Sea — Maritime boundaries — Delimitation — Arbitral tribunal asked to decide whether agreement concluded by colonial powers in force between successor States — Agreement only effecting delimitation of maritime areas existing at time concluded— Relevance of customary international law

State succession—Treaties—Agreement concluded by colonial powers regarding maritime delimitation — Whether binding upon successor States—Effect of declaration of *tabula rasa* on agreement

State succession — Boundaries — Principle of *uti possidetis* — Whether applicable to maritime boundaries—Principles of sovereignty over natural resources—Effect on maritime delimitation agreement concluded by colonial powers—Liberation movement operating in colony—Whether restricting authority of colonial power to conclude treaties in respect of colony

Arbitration — Arbitration agreement — Maritime boundary delimitation—Competence of tribunal—Arbitration agreement concluded by States not party to agreement which formed subject-matter of arbitration—Competence of tribunal in respect of earlier agreement

Treaties—Validity—Effect of breach of internal law on validity of treaties—Relevance of practice in assessing whether breach of internal law renders treaty invalid—Effect of non-registration of treaty with United Nations—Franco-Portuguese exchange of letters, 1960—Article 46 of the Vienna Convention on the Law of Treaties

CASE CONCERNING THE ARBITRAL AWARD OF 31 JULY 1989

(GUINEA-BISSAU *v.* SENEGAL)

Arbitration Tribunal for the Determination of the Maritime Boundary

(Barberis, *President*; Bedjaoui and Gros, *Arbitrators*)

31 *July* 1989

SUMMARY: *The facts*:—Under an Agreement of 12 March 1985 the Governments of Guinea-Bissau and Senegal agreed to submit the dispute relating to their respective maritime boundaries to arbitration. The Arbitration Tribunal was asked 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?

Senegal became an independent State, distinct from the Republic of Mali, on 20 August 1960, following a transition period during which Senegal had been an autonomous State within the French *Communauté* and a member of the Federation of Mali. Guinea-Bissau attained independence from Portugal on 24 September 1973.

On 12 May 1886 France and Portugal concluded a Convention (''the 1886 Convention'') fixing land boundaries between the then Portuguese province of Guinea and the French territory of Senegal. Both Guinea-Bissau and Senegal accepted the land boundaries established under the 1886 Convention. Both States also accepted that the Convention had not drawn the maritime boundaries between the Republics of Guinea-Bissau and Senegal.

In 1960, by an exchange of letters (''the 1960 Agreement''), France and Portugal fixed the maritime boundaries between the two territories. The 1960 Agreement was published in the French *Journal Officiel* and in official journals of the *Communauté* and the Federation of Mali. The 1960 Agreement was not published in the Portuguese official journal, nor was it published in the province of Guinea. It was not registered with the United Nations.

Before the Arbitration Tribunal, Guinea-Bissau submitted that:

(1) The provisions of the Vienna Convention on the Succession of States in Respect of Treaties, 1978 (''the Vienna Convention''), precluded Senegal from invoking the 1960 Agreement against Guinea-Bissau. Further, Guinea-Bissau maintained that the 1960 Agreement was null and void on the grounds that:

(a) the principle of *uti possidetis juris* applied only to land frontiers and not to maritime delimitations or to agreements concluded in the recent past. It also submitted that the rules relating to State succession did not apply in the relations between Guinea-Bissau and Senegal;

(b) the 1960 Agreement had not been published either in Portugal or in the province of Guinea;

(c) the failure to register the 1960 Agreement with the United Nations precluded Senegal from invoking the Agreement before the Arbitration Tribunal;

(d) a holding that the provisions of the 1960 Agreement were opposable to Guinea-Bissau would be contrary to the right to sovereignty over natural resources expressed in United Nations General Assembly Resolutions 1803 (XVII)[1] and 2158 (XXI).[2] It was argued that the right to self-determination

[1] Paragraph I(1) of Resolution 1803 (XVII) concerned the ''right of peoples and nations to permanent sovereignty over *their* natural resources'' (emphasis added).

