Eighteenth Session — *United Nations Conference on the Law of Treaties, Official Records (First and Second Sessions)*, 1971, p. 39, para. 8; see, also, Myres S. McDougal, Harold Lasswell and James Miller, *The Interpretation of Agreements and World Public Order: Principles of Content and Procedure*, 1967, p. 116.

[4] *Op. cit.*, p. 72.

[5] *I.C.J. Reports 1950*, p. 8; see, also, Advisory Opinion on the *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, I.C.J. Reports 1960*, p. 150.

> "In considering the question before the Court upon the language of the Treaty, it is obvious that the Treaty must be read as a whole, and that its meaning is not to be determined merely upon particular phrases which, if detached from the context, may be interpreted in more than one sense." [1]

Since then, the Vienna Convention on Treaties has given this principle more explicit form in Article 31.

Words and phrases cannot be understood by themselves, and, as Article 31 makes clear, their "ordinary meaning" must be understood not in isolation but in their context *and* in the light of the document's object and purpose. Judge Ago emphasized this aspect in the deliberations of the International Law Commission [2] when, in commenting on the concept of "ordinary meaning", he observed that:

> "a term in isolation had no meaning; terms had no meaning except in a sentence or in a set of sentences and articles, in other words, in their context".

We have moved far from the Vattelian principle that "the first general rule of interpretation is that *it is not permissible to interpret what has no need of interpretation*" [3]. Though followed by some eminent international jurists even into the early years of this century, the need for even the simplest words to require some interpretation has been highlighted both by legal scholars [4] and by modern linguistic studies. The impact of the latter is seen in such studies as Schwarzenberger's analysis of the Vienna Convention [5], in which, in reliance on linguistic studies, he points out that the very word "meaning" can have up to sixteen meanings and that the difficulty in seeking to give words their "ordinary meaning" is that "almost any word has more than one meaning" (citing in support such well-known authorities as C. K. Ogden, *The Meaning of Meaning*). Hence, as McNair points out in his *Law of Treaties* (1961, p. 367), even the best understood of "plain terms" such as "mother" can depart very widely from its normal meaning,

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[1] Advisory Opinion on the *Competence of the ILO in Regard to International Regulation of the Conditions of Labour of Persons Employed in Agriculture (P.C.I.J., Series B, No. 2*, p. 23).

[2] *Yearbook of the International Law Commission*, 1966, Vol. I, Part II, p. 189, para. 57.

[3] Emmerich de Vattel, *The Law of Nations or the Principles of Natural Law*, Vol. III, Bk. II, Chap. XVII, in *The Classics of International Law*, ed. J. B. Scott, p. 199; emphasis added.

[4] See E. S. Yambrusic, *Treaty Interpretation: Theory and Reality*, 1987, pp. 9 *et seq.*

[5] "Myths and Realities of Treaty Interpretation: Articles 31-33 of the Vienna Convention on the Law of Treaties", in S. K. Agrawala (ed.), *Essays on the Law of Treaties*, p. 71, at p. 86.

depending on the context in which it is used [1]. Not without reason has this Court had occasion to refer [2] to the famous observation of Mr. Justice Holmes that

> "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and context according to the circumstances and the time when it is used" (*Towne* v. *Eisner*, 245 US 418, 425).

It is clear therefore that the expressions "the relations" and "negative answer" cannot be understood by themselves but only in strict relation to their context. One cannot give a meaning to these expressions without subjecting them to rigorous contextual scrutiny. Professor Glanville Williams, in a noted scholarly analysis of legal interpretation in the wider context of Language and the Law [3], follows linguistic insights to point out that

> "it is always the duty of the Court, within the limits set by the law of evidence, to go behind the dehumanized dictionary-meaning to what the assertor was actually trying to express" [4].

I may also refer to the *Anglo-Iranian Oil Co.* case, where this Court observed, in relation to the declaration by the Government of Iran, under Article 36 (2) of the Statute of this Court:

> "But the Court cannot base itself on a purely grammatical interpretation of the text. It must seek the interpretation which is in harmony with a natural and reasonable way of reading the text." (*I.C.J. Reports 1952*, p. 93, at p. 104.)

We must thus go further in examining the two phrases in question than grammatical meanings or dictionary definitions, and give the words a meaningful nexus with the real dispute reflected in the terms of the *compromis.*

(i) Contextual indications

The general context yields several indications that the Agreement between Guinea-Bissau and Senegal concerned a consolidated question

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[1] On linguistics and legal interpretation, see, also, C. G. Weeramantry, *The Law in Crisis: Bridges of Understanding*, 1975, pp. 163-167.

[2] *Delimitation of the Maritime Boundary in the Gulf of Maine Area, I.C.J. Reports 1984*, at p. 360, *per* Judge Gros, dissenting.

[3] Glanville Williams, "Language and the Law", [1945] 61 *LQR* 384 at 393.

[4] Cf., Savigny, *Obligations*, 1851, Vol. 2, § 71, on the need for "making the living thought concealed in dead letters to come alive in our perception".

and not a series of discrete questions. That question is compendiously described in the Preamble to the *compromis* as "the dispute", which is not the language one would expect if the intention was to treat this as a series of disparate questions which may or may not be answered at the discretion of the Tribunal. Internal evidence to this effect from the text of the treaty can be gathered from at least five sources:

(a) Paragraph 2 of the Preamble speaks of the recognition by the Parties that they have been unable to settle by means of diplomatic negotiation *the* dispute relating to the determination of their maritime boundary.
(b) Paragraph 3 of the Preamble follows up this reference to "the dispute" by speaking of the desire of the Parties, in view of their friendly relations, to reach a settlement of *that* dispute, as soon as possible.

(c) Article 2, in its formulation of Question 1, speaks of *the* maritime boundary.
(d) Article 2, in its formulation of Question 2, speaks of *the* line delimiting the maritime territories.
(e) Article 9 requires the drawing of *the* boundary line on the map. *One* boundary line for all *five* disputed areas is one of the clearest pointers in the direction I have indicated.

There was thus a clear understanding on the part of the contracting Parties that the Agreement they were entering into was one seeking a delimitation of the entire boundary.

(ii) Questions 1 and 2 viewed in the context of each other

The two questions constituted an interlocking pair set within a common context — the resolution of the entire dispute. Indeed, one could even look at the questions together as a composite question in bifurcated form, with a clear end result — the resolution of the entire dispute.

Question 2 implicitly indicates that, whatever the answer to Question 1, the result should be one boundary line. Three possibilities present themselves in regard to Question 1 —

(a) an answer that the Agreement was binding in regard to all components;
(b) an answer that it was not binding in regard to any component; and
(c) an answer that it was binding only in regard to some.

Whatever the answer, the mutually desired result of a single boundary line was achieved through the juxtaposition of the two questions.

In eventuality *(a)* described above there was no problem in reaching the

desired result, for the answer to Question 1 would, in that event, settle the entire problem which was to be resolved. Question 2 would in that situation become a superfluous appendage denuded of practical purpose and content. However, in eventualities *(b)* and *(c)*, Question 2 remained a live and meaningful part of the entire exercise — indeed a part without which the exercise would remain fruitless and its object languish unaccomplished. The vast amount of expense, time and trouble which the entire operation had absorbed would then turn sterile unless Question 2 was addressed. It thus remained a vital part of the Tribunal's commitment and obligation if it was to address itself truly to the object for which it was constituted — an object which could not fail to receive attention if the Tribunal's mandate was to be interpreted in accordance with the norms of international law as stipulated in the opening line of the clause under reference.

In eventualities *(b)* and *(c)* work remained to be done through Question 2 to achieve the desired complete single boundary implicit in that question, by demarcating all zones in eventuality *(b)* and the remaining zones in eventuality *(c)*.

There are thus no two parts of the document more closely grappled to each other than these two questions and neither question is capable of being viewed in isolation from the other. The rule of contextual interpretation requires not merely the picking out of isolated indicia such as are identified earlier in this opinion, but also the reading of different parts of the document consistently with each other. Sitting side by side in the *compromis*, each question supplementing and complementing the other, each defies proper interpretation except in the context of its paired companion.

Analysed in yet another way, the untenability of the Tribunal's interpretation of the phrase "negative answer" becomes apparent if one reduces hypothetically the extent of the supposedly affirmative answer given to Question 1. Would it be an affirmative answer if the Tribunal's finding had been that the Agreement was binding only in regard to, say, the territorial sea? Would it still be an affirmative answer if the Tribunal had found, for some reason, that the Agreement was binding only in regard to the first mile of the territorial sea? There comes a point at which an affirmative answer in relation to a portion of the disputed areas becomes affirmative in name but not in substance, in form but not in reality. Affirmative to however inconsequential an extent, it would be negative for purposes contemplated by the Parties. We cannot therefore assume that the mere fact of the answer being partially affirmative lifted it out of the category of the "negative answer" contemplated by the question. To accept such a proposition would be to miss the object and purpose of the exercise which was to delimit boundaries whose uncertainty as a whole was the cause of tension between two States desiring very much to have this uncertainty resolved.

A view which left the Tribunal free, on the basis of such supposedly affirmative answers, to shut the door on the vital issues awaiting it under Question 2, would reduce the whole concept of this solemn international arbitration to an empty exercise, by leaving the Parties with a partial solution and sending them to all the expense, inconvenience and delay of another determination. As will be seen later in this opinion, it even throws doubts upon the validity of the partial solution. It illustrates the danger of reading words picked out of Question 2 in isolation, rather than of looking upon Questions 1 and 2 as an integrally related entity aimed at a resolution of the matters in issue between the Parties.

Such restricted views of the obligations attendant on arbitration cannot constitute a true discharge of arbitral responsibilities and are so far a departure from their very *raison d'être* that I do not think they can be viewed as even a prima facie discharge of arbitral duty. Where this Court has the opportunity to register its concern at such an attenuation of the arbitral process, I believe it should do so. Else, not only in this case but in important arbitrations yet unconceived, literal interpretations of arbitral responsibility unrelated to context may cause the vast effort and expense involved in complex proceedings to trickle away into futility. This will involve not only great cost to the parties but also damage to the prestige and authority of the international arbitral process.

