DISSENTING OPINION OF JUDGE THIERRY

[Translation]

To my deep regret I am unable to associate myself with the Court's decision in the present case concerning the *Arbitral Award of 31 July 1989*. I hereby give the reasons for my dissent, which essentially relate to the legal consequences of the fact, explicitly recognized by the Court, that that Award: "has not brought about a complete delimitation of the maritime areas appertaining respectively to Guinea-Bissau and Senegal" (paragraph 66 of the Judgment of the Court).

It follows that the dispute has not been fully settled and the Court notes that there are "elements of the dispute that were not settled by the Arbitral Award" (para. 68).

The omission is nonetheless seen as ascribable to the Parties rather than to the Tribunal inasmuch as, according to the Judgment: "that result is due to the wording of Article 2 of the Arbitration Agreement" (para. 66).

Accordingly, and in spite of that "result", the Award is found to be valid and binding for the Parties and the submissions of Guinea-Bissau are consequently rejected.

It seems to me, on the contrary, that

(1) what the Court refers to as "elements of the dispute that were not settled by the . . . Award" were in fact the essential part of that dispute. Having failed to bring about a comprehensive settlement of the dispute submitted to it, relating to the determination of the maritime boundary between Senegal and Guinea-Bissau, the Tribunal failed to accomplish its jurisdictional mission — as can be seen from the fact that that maritime boundary has still not been delimited. The Tribunal did not do its job and it is that failure which should, in my opinion, have led the Court to find the Award to be null and void;

(2) contrary to the line of argument developed by the Court, that failure was not justified by the terms of Article 2 of the Arbitration Agreement. That provision did not stand in the way of a comprehensive settlement of the dispute provided it was interpreted in its context and in the light of the object and purpose of the Arbitration Agreement, in application of the rules of international law relating to the interpretation of treaties that have their origin in the jurisprudence of the Court itself. This means that the dispute could — and thus should — have been completely and comprehensively settled in accordance with the common will of the Parties, as expressed in the Arbitration Agreement, and with the essential purpose of the institution of arbitration;

(3) paragraphs 66 and 67 of the Court's Judgment should, on the other

hand, be approved, as they open the way to the necessary settlement of the long-standing dispute between Senegal and Guinea-Bissau, for which there is still no equitable solution, relating to the determination of their maritime boundary.

I

The Tribunal, constituted under the Arbitration Agreement between Senegal and Guinea-Bissau dated 12 March 1985, was, as can be seen from the first page of the Award, officially entitled in French: *Tribunal arbitral pour la détermination de la frontière maritime, Guinée-Bissau/Sénégal* ["Arbitration Tribunal for the Determination of the Maritime Boundary: Guinea-Bissau/Senegal"] (and in Portuguese: *Tribunal arbitral para a determinação da fronteira marítima, Guiné-Bissau/Senegal*). The mission of that Tribunal, like every judicial body, was to settle the dispute submitted to it. The subject of that dispute followed from the name given to the Tribunal, but also from the Preamble to the Arbitration Agreement, which expressed the intention and the purpose of the Parties, by virtue of which that Agreement had been reached. That Preamble states that:

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

These terms are perfectly clear. The dispute submitted to the Tribunal by the two States was the dispute "relating to the determination of their maritime boundary". (The term "determination" is significant and does not mean the same thing as "delimitation", which occurs more frequently in the Judgment of the Court. The word "determination" applies to a boundary line that is not yet known and which remains to be defined. "Delimitation" applies to known areas, whose extent needs to be specified.)

However, the Arbitration Agreement did not merely define the dispute in that way; it also provided guidelines for the ways in which it was to be settled by the Tribunal. In relation to the determination of the maritime boundary, it was stated that this should be effected by the definition of a "boundary line", i.e., by a single line. Article 2, paragraph 2, of the Arbitration Agreement refers in that regard to: "*the line* delimiting the maritime territories appertaining to the Republic of Guinea-Bissau and the Republic of Senegal respectively".