[2] Paragraph I(1) of Resolution 2158 (XXI) reaffirmed ''the inalienable right of all countries

formed part of the body of peremptory norms of international law and a corollary to this was the right to sovereignty over natural resources. It was submitted that, by 1960, Portugal no longer had the authority to conclude agreements on behalf of the territory because of the existence at that time of an indigenous movement seeking independence from Portugal;

(e) the 1960 Agreement was contrary to contemporary law relating to maritime delimitation and violated fundamental internal laws of Portugal and France. The Portuguese Constitution in force in 1960 prohibited the alienation of any national territory without the consent of the National Assembly and required the approval of the National Assembly for the ratification of international agreements. The failure to submit the 1960 Agreement to the Portuguese National Assembly thus rendered that Agreement void under Article 46 of the Vienna Convention on the Law of Treaties, 1969.[3]

(2) Therefore, the maritime boundary between Guinea-Bissau and Senegal had never been delimited;

(3) The delimitation should be effected in accordance with Article 15 of the Law of the Sea Convention, 1982, by reference to a line equidistant from the baselines of Guinea-Bissau and Senegal in the direction of 247°; and

(4) Equitable considerations and other relevant factors resulted in the drawing of lines lying between 264° and 270°. The delimitation of continental shelves, exclusive economic zones and fishery zones should be fixed between those two lines;

(5) Even if the 1960 Agreement was held to be opposable to it, Guinea-Bissau was entitled to require that the equitable character of the line of delimitation be confirmed.

In response, Senegal maintained:

(1) The 1960 Agreement had delimited the continental shelf, the contiguous zone, the territorial sea and the exclusive economic zone between the two countries and had been a valid exercise of sovereignty by France and Portugal and had conformed with the principles governing the operation and validity of agreements;

(2) The competence of the Portuguese National Assembly in these circumstances could lawfully be delegated to the Government and the 1960 Agreement did not require approval of the National Assembly, because it did not consist of the alienation of national territory, but was simply a territorial delimitation;

(3) That the 1960 Agreement had the force of law between Guinea-Bissau and Senegal was confirmed by the conduct of France and Portugal and the States which succeeded them;

to exercise permanent sovereignty over *their* natural resources" (emphasis added).

[3] Article 46 of the Vienna Convention on the Law of Treaties, 1969, provides:

1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

(4) Whatever the conclusion of the Tribunal on the legal effect of the 1960 Agreement, the line of the maritime boundary between the two States should be "drawn on azimuth 240°, from the lighthouse at Cape Roxo and by its prolongation in a straight line".

Held (by two votes to one):—The 1960 Agreement was valid and was opposable to Guinea-Bissau and Senegal. The 1960 Agreement effected the delimitation of the contiguous zone and the territorial sea between the two States.

(1) The dispute which had arisen was one which could only emerge after both States had achieved independence. The two States agreed on this point but were not in accord as regarded the effect of the agreements and actions of their former metropolitan powers. Nevertheless, the issues which came to light in the dispute related to the position between the territories before, as well as after, the conclusion of the 1960 Agreement (pp. 16-21).

(2) The Tribunal had competence to assess the validity of the 1960 Agreement notwithstanding that the Tribunal had been established under a treaty between two States which were not parties to the 1960 Agreement. In so far as the 1960 Agreement was subject to the rules of the succession of States, the Tribunal had competence to analyze and assess its validity with regard to the relations between Guinea-Bissau and Senegal. Although Guinea-Bissau had declared *tabula rasa* as regards the application of treaties concluded by Portugal, both States accepted the principle of *uti possidetis*. Furthermore, the conduct of the two States in the arbitration confirmed that they were acting as the successor States of France and Portugal (pp. 21-3).

(3) Although Guinea-Bissau claimed that the 1960 Agreement was non-existent, the question posed to the Arbitration Tribunal—which stated "Does the Agreement . . . have force of law . . . "—implied that the treaty did exist. Accordingly, it was to be assumed that the 1960 Agreement did exist and the arguments put forward by Guinea-Bissau for its non-existence would be assessed in resolving the issue of nullity (p. 23).