B. The "Intentions" Approach

I here use the "intentions" approach through textual analysis of objects and purposes and through the positions formulated by the Parties themselves. An analysis according to the "intentions" approach powerfully confirms the contextual interpretation outlined above. A strong endorsement of this approach by Sir Hersch Lauterpacht bears repetition in this context:

> "It is the intention of the authors of the legal rule in question — whether it be a contract, a treaty or a statute — which is the starting point and the goal of all interpretation." [1]

Indeed, intention is so significant that the importance of even text and context in interpretation has been attributed by some [2] to the fact that the text is the primary evidence of what the parties had intended. In McNair's

[1] *British Year Book of International Law*, Vol. 26 (1949), p. 83.
[2] See Waldock, Third Report on the Law of Treaties, *Yearbook of the International Law Commission*, 1964, Vol. II, p. 56.

words [1], "the true duty of the judge is to search for the common intention of the parties in using the language of the text".

Sir Gerald Fitzmaurice's succinct summary of the general principles deriving from the major theories of treaty interpretation also emphasizes this aspect:

> "(i) The basic purpose of treaty interpretation . . . is to give effect to the intentions of the parties.
> (ii) These intentions are presumed, *prima facie*, to be expressed in, and represented by, the terms of the treaty itself, read as an integral whole, on a basis of reason and common sense, and with due regard to the circumstances of its conclusion; but if this is not the case, or if the intention cannot be gathered from the terms with adequate certainty or sufficiency, recourse may then be had to extraneous circumstances or means . . .
> (iii) There is an underlying *general* presumption that the intention of the parties includes the intention effectively to *achieve* the intended purpose of the treaty. Hence there is warrant, *if that purpose is clear*, . . .
> *(a)* for interpreting the treaty in such a way as will achieve that purpose rather than not achieve it;
> *(b)* if more than one equally valid interpretation of the text is reasonably possible, for adopting that which most effectively achieves the intended purpose; . . ." [2]

Points (iv) and (v) deal with general multilateral conventions and do not concern us here.

The jurisprudence of the Court also supports the "intentions" approach as when, in the Advisory Opinion in the *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* case, this Court stated that:

> "The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions." (*I.C.J. Reports 1951*, p. 15, at p. 23.)

The principles set out by Fitzmaurice, distilled as they are from the major theories of interpretation (and "in a form which might very possibly have been concurred in by Lauterpacht" [3]), all have applicability here. There can be no doubt of the intention of the Parties, the meaning of the treaty read as an integral whole and the interpretation that would achieve the purpose of the treaty. That interpretation is the interpretation which

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[1] *Op. cit.*, 1961, p. 373.
[2] Fitzmaurice, *op. cit.*, pp. 793-794; emphasis added.
[3] *Op. cit.*, p. 793.

looks upon the treaty as embodying the will of the contracting States to secure the settlement once and for all of the maritime boundary dispute that had troubled them for so many years.

I am conscious that, in dealing with questions of interpretation, difficulties can arise not only about the meaning of terms but also from differences of attitude or frame of mind. Parties may then "be travelling along parallel tracks that never meet" to use the expressive language of Judge Fitzmaurice in the *Golder* case [1] or be speaking "on different wavelengths" [2]. In the present case, as the ensuing analysis will show, the frame of mind of both Parties, in desiring a settlement of the entire dispute, was clearly the same. To use the language of contract, they were clearly *ad idem.*

(i) The Preamble

An obvious internal source of reference is the preamble to the treaty. The preamble is a principal and natural source from which indications can be gathered of a treaty's objects and purposes even though the preamble does not contain substantive provisions. Article 31 (2) of the Vienna Convention sets this out specifically when it states that context, for the purpose of the interpretation of a treaty, shall comprise in addition to the text, the preamble and certain other materials. The jurisprudence of this Court also indicates, as in the case concerning *Rights of Nationals of the United States of America in Morocco* [3] and the *Asylum (Colombia/Peru)* case [4], that the Court has made substantial use of it for interpretational purposes. In the former case, a possible interpretation of the Madrid Convention was rejected for its lack of conformity with the preamble's specific formulation of the purposes of the Convention. In the latter case the Court used the objects of the Havana Convention, as indicated in its preamble, to interpret Article 2 of the Convention. Important international arbitrations have likewise resorted to the preamble to a treaty as guides to its interpretation [5].

The Preamble to the present *compromis* makes it transparently clear that the object of the instrument was the settlement of the entire boundary question. The two Governments, having been unable to settle by means of diplomatic negotiation *the* dispute relating to the determination of their maritime boundary, express their desire, in view of their friendly rela-

[1] *European Court of Human Rights, Ser. A*, Vol. 18, p. 42.
[2] Sir Humphrey Waldock's words, quoted by Judge Fitzmaurice *(ibid.)*.
[3] *I.C.J. Reports 1952*, p. 176, at p. 196.
[4] *I.C.J. Reports 1950*, p. 266, at p. 282.
[5] See paras. 19 and 20, the *Beagle Channel Arbitration*, 1977, Wetter, *The International Arbitral Process*, 1979, Vol. 1, p. 276, at pp. 318-319.

tions, to reach a settlement as soon as possible of *that* dispute. To *that end*, they have decided to resort to arbitration. They were not resorting to arbitration for a partial settlement of their dispute, which possibly was furthest from the objects and purposes of the agreement.

(ii) Parties' positions during the negotiations

Article 32 of the Vienna Convention provides that, as a supplementary means of interpretation, recourse may be had *inter alia* to the circumstances of the conclusion of the treaty *"in order to confirm the meaning resulting from the application of article 31"* (emphasis added). Using such material as is before us on this matter, but only as a supplementary means of interpretation, it is clear that this material confirms the results flowing from the contextual and the "objects and purposes" methods set out in Article 31 (1).

It is not necessary to make detailed references to the course of affairs leading to the *compromis*. It will suffice to observe that the entire course of negotiations between the Parties was conducted with the end in view that all aspects of the maritime boundary questions would be settled. The long history of disputes between the Parties ranging from 1977 to 1985 was not confined to any one aspect of the maritime boundary. It was in the interests of neither Party that the determination of the boundary or any part of it should remain in abeyance. These were the circumstances in which the agreement was reached that the matter be referred to arbitration and they strongly confirm the interpretation reached by the other approaches.

(iii) Parties' positions before the Tribunal

I do not need to elaborate here on the attitude of Guinea-Bissau whose position on this matter was never in contention. I shall concentrate rather on that of Senegal. It is clear that Senegal's position before the Tribunal was that the *entire* maritime dispute was before it and that the 1960 Agreement extended to that entire dispute, i.e., that it was not confined to the territorial sea, the contiguous zone and the continental shelf, but extended to the exclusive economic zone and fishery zone as well.

The following are among the indications of this position which can be gathered from the documents before the Court:

(a) In paragraph 53 of its Counter-Memorial submitted to the Tribunal, Senegal explains the scope of Article 2 of the Arbitration Agreement, and its contention regarding the applicability of the principles of intertemporal law to the 1960 Agreement. It then goes on to say:

> "Having made these two points, the Government of Senegal associates itself with the comment made by Guinea-Bissau, from which it

emerges: (1) that if it is accepted that the 1960 Agreement was validly concluded and is binding on the Parties, it is that Agreement alone which has the force of law concerning the maritime boundary separating *all* the maritime areas appertaining to each State, a conclusion borne out by the fact that the Parties desire a single dividing line; and (2) that the Tribunal is required itself to draw a line of separation in the sole event of a negative answer to the first question. That is what the Parties desired; the GBM [Guinea-Bissau Memorial] rightly emphasizes this." (Memorial of Guinea-Bissau in the present proceedings, Annexes, Book II; emphasis added.)

(b) In paragraph 153 of the Rejoinder of Senegal submitted to the Tribunal, Senegal avers that subsequent practice:

"has also complemented the 1960 Agreement, giving it, as it were, an additional dimension. For it has enriched it on the 'vertical' plane, with respect to the delimitation of the superjacent water column . . . The Government of Senegal intends, indeed, to demonstrate that subsequent practice has widened the initial area of application of the Franco-Portuguese Exchange of Letters of 1960 and that the 240° maritime boundary from Cape Roxo is valid not only as limit of the sea-bed and its subsoil but also with respect to the superjacent waters." (Memorial of Guinea-Bissau in the present proceedings, Annexes, Book III.)

(c) In paragraph 245 of the same Rejoinder Senegal re-emphasizes this position:

"In other words, while the maritime boundary established by the 1960 Agreement related, beyond the outer limit of the territorial waters, only to the continental shelves, thereby reflecting the state of the international law of the sea at the time, a considerable subsequent practice thereafter enriched and complemented the 1960 Agreement by, as it were, raising the 240° limit to the level of the surface of the superjacent waters."

(d) Paragraph 246 of the same Rejoinder reads:

"Moreover the Government of Senegal has referred, in its Counter-Memorial, to this extension of the area of application of the 1960 Agreement, on both the spatial and the substantive plane. It has observed, in particular, that ever since Senegal's accession to independence it had 'exercised its competences, in the most varied domains, over the maritime spaces coming within its national jurisdiction and located to the north of [the 240° line]' (SCM, para. 9). It added that apart from petroleum-related activities, it had been led to 'exercise its police powers' by reference to this 240° maritime boundary . . ."

(e) At the hearing before the Tribunal Senegal put its position thus:

> "We observe that a dividing line — one single line and no other — comes up not just once, by chance, but constantly without any exception in the practice of these States and in the exercise of their respective jurisdictions. And what, Mr. President, is that dividing line? It is invariably the line drawn at 240° from Cape Roxo." (Memorial of Guinea-Bissau in the present proceedings, Annexes, Book IV, Part II, Verbatim Record of Oral Arguments of Senegal before the Tribunal, Record No. 9, p. 83.)

These submissions can leave no doubt that the matter which Senegal looked upon as the subject of the arbitration was the *entire* maritime boundary and no less. Its contention was that the 1960 Agreement referred to the *entire* maritime boundary and no less. The object of the arbitration was the determination of the *entire* maritime boundary and no less. Consequently Question 1, as read in its context as well as in the light of the object and purpose of the Agreement, related to the binding nature of the 1960 Agreement over the *entire* maritime boundary and no less.

Just as Senegal was urging the acceptance of the 1960 demarcation in regard to the *whole* of the maritime boundary, Guinea-Bissau was contending that it was without force in regard to the *whole* of the boundary.