Need one stress that, in this text, the "maritime territories" are in the plural and the word "line" is singular, and that it is therefore one single line, rather than several, that is contemplated?

In the same way, Article 9, paragraph 2, of the Arbitration Agreement, which provides that the Award "shall include the drawing of *the boundary line* on a map", is fully explicit both with respect to the obligation implied by the word "shall" and with respect to the concept of the boundary line.

There was therefore no uncertainty surrounding the mission of the Tribunal as defined by the Arbitration Agreement. It was required, not to delimit this or that maritime area appertaining to the Parties respectively, but to bring about a comprehensive settlement of their dispute by the determination of their maritime boundary.

This is the mission that the Tribunal has not accomplished. As we know, it confined itself to finding that the Franco-Portuguese Agreement of 26 April 1960, concluded prior to the independence of the two litigant States, "has the force of law" in the relations between them. By so doing, the Tribunal applied, to the maritime areas, the principle known as *uti possidetis juris* or, in other words, the principle of respect for frontiers inherited from the colonial period. The Tribunal nonetheless specified that that Agreement related exclusively to the only areas that existed in international law at the time of its conclusion and that, as a consequence, only those areas had been delimited, i.e., the territorial sea, the contiguous zone and the continental shelf. What is more the Award, in its statement of reasoning, makes the paradoxical suggestion that: "it may be concluded that the Franco-Portuguese Agreement delimits the continental shelf between the Parties over the whole extent of that maritime space as defined at present" (text quoted in paragraph 16 of the Judgment).

The vagueness of this statement derives from the words "it may be concluded" and the paradox results from the reference to the continental shelf as defined *at present*, i.e., to its definition on the day on which the Award was handed down, although the Tribunal had accepted, in accordance with the "principles of intertemporal law", that the Agreement of 1960 should be interpreted in the light of the law in force at the time of its conclusion. The definition of the extent of the continental shelf did of course evolve very markedly between 1960 and 1989, because of the development of the means whereby its resources could be exploited and as a result of the work done at the Third United Nations Conference on the Law of the Sea.

However, having made that finding on the applicability of the 1960 Award, the Tribunal did not pass on the delimitation of the exclusive economic zone, which was not covered by that Agreement, as that concept was not incorporated into international law until a later date, in relation to the work of the Third United Nations Conference on the Law of the Sea.

Nor did the Tribunal determine the single maritime boundary delimiting the whole of the maritime areas (including the exclusive economic

zone) that appertained to the two States; it did not even sketch out the process of that determination. Nor did it include in its decision a map showing the course of the maritime boundary, as it was obliged to do by virtue of Article 9, paragraph 2, of the Arbitration Agreement. In fact, that omission was the consequence of the Tribunal's failure to accomplish its mission with respect to the determination of the maritime boundary. As that line had not been determined, it was clearly impossible to show it on a map included in the decision of the Tribunal! There was thus a cumulation of failures by the Tribunal to fulfil its obligations.

The result of these failures was that the Tribunal did not accomplish its mission. In that regard, the Court has accepted — as I said at the very beginning of this opinion — that "the Award has not brought about a complete delimitation of the maritime areas appertaining respectively to Guinea-Bissau and to Senegal".

It nonetheless appears that, because of its failure to settle the dispute in a complete and above all comprehensive manner, the Tribunal did not settle it at all, seeing that it related to the determination of a maritime boundary, i.e., a single boundary *line*. The delimitation of certain maritime areas by virtue of the provisions of the 1960 Agreement and by reference to that Agreement, does not constitute a partial settlement needing to be completed by the delimitation of other areas and, more particularly, by that of the economic zone — leading, by successive strokes, to a plurality of lines. Seeing that the delimitation of the maritime areas appertaining to each of the two States was to lead to the determination of a single maritime boundary, in accordance with the common will of the Parties, it is clear that the course of that boundary depended upon the taking into consideration of the extent of all the maritime areas, not just some of them. The Tribunal had therefore to take account of the delimitation of the economic zone, to the same extent as that of the other areas, in order to determine the maritime boundary.