(4) The principle of sovereignty over natural resources presupposed that the resources in question were found within the territory of the State invoking the principle. The 1960 Agreement established the maritime boundary of each State and, prior to this Agreement, the maritime boundaries between the two States had not been determined. The disputed territory could not, therefore, be shown to have belonged to Guinea-Bissau and the principle of sovereignty over natural resources was not applicable in the present instance (pp. 24-5).

(5) Guinea-Bissau's argument that the right to self-determination limited the authority of a metropolitan power to exercise sovereign functions in respect of a colony where there was a liberation movement was unfounded. On occasion the United Nations had specifically recognized national liberation movements which held a degree of recognition on the international stage and had significantly undermined the control and authority of the metropolitan power. Guinea-Bissau had formerly conceded that in 1959-60 the liberation movement had not made a significant effect on Portuguese control of the territory. Indeed, in the arbitral award of 1985 between Guinea-Bissau and Guinea, it was stated that the war of liberation

began in 1963. Recognition by the United Nations only came in 1973 upon the proclamation of independence. At the relevant time, therefore, Portugal had the capacity to conclude treaties for Guinea-Bissau (pp. 25-30).

(6) The issue of whether Portugal was acting in accordance with its internal law when it concluded the 1960 Agreement was subject to the principle of good faith which prevailed at that time. That principle was therefore relevant to the present dispute. In 1960, approval of the Portuguese National Assembly for international agreements was rarely sought by the Government, as demonstrated by the lack of action taken by the National Assembly in approving the Charter of the United Nations and several significant bilateral treaties. Therefore, the normal practice of the time had been followed and the French Government had had good reason to believe, in good faith, that the 1960 Agreement was valid. Guinea-Bissau lacked standing to claim that the French Government had breached its internal law in concluding the Agreement (pp. 30-4).

(7) Both States had accepted that the land boundary agreements concluded in the colonial era were still valid between the two States. Therefore, the declaration of *tabula rasa* by Guinea-Bissau did not apply to treaties relating to frontiers, as evidenced by the acceptance of the principle of *uti possidetis* by the two States. The claim that the 1960 Agreement was too recent for the *uti possidetis* principle to apply was unfounded (pp. 35-7).

(8) The alleged non-publication of the 1960 Agreement in Guinea-Bissau and Portugal did not render the Agreement invalid. The Agreement had not been concluded in secret and had appeared in several official and other journals of international law. The 1960 Agreement had also been cited in actions before the International Court of Justice and had been referred to in several monographs.

The matter of whether there was a requirement that the Portuguese Government publish the Agreement in Guinea was a matter for Portuguese internal law. The failure by Portugal to fulfil such an obligation under internal law could not be regarded as a failure to fulfil an obligation imposed under international law. International law only referred to the publication of treaties with regard to the registration of treaties. The question of notification between Portugal and Guinea-Bissau with regard to the 1960 Agreement was a matter concerning the relations between those two countries and was not an issue which lay within the competence of the Tribunal (pp. 37-41).

(9) The Tribunal was not an organ of the United Nations and therefore Article 102(2) of the Charter of the United Nations was not applicable. The 1960 Agreement might therefore be invoked before the Tribunal. Furthermore, it was illogical that a State which was one of two Parties which had concluded the Arbitration Agreement specifically in order to assess whether the 1960 Agreement had force of law between the two Parties should contend that the 1960 Agreement could not be invoked in the arbitration (pp. 41-2).

(10) There was no rule of international law that gave successor States the right to verify or review the equitable character of valid maritime treaties concluded by their metropolitan States. The Law of the Sea Convention,

1982, was not yet in force and could not be relied upon in an action (pp. 42-3).

(11) The Agreement was valid and opposable to Guinea-Bissau and Senegal. The Agreement determined the maritime boundary for the territorial sea, the contiguous zone and the continental shelf.

The Tribunal's duty was to interpret the 1960 Agreement and to assess whether the Agreement covered the delimitation of all maritime areas existing under the contemporary law of the sea. It was not the function of the Tribunal to revise the text of the 1960 Agreement. The Agreement had to be interpreted in the light of the law applicable when it was concluded. Therefore, the Agreement did not delimit the exclusive economic zone and the fishery zone which did not exist at that time (pp. 43-6).