Ut res magis valeat quam pereat, sometimes described as the rule of effectiveness, is another general principle of interpretation which may be invoked under the head of intention. It embodies a wisdom which is specially apposite in interpreting agreements such as this, where a concentration on the literal meaning of particular phrases may not only stifle the spirit of an agreement but also damage the harmony which that agreement was meant to promote. There is considerable warrant in the jurisprudence of this Court for applying the rule of effectiveness, though of course this principle cannot be pressed so far as to attribute to treaty provisions a meaning which would be contrary to their letter and spirit [1].

It should also be noted that the International Law Commission has taken the view that, in so far as this maxim reflects a true general rule of interpretation, it is embodied in Article 31, paragraph 1, "which requires that a treaty shall be interpreted *in good faith*" and *"in the light of its object and purpose"* [2]. The International Law Commission goes on to observe:

> "When a treaty is open to two interpretations one of which does and the other does not *enable the treaty to have appropriate effects*,

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[1] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion, I.C.J. Reports 1950*, p. 221, at p. 229.

[2] *United Nations Conference on the Law of Treaties, op. cit.*, p. 39; emphasis added.

good faith and the *objects and purposes of the treaty demand* that the former interpretation should be adopted." [1]

An analysis according to the "intentions" approach thus shows that a partial resolution of the dispute was clearly beyond the contemplation of both Parties. Indeed, it was so far from their intentions that one could reasonably postulate that neither Party would have gone to arbitration had it visualized such an inconclusive outcome, for it would only have compounded their problems and left them further from resolution than when they began.

One must, of course, in applying the "intentions" approach, always be on one's guard lest one use it to read into a treaty a stipulation which is not contained in the text. As the Permanent Court of International Justice warned in the *Access to, or Anchorage in, the Port of Danzig, of Polish War Vessels* case (*P.C.I.J., Series A/B, No. 43*, p. 144), the Court was not prepared to hold that the text of a treaty "can be enlarged by reading into it stipulations which are said to result from the proclaimed intentions of the authors of the Treaty, but for which no provision is made in the text itself". The present case involves no such introduction into the document of that which was not already there. The entire document was instinct with this meaning from its very Preamble.

The determination of *the dispute* was thus the basis on which the Tribunal was entrusted with its heavy responsibilities. It was called upon to render certain a boundary obscured by the opposing contentions of Parties and to provide a firm basis on which they could henceforth order their affairs. They could not read their mandate any differently in the light of the norms of international law as set out in the Vienna Convention in particular.

C. The "Teleological" Approach

I do not here use the teleological approach, as it is sometimes used in its more extreme forms, for setting an external object or purpose for a treaty which may not coincide with the intentions of the parties. The object or purpose I seek is firmly anchored in the text of the treaty and the parties' own views thereof. To that extent, it is linked to the approaches under the other two heads.

The only extent to which I have invoked a purpose going beyond this is when I refer to accepted principles regarding the underlying purpose of arbitration agreements. Used in this limited manner, there is legitimate scope for the teleological method. As Fitzmaurice observes, "there is no doubt that an element of teleology does enter into interpretation and finds, within limits, a legitimate place there" [2].

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[1] *United Nations Conference on the Law of Treaties, op. cit.*, p. 39; emphasis added.
[2] *Op. cit.*, p. 342.

Used in this fashion, it provides through another approach a confirmation of the conclusions reached through the other two approaches.

With those prefatory remarks, and subject to the limitations indicated, I may observe that the underlying purpose of an arbitration agreement is clearly the amicable settlement of the issues which the parties have committed for resolution to the arbitral tribunal. As Verzijl observes, arbitration is "a procedure of international law destined to terminate a dispute which has arisen between sovereign States by the decision, vested with binding force, of one or more third persons" [1]. This purpose derives added strength from the fact that it accords with one of the high objectives of international law — the harmonious resolution of international disputes so as to eliminate continuing frictions that endanger peace.

The Permanent Court of International Justice had occasion to use the teleological method, in the context of arbitration, and to pronounce upon the end which arbitration treaties should serve. In the *Factory at Chorzów, Jurisdiction* case, in discussing Article 23 of the German-Polish Convention concluded at Geneva in 1922 (which it described as "a typical arbitration clause"), it observed:

> "For the interpretation of Article 23, account must be taken not only of the historical development of arbitration treaties, as well as of the terminology of such treaties, and of the grammatical and logical meaning of the words used, but also and more especially of the function which, in the intention of the contracting Parties, is to be attributed to this provision." (*Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9*, p. 24.)

The Court went on to add:

> "An interpretation which would confine the Court simply to recording that the Convention had been incorrectly applied or that it had not been applied, without being able to lay down the conditions for the re-establishment of the treaty rights affected, would be contrary to what would, *prima facie*, be the natural object of the clause; for a jurisdiction of this kind, instead of settling a dispute once and for all, would leave open the possibility of further disputes." (*Ibid.*, p. 25.)

These considerations have strong relevance to the case before us having regard to the Tribunal's restrictive interpretation of the clause spelling out its function — an interpretation which, to borrow the Court's phraseology, "instead of settling a dispute once and for all, would leave open the possibility of further disputes".

In the context of the present case these considerations lead to the view that the Arbitral Tribunal was under the *compromis* charged with a duty to

[1] J. H. W. Verzijl, *International Law in Historical Perspective*, 1976, Vol. VIII, p. 143.

settle the problem which had brought the Parties before it, or, in Verzijl's language, "to terminate a dispute which has arisen between sovereign States". That it has signally failed to do, and any interpretation which renders possible the course the Tribunal took, would not be in consonance with the principle of interpretation under discussion.

In the event of two equally acceptable interpretations, one leaving disputed issues still unsettled and one resolving all issues, the teleological approach would weight the balance in favour of the latter. In the present case, the "textual" approach and the "intentions" approach have already led to the latter interpretation and the teleological approach only confirms it.

When, as in the present case, the parties have broken through years of disagreement to reach the stage of referring their dispute to arbitration, the protection of the *compromis* in all its integrity becomes specially important. The Court needs to be vigilant to safeguard the *compromis* and the arbitration against interpretations which defeat their central purpose.

The limited extent to which I have used the teleological method of interpretation obviates any necessity to analyse it further in the present opinion. Looking forward to the future it may be that the teleological method of interpretation, in contrast to strict juristic formalism, may play a greater role in the development of international law [1]. Interpretation by reference to the "spirit" of the treaty [2] or by reference to important values may well receive more recognition as international law develops [3]. These are questions which the jurisprudence of the future will need to address.

For present purposes it will suffice to observe that the insights to be gained from the teleological method could guard the interpreter from so close an adherence to literal meanings as to cause the fundamental objectives of the document to recede from view.

Interest reipublicae ut sit finis litium applies equally to judicial and arbitral awards, and applies equally to domestic and international litigation. A partial answer that may well result in greater confusion and uncertainty

[1] See the dissenting opinion of Judge Tanaka in *South West Africa, Second Phase, I.C.J. Reports 1966*, esp. at pp. 276-278.

[2] See the dissenting opinion of Judge Alvarez in *Anglo-Iranian Oil Co., I.C.J. Reports 1952*, p. 126; *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 336; cf. Lord Diplock's observation in *R* v. *Henn* (1980) 2 All ER 166 that in interpreting treaties the Court of Justice of the European Communities seeks to give effect to the "spirit" rather than to the letter of treaties.

[3] See Rousseau, *Droit international public*, I, p. 29; M. S. McDougal, H. D. Lasswell and J. L. Miller, *The Interpretation of Agreements and World Public Order*, 1967, pp. 39-45; Richard Falk, *The Status of Law in International Society*, 1970, pp. 368-377; *id.*, "On Treaty Interpretation and the New Haven Approach: Achievements and Prospects", (1967-1968) 8 *Virginia Journal of International Law*, p. 323; Julius Stone, "Fictional Elements in Treaty Interpretation — A Study in the International Judicial Process", (1953-1955) *Sydney Law Review*, pp. 363-368.

than prevailed before is not in keeping with this maxim which supplies the principal rationale for the finality of awards.

Article 34 of the Model Rules on Arbitral Procedure adopted by the International Law Commission declares that the arbitral award "shall settle the dispute definitively and without appeal". It can only do so if it settles the dispute substantially. If it settles part of the dispute, leaving a gaping void yet to be filled by further arbitral determination, one finds it difficult to see how the quality of definitiveness can attach to such an award.

Another facet of the same principle, expressed from the standpoint of the individual litigants rather than the community — *nemo debet bis vexari pro una et eadem causa* (its counterpart in criminal law being *nemo debet bis vexari pro uno et eodem delicto*) — also has relevance here, for, after all the trouble and years of delay involved in getting this arbitration off the ground, both Parties were entitled to expect a final resolution of the dispute between them rather than to have to face a second prolonged arbitral process. The fact that an important segment of the dispute was left undecided had an effect precisely the opposite of that contemplated by these maxims.

If I am correct in the principles of interpretation I have applied, it seems to me that there is only one conclusion the Tribunal could have arrived at in regard to Question 2 had it applied the rules of treaty interpretation recognized alike by customary international law and in its codification in the Vienna Convention on Treaties. These rules were binding on the Tribunal and left it with no alternative. Unless it strayed far from the real dispute by giving a literal meaning to phrases such as "negative answer" picked out of their context in violation of those rules of interpretation, it had necessarily to reach the result that it was its duty to enter into Question 2.

It will be noticed that, in this analysis, I have used well-accepted theories of interpretation which may be said to represent the mainstream view as opposed to other theories of interpretation which still do not command general acceptance. I have refrained from using other theories, as a finding which needs to be so definite as to provide a basis for a declaration of nullity requires to be approached along well-trodden ground.

The preceding analysis has made it clear that the one interpretation pointed to by the contextual, "intentions" and teleological methods is that the entire dispute was the subject of the arbitration in general and of Question 1 in particular. It is also clear that the duty of the arbitrators was to have had constantly before them the main object and purpose of the enterprise on which they were engaged — the determination of the entire maritime boundary and the resolution of the acute dispute that had arisen between the Parties.

The conclusions thus arrived at through the use of principles of inter-

pretation are in fact fortified even further by the Tribunal's own view of the question before it.

The Tribunal was well aware that "the relations" were not confined to the territorial sea, the contiguous zone and the continental shelf, but extended also to the exclusive economic zone and the fishery zone. The ambit of the dispute as extending to all five zones was never in dispute before the Tribunal. The Order of the Tribunal also shows that it was well aware that the boundaries of all five zones were before it for determination. Indeed, the Order is headed, in phraseology no doubt worked out by the Tribunal itself, with the caption "Arbitration Tribunal for the Determination of *the* Maritime Boundary" (emphasis added).

