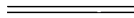


REPORTS OF INTERNATIONAL
ARBITRAL AWARDS



RECUEIL DES SENTENCES ARBITRALES

VOLUME XX

UNITED NATIONS PUBLICATION

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VOLUME XX



UNITED NATIONS — NATIONS UNIES

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FOREWORD

The present volume is made up of three arbitration cases, namely, the case concerning the location of boundary markers in Taba between Egypt and Israel, the case concerning the delimitation of maritime boundary between Guinea-Bissau and Senegal and the case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements concluded between the two States and which related to the problems arising from the *Rainbow Warrior Affair*.

As a general rule, the awards are printed in English or French, whichever was the language of the original. In order to facilitate consultation of the material, head-notes have been prepared in both English and French.

This volume, like volumes IV to XIX, was prepared by the Codification Division of the Office of Legal Affairs.

AVANT-PROPOS

Le présent volume contient trois affaires d'arbitrage : l'affaire concernant l'emplacement des balises frontalières à Taba entre l'Égypte et Israël; l'affaire de la délimitation de la frontière maritime entre la Guinée-Bissau et le Sénégal et l'affaire concernant les problèmes nés entre la Nouvelle-Zélande et la France relatifs à l'interprétation ou l'application de deux accords conclus le 9 juillet 1986, lesquels concernaient les problèmes découlant de l'affaire du *Rainbow Warrior*.

Les textes figurant aux sections I à III sont reproduits dans leur version originale anglaise ou française. Pour faciliter autant que possible la consultation de ces sentences, on les a fait précéder de notes sommaires rédigées à la fois en anglais et en français.

Le présent volume, comme les volumes IV à XIX, a été établi par la Division de la codification du Bureau des affaires juridiques de l'Organisation des Nations Unies.

PART I

**Case concerning the location of boundary markers
in Taba between Egypt and Israel**

Decision of 29 September 1988

**Affaire concernant l'emplacement des balises frontalières
à Taba, entre l'Égypte et Israël**

Sentence du 29 septembre 1988

CASE CONCERNING THE LOCATION OF BOUNDARY MARKERS IN TABA BETWEEN EGYPT AND ISRAEL

29 SEPTEMBER 1988

Critical period for which the location of boundary markers represents legal boundary between the States—Critical period in respect of appropriate evidence—Succession of States to territory—Estoppel—Acquiescence and *de facto* agreement—Conduct of a party as evidence of its acquiescence—Conduct of both parties as evidence of their acquiescence—The principle of stability of boundaries—Relevance of events subsequent to the critical period.

Decision of the Tribunal in the absence of conclusive evidence and on the basis of “better” claim—“Preponderance of evidence” rule—Relevance of maps to determining boundary markers—Inconsistency between existing boundary line and the description of such line in a boundary agreement—Evidentiary value of publications—The absence of intended intervisibility in the boundary markers—The principle of *non licet*—Execution of the award—The powers of the Tribunal.

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AWARD

In the Dispute Concerning Certain Boundary Pillars between the Arab Republic of Egypt and the State of Israel

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Adviser
Mr. Gershon Steinberg
Adviser
Dr. Mala Tabory
Adviser
Mr. Michael P. Wallace
Adviser
Mrs. Ora Seidner
Coordinator
Mrs. Shirley Rainbow
Secretary

The Tribunal, composed of
Gunnar Lagergren, President
Pierre Bellet,
Dietrich Schindler,
Hamed Sultan, and
Ruth Lapidoth,
delivers the following Award:

I. THE ARBITRAL PROCEEDINGS

A. Introduction

1. The Arab Republic of Egypt ("Egypt") and the State of Israel ("Israel") concluded a Treaty of Peace on 26 March 1979. Article I of the Treaty of Peace provides that: "1. The state of war between the Parties will be terminated and peace will be established between them . . ." and "2. Israel will withdraw all its armed forces and civilians from the Sinai behind the international boundary . . . and Egypt will resume the exercise of its full sovereignty over the Sinai." Article II of the Treaty of Peace establishes that the permanent boundary between Egypt and Israel is "the recognized international boundary between Egypt and the former mandated territory of Palestine".

2. A Joint Commission was established pursuant to Article IV of the Treaty of Peace for the purpose of, among other functions, "organiz[ing] the demarcation of the international boundary" as set forth in Article IV(3) (d) of the Appendix to Annex I to the Treaty of Peace. In the course of the Joint Commission's work relating to the demarcation of the international boundary, the precise locations of some of the nearly 100 pillars demarcating the boundary line could not be agreed upon prior to 25 April 1982, the date established pursuant to Annex I to the Treaty

of Peace for the final Israeli withdrawal behind the international boundary. On 25 April 1982, the Parties agreed to submit the remaining technical questions concerning the international boundary "to an agreed procedure which will achieve a final and complete resolution, in conformity with Article VII of the Treaty of Peace". In the interim, each Party agreed "to move behind the lines indicated by the other".

3. Article VII of the Treaty of Peace provides that:

1. Disputes arising out of the application or interpretation of this Treaty shall be resolved by negotiations.

2. Any such disputes which cannot be settled by negotiations shall be resolved by conciliation or submitted to arbitration.

Negotiations between the Parties, assisted through the mediation of representatives of the United States of America as contemplated by the 25 April 1982 Agreement, did not result in any agreement. The Parties then agreed on 11 September 1986 to submit to arbitration their differences regarding the location of fourteen of the boundary pillars demarcating their international boundary between a point on the coast of the Mediterranean Sea near Rafah to a point called Ras Taba on the western shore of the Gulf of Aqaba. The Parties also agreed that the locations of two other disputed pillars depended directly on the decision made by the arbitral tribunal regarding neighbouring disputed pillars.

B. The Principal Provisions of the Compromis and Their Implementation

4. The Arbitration Compromis of 11 September 1986 provided for the establishment of the Tribunal and identified its five Members: Ruth Lapidot, nominated by the Government of Israel, Hamed Sultan, nominated by the Government of Egypt, Pierre Bellet, Dietrich Schindler, and Gunnar Lagergren, named as President of the Tribunal. The Tribunal first met in Geneva, Switzerland on 8 December 1986 at Le Saugy in Genthod and was formally constituted on 10 December 1986 in the Alabama Room of the Hôtel de Ville of the Republic and Canton of Geneva in the presence of the Agents for the Parties and certain invited guests. Basic procedural questions were resolved during the first, second, and third meetings of the Tribunal on 8, 9, and 10 December 1986, including the timetable for the submission of the written pleadings and the appointment of Professor Bernard Dutoit of the University of Lausanne as temporary Registrar of the Tribunal.

5. Article VIII, paragraph 3, of the Compromis provides that:

The proceedings shall consist of written pleadings, oral hearings and visits, to sites which the Tribunal considers pertinent, in accordance with the following schedule:

(A) The written pleadings shall include the following documents:

(i) A memorial, which shall be submitted by each party to the Tribunal within 150 days of the first session of the Tribunal, and

(ii) A counter-memorial, which shall be submitted by each party to the Tribunal within 150 days of the exchange of memorials, and

(iii) A rejoinder, if a party, after informing the other party, notifies the registrar within 14 days of the exchange of counter-memorials of its intention to file a re-

joinder. In the event of such notification by one party, the other party shall also be entitled to submit a rejoinder. The rejoinders shall be submitted to the Tribunal within 45 days of the notification . . .

(B) The oral hearings and the visits shall be conducted in such order and in such manner as the Tribunal shall determine. The Tribunal shall endeavor to complete its visits and the oral hearings within 60 days of the completion of the submission of the written pleadings . . .

6. In accordance with this Article, the Parties exchanged their Memorials on 13 May 1987 in the presence of the President and the temporary Registrar. Pursuant to Article V of the Compromis, and during August 1987, the President appointed as Registrar Douglas Reichert, Member of the Bar of the State of California and presently located in Geneva. The Counter-Memorials were exchanged on 12 October 1987 in the presence of the Tribunal and the Registrar, convened for the occasion to discuss procedural matters related to the schedule of the visit and the hearing. By the drawing of a lot, it was determined that Egypt would present first its oral arguments at the hearing, followed by Israel. At the joint request of the Parties, Rejoinders were submitted on 1 February 1988 in the presence of the Tribunal and the Registrar, convened to finalize the schedule for the remainder of the proceedings. The various written pleadings were accompanied by Annexes, including maps, documents, and two models.

7. The Tribunal conducted a visit to selected sites within the disputed areas on 17 February 1988. The Tribunal's visit itinerary was established in consultation with the Parties. Air and ground transportation within the disputed areas was provided by the Multinational Force and Observers (MFO), an organisation established by the Parties pursuant to the Treaty of Peace and charged, *inter alia*, with maintaining security in the Taba area pursuant to Article XI of the Compromis.

8. In parallel with the Tribunal's activities during the written phase of the proceedings, a Chamber was constituted pursuant to Article IX of the Compromis to "explore the possibilities of a settlement of the dispute." Article IX provides:

1. A three-member chamber of the Tribunal shall explore the possibilities of a settlement of the dispute. The three members shall be the two national arbitrators and, as selected by the President of the Tribunal sometime before the submission of the suggestions, one of the two non-national arbitrators.

2. After the submission of counter-memorials, this chamber shall give thorough consideration to the suggestions made by any member of the chamber for a proposed recommendation concerning a settlement of the dispute. Suggestions based upon the memorials, the counter-memorials, and other relevant submissions shall be presented to the chamber commencing from the month immediately preceding the counter-memorials. The chamber shall thereafter consider these suggestions, and the counter-memorials, during the period after submission of the counter-memorials until the completion of the written pleadings. Any proposed recommendation concerning a settlement of the dispute which obtains the approval of the three members of the chamber will be reported as a recommendation to the parties not later than the completion of the exchange of written pleadings. The parties shall hold the report in strictest confidence.

3. The arbitration process shall terminate in the event the parties jointly inform the Tribunal in writing that they have decided to accept a recommendation of

the chamber and that they have decided that the arbitration process should cease. Otherwise, the arbitration process shall continue in accordance with this Compromis.

4. All work pursuant to the above paragraphs absolutely shall not delay the arbitration process or prejudice the arbitral award, and shall be held in the strictest confidence. No position, suggestion, or recommendation, not otherwise part of the presentation of a party's case on the merits, shall be brought to the attention of the other members of the Tribunal, or be taken into account in any manner by any of the members of the Tribunal in reaching their arbitral decision.

9. The Chamber was composed of the two national arbitrators, Hamed Sultan and Ruth Lapidot, and Pierre Bellet, who was selected by the President on 1 September 1987. The Chamber convened following the exchange of the Counter-Memorials on 12 October 1987, appointed Mr. Bellet as its Chairman, and empowered him to meet with the Agents of the Parties separately and together. The Chamber met on 13 October 1987, 6-7 January 1988, and 3 February 1988 following meetings between the Chairman and the Agents for the Parties.

10. Since the Compromis provides that the mandate of the Chamber expired with the "completion of the written pleadings", and in order to permit the Chamber to take into consideration the arguments contained in the Rejoinders, an arrangement was made with the Parties that they should informally exchange their Rejoinders on 1 February 1988 as decided, but that the formal filing, and hence the completion of the written pleadings, be extended until 1 March 1988.

11. On 1 March 1988, the Chairman of the Chamber informed the President of the Tribunal and the Agents of the Parties that the Chamber regretted not having been able to propose to the Parties any recommendation for a settlement of the dispute, despite their efforts to find a reasonable proposal which might be acceptable to both Parties.

12. The oral arguments were heard in private during two rounds from 14 March to 25 March 1988 and from 11 April to 15 April 1988 in the Salle du Grand Conseil and in the Alabama Room of the Hôtel de Ville in Geneva. At the opening of the hearing, a short video film was presented by Israel. During the hearing, 13 witnesses gave testimony, 10 presented by Egypt and 3 by Israel. One additional witness for Egypt, unable to attend the hearing for health reasons, provided, with the leave of the Tribunal, an affidavit concerning his testimony.

13. A number of additional maps, photographs, and documents were introduced during the hearing by both Parties with the consent or at the request of the Tribunal. In response to the testimony of an expert witness for Egypt that one of the photographs submitted by Israel might not be authentic, Israel requested leave to introduce additional witnesses in order to testify with regard to the authenticity of the series of photographs in question. The Tribunal considered the question but decided, with one Member dissenting, that there was no reason at the time to grant the request. The original print of the questioned photograph was later submitted for inspection by the Tribunal and no further action was taken.

14. The Tribunal wishes to commend the Parties for the spirit of cooperation and courtesy which permeated the proceedings in general and which thereby rendered the hearing a constructive experience.

15. In connection with its present task, the Tribunal notes the following important provisions of the Compromis and related documents regarding the functions of the Tribunal and the rendering of its Award.

Article II

The Tribunal is requested to decide the location of the boundary pillars of the recognized international boundary between Egypt and the former mandated territory of Palestine, in accordance with the Peace Treaty, the April 25, 1982 Agreement, and the Annex.

Article VIII, paragraph 1

The Tribunal shall apply the provisions of this Compromis.

Article XI

1. In accordance with the provisions of the agreement of 25 April 1982:

(A) Egypt and Israel agree to invite the MFO to enter Taba and maintain security therein through the establishment of an observation post in a suitable topographic location under the flag of the MFO in keeping with the established standards of the MFO. Modalities for the implementation of this paragraph have been discussed and concluded by Egypt and Israel through the liaison system before the signature of the Compromis. The interpretation and implementation of this paragraph shall not be within the jurisdiction of the Tribunal.

(B) During the interim period any temporary arrangements and/or any activities conducted shall not prejudice in any way the rights of either party or be deemed to affect the position of either party or prejudice the final outcome of the arbitration in any manner.

(C) The provisions of the interim period shall terminate upon the full implementation of the arbitral award.

2. The Tribunal shall have no authority to issue provisional measures concerning the Taba area.

16. The relevant provisions of the Treaty of Peace were noted above in the Introduction.

17. The 25 April 1982 Agreement provides:

Egypt and Israel agree on the following procedure for resolving the remaining technical questions concerning the international boundary, in conformity with all the relevant provisions of the Treaty of Peace, which they have been unable to resolve through negotiations. Egypt and Israel agree that these questions shall be submitted to an agreed procedure which will achieve a final and complete resolution, in conformity with Article VII of the Treaty of Peace. Pending conclusion of the Agreement, each party agrees to move behind the lines indicated by the other. The parties agree to request the Multinational Force and Observers to maintain security in these areas. In the interim period, activities which have been conducted in these areas shall continue. No new construction projects will be initiated in these areas. Meetings will be held between Egypt and Israel to establish the arrangements which will apply in the areas in question, pending a final determination of the boundary demarcation questions. Representatives of the United States Government will participate in the negotiations concerning the procedural arrangements which will lead to the

resolution of matters of the demarcation of the International Boundary between Mandated Palestine and Egypt in accordance with the Treaty of Peace, if requested to do so by the Parties. The temporary arrangements hereby or subsequently established and the activities conducted pursuant thereto shall not be deemed to affect the position of either party, or prejudice the final outcome.

18. The Annex to the Compromis provides:

1. A dispute has arisen on the location of the following boundary pillars of the recognized international boundary between Egypt and the former mandated territory of Palestine: 7, 14, 15, 17, 27, 46, 51, 52, 56, 85, 86, 87, 88, and 91. The parties agree that boundary pillars 26 and 84 are on the straight lines between boundary pillars 25 and 27, and 83 and 85, respectively, and that the decision of the Tribunal on the locations of boundary pillars 27 and 85 will establish the locations of boundary pillars 26 and 84, respectively. The parties agree that if the Tribunal establishes the Egyptian location of boundary pillar 27, the parties accept the Egyptian location of boundary pillar 26, recorded in Appendix A; and, if the Tribunal establishes the Israeli location of boundary pillar 27, the parties accept the Israeli location of boundary pillar 26, recorded in Appendix A. The parties agree that if the Tribunal establishes the Egyptian location of boundary pillar 85, the parties accept the Egyptian location of boundary pillar 84, recorded in Appendix A; and, if the Tribunal establishes the Israeli location of boundary pillar 85, the parties accept the Israeli location of boundary pillar 84, recorded in Appendix A. Accordingly, the Tribunal shall not address the location of boundary pillars 26 and 84.

2. Each party has indicated on the ground its position concerning the location of each boundary pillar listed above. For the final boundary pillar No. 91, which is at the point of Ras Taba on the western shore of the Gulf of Aqaba, Israel has indicated two alternative locations, at the granite knob and at Bir Taba, whereas Egypt has indicated its location, at the point where it maintains the remnants of the boundary pillar are to be found.

3. The markings of the parties on the ground have been recorded in Appendix A.

4. Attached at Appendix B is the map referred to in Article II of the Treaty of Peace, which provides:

The permanent boundary between Egypt and Israel is the recognized international boundary between Egypt and the former mandated territory of Palestine, as shown on the map at Annex II, without prejudice to the issue of the status of the Gaza Strip. The parties recognize this boundary as inviolable. Each will respect the territorial integrity of the other, including their territorial waters and airspace.

A 1:100,000 map is included in order to permit the indication of the locations of the 14 disputed boundary pillars advanced by the parties and provides an index to Appendix A. The Tribunal is requested to refer to the general armistice agreement between Egypt and Israel dated 24 February 1949.

5. The Tribunal is not authorized to establish a location of a boundary pillar other than a location advanced by Egypt or by Israel and recorded in Appendix A. The Tribunal is also not authorized to address the location of boundary pillars other than those specified in paragraph 1.

19. In connection with the formulation of its Award, the Tribunal also notes the following further provisions of the Compromis:

Article XII

1. The Tribunal shall endeavor to render its award within 90 days of the completion of the oral hearings and visits. The award shall state the reasons upon which it is based.

2. The award shall be deemed to have been rendered when it has been presented in open session, the agents of the parties being present, or having been duly summoned to appear.

3. Two original copies of the award, signed by all members of the Tribunal, shall immediately be communicated by the President of the Tribunal to each of the agents. The award shall state the reason for the absence of the signature of any member.

4. The Tribunal shall decide the appropriate manner in which to formulate and execute its award.

5. Any member of the Tribunal shall be entitled to deliver a separate or dissenting opinion. A separate or dissenting opinion shall be considered part of the award.

6. The Tribunal shall at the joint request of the parties incorporate into its award the terms of any agreement between the parties relating to the issue.

Article XIII

1. Any dispute between the parties as to the interpretation of the award or its implementation shall be referred to the Tribunal for clarification at the request of either party within 30 days of the rendering of the award. The parties shall agree within 21 days of the award on a date by which implementation will be completed.

2. The Tribunal shall endeavor to render such clarification within 45 days of the request, and such clarification shall become part of the award and shall not be considered a provisional measure under the provisions of Article XI (2) of this Compromis.

Article XIV

1. Egypt and Israel agree to accept as final and binding upon them the award of the Tribunal.

2. Both parties undertake to implement the award in accordance with the Treaty of Peace as quickly as possible and in good faith.

C. The Factual Background of the Dispute

1. Introduction

20. During the 19th century and before, the territories of present-day Egypt and Israel were both contained in the Ottoman Empire. However, in 1841, the Sultan conferred upon Mohammed Ali the hereditary Pashalik of Egypt, creating thereby, within boundaries defined by the Sultan, a privileged vassal State within the Empire. Egypt was empowered to administer the territory of Sinai. The precise bounds of this administrative control of territories in Sinai fluctuated during the reign of the first three Khedives and the western limits of the neighbouring Vilayet of Hedjaz were never clearly expressed.

21. The Suez Canal was opened in 1869. In order to secure the Canal as its route to India, Great Britain occupied Egypt in 1882 without, however, seeking to alter the formal status of the Khedivate as an Ottoman vassal. On 24 October 1885, Great Britain and Turkey concluded a Convention relative to Great Britain's special status in Egyptian affairs.

22. Upon the succession of Abbas Hilmi as Khedive in January 1892, the British Agent and Consul General in Cairo, Sir Evelyn Baring

(later Lord Cromer), was concerned by the apparent differences between the wording of the Firman of Investiture issued to Abbas Hilmi by the Sultan on 27 March 1892 and that issued to his predecessor. The new Firman made no mention of the Sinai territories administered by the previous Khedives and defined the territory of the Khedivate of Egypt in terms of the line from Rafah to Suez. The Grand Vizier of the Sultan sent a telegram to the Khedive on 8 April 1892, confirming that certain Egyptian garrisons outside of the Sinai, including Aqaba, were to be restored to the Vilayet of Hedjaz, but that the status quo of Khedival administration of the parts of the Sinai lying east of the Rafah-Suez line was to be maintained. It may be noted that the land route across Sinai for the Haj was apparently falling into disuse at the time. Lord Cromer wrote to Tigrane Pasha, the Egyptian Minister for Foreign Affairs, on 13 April 1892 and informed him that Great Britain consented to this confirmation of Egypt's administration of Sinai, adding his understanding that the Sinai peninsula consisted of "the territory bounded to the east by a line running in a south-easterly direction from a point a short distance to the east of El Arish [which apparently meant Rafah] to the head of the Gulf of Akaba", leaving Aqaba itself in the Vilayet of Hedjaz.

2. *The Taba Crisis of 1906*

23. At the end of December 1905, Lord Cromer received intelligence from Constantinople that the Sultan had been informed of Egyptian plans to construct "barracks" on the Sinai frontier near Aqaba and that he had decided to establish a Turkish guardhouse there first. On 2 January 1906, Lieutenant W. E. J. Bramly, the Inspector of Sinai (a title equivalent to Governor), was instructed by the British Acting Director of Intelligence for the area in Cairo, Captain R. C. R. Owen, to form a small post at Naqb el Aqaba. He was informed that he might find that the Turks had already established a post at the spot and that he should avoid a confrontation.

24. On 10 January 1906, Bramly reported that he had established himself at the foot of the Naqb el Aqaba, in Marashash (present-day Eilat) at the mouth of the Wadi el Arabi near to a well at the head of the Gulf, had met with the Turkish *Kaimakam* (head of district) at Aqaba, and had ascertained that Turkey was claiming Taba and Kuntilla, both places with water which Egypt considered to be west of the Rafah-Aqaba line asserted by Lord Cromer. Bramly proposed that he and a Turkish representative should demarcate the boundary and that he would thereafter map it, as he had been sketching maps of the area for the War Office and the Palestine Exploration Fund over the previous two years.

25. On 14 January 1906, Bramly reported that he had met with the Commandant of Aqaba and had decided to return to Nekhl, the main Egyptian garrison in the center of the Sinai, after agreeing to remove his tents at Marashash upon receipt from the Commandant of a written claim by Turkey to the place. He stated that he would observe Turkish actions on the frontier while awaiting further instructions.

26. Owen then dispatched the Egyptian Coast Guard steamer "Nur el Bahr", with Saad Bey Rifaat, the former Egyptian Commandant at Aqaba prior to 1892, and 50 men to re-occupy the Naqb el Aqaba and, if Bramly thought necessary, Taba also. On 23 January 1906, the Commander of the "Nur el Bahr" wrote to Bramly in Nekhl to inform him that, on their arrival at Taba, they had encountered a Turkish officer who refused them permission to land and had threatened to fire on the ship if they so attempted. The Egyptian force established itself on nearby Pharaon Island instead.

27. Bramly joined the force at Pharaon and received instructions dated 28 January 1906 from Captain A. C. Parker, the Assistant Director of Intelligence in Cairo, to hold his position but to see to it that nothing in the nature of hostilities should take place. On 14 February 1906, Owen sent Parker to replace Bramly at Pharaon and instructed Bramly to return to Nekhl and resume administration of the Sinai territory since it appeared to him that resolution of the crisis might take some time.

28. The British Ambassador in Constantinople meanwhile suggested a joint delimitation of the Sinai frontier, but Turkey objected, arguing that it was impossible to change the description of Egyptian territory already effected by the Imperial Firman of Investiture of 1892. Negotiations continued for several months.

29. On 27 March 1906, Lord Cromer suggested to the Foreign Office in London that the main point had become to achieve withdrawal of Turkish troops from Egyptian territory and that demarcation was now less important. He regretted the absence in the 8 April 1892 telegram from the Grand Vizier mentioned above of any definition of the eastern limit of the Sinai, and referred to his definition given at the time in his letter of 13 April 1892. Lord Cromer then suggested a refinement of that definition, which he felt could be achieved through an exchange of diplomatic notes between Great Britain and Turkey, confirming that the frontier was as defined in his note of 13 April 1892, but describing the limits more precisely as: "the territory bounded to the east by a straight line running from Rafah—a point a short distance east of El-Arish—in a south-easterly direction to a point on the Gulf of Akaba, lying three miles to the west of the existing fort of Aqaba".

30. Turkey rejected this definition, reserving to itself the right to interpret the 1892 Firman, which spoke only of the Suez-Rafah line as the frontier of Egypt, and the right to revoke at any time the Grand Vizier's telegram of 8 April 1892 regarding Egyptian administration of the Sinai to the east of the Suez-Rafah line. Turkey argued that Taba was a dependency of Aqaba, and informed the Khedive that it was contemplating the extension of the Hedjaz railway to Aqaba and from thence to Suez. The railway would traverse the Sinai peninsula south of the Suez-Rafah line referred to in the 1892 Firman as constituting the actual limit of Egyptian territory. The Sultan's special representative, sent to Cairo to settle the dispute, nonetheless suggested a compromise line from El Arish to Ras Mohammed.

31. These proposals and positions greatly alarmed the British, who viewed the Rafah-Aqaba line as vital to the security of the Canal.

Lord Cromer suggested that forceful measures were necessary, but not in the area of the Sinai, in order to persuade the Sultan to accept the British understanding of the Egyptian administrative frontier.

32. An ultimatum was addressed to the Sultan on 3 May 1906, underscored by a British naval threat to seize certain Turkish islands in the Mediterranean, giving the Sultan 10 days in which to agree to evacuate Taba and to a demarcation of the line from Rafah to the head of the Gulf of Aqaba on the basis of the 8 April 1892 telegram. The Sultan agreed to evacuate Taba and on 13 May 1906 the Turkish forces at Taba were withdrawn. On 14 and 15 May 1906, Great Britain and Turkey exchanged diplomatic notes expressing their agreement "to delimit and record on a map", prepared jointly by representatives of the Sultan and the Khedive, "the line of demarcation running approximately straight from Rafah in a south-easterly direction to a point on the Gulf of Akaba not less than 3 miles from Akaba".

3. *The Delimitation and Demarcation of the 1906 Line*

a. *Negotiations and Survey*

33. On 22 May 1906, the Khedive appointed Ibrahim Fathi Pasha and Captain Owen as his representatives for the settlement of the frontier between Aqaba and Rafah with the representatives of the Ottoman Government. He gave them full powers to agree to whatever petty changes were deemed necessary to the boundary line, which he described as beginning at "Rafah, near El Arish, and tak[ing] a south-easterly direction until it ends in a point on the Gulf of Akaba at least 3 miles from Akaba" and that it "should be an approximately straight line".

34. In May, Mr. E. B. H. Wade and Mr. B. F. E. Keeling from the Survey Department of the Egyptian Ministry of Finance were assigned to accomplish the difficult task of rapidly and accurately charting the territory along the length of the expected frontier line. Owing to the hot desert conditions during the summer months, a triangulation survey was ruled out. Instead, the surveyors decided to conduct their survey by determining the latitude of a number of intervisible points, designated astronomical stations, the azimuth of the lines connecting them, and then to calculate the longitude of each point after ascertaining, as accurately as possible, the longitude of the two end points of this chain of astronomical stations established near to the hypothetical straight line from Rafah to the point at least three miles from Aqaba.

35. Owen and Fathi Pasha left Cairo on 24 May 1906, joined the surveyors and the "Nur el Bahr" at Suez, and arrived at Aqaba on 26 May 1906. Wade established a site for astronomical observations at Taba, describing it as A.1.

36. The Egyptian Commissioners had their first meeting in Aqaba with Muzaffer Bey and Fahmi Bey, the two Commissioners appointed by the Sultan, on 27 May 1906. Wade, who had expected to be able to return to Taba on 28 May for his astronomical observations, instead determined the azimuth of a line he made at Aqaba. On the 29th he established his station A.2 near the camp at Aqaba. From A.2 he could

see the granite knob at Taba, near to which he had established his station A.1.

