

**CASE CONCERNING THE ARBITRAL AWARD OF 31 JULY 1989
(GUINEA-BISSAU v. SENEGAL)**

Order of 2 March 1990

In an Order issued in the case concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal), the Court dismissed, by fourteen votes to one, the request of the Republic of Guinea-Bissau for the indication of provisional measures.

The Court was composed as follows:

President Ruda; *Vice-President* Mbaye; *Judges* Lachs, Elias, Oda, Ago, Schwebel, Sir Robert Jennings, Ni, Evensen, Tarassov, Guillaume, Shahabuddeen and Pathak; *Judge ad hoc* Thierry.

Judges Evensen and Shahabuddeen appended separate opinions to the Order of the Court; Judge *ad hoc* Thierry appended a dissenting opinion.

In its Order the Court recalls that on 23 August 1989 Guinea-Bissau instituted proceedings against 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.

On 18 January 1990 Guinea-Bissau, 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.”

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The Court further recalls the events leading to the present proceedings: 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; after the accession to independence of Senegal and Guinea-Bissau a dispute arose between them concerning the delimitation of their maritime territories; in 1985 the Parties concluded an Arbitration Agreement for submission of that dispute to an Arbitration Tribunal, Article 2 of which 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 Article 9 of which provided that the decision of the Tribunal “shall include the drawing of the boundary line on a map”.

On 31 July 1989 the Arbitration Tribunal pronounced, 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.”

In that award the Tribunal also stated its conclusion that “it is not called upon to reply to the second question”, and that “in view of its decision it has not thought it necessary to append a map showing the course of the boundary line”; the President of the Arbitration Tribunal appended a declaration to the award.

Guinea-Bissau contends in its Application to the Court that “A new dispute then came into existence, relating to the applicability of the text issued by way of award on 31 July 1989”; and requests the Court, in respect of the decision of the Arbitration Tribunal, to adjudge and declare:

“— that that so-called decision is in-existent 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;”

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The Court observes that 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;”

It then summarizes the incidents which took place and which involved actions by both Parties with regard to foreign fishing vessels.

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On the question of its jurisdiction the Court subsequently considers that, whereas on a request for provisional measures it 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; and finds that the two declarations made by the Parties under Article 36, paragraph 2, of the Statute and invoked by the Applicant do appear, *prima facie*, to afford a basis of jurisdiction.

It observes that that decision in no way prejudices the question of the jurisdiction of the Court to deal with the merits of the case.

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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”.

The Court observes that 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); that such measures are provisional and indicated “pending the final decision” (Article 41, paragraph 2, of the Statute); and that 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.

It further notes that 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”; that 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; that 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.

The Court observes that 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”; that 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; it finds that 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 that any such measures could not be subsumed by the Court’s judgment on the merits.

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 that the dispute over those claims will therefore not be resolved by the Court’s judgment.

OPERATIVE PARAGRAPH

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.”

SUMMARY OF OPINIONS APPENDED TO THE ORDER OF THE COURT

Separate Opinion of Judge Evensen

The circumstances of the present case do not seem to require the exercise of the Court’s power under Article 41 of the Statute of the International Court of Justice to indicate interim measures.

But the Court does not need finally to establish that it has jurisdiction on the merits of the case before deciding whether or not to indicate interim measures. The absence at this stage of any challenge to the Court’s jurisdiction is relevant in this context.

The avoidance of irreparable damage should not be a condition for the stipulation of interim measures. Neither Article 41 of the Statute of the Court nor Article 73 of the Rules of Court contain any reference to “irreparable damage”. The Court’s discretionary powers should not be limited in such a manner.

In the present case guidance may be found in the United Nations Convention on the Law of the Sea of 10 December 1982, especially in Part V on the Exclusive Economic Zone and in Part VI on the Continental Shelf. Both the Government of Guinea-Bissau and the Government of Senegal have signed and ratified this Convention.

Article 74, paragraph 1, of the 1982 Convention, dealing with the *delimitation of the exclusive economic zone* between neighbouring coastal States provides that the delimitation of the zone "shall be effected by agreement". Identical provisions are found in Article 83 of the Convention *on the delimitation of the continental shelf*. The Convention has not yet entered into force.

But these articles give expression to governing principles of international law in this field. They entail that coastal States should conclude agreements, where necessary, concerning the allowable catch of fishstocks, the distribution of this catch between the States concerned, the issuance of fisheries licenses, the character and modes of fishing gear, the protection of spawning grounds, the maintenance of the necessary contacts between the relevant national fisheries authorities together with other means for the rational and peaceful exploitation of these vital resources of the oceans.

Separate Opinion of Judge Shahabuddeen

In his separate opinion, it appears to Judge Shahabuddeen that Guinea-Bissau has been contending for a more liberal view than that adopted by the Court of the kind of link which should exist between rights sought to be preserved by provisional measures and rights sought to be adjudicated in the case. But, in his view, such an approach is limited by the reflection that the situation created by an indication of provisional measures should be consistent with the effect of a possible decision in the main case in favour of the State applying for such measures. In this case, if Guinea-Bissau were to succeed in obtaining a declaration that the award was inexistent or invalid, the original dispute would be reopened and each

party would be at liberty to act within the limits allowed by international law. This liberty of action, resulting from such a decision in Guinea-Bissau's favour, would be actually inconsistent with the situation created by an indication of provisional measures restraining both parties from carrying out any activities, instead of being consistent with it as in the normal case. Consequently, Judge Shahabuddeen does not consider that the approach suggested by Guinea-Bissau could lead to a decision different from that reached by the Court.

Dissenting Opinion of Judge ad hoc Thierry

In his dissenting opinion, Judge Thierry gives the reasons which have unfortunately prevented him from associating himself with the Court's decision. Indeed, he takes the view that:

1. The incidents set forth in the Order were such as to require the indication of provisional measures which ought, for that reason, to have been indicated in accordance with Article 41 of the Statute and Article 75, paragraph 2, of the Rules of Court.

2. There was, in this case, no legal impediment to the exercise, by the Court, of its power to indicate provisional measures, since the finding that it is called upon to reach with regard to the merits (i.e., on the validity of the Arbitral Award of 31 July 1989) is bound to affect the rights of the Parties in the disputed maritime area.

3. The Court ought to have enjoined the Parties to negotiate on the basis of the assurances given by Senegal in that regard, in order to forestall any aggravation of the dispute for the time being.