

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

CASE CONCERNING THE
ARBITRAL AWARD OF 31 JULY 1989

(GUINEA-BISSAU *v.* SENEGAL)

REQUEST FOR THE INDICATION OF PROVISIONAL
MEASURES

ORDER OF 2 MARCH 1990

1990

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE RELATIVE À LA SENTENCE
ARBITRALE DU 31 JUILLET 1989

(GUINÉE-BISSAU *c.* SÉNÉGAL)

DEMANDE EN INDICATION DE MESURES
CONSERVATOIRES

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INTERNATIONAL COURT OF JUSTICE

YEAR 1990

2 March 1990CASE CONCERNING THE
ARBITRAL AWARD OF 31 JULY 1989(GUINEA-BISSAU *v.* SENEGAL)REQUEST FOR THE INDICATION
OF PROVISIONAL MEASURES

ORDER

Present: President RUDA; Vice-President MBAYE; Judges LACHS, ELIAS, ODA, AGO, SCHWEBEL, Sir Robert JENNINGS, NI, EVENSEN, TARASSOV, GUILLAUME, SHAHABUDEEN, PATHAK; Judge ad hoc THIERRY; Registrar VALENCIA-OSPINA.

The International Court of Justice,

Composed as above,

After deliberation,

Makes the following Order:

Having regard to Articles 41 and 48 of the Statute of the Court and to Articles 73 and 74 of the Rules of Court,

1. Whereas by an Application filed in the Registry of the Court on 23 August 1989 the Republic of Guinea-Bissau instituted proceedings against the Republic of Senegal in respect of a dispute concerning the existence and validity of the arbitral award delivered on 31 July 1989 by the Arbitration Tribunal for the Determination of the Maritime Boundary between the two States;

2. Whereas on 23 August 1989 a copy of the Application was transmitted to the Republic of Senegal; whereas pursuant to Article 40, paragraph 3, of the Statute and Article 42 of the Rules of Court, copies of the Application were transmitted to Members of the United Nations through the Secretary-General and to other States entitled to appear before the Court; and whereas by an Order dated 1 November 1989 the Court fixed time-limits for the written proceedings in the case;

3. Whereas on 18 January 1990 a request was filed in the Registry whereby the Government of Guinea-Bissau, relying on Article 41 of the Statute of the Court and Article 74 of the Rules of Court, and on the ground of actions stated to have been taken by the Senegalese Navy in a maritime area which Guinea-Bissau regards as an area disputed between the Parties, requested the Court to indicate the following provisional measures:

“In order to safeguard the rights of each of the Parties, they shall abstain in the disputed area from any act or action of any kind whatever, during the whole duration of the proceedings until the decision is given by the Court”;

4. Whereas the Agent of Senegal was on 18 January 1990 notified by telex of the filing of the request for provisional measures and on 19 January 1990 the text thereof was communicated to him by post;

5. Whereas pursuant to Article 31, paragraph 2, of the Statute, the Government of Guinea-Bissau chose Mr. Hubert Thierry to sit as judge *ad hoc* in the case;

6. Whereas the Parties were informed by communications dated 26 January 1990 that the Court would hold public hearings opening on 12 February 1990 to afford the Parties the opportunity of presenting their observations on the request for the indication of provisional measures;

7. Whereas by letter of 7 February 1990, received in the Registry on 9 February 1990, the Agent of Senegal presented to the Court written observations of Senegal on the request for the indication of provisional measures, containing the following submission:

“The Government of Senegal prays the Court, pursuant to Article 41 of its Statute and Article 73 of the Rules of Court, to declare inadmissible and subsidiarily to dismiss the request for provisional measures made by the Government of Guinea-Bissau”;

8. Whereas at public hearings held on 12 February 1990 oral observations on the request for provisional measures were presented by the following representatives: on behalf of the Republic of Guinea-Bissau: H.E. Mr. Fidélis Cabral de Almada, Agent, Mrs. Monique Chemillier-Gendreau, Counsel, and Mr. Miguel Galvao Teles, Counsel; on behalf of the Republic of Senegal: H.E. Mr. Doudou Thiam, Agent, and Mr. D. W. Bowett, Co-Agent;