37. Wade finally returned to Taba on 30 May and determined the latitude of his station A.1. On 31 May, he established a station B.1 on the "conspicuous granite knob on shore at Taba", from which he could see A.2, not having been able to see A.2 from A.1.

38. Meanwhile, on 29 May 1906, all of the Commissioners rode up the Naqb el Aqaba to the head of the pass on to the plateau where the Nekhl-Aqaba and Gaza-Aqaba roads meet. In their initial discussion, the Turkish Commissioners indicated that they were most interested in securing the whole of the Naqb el Aqaba as it was "part of Aqaba" and necessary to its security. Owen reported to Lord Cromer the day of this visit that he thought that "we can without any loss to ourselves give the Turks the Nakb-el-Akaba, provided we hold the head of it . . . Our frontier line, I think, will then run along the ridge north of Taba in a northerly direction till it reaches a prominent hill (which we have named Jebel Ibrahim) about 1,000 yards from the head of the Nakb-el-Akaba, and from thence to the head of the pass and edge of the plateau . . . We, of course, keep Taba, running the boundary line in such a way that no position can command the Wadi-el-Taba, which will be our road down to Taba and so to the Gulf of Akaba."

39. In one of two Reports of 3 June 1906, Owen further described his proposal for the course of the line in the area of the Naqb el Aqaba. He "proposed that the boundary-line should commence on the Gulf of Akaba at Ras Taba, that is at the point where the ridge north of Taba meets the sea, thence along ridge in a north-westerly direction up to a certain fixed point, thence north-east, south of Jebel Ibrahim to Mufrak, the head of the pass and edge of plateau . . ." In later descriptions, Owen referred to "Jebel Fort" in place of the "fixed point".

40. There was much discussion in the early meetings of the location of the point at least "3 miles from Akaba" where the boundary line was intended to start. The Turkish Commissioners advanced several interpretations; among them that this could be measured from Naqb el Aqaba up on the plateau, construing the Naqb el Aqaba as part of the locality of Aqaba, that this could be measured directly across the Gulf from Aqaba Fort, or that the boundary should commence at Taba. The Egyptians claimed that the point "3 miles from Akaba" was intended to be measured around the Gulf, along the shoreline, to Marashash. Owen had written to Parker on 1 June 1906 that the location of this point would "probably decide to whom Kassima, which is the most important point along the line, belongs". He added that "[w]e must have Kassima." In his General Report, written after returning to Cairo in October, Owen remarked that the starting point of the boundary was "the principal and most difficult point to decide" in the early discussions.

41. The general procedure thereafter was for Keeling to proceed in advance and to beacon places he felt could serve as astronomical stations to which he could tie his topographical observations, once Wade had made the necessary astronomical observations and calculated the values for these points so that they could be plotted on the map

paper. In all, 16 astronomical stations were established by Wade. The Commissioners apparently travelled with the main camp, while reconnoitering the areas where they believed the boundary should pass.

42. Owen next reported on 12 June 1906 from Mayein that the surveyors, owing to the rough nature of the terrain and the limited time available to them, were only able to make "a fairly rough though very accurate survey".

43. The Commissioners eventually reached Rafah on 28 June 1906. Wade reported that, on 30 June 1906, he observed the local time and latitude for his station A. 13. This station was established 80 metres south of the marble frontier pillars at Rafah, which had been long before erected to indicate the frontier of Egypt. From Rafah, time signals were exchanged by telegraph with the Helwan Observatory in Cairo in order to establish the longitude of A. 13. From this information, Wade was able to calculate the latitude and longitude of all of his astronomical stations, as well as of the marble pillars themselves. In early July 1906, the surveyors then worked on their map in El Arish.

44. Owen next reported on 10 July 1906, after receiving from the surveyors the completed maps of the area along the Rafah-Aqaba line, that the discussions again had become difficult since the Turkish Commissioners indicated that they lacked full powers. Difficult and prolonged discussions followed. They were not crowned with success until after the Sultan on 11 September 1906 issued an Imperial Iradé to the following effect, *inter alia*: "1. The starting-point of the line on the Gulf to be Marashash. 2. Such commanding positions of Nagb-el-Akaba as are necessary to Akaba from a strategic point of view are to remain on the Turkish side, while Mofrak is to be left to Sinai" (from a telegram of 12 September 1906 from Sir N. O'Connor to Sir Edward Grey). An agreement on the line was reached soon thereafter and signed on 1 October 1906.

b. *The 1 October 1906 Agreement*

45. While the Egyptian Commissioners requested that the agreement be written in French, the Turkish Commissioners insisted on Turkish, as that was the official language for communications between the Sultan and the Khedive. The negotiated text was therefore written in Turkish and then translated from Turkish into Arabic and then from the Arabic translation into English for the benefit of the English-speaking members of the Egyptian delegation. The British decided that it was important to conclude the agreement rapidly, and so the decision was taken not to attempt to correct the inconsistencies between the informal English translation and the authentic Turkish text, or to refine further the language. English translations were printed in a number of official sources and apparently were relied on thereafter. This expediency has led to some questions of interpretation in the present case, as it transpired that up until after the conclusion of the Compromis in 1986, no authorities since before the First World War had ever consulted the authentic Turkish text, not even the Parties to this dispute. The Tribunal, unless it specifies otherwise, will follow in this Award the general

practice of the Parties and refer to the contemporaneous English translation as included in Owen's General Report.

46. The Agreement, signed at Rafah on 1 October 1906, reads in Article 1:

The administrative separating line, as shown on map attached to this Agreement, begins at the point of Ras Taba on the western shore of the Gulf of Akaba and follows along the eastern ridge overlooking Wadi Taba to the top of Jebel Fort, from thence the separating line extends by straight lines as follows:

From Jebel Fort to a point not exceeding 200 metres to the east of the top of Jebel Fathi Pasha, thence to that point which is formed by the intersection of a prolongation of this line with a perpendicular line drawn from a point 200 metres measured from the top of Jebel Fathi Pasha along the line drawn from the centre of the top of that hill to Mofrak Point (the Mofrak is the junction of the Gaza-Akaba and Nekhl-Akaba roads). From this point of intersection to the hill east of and overlooking Thamilet-el-Radadi—place where there is water—so that the Thamila (or water) remains west of the line, thence to top of Ras Radadi, marked on the above-mentioned map as (A 3), thence to top of Jebel Safra marked as (A 4), thence to top of eastern peak of Um Guf marked as (A 5), thence to that point marked as (A 7), north of Thamilet Sueilma, thence to that point marked as (A 8), on west-north-west of Jebel Semaui, thence to top of hill west-north-west of Bir Maghara (which is the well in the northern branch of the Wadi Ma Yein, leaving that well east of the separating line), from thence to (A 9), from thence to (A 9 *bis*) west of Jebel Megrah, from thence to Ras-el-Ain, marked as (A 10 *bis*), from thence to a point on Jebel Um Hawawit marked as (A 11), from thence to half-distance between two pillars (which pillars are marked at (A 13)) under a tree 390 metres southwest of Bir Rafeh, it then runs in a straight line at a bearing of 280° of the magnetic north—viz., 80° to the west—to a point on a sand-hill measured 420 metres in a straight line from the above-mentioned pillars, thence in a straight line at a bearing of 334° of the magnetic north—viz., 26° to the west—to the Mediterranean Sea, passing over hill of ruins on the sea-shore.

47. Egypt made a new translation of the Agreement directly into English in August 1987, which reads in its first part of Article 1:

The Separating Line, as shown on map attached to this AGREEMENT, begins at Ras Taba on the western shore of the GULF OF AKABA and extends to the summit of the mountain called JEBEL FORT, passing by the summits of the mountains lying east of and overlooking WADI TABA, and from the summit of JEBEL FORT the Separating Line extends by straight lines as follows: . . .

48. Israel disagrees with certain aspects of this translation and responded in its Rejoinder with another translation into English, rendering the same passage as follows:

The separating line as shown on the map attached to this agreement begins at Ras Taba, which is situated on the western shore of the Gulf of Akaba, and arrives at the hill called Jabal Fort while passing by the heights that are [situated] at the east[ern side] of Wadi Taba and overlook this Wadi, and from this hill it continues straight as follows.

49. Article 2 of the Agreement provides that the separating line described by Article 1 was "indicated by a black broken line on duplicate maps . . . signed and exchanged simultaneously with the Agreement". The Parties do not differ on this translation. The fate of these duplicate maps annexed to the Agreement is not clear. Owen reported that "[t]he original Agreement and map were sent to the British Agency from Rafeh on the 5th October, 1906". All trace of this copy disappeared after 1926, and the British Government informed the Parties in 1985 that

it believes that the copy it had received may have been destroyed during a rapid evacuation of the British Embassy in Cairo, e.g. in 1952 or 1956. Turkey's copy of the map, however, is reportedly still in Turkish archives. A photocopy of a map, sent by Turkey and asserted to be a copy made from the map annexed to the original Agreement, was submitted by Egypt, but Israel contests the authority of the map since there is no trace of the signatures reported to have been made to the map and alleges that portions of the line indicated thereon are manifestly at variance with the terms of Article 1 in the vicinity of the terminus of the line near Rafah and at astronomical station A.5.

50. Article 3 provides:

Boundary pillars will be erected, in the presence of the Joint Commission, at intervisible points along the separating line, from the point on the Mediterranean shore to the point on the shore of the Gulf of Akaba.

Egypt's new translation did not differ from this version, but Israel submitted a different direct English translation:

Pillars will be erected while the officials of each side are present, in such a manner that from the one of them the other will be seen, the length of the Separating Line from the point on the Mediterranean shore as far as the point on the shore of the Gulf of Akaba.

51. In addition, it may be noted that Articles 5, 6, and 7 provide:

Art. 5. Should it be necessary in future to renew these pillars, or to increase them, each party shall send a representative for this purpose. The positions of these new pillars shall be determined by the course of the separating line as laid down in the map.

Art. 6. All tribes living on both sides shall have the right of benefiting by the water as heretofore—viz., they shall retain their ancient and former rights in this respect.

Necessary guarantees will be given to Arab tribes respecting above.

Also Turkish soldiers, native individuals and gendarmes, shall benefit by the water which remained west of the separating line.

Art. 7. Armed Turkish soldiers and armed gendarmes, will not be permitted to cross to the west of the separating line.

c. The Demarcation of the Line

52. Owen stated in his General Report that, "[w]ith reference to Article 3 of the Agreement, it was decided that telegraph poles be erected in the presence of the Commissioners at intervisible points along the boundary line". Wade was recalled from Cairo to assist this operation, and an Egyptian officer and a Turkish officer also joined the Boundary Commission to observe the placement of the telegraph poles, as they both would be present for the subsequent construction by the Egyptian Department of Public Works of the masonry pillars at the site of each telegraph pole.

53. A few days after concluding the Agreement, and after Wade and the necessary materials had arrived from Cairo, the Commissioners commenced placing telegraph poles along the boundary line near Rafah, and then started down the line towards Taba on 6 October 1906. Wade reported that the demarcation operations were on the whole uneventful. After setting up the poles around Rafah, the first traverse from A.13 to

A.11 took three days, and Wade stated that he was able to keep the line of intervisible telegraph poles “perfectly straight”, although his technical discussion concedes that the margin of error could be as much as 12 metres on either side of the abstract straight line between the astronomical stations. Later on, in the area just north of astronomical station A.9 *bis*, Wade reported that the line of telegraph poles had deviated from the intended line by 500 metres to the east, and that while two of the poles placed off the straight line were corrected after discovery of the error, some earlier ones were accepted by the Commissioners as placed, apparently in the interest of bringing the work to conclusion without losing time.

54. Owen reported that the Commissioners arrived at Taba on Wednesday, 17 October 1906, after having erected “[n]inety intervisible pillars . . . on the boundary line . . . at varying intervals from 1/2 kilom. to 3 kilom.”. Between the pillar placed on Jebel Fort and the pillar at Ras Taba, Owen reported that two pillars were erected on the “Taba Hills”. Wade’s account conflicts with this in two respects. He reported that the final pillars were set on 18 October 1906 and that three pillars were erected on the “east cliffs of Taba” between the beacon placed on Jebel Fort and the beacon placed at the point where the east cliffs “strike the gulf”. Everyone then left the area, the work having been completed.

55. As noted above, arrangements had been made for the construction by the Public Works Department of Egypt of masonry pillars at the site of each telegraph pole. Very little evidence concerning this project was submitted in these proceedings. As mentioned above, it was intended to be done under the supervision of an Egyptian officer, in the presence of a Turkish officer, both of whom had been summoned to participate in the October demarcation operations. It appears from the records produced that Parker, who had in the meantime been named Governor of Sinai, was present during at least the first part of the operations, as well as the two Turkish Commissioners. Mr. Naum Shoucair, the Secretary to the Egyptian Commissioners, seems to have been present again, as he relates certain features of the operation in his subsequent book published in 1916.

56. Parker’s 1906 diaries, although not those for 1907, were produced by Egypt, having been located in the possession of his daughter in England. Parker’s diary shows that he came overland from Suez via Nekhl and arrived at Taba on 5 December 1906, where he was met by the Egyptian Coast Guard steamer “Aida” with stores on 7 December 1906. The Turkish Commissioners were not yet in Aqaba, and he was instructed to wait. Finally, on 31 December 1906, he met in Aqaba with the Turkish Commissioners Muzaffer Bey and Fahmi Bey and they reached an agreement that the masonry pillars would be constructed 2 metres high, topped by one metre of iron. In the afternoon, they all went to Taba, and Parker took a series of photographs of the group and of the construction of the first pillar. These photographs were introduced by Egypt in these proceedings.

57. Ottoman documents from October 1911 clearly indicate that the border was marked by officials assigned by both sides. The letter of

22 October states that "it is obvious that there is no need for such work to be done again".

58. Shoucair wrote later in his book that the first pillar was built on 31 December 1906 at Ras Taba and numbered 91. He related that the last pillar, numbered 1, was built on 9 February 1907 and that the absence of water at certain places along the route had complicated the task.

4. *The Subsequent History of the Separating Line*

a. *The Pre-Mandate Period (1907-1923)*

59. Events concerning the boundary during the first few years involved two joint operations of Egyptian and Ottoman authorities to repair pillars. Parker stated in his monthly summary for November 1908 to the Intelligence Department in Khartoum that it was reported that several pillars near to Rafah had become unstable due to the shifting sand. His report for May 1909 related that arrangements had been made with the Turkish authorities and in late April 1909 a Turkish officer was present for the rebuilding or repair of eight pillars, six of which were identified as pillars 8-13 near Rafah. The British Consul in Jerusalem passed on a similar report on 26 May 1909 to the Foreign Office. Again, in February 1911, the British Consul in Jerusalem reported that a joint Turkish-Egyptian delegation was to be present at the re-erection of some boundary columns in the Beersheba district which had fallen down during the heavy rains that season.

60. A number of maps from this period, introduced into the record of this proceeding, appear to be based on the 1906 Wade/Keeling survey map or derivative copies of that map, at least with respect to the area near to the separating line, including, for instance, the map printed in the 1908-09 Rushdi book and the 1911 Survey Department of Cairo map. In addition, the first trigonometrical and plane table survey map of the area was prepared during this period. On 16 May 1908, the British War Office proposed to the Egyptian Government that they collaborate on the production of a detailed map of the Sinai Peninsula, whereby the Survey of Egypt would do the basic trigonometrical work and the detail survey would be done by Royal Engineers of the British War Office. This was agreed, and each winter from 1908 to 1914 teams worked in the field preparing the detail for the maps based on the Egyptian triangulation, which apparently was completed by 1911. Work along the boundary area started from the north in 1911 and evidently reached the Taba area during the 1914 season, although the map recites that the survey work was completed in 1913.

61. In connection with this survey, on 27 September 1911, the Grand Vizier received an intelligence report that on 5 September 1911 the British had dug a trench on the border, carried out a survey, and that a bedouin had claimed to have seen the British secretly remove several border signs. At about the same time, the Egyptian authorities made a request that the surveyors not be prevented from taking short-cuts and crossing over into Turkish territory. This request was apparently approved in Jerusalem. Finally, the Ottoman authorities decided in late

October 1911 to dispatch a Turkish officer to check whether any modifications or changes had been made to the line.

62. During the winter of 1914, the Turkish side of the border in the Negev from Rafah over to the Dead Sea and south to Aqaba was to be surveyed under the auspices of the Palestine Exploration Fund, a non-governmental organisation which had also sponsored earlier surveys of northern Palestine regions. The group was headed by Captain S. F. Newcombe, who had participated up till then in the Sinai surveys for the British War Office. Two civilians accompanied the surveyors to undertake archeological work during February 1914, Mr. T. E. Lawrence and Mr. C. L. Woolley. While Newcombe, accompanied by Lawrence, was in the Aqaba region in February, the Commander at Aqaba refused him permission to survey the area along the border in the vicinity of Aqaba. Consequently, the survey was incomplete.

63. Apparently, however, the actual detail survey for the Taba and Ras el Naqb areas on the Egyptian side of the border was undertaken in 1914, for during the course of the proceedings, the Parties discovered in the British Library the original surveyor's field sheets and clean tracings made from those sheets used in the construction of the Sinai map by the War Office in 1915. These field sheets were registered at the War Office in London on 6 June 1914. Drawn on a scale of 1:125,000, the original sheet for Wadi Taba indicates some pillars on the heights east of the Wadi, and, in particular, with some technical explanation, two pillars just near the shore. The tracing of this original, which apparently was used in the preparation of the map itself, only picked up one of these pillars, the one further up the ridge from the shore. That pillar, indicated at an elevation of 298 feet, was marked as a boundary pillar on both versions of the map printed in 1915 in England at the scales of 1:125,000 and 1:250,000. Owing to the war, the map apparently was not publicly released at the time. (But see paragraph 75 below.)

64. In August 1914, Egypt established posts at Taba and at Ras el Naqb and used them to observe developments in Aqaba, as there were reports of large troop movements throughout the region. In October 1914, Turkey entered the war on the side of the central European powers and, in November, Great Britain imposed martial law in Egypt. Finally, in December, Great Britain declared a Protectorate over Egypt due to the state of war with Turkey.

65. In early 1915, Great Britain withdrew its forces towards the Suez Canal and Turkey occupied much of the Sinai, remaining there until El Arish was taken in December 1916. No evidence has been submitted regarding the boundary during the war period, except that Germany produced a 1:250,000 map of the Sinai based on a road survey it conducted for Turkey in 1915.

66. During the fall of 1917, Allied forces advanced into Palestine following the fall of Aqaba in July 1917 to the Arabs of the Hedjaz.

67. At this time, the Survey of Egypt conducted a trigonometrical and plane table survey of the area of Aqaba on the scale of 1:40,000. The map produced in 1917 from this survey, a small portion of which was introduced into these proceedings, shows two boundary pillars near the

shore on the ridge east of Wadi Taba, one on a cliff at the shoreline and another at a triangulated position at an elevation of 298 feet. The map, however, apparently produced for military purposes, was not given public distribution. The triangulation information, dated perhaps 1917 but possibly based on earlier survey work, still exists according to testimony elicited under cross-examination of an expert witness for Egypt, but was not submitted in evidence.

68. Following the war, British forces occupied both sides of the separating line and the Turks were not to return. In Article 101 of the Treaty of Sèvres of 10 August 1920 concerning the terms of peace with Turkey, which treaty never entered into force, Turkey had to renounce all rights and titles over Egypt. By Articles 16 and 17 of the Treaty of Lausanne of 24 July 1923, which replaced the Treaty of Sèvres and did become effective, Turkey renounced all rights and titles over territories lying outside of the Turkish frontiers established by the treaty, and this was declared effective with respect to Egypt and the Soudan as of 5 November 1914, the date on which Great Britain instituted martial law in Egypt.

69. Egypt sought independence from British rule after the war, but negotiations with Great Britain foundered largely on the question of continued British military occupation in order to protect the Canal. Instead, Great Britain achieved this objective by unilaterally terminating the Protectorate and recognizing Egypt as an independent sovereign State on 28 February 1922, but reserving to its discretion four areas of interest, including in particular the defense of Egypt and the security of its communications, evidently meaning the Canal.

70. On 17 February 1922, Mr. H. J. Llewellyn Beadnell, of the Survey of Egypt, visited Taba during his exploration of the Sinai and tied his survey to the "penultimate beacon" and took a photograph of it showing a plaque with the number 90 on it. This photograph, discovered by the Parties during the proceedings, was submitted by both Parties.

b. *The Mandate Period (1923-1948)*

71. By the time the Council of the League of Nations had approved the text of the Mandate for Palestine on 24 July 1922, and later when the Mandate finally entered into force on 29 September 1923, no boundaries had been established for the mandated territory. The Preamble to the Mandate Resolution recites that the Principal Allied Powers had decided to entrust to Great Britain the mandate for Palestine, "within such boundaries as may be fixed by them". Article 5 of the Mandate stipulated, however, that:

The Mandatory shall be responsible for seeing that no Palestine territory is ceded or leased to, or in any way placed under the control of, the Government of any foreign Power.

72. A few years later, in answer to a question raised on 16 July 1925 in the British House of Commons with regard to the status of Aqaba, Mr. McNeill answered for the Government of Great Britain that "[t]he line dividing the territories under Egyptian and Turkish administration respectively was defined in 1906 by a boundary commission and

has not since been modified". He informed the questioner that "Akaba lies a few miles to the east of this line".

73. On 6 October 1925, Great Britain invited Egypt to recognize the special situation of Great Britain in the territory of Palestine. The Egyptian Prime Minister and Minister for Foreign Affairs, Ahmed Ziwer Pasha, did so in a letter to the British High Commissioner in Cairo of 4 February 1926, but reserved Egypt's position regarding the Egyptian frontier with Palestine since the Mandate provided that the frontiers of Palestine would be decided at a later date "by the Principal Allied Powers". The letter concluded that the Egyptian frontier with Palestine could not in any way be affected by the delimitation of the frontiers of Palestine.

74. Following consultations with the relevant British authorities, the British High Commissioner informed the Egyptian Foreign Minister by letter of 25 June 1926 in response to the letter of 4 February that "the Palestine and Egyptian frontier as defined in the year 1906 will be in no way affected by the delimitation of the frontiers of the mandated territory of Palestine".

75. In 1926 the Survey of Egypt published the 1915 British Map of the Sinai at the scale of 1:250,000. The Tribunal was not informed when the 1915 British Map was made public by Great Britain. It remained the only map for some time which plotted the position of individual boundary pillars along the line. In subsequent years, the authorities of mandated Palestine repeatedly sought survey information from the Survey of Egypt concerning the locations of the boundary pillars in order to describe accurately the south-western boundary of Palestine, but the Survey of Egypt replied that the boundary pillars had never been surveyed.

76. On 4 April 1932, the Eastern Department of the British Foreign Office issued a lengthy memorandum on the question of the frontiers of mandated territories in the Middle East due to a question raised in the League of Nations concerning the necessity of submitting the frontiers of mandated territories to the Principal Allied Powers or to the Council of the League for approval. Attached to this memorandum was an annex describing the frontiers of each of the mandated territories. The description of the Egypt-Palestine frontier affirmed that the then-present frontier was the same as the "Separative Administrative Line" established by the 1 October 1906 Agreement, but remarked that the line "does not appear at any stage to have been formally constituted an international frontier". After noting the letter of 4 February 1926 from the Egyptian Government to the British High Commissioner, the annex stated that the assurance given in response to Egypt's reservation "seems to imply recognition by His Majesty's Government and the Egyptian Government of the 1906 line as the definitive frontier between Palestine and Egypt".

77. In 1933, Mr. R. H. Mitchell, a geologist in Palestine, presented a geological map of the Naqb el Aqaba area, part of a mineral concession, on which were plotted nine boundary pillars from Ras el Naqb to the shore. The map shows two pillars near to the shore on the ridge to the

east of Wadi Taba. A number of other details, such as buildings and ruins, also appear on the map.

78. Great Britain's Report for 1935 to the Council of the League of Nations on the administration of Palestine and Trans-Jordan described the south-western boundary of the mandated territory of Palestine in the following terms:

From a point on the Mediterranean coast north-west of Rafa, passing in a south-easterly direction to the south-west of Rafa, to a point west-north-west of Ain Maghara; thence to the junction of the Gaza-Aqaba and Nekl-Aqaba roads, from whence it continues to the end of the boundary line at the point of Ras Taba on the western shore of the Gulf of Aqaba.

This description was repeated in subsequent Reports for the years 1936 and 1937.

79. During the years 1935-38, the Survey of Egypt apparently conducted a survey in the Sinai to update the 1915 British Map and coordinate it with Egyptian maps of the southern Sinai regions at the scale of 1:100,000. A surveyor was sent to Taba to determine the course of the Taba-Mofrak road which had recently been improved for motorized vehicles. That road crossed over into Palestine in order to utilize the route up the Wadi el Masri in the Naqb el Aqaba, an area which Newcombe had not been permitted to survey in 1914. The surveyor's sketch map of the area submitted in these proceedings reproduced the same pillars as those shown on the 1915 British Map. The depiction of the boundary on the map itself, with most of its pillars, is very similar to that shown on the 1915 British Map. New details, however, of the topography in the Naqb el Aqaba appeared for the first time on this map.

80. During World War II, the British Army compiled all available survey data on trigonometrical points in Palestine, and included information obtained from the Survey of Egypt concerning points along the Sinai boundary. This information was then organized in the form of lists covering specified areas. The list relevant to the Sinai boundary was called Trig List 144.

81. During 1943, the British also apparently conducted two surveys: an aerial survey based on photographs taken in April 1943 and a detailed ground survey about which the Tribunal received little specific information. The aerial survey resulted in a large-scale map of the Aqaba area, including Taba, introduced by Egypt in these proceedings.

82. Following the war, a Foreign Office official, Mr. D. M. H. Riches, in a letter dated 16 April 1947 to Mr. W. Low of the Air Ministry, recalled the 1926 recognition by Great Britain that the delimitation of the frontiers of the mandated territory of Palestine in no way altered the line defined in 1906 and observed that "although the 1906 boundary-line was a Turkish creation, its position as the correct and suitable line between Palestine and Egypt has not been called into question since that time. The status of the countries which it divides has changed since 1906, but not the line."

83. It appears that a British military camp at Rafah, which apparently had grown in importance during World War II, extended over the 1906 frontier into Egyptian territory along a strip 2 miles wide by

7 miles long. In January 1947 the Governor of Sinai informed the Rafah camp Commander that he intended to construct a fence along the frontier in that area to prevent smuggling and that the fence would bisect the camp. The British authorities attempted to have the camp's perimeter fence continue to be deemed the frontier for practical reasons, but the Egyptian Minister of National Defence refused this request and reaffirmed the fixed nature of the frontiers of Egypt.

c. The Post-Mandate Period (1948-1982)

84. By 1947, the United Kingdom announced its intention to give up the Mandate for Palestine and requested the United Nations General Assembly to form a Special Committee to prepare recommendations on the question of the future government of Palestine. The Special Committee recommended a Plan of Partition with Economic Union, which the General Assembly adopted by its Resolution 181(II) of 29 November 1947.

85. With the end of the Mandate on 14 May 1948, the State of Israel was proclaimed as an independent State. The Act of Independence took effect at one minute after midnight of 14/15 May 1948. Military forces from neighbouring States simultaneously entered Palestine and informed the United Nations Security Council on 15 May 1948 that they intended to restore order. Hostilities between the forces of the new State of Israel and the Arab forces ensued. The United Nations Security Council ordered a truce, considering that the situation in Palestine constituted a threat to the peace within the meaning of Article 39 of the Charter of the United Nations, appointed a Mediator, and on 16 November 1948 decided to establish an armistice to facilitate the transition from the truce to a permanent peace in Palestine, calling upon the parties directly involved to seek agreement on the establishment of an armistice as a provisional measure under Article 40 of the United Nations Charter.

86. The General Armistice Agreement between Egypt and Israel was entered into at Rhodes on 24 February 1949. The Armistice Agreement established a general armistice between the armed forces of the two Parties and provided that no military or para-military forces of either Party were to pass over the Armistice Demarcation Line set forth in Article VI of the Agreement, nor elsewhere violate the international frontier. Article IV of the Agreement affirmed the following principle in its paragraph 3:

It is further recognized that rights, claims or interests of a non-military character in the area of Palestine covered by this Agreement may be asserted by either Party, and that these, by mutual agreement being excluded from the Armistice negotiations, shall be, at the discretion of the Parties, the subject of later settlement. It is emphasized that it is not the purpose of this Agreement to establish, to recognize, to strengthen or to weaken or nullify, in any way, any territorial, custodial or other rights, claims or interests which may be asserted by either Party in the area of Palestine or any part or locality thereof covered by this Agreement . . .