It is as well to point out, in that regard, that the Parties' desire for a single maritime boundary, as expressed in the Arbitration Agreement, corresponds to the development of the law and the practice in relation to delimitation. Professor Weil has pointed out that the Judgment of a Chamber of the Court in the *Delimitation of the Maritime Boundary in the Gulf of Maine Area* case (Judgment of 12 October 1984) made

> "a significant contribution to the trend towards a single boundary, determined by the application of the same 'neutral' criteria of coastal geography and recourse to the same 'neutral' geometric methods" (*Perspectives du droit de la délimitation maritime*, Pedone, 1988, p. 135).

In the current legal situation resulting from the Court's validation of the Award of 31 July 1989, the boundaries of certain maritime areas are legally established by virtue of the 1960 Agreement and with reference to it, but the maritime boundary between the two States, as referred to in the

1985 Arbitration Agreement, remains undetermined. That uncertainty is naturally detrimental to good neighbourly relations between the two States.

In other words, the "elements of the dispute that were not settled" which feature in the Judgment of the Court are the essence of the dispute, its true subject. The incomplete settlement of the dispute is tantamount to an absence of a settlement. It is a proverbial truth that doing things by halves is the same as not doing them at all.

It is that omission and the corresponding failure of the Tribunal to accomplish its judicial mission, that should have led the Court to find that the Award was null and void. By so doing, the Court would not in any way have acted as a court of appeal in relation to the Tribunal, and would not have subjected the Award to a *réformation.* It would not have exceeded its jurisdiction as explained in its Judgment in the case concerning the *Arbitral Award Made by the King of Spain on 23 December 1906,* of which the relevant passage is quoted in paragraph 25 of the Court's decision in the present case. It would, on the contrary, have pointed to the derelictions of the Tribunal, as those derelictions together constituted the *"excès de pouvoir"* even though that expression, generally employed to designate cases in which a court exceeds its jurisdiction and, by so doing, decides *ultra petita,* is rather inappropriate in the context of this case. It is nonetheless generally accepted that an *excès de pouvoir* may result both from a situation in which a judicial body exceeds its mission and from any failure to accomplish that mission. However, those terminological considerations apart, an award which does not achieve the settlement of the dispute should be found to be null and void, by virtue of a well-established jurisprudence from which the Judgment of the Court does not depart.

For by saying that

> "It has simply to ascertain whether by rendering the disputed Award the Tribunal acted in manifest breach of the competence conferred on it by the Arbitration Agreement, either by deciding in excess of, or by failing to exercise, its jurisdiction" (para. 47),

the Court admits that an award incompatible with the agreement for the arbitration should be annulled. However, in the present case, the Court has found that the Award was compatible with the Arbitration Agreement although in my opinion, based upon the reasons I have given, it is incompatible with it.

Was the Court concerned to preserve the institution of international arbitration by validating the Award of 31 July 1989, even though that Award leaves the dispute essentially unsettled? Not to encourage States to contest awards for no good reason is, of course, a legitimate concern, and it is understandable that the Court should be affected by it. However, one may also fear that such an important and respectable institution as arbitration may suffer from a jurisprudence too exclusively inspired by that concern, leading to the confirmation of awards that are seriously flawed. If the presumption of validity of awards, which is in itself legitimate, were

ever to assume the character of an irrefutable presumption because of the line of conduct followed by the Court, States — and in particular those with no more than a limited experience of international procedures — would, in the absence of any appropriate recourse or safeguard against *excès de pouvoir* or deficiencies of arbitration tribunals, be discouraged from referring their disputes to those tribunals.

In the present case, the Court displays a very perceptible inclination towards a very strong and very absolute presumption of validity of awards. This can be seen from what I have just said, and is also apparent from its reasoning on the interpretation of Article 2 of the Arbitration Agreement, whereby the Tribunal's failure to accomplish its mission was nonetheless found to be compatible with the terms of that Agreement.