9. Whereas during the oral proceedings questions were put to the Parties by Members of the Court, and replies in writing, with documents in support, were subsequently transmitted to the Registry;

*

10. Whereas the events leading to the present proceedings are as follows: on 26 April 1960 an agreement by exchange of letters was concluded between France and Portugal for the purpose of defining the maritime boundary between Senegal (at that time an autonomous State within the *Communauté*) and the Portuguese Province of Guinea; and whereas that agreement adopted as the boundary line a straight line at 240° from the intersection of the extension of the land frontier and the low-water mark, represented by the Cape Roxo lighthouse;

11. Whereas after the accession to independence of Senegal and Guinea-Bissau a dispute arose between them concerning the delimitation of their maritime territories, which was the subject of negotiations between them from 1977 onward; whereas on 12 March 1985 the Parties concluded an Arbitration Agreement for submission of that dispute to an Arbitration Tribunal; whereas Article 2 of the said Agreement provided that the following questions should be put to the Tribunal:

“(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?”

and whereas Article 9 of the Agreement provided that the decision of the Tribunal “shall include the drawing of the boundary line on a map”;

12. Whereas the Arbitration Tribunal constituted under the Agreement pronounced on 31 July 1989, by two votes (including that of the President of the Tribunal) to one, an award of which the operative clause was as follows:

“For the reasons stated above, the Tribunal *decides* . . .

To reply as follows to the first question formulated in Article 2 of the Arbitration Agreement: The Agreement concluded by an exchange of letters on 26 April 1960, and relating to the maritime boundary, has the force of law in the relations between the Republic of Guinea-Bissau and the Republic of Senegal with regard solely to the areas mentioned in that Agreement, namely the territorial sea, the contiguous zone and the continental shelf. The ‘straight line drawn at 240°’ is a loxodromic line”;

and whereas in that award the Tribunal also stated its conclusion that “it is not called upon to reply to the second question” in the Arbitration Agree-

ment, and that in view of its decision it “has not thought it necessary to append a map showing the course of the boundary line”;

13. Whereas the President of the Arbitration Tribunal appended a declaration to the award; and whereas in the view of Guinea-Bissau it was “clearly apparent” that the position adopted by the President in that declaration was “incompatible with the position which he has endorsed by his vote in favour of the ‘award’ and which had given the appearance of a majority”; whereas Guinea-Bissau accordingly considers that “there was in fact no majority within the Tribunal”;

14. Whereas Guinea-Bissau contends in its Application to the Court that “A new dispute thus came into existence, relating to the applicability of the text issued by way of award on 31 July 1989”; whereas that dispute was brought before the Court by the above-mentioned Application, in which Guinea-Bissau requests the Court, in respect of the decision of the Arbitration Tribunal, to adjudge and declare:

- that that so-called decision is inexistent in view of the fact that one of the two arbitrators making up the appearance of a majority in favour of the text of the ‘award’, has, by a declaration appended to it, expressed a view in contradiction with the one apparently adopted by the vote;
- subsidiarily, that that so-called decision is null and void, as the Tribunal did not give a complete answer to the two-fold question raised by the Agreement and so did not arrive at a single delimitation line duly recorded on a map, and as it has not given the reasons for the restrictions thus improperly placed upon its jurisdiction;
- that the Government of Senegal is thus not justified in seeking to require the Government of Guinea-Bissau to apply the so-called award of 31 July 1989”;

15. Whereas Guinea-Bissau explains in its request for the indication of provisional measures that that request was prompted by