(12) The straight line drawn at 240° specified in the 1960 Agreement was a loxodromic line (pp. 46-7).

(13) The Tribunal was not called upon to answer the second question placed before it (p. 47).

Declaration of Mr Barberis

The Award of the Tribunal should have stated that the 1960 Agreement relating to maritime delimitation had force of law in the relations of Guinea-Bissau and Senegal in respect of the territorial sea, the contiguous zone and the continental shelf. The Award should also have clearly stated that the 1960 Agreement did not have force of law in the relations between the two countries in respect of the exclusive economic zone and the fishery zone and that the straight line drawn from 240° was a loxodromic line. Such a reply would have left scope for the Tribunal to delimit the exclusive economic zone or the fishery zone between Guinea-Bissau and Senegal, which would have resolved the entire dispute between the two countries (pp. 48-9).

Dissenting Opinion of Mr Bedjaoui

(1) The Award of the Tribunal failed to distinguish the inherent right of a people over its maritime territory. This right existed prior to delimitation and had been recognized by the International Court of Justice and in the provisions of the Law of the Sea Convention, 1982 (pp. 49-50).

(2) The 1960 Agreement was not opposable to Guinea-Bissau. In 1960, Senegal was no longer a dependent territory of France and was a contracting party to the 1960 Agreement. Guinea-Bissau was a third-party to the 1960 Agreement. The law of succession of States could not, therefore, be applied to the present dispute (pp. 50-3).

(3) The 1960 Agreement was a maritime boundary treaty. Guinea-Bissau had consistently adhered to its *tabula rasa* declaration in which it had repudiated all agreements concluded by Portugal on its behalf except those to which it expressly succeeded. The submission that the 1960 Agreement was not opposable to Guinea-Bissau implied that it had not succeeded to the 1960 Agreement (pp. 53-6).

(4) The *uti possidetis* principle, accepted by Guinea-Bissau with regard to land boundaries, did not necessarily operate in the sphere of maritime boundaries. The differences in the nature of land boundaries and maritime

boundaries necessitated differences in the principles which applied to each (pp. 56-74).

(5) The ignorance of Guinea-Bissau of the Agreement was a fundamental element which rendered the Agreement non-opposable to Guinea-Bissau (pp. 74-80).

(6) The practice of Guinea-Bissau in the disputed area had not confirmed the delimitation purported to have been effected by the 1960 Agreement (pp. 80-4).

(7) The appropriate solution to the dispute was to delimit the maritime boundary *ex novo*. The provisions of the Law of the Sea Convention, 1982, could be applied in the present dispute, although it had not yet entered into force, because it had been ratified by both States. Also applicable were the rules of customary international law. The solution to the dispute had to be equitable and achieved by means of equitable principles. Both Parties accepted that equidistance might be the appropriate method to be employed in the delimitation (pp. 84-7).

(8) It was logical to work within the scope of the delimitations suggested by the two Parties. The southern limit would therefore be a line drawn from 240° as claimed by Senegal; and to the north, a line following the 270° parallel, as claimed by Guinea-Bissau. It was noted that the area of delimitation did not coincide with the larger scope of the "maritime domains" of the two States. Certain of these boundaries, with other States, were as yet undetermined by delimitation (pp. 87-91).

(9) Development in the law of the sea had resulted in an emphasis upon the delimitation being equitable—the so-called "fundamental norm". It was the duty of the arbitrator to test that the principles which had been applied in a particular delimitation, and the results of that delimitation, were equitable (pp. 91-4).

(10) The delimitation relied predominantly on relevant geographical factors. The concepts of natural prolongation and geological and geomorphological characteristics were implemented. The submission by Guinea-Bissau that the "iso-distance" method of delimitation should be adopted was rejected.

The most significant geographical features affecting delimitation were the islands off the coast of Guinea-Bissau. The islands were only given partial effect.

A line of delimitation was drawn at 252°. The equitableness of this solution was verified by the application of the principle of proportionality which fulfilled the fundamental principle of the equality of States (pp. 94-119).