87. Article V provided in part:

1. The line described in Article VI of this Agreement shall be designated as the Armistice Demarcation Line . . .

2. The Armistice Demarcation Line is not to be construed in any sense as a political or territorial boundary, and is delineated without prejudice to rights, claims and positions of either Party to the Armistice as regards ultimate settlement of the Palestine question.

88. Article VIII provided for the demilitarization of the area comprising the village of El Auja and vicinity. Paragraph 4 of that Article stipulated that “[t]he road Taba-Qouseima-Auja shall not be employed by any military forces whatsoever for the purpose of entering Palestine”.

89. A Mixed Armistice Commission was established to supervise the execution of the Agreement and maintained its headquarters at El Auja pursuant to Article X.

90. Finally, Article XI provided:

No provision of this Agreement shall in any way prejudice the rights, claims and positions of either Party hereto in the ultimate peaceful settlement of the Palestine question.

91. Similar Armistice Agreements were thereafter entered into between Israel and Lebanon, Jordan, and Syria.

92. On 10 March 1949, shortly after the Armistice Agreement with Egypt was signed, Israeli military forces established a post at Umrash-rash (present-day Eilat). Each day thereafter a group travelled to Taba to fetch water, having reached an arrangement with the Egyptian officer there. During some of these visits, the Israeli soldiers and a Government press official took photographs of the area, several of which were placed in the archives of the Government of Israel and introduced in these proceedings. Some of the private photos by the soldiers were also introduced in these proceedings.

93. General Sadek Pasha of the Egyptian Army on 21 March 1949 directed a complaint about the use of the Taba well by Israeli soldiers to General Riley of the United Nations Truce Supervision Organization (UNTSO), which led to an investigation of the matter in conjunction with that of the Aqaba area in general. General Riley observed that there was no other road from Taba to Mofrak than passed through the Palestine side of the frontier and that Egyptian personnel used this route. For this reason, he suggested that Egypt continue to allow Israeli soldiers to draw water from the Taba well as part of this local arrangement. However, General Sadek Pasha decided instead to stop using the road between Taba and Mofrak, and closed off transborder access to the well, informing General Riley of this decision on 28 March 1949. Two days later the Mixed Armistice Commission decided that its Taba observer was no longer required.

94. During the so-called Sinai war of 1956, the General Assembly of the United Nations on 2 November 1956 adopted a resolution urging all parties involved in hostilities in the area to agree to an immediate cease-fire and urging all parties to the Armistice Agreements to withdraw behind the armistice lines. It thereafter decided on 5 November 1956 to form a United Nations Command for an Emergency International Force (UNEF) to secure and supervise the cessation of hostilities. Israeli forces ultimately withdrew from the Sinai and the Gaza Strip in

March 1957 and UNEF forces were deployed on the Egyptian side of the armistice line.

95. In order to fulfil UNEF's functions, UNEF officials erected barrel markers as navigation aids for its patrols at some locations along the armistice line. In many places, however, the border pillars had long since disappeared since no effort apparently had been made to maintain them since 1911 and several armies had crossed the frontier since then. These barrels were apparently therefore placed on the basis of the available map information. Surveys were conducted by UNEF in this area to place as accurately as possible the markers, but it was emphasized at all times that these markers were not necessarily placed "on the frontier". They also were movable, and some were later found to have shifted position with the sand dunes on which they were placed.

96. The Survey of Israel apparently conducted a thorough survey of the frontier area during May 1960, and placed new pipe markers at a number of points on the western side of the UNEF patrol route in the Kuntilla area. UNEF considered that its patrol route lay entirely on the western side of the armistice line.

97. Egypt introduced a large-scale map in Hebrew produced by Israel in 1964 showing the Taba and Ras el Naqb areas. This map also shows two pillars near the shore on the ridge above Wadi Taba, as well as essentially the same line, but with more pillars than depicted on the 1915 British Map and its derivatives. An Arabic version of this map, printed in 1967 at a scale of 1:50,000, was also introduced by both Parties, plotting the same two pillars near the shore at Taba, as well as all of the pillars in the Ras el Naqb area.

98. Little other information concerning the Taba area is available for this period. The Egyptian Army, which pursuant to its agreement with UNEF was deployed at least 5 kilometres from the armistice line, planned to make a comprehensive survey of the southern portion of the frontier in 1964, but ultimately desisted. No UNEF patrols covered the Taba area, and, except for occasional night patrols, no Egyptian forces visited Wadi Taba from 1956 until after the Treaty of Peace was signed in 1979. UNEF operations relevant to the present dispute ceased after the 1967 war, when UNEF was disbanded. The second UNEF force, established after the 1973 war, was deployed elsewhere in the Sinai until withdrawn after the conclusion of the Treaty of Peace.

99. The Treaty of Peace resulted from the Framework for the Conclusion of a Peace Treaty between Egypt and Israel, signed on 17 September 1978 at the end of the Camp David Conference. In the Framework, Egypt and Israel agreed, among other things, to the withdrawal of Israeli armed forces from Sinai and "the full exercise of Egyptian sovereignty up to the internationally recognized border between Egypt and mandated Palestine". The Treaty of Peace, concluded on 26 March 1979 as noted earlier, again defined the international boundary between Egypt and Israel, and expressed it in Article II in terms of "the recognized international boundary between Egypt and the former mandated territory of Palestine". Attached to the Treaty of Peace were a number of maps, including one on a scale of 1:250,000

indicating the international boundary. The name "Ras Taba", which had not appeared on any maps since before 1910, was printed at the southern end of the line.

100. The Joint Commission formed pursuant to the Treaty of Peace was charged with demarcating the boundary and it undertook this task in 1981-82. The Israeli Delegation to the Joint Commission proposed on 20 September 1981, in an outline for the working plan for Phase II of the Israeli withdrawal, and in relation to the demarcation of the international boundary and Lines A, B, and D, all defined in the Treaty of Peace, that "the work of the sub-committee on survey, including preliminary reconnaissance tours, plan and timetable for the marking of the International Boundary . . ." be continued, that the work method consist of "locating the existing border stones on aerial photographs and in sections where these boundary stones are missing to locate the points of the boundary according to the description in the 1906 agreement", and that the marking in the field and the setting of the remaining boundary markers be carried out.

101. Israeli survey teams conducted a preliminary reconnaissance of the state of the markers along the boundary and presented the results of these investigations, in the form of photograph albums, to Egypt during 1981. Joint inspections of portions of the boundary took place from October to December 1981. A report prepared by the Israeli delegation dated 8 November 1981 on Demarcation of the International Boundary stated that the starting point of work was the border stones situated along the line, noting that some were clearly "stones erected in 1906" and others were stones and markings erected at later dates. After the first week of work, only one border stone indicated by the Israeli surveyors had been confirmed by the Egyptian delegation and 18 others remained under study in that section of the boundary by the Egyptian survey experts.

102. By this time, according to the Israeli report, the Joint Commission and its sub-committee on the demarcation of lines had agreed upon two authentic sources for "the identification and delimitation of the International Boundary". The two sources, as described by the Israeli delegation, were first, "[t]he positions of the border stones erected in 1906", and second, where no border stones exist, the verbal description of the boundary in the 1906 Agreement. The same report observed that due to the low precision of survey methods in 1906, the positions of some stones were not as exact as they would be if the work were done today.

103. The survey teams continued their demarcation work during November 1981 and by 3 December 1981 reached agreement on locations for over seventy pillars along the boundary, including some new locations for original pillars and the locations for some additional pillars settled upon in order to mark more precisely the course of the boundary.

104. When the survey teams visited the Taba and Ras el Naqb areas on 3 December 1981, however, the Parties were only able to agree on the pillar locations of BP 83, BP 89, and BP 90, as well as the utility of a new pillar location north of BP 89, which they designated BP 88,

although they were not able to concur on the precise location for this new pillar. Following several attempts to reach agreement on the remaining locations during January, February, and March 1982, including efforts at the highest level of the Joint Commission, the Parties concluded their agreement regarding the initial procedure for resolving boundary questions, referred to above as the 25 April 1982 Agreement. The Joint Commission was thereafter apparently dissolved in accordance with the Treaty of Peace and its remaining functions transferred to the Liaison System established thereby.

5. *The Parker Pillar*

105. In the course of the proceedings, it became clear that a boundary pillar ("the Parker pillar") formerly existed at a location in the Taba area not recorded by either Party in Appendix A to the Compromis. The Parker pillar, identified from the Parker photographs and from maps, was located on a cliff which used to be above the shoreline in the Taba area. The cliff was removed during construction of the road along the western shore of the Gulf of Aqaba in about 1970. The pillar itself had apparently disappeared sometime after 1949 and before 1967.

106. Evidence for the existence of the Parker pillar was submitted by both Parties, and consists primarily of the Parker photographs from 31 December 1906, photographs of the pillar at the Parker location taken in 1949, and maps and survey information gathered at various times since 1914. The original field sheet from 1914 shows that the surveyor marked two pillar locations near the shore in the Taba area. But the tracing of that work only reproduces one pillar. The actual map, based on the tracing, also only shows one pillar, identified there as a boundary pillar, located at an elevation of 298 feet. The evidence indicates that the pillar was located at a trig point. The 1917 map of the Aqaba area also shows a trig point at an elevation of 298 feet, identified as a boundary pillar, but also another pillar on the cliff at the shore. The 1933 Mitchell map, introduced by Israel, clearly shows on a large scale the two pillars, identifying both as boundary pillars by their numbers BP 90 and BP 91, and their placement on the boundary line indicated on the map. Israel asserted during the oral proceedings that the 1943 ground survey identified the Parker pillar, but the actual survey information was not submitted to the Tribunal. Finally, a 1964 Survey of Israel map, introduced by Egypt, clearly shows pillars at both the Parker and at the BP 91(E) locations. The same applies to a 1967 map in Arabic, introduced by both Parties.

107. As already noted above, Parker took photographs of the first pillar erected at Taba on 31 December 1906, introduced by Egypt, and Israel introduced several 1949 photographs of the pillar at the Parker location. Both Parties observed that the photographs from 1906 and 1949 show differences in the pillars (the pillar shown in the 1949 photographs being shorter, having an iron flange extending out of the top, and a plaque stuck on the side with the number 91 engraved in it). The pillar shown in the 1949 photographs is substantially similar in these respects to the pillars shown in other photographs taken in the area, first that of a pillar numbered 90 and photographed by Beadnell in 1922, and second

those pillars numbered 85, 86, and 87 photographed by Egypt for these proceedings. On the basis of these differences, Israel alleges that new pillars must have been erected in the area sometime between 1907 and 1922, probably in 1917, and that these new pillars were not necessarily constructed at the same locations as the original telegraph poles or the masonry pillars that replaced them.

108. While a new pillar was erected at or practically at the location of the Parker pillar, Israel does not concede that the Parker pillar was legally a correct boundary pillar. Israel further alleges that the pillar erected at the location BP 91(E) and photographed by Beadnell in 1922 was not at the location of any boundary pillar in 1906 and that this location had originally been established as a trig point. Israel alleges that the constructor of the 1915 British Map may have taken the trig point for a boundary pillar and so erroneously indicated a boundary pillar at that location on the map. When replacement pillars were allegedly constructed in the area thereafter, Israel believes it was done on the basis of the pillars shown on the map, including the pillar shown at the elevation of 298 feet corresponding to BP 91(E). In the case of the replacement pillar at the Parker location, which was not shown on the 1915 British Map, Israel believes that this must have been done on the basis of whatever remains were present of the original Parker pillar. Egypt contends, for its part, that whatever the reasons for the construction of a new pillar at the Parker location and its different style from the original Parker pillar, the pillar at BP 91(E) marked on the 1915 British Map and photographed by Beadnell had always been a boundary pillar, supporting this conclusion with the indication by Wade that three pillars had been erected between the pillar placed on Jebel Fort and the pillar at the Parker location on Ras Taba at the locations of BP 89, BP 90, and BP 91(E), respectively.

D. *Contentions of the Parties*

1. *Egypt's Contentions*

109. Egypt, in its Memorial, made the following submissions:

In view of the facts, historical evidence, documents and the statement of law referred to in this Memorial; and

Considering that under the Compromis the Parties have requested the Tribunal to decide the location of certain boundary pillars of the recognized international boundary between Egypt and the former mandated territory of Palestine, namely, Pillars 7, 14, 15, 17, 27, 46, 51, 52, 56, 85, 86, 87, 88 and 91; and

Considering further that each Party has recorded in its description cards in Appendix A to the Compromis its position concerning the location of each boundary pillar listed above;

May it please the Tribunal, rejecting all claims and submissions to the contrary, to adjudge and declare that the location of each such boundary pillar as set forth in the Egyptian description cards in Appendix A to the Compromis, as further described and identified in Part VI(D) of this Memorial, is the exact location of such boundary pillar on the recognized international frontier between Egypt and the former mandated territory of Palestine.

These submissions were reaffirmed in Egypt's Counter-Memorial, but the following submissions were set forth in the Egyptian Rejoinder:

. . . Egypt requests the Tribunal to adjudge and declare:

A. That BP 91, identified in the Compromis as being the one remaining pillar on the recognized international boundary between Egypt and the Former Mandated Territory of Palestine following agreed BP 90, is at the location set forth in the Egyptian description card in Appendix A to the Compromis and marked on the ground and is *not* at either of the alternative locations set forth in the Israeli description cards in Appendix A to the Compromis;

B. That the remaining boundary pillars in dispute on the recognized international boundary (as specified in the Annex to the Compromis) are at the locations set forth in the Egyptian description cards in Appendix A to the Compromis and marked on the ground and are *not* at the locations set forth in the Israeli description cards in Appendix A to the Compromis.

110. These two submissions were reiterated during the hearing.

111. Egypt contends that the task of the Tribunal under Article II of the Compromis is to identify the locations of the disputed pillars of the boundary defined in Article II of the Treaty of Peace. In Egypt's contention, the formulation of the boundary between Egypt and Israel as "the recognized international boundary between Egypt and the former mandated territory of Palestine" implies that 24 July 1922 is the critical date at which time the Tribunal must establish the factual location of boundary pillars as representing the legal boundary between Egypt and Palestine. This date, being the date when the Council of the League of Nations adopted the Mandate for Palestine, was selected since it constituted the first date on which the two distinct entities of Egypt and mandated Palestine could be said both to have attained status on the international plane. Egypt contends that this early date is the appropriate one in terms of application of the concept of the critical date. In the course of the proceedings, however, Egypt conceded that 14 May 1948, the date on which the Mandate expired, or any date within the period of the Mandate, could just as well serve as the critical date since the Parties were in agreement that no changes had occurred in the boundary during that period.

112. Egypt alleges that the Tribunal must weigh the claims of the Parties on the basis of the physical, geodesic, cartographic, photographic, documentary, and other evidence of the location of pillars on the ground on the critical date—as against whatever conclusions could be reached on the basis of evidence of the situation prior to the critical date—and in light of the conduct of relevant parties after the critical date, to the extent that such conduct confirms the understanding reached of what the situation was on the critical date.

113. Egypt alleges that the effect of application of the critical date concept is thus to fix the boundary in time and to bring into operation the general legal principles of the stability and finality of boundaries, the succession of States to territory, estoppel, acquiescence, and *de facto* agreement so as to preclude Israel's claims based on application of the terms of the 1906 Agreement.

114. With respect to the Taba area, Egypt contends that the location of BP 91 at "Ras Taba" is at an elevation of 91 metres on the

eastern ridge overlooking Wadi Taba, where remains of the boundary pillar were found in 1981 during the work of the Joint Commission. This location is identified on the relevant description card in Appendix A to the Compromis as BP 91(E).

115. Egypt alleges that this location is consistent with evidence of what the Commissioners in 1906 understood as "Ras Taba" and with the strategic considerations which underlay the negotiations concerning the course of the boundary line. Owen wrote that Ras Taba was "the point where the ridge north of Taba meets the sea". Owen had moreover rejected during the negotiations the Turkish proposal that the line run down the thalweg of the Wadi. Egypt points out that the text of the 1906 Agreement speaks of the line running along the eastern ridge, not in the Wadi. Egypt does not consider the granite knob as part of the eastern ridge, but rather as an isolated feature in the bed of the Wadi.

116. Egypt draws support for its location for BP 91 from the 1915 British Map, which plotted a boundary pillar at the location of BP 91(E) and does not show any further pillar nearer to the shore. Egypt points out that pre-1915 maps do not indicate the location of any boundary pillars on the line except those which were placed at Wade's astronomical stations and used subsequently as points of reference for the delimitation and demarcation of the line. Egypt also considers that pre-1915 maps are not accurate in the sense that the topographical features on the maps are shown by conventional symbols rather than the more precise contour lines produced by the plane table survey methods employed in preparation of the 1915 British Map, even though most of these pre-1915 maps clearly indicate that the boundary line did not end close to an astronomical station at Taba, as Israel contends.

117. Egypt further alleges that a boundary pillar is plotted at the location of BP 91(E) on all maps produced since 1915 showing boundary pillars along the boundary line. The maps submitted by Egypt in this category include the original 1915 British Map, a 1922 oil-concession map based on the 1915 British Map, a reproduction of the 1915 Map made by the Survey of Egypt in 1926, and a revised version prepared on a larger scale by the Survey of Egypt between 1935 and 1938. Egypt noted that the 1917 map and the 1933 Mitchell Map introduced by Israel both show a boundary pillar at the location BP 91(E). A large-scale map including the Taba area and produced by the British War Office in 1943 also plotted a boundary pillar at an elevation of 91 metres at the location of BP 91(E). Large-scale maps produced after the Mandate period, showing the armistice line, also indicate a pillar at BP 91(E), including the map attached to the Compromis.

118. Egypt draws further support for BP 91(E) from lists of surveyed trigonometrical points in the region which identify the location of BP 91(E) as a boundary pillar. A list of triangulation points in the vicinity of Aqaba and a sketch of those positions was found in the archives of the Survey of Egypt, together with a copy of an unsigned letter dated 6 December 1931 addressed to the Acting Director of Surveys of the Survey of Palestine, in response to a request dated 27 November 1931. The sketch, on a scale of 1:40,000, shows triangulated

boundary pillars identified as A.3, B 83, B 85, and B 90. Written in pencil next to these locations, evidently by a different hand, are the labels L 193, L 192, L 191, and L 190, respectively. The list enclosed with the letter gives "provisional final values" for the four boundary pillars plotted on the sketch, plus a boundary pillar at A.4 not shown thereon, with altitudes in feet. For B 90, the values given are: Latitude $29^{\circ}29'36.8''$, Longitude $34^{\circ}54'07.3''$ with an altitude of 298 feet.

119. Egypt also submitted a photocopy of a survey card with the name of Dr. Ball on it, showing the same coordinates as on the 1931 list, expressed however to the nearest hundredth of a second and showing the elevation in metres rather than feet. Egypt alleges that this card was made in 1941, although a witness for Israel testified that Dr. Ball had retired from the Survey of Egypt by 1936. The card also shows that the original coordinates were later revised by someone using a different pen and slightly different handwriting to read: Latitude $29^{\circ}29'35.66''$, Longitude $34^{\circ}54'07.15''$, altitude 91.65 metres. Three sets of grid coordinates, also apparently later added to the card, are also given.

120. Egypt also produced the first edition of Trig List No. 144, "probably produced during 1941-45 and probably before 1943" by a British military survey organisation established in 1941: the Survey Directorate of the General Headquarters Middle East. The list has been described as "a compendium of survey information, some pre-[World War II], some wartime revision. The earliest material is information drawn from the work of the civil Surveys of Palestine and Egypt." The list, consisting of two pages, shows rectangular coordinates of trig points on the Palestine Grid. It gives coordinates and heights for each point to the nearest metre. The last entry on the list shows a "third order" trig point identified as a boundary pillar, labelled 190, with the coordinates Eastings 140 295, Northings 878 478, and height of 91.6 metres. A second edition of this list, consisting of 19 pages, was prepared in 1956, covering a larger area and superseding former trig lists, including the first edition of Trig List No. 144. The same values for boundary pillar 190 are found on page 17 of the second edition of the list.

121. On 10 August 1960, Major General Amin Hilmy II, Commander of the Egyptian Liaison to UNEF, wrote to Lt. General P. S. Gyani, Commander of UNEF, enclosing a list of surveyed points of the international frontier between Egypt and Palestine intended to assist UNEF in its identification of the international frontier. This list included an entry for a boundary mark identified as point L190 with coordinates from the 35th Meridian East of $x = 1043\ 829.86$, $y = 290\ 495.24$, altitude 91.65 metres, in these proceedings, uncontestedly assumed to be equivalent to the values shown on the 1931 list, to those shown on Dr. Ball's survey card for the Egyptian Grid coordinate system, and to those expressed for the point in Trig List No. 144, which used the Palestine Grid system. Egypt alleged that General Hilmy's list would presumably have been transmitted to Israel by UNEF, although no direct evidence for this was produced from UNEF files.

122. The existence of a boundary pillar at the location of BP 91(E) is also supported by a photograph of the pillar made in 1922 by Beadnell,

of the Survey of Egypt, and a photograph from the Israel Government Press Office, dated March 1949. General Hamdy, a witness for Egypt, stated that in 1949 there was only one pillar in the Taba area, not near the sea but up on the mountain at the side of BP 91(E). The testimony of Mr. Yigal Simon, a witness for Israel, that a pillar taken to be a boundary pillar was on the site in 1966-67 was also cited by Egypt in support for its location BP 91(E).

123. Egyptian presence in the Wadi was demonstrated by reference to the establishment of an outpost in 1914 and after 1917 a Frontier Districts Administration post, as well as the guest house outfitted near the granite knob in 1932 and the continuous military presence from 1949 to 1956.

124. Finally, Egypt invoked the description given by J. M. C. Plowden in her book *Once in Sinai* published in 1940, where she writes on page 281: "Shortly after quitting Taba we passed round the base of a high hill upon whose summit a cairn marks the frontier. There is, however, nothing on the beach to indicate the exact moment when we crossed into Palestine."

125. The conduct of Israel with respect to the line in the Taba area is also invoked by Egypt to demonstrate the understanding of the line by the Parties. Egypt notes that Israel withdrew from Sinai, including Taba, in 1957 and established its forces behind the ridge east of Taba. A Background Paper on the Gulf of Aqaba, submitted by the Israel Ministry of Foreign Affairs to the Secretary-General of the United Nations in May 1956, described the frontier between Egypt and Israel as running "from a point south of Umm Rash Rash in a northeasterly direction" that "coincides with the former international frontier between Palestine and Egypt, confirmed by the General Armistice Agreement . . . of 24 February 1949".

126. In the Ras el Naqb area, Egypt contends that the existing pillars at the locations claimed for BP 85, BP 86, and BP 87 are fully consistent with the terms of the 1906 Agreement and the descriptions of the demarcation operations given by Owen and Wade. Wade provided a technical description of how he laid out the line in this area with a chain and prismatic compass in order to comply with the description of the boundary in this area contained in Article 1 of the 1906 Agreement.

127. More importantly, in Egypt's view, its pillar locations are plotted on the 1915 British Map and in subsequent maps referred to above. In addition, Egypt alleges that all maps produced prior to the dispute, including the pre-1915 maps and maps prepared between 1948 and 1982 by the Survey of Israel, show the line as claimed by Egypt and readily distinguishable from the line as claimed by Israel, no matter the scale of the map.

128. The same trig lists as mentioned above contain similar information concerning certain of the boundary pillars in this area. For instance, the list accompanying the 1931 letter refers to a station B 85, identified also on the sketch as L 191. The equivalent coordinates for this point also appear in Dr. Ball's survey cards, both editions of Trig List No. 144, and General Hilmy's letter. The coordinates thus given

correspond to BP 85(E). Similarly, the coordinates for BP 87(E) appear in Dr. Ball's survey cards as a boundary mark 87 or L 113 and also in General Hilmy's letter, but in neither occasion with a given altitude.

129. Egypt also invokes Israeli conduct in this area since the 1949 Armistice, in particular the withdrawal in 1957 behind the line indicated by the pillars now asserted by Egypt as representing the boundary. In addition, Egypt notes that UNEF forces were deployed in the area and presented three witnesses who had participated in the Yugoslav battalion of UNEF stationed in the Ras el Naqb area. Two of these witnesses testified that their camp, patrol routes, and an observation post in the area were all located to the east of the line now claimed by Israel, which would have been inconsistent with Israel's requirement at the time that UNEF only be deployed west of the armistice line, i.e. on Egypt's side of the line.

130. Egypt moreover contends that BP 88 should be placed at the location identified as BP 88(E) since that corresponds to the coordinates and the angle of the turning point of the line derived from the 1935-38 map, which Egypt alleges was the rationale for the agreement of the Parties in the Joint Commission to erect a new pillar at that location. Egypt contends in this connection that Article 1 of the 1906 Agreement does not provide guidance for the location of this pillar between BP 89 and that on Jebel Fort as, in Egypt's interpretation, the text does not indicate that the "eastern ridge" or Wadi Taba extend any further than a point about 600 metres north-west of BP 89.

131. With respect to the nine disputed pillars north of the Ras el Naqb area, Egypt bases its claimed locations on a variety of reasons.

132. For disputed boundary pillars nos. 7, 14, 15, and 17, Egypt does not find any physical evidence at the places it believes the pillars should be located and disputes the relevance of the UNEF markers or other alleged remnants invoked by Israel at the corresponding disputed locations. The basis for Egypt's claim at each of these locations is the indication of a boundary pillar on its 1935-38 map of the area.

133. Egypt states that the 1935-38 map, as well as all other pre-Peace Treaty maps, uniformly show a straight line between BP 3 and BP 14. BP 7(E) and BP 14(E) both are located on this straight line, whereas the locations claimed by Israel diverge from this line. Egypt also alleges that the Joint Commission agreed to apply the criterion of straightness for the location of boundary pillars in this area.

134. Egypt determined its location for BP 15(E) by measuring the angle of the change in direction of the line at BP 14 shown on the 1935-38 map as well as the distance from the mark for BP 16, and then applying that data by electronic measuring means to the ground. Egypt alleges that this location is confirmed by assessing the coordinates for the pillar indicated on the map.

135. Egypt's case for BP 17(E) is based again on the 1935-38 map, which it alleges shows a boundary pillar at a certain distance on the prolongation of the straight line drawn from BP 19 through BP 18 towards the location for BP 17. By measuring the distance shown on the

map and applying it along the straight line on the ground, Egypt alleges that it has established the location for BP 17(E).

136. For BP 27(E), Egypt bases its claim on a cement trig point marker found at the location in 1981 and the information contained on one of Dr. Ball's survey cards, Trig List No. 144, and the list attached to the Hilmy letter, all of which indicate that the boundary marker at this location was used as a trig point.

137. For BP 46, 51, and 56, Egypt bases its claims on remnants of the original pillar found at each of these locations piled a few metres from the pipe marker or remnants invoked by Israel. Egypt contests the relevance of such pipe markers.

138. Egypt's cases for BP 46(E) and BP 56(E) are based on the pile of stones found at each site in 1981. Egypt also alleges that BP 46(E) lies on the prolongation of a straight line extended from BP 48 through BP 47 to BP 46(E), as shown on the 1935-38 map.

139. Egypt's claim for BP 51(E) is based, first of all, on measurements of distances and angles derived from the 1935-38 map and applied to the ground with electronic devices. Egypt also alleges that the location thus derived is confirmed by the presence of remnants of the original boundary pillar found at the site.

140. Finally, Egypt's case for BP 52(E) is based on the depiction on all pre-1982 maps of a straight line in this region between BP 51 and BP 53. Egypt derives its location on the straight line from measurements taken from the 1935-38 map and applied to the ground between disputed location BP 51(E) and agreed BP 53.