“acts of sovereignty by Senegal which prejudice both the judgment on the merits to be given by the Court and the maritime delimitation to be effected subsequently between the States”;

whereas the acts complained of by Guinea-Bissau, and alleged to have occurred in a “disputed area”, are as follows: on 9 October 1989 a fishing vessel of Japanese registry, the *Hoyo Maru No. 8*, holding a licence issued by the authorities of Guinea-Bissau to fish in the exclusive economic zone of Guinea-Bissau, was boarded by the Senegalese Navy in a position corresponding to geographical co-ordinates 12° 01' North and 17° 31' West, and escorted to a Senegalese port; legal proceedings were taken, for breach of Senegalese fishing regulations, and the vessel was released on payment of 90 million CFA francs; on 9 November 1989 a fishing vessel of Chinese registry, the *Yan Yu 625*, holding a similar fishing licence issued

by Guinea-Bissau, was similarly boarded at 12° 08' North and 17° 04' West, and escorted to a Senegalese port; legal proceedings were taken, and the vessel subsequently released on payment of 50 million CFA francs;

16. Whereas Senegal has confirmed that these incidents occurred, and states that if the area where the incidents occurred was "the maritime area that is under Senegal's jurisdiction by virtue of the agreement of 1960 (that is to say, the territorial sea, the contiguous zone and the continental shelf)", Senegal relied on a presumption of validity of the award;

17. Whereas after the close of the oral proceedings the Agent of Guinea-Bissau, by a letter of 13 February 1990, stated that a further incident took place on 18 December 1989, when the vessel of Chinese registry *Yuan Yu I* was boarded by the Senegalese Navy at a position (12° 07' 67" North, 17° 03' 65" West) stated to be to the south of the 240° line from Cape Roxo, and therefore, in the view of Guinea-Bissau not in the disputed area, and in an area undisputedly within the jurisdiction of Guinea-Bissau;

18. Whereas according to information supplied to the Court by both Parties, on 1 January 1990 the authorities of Guinea-Bissau arrested four fishing vessels of Senegalese registry in the area regarded by Guinea-Bissau as the disputed area, at positions 12° 14' 06" North, 17° 09' 97" West; 12° 14' 69" North, 17° 10' 07" West; 12° 15' 06" North, 17° 09' 33" West; and 12° 12' 74" North, 17° 11' 71" West; whereas Guinea-Bissau alleges that the captains of these vessels stated to the authorities of Guinea-Bissau that the authorities of Senegal had authorized and even encouraged them to fish in the area, which was regarded by Senegal as appertaining to it;

* *

19. Whereas the Republic of Guinea-Bissau claims to found the jurisdiction of the Court to entertain the present case upon declarations made by the Parties accepting the compulsory jurisdiction of the Court under Article 36, paragraph 2, of the Statute of the Court; and whereas such declarations were made, by the Republic of Senegal on 22 October 1985, deposited with the Secretary-General of the United Nations on 2 December 1985, and by the Republic of Guinea-Bissau on 7 August 1989, deposited the same day with the Secretary-General of the United Nations; whereas the declaration made by Guinea-Bissau is without reservations, while the declaration of Senegal is subject to reservations, but Guinea-Bissau contends that none of them is relevant to the present dispute;

20. Whereas on a request for provisional measures the Court need not, before deciding whether or not to indicate them, finally satisfy itself that it has jurisdiction on the merits of the case, yet it ought not to indicate such

measures unless the provisions invoked by the Applicant appear, *prima facie*, to afford a basis on which the jurisdiction of the Court might be founded;

21. Whereas the Court takes note of the statement made at the hearing by the Agent of Senegal that Senegal makes every reservation at this stage as to the jurisdiction of the Court with respect to the substance of the Application, and the statement of the Co-Agent of Senegal that it is not satisfied that the Court has jurisdiction to entertain the main Application, but does not wish to broach the issue of jurisdiction over the main Application at this stage; and whereas Senegal, while contending that the Court should decline to indicate provisional measures, has accordingly not based that contention on the ground of lack of jurisdiction on the merits of the case;

22. Whereas the Court considers that the two declarations made under Article 36, paragraph 2, of the Statute appear, *prima facie*, to afford a basis on which the jurisdiction of the Court might be founded;