II

Is it a tenable view, on the lines of the Court's reasoning, that the Tribunal's approach, and accordingly the incomplete nature of the Award, was justified by the terms of Article 2 of the Arbitration Agreement?

Argument before the Court centred on this provision and it was fundamentally on it that the Court based its conclusion that the Award is consistent with that Agreement. It is, on the contrary, my opinion that Article 2 did not prevent the Tribunal from accomplishing the mission which was its *raison d'être* and the purpose of its establishment, and, therefore, from fulfilling the Tribunal's primary, primordial obligation to perform its task with respect to the determination of the maritime boundary between the two States.

The text of this Article 2, which sets out the questions the Tribunal was to decide with a view to a settlement of the dispute, is 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?"

The history of the negotiations that led to this provision has been outlined by the Court in support of its opinion that it was not the Tribunal's task in any event to delimit the whole of the two States' maritime areas by a single line. I have set out above the reasons, based on the provisions of the Arbitration Agreement, for which I feel that this view is not well founded;

but the history of the negotiations, as outlined by the Court, sheds light on the language of Article 2 and, particularly, the way its two paragraphs mesh.

As the Court has pointed out (paras. 53 *et seq.* of the Judgment), in the course of the negotiation of the Arbitration Agreement, Senegal laid particular emphasis on the Franco-Portuguese Agreement of 1960, which was advantageous to it, and wanted the line laid down by this Agreement (a straight line at 240°) to be perpetuated so that it would constitute the sole delimitation for all the maritime areas, present and future, over which the two States would respectively be called upon to exercise exclusive rights. Senegal therefore expected that recognition of the validity of the 1960 Agreement would suffice for the complete settlement of the dispute in such a way that the single maritime boundary would be the 240° line. On the other hand Guinea-Bissau, which considered itself disadvantaged by the 1960 Agreement (which is indeed the case, as is abundantly clear from the most cursory inspection of the map — not produced by the Tribunal — showing the 240° line) wanted an *ex novo* delimitation taking account of the evolution of the law of the sea, particularly as regards the continental shelf and the exclusive economic zone. However, both Parties were agreed as to the need for a single line, although it was not the same line they had in mind.

Thus, the language of the Arbitration Agreement was, as is often the case, the result of a compromise (i.e., an intermediate solution accepted at the price of mutual concessions). Article 2 set forth two questions, one reflecting the wishes of Senegal as to the applicability of the 1960 Agreement and a second one reflecting those of Guinea-Bissau, which strove for an *ex novo* delimitation of the boundary line. That the second question was to be subordinated to the first was nevertheless accepted and made clear by the phrase "In the event of a negative answer to the first question", at the beginning of the second question. But both Parties considered that in any event the dispute would be completely settled whatever the reply of the Tribunal to the first question (whether an affirmative reply to it effected a complete settlement of the dispute, or a negative one enabled the Tribunal to deal with the second question). Moreover, both Parties, Senegal as well as Guinea-Bissau, referred, throughout the proceedings before the Tribunal, to a single line and therefore to a global settlement of the dispute, as can be seen from the final submissions of Senegal formulated at the close of those proceedings. (Annexes to the Memorial of Guinea-Bissau, Book IV, Part 2, Hearing of 29 March 1988 (afternoon), p. 281.)

But it was not possible to meet the common desire of the Parties by answering only the first question once the Tribunal, being bound by the principle of intertemporal law, had held that the 1960 Agreement applied to certain areas (territorial sea, contiguous zone and continental shelf) but not to others and particularly not to the economic zone. Thus the principle

of intertemporal law prevented an affirmative answer to the first question of Article 2 of the Arbitration Agreement from being sufficient for the settlement of the dispute.

The Tribunal was therefore faced with the following alternatives: either it would not go beyond a literal interpretation of Article 2, and thus refrain from answering the second question and hence from determining the frontier line, thereby failing to settle the dispute and leaving unperformed the mission entrusted to it by the Arbitration Agreement; or, on the contrary, the Tribunal might seek to interpret Article 2 in the light of the object and purposes of the Arbitration Agreement and, by answering the second question, perform its jurisdictional mission by determining, in keeping with that mission, the maritime boundary between the two States.