2. *Israel's Contentions*

141. In its Memorial, Israel requested the Tribunal:

to decide the location of the boundary pillars of the recognized international boundary between Egypt and the former mandated territory of Palestine specified in paragraph 1 of the Annex to the Compromis

(i) as being at the locations advanced by Israel and indicated in Appendix A to the Annex of the Compromis and/or

(ii) as not being at the locations advanced by Egypt and indicated in Appendix A to the Annex of the Compromis.

In its Counter-Memorial, Israel submitted that:

The Tribunal should decide that:

Principal submissions:

1. *As regards BP 91: . . .*

a. Egypt has abandoned its claim to a location for BP 91 at the point identified by Egypt as BP 91 E in the relevant Egyptian description card in Appendix A of the Compromis;

b. The claim by Egypt to a location for BP 91 at a point other than BP 91 E is not admissible;

c. In the absence of any admissible claim by Egypt to a location for BP 91 conflicting with Israel's claim to a location for BP 91 at either of the locations identified on the Israeli description cards as BP 91 I (G.K.) or BP 91 I (B.T.), the location of BP 91 is at one or the other of the latter locations.

2. *As regards the Boundary Pillars other than BP 91:* for the reasons set out in Chapters 9 of the [Israeli Memorial] and Part V of the present Counter-Memorial,

the Boundary Pillars other than BP 91 are at the locations advanced by Israel and indicated in Appendix A to the Annex of the Compromis.

3. Further or in the alternative, as regards all the disputed Boundary Pillars, they are not at the locations advanced by Egypt and indicated in Appendix A to the Annex of the Compromis.

Alternative submission:

As regards all the Boundary Pillars specified in paragraph 1 of the Annex to the Compromis,

(i) the pillars are situated at the locations advanced by Israel and indicated in Appendix A to the Annex of the Compromis and/or

(ii) the pillars are not situated at the locations advanced by Egypt and indicated in Appendix A to the Annex of the Compromis.

Israel reaffirmed these submissions at the end of its Rejoinder and during the hearing.

142. With respect to the task of the Tribunal, Israel contends that the Tribunal must decide, in conformity with Article II of the Compromis, the course of the legal boundary adopted by the Parties in Article II of the Treaty of Peace and express the line in terms of the location of boundary pillars where these are in dispute. The legal boundary, according to Israel, is “the recognized international boundary” which separated Egypt from the mandated territory of Palestine.

143. Israel alleges that Great Britain, as mandatory power in Palestine, and Egypt had both explicitly recognized in 1926 the line defined in 1906 as that boundary, and that Great Britain had assured Egypt that its boundary would not be affected by the delimitation of the boundaries of Palestine. By virtue of a *renvoi*, or referral, to the 1906 Agreement made by Egypt and Great Britain in 1926, and in the absence of any explicit agreement between Egypt and Great Britain defining the frontier of Egypt and Palestine, Israel contends that the Tribunal is, pursuant to the Treaty of Peace and the Compromis, referred to the terms of the 1906 Agreement to determine the course of the legal boundary. For Israel, any pillars or pillar remains which are at variance with the terms of the 1906 Agreement are of no significance since no pillars of whatever nature, type, or designation were ever recognized as boundary pillars during the period of the Mandate, which Israel agrees is the legally relevant period according to the Treaty of Peace for the definition of the boundary between Egypt and Israel. Israel further contends that the several conventions between the Parties related to the boundary, with their implicit reference to the 1906 Agreement, are sufficient for the Tribunal’s task and that the Egyptian reliance on general principles of law is unnecessary.

144. In the Taba area, Israel contends that BP 91 is on the granite knob at a location intervisible with BP 90, identified on the relevant description card. This location, while approximate in the sense that it falls within a small zone near to the shore intervisible with BP 90, is supported by its proximity to the geographical feature identified by Israel as “Ras Taba”, being the promontory or cape on which the granite knob is located. The combination of these factors satisfies the conditions laid down by the 1906 Agreement: the description of the course of the boundary line contained in Article 1 as “at the point of Ras

Taba on the western shore of the Gulf of Akaba” and the requirement of intervisibility between pillars set forth in Article 3.

145. Further support for this location is drawn from the contemporaneous reports made by Owen and Wade in 1906 and 1907 respectively regarding Ras Taba and in the description given by Shoucair in his 1916 book that the 91st pillar was placed “on a small hill” which the Commissioners had named “Ras Taba”.

146. Israel also draws support for BP 91(I) on the granite knob from several maps produced soon after the demarcation of the boundary in October 1906. The map attached to Owen’s Report is captioned “map annexed to the Agreement of 1st October 1906”. This map, as well as the map attached to the Wade Report, the 1909 Turkish military map, and the 1916 Turkish-German map, show the line ending at a triangle, which in the context could only represent Wade’s astronomical station A.1 or B.1. Israel contends that the triangle represents B.1.

147. Israel finds confirmation of its claim for BP 91 on the granite knob in the description of Egyptian boundaries contained in the *Statistical Yearbook of Egypt for 1909*, which reads in relevant part:

East.—The boundary follows the line laid down in 1907 from Rafa, near El Arish, to the head of the Gulf of Aqaba at Taba (lat. 29°29’12” N. and long. 34°55’05” E., granite knob on the shore). Thence down the Red Sea . . .

148. Israel alleges that additional evidence indicating a Turkish police or frontier post down in the Wadi during the years immediately following the 1906 Agreement supports the conclusion that the 1906 line ended at BP 91(I) on the granite knob. In this connection, Israel cites the guidebook by Meistermann, *Guide du Nil au Jourdain*, published in 1909 (repeated in 1913), at page 190:

On laisse à gauche le ouâdi Mezarik (1h. 10), puis on arrive au ouâdi Tabah (15 min.), qui possède un puits d’eau saumâtre entouré de quelques palmiers doums, et une citerne en bonne maçonnerie. Cet endroit acquit une certaine notoriété en 1906. Les troupes turques l’avaient occupé, malgré les protestations des Anglais; définitivement il est resté dans le territoire égyptien. Mais en deçà de l’oasis passe la nouvelle frontière de l’empire ottoman, sur laquelle veille un poste de soldats turcs, casernés dans un petit fort.

La route fléchit vers l’est et contourne un petit cap, râs el Masri, traversé par la gorge du naqb es Sath (1 h.). Dans la direction du nord court une chaîne de basalte, de granit et de porphyre d’une coloration remarquable . . .

A similar description found in Baedeker’s *Palestine and Syria* (5th ed. 1912), also invoked by Israel, reads at page 213:

In about 1 hr. 10 min. we reach the *Wâdi Mezârik*; 1/4 hr. the *Wâdi Tâba*, with a bitter spring and dûm-palms. Close by is a cistern of red stone. Just beyond is the Egyptian-Turkish frontier, with a Turkish military post. The *Râs el-Masri*, a promontory of dark stone, is rounded (1 hr.) . . .

Israel suggests that a rest house located next to the granite knob and prepared from “an old building” for visiting officials by the Egyptian Frontier Districts Administration in 1932-33 may be a reference to the Turkish military post noted by Meistermann and Baedeker. Further, Israel cites the April 1913 *Sudan Intelligence Report*, a centralized British compilation of reports from agents throughout the Middle East, where on page 6 “[i]t is reported that . . . a Pasha with two guns have

arrived at Akaba. The guns are said to have been placed in position at Taba and on J. Bereio.”

149. Finally, Israel submits a photograph published in June 1946 in *Western Arabia and the Red Sea*, part of the Geographical Handbook Series prepared by the British Naval Intelligence Division, showing the rest house near the granite knob and a “cairn”, which itself, although not alleged to be a boundary pillar, is alleged to be related to the boundary and intervisible with BP 90.

150. Israel also contends, in the alternative, that BP 91, if it is not found by the Tribunal to have been located at the granite knob, must have been located at the site near Bir Taba identified in the description cards, which site is also intervisible with BP 90.

151. Apart from satisfying the conditions of the 1906 Agreement, Israel contends that the alternative location is supported by several descriptions of the boundary made by officials of the British Government during the Mandate period which all mention “Bir Taba” in conjunction with the boundary line. The first of these descriptions is found in another volume of the Geographical Handbook Series in December 1943 on *Palestine and Transjordan*. The book describes the southern and south-western boundaries of Palestine at page 1 as extending “[f]rom Akaba along the gulf to Bir Taba and then north-westwards to the Mediterranean immediately north-west of Rafa . . .” It likewise describes at page 522 the Sinai-Palestine frontier in the vicinity of Aqaba as running “north-west from Bir Taba, about 8 miles south-west of Akaba round the coast of the gulf”. Furthermore, on 16 September 1945, in response to an inquiry from the Colonial Office prompted by a request for information from the Anglo-Iranian Oil Company, a Foreign Office official minuted his response regarding “the actual length of the coast line in the Gulf of Aqaba deemed to be Palestine territory” by stating that “[t]he Palestinian coast line on the Gulf of Aqaba extends from a point two miles west of the village of Aqaba as far as Bir Taba . . . The frontier between Egypt and Palestine follows the former boundary between Egypt and the Ottoman Empire, as drawn in 1906 . . .” On 17 September 1945, the Map Section of the Research Department of the Foreign Office issued an inter-departmental memo to the Eastern Department describing the Palestine-Transjordan boundary as running along the coast west and south-west “a distance of 6 1/2 miles to Bir Taba”, where the Palestine-Sinai boundary leaves the coast and runs in a north-west direction. A Note describing the boundaries in the neighbourhood of Aqaba was attached to the minutes of a meeting held on 30 October 1945 in the Colonial Office. The Note states that the Palestine-Egypt boundary follows the old boundary between Egypt and the Ottoman Empire. “It leaves the Gulf of Aqaba at Bir Taba and then goes north-westwards to the Mediterranean.”

152. In the Ras el Naqb area, Israel contends that the existing pillars on the ground are not properly situated in respect to the geographic features of Wadi Taba and its eastern ridge, Jebel Fort, Jebel Fathi Pasha, and the Mofrak, invoked in the description of the course of the line contained in Article 1 of the 1906 Agreement. According to

Israel, the pillar locations claimed by Egypt in this area are not on the boundary line because they do not overlook Wadi Taba from the east, and are not located on Jebel Fort or near Jebel Fathi Pasha as stipulated in the 1906 Agreement. Moreover, Israel contends that the burden of proving the authenticity of the existing pillars lies with Egypt.

153. Israel alleges that Wadi Taba extends nearly as far north as the edge of the Ras el Naqb plateau near to the Nekhl road and that, according to the terms of Article 1 of the 1906 Agreement, the disputed pillars placed from Ras Taba up to or close to Jebel Fort must have been on the heights overlooking the Wadi, as are the pillars at the agreed locations of BP 89 and BP 90. Israel contends that Wadi Taba, in its upper reaches, follows a drainage line which does not bear any name on any maps. Israel further alleges that it could not be either of the tributaries identified on some maps as Wadi Gasairiya or Wadi Haneikiya. Support for this contention is drawn from Owen's understanding of the extent of Wadi Taba as shown by his "rough map" of the area included with his letter to Lord Cromer of 3 June 1906 and from his description of nearby features, such as Jebel Fathi Pasha, overlooking part of Wadi Taba.

154. The feature of Jebel Fort, in Israel's view, overlooks the beginning of Wadi Taba and is represented on the map attached to the Wade Report of 1907 at Israel's location for BP 86. Israel also argues that its location is on the real Jebel Fort since the feature better satisfies the description of a fortress.

155. Likewise, the feature of Jebel Fathi Pasha, in Israel's view, dominates the Ras el Naqb area and coincides on the Wade Map with Israel's location for BP 85. Further support for this assertion is found in Owen's and Wade's descriptions of the area. While the 1906 Agreement stipulates that the line passes within 200 metres of the summit of Jebel Fathi Pasha and the Owen and Wade Reports indicate that two pillars were erected in this locality, Israel, after having added a pillar location (BP 87(I)) south of its location for Jebel Fort, now claims only one pillar location in order to respect the number of pillars agreed to by the Joint Commission.

156. The locations of BP 88(I) and BP 87(I) were selected in light of the description in Article 1 of the 1906 Agreement that the line from Ras Taba to Jebel Fort "follows along the eastern ridge overlooking Wadi Taba"

157. In response to Egypt's reliance on the deployment of UNEF forces, Israel contends that this is evidence only of the course of the armistice line which was established without prejudice to the political frontier between Egypt and Israel.

158. With respect to the pillars north of the Ras el Naqb area, Israel bases its claims on a variety of reasons.

159. Israel's claim for BP 7(I) is based on concrete remains of an authentic pillar and the proximity of a UNEF barrel marker, found about 9 metres west of the base of the hillock on which BP 7(I) is located. Israel alleges that UNEF markers constitute strong, though not irrefut-

table, evidence of the boundary. Israel also alleges that all pillars in this area were agreed to on the basis of remnants and not straight lines.

160. Israel's case for BP 14(I) is based on the discovery at the site in 1981 of a concrete-filled pipe of the same type agreed to indicate the locations of BP 8, 11, and 16 and all apparently UNEF pipe markers. Israel also alleges that BP 14(I) was a boundary pillar/trig point coordinated by the Survey of Egypt and included as a boundary pillar location in the Hilmy letter.

161. For BP 15(I) and BP 17(I), Israel's claims are based on slight remnants of an authentic boundary pillar and corroborated by unspecified information drawn from a UNEF survey.

162. Israel's case for BP 27(I) is based on an inference drawn from a 1955 Israeli survey description card that the authentic pillar was next to the cement trig point marker found on the site in 1981 and advanced by Egypt as BP 27(E). The survey card contains a sketch of the cement trig point and the old pillar. The pillar shown on the sketch was not at the site in 1981. The location of BP 27(I), taken to be the location of the old pillar, was derived by extending lines through multi-layered concrete pyramid markers placed along the armistice line in this area by Israel before 1956. BP 27(I) is the point where these lines intersect.

163. Israel's claimed locations at BP 46(I), BP 51(I), BP 52(I), and BP 56(I) are based on various steel pipes or the remains of their concrete bases erected by Israel in the early 1960s to mark the armistice line. Israel alleges that such steel pipes marked the agreed locations of BP 42, 43, 44, 49, 53, and 55. Israel disputes the relevance of the piles of stones found near to the pipe markers at BP 46(I), BP 51(I), and BP 56(I) on the grounds that no base of an original pillar was found under the stones to indicate the location of the original pillar, as was the case at other agreed locations. Israel alleges that the original base was used in each instance for the pipe markers and that the stones were displaced for this purpose.

II. REASONS FOR THE AWARD

A. *Preliminary Issues*

1. *The Task of the Tribunal*

164. Article II of the Compromis states:

The Tribunal is requested to decide the location of the boundary pillars of the recognized international boundary between Egypt and the former mandated territory of Palestine, in accordance with the Peace Treaty, the April 25, 1982 Agreement, and the Annex.

165. The relevant Article II of the Treaty of Peace of 26 March 1979 stipulates, *inter alia*:

The permanent boundary between Egypt and Israel is the recognized international boundary between Egypt and the former mandated territory of Palestine, as shown on the map at Annex II, without prejudice to the status of the Gaza Strip. The Parties recognize this boundary as inviolable . . .

166. Article IV(3) of the Treaty of Peace provides that a “Joint Commission will be established to facilitate the implementation of the Treaty, as provided for in Annex I [concerning Israeli withdrawal and security arrangements]”.

167. The 1982 Agreement specifies that “[r]epresentatives of the United States Government will participate in the negotiations concerning the procedural arrangements which will lead to the resolution of matters of the demarcation of the International Boundary between Mandated Palestine and Egypt in accordance with the Treaty of Peace, if requested to do so by the parties”. (See also Article IV(3)(d) of the Appendix to Annex I to the Treaty of Peace.)

168. The demarcation matters referred to in the 1982 Agreement are reduced in the Annex to the Compromis to the location of fourteen “boundary pillars of the recognized international boundary between Egypt and the former mandated territory of Palestine” (see also the preamble to the Compromis).

a. *Meaning of the phrase “the recognized international boundary between Egypt and the former mandated territory of Palestine”*

169. The formula concerning “the recognized international boundary between Egypt and the former mandated territory of Palestine” originated in the 1978 Camp David Accords and was repeated, in a slightly revised form, in the 1979 Treaty of Peace and the 1986 Compromis. This description of the boundary is not very clear or specific, particularly the word “recognized” is in the context ambiguous.

170. As has been stated above in paragraph 143, Israel submits that both Great Britain, as mandatory power, and Egypt in 1926 explicitly recognized the line defined in 1906 as the boundary between Egypt and Palestine. By virtue of this *renvoi* to the 1906 Agreement, Israel contends, the Tribunal is referred to the line defined in the 1906 Agreement, not to the boundary pillars established pursuant thereto. The Tribunal cannot share this view. First of all, the expressions “defined in 1906” and “defined by the 1906 Agreement”, which were used in British and Egyptian declarations in 1926, do not have a particular technical meaning in the sense that they refer only to the description of the boundary line in the Agreement to the exclusion of the demarcation of the boundary also expressly provided for by the 1906 Agreement. It can hardly have been the meaning of the declarations of Great Britain and Egypt in 1926 that the demarcation of the boundary, as it took place in 1906-07, could be disregarded. It is important in this respect that both Great Britain and Egypt were well acquainted with the demarcated boundary. Egypt had taken part in the demarcation of the boundary. Both States had made surveys and produced maps of the region, both before and during the time of the British Mandate over Palestine. The 1915 British map and the 1926 and 1935-38 Egyptian maps even indicate the location of boundary pillars. Neither State ever questioned the demarcated line.

171. It would also hardly be understandable why the Treaty of Peace and the Compromis should refer to “the recognized international

boundary between Egypt and the former mandated territory of Palestine” if reference could just as well have been made directly to the 1906 Agreement. Moreover, Israel’s contention that the boundary line proposed by it corresponds to “the legal line” as defined by the 1906 Agreement, while the Egyptian line, which in its southern part is based on boundary pillars, deviates from the Agreement, has not been confirmed by the evidence submitted to the Tribunal, as will be shown later in the Award.

172. The Tribunal will therefore have to decide the locations of the fourteen boundary pillars on the basis of the boundary between Egypt and the former mandated territory of Palestine as it was demarcated, consolidated, and commonly understood during the period of the Mandate (29 September 1923–14 May 1948, also referred to as “the critical period”). Although both Parties referred to 24 July 1922 as the starting date of the Mandate, the Tribunal considers that 29 September 1923, the date of the formal entry into force of the Mandate, is the appropriate date in the circumstances.

173. In so far as there are doubts as to where the boundary pillars stood during the period of the Mandate or for confirmation of its findings, the Tribunal, for its part, will also consider the 1906 Agreement, but merely as an indice among others, as to what was the situation on the ground during the critical period. In the same way, the Tribunal will consider any relevant evolution with regard to the delimited and demarcated boundary prior to the critical period.

174. In this context it is worth mentioning that even when the Annex to the Compromis refers to “the final boundary pillar No. 91” it adopts literally and without qualifications the following words from the translation of the 1906 Agreement included in Owen’s General Report: “at the point of Ras Taba on the western shore of the Gulf of Akaba”.

175. Events subsequent to the critical period can in principle also be relevant, not in terms of a change of the situation, but only to the extent that they may reveal or illustrate the understanding of the situation as it was during the critical period. However, in the present case the Tribunal has felt it to be of only limited use to consider events belonging to the troublesome period after the termination of the Mandate and during which period also the nations involved were not the same as before.

b. Restrictions imposed upon the Tribunal concerning the locations advanced by the Parties

176. The Annex to the Compromis provides further that the Tribunal is not authorized to establish a location of a boundary pillar other than a location advanced by Egypt or by Israel and recorded in Appendix A. The Parties agree that, if the evidence of one Party is not conclusive in itself, the Tribunal has to weigh the evidence of one Party against that of the other, and the decision will be in favour of the Party with the “better” claim. However, it has also been proposed by Egypt, with Israel in opposition, that this power to decide according to the “relative weight” of evidence may be translated into physical distance,

namely: if there is no proof for locations A and B claimed by the respective Parties, but there is proof for location C which is physically nearer to A than to B, the Tribunal may attribute this evidence to A and consider this as “preponderance of evidence”. The Tribunal does not consider it to be either logical or reasonable to draw such conclusions. The “preponderance of evidence” rule means that the Tribunal may find for location A in the above example if the evidence for A is stronger than the evidence for B. But if there is no evidence for A, it cannot be replaced by evidence for C, even if C is physically nearer to A than to B.

177. The Tribunal must also consider the meaning of the word “address” in the following sentence in paragraph 5 of the Annex: “The Tribunal . . . is not authorized to address the location of boundary pillars other than those [fourteen] specified in paragraph 1.” Does this mean that the Tribunal may not discuss any other pillar, or does it mean merely that the Tribunal may not adopt any decision concerning other pillars? The Tribunal holds the second interpretation to be the correct one. The word “address” appears also in paragraph 1 of the Annex. There, the Parties state that the location of pillars 26 and 84 depends on the location of pillars 27 and 85 respectively, and that therefore “the Tribunal shall not address the location of boundary pillars 26 and 84”. Certainly, in this context the prohibition to “address” those pillars concerns only the adoption of a decision on their location. It is only logical that the word “address” should be given the same interpretation in two paragraphs of the same Annex. Hence, the Tribunal is not precluded from discussing “other” locations, but it may not adopt any decision on their location. In particular, the Tribunal has not the task to determine the course of the boundary from BP 91 to the shore and beyond.

2. *The admissibility of Egypt’s claim for BP 91(E)*

178. Egypt produced with its Memorial the so-called Parker photographs (see paragraphs 105-108 above) and submitted that they established the location of BP 91(E), because the pillar shown therein was at or in the immediate vicinity of BP 91(E). Israel could conclusively demonstrate that the Parker photographs are not related to BP 91(E). They show instead a pillar erected 284 metres apart from the location BP 91(E) in horizontal distance and 64 metres in vertical distance. Israel argues that Egypt, by claiming a location for BP 91 at the site of the Parker pillar, had abandoned its claim to BP 91(E) and hence to any location of which the Tribunal is permitted to take cognizance. In procedural terms, Israel in effect asks the Tribunal to declare that the Egyptian claim for BP 91(E) is no longer admissible because Egypt was now asking for another location and that, in the absence of an admissible Egyptian claim to a location for BP 91, the Tribunal must find in favour of one or the other of the Israeli locations.

179. Egypt states that it is a blatant distortion of Egypt’s position to maintain that Egypt has abandoned its claim to BP 91(E). In its Memorial, Egypt submits that the Tribunal should “adjudge and declare that the location of each such boundary pillar as set forth in the Egyptian description cards in Appendix A to the Compromis . . . is the exact

location of such boundary pillar on the recognized international frontier". In the final paragraph of the Egyptian Counter-Memorial, Egypt reaffirms its "Submissions" in the Memorial. And once again in the "Submissions" in the Egyptian Rejoinder, Egypt requests the Tribunal to adjudge and declare that "BP 91 . . . is at the location set forth in the Egyptian description card in Appendix A to the Compromis".

180. Egypt submits that at the time when the Memorial was prepared, Egypt was unable to identify precisely where, on the eastern ridge overlooking Wadi Taba, the site of the original pillar shown in the photographs was. This explains why, in the Memorial, the Parker photos were cited as demonstrating conclusively that neither of the claimed Israeli locations for BP 91 could be correct and as indicating the existence of a pillar "at or in the immediate vicinity of the location indicated by Egypt".

181. It follows from these contentions that Egypt, when it submitted with its Memorial the Parker photographs, was erroneously of the opinion that the Parker pillar stood at or in the immediate vicinity of the location of BP 91(E). When it realized its error, however, it reiterated in the Counter-Memorial, in the Rejoinder, and at the oral proceedings its Submissions made in the Memorial. The location of BP 91(E) falls undoubtedly within the scope of all these Submissions. Under these circumstances, there is no reason to disregard Egypt's claim for BP 91(E). Evidently, the Tribunal is not authorized to decide on the location of the Parker pillar.

B. *The Fourteen Pillar Locations*

1. *The Nine Northernmost Pillars*

182. The Parties have neither in their written nor in their oral pleadings put much emphasis on the nine northernmost disputed pillars nos. 7, 14, 15, 17, 27, 46, 51, 52, and 56. This lack of attention is understandable in light of the fact that the distances between the disputed pillar locations are very small. In four instances the disputed pillar locations are less than six metres apart, in another four between 34 and 65 metres, and in one case about 145 metres. In only two of these cases does the difference of the respective locations create a divergence of more than 20 metres between the boundary lines claimed by Egypt and Israel. In addition, the nine pillars are situated in an uninhabited desert region where apparently no essential interests of the Parties are involved and little evidence was available to assist the Parties or the Tribunal in the establishment of the pillar locations. Moreover, despite the Tribunal's request, the Parties did not even succeed in producing a coherent large-scale map showing the disputed locations of the nine pillars.

183. The facts and contentions with regard to these nine pillar locations submitted during the written and oral proceedings proved to be largely inconclusive. The Tribunal must take into account the relative strength of the titles invoked by the Parties, as stated in paragraph 176 above and as was done by the arbitrator in the *Island of Palmas* case (2 RIAA 869-70).

184. The Parties base their respective claims on several types of evidence whose relative weight must be examined. First, for most of the disputed pillar locations, one or the other Party alleges the existence of remnants of original boundary pillars. In addition, other types of markers, some erected by UNEF and others by the Survey of Israel during the 1950s and 1960s, are alleged by Israel to indicate the boundary pillar locations in several places. In no case of alleged remnants of original pillars, however, could the Tribunal find sufficient evidence demonstrating that the loose stones considered as remnants actually marked the location of an original boundary pillar, even if it is accepted that the stones might have come from original boundary pillars. As to UNEF markers or markers erected by the Survey of Israel, the Tribunal similarly finds no sufficient evidence as to the accuracy of their placement or certainty of their origin. Second, in the absence of alleged remnants or other physical markers, Egypt bases its claims on map evidence. Egypt systematically derives information concerning coordinates, elevation, and distances regarding its disputed pillar locations from its 1935-38 map of the Sinai. The Tribunal does not consider these map-based indications to be conclusive since the scale of the map (1:100,000) is too small to demonstrate a location on the ground as exactly as required in these instances where the distances between disputed pillar locations are sometimes only of a few metres. By way of illustration, it is sufficient to recall that on a map of the scale of 1:100,000, 1 millimetre on the map represents 100 metres on the ground. On the other hand, maps can be of some assistance, for instance where they show straight lines through a number of boundary pillars. They will be taken into consideration in this respect.

185. The Parties in some cases also refer to the terms of the 1906 Agreement and the Owen and Wade Reports on the delimitation and demarcation of the boundary. As was stated in paragraph 173 above, the Tribunal considers the 1906 Agreement in cases of doubt as to where boundary pillars stood during the critical period. The 1906 Agreement and the two Reports, however, contain little relevant information concerning these nine pillar locations. For instance, the fact that the 1906 Agreement and the two Reports mention that some of the disputed boundary pillars were set at locations of Wade's astronomical stations (BP 27 on A.11, BP 46 on A.9 *bis*) is not helpful. Even if it were possible to translate accurately the old coordinates of the astronomical stations given by Wade into exact locations on the ground today, this would not help distinguish between the claims of the Parties at these locations, as they are literally next to each other. Neither does the requirement of intervisibility of boundary pillars, stipulated by Article 3 of the 1906 Agreement, lead to any results since no undisputed information as to intervisibility was given to the Tribunal. The Parties did not in fact put any decisive weight on the question of intervisibility in respect of these northern pillars. The 1906 Agreement and the Owen and Wade Reports are thus relevant only as to their indications concerning straight lines drawn through a number of boundary pillars.

186. In two cases (BP 14 and BP 27), the Parties assert that their locations coincide with a trig point identified as a boundary pillar. The

Tribunal will take this evidence into account, but only found it to be determinative in one case (BP 14).