The Tribunal, having decided that the Agreement was — "valid, wholly valid" (Award, para. 82) had to move on to the interpretation of that agreement in the context of the practical dispute that had surfaced between the Parties and was dominating their concern. It was no question of academic interpretation to which the Tribunal was asked to address itself but one firmly embedded in the real world of practical affairs. How did the Tribunal view that task?

To quote its words:

> "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." (*Ibid.*, para. 27; emphasis added.)

If there were still any doubt regarding the Tribunal's understanding of the question which it was addressing, such doubt is dispelled by the Tribunal itself. It says in paragraph 83 of its Award:

> "The Tribunal is not attempting to determine at this point whether there exists a delimitation of the exclusive economic zones based on a legal norm other than the 1960 Agreement, such as a tacit agreement, a bilateral custom or a general norm. *It is merely seeking to determine whether the Agreement in itself can be interpreted so as to cover the delimitation of the whole body of maritime areas existing at present.*" (Emphasis added.)

If that was the question the Tribunal was seeking to address, the answer it gave was clearly in the negative.

That the dispute related to the entire boundary was thus incontrovertible. That fact, firmly set in concrete, so to speak, provided the mould within which the arbitration was conceived and the *compromis* took its eventual shape — a mould which no interpretation of the *compromis* was free to break through. That was the setting in which Questions 1 and 2 require to be read and if, as we are obliged by Article 31 of the Vienna Convention on Treaties to do, we take into account the object and purpose of the Agreement, that is the conclusion to which we are inexorably led.

It was of course open to the Tribunal to reject the contentions of both Parties in regard to the scope of applicability of the 1960 Agreement and to answer as it did that it applied only to some sectors of the boundary. However, consistently with the object and purpose of the Arbitration Agreement, it could then only read Question 2 as throwing on it the burden of determining that which Question 1 had left undetermined and to complete the task entrusted to it. To settle part of the boundary dispute and leave other matters in a state of suspense, awaiting later determination, was to abdicate its function and defeat its purpose.

The Tribunal has thus failed to interpret the Agreement consistently with its own understanding of the question before it. It has also failed to give effect to its mandatory duty under the Vienna Convention and to accepted rules of interpretation. It has thereby left an important portion of its commitment dangling unresolved. It has increased the problems of the Parties rather than discharged its duty of resolving them. In short, it has lost sight of the *raison d'être* leading to its creation. Such a patent nullifying factor entitles this Court, for reasons set out later in this opinion, to declare that the Award was undermined at its foundations and therefore cannot stand. Having regard to the widespread and increasing reliance on international arbitration as a means for peaceful resolution of disputes, it would have a damaging influence upon this commendable trend if arbitral bodies solemnly charged with the settlement of major issues of this nature should be able, by such restrictive interpretations of their jurisdiction, to avoid the onus and responsibility of deciding the issues committed to their care.

What follows in law from the principles outlined in the preceding discussion?

II. Is the Award a Nullity?

A consideration of the legal effect on the Award of the circumstances outlined thus far necessitates the examination of a number of legal principles, all of which were the subject of detailed submissions to this Court. The central question to be addressed is whether the manifestly incorrect interpretation of the *compromis* and of the Tribunal's mandate, followed by the Tribunal's consequent course of action, results in the nullity of the Award. If this result follows in law, the further question must be examined whether the Award is a nullity in its entirety or only in regard to the decision not to examine the issues remaining for examination under Question 2.

The ensuing enquiry deals first with the legal presumptions and principles applicable to the protection of the Award. The concepts of nullity and *excès de pouvoir* will then be briefly examined, followed by an examination of the question whether the nullity of an international arbitral award takes effect of its own force or depends on the existence of a Tribunal competent so to declare. Two conceptual questions will then be consid-

ered — whether the failure to answer Question 2 was the subject of a decision and whether a negative decision cannot constitute an *excès de pouvoir*, as submitted by Senegal. A brief examination follows of Guinea-Bissau's contention that the decision is nullified in consequence of absence of reasons and of Senegal's submission that the principle of *compétence de la compétence* places questions of interpretation within the exclusive domain of the Tribunal. The enquiry concludes with a somewhat more extended discussion of the principle of severability as applied to the issues already decided and those awaiting decision.

Burden of proof of invalidity of Arbitral Award

As Balasko has written in his celebrated work [1], the validity of the arbitral award is to be presumed.

In the *Arbitral Award Made by the King of Spain* (*I.C.J. Reports 1960*, p. 192, at p. 206), this Court acted on the principle that the burden lay upon the party contending that the award is invalid. The ensuing enquiry is undertaken on this basis and with due deference to the presumption of validity. The burden of displacing that presumption lies on Guinea-Bissau and that burden, having regard to the importance of the finality of arbitral awards, is a heavy one. Moreover, the contention of Guinea-Bissau (public sitting of 4 April 1991, CR 91/3, pp. 85-87) that, in the case of a patent flaw, the burden of proof of validity lies upon the parties seeking to uphold it is not entitled to succeed. This opinion proceeds upon the basis that the party impugning the award is at all times under the burden of proving that sufficiently weighty circumstances exist to support its contention that the award is invalid.

Protection of the Award and protection of the compromis

The Republic of Senegal has urged before us, and rightly so, that we should, when invited to pronounce upon the validity of an award, bear in mind that the institution of arbitration represents one of the major achievements of the international legal order. A heavy burden of responsibility thus rests upon an international tribunal which is invited to make a declaration that an arbitral award, entered under a valid *compromis* freely contracted between the parties, is null and void. Such a declaration is not one to be lightly sought or lightly granted by any court.

At the same time it should be observed that a proper respect for international arbitration involves not only respect for the award but also respect for the *compromis* which provides the foundation on which the award stands. While, therefore, one must respect the integrity and finality of the arbitral award, the principle of deference to the award cannot entrench awards regardless of major discrepancies between the conduct of the arbi-

[1] A. Balasko, *Causes de nullité de la sentence arbitrale en droit international public*, 1938, p. 201.

tration and the course charted out for it by the *compromis*. Far from preserving respect for the arbitral institution, such an approach would undermine the proper respect the institution should command. Absolute finality can only be bought at the cost of detriment to arbitration as an institution.

There is a natural tension between the two principles outlined, and the demarcation of the borderline between them is hence a task calling for anxious consideration. In that task we are called upon to weigh the benefits of certainty against the danger of departures from the *compromis* and there is no set formula that will match these considerations against each other. The Court's task is not an easy one. Yet, as with so many instances in the law where opposing principles compete for supremacy, there are cases where the one consideration is present in so strong a measure that the other must clearly recede. This case is one such.

The jurisprudence of international law offers us many examples where the principle of the integrity of the *compromis* has prevailed over that of the integrity of the award. For example, where a tribunal, invited to decide whether one party or the other should be awarded sovereignty over a territory does not decide this question but examines rather whether there should be a servitude over the territory, the award clearly cannot stand (as happened in the *Aves Island* case of 1865 where the Queen of Spain was arbitrator [1]). So, also, where an arbitrator, invited to choose between two boundary lines, recommends a third line, he clearly oversteps the limit of his authority [2]. These are cases clearly travelling beyond the scope of the arbitrator's authority.

As will be discussed later, decisions can take a positive or negative form. One can take a decision to act when the *compromis* clearly requires one not to act, just as one can take a decision not to act where the *compromis* clearly requires one to act. In both cases alike the decision is one beyond the scope of the arbitrator's authority and involves the arbitrator in stepping out, so to speak, from the frame of the *compromis*. When this happens the resulting decision can command no claim to validity, for it is not based on that bedrock of mutual consent which is a prerequisite to arbitral authority. The award, lacking that foundation, cannot sustain itself or command recognition.

The concept of nullity

A brief prefatory note will clarify the terminology adopted in this section, as confusion is sometimes caused in the area of nullity by the some-

[1] A. de Lapradelle and N. Politis, *Recueil des arbitrages internationaux*, Vol. II, p. 404, at p. 414.

[2] See the *Northeastern Boundary: Arbitration under the Convention of September 29, 1827*, where the King of the Netherlands, invited to choose between the boundary lines, recommended, in his award of 1831, a third line (Moore, *International Arbitrations*, Vol. I, pp. 133-136).

what different connotations which different legal systems attach to some of the expressions used.

Contract, matrimonial law and, more recently, administrative law are traditionally areas where domestic legal systems have had to make distinctions between the results caused by a variety of vitiating factors. The terminology of international law in regard to nullity has its antecedents in those concepts of domestic law. The common law and the civil law have differing approaches to the categorization of the resulting juristic situations.

The civil law differentiates at least three distinct types of legal status resulting from a vitiating factor while the common law, broadly speaking, contents itself with two. The word "nullity" as used in the one system is not therefore identical with the word as used in the other. The language of international law in this field seems in general to have followed the phraseology of the civil law.

The three principal types of nullity, as referred to in the literature of international law, are

(i) inexistence;
(ii) absolute nullity; and
(iii) nullity resulting from the act of annulment by a competent authority [1].

The term "inexistence" is not a term of the common law. Rather, the common law distinguishes between acts which are:

(i) void; and
(ii) voidable, i.e., those which retain their validity and are productive of legal effects unless and until they are set aside by competent authority, in which case the nullity may operate retrospectively.

Category (iii) in the first group of terms would be classified as voidable in the common law, and when the term "nullity" is used in international law it may well be to describe a situation which is only voidable under the common law.

When the term "nullity" is used in this opinion it will not be used in sense (iii) — i.e., not in the sense of voidability — for this Court is not sitting in appeal or review and is not engaged in the exercise of invalidating an order that would otherwise be valid. It is engaged rather in the task of making a pronouncement in relation to the existing status of the Award made by the Arbitration Tribunal.

A word needs to be said to clarify the distinction between categories (i) and (ii) in the first classification.

[1] See R. Y. Jennings, "Nullity and Effectiveness in International Law", *Cambridge Essays in International Law: Essays in Honour of Lord McNair*, 1965, pp. 65-67.