It was the former of the two solutions that the Tribunal adopted, without taking steps to justify its decision, except implicitly, and without stating its choice in the operative part of the Award. The decision taken by the Tribunal in this connection appears only in the statement of reasoning, and the Tribunal's grounds are set out in four lines (paragraph 87 of the Award, quoted in paragraph 17 of the Court's Judgment). It was these defects, due no doubt to the chaotic character of proceedings that lasted four years (1985-1989) and to the very pronounced disagreements that arose within the Tribunal (and were revealed by the declaration of its President and the dissenting opinion of Mr. Bedjaoui), which prompted the Court to state that "the structure of the Award is, in that respect, open to criticism" (para. 41) and that "this reasoning is brief, and could doubtless have been developed further", but that the statement of reasoning, while succinct, "is clear and precise" (para. 43). These expressions were no doubt carefully chosen, but the Court's Judgment appears to be, in a number of respects, a collection of euphemisms: elements of the dispute that were not settled; award so structured as to be open to criticism; reasoning that was brief but . . . !

However, the reasoning that led the Court to declare the Award valid is, fortunately, more fully worked out than that of the Tribunal. The Court held that, given the language of Article 2, it was not the Tribunal's task to delimit the whole of the maritime spaces appertaining to the two States, by a single line, in any event. The Parties had only "expressed in general terms in the Preamble of the Arbitration Agreement their desire to reach a settlement of their dispute" but "their consent thereto had only been given in the terms laid down by Article 2" (para. 56).

That provision — Article 2 — was accordingly the only one in which the will of the Parties had been manifested, since the Preamble was merely optative and Article 9 was subordinated to Article 2.

As a result, since the comprehensive settlement of the dispute was not seen by the Court as the primary task of the Tribunal, there was nothing to stand in the way of a literal interpretation of paragraph 2 of the Arbitration Agreement and that interpretation was the one most consistent with the rules of interpretation of treaties. By answering the first question in the affirmative and deciding, though implicitly, not to answer the second, the

Tribunal had, in the opinion of the Court, in no way failed to exercise jurisdiction. Moreover, there would have been no need to produce the map required by Article 9 of the Arbitration Agreement, given the Tribunal's decision not to answer the second question and, in any event, that omission could not "constitute such an irregularity as would render the Award invalid" (para. 64).

Thus the Court's conclusions rest essentially on the premise that the Tribunal was not necessarily required to determine the boundary line.

The reasoning of the Court can be analysed as a syllogism having the following form:

(1) the Tribunal was not under an obligation to settle the dispute completely in any event;
(2) the Tribunal settled the dispute in part;
(3) the Award is therefore valid.

I have, earlier in this opinion, challenged the premise of this syllogism, showing that, on the contrary, it was clear from the Arbitration Agreement (from its Preamble, from Article 2, from Article 9, paragraph 2), and also from the history of the negotiations that led to the conclusion of this instrument, as outlined by the Court, as well as from the submissions of the Parties in the proceedings before the Tribunal, that the common desire of the Parties was to bring about the delimitation of a single maritime boundary and that such was the essential task they entrusted to the Tribunal.

Now if, as I believe is the case, the premise of the Court's reasoning is incorrect, it necessarily follows that the conclusion is also incorrect.

But in order to refute the reasoning of the Court fully, it is also necessary to show that the Tribunal could answer the second question without committing an *excès de pouvoir* — in the more usual meaning of the term, i.e., without exceeding its competence under the Arbitration Agreement.

The Court has recalled two fundamental rules of interpretation of treaties, applicable to the interpretation of the Arbitration Agreement; the first, known as that "of the ordinary meaning of terms", was formulated, for example, in the Court's opinion in the case concerning the *Competence of the General Assembly for the Admission of a State to the United Nations*, in which the Court made the following observations:

> "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. If the relevant words in their natural and ordinary meaning make sense in their context, that is the end of the matter." (*Advisory Opinion, I.C.J. Reports 1950*, p. 8, quoted in paragraph 48 of the present Judgment.)