187. Where no other relevant evidence for a pillar location has been produced by the Parties, the Tribunal will, in a subsidiary way, consider which of the claimed locations is on or closest to a straight line extended through adjacent agreed pillars, and decide on that basis. This subsidiary criterion seems legitimate in cases where the Joint Commission of 1906 intended to establish a straight line through a number of boundary pillars (see paragraph 53 above) and in view of the fact that it was the aim of the parties to the 1906 Agreement that the boundary should run approximately straight from Rafah to a point on the Gulf of Aqaba (see paragraphs 29, 32-34 above). The fact that the parties to the 1906 Agreement spoke of an "approximately" straight line (see paragraphs 32 and 33) and that they did not in fact achieve an exactly straight line, is no argument against choosing the location which is closer to the straight line. If it is impossible to ascertain the original location of a pillar and if no other indications are available, the straight line is the criterion best corresponding to the intention which was at the basis of the 1906 Agreement. The best means at the disposal of the Tribunal to ascertain which pillar location is on or closer to the straight line are, in the view of the Tribunal, the description cards supplied by the Parties in Appendix A to the Compromis. The description cards give indications as to straight lines only on one side of the disputed pillar locations, not on both sides. The Tribunal had to rely on the straight lines extended through adjacent pillars rather than on the straight line from Rafah to Taba since the position of the disputed pillar locations could not be exactly identified relative to this straight line for want of a coherent large-scale map which the Parties did not succeed in producing for the Tribunal.

a. *Boundary Pillar 7*

188. For BP 7 the Parties dispute the significance of map evidence and certain remnants, which, as has been stated, cannot be considered as decisive. The Tribunal notes that according to the 1906 Agreement the boundary line was to proceed straight between astronomical stations A.13 (BP 3) and A.11 (BP 27). The maps presented to the Tribunal show, however, that the line between these two points is not in fact perfectly straight, but forms a slight irregular curve. The imperfect nature of this stretch of the boundary is implicit from the contentions of the Parties and is confirmed by Wade's description of the techniques he employed in this area for the placement of the original telegraph poles. The Tribunal will therefore decide on the basis of straightness relative to neighbouring agreed pillars as shown on the relevant description cards. The description cards for BP 7(E) and BP 7(I) show that there is an absolutely straight line connecting the Egyptian location for BP 7(E) to BP 10, the angle at BP 8 being $180^{\circ}00'00''$, while the angle at the same location on Israel's card is $179^{\circ}06'17''$. The Tribunal therefore decides in favour of Egypt's location BP 7(E).

b. *Boundary Pillars 14 and 15*

189. The Tribunal considers it appropriate to consider these two consecutive pillar locations together. In both instances, the Parties again disagree on the significance of map evidence and certain remnants or other physical markers. For BP 14, however, the Tribunal notes that the coordinates of a boundary pillar in this area are indicated on the list of coordinates attached to the letter of General Hilmy of 10 August 1960. This list, prepared by Egypt, gives the coordinates for trig point L 174, identified as a frontier pillar. The coordinates on the list do not match the coordinates asserted by Egypt in its pleadings for BP 14(E) but instead seem to coincide with BP 14(I). The Tribunal therefore decides in favour of Israel's location BP 14(I).

190. For BP 15, in the absence of any other relevant criterion, the straight line relative to neighbouring pillars is decisive, as was the case for BP 7. Having decided in favour of Israel's location for BP 14, it follows from the description cards that Israel's location BP 15(I) is closer to the straight line between BP 14(I) and the agreed location of BP 16. The Tribunal therefore decides in favour of Israel's location BP 15(I).

c. *Boundary Pillar 17*

191. For BP 17, the Parties also disagree on the significance of map evidence and certain remnants found on the ground. The straight line is again the only relevant criterion on which the Tribunal can rely. The only data available to the Tribunal to determine the relative straightness of the line are the angles at BP 18 shown on the respective description cards for BP 17. The angle is $180^{\circ}14'19''$ on the Egyptian card and $179^{\circ}33'18''$ on the Israeli card. Egypt's location BP 17(E) is therefore slightly closer to the straight line than Israel's location. The Tribunal therefore decides in favour of Egypt's location BP 17(E).

d. *Boundary Pillar 27*

192. With regard to BP 27, Egypt's and Israel's locations are only 1.77 metres apart. Here the Parties dispute the significance of a trig point marker. Egypt's location BP 27(E) is based on a cement trig point marker found on the site in 1981 and allegedly identical with trig point L 172 identified as a boundary pillar on one of Dr. Ball's survey cards and on the list attached to General Hilmy's letter. Israel, on the other hand, bases its claim on a Survey of Israel description card from 1955 for its trig point 559 Q. The card contains an illustration showing next to the cement trig point marker a masonry construction identified as an old boundary pillar, which in Israel's opinion is the correct location of BP 27. Neither the cement trig point nor the masonry pillar exist any longer. As no further evidence is available, the Tribunal, on the basis of these submissions, has no possibility to ascertain which of the two locations is the correct one. It has therefore to rely on its subsidiary criterion, the straight line. As the Egyptian location is closer to the straight line, it decides in its favour.

e. *Boundary Pillar 46*

193. In the case of BP 46, the Parties dispute the significance of a pile of loose stones near to a modern pipe marker. In these circumstances, the straighter line is again the only adequate criterion for the decision. Egypt contends that BP 46 lies on the prolongation of a straight line extended from BP 48 through BP 47 to BP 46, as shown on the 1935-38 map, and alleges that its location BP 46(E), based on a pile of loose stones, is on such a straight line. Israel, for its part, points to the fact that the description cards demonstrate that its location BP 46(I) is closer to the straight line asserted by Egypt than Egypt's location BP 46(E). In fact, the description cards for BP 46 show that the angle at BP 47 for the line between BP 48 through BP 47 to the disputed locations of BP 46 is $180^{\circ}01'19''$ for Israel's location and $180^{\circ}03'50''$ for Egypt's location. The Tribunal therefore decides in favour of Israel's location BP 46(I).

f. *Boundary Pillars 51 and 52*

194. The Tribunal considers it appropriate to deal with BP 51 and BP 52 together. As at other locations, the Parties disagree on the significance of loose stones and of a pipe marker at the site of BP 51 and the significance of map evidence versus remnants for BP 52. Israel maintains that its location is on a hilltop, as in the case of other agreed pillar locations in the area where deviations were made from the straight line.

195. The Tribunal notes that the 1906 Agreement stipulates a straight line between astronomical station A.8 (BP 53) and "the top of the hill west-north-west of Bir Maghara" (BP 51). In addition, Wade's Report makes clear that he verified with the theodolite, together with one of the Turkish Commissioners, that the position of the telegraph pole placed at BP 52 was "in line with" BP 53 at A.8 on the summit of Gebel Samawi and BP 51. Moreover, all maps from the critical period, which indicate the boundary line, show a straight line between the location of BP 51 and BP 53. The Tribunal notes that Egypt's line between BP 51(E) and BP 53 is straight while Israel's line forms a distinct angle at BP 52(I), being separated from BP 52(E) by 145 metres. Israel objects against this reasoning that Egypt had determined its location for BP 52(E) on the basis of the straight line between undisputed BP 53 and BP 51(E), the location of which it had already decided on other grounds. Since the Tribunal takes the straight line between BP 51 and BP 53 as the basis of its decision, it is clear that only the two Egyptian locations can be considered in conformity with this requirement. At BP 51 the Egyptian and the Israeli locations are only 5 metres apart, while at BP 52 they have a distance of about 145 metres. This shows that even if a straight line were drawn between the Israeli location of BP 51 and the uncontested BP 53, the Egyptian location would be considerably closer to the straight line than the Israeli one. The Tribunal therefore decides for the Egyptian location of BP 51 and BP 52.

g. *Boundary Pillar 56*

196. For BP 56, the Parties again dispute the significance of loose stones and a pipe marker at the site. No other relevant criterion is

available than the straight line relevant to the neighbouring agreed pillars, in this case, agreed BP 58 through agreed BP 57 to BP 56. The description card for BP 56(E) shows an angle of $180^{\circ}18'50''$ at the location of BP 57. The description card for BP 56(I) shows an angle of $180^{\circ}16'12''$ at the same location. Israel's location BP 56(I) is therefore slightly closer to the straight line than Egypt's location. The Tribunal therefore decides in favour of Israel's location BP 56(I).

2. *Boundary Pillars 85, 86, 87, and 88*

197. The Parties disagree on the locations of the four consecutive pillars 85, 86, 87, and 88 in the Ras el Naqb area. As to pillars 85, 86, and 87, Egypt bases its claim on the fact that old pillars are at the Egyptian locations. Egypt considers them to be the original pillars erected in 1907 at the site of the temporary poles. Egypt also refers to maps of different periods which indicate pillars at these locations or show the boundary line passing through these locations. Israel recognizes that pillars exist at these locations but asserts not only that their origin is uncertain but also that their locations do not correspond to the 1906 Agreement. Article 1 of this Agreement mentions the names of several places which determine the course of the boundary line in this area (Wadi Taba, Jebel Fort, Jebel Fathi Pasha). Israel contends that the Egyptian locations do not correspond to the correct places of these geographical features and are therefore in contradiction with the Agreement. As to pillar 88, the Parties agree that no such pillar had previously existed. The Joint Commission in 1981 decided to add a new pillar in order to indicate more clearly the course of the boundary line, but could not agree on its precise location. The addition of pillar 88 led to the renumbering of the following pillars.

a. *Boundary Pillars 85, 86, and 87*

198. Before dealing more closely with the arguments of the two Parties, the Tribunal considers it necessary to point to some facts which are relevant with regard to the existing pillars and the boundary line as indicated on maps. There is no clear evidence that the existing pillars at locations BP 85(E), BP 86(E), and BP 87(E) are original pillars erected in 1907. The fact that their shape is different from the pillar seen on the Parker photographs of 1906 suggests that they were erected or rebuilt at a later date. However, there is no doubt that boundary pillars have been at their present locations at least since 1915. Several maps produced from 1915 on show pillars at the Egyptian locations, especially the 1915 British Map and the maps of the Survey of Egypt of 1926 and 1935-38. Moreover, all other maps submitted to the Tribunal dating from 1906 through the entire period of the British mandate over Palestine up to 1982, on which the boundary line of 1906 is indicated (approximately 25 maps), show the same direction and shape of this line as does the line formed by the existing pillars. Slight differences which can be observed may easily be explained by the inexactness of several maps. No map made before 1982 shows a line similar to the one corresponding to Israel's locations for pillars 85, 86, and 87. On no such map does the boundary line form a sharp break at BP 85 as it does if one follows

Israel's locations. While on all pre-1982 maps the angle at BP 85 is widely open (mostly approximately 135°) the angle of the line drawn through BP 85(I) is much smaller (approximately 75°). On no map from 1906 to 1982 does the boundary line at BP 85 lie as far west as Israel claims. This can easily be recognized not only by the form of the boundary line but also if one compares the relative positions of Israel's and Egypt's locations for BP 85 in relation to the triangular flat area on the plateau north of BP 85 which can be seen on most maps. The Tribunal can therefore assume that boundary pillars were in existence at Egypt's locations for BP 85, 86, and 87 during the entire period of the British mandate over Palestine.

199. On the basis of these facts and the contentions of the Parties, the Tribunal will, under the two following headings, examine two questions. First: Do the locations of the existing boundary pillars at BP 85(E), 86(E), and 87(E) contradict the 1906 Agreement? Secondly: If such a contradiction exists, is it the line formed by the pillars or the line described by the 1906 Agreement which prevails?

i) DO THE LOCATIONS OF THE EXISTING PILLARS CONTRADICT THE 1906 AGREEMENT?

200. As has been stated above in paragraph 172, the Tribunal has to base its decision on the recognized international boundary as it existed between Egypt and Palestine during the period of the British mandate. The 1906 Agreement is therefore to be taken into consideration only in order to clarify the situation which existed during this period. It is with this proviso that the Tribunal will examine the contention that the locations of the existing pillars at BP 85(E), BP 86(E), and BP 87(E) are in contradiction with the 1906 Agreement.

201. Article 1 of the 1906 Agreement reads in its initial part as follows:

The administrative separating line, as shown on the map attached to this Agreement, begins at the point of Ras Taba, on the Western shore of the Gulf of Akaba, and follows along the eastern ridge overlooking Wadi Taba to the top of Jebel Fort; from thence the separating line extends by straight lines as follows:

From Jebel Fort to a point not exceeding 200 metres to the east of the top of Jebel Fathi Pasha . . .

As already mentioned, Israel asserts that three places mentioned in this provision, *viz.*, Wadi Taba, Jebel Fort, and Jebel Fathi Pasha, have been incorrectly identified on the ground by the persons who erected the pillars and by Egypt.

202. According to the 1906 Agreement, the boundary line should pass through the top of Jebel Fort and lie at a distance not exceeding 200 metres east of Jebel Fathi Pasha. However, on the map attached to Wade's Report of 1907 ("the Wade Map"), Jebel Fort and Jebel Fathi Pasha are indicated considerably to the west of the boundary line, the boundary line itself taking the same course as shown on all maps. This discrepancy leads Israel to conclude that the boundary line has to be drawn more to the west in order to pass through the top of Jebel Fort and

to a point not exceeding 200 metres east of Jebel Fathi Pasha. A further map, the Turkish Military Map of 1909, which does not mention Jebel Fort, indicates Jebel Fathi Pasha also more west of the boundary line than would correspond to the 200 metres mentioned in the 1906 Agreement. A third map, the 1911 Egyptian Map, shows Jebel Fort west of the boundary line while it remains uncertain to which feature the words Jebel Fathi Pasha exactly refer. These three maps are the only ones in favour of Israel's contentions, but, as has been mentioned, the boundary line on these maps takes the same course as the one shown on all the other maps.

203. On other maps which were also produced in the years of the conclusion of the Agreement and of the demarcation of the boundary, Jebel Fort and Jebel Fathi Pasha are in accordance with Egypt's locations and with the corresponding boundary line. Two other maps made by Wade in July 1906, the "Wade Original" and the "Wade Sketch Map" (also called "Wade Survey" and "Aqaba-Rafah Map") confirm Egypt's claim. Although neither map shows the boundary line (they were made before the demarcation), the names of both Jebel Fort and Jebel Fathi Pasha appear in places corresponding to Egypt's locations. The 1907 British War Office Map also shows both Jebel Fort and Jebel Fathi Pasha at Egypt's locations and in their correct relation to the boundary line.

204. The maps invoked by Israel, taken alone, do therefore hardly furnish sufficient evidence against the correctness of the existing boundary pillar locations. This seems all the more being the case as even the maps invoked by Israel show differences among each other. Although there is no obvious explanation for the deviations on a few maps, one has to bear in mind that all maps concerned have a very small scale (the map attached to the Wade Report 1:500,000) and do not show a particular precision. Both Parties repeatedly observed during the pleadings that the maps in question differ in many details. It may also be pointed to the fact that on the Wade Map attached to his Report, which is the principal evidence of Israel, the words "Ras Taba" are printed in a place which neither of the Parties considers as correct.

205. Israel points to a further discrepancy of maps which, however, relates to Jebel Fathi Pasha only. Most maps dating from 1906 to 1911 and which have a scale not smaller than 1:100,000 show, in the region of Jebel Fathi Pasha, a group of three small hills close together (Wade Original, Wade Sketch Map, the map alleged to have been annexed to the authentic Turkish text of the 1906 Agreement, 1906 Egyptian Map, Rushdi Map, 1911 Egyptian Map). On all of these maps, except on the Wade Original and the Wade Sketch Map which were made before demarcation, the boundary line runs between the middle and the eastern hill. According to Egypt, the middle hill is Jebel Fathi Pasha. However, Israel points out that on two maps (Wade Original and 1906 Egyptian Map) the words "Jebel Fathi Pasha", or an abbreviation of them, are printed next to the westernmost of the three hills and therefore do not support Egypt's position. On other maps, however, the words "Jebel Fathi Pasha" rather relate to the middle hill or can be

related to either the middle or the western hill (Wade Sketch Map, Rushdi Map, and 1911 Egyptian Map). Here again, we are in the presence of a difference of maps which are not too reliable as to details. The fact that on some maps the words "Jebel Fathi Pasha" for one reason or another are not printed exactly where the Parties claim they ought to have been printed can hardly be taken as convincing evidence to disprove the correctness of the boundary line as it is indicated on most maps and demarcated on the ground.

206. Israel advances another argument against the correctness of Egypt's locations. It refers to Article 1 of the 1906 Agreement which states that the separating line "follows along the eastern ridge overlooking Wadi Taba to the top of Jebel Fort". Israel argues that according to this provision Jebel Fort must lie at the end of the eastern ridge overlooking Wadi Taba or, at least, not too far from that end. Egypt's location of Jebel Fort, obviously, lies far away from Wadi Taba (Wadi Taba as understood either by Egypt's or by Israel's definition, as will be stated below). Israel contends that only its location of Jebel Fort is in accordance with Article 1 of the 1906 Agreement. Israel's contention presupposes, however, that Wadi Taba is understood according to Israel's definition. While Egypt asserts that Wadi Taba embraces only the region between Taba and the point north of BP 89 where Wadi Taba bifurcates into three tributaries, Israel contends that Wadi Taba does not end at this point but continues into the middle one of the three tributaries. Israel's location of Jebel Fort has, consistent with its contention, been placed on the eastern ridge of this middle tributary.

207. Israel's argumentation depends on two assumptions: First, on a particular interpretation of Article 1 of the 1906 Agreement, and secondly, on the definition of Wadi Taba. As to the interpretation of Article 1 of the 1906 Agreement, the Tribunal cannot see any incompatibility between Egypt's location of Jebel Fort and Article 1. The wording of Article 1 does not require that Jebel Fort must be on the eastern ridge of Wadi Taba or a point not far from it. It does not exclude that Jebel Fort lies at a considerable distance from the end of the eastern ridge. It may also be observed that both according to Owen and to Wade, Jebel Fort is not considered to be on the "east cliffs" or the "Taba Hills". As to the definition of Wadi Taba, there is no conclusive evidence for the Israeli view. In almost all maps which show the designation "Wadi Taba", this designation is printed in the lowest part of the Wadi. On only two maps the designation "Wadi Taba" is used for one of the tributaries above the bifurcation north of BP 89. One is Owen's "rough map" of 1906 which in fact is a handmade sketch obviously designed from memory only. Wadi Taba on this sketch reaches up to the plateau of Ras el Naqb and is met in its higher part by Wadi Tuéba. As the three tributaries of Wadi Taba north of BP 89 are not distinguished on this sketch it seems hardly possible to draw the conclusion from it that it must be the middle tributary which is Wadi Taba. The other map is the 1933 Mitchell Map on which the eastern, not the middle, tributary is designated as "Wadi Taba". Only two further pre-1948 maps give an indication as to the names of the tributaries, but do not designate any of

them as "Wadi Taba": the 1915 British Map and the 1935-38 Egyptian Map. Both maps show the names "W. Haneikiya" for the western tributary and "W. Gasairiya" for the eastern tributary, but give no name for the middle tributary. The contention that the middle tributary bears the name "Wadi Taba" finds no basis in any pre-1982 document or map submitted to the Tribunal.

208. The Tribunal therefore arrives at the conclusion that the locations of the existing boundary pillars 85, 86, and 87 are not in contradiction with the 1906 Agreement.

ii) THE LEGAL SITUATION IN CASE OF CONTRADICTIONS BETWEEN EXISTING PILLAR LOCATIONS AND THE 1906 AGREEMENT

209. Although the Tribunal does not find any contradiction between the existing boundary pillar locations and the 1906 Agreement it will also examine the question whether in case of such contradiction it is the line formed by the existing pillars or the line described by the 1906 Agreement which prevails. Such an examination seems appropriate in view of a complete exploration of the case.

210. Article 3 of the 1906 Agreement states that "[b]oundary pillars will be erected, in the presence of the Joint Commission, at intervisible points along the separating line . . ." The demarcation took place in two phases: first, the erection of provisional telegraph poles during October 1906, and, secondly, the replacement of them by permanent masonry pillars between 31 December 1906 and 9 February 1907. Both operations were carried out in the presence of the Egyptian and Turkish Commissioners or representatives. As to the first operation, the Owen and Wade Reports confirm the cooperation of both Parties. For the second operation, the Parker photographs of 31 December 1906 show the presence of the Commissioners or representatives of both sides at the erection of the first masonry pillar. As to the rest of the pillars, the collaboration of the Parties has to be presumed since Article 3 of the 1906 Agreement prescribes it and no party ever claimed that the Agreement had not been correctly executed. (See paragraph 170 above.) At two later occasions, in 1909 and 1911, Turkish and Egyptian officials cooperated in the rebuilding of certain boundary pillars. If a boundary line is once demarcated jointly by the parties concerned, the demarcation is considered as an authentic interpretation of the boundary agreement even if deviations may have occurred or if there are some inconsistencies with maps. This has been confirmed in practice and legal doctrine, especially for the case that a long time has elapsed since demarcation. Ress concludes an examination of cases with the following statement: "If the parties have considered over a long time the demarcated frontier as valid, this is an authentic interpretation of the relevant international title." (Ress, *The Delimitation and Demarcation of Frontiers in International Treaties and Maps*, Institute of International Public Law and International Relations in Thessaloniki 1985, pp. 435-37, especially 437; see also Münch, "Karten im Völkerrecht", *Gedächtnisschrift für Friedrich Klein*, Munich 1977, p. 344) It may also be referred

to the Judgment of the International Court of Justice in the *Temple* case where the Court states:

In general, when two countries establish a frontier between them, one of the primary objects is to achieve stability and finality. This is impossible if the line so established can, at any moment, and on the basis of a continuously available process, be called in question, and its rectification claimed, whenever any inaccuracy by reference to a clause in the parent treaty is discovered. Such a process could continue indefinitely, and finality would never be reached so long as possible errors still remained to be discovered. Such a frontier, so far from being stable, would be completely precarious. (1962 *ICJ Reports* 34)

It is therefore to be concluded that the demarcated boundary line would prevail over the Agreement if a contradiction could be detected. As has been stated, no such contradiction exists.

211. For these reasons, the Tribunal decides in favour of Egypt's locations BP 85(E), BP 86(E), and BP 87(E).

b. *Boundary Pillar 88*

212. Egypt's and Israel's locations for this new pillar are near the top of the same hill, only 44.53 metres apart and apparently at the same elevation, with the Egyptian location on the eastern side, the Israeli on the western side of the hill. Egypt argues that its location corresponds to pre-1982 maps and to the coordinates of the place where the boundary line forms a slight bend, which can be seen on the 1935-38 map. Israel disputes Egypt's methodology and contends that pillar 88 must satisfy the requirement of being situated on "the eastern ridge overlooking Wadi Taba". Israel therefore places the pillar at a point from where one can look down into the middle of the three tributaries, which it considers to be Wadi Taba. Egypt's location does not overlook this tributary.

213. Since no previous pillar 88 is known to have existed, the Tribunal has to choose the one of the two locations which fits more logically into the context of the neighbouring pillars. The Tribunal takes into consideration that no conclusive evidence could be found to show that the middle tributary of Wadi Taba bore the name Wadi Taba. The Israeli argument that pillar 88 must overlook this tributary cannot therefore have any weight for the Tribunal. Furthermore, the Tribunal has arrived at the conclusion that Article 1 of the 1906 Agreement does not presuppose that the "eastern ridge overlooking Wadi Taba" extends all the way up to Jebel Fort. There is therefore no necessity to place the new pillar on the eastern ridge overlooking Wadi Taba, wherever that ridge may be. As no other criterion is available, the Tribunal has to base its decision on the straight line criterion to which the parties to the 1906 Agreement repeatedly referred during their negotiations leading to the conclusion of the Agreement (see paragraphs 29 and 32-34 above) and which has already been used by the Tribunal with regard to several of the northern pillars (see paragraph 187 above). In the circumstances of BP 88, the Tribunal finds it most appropriate to take the straight line between Egypt's location BP 87(E), accepted by the Tribunal, and the agreed location of BP 89 as the basis for its decision. The two neighbouring pillars are here recognizable on the maps and on the ground.

Egypt's location is closer to the straight line. For these reasons, the Tribunal decides in favour of Egypt's location BP 88(E).

3. *Boundary Pillar 91*

214. The Tribunal has from the beginning been conscious of the particular importance both Parties attach to pillar 91. Indeed, the Annex to the Compromis contains a sentence dealing specifically with this pillar:

For the final pillar No. 91, which is at the point of Ras Taba on the western shore of the Gulf of Aqaba, Israel has indicated two alternative locations, at the granite knob and at Bir Taba, whereas Egypt has indicated its location, at the point where it maintains the remnants of the boundary pillar are to be found.

215. The positions of the Parties with regard to BP 91 were most strongly affected during the written and oral proceedings by the so-called Parker photographs, submitted by Egypt with its Memorial (see paragraphs 105-108 and 178-181 above). These photographs show a pillar at a location on a cliff above the shoreline of Taba which does not correspond to any of the three locations advanced by the Parties for BP 91. The pillar had disappeared by the time Israel removed part of the cliffs on which it was built when constructing a new road along the coast around 1970.

216. The existence of the Parker pillar has considerable repercussions on the claims of the two Parties concerning BP 91. If the Parker pillar was correctly located as the first (or final, if one takes the opposite direction) pillar in 1906 and formed part of the international boundary line during the critical period, it excludes the two locations advanced by Israel for the final pillar location. On the other hand, if the Parker pillar existed during the critical period, the pillar at the Egyptian location of BP 91 was not the final pillar at that time. In view of the considerable impact on the Parties' claims for BP 91, the Tribunal will have to take the question of the Parker pillar into consideration when examining the claims concerning BP 91. The Tribunal is, however, excluded by paragraph 5 of the Annex to the Compromis from taking any decision on the location of this pillar.

a. *Israel's Alternative Locations*

217. Israel advances two alternative locations for BP 91: BP 91(I) (east)—the location on the westerly lower end of the granite knob—and BP 91(I)(west)—the location at Bir Taba. In the oral proceedings, Israel concentrated its arguments on BP 91(I) (east), without abandoning the alternative location. Israel brought forward several arguments in favour of its locations which will be taken into consideration, together with contrary arguments, in the following paragraphs.

218. Israel's strongest argument is based on *intervisibility*. Israel argues that its locations are intervisible with the preceding pillar (agreed pillar 90) while Egypt's location is not. Israel argues that intervisibility between boundary pillars is mandatory, because Article 3 of the 1906 Agreement provides that "[b]oundary pillars will be erected . . . at intervisible points". Owen's Report also states that "[n]inety intervisible pillars were erected". It is not contested that intervisibility exists

for the two Israeli locations but not for the Egyptian location. The value of this argument will be judged in connection with BP 91(E) (see paragraphs 236-237 below). The argument will lose its weight if it can be shown—as will be shown in paragraph 237 below—that BP 91(E), in spite of the lack of intervisibility, was a regular pillar of the recognized international boundary between Egypt and the former mandated territory of Palestine.

219. Israel also advances *map evidence*. It relies principally on the maps attached to the Wade and Owen Reports, as well as on two military maps from 1909 and 1916, because these appear to show the boundary as terminating at a triangle which must be one of the astronomical stations A.1 or B.1. However, only two maps, the 1909 Turkish military map and the 1916 Turkish-German map, show the boundary line clearly ending in a triangle. On the maps attached to the Owen and Wade Reports, the boundary line ends at the eastern edge of the triangle. As the scale of these maps is 1:500,000 and the triangle is relatively large, no conclusions can be drawn from these maps as to where the line in fact ended. It is furthermore uncertain whether the triangle on these maps represents A.1 or B.1. Other maps of the early years clearly show the boundary line ending east of the triangle and therefore rather at the location of the Parker pillar. This applies to the 1906 Survey of Egypt map, the 1907 British War Office map, the 1908-09 Rushdi map, and the 1911 Survey Department of Cairo map. In view of such divergences, evidence drawn from the early maps with regard to the final pillar location cannot lead to any clear conclusion. All later maps (from 1915 on), except the 1916 Turkish-German map, show the line passing through BP 91(E) or both BP 91(E) and the Parker site, as will be shown in paragraphs 227-228 below.

220. Israel furthermore argues that the *Statistical Yearbook of Egypt for 1909* identified the boundary as terminating at the granite knob. However, the evidentiary value of such technical publications, designed to provide general information, is low, for such publications are not designed as authoritative statements about boundaries. They fall within the category of what could be described as encyclopaedic reference books and not administrative acts. In any event, that reference to the terminal point of the boundary disappeared in the following years, and certainly throughout the critical period of the Mandate there is no evidence that either Egypt or Great Britain relied upon that one, isolated reference to the granite knob as evidence of the terminal point. Israel's argument is also weakened by the fact that the *Statistical Yearbook of Egypt for 1909* refers to the coordinates of astronomical station B.1, which was on the top of the granite knob. Israel's location for BP 91(I) (east), however, is at a considerable distance from it at the western end of the granite knob, almost at the bottom of the Wadi.