The inexistent order is one which is no order at all. A person with no judicial authority who purports to make a judicial order would produce an "order" which could be described as non-existent. In no circumstance can this so-called "order" produce any legal consequences whatsoever. It was never a juristic act at all. If, in this case, there was not in fact a majority in favour of the Tribunal's decision by virtue of the President's vote being vitiated by his declaration, that would have been a case of inexistence, which of course is not the position here.

On the other hand, one may have to deal with an order or juristic act which, though regular on the face of it, is rendered illegal by a factor extraneous to the procedural regularity of its creation. For example, a treaty which offends against a rule of *jus cogens*, though complying fully with all the requirements of procedural regularity in its creation, can still be null and void owing to a factor lying outside those procedural formalities. As Jennings points out:

> "the treaty may fulfil all the requirements for a valid treaty and is void not because it lacks an essential ingredient of a valid treaty but because it offends against the general rule of the *jus cogens* . . . The treaty that offends against a rule of the *jus cogens* is not so because it lacks an essential ingredient but, on the contrary, precisely because it is a treaty." (*Op. cit.*, pp. 66-67.)

In other words an act which is a nullity because it offends some fundamental principle is in a different category from an act which was never a juristic act at all.

Inexistence and absolute nullity are thus distinguishable one from the other although they have this in common that they are nullities from their very inception and do not require the declaration of a competent tribunal or a court to render them devoid of legal consequences.

This case has been presented solely on the basis that the act in question, namely the Award of the Tribunal, is inexistent or a nullity *ab initio* requiring no invalidation from this Court, but only a declaration that such act is and has been a nullity from the commencement. The Applicant itself has stressed that it is not addressing any argument to this Court as though it were sitting in appeal or review. This rules out from our consideration the question of voidability.

Senegal has advanced the argument that, inasmuch as no act of avoidance is involved in making a declaration of nullity, the role of a court making such a declaration is reduced to that of a mere mechanical endorser of a pre-existing state of affairs. This contention of Senegal cannot be upheld. Declarations of nullity have an important juristic significance, and the jurisdiction to make such declarations in appropriate circumstances enhances rather than diminishes the role of the Court as a custodian of international law and its principles. Indeed, through the exercise of this jurisdiction, the Court can play a role in imparting a dynamic nature to this developing department of international jurisprudence and

help to mould it in a manner which will protect the integrity and prestige of the arbitral process.

Development of the concept of nullity

International law, though still an infant science, has made remarkable progress since the days of Grotius who, at a very rudimentary stage of its evolution, perceived the need to clothe the international arbitral decision with finality and unquestioned validity [1]. The foundations of international arbitration had then to be solidly laid. Yet the law could not remain static and after early inroads upon the principle of finality, made by such writers as Pufendorf, later writers have built upon those foundations a structure increasingly responsive to the varied situations for which it must cater in a changing world.

In the developing jurisprudence that has ensued there appear the names of a galaxy of writers who analyse in great detail the circumstances in which an award can be considered a nullity [2]. As early as 1873 the Institute of International Law adopted a *Règlement* concerning the procedure of arbitral tribunals. Article 27 of the *Règlement* provided that an arbitral award is null and void in certain cases, one of which is excess of authority.

This is not to say that respected voices were not heard supporting the opposite view. The illustrious de Martens, for example, at the Hague Convention of 1899, argued strongly against the possibility of nullifying or revising an arbitral award [3]. So, also, the Hague Conventions of 1899 and 1907 in their articles relating to arbitration speak of arbitration orders as being final and without appeal and do not specify causes of nullity (see Articles 48 and 54 of 1899 and Articles 73 and 81 of 1907).

Yet the weight of opinion has long swung in favour of the view that the validity of arbitral awards is not absolute. The Report of the International Law Commission, 1958, states in regard to the annulment of the award that:

> "Neither the Special Rapporteur nor the Commission itself has accepted the categorical theory that an arbitral award should be

[1] Grotius, *De Jure Belli ac Pacis*, Book III, Chap. XX (XLVI), in *The Classics of International Law*, ed. J. B. Scott, Vol. II, p. 823.

[2] Guinea-Bissau in its Memorial in the present proceedings (para. 63, footnote) cites an array of publicists including A. Balasko, F. Bondil, E. Borel, F. Castberg, A. El Ouali, P. Guggenheim, W. G. Hertz, M. A. Pierantoni, G. Salvioli, M. Reisman, J. H. W. Verzijl, J. G. Wetter and J. C. Witenberg. To this list may be added Hall, Oppenheim, Brierly, Hyde, Fauchille, Nys, Heffter, Bluntschli, Fiore, Twiss and Rolin among others.

[3] See *Proceedings of the Hague Peace Conferences: Conference of 1899*, p. 186.

> treated as final even if found to be morally unacceptable or practically unenforceable." [1]

Further developments and refinements of the bases of nullity must necessarily ensue, and this Court will no doubt be called upon to play an important role in evolving the principles that will enable the balance to be held true, between the principle of finality and the due recognition of vitiating factors.

The nullity of an award given without jurisdiction is moreover a well-accepted proposition in domestic legal systems. In the common law one of the classic texts on the finality of judgments and awards states:

> "it is quite clearly established that, wherever the arbitral tribunal has exceeded the jurisdiction with which it has been invested by the agreement of the parties, or by the order of the court, or by the statute, the award, so far from operating as *res judicata*, is deemed an absolute nullity either in whole, or in part, as the case may be" [2].

In the civil law the principle that an arbitrator cannot exceed the terms of his authority is a time-honoured one going all the way back to the Roman maxim *arbiter nihil extra compromissum facere potest.* The principle that arbitrators cannot exceed their powers and decide points which have not really been submitted to them was adopted by international law at a very early stage [3].

Excès de pouvoir *and* infra petita

The doctrine has been continuously developed since its formulation by early writers such as Vattel *(op. cit.)*, especially under the rubric of *excès de pouvoir*, and numerous cases have built around it a considerable body of jurisprudence. One has only to look at treatises such as that of Dr. Verzijl [4] to see the numerous major cases where the plea of *excès de pouvoir* has been raised over a long historical period. Within the rubric of *excès de pouvoir*, *infra petita* covers the case where a tribunal runs counter to its *compromis* in not addressing issues it was required to address.

Excès de pouvoir is one of the most invoked rubrics of nullity and one of the areas where arbitral law will continue to face challenges and require development. Although the Parties, both of civil law jurisdictions, pre-

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[1] *Yearbook of the International Law Commission*, 1958, Vol. 2, p. 11.

[2] G. Spencer Bower and A. K. Turner, *Res Judicata*, 2nd ed., p. 102.

[3] Vattel, *Le droit des gens*, 1758 (para. 329), in *The Classics of International Law*, ed. J. B. Scott, Carnegie Institution of Washington, 1916, Vol. 3, p. 224, translated by G. Fenwick.

[4] J. H. W. Verzijl, *op. cit.*, p. 577.

ferred to couch their arguments in terms of *excès de pouvoir*, similar concepts of total nullity find a place in the jurisprudence of other legal systems, including the common law, where the concept of *ultra vires* has recently received extended development in the context of administrative [1] and arbitral [2] law. In Islamic jurisprudence, likewise, a similar notion of nullity existed under the well-recognized principle of legitimacy. Under this principle, all acts, procedures, dispositions and final decisions of the public authorities at any level were held to be invalid and not legally binding as to the people they affected, save to the extent that they were consistent with the law [3]. The basic notion of the nullity of an act performed without the requisite authority thus enjoys wide recognition in the world's legal systems.

In the present case, the *infra petita* doctrine perhaps encapsulates the relevant principle even more neatly, for the Tribunal has fallen short of performing that which it should have performed and in this way acted as it was not entitled to act.

Is nullity automatic or dependent on the existence of a competent tribunal?

The next stage of enquiry is into the question whether such nullity is restricted to cases where a tribunal with necessary authority exists to make such a pronouncement or whether the nullity is automatic, producing an instant effect irrespective of the existence or absence of a tribunal competent so to declare.

The latter position is not free of difficulty. One logical consequence of recognizing the concept of automatic nullity is that it gives to dissatisfied parties a legal rubric under which they can unilaterally repudiate an inconvenient award. Parties can then become judges in their own cause and the finality that should attend arbitral awards would theoretically be gravely impaired.

The difficulty was analysed by Sir Hersch Lauterpacht, who, in 1928 [4], pointed out that it results from the co-existence of three rules of international law, each of which individually seems to be inherently sound.

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[1] See H. W. R. Wade, *Administrative Law*, 1988, pp. 39-48.

[2] M. J. Mustill and S. C. Boyd, *Commercial Arbitration*, 1989, pp. 554-555. This work states that non-compliance with certain essential requisites constitutes a patent flaw which could invalidate an award. Among these requisites is the following: "The award must be complete in that it contains an adjudication upon all the issues submitted to arbitration" (p. 556).

[3] O. A. al-Saleh, "The Rights of the Individual to Personal Security in Islam", in M. C. Bassiouni, *The Islamic Criminal Justice System*, 1982, p. 85.

[4] "The Legal Remedy in Case of Excess of Jurisdiction", *BYBIL*, 1928, p. 118.

Lauterpacht lists these three rules as follows:

(a) The arbitrator is competent to interpret the instrument conferring jurisdiction upon him and that is virtually to determine the scope of his competence.

(b) In so doing, he must not disregard the terms of reference under which the tribunal has been created.

(c) Owing to the deficiencies of judicial organization of the international community and the absence of an appropriate tribunal no sanction is attached to the disregard of the second principle in consequence of which, as a rule, the awards of arbitral tribunals are final and without appeal.

Though each rule taken by itself is apparently sound, in combination they produce conflicts which, as Lauterpacht points out, are a fruitful source of discredit for the whole institution of international arbitration. Lauterpacht observes that the possibility of the defeated party disobeying an adverse award exposes a sound juridical principle

> "to legal inefficacy and to abuse, inasmuch as it affords an opportunity for cloaking with the garb of legality an essentially law-defying disposition" *(op. cit.)*.

However, he goes on to observe that the remedy is easily supplied by the exercise of a simple and strictly judicial function and that the existence of a judicial tribunal with authority to determine whether the arbitrator had exceeded the terms of reference could be a solution. That judicial tribunal he points out is now existent in the shape of the Permanent Court of International Justice "which is pre-eminently qualified to decide legal questions bearing upon the interpretation of treaties".