The second rule is the one requiring the object and the purpose of the

treaty to be taken into account. This rule, often applied by the Permanent Court of International Justice (*Polish Postal Service in Danzig, 1925, P.C.I.J., Series B, No. 11*, p. 39; *Interpretation of the Convention of 1919 concerning Employment of Women during the Night, 1932, P.C.I.J., Series A/B, No. 50*, p. 373), has been formulated in the following terms:

> "Where such a method of interpretation [the one based on the ordinary meaning of terms] results in a meaning incompatible with the spirit, purpose and context of the clause or instrument in which the words are contained, no reliance can be validly placed on it." (*South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 336.)

This implies that whenever the result is incompatible with the object of the agreement (in the present case the Arbitration Agreement) that object should be taken into account for purposes of interpretation.

Article 31 of the Vienna Convention on the Law of Treaties, which, as the Court has observed, can be regarded as a codification of existing customary law, provides in this respect that:

> "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty *in their context and in the light of its object and purpose.*"

If, as the Court states, the Tribunal was not bound to arrive at a comprehensive and complete settlement of the dispute submitted to it, it is conceivable that a literal interpretation of Article 2 would have been appropriate, although it would also have been necessary to take account of the context, that is, of the definition of the dispute in the Preamble and Article 9.

If, on the other hand, as I maintain, the Tribunal was bound to settle the dispute by determining a boundary line, it is clear that the "ordinary meaning" method led to a result incompatible with the spirit and the object of the Arbitration Agreement, as well as with the context of Article 2, since failure to reply to the second question resulted in the dispute not being settled.

In other words, it was for the Tribunal to take into account, in accordance with the jurisprudence of the Permanent Court of International Justice and of this Court with regard to the interpretation of treaties, the spirit of the Arbitration Agreement and above all its object, which was to ensure the settlement of the dispute by the determination of a boundary line. The Tribunal would thus have concluded that the terms of Article 2 only prevented the second question from being answered if the answer to the first one allowed the dispute to be settled. As this was not the case, the Tribunal was to answer the second question to the full extent that its answer to the first one left the dispute virtually unresolved. No *excès de pouvoir* would have been committed since this interpretation of Article 2 would have been not only consistent with the provisions of the Arbitration Agreement but required in the light of its object. Accordingly, in conclusion, the

Court should have held that the Tribunal had not accomplished its task even though no legal obstacle prevented it from so doing, and should have drawn the appropriate consequences from this shortcoming.

III

In paragraphs 66 to 68 of its Judgment, the Court, after observing that the Award "has not brought about a complete delimitation of the maritime areas appertaining respectively to Guinea-Bissau and to Senegal", took note of the fact that Guinea-Bissau had filed in the Registry of the Court a second Application requesting the Court to adjudge and declare "what should be ... the line (to be drawn on a map) delimiting all the maritime territories appertaining respectively to Guinea-Bissau and Senegal". It also took note of the declaration made by the Agent of Senegal that one solution:

> "would be to negotiate with Senegal, which has no objection to this, a boundary for the exclusive economic zone or, should it prove impossible to reach an agreement, to bring the matter before the Court".

The Court, finally, considered it

> "highly desirable that the elements of the dispute that were not settled by the Arbitral Award of 31 July 1989 be resolved as soon as possible, as both Parties desire".

This observation corresponds to the interest of both countries and one should associate oneself with it. But it is also necessary to arrive at an understanding on the meaning of the phrase "the elements of the dispute that were not settled by the Arbitral Award of 31 July 1989". In my opinion, as expressed above, these unsettled elements of the dispute are its essential part, that is to say the determination of the maritime boundary between the two States, delimiting the whole of the maritime areas appertaining respectively to each of them, a boundary which will fall to be determined equitably in accordance with the principles and norms of international law accepted by Senegal and Guinea-Bissau.

(Signed) Hubert THIERRY.