221. Other evidence produced by Israel proved to be inconclusive. A photograph of a *cairn of stones* next to the western end of the granite knob, taken in 1936, does not prove that the stones formed a boundary pillar. The object is even so badly recognizable that it cannot be said what it really was. Israel furthermore alleges a *presence of a*

Turkish military post in the Wadi Taba in the time following the conclusion of the 1906 Agreement. It refers in this connection to statements in the *Meistermann* and *Baedeker* guidebooks and to the fact that in 1913 the *Sudan Intelligence Report* stated that a Turkish gun had been placed in position at Taba. All three references to a possible Turkish presence in the Wadi Taba can well be taken as indices in favour of the Israeli locations, but they are not conclusive as to where the boundary line actually ran. A Turkish presence in the Wadi Taba could also be explained by other grounds, such as the right under Article 6 of the 1906 Agreement for Turkish soldiers to cross over to the Egyptian side to draw water from the well at Bir Taba. It also has to be kept in mind that a boundary pillar was at the Parker site, well visible from the Wadi, in 1906 and in later years (see paragraph 227 below). A possible Turkish presence at Taba can therefore hardly prove that the boundary line reached the shore at another location.

222. Several arguments have also been brought forward *against* Israel's locations. One of them, the erection of the Parker pillar in 1906 and its existence during the critical period, has already been mentioned. If the Parker pillar was in fact the first (or final) pillar of the boundary line as recognized during the critical period, it excludes both locations proposed by Israel for BP 91. This argument will be dealt with in paragraph 233 below.

223. At neither of its locations could Israel show any evidence of pillar remnants. Nor was Israel able to produce any photographic or map or other evidence showing that telegraph poles or boundary pillars had existed at either location at any time.

224. Another argument against the Israeli locations stems from Article 1 of the 1906 Agreement, which provides that the separating line, which begins at Ras Taba, "follows along the eastern ridge overlooking Wadi Taba" or, in the new translation from the official Turkish text presented by Egypt, "passing by the summits of the mountains lying east of and overlooking Wadi Taba", or, in the new translation presented by Israel, "while passing by the heights that are [situated] at the east[ern side] of Wadi Taba and overlook this Wadi". This description is confirmed by statements in the Owen Report ("following along the top of the ridge north of Wadi Taba" and "the boundary-line, as finally agreed upon, runs for the most part along the watershed") and in the Wade Report ("[b]y the afternoon there was nothing left than to place the beacons on the eastern margin of Wadi Taba" and "[t]hen two more along the line of east cliffs of Taba and one at the point where they strike the gulf"). Neither of the two Israeli locations is in conformity with these descriptions. The lines connecting agreed pillar 90 with the two Israeli locations do not follow the ridge of the hills east and north of Taba nor do they overlook Wadi Taba, but run to a great extent within Wadi Taba and Wadi Khadra (see map no. 4 attached to Israel's Memorial). Furthermore, the eastern Israeli line, before it reaches the hill upon which BP 90 is situated, touches partly the bottom of the eastern margin, but at no place its ridge. The western Israeli line, before reaching the hill at BP 90, nowhere touches either the eastern margin or the eastern

ridge of Wadi Taba. It is also notable in this connection that during the negotiations between Turkey and Egypt in 1906 the Turkish proposal that the line run down the thalweg of the Wadi was rejected. Also, it is questionable whether the granite knob, which is one of the two Israeli locations, could be considered part of the eastern ridge since it is separated from it by the area on which a road and a hotel complex was built.

225. Israel's case for the granite knob is also weakened by the fact that Israel's location is not on the top of the granite knob, where astronomical station B.1 was situated. Israel did not claim the top because it is not intervisible with BP 90. Rather, Israel claims an inconspicuous place at the western end of the long-stretched granite knob where intervisibility exists, at a height of only a few metres above the bottom of the Wadi. This place evidently does not correspond to the description given by Wade as "the point where the east cliffs . . . strike the gulf".

b. *Egypt's Location*

226. Egypt's claim for BP 91(E) is closely related with the question of the Parker pillar. It seems appropriate therefore to state at the outset during which periods boundary pillars were in existence at the two locations of the Parker site and the site of BP 91(E).

i) PERIODS DURING WHICH BOUNDARY PILLARS WERE IN EXISTENCE AT THE PARKER SITE AND AT THE SITE OF BP 91(E)

227. The *Parker pillar* was erected on 31 December 1906 as the first masonry pillar of the boundary. Neither Party contests that it was built as a boundary pillar although Israel argues that it was wrongly located. The continuing existence of the Parker pillar was confirmed by the surveys of 1914 and 1917 (see paragraphs 63 and 67 above), indirectly by the Beadnell photograph of 1922 which shows a pillar at the place of BP 91(E), and which Beadnell described as the "penultimate beacon", by the Mitchell map of 1933, by the 1949 photographs introduced by Israel, by the 1964 Survey of Israel map, by the 1967 map in Arabic, and by an MFO map. In 1967, according to a witness, Mr. Yigal Simon, the Parker pillar was no longer in existence. Around 1970 its site was destroyed in connection with the construction of the road along the shore. This evidence demonstrates that the Parker pillar must have been in existence during most of the years between 1906 and 1967, including the period of the Mandate. It is possible that it was damaged or destroyed sometime after 1906, particularly during World War I, as the 1949 photograph shows a structure different from the 1906 photograph. But there is no doubt, and Israel confirmed it during the oral proceedings, that one must proceed from the assumption that the Parker pillar existed during the critical period.

228. As to the pillar at *BP 91(E)*, there is no evidence with respect to the erection of this pillar in 1906-1907 nor with regard to its existence in the following years. The first evidence of its existence appears on the 1915 British map, which shows a boundary pillar at the elevation of

298 feet (91 metres) conforming to BP 91(E). A pillar at BP 91(E) is also confirmed by the 1917 Survey of Egypt map, the 1922 Beadnell photograph, the 1933 Mitchell geological map, the 1935-38 Egyptian map, the 1943 British map, the lists of trig points prepared during the mandate period (1937 survey letter, Dr. Ball's 1941 survey card, and First Edition Trig List 144, probably produced in 1943), and one of the 1949 photographs submitted by Israel. Furthermore, Egyptian and Israeli witnesses confirmed that they had seen a pillar at BP 91(E) in 1949 and 1964. Although Israel contests that BP 91(E) was erected during the demarcation process in 1906-07 and argues that it was originally a trig point marker which by error was reconstructed as a boundary pillar, around 1917, it does not contest that at least from this time on there was a pillar at the location of BP 91(E) which remained there during the critical period and thereafter until it was destroyed sometime between 1967 and 1981.

229. After having determined that boundary pillars were in existence at the site of the Parker pillar as well as at that of BP 91(E) during the critical period, the Tribunal has to examine Israel's arguments that these pillars were wrongly located and therefore cannot be considered as part of the boundary line. Israel advances mainly four arguments which shall be taken into consideration under the following four headings.

ii) THE ARGUMENT THAT PARKER HAD NO AUTHORITY TO TAKE PART IN THE DEMARCATION PROCESS AND THAT THE PARKER PILLAR WAS WRONGLY LOCATED

230. The Parker photographs show that the masonry pillars which were to replace the provisional telegraph poles were erected in the presence of the two Turkish Commissioners, who had already taken part in the erection of the telegraph poles in October 1906, and of Parker, then Governor of Sinai. The two Egyptian Commissioners who were members of the Joint Commission no longer took part in this stage of the demarcation. No evidence exists concerning the reasons for this change nor on Parker's authorization. Israel contends that Parker was not authorized to take part in the demarcation as the representative of Egypt. It furthermore alleges that the Parker pillar was not placed at the site where the telegraph pole for the final pillar site had been placed in October 1906.

231. The question whether Parker had any authority to take part in the work of the Joint Commission cannot be answered either positively or negatively as no evidence was submitted relating to this point. The Tribunal has to base its decision on the fact that Parker took part in the demarcation process as a representative of Egypt and was not contested in that function at that time nor at any later time. Therefore, there is no basis for Israel's submission. As to the site of the Parker pillar, the Tribunal could find no indication in any of the documents submitted to it that the first masonry pillar was placed at a site different from that on which a telegraph pole had been placed two and a half

months earlier. Israel's assertion is all the less acceptable as the same two Turkish Commissioners were present at both occasions. It is hardly likely that they would have agreed to change the site against Turkey's interests. In the years following the demarcation, Turkey never made any complaint about the location of this first boundary pillar, although this was one of the most crucial of all the pillars of the boundary line and well visible from the coast line and the Gulf. The fact that Turkey, in 1909 and 1911, collaborated with Egypt in the repair and rebuilding of pillars which had become unstable—although not pillars of the southern region—and that Turkish authorities became suspicious when, in 1911, the British War Office and the Survey of Egypt carried out a survey of the area, shows that Turkey did not neglect the observation of this boundary.

232. An implicit recognition of the demarcated line by Turkey can also be seen in the Ottoman documents of October 1911 which confirm the demarcation that had taken place (see paragraph 57 above).

233. The Tribunal therefore comes to the conclusion that, even if Parker had not been properly empowered to represent Egypt in the Joint Commission and even if the Parker pillar had not been placed at the same location as the telegraph pole—assumptions for which no evidence could be found—the parties to the Agreement of 1906 had, by their conduct, agreed to the boundary as it was demarcated by masonry pillars in 1906-07 and to the location of the Parker pillar as the final pillar of the boundary line at that time.

iii) THE ARGUMENT THAT BP 91(E) WAS A TRIG POINT ERRO-
NEOUSLY MARKED AS A BOUNDARY PILLAR

234. Israel contends that at the site of BP 91(E) no boundary pillar was erected in 1906-07. It assumes that a mere trig point was later established at this location, possibly in 1911 or in 1914, and that the map constructor of the 1915 British map by mistake took the trig point for a boundary pillar and marked it as such. Israel furthermore assumes that the pillar at BP 91(E) may have been destroyed by the Turks between 1915 and 1917 and that after their retreat it may have been rebuilt mistakenly as a boundary pillar on the basis of the 1915 map. Egypt, on the other hand, points to the fact that Beadnell, when surveying the region in 1922, spoke of BP 91(E) (then No. 90) as the "penultimate beacon, the position of which was determined years ago by an international boundary commission". This statement, Egypt argues, confirms that the pillar was erected in 1906-07. Egypt also contends that if BP 91(E) had not existed as a boundary pillar from the beginning, there would have been one pillar missing in the numbering of that time between BP 89 (now 90) and the Parker pillar whose number was 91.

235. None of these arguments really proves what the Parties intend to prove. The Tribunal therefore must base its decision on those facts on which no doubt exists. It is not contested that at least from around 1917 and throughout the critical period until a time after 1967 there was a boundary pillar at the location of BP 91(E) which, during this

whole period, was considered to be a boundary pillar. It was marked as such on the ground, on maps, on trig lists, and affirmed by photographs. This suggests that throughout the Mandate period both Egypt and Great Britain treated it as a boundary pillar. Indeed, even Israel itself did not advance this argument of an error in identification until the oral proceedings. The Tribunal considers that where the States concerned have, over a period of more than fifty years, identified a marker as a boundary pillar and acted upon that basis, it is no longer open to one of the Parties or to third States to challenge that long-held assumption on the basis of an alleged error. The principle of the stability of boundaries, confirmed by the International Court of Justice (see paragraph 210 above), requires that boundary markers, long accepted as such by the States concerned, should be respected and not open to challenge indefinitely on the basis of error. The Israeli submission is all the more unfounded as not even Israel itself considers the different elements of its argumentation—the mistake of the map constructor, the destruction of the trig point marker by the Turks, and the erroneous rebuilding of a boundary pillar—as proven, but only as possibilities.

iv) THE ARGUMENT THAT NEITHER BP 91(E) NOR THE PARKER PILLAR WAS INTERVISIBLE WITH BP 90

236. As has been stated earlier, Article 3 of the 1906 Agreement provides that boundary pillars will be erected “at intervisible points”. Israel argues that BP 91(E) is not intervisible with agreed pillar 90 and therefore is in contradiction with the 1906 Agreement. It is true that the Agreement does not provide for any exceptions to intervisibility. Yet, it seems that this principle was not complied within the course of the demarcation of the pillars which were to be located “along the eastern ridge overlooking Wadi Taba”. In fact, there is no intervisibility between the sites of BP 90 and either BP 91(E) or the Parker pillar. There is intervisibility only between BP 91(E) and Parker.

237. There are several indications which may explain the lack of intervisibility. Firstly, Wade in his Report does not mention intervisibility between the last three pillars. Although this is not exceptional as he did not mention intervisibility in all cases where it existed, the silence concerning intervisibility between the last three pillars becomes significant if seen in connection with Wade’s other statements. With regard to the last pillars he writes: “These are of quite a different character from the preceding, and the text of the treaty must be carefully studied to appreciate them, but they presented no difficulty.” Wade refers to the difference existing between the two sectors of Article 1 of 1906 Agreement. In the first sector, the line between Ras Taba and Jebel Fort is described in geographical terms (“along the eastern ridge overlooking Wadi Taba”) while in the second sector in terms of straight lines between specified points. While in the second case intervisibility seems to be essential, it does not seem absolutely necessary in the first case, because the boundary follows the line of the cliffs. Secondly, referring to the days immediately preceding those when the last beacons (telegraph poles) were set, Wade writes: “From this cause and also from the

desirability of bringing the whole business to a conclusion, movements were exceedingly rapid.” This may also explain why intervisibility at the end of the demarcation was not observed. Wade’s description of the last day of the demarcation (18 October 1906) furthermore suggests that the Commissioners did not climb the hills but remained in the Wadi and selected points on the hills which were visible from sites in the Wadi. All these indications may explain why intervisibility was not observed although there is no absolute certainty in this respect. However, as the Tribunal has already come to the conclusion that both the Parker pillar location and the location of BP 91(E) were recognized by the States concerned as forming part of the boundary line during the critical period, lack of intervisibility cannot affect this finding since the boundary line, in spite of non-intervisibility, was accepted by the parties concerned.

V) THE ARGUMENT THAT BP 91(E) IS NOT “THE FINAL PILLAR” NOR “AT THE POINT OF RAS TABA ON THE WESTERN SHORE OF THE GULF OF AQABA” AND THE QUESTION OF *NON LICET*

238. Paragraph 2 of the Annex to the Compromis states:

Each party has indicated on the ground its position concerning the location of each boundary pillar listed above. For the final boundary pillar No. 91, which is at the point of Ras Taba on the western shore of the Gulf of Aqaba, Israel has indicated two alternative locations, at the granite knob and at Bir Taba, whereas Egypt has indicated its location, at the point where it maintains the remnants of the boundary pillar are to be found.

239. Israel argues that if the Parker pillar existed throughout the period of the Mandate, it is logically and legally impossible for the Tribunal to find that BP 91(E) satisfies the definition in paragraph 2 of the Annex. BP 91(E), as Israel states, was not “the final pillar” during the critical period nor situated “at the point of Ras Taba on the western shore of the Gulf of Aqaba”. Israel contends that if the Tribunal finds that Israel’s case for BP 91(I) is not acceptable, it must decide that, as a result of the existence of the Parker pillar, Egypt’s case is not acceptable either since BP 91(E) does not satisfy these conditions. In these circumstances, Israel contends, the Tribunal cannot decide in favour of either Party, because paragraph 5 of the Annex stipulates that the “Tribunal is not authorized to establish a location of a boundary pillar other than a location advanced by Egypt or by Israel and recorded in Appendix A.” This Israel characterizes as a situation of *non licet* that has nothing to do with the absence of applicable law leading to *non liquet*. *Non licet* exists when for some other reason the Tribunal cannot reach a decision on the merits of the case.

240. Egypt affirms that it was not aware that the pillar shown in the Parker photographs was at a different location than BP 91(E) when it submitted its Memorial. It furthermore argues that the adjective “final” in the Annex refers to what the Parties understood by it in 1986, not what it may have signified in 1906. And in 1986, they meant the pillar following agreed boundary pillar No. 90. Egypt asserts that, if the “final pillar argument” succeeded and the Tribunal decided that none of the three locations indicated by the Parties for BP 91 was the correct one, this

would mean the frustration of the arbitration and would be contrary to what both Parties accepted in the preamble to the Compromis, namely "to resolve fully and finally" the dispute that had arisen.

241. The question which the Tribunal has to decide is whether BP 91(E) satisfies the test of being "the final boundary pillar . . . at the point of Ras Taba on the western shore of the Gulf of Aqaba". It must be stated beforehand that the words "final pillar" and "at the point of Ras Taba on the western shore of the Gulf of Aqaba" in paragraph 2 of the Annex would not have been necessary in order to identify the location BP 91(E) and the two alternative locations of BP 91(I) since the three locations had been unequivocally fixed by the Parties. Yet, as these words have been adopted by the Parties, they must be interpreted by the Tribunal.

242. The words "final pillar" must be seen in connection with the first sentence of paragraph 2 of the Annex which states that "[e]ach party has indicated on the ground its position concerning the location of each boundary pillar listed above". According to paragraph 3, the markings of the Parties on the ground have been recorded in Appendix A. Appendix A contains the description cards concerning the locations for each contested pillar. It is clear that an indication on the ground would not have been conceivable for the Parker pillar, given the disappearance of its site around 1970. The location of BP 91(E) was the last pillar location along Egypt's claimed line which in 1986 could be indicated on the ground. BP 91(E) was also the final or last pillar in the series of fourteen pillars mentioned in the first sentence of paragraph 1 and cannot at the same time be considered to be the "penultimate" pillar in the context of the Compromis. In view of this situation, it cannot be assumed that a Party to the Compromis could have signed the sentence containing the words "final pillar" having the Parker pillar in mind and with the expectation that BP 91(E) would thereby be excluded beforehand as a possible choice for the location of BP 91. Such conduct would have been contradictory and not consistent with the wish, affirmed by the Parties in the preamble of the Compromis, "to resolve fully and finally" the dispute between them and "to fulfill in good faith their obligations, including their obligations under this Compromis". It was therefore not incorrect to designate it as the "final pillar" at that moment.

243. It is obvious that the words in the Annex "at the point of Ras Taba" and "on the western shore of the Gulf of Aqaba" were taken from Article 1 of the 1906 Agreement. Evidently, in 1906 they referred to the Parker pillar, not to BP 91(E). However, the essential aspect is not the fact that the words "at the point of Ras Taba on the western shore of the Gulf of Aqaba" originally were conceived for the Parker pillar and could, in the time of the Mandate, be understood in this sense only. The decisive question is whether these words, in 1986, could reasonably be understood as applying to BP 91(E). The words "at the point of Ras Taba" were circumscribed by Owen in the following way: "That is the point where the ridge north of Taba meets the sea." Wade, in his Report of 1907, wrote that the last beacons were erected at points "along the

line of east cliffs of Taba and one at the point where they strike the gulf'. It follows from these descriptions that Ras Taba was identified with the end of the cliffs lying north and east of Wadi Taba. The exact point was fixed by the Joint Commission in 1906. Also significant is what is stated in Israel's Memorial with regard to a translation of a sentence in Shoucair's *The History of Sinai* (1916) regarding Ras Taba: "This translation has been specially checked and it appears that the meaning which the original Arabic conveys is that the point [the beginning of the separating boundary] was given the name 'Ras Taba' by those involved in the establishment of the boundary there." As BP 91(E) is situated on the ridge east of Taba its location could reasonably be understood as being in conformity with the words "at the point of Ras Taba".

244. The words "on the western shore of the Gulf of Aqaba" contain two qualifications. The word "western" means that Taba is on the western, not on the eastern, shore of the Gulf. The words "on the shore" mean that the pillar was to be at a distance not far from the shore and visible from the shore. While the location of the Parker pillar undoubtedly fits this description better, the location of BP 91(E), which is situated on the cliffs and from where one has a large view over the Gulf, at a distance of approximately 170 metres from the shore, also could reasonably be understood as lying "at the point of Ras Taba on the western shore of the Gulf of Aqaba". The Tribunal therefore comes to the conclusion that Israel's plea of *non licet* cannot be admitted and that Egypt is not precluded from claiming BP 91(E).

c. Conclusion

245. On the basis of the foregoing considerations, the Tribunal decides that the boundary pillar No. 91 is at the location advanced by Egypt, BP 91(E), and marked on the ground as recorded in Appendix A of the Compromis.

C. Execution of the Award

246. The Tribunal notes that Article XII of the Compromis contains, in paragraph 4, the requirement that the Tribunal "shall decide the appropriate manner in which to formulate and execute its award".

247. The Tribunal's decisions on the formulation of the award are reflected in the award itself. So far as execution of the award is concerned, the Tribunal would observe that Article XIV of the Compromis provides as follows:

1. Egypt and Israel agree to accept as final and binding upon them the award of the Tribunal.
2. Both parties undertake to implement the award in accordance with the Treaty of Peace as quickly as possible and in good faith.

248. Egypt has in this context stated that the Parties need some very limited agreement on rebuilding of missing pillars. BP 90 is a good example as to type and style of pillars to be established.

249. Israel has proposed that the execution should be entrusted to the Liaison System set up under the Treaty of Peace.

250. The Tribunal accepts both of these proposals and therefore decides that the execution of this Award shall be entrusted to the Liaison System described in Article VII of Annex I to the Treaty of Peace between the Arab Republic of Egypt and the State of Israel. Agreed boundary pillar No. 90 may serve as an example as to type and style of pillars to be established.

DISPOSITIF

FOR THESE REASONS, AND AFTER DELIBERATION,

THE TRIBUNAL

1. *Decides* unanimously that Boundary Pillar No. 7 is situated at the location advanced by Egypt and recorded in Appendix A to the Arbitration Compromis of 11 September 1986;
2. *Decides* unanimously that Boundary Pillar No. 14 is situated at the location advanced by Israel and recorded in Appendix A to the Compromis;
3. *Decides* unanimously that Boundary Pillar No. 15 is situated at the location advanced by Israel and recorded in Appendix A to the Compromis;
4. *Decides* unanimously that Boundary Pillar No. 17 is situated at the location advanced by Egypt and recorded in Appendix A to the Compromis;
5. *Decides* unanimously that Boundary Pillar No. 27 is situated at the location advanced by Egypt and recorded in Appendix A to the Compromis;
6. *Decides* unanimously that Boundary Pillar No. 46 is situated at the location advanced by Israel and recorded in Appendix A to the Compromis;
7. *Decides* unanimously that Boundary Pillar No. 51 is situated at the location advanced by Egypt and recorded in Appendix A to the Compromis;
8. *Decides* unanimously that Boundary Pillar No. 52 is situated at the location advanced by Egypt and recorded in Appendix A to the Compromis;
9. *Decides* unanimously that Boundary Pillar No. 56 is situated at the location advanced by Israel and recorded in Appendix A to the Compromis;
10. *Decides* by four votes to one that Boundary Pillar No. 85 is situated at the location advanced by Egypt and recorded in Appendix A to the Compromis;
11. *Decides* by four votes to one that Boundary Pillar No. 86 is situated at the location advanced by Egypt and recorded in Appendix A to the Compromis;

12. *Decides* by four votes to one that Boundary Pillar No. 87 is situated at the location advanced by Egypt and recorded in Appendix A to the Compromis;

13. *Decides* by four votes to one that Boundary Pillar No. 88 is situated at the location advanced by Egypt and recorded in Appendix A to the Compromis;

14. *Decides* by four votes to one that Boundary Pillar No. 91 is situated at the location advanced by Egypt and recorded in Appendix A to the Compromis;

15. *Decides* unanimously that the execution of this Award shall be entrusted to the Liaison System described in Article VII of Annex I to the Treaty of Peace of 26 March 1979 between the Arab Republic of Egypt and the State of Israel.

Rendered at the Hôtel de Ville in Geneva on 29 September 1988.

Two original copies shall be given to the Agent for the Arab Republic of Egypt, two shall be given to the Agent for the State of Israel, and one shall be placed in the archive of the Tribunal.

Gunnar LAGERGREN

Pierre BELLET

Ruth LAPIDOTH

Dissenting Opinion

Hamed SULTAN

Douglas REICHERT

Dietrich SCHINDLER

Registrar

Dissenting Opinion of Prof. Ruth Lapidoth

In conformity with Article XII, paragraph 5, of the Compromis, Professor Ruth Lapidoth delivers the following Dissenting Opinion:

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Introduction

1. To my great regret, I must dissent from the conclusions of the majority and its views on many essential points, in particular with regard to the Taba area. With all due respect, I consider that the majority has sanctioned pillars erroneously erected at locations inconsistent with the lawfully recognized international boundary between Egypt and the former mandated territory of Palestine. Moreover, the majority has forced an artificial, illogical interpretation on the Compromis by asserting that two different locations, 284 metres apart, both can be considered to be the location of the final pillar of the boundary on Ras Taba.

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2. Leaving aside for the moment the contents of the majority opinion, the important fact should be stressed that the Parties, Egypt and Israel, have submitted their conflict to a procedure for the peaceful settlement of disputes, as befits States that are at peace with each other and wish to fulfil their obligation under the law of nations to settle their international disputes by peaceful means.

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I. *The Powers of the Tribunal*¹

3. The Arbitration Compromis restricts the powers of the Tribunal in very precise terms to a decision concerning "the location of the [14] boundary pillars of the recognized international boundary . . ." (Article II). Moreover, upon Egypt's insistence, each Party was to indicate "on the ground its position concerning the location of each boundary pillar . . ." and "[the] Tribunal is not authorized to establish a location of a boundary pillar other than a location advanced by Israel or by Egypt . . ." (Annex, Article 5).

4. It is rare for the powers of an arbitral tribunal to be limited in such a way. Usually, the tribunal is empowered to establish a boundary or part thereof according to its own opinion and not necessarily in accordance with the line claimed by either of the parties.² I have found only few cases where the tribunal was limited to choosing in law between the boundaries claimed by the parties ("exclusive disjunction"), and in two of those cases the award in fact did not abide by the limitation (The Chamizal Arbitration, 1911,³ and the Northeastern Boundary of the U.S. case, 1827⁴).

5. It is even rarer for an arbitral tribunal to be asked to decide on the location of specific boundary pillars, and I have not found any such case.

6. The Tribunal's functions are so restrictively defined that nobody, in particular not Egypt which insisted on this limitation, should be surprised if the Award does not fully resolve the boundary dispute, even though the Parties have declared in the preamble to the Compromis that they "wish to resolve fully and finally" their dispute. The Party that so wished to restrict the powers of the Tribunal is fully responsible if the Tribunal is unable to settle the whole dispute.

II. *The Recognized International Boundary of the Period of the Mandate*

7. The Peace Treaty, and the Compromis in its wake, speak of "the recognized international boundary between Egypt and the former mandated territory of Palestine". Thus, the Parties, instead of delineating the boundary in terms of specified geographical locations, have referred to the boundary that existed during the Mandate. This boundary, in turn, as shown below, was based on the separating administrative line between the Vilayet of Hejaz and Governorate of Jerusalem and the Sinai Peninsula, agreed upon on 1st October 1906 by the Turkish Sultanate, which at that time was the sovereign power in the whole area, and the Egyptian Khedivate, which was in a vassal status with regard to

¹ The background to this arbitration and the contentions of the Parties have been presented in the first part of the majority opinion, and will not be reiterated here.

² See, e.g., the many examples quoted in A. L. W. Munkman, "Adjudication and Adjustment—International Judicial Decisions and the Settlement of Territorial and Boundary Disputes", *British Year Book of International Law*, 46th year, 1972-1973, pp. 1-116.

³ *American Journal of International Law*, Vol. 5, 1911, pp. 782-833.

⁴ Moore, *International Arbitrations*, Vol. I, p. 119.

Turkey but in fact subject to British dominance. We thus have a two-stage renvoi: the 1979 Peace Treaty contains a renvoi to the recognized mandatory boundary, and the latter in turn refers us back to the 1906 line as laid down by the Agreement and recognized during the mandatory period, as shown below.

8. The Agreement of 1st October 1906 was signed at Rafah by a Joint Turco-Egyptian Commission after a survey of the area and after long negotiations. The whole operation was undertaken due to strong pressure by Great Britain which at the time was in control of Egypt, and with a leading role played by British experts.