The weight of juristic authority is against the view that an award must stand as binding in the absence of a tribunal competent to set it aside. Thus Professor J. L. Brierly [1] describes such a view [2] as a "startling thesis" and points out that such an interpretation does not appear to have occurred to most authors writing on the subject of awards since the Hague Conventions. He cites among others Hall, Oppenheim, Fauchille and Nys. Among these authors, Hall says:

> "An arbitral decision may be disregarded in the following cases: viz. when the tribunal has clearly exceeded the powers given to it by the instrument of submission . . ." [3]

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[1] "The Hague Conventions and the Nullity of Arbitral Awards", *BYBIL*, 1928, p. 115.

[2] As expressed by Professor A. de Lapradelle in *Revue de droit international*, 1928, No. 5, pp. 5-64.

[3] W. E. Hall, *International Law*, 8th ed. (by Pearce Higgins), 1924, p. 420.

and Oppenheim:

> "it is obvious that an arbitral award is only binding provided that the arbitrators have in every way fulfilled their duty as umpires . . . Should they have been bribed, or not followed their instructions . . . the award would have no binding force whatever." [1]

Among the prominent publicists who support the view that, where the arbitrators have proceeded without authority, their awards would carry no weight, are Vattel [2] and Phillimore [3].

Brierly points out that, although "it is undesirable that the complainant state should assume to decide the question of nullity for itself, and although agreements for a further reference to arbitration have sometimes been made by states in such a case" (for example, the *Orinoco Steamship Co.* case), "there is no warrant in law for saying that unless such a reference takes place . . . the complainant party is without remedy . . ." [4].

Further, although the Hague Conference, being unable to propose a satisfactory *procedure* for adjudicating on questions of nullity, thought it best to say nothing about the *substantive* law of nullity, it is to be noted that the report of chevalier Descamps showed that it hoped that when the Permanent Court of Arbitration came to be established States would come to use it for deciding allegations of nullity.

Although inconveniences and practical difficulties can result from the principle of absolute nullity there can thus be no theoretical difficulty in accepting the concept, even in the absence of a tribunal with competence to make the requisite declaration.

It would be difficult for a country to take it upon itself unilaterally to disregard a solemn international arbitration and to act in defiance of the presumption that the arbitral award is binding. As Brierly observes:

> "In practice also the fact that the appreciation of a cause of nullity is left to the state affected is not so grave a defect as it seems in principle. It is not easy for a state to refuse execution of an award on the ground of nullity, and instances where it has done so have been rare." [4]

In this case Guinea-Bissau has very properly sought to have an authoritative declaration of what it states is the legal position and has not chosen to act unilaterally on the basis of its own view.

Reference may also be made in this context to Judge Winiarski's indi-

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[1] L. Oppenheim, *International Law*, 4th ed., Vol. II, pp. 27-28.
[2] *Op. cit.*, pp. 223-224.
[3] R. J. Phillimore, *Commentaries upon International Law*, 3rd ed., Vol. 3 [1885], p. 3.
[4] *Op. cit.*, p. 116.

vidual opinion in the *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal* case (*I.C.J. Reports 1954*, p. 65). That opinion, which has been described as the traditional view, was as follows:

> "An arbitral award, which is always final and without appeal, may be vitiated by defects which make it void; in this event, a party to the arbitration will be justified in refusing to give effect to it. This is not by virtue of any rule peculiar to ordinary arbitration between States; it is a natural and inevitable application of a general principle existing in all law: not only a judgment, but any act is incapable of producing legal effects if it is legally null and void." [1]

There does not therefore seem to be any logical difficulty in the concept of a court declaring a state of nullity to have existed prior to its declaration. Indeed such a declaration made in appropriate circumstances by a court possessed of the necessary jurisdiction is a powerful means of ensuring the integrity of international arbitration.

Was the failure to answer Question 2 the subject of a decision?

The Tribunal took the view that it was not called upon to reply to Question 2. Paragraph 87, which contains this information, is very tersely expressed:

> "*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.)

Does this constitute a decision? Did the Tribunal just happen to wander into a course of inaction or was there a considered decision not to act?

A decision is by definition the process of making up one's mind. One reaches thereby a conclusion which may or may not be formally expressed.

In *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal* (*I.C.J. Reports 1973*, p. 166), this Court dealt with the question whether an omission by a tribunal to exercise jurisdiction with respect to a certain submission made to it constituted a decision. The Court held (at p. 193) that the test was whether the Tribunal had addressed its mind to the matters on which the plea was based, and not the merely formal one of verifying whether the plea had been mentioned *eo nomine* in the substantive part of the judgment.

The question of failure to exercise jurisdiction came before this Court again in *Application for Review of Judgement No. 333 of the United Nations*

[1] W. Michael Reisman, *Nullity and Revision: The Review and Enforcement of International Judgments and Awards*, 1971, p. 423.

Administrative Tribunal (*I.C.J. Reports 1987*, p. 18) where, even in the absence of an express decision specifically rejecting or upholding the relevant contention, this Court found that the Tribunal clearly made a decision, though by implication (at p. 45). What was important was whether "the Tribunal addressed its mind" to the matters on which the contention was based "and drew its own conclusions therefrom" (at p. 44).

It thus seems clear beyond argument that there was a conscious decisional process involved, however terse the language used to describe it. The Tribunal has brought its mind to bear upon two factors — the conclusions it has already reached and the wording of Article 2. It has considered the bearing of one upon the other. It has formed an opinion. It has made up its mind that it will not decide the issue raised in Question 2. It has reached a decision.

The absence of amplified reasons does not take away from the fact that it is a decision. Whether ill- or well-considered, the decision not to answer an important question addressed to it — a decision not to act — was as much a decision as its converse.

That decision was one fraught with far-reaching consequences, for both the Parties and the Tribunal were aware that the disputes regarding the exclusive economic zone and the fishery zone were a vital part of the matters in contention between the Parties. The disputes would continue unabated if the arbitration left them unresolved. Hence the decision was not a decision only in the formal or semantic sense but one on which grave practical consequences turned. The step of not deciding Question 2 was indeed a decision and a momentous one at that.

A negative decision can constitute an excès de pouvoir

To quote Carlston, "the tribunal . . . derives its life and vitality from the *compromis*. Respect for its constitutive treaty is its cardinal rule of action." [1] Consequently, the *compromis* becomes the constant point of reference for the tribunal on every matter concerning its powers, duties and scope of action.

We have here a situation where a *compromis* calls upon the arbitrators to resolve a certain dispute. It maps out for them the area in which their determination is required. Its object and purpose are clear. The Parties to it have committed to the Tribunal the resolution of their entire dispute. The terms of the *compromis* are so drafted as to entitle the Parties to expect an order which will settle this troublesome matter finally and definitively. The essential outcome represents a clear conflict between the course mapped out in the *compromis* and that chosen by the Tribunal.

[1] K. S. Carlston, *The Process of International Arbitration*, 1946, p. 64.

Senegal urged before us (public sitting of 5 April 1991, CR 91/4, pp. 60-61) that the omission to act, far from being an *excès de pouvoir*, is rather the non-exercise of a power which has been conferred and that "an omission is the very opposite of a usurpation".

This submission is not entitled to succeed. The negative fact of inaction ensues from and connotes an affirmative decision. Affirmative decisions attract the tests of *excès de pouvoir* and do not repel them or render them irrelevant merely because the decision is a decision not to act.

This is a conclusion confirmed both by high juristic authority and by the insights of modern analytical jurisprudence. Balasko enumerates the categories of *excès de pouvoir* in public international law as follows:

> "Il est bien entendu que l'excès de pouvoir du tribunal peut être commis non seulement par action, mais *par omission, par inaction, par abstention*, par manquement aux règles prescrites dans le compromis ou par la nature et le but de la fonction juridictionnelle. *Ainsi le tribunal doit juger tout point prévu au compromis*, fût-il d'avis qu'il n'y a pas lieu de l'examiner." [1]

A negative decision is thus clearly within the categories of decisions which can attract the principles of *excès de pouvoir*.

In the words of a detailed treatise on nullity and revision of international awards:

> "There can be little doubt that review competence extends to negative decisions: a decision either to disseise jurisdiction initially (for reasons of defective jurisdiction, inadmissibility, or lack of a showing of adequate 'legal interest') or to reject on grounds of the merits. In terms of value allocation, these decisions are indistinguishable from positive decisions; hence their grounds are equally susceptible to nullification. Indeed, the *Orinoco* case and the *Caracas* arbitrations were nullified because too little, and in some claims nothing at all, was decreed.
>
> From the standpoint of policy, no distinction should be drawn between positive and negative decisions. The conditions which necessitate review can obtain for both . . ." [2]

Much light is thrown on problems such as this by the insights of modern analytical jurisprudence especially in its researches on the semantics of legal language. Such studies as that of Julius Stone [3] have shown how semantic variations in the formulation of the self-same issue produce dif-

[1] A. Balasko, *op. cit.*, p. 200; emphasis added.
[2] Reisman, *op. cit.*, pp. 441-442.
[3] *Legal System and Lawyers' Reasonings*, 1964, pp. 241 *et seq.*

ferent legal answers if one permits the form of the question to overshadow its underlying meaning. One is not here asking whether the Tribunal acted affirmatively or did not act but whether the decision it took was one which it was or was not entitled to take. Following in the wake of research by distinguished jurists of both the common law and the civil law traditions, these explorations of the meaning of meaning stress the importance of the referent behind the form of words, rather than the words themselves.

The proposition that a decision not to act cannot constitute a usurpation of power is clearly untenable. The crucial question for decision is not whether there was action or inaction but whether the course followed, be it positive or negative, was so far out of alignment with the *compromis* as to constitute a serious departure therefrom.

Reisman in his study of nullity reflects this thinking when he observes:

> "Non-decision is simply a different form for articulating a substantive decision. A decision — a controlling value allocation — can, obviously, be articulated in many forms. Once an organized arena has been seised of a matter, however, it cannot escape decision. Its culminating behavior, whatever the manifest purport and form, will have value consequences . . . In particular, students should consider the full range of effects caused by clothing a substantive decision in the form of a non-decision . . .
>
> 'Decisions refusing to decide' — or 'nondecisions' — are real decisions no matter how they are characterized . . ." (*Op. cit.*, pp. 625-626.)

The decision not to answer Question 2 meant that the Tribunal was of its own accord releasing itself from a major portion of the task entrusted to it by the *compromis*. It departed from its terms, context and object. It also defeated the main purpose of arbitration in general, which is to resolve disputes, for it left even more unsettled than before the contentions between the Parties. It was not a decision the Tribunal was entitled to make under the treaty which was its charter of authority.