(11) The Arbitration Tribunal had been requested to resolve the dispute between the two Parties in a conclusive manner, establishing a single line of delimitation for all of the respective maritime zones (pp. 119-20).

The text of the Award of the Tribunal commences on the following page.

whether the Agreement in itself can be interpreted so as to cover the delimitation of the whole body of maritime areas existing at present.

[67] 84. Lastly, Senegal maintains that the 1960 Agreement must be interpreted taking into account the evolution of the law of the sea. The maritime boundary established by the Agreement should therefore be prolonged and enhanced in keeping with functional requirements, which are altogether essential to maintain good neighbourly relations and relations of security. A delimitation agreement should not have any gaps, and such should be filled up in the light of good sense and the nature of things (PV/11, p. 42).

85. The Tribunal considers that the 1960 Agreement must be interpreted in the light of the law in force at the date of its conclusion. It is a well established general principle that a legal event must be assessed in the light of the law in force at the time of its occurrence and the application of that aspect of intertemporal law to cases such as the present one is confirmed by case-law in the realm of the law of the sea (*International Law Reports*, 1951, pp. 161 *et seq*; *The International and Comparative Law Quarterly*, 1952, pp. 247 *et seq*).

In the light of the text, and of the applicable principles of intertemporal law, the Tribunal considers that the 1960 Agreement does not delimit those maritime spaces which did not exist at that date, whether they be termed "exclusive economic zone", "fishery zone" or whatever. For example, it was only very recently that the International Court of Justice has confirmed that the rules relating to the "exclusive economic zone" can be considered as forming part of general international [68] law in the matter (*ICJ Reports 1982*, p. 74;[12] *ICJ Reports 1984*, p. 294;[13] *ICJ Reports 1985*, p. 33[14]). To interpret an agreement concluded in 1960 so as to cover also the delimitation of areas such as the "exclusive economic zone" would involve a real modification of its text and, in accordance with a well-known dictum of the International Court of Justice, it is the duty of a court to interpret treaties, not to revise them (*ICJ Reports 1950*, p. 229;[15] *ICJ Reports 1952*, p. 196;[16] *ICJ Reports 1966*, p. 48[17]). We are not concerned here with the evolution of the content, or even of the extent, of a maritime space which existed in international law at the time of the conclusion of the 1960 Agreement, but with the actual non-existence in international law of a maritime space such as the "exclusive economic zone" at the date of the conclusion of the 1960 Agreement.

[12] 67 *ILR* 4 at 67.]
[13] 71 *ILR* 57 at 121.]
[14] 81 *ILR* 238 at 265.]
[15] 17 *ILR* 318.]
[16] 19 *ILR* 255.]
[17] 37 *ILR* 243 at 281.]

On the other hand, the position regarding the territorial sea, the contiguous zone and the continental shelf is quite different. These three concepts are expressly mentioned in the 1960 Agreement and they existed at the time of its conclusion. In fact, the Agreement itself specifies that its object is to define the maritime boundary "taking into account the Geneva Conventions of 29 April 1958" elaborated by the first United Nations Conference on the Law of the Sea, and these codification conventions define the notions of "territorial sea", "contiguous zone" and "continental shelf". As regards the continental shelf, the question [69] of determining how far the boundary line extends can arise today, in view of the evolution of the definition of the concept of "continental shelf". In 1960, two criteria served to determine the extent of the continental shelf: that of the 200-metre bathymetric line and that of exploitability. The latter criterion involved a dynamic conception of the continental shelf, since the outer limit would depend on technological developments and could consequently move further and further to seaward. In view of the fact that the "continental shelf" existed in the international law in force in 1960, and that the definition of the concept of that maritime space then included the dynamic criterion indicated, 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.

With regard to that question there only remains to determine the meaning and scope of the expression "a straight line drawn at 240°" in the 1960 Agreement.