9. Article I of the 1906 Agreement describes the boundary line as starting "at the point of Ras Taba on the western shore of the Gulf of Akaba", and ending at the Mediterranean Sea near Rafah (these expressions will be analyzed later). Article II reports that the separating line has been indicated by a black broken line on duplicate maps to be signed and exchanged simultaneously with the Agreement. Unfortunately, the original maps have apparently disappeared. Egypt has received from Turkey and submitted to the Tribunal a map which it considers to be a copy of the original maps, but the reliability of this copy is doubtful since it does not bear the signature of the parties as foreseen in Article II, and because its depiction of the boundary in the Rafah area is manifestly erroneous (it deviates considerably from the description in the Agreement). Article III foresees that "[b]oundary pillars will be erected, in the presence of the Joint Commission, at intervisible points along the separating line . . ." Article IV places the pillars under the protection of Turkey and Egypt while Article V lays down the procedure for the renewal of the pillars and for increasing their number if the need arises. The remaining articles (VI-VIII) deal with the preservation of ownership rights on both sides of the line, and with the right to benefit from the water situated to the west of the separating line (the provisions concerning water were necessary since the line left almost all the wells and springs under Egyptian control).

10. Soon after the signing of the Agreement, the border was demarcated on the ground by telegraph poles, which were later replaced by permanent masonry pillars. We have two detailed reports by British officials on the survey and on the erection of the telegraph poles,⁵ but very little information on the construction of the permanent pillars. No report of the Joint Commission nor any Turkish report on any of the various operations has been submitted to the Tribunal.

11. The main information concerning the masonry pillars relates to a controversial pillar erected on the shore of the Gulf of Aqaba on 31st December 1906 of which a photograph was found in the late Captain

⁵ E. B. H. Wade, with additions by B. F. E. Keeling and J. I. Craig, *A Report on the Delimitation of the Turco-Egyptian Boundary Between the Vilayet of the Hejaz and the Peninsula of Sinai (June-September 1906)*, Ministry of Finance, Egypt, Survey Department, Cairo, National Printing Department, 1907 (hereinafter "Wade Report"); Captain R. C. R. Owen, *General Report on the Proceedings of the Sinai Boundary Commission*, October 28th, 1906, Archives of the British Government (hereinafter "Owen's General Report").

Parker's personal effects by his daughter (hence the short name Parker pillar). The location of this pillar coincides neither with the location for BP 91 claimed by Egypt nor with the alternative locations claimed by Israel, and each Party relies on it to refute the claims of the other Party.

12. During the period of the Mandate the two neighbours—Egypt and Great Britain for Palestine—recognized the boundary which had been established in pursuance of the 1906 Agreement. The question upon which the present arbitration turns is: what exactly is the line recognized during the mandatory period? There are at least four possible answers:

- (a) the line defined in the 1906 Agreement;
- (b) the line demarcated by the telegraph poles in October 1906;
- (c) the line formed by the masonry pillars built in 1906-07 which replaced the telegraph poles; and
- (d) the line formed by any pillars which existed *de facto* on the ground in 1923 and which may have been erected after 1906-07.

Since neither Party claims that there is a discrepancy between the line delimited by the 1906 Agreement and the one demarcated by the telegraph poles, no distinction need be made between these lines.

13. My colleagues are of the opinion that the recognized international boundary during the mandatory period was the line formed by the masonry pillars in place during the period of the Mandate, even if some of these pillars were misplaced or constructed unilaterally after 1906-07.

14. I cannot share this view. A careful analysis of the relevant documents has led me to the conclusion that the relevant boundary is the one corresponding to the 1906 Agreement and the telegraph poles. By the various acts of recognition of the boundary during the mandatory period, the limitrophe entities, Egypt and Great Britain (for Palestine), adopted the boundary line of the 1906 Agreement, without reference to any changes on the ground which may have occurred subsequent to that Agreement. This recognition is manifested in many documents, some of them of an international character and others being in the nature of correspondence between different departments in the same country. Some emanate from the central authority (in Great Britain, in Palestine, or in Egypt) and others from another government department (mostly the one in charge of surveying). Some constitute acts of recognition of the boundary while others merely prove the existence of such recognition. The wording is not always the same. Thus, in a letter by Ahmed Ziwer Pasha, then Prime Minister and Minister of Foreign Affairs of Egypt, to Lord Lloyd, the British High Commissioner in Egypt, dated 4th February 1926, Egypt recognized the Palestine Mandate while making

toutes réserves en ce qui concerne les frontières de l'Égypte avec la Palestine, qui ne sauraient être en aucune façon affectées par la délimitation des frontières palestiniennes [which according to the Preamble to the Terms of the Mandate may be fixed later].

Ziwer Pasha did not specify what were the boundaries in question, but the British official reply of 25th June 1926 specifically refers to the "frontiers as defined in the year 1906" (letter from British High Commissioner in Egypt, Lord Lloyd, to Abdel Khaled Sarwat Pasha, then Minister for Foreign Affairs of Egypt), and apparently Egypt agreed to the contents of this reply. Ziwer Pasha had in fact invited a reply to his letter, and the result of its receipt was the identification of the 1906 line as the boundary between Egypt and the mandated territory of Palestine.

15. Other texts also refer to the boundary of mandatory Palestine *as defined in 1906*, i.e. Mr. McNeill's reply for the British Government in the House of Commons, on 16th July 1925; the letter of 7th February 1926 from Mr. N. Henderson, British Minister to Egypt, to Sir Austen Chamberlain, Secretary for Foreign Affairs; the letter dated 30th April 1926 from Mr. L. S. Amery, Secretary of State for the Colonies, to Lord Plumer, British High Commissioner for Palestine; Lord Plumer's letter of 20th May 1926 to Mr. L. S. Amery; the description in the *Geographical Handbook on Palestine and Transjordan* (1943) by the British Naval Intelligence Division; and Minute by Mr. H. Beeley, the Foreign Secretary's Adviser on Palestine Affairs, of 16th September 1945.

16. In other documents there is a clear reference to the boundary *as defined by the 1906 Agreement*, i.e. the letter dated 8th March 1932 from the Surveyor General of Egypt to the Director of Surveys, Survey of Palestine; the letter dated 28th November 1935 from the Colonial Office to Mr. M. Nurock; the letter dated 16th January 1936 from the Chief Secretary of the Government of Palestine to the Commissioner of Lands and Surveys and the reply dated 13th February 1936; the letter dated 6th February 1936 from Mr. Richards of the Survey of Egypt to Mr. H. G. Le Ray, Survey of Palestine, which speaks of "intervisible pillars placed in the ground by the Joint Commission after the agreement was signed"; the letter dated 8th January 1943 from the Director of Surveys, Survey of Palestine, Mr. H. G. Le Ray, to the Pales Press Co.; and the annex to a Foreign Office Memorandum of 4th April 1932 on Frontiers of "A" Mandated Territories. Another important document, which in fact refers to the line defined in the 1906 Agreement by using the expressions of the Agreement, although it does not mention the Agreement *expressis verbis*, is the Minutes of the 7th Meeting (6th June 1935) of the 27th Session of the Permanent Mandates Commission of the League of Nations held in June 1935 (for text of these documents, see Memorial of Israel, annexes 63-82 and Counter-Memorial of Egypt, annex 9). Moreover, in the Statistical Yearbooks of Egypt for the years 1910, 1913, 1916, 1926, 1928, 1929, and 1930 it is said that Egypt "est limitée à l'est par la ligne de démarcation arrêtée par la Commission Turco-égyptienne le premier octobre 1906" (The words "le premier octobre 1906" were added from 1913 onwards). In the 1909 Statistical Yearbook there is a reference to this boundary line and to the 1906 Agreement (despite the misprint of 1905 for 1906) in the note at the bottom of the page.

17. The most important among the above documents are the Statistical Yearbooks of Egypt, Mr. McNeill's reply in the House of Com-

mons (1925), the 1926 exchange of letters between Egypt's Minister of Foreign Affairs and the British High Commissioner in Egypt, and the 1932 Memorandum of the Foreign Office with the detailed definition of the boundaries.

18. These various documents confirm that the international boundary recognized by Egypt and the Mandatory Power was the one defined in 1906 by the 1st October Agreement and demarcated by the telegraph poles, irrespective of any later developments. This was the line commonly understood by the parties during the time of the Mandate to represent the valid and recognized boundary (cf. majority opinion, paras. 170-172). The various texts do not at all refer to the location of certain pillars on the ground. There is thus no reason to prefer pillars, or later maps plotting those pillars, over the line described in the Agreement, which is the line to which the texts specifically refer, when there are clear indications that the pillars in question have been erroneously placed, or unilaterally erected at a later date.

19. The preference for the boundary as it has been established by an agreement is in conformity with the principle of *uti possidetis iuris*, recently considered by a Chamber of the International Court of Justice in the *Burkina Faso/Mali Frontier Dispute* case (1986): "[I]ts first aspect, emphasized by the Latin genitive *juris*, is found in the pre-eminence accorded to legal title over effective possession as a basis for sovereignty."⁶

20. In fact, the majority's conclusion in favour of various locations claimed by Egypt is based on several assumptions which I do not consider justified, namely, that pillars at those locations were built during 1906-07 at the site of the telegraph poles placed in pursuance of the 1906 Agreement; that this process was part of the demarcation of the 1906 line; and that in international law demarcation prevails over delimitation.

21. I cannot agree to any of these premises. There is no proof that the pillars at the locations claimed by Egypt were established in 1906-07, and since these locations are in my opinion inconsistent with the terms of the 1906 Agreement (see detailed discussion below, in paras. 90-95; 167-184), no presumption as to their establishment in 1906-07 arises.

22. Moreover, with regard to the pillar in the Taba area, 91(E), the majority itself has expressed doubt on the date of its establishment: "The first evidence of its existence appears on the 1915 British map" (para. 228). Most probably this pillar was built several years after the erection of the 1906-07 masonry pillars which replaced the telegraph poles (see below, para. 83), and thus could not have been part of the demarcation, irrespective of the question of whether this replacement action in 1906-07 was part of the original demarcation process.

23. The majority places heavy weight on the fact that the pillar at 91(E) existed on the ground when the Mandate for Palestine was established. But its physical existence in 1923 does not mean that it was built with the other masonry pillars erected in 1906-07.

⁶ *ICJ Reports 1986*, p. 554, at p. 556.

24. The second premise of the majority is, as mentioned, that the replacement of the telegraph poles by masonry pillars in 1906-07 was part of the demarcation process.

25. However, unlike my colleagues, I consider that this replacement operation was not at all part of the demarcation process and hence the location of these pillars should not be given overriding weight. The answer to the question whether the erection of permanent pillars in the wake of temporary markers is part of the process of demarcation depends on the specific agreement concluded by the parties and on the relevant circumstances: the degree of care with which the temporary markers had been established compared with the degree of care applied in the replacement operation, whether the replacement was undertaken unilaterally or bilaterally, and whether the replacement operation was properly reported.

26. In sharp contrast to the earlier operations, no official report on the erection of the masonry pillars in 1906-07 has been submitted to the Tribunal. All we know about it is contained in a few laconic references, such as a sentence in H. G. Lyons's Introduction to the Wade Report (he mentions in passing that the permanent signals "have been replaced by masonry marks"), in a private diary and set of photographs by Captain Parker, and in a short reference in Shoucair's book.⁷ This is a far cry from the detailed joint report about each pillar which should be made in a proper demarcation procedure. As Stephen B. Jones states in his most authoritative handbook on boundary-making, "[t]he most important and elaborate document prepared by a demarcation commission is its final report, sometimes called the boundary protocol". The author describes in detail all the information which such a report should include.⁸ According to Prof. Charles Rousseau, "le résultat de la démarcation . . . est consigné dans des protocoles . . . ou des procès-verbaux", and the technical "abornement" too is reported in a procès-verbal.⁹

27. There are several circumstances which support the conclusion that the parties did not consider the erection of the masonry pillars as part of the demarcation process: the telegraph poles were fixed by the members of the Joint Turko-Egyptian Commission with the help of the surveyors who had surveyed the area prior to the delimitation; the same officials and experts had also participated in the delimitation phase (negotiation and conclusion of the 1906 Agreement). At least two of those involved have written detailed reports about the whole operation, including a specific description of the erection of the poles—the difficulties encountered, how they were overcome, the location of the poles. Both of them—Mr. Wade (a surveyor-engineer) and Captain Owen—as

⁷ Naum Bey Shoucair, *Ancient and Modern History of Sinai and its Geography, with a Summary of the History of Egypt, Syria and Lebanon, Iraq and the Arabian Peninsula*, Cairo (1916), p. 615.

⁸ S. B. Jones, *Boundary-Making: A Handbook for Statesmen, Treaty Editors and Boundary Commissions*, Carnegie Endowment for International Peace, Washington, D.C., 1945, pp. 197-200. See also A. O. Cukwurah, *The Settlement of Boundary Disputes in International Law*, Manchester University Press, 1967, p. 79.

⁹ Ch. Rousseau, *Droit International Public*, Vol. 3, Paris, Sirey, 1977, pp. 270-71.

well as the Director General of the Survey of Egypt, Mr. H. G. Lyons, referred to the erection of the telegraph poles as the demarcation process (Wade's Report, p. 50, and Introduction, p. 2; Owen's General Report, p. 6). Neither of these experts nor any of the Egyptian members of the Joint Commission were present at the replacement operation. Captain Parker who probably¹⁰ was present at the erection of the first masonry pillar, was not a member of the Joint Commission. Very little information, mostly inconclusive, was left on the replacement process and no official report was submitted.

28. It thus follows that the delimitation and the erection of the telegraph poles completed the process of the establishment of the boundary line. The erection of the final pillars was only to be a technical operation which should not have involved any measurements or technical expertise. In no document is it spoken of as "demarcation", and it was not recorded in an official, detailed report, as befits a proper demarcation process or "abornement".

29. The third premise of the majority concerns the relative weight of demarcation as compared with delimitation. The majority gives absolute preponderance to the demarcation relying on two articles, one by Prof. F. Münch¹¹ and the other by Prof. G. Ress,¹² in particular on the following quotation from the latter: "If the parties have considered over a long time the demarcated frontier as valid, this is an authentic interpretation of the relevant international law title" (majority opinion, para. 210). However, neither author supports an absolute preference for demarcation over delimitation. Of particular interest is Prof. G. Ress's opinion that "[p]robably demarcation . . . only shifts the burden of evidence to the party which wants to argue that the demarcation was wrong" (at p. 435).

30. Developing Prof. Ress's approach a little further, one might say that the relative weight of delimitation and demarcation depends on the circumstances of each case, i.e. the degree of precision and of detail in the delimitation agreement, the seriousness of the pre-delimitation survey, the degree of care with which the demarcation has been effected and reported,¹³ and of course whether it was undertaken unilaterally or bilaterally.

31. As stated above, several circumstances point to the conclusion that the erection of the masonry pillars in 1906-07 was not part of the demarcation (paras. 25-28). However, even if this stage had been part of the demarcation, as the majority claims, and had thus been included in the renvoi, this would only—to use Prof. Ress's approach

¹⁰ The word "probably" is intended to express some doubt since, according to N. B. Shoucair, Captain Parker left for Nakhl immediately after agreement on the shape of the boundary pillars was reached—see Naum Bey Shoucair, *op. cit.*, note 7, p. 615.

¹¹ F. Münch, "Karten im Völkerrecht", *Gedächtnisschrift für Friedrich Klein*, Munich, 1977, pp. 335-354 at p. 344.

¹² G. Ress, "The Delimitation and Demarcation of Frontiers in International Treaties and Maps", in *National and International Boundaries, Thesaurus Acroasium*, Vol. XIV, Institute of International Public Law and International Relations of Thessaloniki, 1985, pp. 395-458, at p. 437.

¹³ See notes 8 and 9, *supra*.

—shift the burden of proof to the Party that challenges the correctness of these pillars. This burden is amply discharged by several facts.

32. Our analysis of the flaws in the erection of the 1906-07 pillars centers at this stage on the Parker pillar, although neither Party has claimed it as the location for BP 91, since it is the pillar about which more information is available and since it is crucial for the decision concerning the Taba area.

33. First, this pillar was built at the wrong location since it did not conform to the criterion of intervisibility which had been laid down by the 1906 Agreement as a mandatory requirement.

34. Second, its construction was not properly reported, neither in a joint report nor even in a unilateral one.

35. Moreover, according to Article 3 of the 1906 Agreement, the boundary pillars had to be erected in the presence of the Joint Commission. But there is no record of the presence of the Egyptian members of that Commission when the Parker pillar was built. Captain Parker, who probably was present, was not a member of that Commission. There is no trace of any authority given to Captain Parker to demarcate the boundary or to deviate from the express provisions of the Agreement, whereas with regard to the earlier stages the full powers of the Egyptian Commissioners were recorded (Owen's General Report, p. 13). The only reference to any authority which Colonel Parker may have thought to have had are the words "[i]t fell to my lot to arrange the building of the pillars (150 [sic!], I think) marking the line . . ." which he used in a lecture given twenty years later (1927).¹⁴ The vague expression "it fell to my lot", coupled with the mistake concerning the number of the pillars, precludes a conclusion on the existence of a proper authorization in 1906.

36. It follows that even if the Parker pillar had been built within the framework of a demarcation process, no presumption in favour of this "demarcation" would prevail since its location does not comply with the mandatory intervisibility requirement of the 1906 Agreement, the "demarcation" of the whole line was not properly reported, and the pillar was not erected with proper authority.

37. My colleagues rely on the fact that "Turkey never made any complaint about the location of this first boundary pillar . . ." and that "Turkey, in 1909 and 1911, collaborated with Egypt in the repair and rebuilding of pillars which had become unstable . . ." (para. 231).

38. However, the lack of complaint over such a short period (1907-1914) cannot cure a defect stemming from a contradiction between the Parker pillar and a basic provision of the 1906 Agreement. Moreover, the lack of complaint is counterbalanced by two relevant facts: first, during the same period there was effectively a Turkish presence west of the Parker pillar site (see below, paras. 141-142); and second, on

¹⁴ Published in the *Journal of the Central Asian Society*, Vol. XV, 1928, p. 3, and reproduced in H. V. F. Winstone, *The Diaries of Parker Pasha*, Quartet Books, London, 1983, at p. 201.

the two Turkish maps of that period—the 1909 Turkish military map and the 1916 Turkish-German map—the boundary ends considerably to the west of that site, at the Granite Knob (see below, paras. 132-134).

39. As to the effect of the rebuilding of certain pillars jointly by Egypt and Turkey: without going into the question of the possible effect on the specific pillars which have so been rebuilt, it is clear that this collaboration could have no effect on other pillars, in particular the Parker pillar, which were not included in the joint rebuilding operation.

40. The situation in the Ras an-Naqb area is somewhat different. These locations do fulfil the requirement of intervisibility, but on the other hand they contradict the physical description of the boundary as laid down in the 1906 Agreement (as shown below in paras. 166-184). Moreover, any presumption in favour of these pillars loses its basis due to the events of the war: the old pillars erected in 1907 were most probably destroyed during World War I (see majority opinion, para. 107), in which Britain and Turkey fought on opposite sides. After Turkey's withdrawal, the new ones could only have been built without joint participation. Under these circumstances any presumption in favour of the existing pillars loses its ground.

41. It follows that the main premises of the majority opinion are not well founded: the pillar at the location claimed by Egypt for BP 91 was not built in 1906-07 and thus could not be considered part of any operation undertaken in that year; the 1906-07 erection of masonry pillars was not in the nature of demarcation; and even if, *arguendo*, it had constituted an act of demarcation, the presumption in favour of the correctness of such demarcation has been countered by the proof that the Parker pillar and the Ras an-Naqb pillars contradicted the delimitation Agreement, by the lack of a proper report, and by the absence of necessary authority.

42. In their opinion, my colleagues have expressed a preference for "the situation on the ground", relying in particular on a pronouncement of the International Court of Justice in the *Temple of Preah Vihear* case (1962)¹⁵ which sanctifies the permanence and stability of established boundaries. I wholeheartedly agree that boundaries have to be stable and permanent, but the question in our case is, which line is the relevant boundary? Is it the line that was established by the telegraph poles, or is it some other line deviating from the one prescribed by the 1906 Agreement? There can be no doubt in my mind that the stability and permanence referred to in the *Temple of Preah Vihear* case should be attributed to the *de jure* boundary, the line delimited and demarcated in 1906. This was the line recognized during the mandatory period, and this is the line to which the principle of *quieta non movere* applies.

43. In this context I again wish to refer to the *Burkina Faso/Mali Frontier Dispute* case (1986),¹⁶ where the Chamber of the International Court of Justice distinguished between the notions of *uti possidetis juris* and *uti possidetis facti*, and preferred the former.

¹⁵ *ICJ Reports* 1962, p. 34.

¹⁶ See *supra*, note 6.

44. In trying to derive some guidance from the *Temple* case, we have to remember several points on which the facts in the present case differ considerably from the background of that case. As already mentioned, during the time of the Mandate—the critical period—the parties did not refer to the boundary as it may have been on the ground or on certain maps, but they expressly referred instead to the line defined in the 1906 Agreement. Moreover, any later change to the detriment of Palestine was excluded since the mandatory Power was precluded from ceding any of the original territory of Palestine, as laid down in Article 5 of the text of the Mandate:

The Mandatory shall be responsible for seeing that no Palestine territory shall be ceded or leased to, or in any way placed under the control of the Government of any foreign Power.

The last phrase—“or in any way placed . . .”—excludes any loss of territory, whether by commission or omission, whether expressly or by an implied acquiescence. It follows that the mandatory authorities were not entitled to change the boundary as laid down by the 1906 Agreement. In fact they did not intend to change it, nor did they change it.

45. The circumstances in the present case differ from those in the *Temple* case on several additional points. First, the Parties to this arbitration explicitly used in their Compromis, at least with regard to the final pillar, the precise language of the 1906 Agreement, thus expressing their intention that this Agreement is the controlling factor. Second, unlike the facts in the *Temple* case, in the present one (contrary to the majority’s opinion) the maps drawn between 1906 and 1915 to a large extent support the 1906 line as understood by Israel (see below, paras. 132-134). Third, another important difference concerns the relative precision of the boundary agreement: the 1906 Turko-Egyptian Agreement was more detailed and specific in its description of the boundary than the 1904 Franco-Siamese agreement dealt with in the *Temple* case. The reason may be that with regard to the Turko-Egyptian Agreement, a proper survey had been undertaken before the signing of the Agreement, whereas the Franco-Siamese boundary was apparently not so well surveyed prior to the conclusion of the agreement. This may explain why in the *Temple* case so much weight was given to the 1907 (post-treaty) map.

46. On the question whether the principle formulated in the *Temple* case requires the continued validity of an erroneous border which has for a long time been recognized, it is interesting to refer to a 1980 judgment of the Swiss Federal Court concerning the boundary between the cantons of Valais and Ticino.¹⁷ After the building of a new road on the basis of a 1947 map, the canton of Valais claimed the map to be inaccurate and asserted that the borderline between the two cantons was shown correctly on an 1872 map. The dispute was decided by the Swiss

¹⁷ The *Nufenenpass* case, *Entscheidungen des Schweizerischen Bundesgerichts* aus dem Jahre 1980, Amtliche Sammlung, 106 Band, Ib. Teil, p. 154. For a summary in English, see *International Law Reports*, Vol. 75, 1987, pp. 114-121.

Federal Court on the basis of public international law applied by analogy, and it distinguished it from the *Temple* case:

Der Umstand, dass der Kanton Wallis weder im Zusammenhang mit der Planung und dem Bau der Nufenenstrasse noch im Verfahren der Gewährung der Bundesbeiträge Vorbehalte zur Grenzfrage angebracht hat, besitzt an sich erhebliches Gewicht. Das umstrittene Gebiet ist indessen sehr klein . . . Vor dem Strassenbau war dieses Gebiet völlig unwegsam und ohne jede wirtschaftliche Bedeutung . . . Unter diesen Umständen—die sich von denjenigen im zitierten Fall des Tempels von Preah Vihear wesentlich unterscheiden—kann dem Kanton Wallis nicht zur Last gelegt werden, dass er die Abweichung der Kartengrenze von dem nach seiner Auffassung richtigen Grenzverlauf zunächst nicht erkannte und erst nach Abschluss der Bauarbeiten die Frage der Grenzziehung aufwarf. Man würde an die Sorgfaltspflicht der Kantone bei der rechtlichen Sicherung ihrer Grenzen überhöhte Anforderungen stellen, wollte man von ihnen verlangen, in abgelegenen und unerschlossenen Gebieten jederzeit auch minime Abweichungen auf Landeskarten und anderen offiziellen Dokumenten vom realen Grenzverlauf festzustellen und entsprechende Schritte zur Wahrung des Status quo zu unternehmen (at p. 168).

This Swiss case has some interesting similarities to the present arbitration. The disputed area was relatively small, uninhabited, and without economic importance. Only when a road was built did it acquire some economic interest. Under these circumstances, the Swiss Federal Court found that Valais's legal claim should not be prejudiced by that canton's unawareness, prior to the dispute, of the discrepancy between the location of the boundary on modern maps, and the line on older ones—the line which Valais submitted to be the correct one. In the view of the Court, a different conclusion would have put too heavy a burden of alertness on the cantons. Thus the Court rejected the validity of a boundary which had been erroneously depicted for a long time.

47. In the present case too, the area in dispute is small, almost uninhabited, and did not have any economic value until it was opened to tourism as a result of the building of the road to Sharm ash-Sheikh and the establishment of the vacation facilities in the Taba area. In the critical period (the Mandate period), it was of no economic or touristic value, and did not attract any attention.

48. The probable absence of a demarcation between Valais and Ticino does not affect the relevance of that case. First, in this Arbitration there is disagreement about the demarcation, as discussed above (whether the erection of the masonry pillars is part of the demarcation process or not), and second, because, as explained earlier, even a proper demarcation only shifts the burden of proof to the party that challenges it.

49. To sum up, the Treaty of Peace refers to the boundary recognized during the British Mandate and the latter refers us to the line established by the 1906 Agreement. The majority errs in assuming that the recognized international boundary during the mandatory period was formed by the pillars that in fact existed on the ground, whether wrongly or rightly erected. Those pillars had never been "recognized" during the Mandate period. The express documentary references relating the recognition of the mandatory boundary to the 1906 Agreement or to the

1906 line establish beyond doubt the overriding dominance of the delimitation provided in the Agreement and the demarcation by the telegraph poles. It excludes giving any effect to contradicting or modifying elements which could be found on the ground or in maps. It is the legal and lawful 1906 line which deserves protection for the sake of stability and permanence.

III. *The Taba Area: Pillar Number 91*

50. Turning now to the main pillar in dispute, I shall discuss:

- (A) the description of the pillar in the basic documents;
- (B) the conditions that BP 91 has to fulfil;
- (C) Egypt's location for BP 91;
- (D) Israel's locations for BP 91; and
- (E) conclusion and the problem of *non licet*.

A. *The location of the pillar according to the basic documents*

51. This description can be found in three provisions. First, Article 1 of the 1906 Agreement states that "[t]he administrative separating line, as shown on map attached to this Agreement, begins at [the point of] Ras Taba on the western shore of the Gulf of Akaba . . ." (the words "the point of" appear in the English translation used by Owen and Wade and later published in *British and Foreign State Papers*, but they were omitted in the two recent translations prepared by the Parties during the present arbitration).

52. Second, the Compromis says, in the Annex, paragraph 2:

For the final boundary pillar No. 91, which is at the point of Ras Taba on the western shore of the Gulf of Aqaba, Israel has indicated two alternative locations, at the granite knob and at Bir Taba, whereas Egypt has indicated its location, at the point where it maintains the remnants of the boundary pillar are to be found.

It is most remarkable that all other boundary pillars are mentioned in the Compromis (Annex A, paragraph 1) only by numbers, but with regard to BP 91 the Parties themselves have given a detailed geographical description, no doubt inspired by the text of the 1906 Agreement, but by itself a valid expression of their intentions in 1986.

53. Third, according to the Compromis, "[t]he markings of the parties on the ground have been recorded in Appendix A" (Annex, paragraph 3). In this Appendix, Egypt marked the "Remnants", while Israel marked (a) an "Approximate Location at the Granite Knob", and (b) "Bir Taba".