The absence or insufficiency of reasons

The necessity for reasons in an arbitral award is of course obvious as it removes any appearance of arbitrariness in the Tribunal's decision. It is a long-established and well-respected rule.

Article 31 of the International Law Commission's Model Rules on Arbitral Procedure, adopted by the Commission in 1958, states that, "The award shall state the reasons on which it is based for every point on which it rules."

There have been occasional instances of major international arbitrations in which no reasons have been given for the award, as for instance in the *Portendick* arbitration of 1843 between France and Great Britain in which the arbitrator was the King of Prussia. However, such award without reasons immediately attracted criticism from learned publicists even at that early stage in the evolution of international arbitral law. The *Portendick* arbitration was criticized by Fauchille [1] and in 1897 when President Cleveland failed to give reasons for his decision in the *Cerruti* arbitration between Colombia and Italy, this was criticized by Darras [2].

Scelle, the eminent Special Rapporteur to the International Law Commission, referred in his report to the rule that a judgment should be accompanied by a statement of the reasons on which it is based. Describing this as a firmly established principle which had acquired the force of law, he added:

> "There would appear to be no point in stressing these undisputed principles here, and it is enough to emphasize the need for a statement of reasons. A judgment unaccompanied by a statement of reasons is not a judgment, but a mere opinion." [3]

In the case of the *King of Spain's Award*, one of the grounds of nullity urged by Nicaragua was that there was an inadequacy of reasons given by the arbitrator in support of his conclusions. However the Court held that the award dealt in logical order and in some detail with all the relevant considerations and that it contained ample reasoning and explanations in support of the arbitrator's conclusions. The allegation was therefore rejected.

In the present case, the Tribunal has set out rather scantily the factors which weighed with it in reaching its decision not to answer Question 2. No reason has been given in respect of its decision not to append a map, beyond a reliance on its decision not to address Question 2.

This seems unsatisfactory. Yet it does not follow that these circumstances by themselves are sufficient to ground a finding of nullity. The Tribunal has, however scantily, set out some reasons for its decision and it is not necessary to consider this matter further, as other grounds exist for a finding of nullity. However, it is to be hoped, in the interests of proper arbitral practice, that such inadequate statements of reasons will not be looked upon in the future as adequate foundations on which to rest important portions of an award.

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[1] Doctrinal note in de Lapradelle and Politis, *Recueil des arbitrages internationaux*, Vol. 1, pp. 543-544.

[2] *Revue générale de droit international public*, 1899, Vol. 6, p. 547.

[3] Scelle, *Report on Arbitration Procedure*, A/CN.4/18, 21 March 1950, p. 67.

The principle of compétence de la compétence

It has been argued in this case that questions of interpretation of the *compromis* are a matter for the Tribunal itself and that questions of its powers and jurisdiction are within its exclusive domain. The principle invoked is the principle of *compétence de la compétence.*

This principle, which is in tension with the principle *extra compromissum arbiter nihil facere potest* [1], evolved at an early stage of the development of international arbitration as a necessary attribute of the independence of arbitrators. Though they were nominees of the contending parties they needed to shake themselves clear of any appearance of continuing dependence on their principals in regard to matters concerning the scope of their arbitral powers. When a dispute arose as to the interpretation of the clause conferring jurisdiction upon them, this was therefore treated as a matter entirely for the arbitrators, and rightly so.

The rule of *compétence de la compétence,* now well recognized in international law, is embodied in Article 6, paragraph 6, of the Statute of this Court and in Article 10 of the Model Rules on Arbitral Procedure, 1958, of the International Law Commission [2].

The rule was clearly enunciated by the Permanent Court of International Justice in its Advisory Opinion in the *Interpretation of the Greco-Turkish Agreement of 1 December 1926:*

> "it is clear — having regard amongst other things to the principle that, as a general rule, any body possessing jurisdictional powers has the right in the first place itself to determine the extent of its jurisdiction — that questions affecting the extent of the jurisdiction of the Mixed Commission must be settled by the Commission itself without action by any other body being necessary" (*P.C.I.J., Series B, No. 16,* p. 20).

Yet there must naturally be limits upon this principle as Senegal itself has so properly recognized in its Counter-Memorial in the present proceedings in paragraph 64 of which it states:

> "It is nevertheless true — and Guinea-Bissau is right on this point — that a court's jurisdiction over its own competence is not unlimited: the court may thus not usurp powers which manifestly do not follow from the text of the jurisdictional clause, interpreted in the light of the relevant principles of international law. If a court were thus to exceed its powers, the result would be to render its decision null and void in whole or in part."

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[1] Jennings, *op. cit.*, pp. 83-84.

[2] See also J. H. Ralston, *International Arbitral Law and Procedure,* 1910, pp. 21 *et seq.*; and C. Rousseau, *Droit international public,* Vol. V: *Les rapports conflictuels,* 1983, No. 311, p. 323.

A standard work on international arbitration [1] explains that the principle would not apply to an award based on an assumption of powers which clearly could not be justified on any legitimate process of interpretation of the *compromis*. Nor would it apply if it could be shown for example that the Tribunal had not directed its mind to the question on which its jurisdiction depended. The authors conclude:

> "The rule that a tribunal has jurisdiction to decide its jurisdiction therefore does not mean that its decision is conclusive. There is no conflict between the two rules; the first rule has to be read as subject to the second. In practice difficulty arises, not from the alleged conflict between the two rules, but from the lack of any generally available means of determining objectively whether the conduct of the tribunal has been such as to justify the application of the second rule." [2]

These considerations go to the very heart of the *compromis*. What was the matter which was committed to the Tribunal for decision? Was it the entire maritime dispute or only a part thereof? Did it accord with the object and purpose of the *compromis* that the Tribunal should address only part of this question and leave a major part unanswered? These issues clearly touch the very fundamentals of the Tribunal's authority. A decision which manifestly goes beyond the authority conferred by Article 2 is not in my view saved by the principle of *compétence de la compétence*.

The principle of severability

The preceding discussion has led to the conclusion that the Award is so fundamentally flawed as to be a nullity. One question yet remains for examination and that is whether such nullity applies only to the decision not to demarcate the boundaries of the exclusive economic zone and the fishery zone or whether it applies also to the decision in regard to the three zones which the Tribunal did in fact demarcate.

There is more than one reason why every endeavour should be made to preserve the integrity of that latter decision. In the first place, it was within the subject-matter committed to the Tribunal for decision and, from the point of view of formal jurisdiction, was untouched by the taint of *excès de pouvoir*. Secondly, in the interests of achieving an end to litigation, it can be urged that it determines at least some contentious issues and clears the decks so to speak for the future determination of the remaining issues. In the third place, a duty lies upon the court making the declaration of nullity to keep to a minimum the scope of that nullity.

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[1] J. L. Simpson and Hazel Fox, *International Arbitration: Law and Practice*, 1959, p. 252.

[2] *Ibid.*; see also Lauterpacht, *op. cit.*, p. 117.

These are powerful considerations moving the Court in the direction of upholding the Tribunal's determination of the territorial sea, the contiguous zone and the continental shelf.

Yet, there is an overriding principle which prevents the Court from giving effect to the considerations just mentioned and that is the principle that serious prejudice must not be caused to either party in consequence of the erroneous decision to make only a partial determination. Much though a court should strive to uphold the decisions made within the tribunal's formal authority, this result should not be achieved at the cost of substantial damage to the interests which the parties had submitted to the tribunal for decision.

The principle of severability holds the key to the determination of this question of prejudice. Can the issues already decided be severed from those awaiting determination without prejudice to the interests of one party or the other? Are the issues involved so intrinsically connected that the known answer will cramp the free determination of the unknown by wielding a significant influence upon it? If so, this course of salvage of the partial solution becomes unacceptable and difficult to square with principles of justice and equity. The later decision may then be said to be pre-empted in whole or in part by the earlier.

One could of course visualize a case where, though the various questions are interrelated, the substantial dispute is answered but some inconsequential portions of the dispute remain unanswered. One would not be justified in such a situation in treating the minor omission as invalidating the entire decision. However, that is clearly not the case in the matter before us.

There are also cases, including boundary disputes, where different segments of the total matter in dispute can be decided as separate and discrete problems, the answers to which can stand independently of each other. In such cases the segments of the dispute that have been properly determined can maintain their integrity though the findings on other segments are assailed or do not exist. Such was the position in the *Argentine-Chile Frontier Award* case of 1902 and the *Orinoco Steamship Co.* case of 1910 [1]. In the former, a portion of the boundary between two boundary posts needed further determination while the findings in regard to the rest of the boundary could still remain intact. In the latter a series of separable and discrete claims could be separately adjudicated upon without the findings on one of them being interlinked with those on the others.

If, on the other hand, the different component elements of the subject-matter are inextricably interlinked, we face difficulties in attempting to

[1] 16 *Reports of International Arbitral Awards* 109 and 11 *ibid.* 237, at p. 238, respectively.

uphold a partial award. One test would be to examine the practicalities of the later decisional process. With a line already drawn and unalterable, would the later tribunal be as free as it would be in the absence of such a line to take into consideration all relevant facts and make an equitable order determining the exclusive economic zone and the fishery zone? Are all the factors relevant to the different zones a composite group whose subtle interaction upon each other cannot take place if the zones are compartmentalized and separately determined? If the overall result is to prevent a free and untrammelled resolution of the remaining areas of the dispute, the option of preserving the existing decision ceases to be available.

Needless to say, the task of delimitation of maritime boundaries as important as those of the exclusive economic zone and the fishery zone, is a delicately balanced one involving a plethora of factors — geological, geomorphological, ecological and economic, among others — which must be taken into account. Special circumstances such as islands, rocks and coastline irregularities have to be considered. Developing principles of law and equity [1], fine-tuned to meet the needs of the particular case, have to be sensitively applied. Thus alone can a fair and equitable result be achieved. The possible interlinkages are too numerous to be visualized or itemized in advance.

We should remind ourselves in this connection that:

> "The fundamental rule of general international law governing maritime delimitations . . . requires that the delimitation line be established while applying equitable criteria to that operation, with a view to reaching an equitable result." (*Delimitation of the Maritime Boundary in the Gulf of Maine Area, I.C.J. Reports 1984*, p. 339, para. 230.)