23. Whereas the decision given in the present proceedings in no way prejudices the question of the jurisdiction of the Court to deal with the merits of the case or any questions relating to the merits themselves and leaves unaffected the right of the Respondent to submit arguments against such jurisdiction or in respect of such merits;

* *

24. Whereas Guinea-Bissau has requested the Court to exercise in the present proceedings the power conferred upon it by Article 41 of the Statute of the Court "to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party"; whereas the purpose of exercising this power is to protect "rights which are the subject of dispute in judicial proceedings" (*Aegean Sea Continental Shelf, I.C.J. Reports 1976*, p. 9, para. 25; *Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1979*, p. 19, para. 36); whereas such measures are provisional and indicated "pending the final decision" (Article 41, paragraph 2, of the Statute); and whereas therefore they are to be measures such that they will no longer be required as such once the dispute over those rights has been resolved by the Court's judgment on the merits of the case;

25. Whereas Guinea-Bissau recognizes in its Application that the dispute of which it has seised the Court is not the dispute over maritime delimitation brought before the Arbitration Tribunal, but a "new dispute . . . relating to the applicability of the text issued by way of award of 31 July 1989"; whereas however it has been argued by Guinea-Bissau that provisional measures may be requested, in the context of judicial proceedings on a subsidiary dispute, to protect rights in issue in the underlying dispute; that the only link essential for the admissibility of measures is the link between the measures contemplated and the conflict of interests

underlying the question or questions put to the Court, — that conflict of interests in the present case being the conflict over maritime delimitation, — and that this is so whether the Court is seised of a main dispute or of a subsidiary dispute, a fundamental dispute or a secondary dispute, on the sole condition that the decision by the Court on the questions of substance which are submitted to it be a necessary prerequisite for the settlement of the conflict of interests to which the measures relate; whereas in the present case Guinea-Bissau claims that the basic dispute concerns the conflicting claims of the Parties to control, exploration and exploitation of maritime areas, and that the purpose of the measures requested is to preserve the integrity of the maritime area concerned, and that the required relationship between the provisional measures requested by Guinea-Bissau and the case before the Court is present;

26. Whereas the Application instituting proceedings asks the Court to declare the 1989 award to be “inexistent” or, subsidiarily, “null and void”, and to declare “that the Government of Senegal is thus not justified in seeking to require the Government of Guinea-Bissau to apply the so-called award of 31 July 1989”; whereas the Application thus asks the Court to pass upon the existence and validity of the award but does not ask the Court to pass upon the respective rights of the Parties in the maritime areas in question; whereas accordingly the alleged rights sought to be made the subject of provisional measures are not the subject of the proceedings before the Court on the merits of the case; and whereas any such measures could not be subsumed by the Court’s judgment on the merits;

27. Whereas moreover a decision of the Court that the award is inexistent or null and void would in no way entail any decision that the Applicant’s claims in respect of the disputed maritime delimitation are well founded, in whole or in part; and whereas the dispute over those claims will therefore not be resolved by the Court’s judgment;

28. Accordingly,

THE COURT,

by fourteen votes to one,

Dismisses the request of the Republic of Guinea-Bissau, filed in the Registry on 18 January 1990, for the indication of provisional measures.

IN FAVOUR: *President* Ruda; *Vice-President* Mbaye; *Judges* Lachs, Elias, Oda, Ago, Schwebel, Sir Robert Jennings, Ni, Evensen, Tarassov, Guillaume, Shahabuddeen, Pathak;

AGAINST: *Judge ad hoc* Thierry.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this second day of March, one thousand nine hundred and ninety, in three copies, one of which will be placed in

the archives of the Court and the others transmitted to the Government of the Republic of Guinea-Bissau and the Government of the Republic of Senegal, respectively.

(Signed) José María RUDA,
President.

(Signed) Eduardo VALENCIA-OSPINA,
Registrar.

Judges EVENSEN and SHAHABUDEEN append separate opinions to the Order of the Court.

Judge *ad hoc* THIERRY appends a dissenting opinion to the Order of the Court.

(Initialed) J.M.R.

(Initialed) E.V.O.