* *

86. With regard to the expression just mentioned, Guinea-Bissau has pointed out (Reply, p. 252) that there is no such thing as a "straight [70] line" on the globe of the Earth, and that this involves a technical inaccuracy which would make the Agreement inapplicable, since it is not indicated precisely whether the line in question is a loxodromic line or a geodesic line. At a distance of 200 miles off the coast, lines of these two types would be several kilometres apart.

Does the 1960 Agreement really contain a technical inaccuracy on this point which would render it inapplicable? In order to reply to that question, one must determine the exact meaning of the expression "a straight line drawn at 240°" in the 1960 Agreement. It is clear that the words "straight line" can relate to a line which could be drawn just as well on a map employing the Mercator projection as on a map using another system. Nor can there be any doubt that a straight line drawn on a Mercator projection map becomes curved when it is

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CASE CONCERNING THE ARBITRAL AWARD OF 31 JULY 1989

(GUINEA-BISSAU *v.* SENEGAL)

International arbitral award — Application based on Article 36, paragraph 2, of the Statute, requesting Court to declare inexistence or nullity of the award — Recognition by both Parties that proceedings not by way of appeal — Jurisdiction not disputed by Respondent.

Allegation of abuse of process.

Possible effect of absence of arbitrator from meeting at which award delivered to Parties.

Inexistence of award attributed to lack of real majority — Declaration appended to award by President of Tribunal did not invalidate his vote.

Nullity of award on grounds of excès de pouvoir *and insufficiency of reasoning — Second question put to Tribunal by arbitration agreement to be answered "In the event of a negative answer" to the first question — No reply given to second question — Whether lack of reply supported by sufficient reasoning — Criticism of structure of award.*

Interpretation by tribunal of provisions of arbitration agreement governing its competence — Role of the Court in nullity proceedings not to determine what interpretation might be preferable but to ascertain whether tribunal acted in manifest breach of competence conferred by arbitration agreement — Application of relevant rules of treaty interpretation — Ordinary meaning of words confirmed by travaux préparatoires.

Argument that Tribunal required to answer both questions in any event — Absence of agreement of Parties to that effect when Arbitration Agreement drafted — Argument that Tribunal's answer to first question was partially negative — Interpretation of expression "negative answer" — Tribunal's answer to first question was complete and affirmative answer.

Provision in Arbitration Agreement for drawing of boundary line on a map — Decision not to attach map sufficiently reasoned — Absence of map not, in the circumstances of the case, such an irregularity as would render award invalid.

JUDGMENT

Present: *President* Sir Robert JENNINGS; *Vice-President* ODA; *Judges* LACHS, AGO, SCHWEBEL, NI, EVENSEN, TARASSOV, GUILLAUME, SHAHABUDDEEN, AGUILAR MAWDSLEY, WEERAMANTRY, RANJEVA; *Judges* ad hoc THIERRY, MBAYE; *Registrar* VALENCIA-OSPINA.

In the case concerning the Arbitral Award of 31 July 1989,

between

the Republic of Guinea-Bissau,

represented by

H.E. Mr. Fidélis Cabral de Almada, Minister of State attached to the Presidency of the Council of State of Guinea-Bissau,

as Agent;

H.E. Mr. Fali Embalo, Ambassador of Guinea-Bissau to the Benelux countries and the European Communities,

as Co-Agent;

Mrs. Monique Chemillier-Gendreau, Professor at the University of Paris VII,
Mr. Miguel Galvão Teles, Advocate and former Member of the Council of State of Portugal,
Mr. Keith Highet, Adjunct Professor of International Law at the Fletcher School of Law and Diplomacy and Member of the Bars of New York and the District of Columbia,
Mr. Charalambos Apostolidis, Lecturer at the University of Bourgogne,

Mr. Paulo Canelas de Castro, Assistant Lecturer at the Law Faculty of the University of Coimbra,
Mr. Michael B. Froman, Harvard Law School,

as Counsel;

Mr. Mario Lopes, Procurator-General of the Republic,
Mr. Feliciano Gomes, Chief of Staff of the National Navy,

as Advisers,

and

the Republic of Senegal,

represented by

H.E. Mr. Doudou Thiam, Advocate, former Bâtonnier, Member of the International Law Commission,

as Agent;