Far from the complex mix of decisional factors blending into a harmonious and equitable result, we will have the second tribunal functioning within a straitjacket imposed upon it by a fixed and unalterable boundary governing the territorial sea, the contiguous zone and the continental shelf. For these reasons, this Court cannot conclude with any degree of assurance that the interests of Guinea-Bissau would not be prejudiced by the piecemeal process that will take the place of the composite process both parties had in mind.

Is that prejudice substantial or can we overlook it in the interests of salvaging that part of the boundary determination that has already been made? From a practical point of view, it can hardly be said that the riches of the sea in such key areas as the exclusive economic zone and the fishery zone are anything but a most vital resource for any country, developed

[1] See P. Bravender-Coyle, "The Emerging Legal Principles and Equitable Criteria Governing the Delimitation of Maritime Boundaries between States" [1988], 19 *Ocean Development and International Law*, pp. 171-227.

and developing alike. The determination of their boundaries within the framework of such pre-set constraints clearly causes a degree of prejudice too great to be overlooked in the interests of salvaging the Award. Indeed, it would be pertinent to note that the maritime wealth of the exclusive economic zone and the fishery zone would, for both Parties to this particular dispute, constitute a far greater proportion of their total national asset than the disputed maritime zones would have involved, for example, for the United States of America and Canada in the *Gulf of Maine* case or for the Federal Republic of Germany, Denmark and the Netherlands in the *North Sea Continental Shelf* cases, to quote just two examples of cases of significant importance in the jurisprudence of the Court. For the parties concerned, the issues were momentous and any interference with their fair determination a matter of grave concern. The prejudice involved, by determining the later issues within the framework of the first decision, is thus too great to be overlooked in the interests of preserving the partial award.

A consideration of the question of severability would be incomplete without examining the possibility of different lines being drawn in regard to different boundaries. This in itself is a vast question, the complexities of which cannot at this point be envisaged. It is relevant to note in this context that in more than one place the *compromis* speaks of *the* boundary line which the Tribunal will draw, thus showing no contemplation of more than one. One line drawn at 240° for the zones already determined and another at another angle for those yet to be determined does not seem to accord with this language. Else there could be a resulting situation, for example, of the continental shelf following the 240° line and the exclusive economic zone following another. Whether such a situation, even if it is possible in law, is feasible in reality, this Court is not called upon to determine here. All that is possible at this stage is to make a brief reference to the jurisprudence of this Court. Such a reference will reveal a problem so complex that it is not possible to point to a later determination as affording Guinea-Bissau a way out of the impasse in which it finds itself if the territorial sea, the contiguous zone and the continental shelf are to be treated as already fixed and determined.

The *Gulf of Maine* case, the first in which the Court was asked to draw a delimitation line itself [1], was also of special significance as the Court was asked to delimit *both* the continental shelf *and* the exclusive fishery zone by a *single* boundary.

[1] As opposed to indicating the applicable principles and rules of international law as in the *North Sea Continental Shelf, I.C.J. Reports 1967*, pp. 3 and 6, and *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), I.C.J. Reports 1982*, p. 18.

The problems attendant on treating each separate boundary as a matter for separate enquiry become apparent from the Judgment, for, after acknowledging that separate criteria may be appropriate and equitable for the determination of the two areas involved, the Chamber goes on to state:

> "In other words, the very fact that the delimitation has a twofold object constitutes a special aspect of the case *which must be taken into consideration even before proceeding to examine the possible influence of other circumstances on the choice of applicable criteria.* It follows that, whatever may have been held applicable in previous cases, it is necessary, in a case like the present one, to *rule out the application of any criterion found to be typically and exclusively bound up with the particular characteristics of one alone* of the two natural realities that have to be delimited in conjunction." (*Delimitation of the Maritime Boundary in the Gulf of Maine Area, I.C.J. Reports 1984*, p. 326, para. 193; emphasis added.)

The fact that the determination of separate boundaries in hermetically sealed compartments produces different results from those that follow when they are dealt with as a collectivity thus receives authoritative endorsement.

The Chamber goes on to observe that:

> "it can be foreseen that with the gradual adoption by the majority of maritime States of an exclusive economic zone and, consequently, an *increasingly general demand for single delimitation, so as to avoid as far as possible the disadvantages inherent in a plurality of separate determinations*, preference will henceforth inevitably be given to criteria that, because of their more neutral character, are best suited for use in a multi-purpose delimitation" (p. 327, para. 194; emphasis added).

This judicial confirmation of the differences between a composite determination and a plurality of separate determinations, and of the disadvantages of the latter, further establishes the necessary interlinkage between the partial award that has been made and the residual award yet to come. The second can scarcely be effected in isolation from the first.

The tendency to make the determination of the exclusive economic zone coincide with that of the continental shelf is another factor crippling freedom of decision in the course to which Guinea-Bissau would be committed if she were to be sent to another decisional process while preserving the demarcation of the continental shelf. As Judge Jiménez de Aréchaga observed in the case concerning the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*:

> "At least in the large majority of normal cases, the delimitation of the Exclusive Economic Zone and that of the continental shelf would

have to coincide. The reason is that both of these delimitations are governed by the same rules . . ." (*I.C.J. Reports 1982*, pp. 115-116, para. 56.)

So, also, Judge Evensen referred in the same case, to "the obvious advisability of having identical lines of delimitation for the continental shelf and the 200-mile Exclusive Economic Zone" (at p. 319).

It is not necessary to enter here into all the complexities of these processes, suffice it merely to note them for the limited purposes of this opinion. Some understanding of the extent of these complexities appears also from a perusal of the dissenting opinion of Judge Gros in the *Gulf of Maine* case, and from the writings of Judge Oda [1]. Having regard to these complexities, it is clear that it would be prejudicial to the vital national interests of Guinea-Bissau in its exclusive economic zone and fishery zone to commit it to a decisional process clouded by so many obscurities and hampered by so many restraints.

It is to be noted finally that the exercise of fixing separate boundaries for separate zones through two or more discrete determinations is conceptually and methodologically different from the combined operation of evaluating them as a totality. The interplay of factors relevant to more than one boundary is immaterial to the former enquiry but central to the latter. The production of inconsistent boundary lines is possible under the first method but is unavailable under the second. Practical considerations of achieving a workable overall demarcation are of immediate importance to the second method but not necessarily to the first.

Needless to say, the compartmentalized enquiry can thus lead to vastly different results from the consolidated one. The result which is equitable in the context of any one or more boundaries viewed by themselves may well be inequitable in the context of a total determination.

It is not difficult to see why the agreement laid so much store by the concept of one demarcation line and why that factor assumes such central importance in this case.

In all these circumstances, one cannot conclude, unless compelled thereto by obligatory juristic principle, that an interpretation is legitimate which commits one party or the other to a situation so fraught with prejudice. Such a course neither offers a real solution to the problem before the Court nor ensures a fair determination for Guinea-Bissau of its exclusive

[1] See "Delimitation of a Single Maritime Boundary: The Contribution of Equidistance to Geographical Equity in the Interrelated Domains of the Continental Shelf and the Exclusive Economic Zone", in *International Law at the Time of Its Codification, Essays in Honour of Roberto Ago*, 1987, Vol. II, p. 349.

economic zone and its fishery zone, which was among the principal purposes of the document under examination.

Without any intrusion into the question of the merits in relation to the Award concerning the territorial sea, the contiguous zone and the continental shelf, the conclusion seems irresistible that the failure of the Tribunal to address the entire question posed to it undermines the validity of even the partial answer it has rendered.

III. Conclusion

Reference was made at the commencement of this opinion to the importance of maintaining the integrity of international arbitration as one of the cardinal procedural achievements of international law. This involves the twin considerations of respecting the finality of arbitral awards once made and of holding arbitral proceedings within the confines of the *compromis* on which they are based. As international law matures it will be necessary, without impairing the integrity of the first principle, to develop the second so as to make it more responsive to the demands of juristic principle.

The case before us juxtaposes these competing considerations in a manner highlighting the importance of each. It would be tempting to adopt the stance that an unassailably valid *compromis* followed by a procedure enjoying all the appearances of regularity should be left intact and unimpaired. It is evident, however, that other considerations are involved, too important to the future of international arbitration to be ignored. A court invited to declare on the validity of the order, and with undoubted jurisdiction to make a pronouncement thereon, would, in my respectful view, be in error if it should fail to give to important vitiating factors the weight which they deserve.

It has been observed that the lack of courts with jurisdiction to examine questions of nullity and effectiveness is damaging to the development of international law in this field (see Jennings, *op. cit.*, p. 86). While "the enervating effect of the lack, or near lack, of courts with compulsory jurisdiction is nowhere more damaging than in this aspect of international law . . ." *(ibid.)*, we have here a situation where a court seised of the matter is eminently in a position to give some guidance on the substantive law relating to nullity. Deference to arbitral awards is important but deference in the presence of significant deviations from the *compromis* may damage the institution which it is intended to protect.

The reasons set out in this opinion lead to the conclusion that the burden of proof of invalidity, which at all times lay upon Guinea-Bissau, has been discharged and that the entire Arbitral Award is null and void. Guinea-Bissau is therefore entitled to a declaration to this effect.

The ground on which a declaration of nullity should issue is the ground that the Tribunal had no competence to decide that it would not decide a principal part of the matter entrusted to it and which, by its acceptance of its mandate, it had undertaken to decide. Its decision not to decide Question 2 was without jurisdiction. That decision was incompatible with the *compromis*, thus vitiating the Award from its very commencement. Moreover, the impossibility of obtaining a full and fair determination of the remaining portions of the boundary, so long as the portions of the boundary already determined remained valid, rendered it impossible to preserve even the determined portion of the boundary, thus undermining the answer to Question 1 as well, and resulting in the nullity of the total Award.

For the reasons set out in this opinion, the second declaration sought by Guinea-Bissau in its Memorial should be granted, but only on the ground that failure to reply to the second question did not comply with the provisions of the Arbitration Agreement, and not on the ground of failure to draw a single line and record that line on a map, or on the ground of failure to give reasons.

The third declaration sought by Guinea-Bissau, to the effect that the Government of Senegal is not justified in seeking to require the Government of Guinea-Bissau to apply the Award, should also be granted.

The first declaration sought by Guinea-Bissau, to the effect that the Award is inexistent, should be refused.

(Signed) Christopher Gregory WEERAMANTRY.