B. *The conditions that BP 91 must fulfil*

54. The 1906 Agreement and the 1986 Compromis have laid down a number of conditions which the proper BP 91 has to fulfil: it has to be the final pillar of the boundary, it must be at the point of Ras Taba on the western shore of the Gulf of Aqaba, and it has to be intervisible with the preceding pillar, namely agreed BP 90. For convenience, the two first conditions will be discussed together.

- i) IT HAS TO BE THE FINAL PILLAR ON THE BOUNDARY; AND
- ii) IT MUST BE “AT THE POINT OF RAS TABA ON THE WESTERN SHORE OF THE GULF OF AQABA”

55. The Compromis describes BP 91 as “the final boundary pillar No. 91 . . .” (Annex, paragraph 2). In order to interpret this expression, it might be helpful to read it in its context, namely, in conjunction with paragraph 1 of the Annex. This paragraph tells us that “[a] dispute has arisen on the location of the following boundary pillars of the recognized international boundary . . .”. Since the whole dispute is defined by reference to certain boundary pillars on the recognized international boundary identified according to their number on that boundary, the expression “final boundary pillar” in paragraph 2 of the Annex can only mean the final boundary pillar of that recognized international boundary. I don’t see any contradiction, as the majority does, between the location of 91(E) being on the one hand the final one mentioned in the list of disputed locations and on the other hand the penultimate pillar of the boundary (para. 242).

56. Moreover, the fact that the pillar has to be “at the point of Ras Taba on the western shore of the Gulf of Aqaba” also shows that we are dealing with the final, ultimate pillar near the water, since this is precisely where the boundary is defined to commence according to the 1906 Agreement (see also paras. 62-64).

57. “Ras”, when mentioned in the context of a shore, means cape—a headland or a promontory. According to Dr. Y. Tony’s *Dictionary of Geographical Terms*, “ras” means “part of the land which protrudes into the sea or alluvium or a sharp tongue [a long narrow strip of land projecting into a body of water] or part of the land that continues into the sea”.¹⁸ As an example of a Ras in the same area, one can mention Ras Muhammad at the entrance to the Gulf of Aqaba. As already mentioned (para. 51), the word “point” does appear in the 1906 translation used by the Commissioners, but it does not appear in the more recent translations from the Turkish by experts for the Parties to the arbitration. However, since the word does appear in the text of the Compromis itself, the Tribunal is bound to take it into consideration.

58. In the discussion of the locations advanced by Egypt (91(E)) and by Israel (91(I)), I shall deal with the question of which one fulfils the condition of being the location of the final pillar. Here only the general problems raised by the majority will be dealt with.

59. My colleagues have expressed the opinion that “[e]vidently, in 1906 they [the words concerning the conditions of being the final pillar and at the point of Ras Taba] referred to the Parker pillar, not to BP 91(E) . . .” (para. 243). They are, nevertheless, of the opinion that in 1986, BP 91(E) could also have been designated as the “final pillar” since “[i]t is clear that an indication on the ground would not have been conceivable for the Parker pillar location . . .”, and “[t]he location of

¹⁸ Dr. Youssef Tony, *Dictionary of Geographical Terms*, 2d ed., Cairo (in Arabic).

BP 91(E) was the last pillar location along Egypt's claimed line which in 1986 could be indicated on the ground" (para. 242).

60. This conclusion is based on an erroneous assumption of facts. In 1986 there was no hindrance to indicate the Parker location on the ground. Although the cliff had been removed when the road was built, the ground below the cliff does exist and could easily have been indicated.

61. As to the condition of being "at the point of Ras Taba on the western shore of the Gulf of Aqaba", my colleagues consider that "[t]he words 'on the shore' mean that the pillar was to be at a distance not far from the shore and visible from the shore" (para. 244).

62. However, when a delimitation agreement designates a commencement of the boundary "on the shore", the plain meaning of the words is that the boundary starts on the shore, near the waterfront. The most authoritative author on boundary-making, S. B. Jones, makes a distinction between the term "coast", which may connote both shore and hinterland, and "shore", which "refers to the belt within tide range".¹⁹ Since there is only little tide in the Gulf of Aqaba, the expression "within tide range" can only mean: very close to the shore. If the Parties' intention had been to indicate a place not far from the shore, the Agreement and the Compromis would have said "near the shore" or "in the vicinity of the shore".

63. Moreover, this conclusion also follows from the wording of Article III of the 1906 Agreement:

Boundary pillars will be erected, in the presence of the Joint Commission, at inter-visible points along the separating line, from the point on the Mediterranean shore to the point *on* the shore of the Gulf of Aqaba (emphasis added).

This article too proves that the pillars have to be as close as possible to the sea itself. The description of the demarcation in the Rafah area shows that the Commissioners in fact erected the pillar close to the beach, approximately 45 metres from the water's edge. There is no reason to assume that on the Gulf of Aqaba it was farther removed.

64. According to the majority, "the words 'at the point of Ras Taba . . .' originally were conceived for the Parker pillar and could, in the time of the Mandate, be understood in this sense only" (para. 243), and "the location of the Parker pillar undoubtedly fits this description better", but they nevertheless consider that "the location of BP 91(E) . . . also could reasonably be understood as lying 'at the point of Ras Taba on the western shore of the Gulf of Aqaba'" (para. 244). However, if the Parker location fulfilled this condition, then the location of the pillar beyond it could not logically fulfil the same condition. If the majority's opinion were correct, this would mean that two pillars were erected on Ras Taba—the Parker pillar and a pillar at the location of 91(E)—a possibility which is clearly contradicted by Owen and Wade who stated that *one* pillar was erected on "Ras Taba on the Gulf of Aqaba" (Owen's General Report, p. 7; Wade's Report, pp. 53 and 65) (see also *infra*, para. 159).

¹⁹ S. B. Jones, *op. cit.*, note 8, at p. 148.

65. The said conditions by their very nature can be fulfilled only by one location, and by stating that two locations fulfilled them, the majority in fact disregarded these conditions, contrary to the provisions of the 1906 Agreement and the 1986 Compromis. (I shall later come back to this problem below in paras. 162-164.)

iii) IT HAS TO BE INTERVISIBLE WITH BP 90

66. As mentioned above, the 1906 Agreement foresaw that “[b]oundary pillars will be erected, in the presence of the Joint Commission, at intervisible points . . .”. This is a clear, straightforward provision which, contrary to the opinion expressed by the majority, imposes intervisibility as a mandatory requirement without exception. The requirement of intervisibility was included in the Agreement itself and not merely in technical recommendations to the surveyors. The auxiliary verb “will” in the Agreement means, in this context, a mandatory condition and is synonymous with “shall”.²⁰ The imposition of the requirement of intervisibility by the Agreement conforms to a general technique of good boundary demarcation.²¹ Owen’s General Report confirms that this mandatory requirement was in fact followed, since he states that “[n]inety intervisible pillars were erected on the boundary line . . .” (p. 7). The use of the past tense in the Report—“were”—shows that intervisibility was in fact achieved. Wade’s report mentions intervisibility several times (e.g., pp. 50, 53, 54, 55, 64, 65) and Shoucair also refers to it.²²

67. The element of intervisibility was so important that even during the period of the Mandate it was mentioned at least three times in the letter from the Survey of Egypt to the Survey of Palestine of 6th February 1936 (“Intervisible marks have been put in by a joint commission . . .”; “. . . the intervisible pillars placed in the ground by the joint commission after the agreement was signed . . .”; and then a professional recommendation that “boundaries should be defined as straight lines joining consecutive intervisible points . . .”). Similarly, in a letter of 8th March 1932 from the Surveyor General of the Survey of Egypt sent in reply to a question from the Survey of Palestine, it is said that “[t]he Boundary was demarcated on the ground by Pillars erected at intervisible points”.

68. Intervisibility was in fact achieved all along the line in 1906. The few minor deviations which Egypt points out exist today can easily

²⁰ See D. Rushworth in Verbatim Record (V.R.), p. 557. Since I intend to rely with regard to several important matters on the testimony of Mr. D. Rushworth, the expert witness on behalf of Israel, it is appropriate to mention at this point some of his professional credentials. He is a graduate in civil engineering from London University and has a post-graduate diploma in geodesy from Oxford University. He is a Chartered Land Surveyor. He has much experience in surveying, cartography, and demarcation, acquired partly in the British army and partly in civilian functions. His experience relates to both the United Kingdom and overseas countries, including several Arab countries.

²¹ S. B. Jones, *op. cit.*, note 8, p. 215.

²² N. B. Shoucair, *op. cit.*, note 7, p. 614.

be explained, as confirmed by Commander P. B. Beazley's Report and testimony.

69. My colleagues agree that "the Agreement does not provide for any exceptions to intervisibility" (para. 236), but they accept Egypt's contention that in the southern part of the boundary intervisibility was not complied with. The majority relies on the fact that Wade in his Report does not mention intervisibility between the last three pillars, and they consider that this silence, together with the difference in the character of the boundary in the south, point in the direction that intervisibility was dispensed with and that the Commissioners in 1906 were content to rely on the verbal description of the boundary (para. 237). Moreover, from the fact that according to Wade the Commissioners were in a hurry, my colleagues conclude that "the Commissioners did not climb the hills but remained in the Wadi and selected points on the hills which were visible from sites in the Wadi" (para. 237).

70. None of these conjectures seems warranted. As to Wade's silence on intervisibility along the last stretch: the majority too agrees that with regard to other stretches of the boundary as well he does not expressly mention that intervisibility was achieved, although in fact it certainly was adhered to. Moreover, a very careful analysis of Wade's Report on demarcation, at page 53, reveals that by implication he does mention the existence of intervisibility along the last stretch as well. He says that "I accompanied the Commissioners and assisted them generally, but as explained no technical assistance or instrumental work was required . . ." (p. 53). The words "as explained" refer us back to the preceding paragraph, where Wade describes the demarcation in the Thamilet el Radadi area: "the summits to be beaconed were within easy distance of one another and visible throughout, so that the selection of intervening points in the plain required practically no technical help." Actually Wade's words mean that the achievement of intervisibility in this area required no technical help since in practice all the Commissioners had to do was to look and to follow their sight.

71. The fact that during the last days of the erection of the telegraph poles the Commissioners proceeded rapidly, does not warrant the majority's conclusion that the Commissioners gave up intervisibility (see D. Rushworth's evidence, V.R., p. 563). In particular, I have not found any basis or hint to support the assumption that the Commissioners selected points on the hills which were intervisible with sites in the Wadi. Such action would not constitute compliance with the requirement of intervisibility: intervisibility means mutual sight between two consecutive boundary poles, not visibility between each of them and a third point. There is thus no basis for the assumption of the majority that, due to the configuration of the terrain and the fact that the Commissioners were in a hurry, they disregarded the 1906 Agreement and gave up intervisibility south of Jebel Fort.

72. Finally, it is unthinkable that an experienced surveyor like Wade and careful official like Captain Owen would give up intervisibility at an important pillar of the boundary without specifically mentioning it in their meticulous Reports (see D. Rushworth, in V.R., p. 566).

73. It follows that the considerations based on the demarcation report relied upon by the majority to dispense with the requirement of intervisibility are not convincing.

74. According to the second consideration of the majority, lack of intervisibility is irrelevant since “the Parker pillar location and the location of BP 91(E) were recognized by the States concerned as forming part of the boundary line during the critical period . . .” (para. 237).

75. Again, with all due respect, I must differ. The texts analyzed in Chapter II above (paras. 7-49) show that during the period of the Mandate the two neighbouring entities had recognized the boundary as defined by the 1906 Agreement. If the parties had intended to recognize the pillars that *de facto* existed on the ground, they could have done so, but in no text or letter is to be found a reference to the situation in the field.

76. To sum up: the 1906 Agreement and the 1986 Compromis have established three conditions which BP 91 must fulfil: it has to be the final pillar of the boundary at the southern end of the line, and logically only one location can fulfil this condition; it has to be “at the point of Ras Taba on the western shore of the Gulf of Aqaba”, and again, there is no basis whatsoever for the argument that two locations may logically be at that place; and it has to be intervisible with agreed BP 90 since intervisibility is a mandatory requirement in the 1906 Agreement, and this requirement was in fact complied with at the erection of the telegraph poles. The opinion that intervisibility is irrelevant since the Parker pillar and 91(E) were recognized by Egypt and mandated Palestine as boundary pillars is based on the erroneous premise that the recognized boundary was formed by the *de facto* pillars even in case of a contradiction with the 1906 Agreement.

C. *Egypt's location for BP 91*

77. There is no doubt that there are remnants of an old pillar-type construction at the location of 91(E) but there is no evidence that it was erected in 1906. On the contrary, the very trustworthy expert witness, Mr. D. Rushworth, has explained how this pillar was subsequently built by mistake at what was originally a mere trig point, and he based his explanation on the field sheets of the 1915 map (to be discussed below in para. 83).

78. Both Parties agree that at 91(E) physically existed a pillar during the mandatory period, but, as shown in Chapter II, this is irrelevant for the definition of the recognized boundary.

79. According to the 1906 Agreement, the line is supposed to follow “along the eastern ridge overlooking Wadi Taba . . .” (Article 1), and, according to Wade, the beacons were placed “on the eastern margin of Wadi Taba” (p. 53). But the location of 91(E) is not on the eastern margin of Wadi Taba, and it hardly overlooks the Wadi. Standing at 91(E), one can see only the southern tip of the Wadi, since 91(E) is located on the second group of cliffs, far beyond the margin of the Wadi.

80. The majority found that due to divergencies in the 1906-1915 maps, "evidence drawn from the early maps with regard to the final pillar location cannot lead to any clear conclusion" (para. 219).

81. A careful study of the maps of that period has led me to the conclusion that *not one* of the early maps confirms that the 91(E) location is on the boundary. These are the map attached to Owen's General Report, 1906; the map attached to Wade's Report, 1907; the 1909 Turkish military map; the 1907 British War Office map; the 1916 Turkish-German map; the 1906 Survey Department of Cairo map; the map included in Rushdi's book (1910-11); the map included in Hertslet's *Map of Africa by Treaty*, 3rd ed., Vol. III, No. 373, p. 1201, H. M. Stationery Office, 1909; and the 1911 Survey Department of Cairo map.

82. According to the majority opinion, "[t]he first evidence of [the] existence [of a pillar at 91(E)] is the 1915 British map, which shows a boundary pillar at the elevation of 298 feet (91 metres) conforming to BP 91(E)" (para. 228). The existence of this pillar was confirmed by later maps, by various trig lists, and by photos—the 1922 Beadnell photo as well as a photo taken by an Israeli in 1949 (para. 228).

83. However, we have heard convincing expert evidence that on the 1915 British map, a trig point was marked, by mistake, as a boundary pillar (D. Rushworth's testimony, V.R., p. 588) and perhaps later caused the erection of a boundary pillar on that spot. The expert, Mr. D. Rushworth, based his opinion on a careful study of the various field sheets made in the preparation of that map.

84. Other shortcomings which shed doubt on the reliability of the 1915 British map are the fact that it does not show the Parker pillar which probably existed *de facto* at that time, and that it misplaces the change in the direction of the boundary line which occurs at today's agreed BP 90 and shifts it into Wadi Khadra. Probably all the later maps and trig lists, as well as the actual existence of the pillar at the location of BP 91(E), have their origin in the error in the 1915 map.

85. The authority of the 1915 British map is even further reduced due to the publication soon afterwards of the Turkish-German map of 1916, which describes the boundary very differently, as running along the margin of the Wadi, at the foot of the eastern hills, and ending at the triangle which represents the astronomical station on the Granite Knob.

86. In order to be able to evaluate properly the weight of the 1915 British map and those made in its footsteps, one does not have to delve into the difficult question of the probatory value of maps in general. As Prof. F. Münch has said, "[d]ie Rolle der Karten kann sehr verschieden sein, und je nachdem kann ihr rechtlicher Gehalt von Null bis zu einem Höchstwert gehen."²³ [The role of maps can vary greatly, and depending on the circumstances, their legal weight can go from zero up to a maximum value.] As to the 1915 British map, its reliability may be questioned due to the above-mentioned mistakes (para. 84); second, it contradicts the earlier, 1906-1915 maps, which should be preferred since

²³ F. Münch, *op. cit.*, note 11, at p. 335.

they were made closer to the delimitation and demarcation operations; and third, to the extent that it deviates from the 1906 line it is irrelevant, since the boundary recognized during the critical period was the 1906 *line* as such (see above, Chapter II). Any later maps, trig points, and pillars which deviate from this line are not included in the two-stage renvoi on which the Egypt-Israel boundary is based.

87. The majority is not disturbed by any doubts or disagreement concerning the origin of the pillar at 91(E) since it is of the opinion that “at least from around 1917 and throughout the critical period until a time after 1967 there was a boundary pillar at the location of BP 91(E), . . . [and] throughout the Mandate period both Egypt and Great Britain treated it as a boundary pillar” (para. 235).

88. However, *ceterum censeo* (paras. 7-49), in my opinion the physical existence of pillars at certain locations during the critical period is not the decisive factor.

89. According to the majority, the principle of stability of boundaries supports the 91(E) location, where a pillar existed *de facto*:

The principle of the stability of boundaries, confirmed by the International Court of Justice . . . , requires that boundary markers, long accepted as such by the States concerned, should be respected and not open to challenge indefinitely on the basis of error (para. 235).

The majority erroneously attributes stability to boundary *markers* whereas the principle of stability and permanence applies not to markers but to boundaries lawfully established and recognized.

90. The question arises whether the location of 91(E) fulfils the three conditions, discussed earlier (paras. 54-76), upon which the proper location of boundary pillar 91 depends.

i and ii) DOES 91(E) FULFIL THE CONDITIONS OF HAVING BEEN DURING THE CRITICAL PERIOD THE FINAL PILLAR AND AT THE POINT OF RAS TABA ON THE WESTERN SHORE OF THE GULF OF AQABA?

91. On this matter, I refer back to my general discussion of these two conditions (paras. 55-65). Assuming, as the majority does, the validity of *de facto* existing pillars, 91(E) cannot be considered as the final pillar: during the critical period, there was another pillar nearer to the end of the boundary—the pillar at the Parker location, and it was not impossible to mark that location on the ground in 1986. The majority’s assumption that both the Parker and the 91(E) locations can be considered as the final pillar amounts to disregarding this condition, as does the assumption, contrary to Wade’s and Owen’s Reports, that both can be considered to be on Ras Taba.

92. The majority considers that in view of certain statements by Owen and Wade, 91(E) could also fit into the description of being on Ras Taba: In Owen’s 3rd June 1906 report to Lord Cromer he describes Ras Taba as “the point where the ridge north of Taba meets the sea”; Wade mentions the erection of a telegraph pole where “the east cliffs of Wadi Taba . . . strike the gulf of Aqaba” (p. 56), and that the beacons were placed “on the eastern margin of Wadi Taba” (p. 53). Neither of these

descriptions fits 91(E), which is up on the cliffs, rather removed from the margin of the Wadi, and the cliffs do not strike the Gulf at that location.

93. According to Shoucair,²⁴ Ras Taba, on which the boundary commenced, was a small hill on the left side of Wadi Taba at (“ind” in Arabic) its mouth. This description cannot be associated with the location of 91(E) which is not on a small hill but high up, and quite remote from the mouth of the Wadi.

94. We will see later that all these descriptions far better suit the Israeli location on the Granite Knob.

iii) DOES 91(E) FULFIL THE CONDITION OF INTERVISIBILITY?

95. Certainly not, and both Parties agree on that. I have explained above (at paras. 69-75) that the majority’s opinion that intervisibility was dispensed with in the southern part of the boundary and that intervisibility has become irrelevant due to the existence of non-intervisible pillars during the period of the Mandate is based on erroneous assumptions of fact and law.

96. To sum up: the remnants at 91(E) do not prove that 91(E) is the proper location for Boundary Pillar 91, since there is no proof that the pillar at 91(E) was built in 1906; on the contrary, the first proof of its existence is a map made as late as 1915. It was probably built as a consequence of an error in that map. Its factual existence during the period of the Mandate is not relevant. 91(E) is not situated on the eastern margin of Wadi Taba but on a more remote cliff, and it hardly overlooks the Wadi. Its role as a boundary pillar is contradicted by all the earlier maps. The 1915 British map and the subsequent trig lists and photos cannot endow 91(E) with validity since the markers deviate from the line prescribed in 1906 and recognized by Egypt and Great Britain. As to the principle of stability and permanence of boundaries, it applies to the 1906 *line* which was the subject of the renvoi, not to “boundary markers” which deviate from it. 91(E) is not acceptable since it was not the final pillar during the mandatory period, it was not located at the point of Ras Taba on the western shore of the Gulf of Aqaba and it completely lacks intervisibility with agreed pillar 90.

97. I wish to emphasize that my mentioning the Parker pillar as proof that 91(E) could not have been the final pillar should not be construed as any recognition of the legality or validity of this pillar. The Parker pillar simply shows that according to the criterion chosen by Egypt herself and by the majority—a criterion which I reject—91(E) could not have been the final pillar.

D. *Israel’s locations for BP 91*

98. My colleagues have emphasized the lack of remnants or of other evidence showing that an actual boundary pillar had existed at the locations designated by Israel (para. 223). However, with regard to

²⁴ N. B. Shoucair, *op. cit.*, note 7, p. 62.

many pillar locations no remnants were found, a fact which in a wild and arid area ravaged by several wars should not come as a surprise. Moreover, Israel's case is based on the premise that a telegraph pole was erected at 91(I), not a masonry pillar.

99. The majority criticizes the specific location of 91(I) on the western slope of the Granite Knob: "Israel's case for the granite knob is . . . weakened by the fact that Israel's location is not on the top of the granite knob, where astronomical station B.1 was situated." Actually, the majority itself gives the answer: "Israel did not claim the top because it is not intervisible with BP 90" (para. 225). Or, in the words of the expert witness, Mr. D. Rushworth:

I would certainly regard that as a second-best solution. Obviously the place one would prefer to have it . . . would be on the top of the Granite Knob. But if, when I got there, I found that 90 was not intervisible . . . you would take the second-best solution, of putting it lower down on the Granite Knob (V.R., p. 566; see also statement by E. Lauterpacht, Q.C., at V.R., pp. 418-419).

100. In other words: the astronomical station B.1 on the Granite Knob was intervisible with A.2 at Aqaba, and the boundary poles established at present BP 87 (whether 87(E) or 87(I)), as well as at present BP 89, were intervisible with B.1, which was to be the location of the final pole (today's BP 91). When the Commissioners reached B.1, located on the Granite Knob, they must have shifted the location of 91 from the top of the Knob to its western slope, in order to ensure intervisibility between 91 and the pole immediately before it, namely today's BP 90.

101. The majority doubts that the location for 91(I) suits the physical description of the boundary (para. 224). Unfortunately neither the Agreement nor Wade and Owen have described the location of the last pillar with sufficient precision and therefore one can only try to interpret their cursory descriptions. Owen's General Report (pp. 7, 8) and Wade's Report (p. 53) say that the last pillar was erected at or on Ras Taba. As will soon be shown, the Granite Knob is on Ras Taba. Wade also speaks about placing "the beacons on the eastern margin of Wadi Taba" (p. 53) and about the erection of the remaining beacons "at suitable points on the east cliffs of Wadi Taba, and at the point where they strike the gulf of Aqaba" (p. 56). According to the Agreement, the line begins at Ras Taba, as mentioned above, "and follows along the eastern ridge overlooking Wadi Taba to the top of Jebel Fort".²⁵

²⁵ The majority brings two additional quotations from the reports: Owen used the expression "following along the top of the ridge north of Wadi Taba" (at p. 3), but this description is included in his analysis of the negotiations, not of the Agreement itself. However that may be, Israel's location for BP 91 is in conformity with this text since Owen speaks of the ridge *north* of Wadi Taba. The second quotation according to which "[t]he boundary-line, as finally agreed upon, runs for the most part along the watershed" (Owen, General Report, p. 10) is a general observation concerning the whole boundary and does not deal specifically with the Taba area: "no part of the boundary runs along a watershed in [this] area . . . there are lots of watersheds . . . here. Each of these ridges forms a watershed, but I don't see the line running along any of them . . . I would have thought it almost impossible to plot a line anything like the proposed lines that would stick to watersheds" (testimony by Mr. D. Rushworth, V.R., p. 653).

102. These various descriptions lead to the following common denominator: the last pillar was to be and was located at Ras Taba, and the preceding ones on the eastern ridge or east cliffs overlooking the Wadi, or on its margin. Wade's words about the location of a pillar where the east cliffs "strike the gulf of Akaba" suit the Granite Knob: it is composed of granite, like the other southern cliffs to the east of Wadi Taba and south of Wadi Khadra and in contradistinction to the hills on the west side. The Knob is part of a group or chain of lower hills, including the one on which the MFO observation post is located, that line the eastern margin of the Wadi.

103. The majority doubts whether the location of 91(I) on the Granite Knob can be considered to be the point where the east cliffs strike the Gulf. First, they mention the fact that Israel's location for BP 91 is not on the top of the Knob but on its slope (para. 225). Nevertheless, as explained earlier (para. 99), 91(I) is located on the Granite Knob, which is the eastern cliff that strikes the Gulf. Second, the majority is of the opinion that "it is questionable whether the granite knob . . . could be considered part of the eastern ridge since it is separated from it by the area on which a road and a hotel complex was built" (para. 224).

104. On the position of the Granite Knob, one has to refer again to the words of Mr. D. Rushworth, the expert witness. When asked by Mr. Lauterpacht, Q.C., what would be the terminus of the eastern ridge, he replied:

. . . you're conscious perhaps more of a wall than a ridge and that wall certainly . . . leads right down and the Granite Knob appears . . . to be almost part of that wall. In fact, it does appear to be part of that wall if you're far back (V.R., p. 561)

or elsewhere

. . . the land flows down to it through a number of minor features to finish in the Granite Knob (V.R., p. 649).

105. Although the Granite Knob is not part of the higher eastern cliffs and there is some distance between it and those cliffs, the Knob is nevertheless the place where the first range of east cliffs of the Wadi strike the Gulf. As explained by Mr. Rushworth, the Granite Knob appears to be part of the eastern cliff wall of the Wadi, irrespective of the distance that separates it from the higher cliffs.

106. The area between the lower ridge to which the Granite Knob belongs and the higher cliffs cannot be considered to be part of the Wadi, since the latter is the area of the watercourse. The difference and distinction between the Wadi itself and the area between the Granite Knob and the higher cliffs is also apparent from the flora: only in the area of the Wadi itself one can see the bushes and trees that usually grow in a Wadi, whereas in the area between the lower and the higher cliffs no such natural vegetation can be discerned.

107. Thus the line claimed by Israel leaves almost the whole Wadi in Egyptian territory, as required by Captain Owen (Owen's General Report, p. 8).

108. As mentioned, according to the 1906 Agreement the line "follows along the eastern ridge overlooking Wadi Taba to the top of

Jebel Fort''. But since the hills to the east of the southern part of the Wadi (south of its junction with Wadi Khadra) are broken and dissected,²⁶ there is practically no *ridge* in that area. Soon after these dissected heights change into a ridge, the line claimed by Israel joins that ridge. Up to this point, the boundary line runs from the Granite Knob along the eastern margin of Wadi Taba ("most of the way it is hugging the eastern side of the Wadi, the wall on the eastern side") and only for a very short distance is it actually in the Wadi bed (V.R., p. 651). At no place is it in the thalweg—a line which had been proposed by Turkey and rejected by Egypt (Owen's General Report, p. 3; majority opinion, para. 224).

109. It follows that the location of 91(E) on the Granite Knob conforms to the various geographical descriptions found in the 1906 Agreement and in the Wade and Owen Reports: it is situated where the east cliffs strike the Gulf, it leaves almost the whole Wadi under Egyptian control, and it permits the boundary line to pass on the eastern ridges close to the point where such a ridge starts.

110. Let me stress again that the Granite Knob marks the eastern boundary of Wadi Taba and overlooks considerable parts of the Wadi, whereas the Egyptian location for BP 91 is beyond the hills that flank the Wadi and it overlooks only a small part of the very last stretch of the Wadi.

111. The case for 91(I) (Granite Knob) is based on the above physical description, on the fact that this location fulfils the three conditions that the correct location for BP 91 has to fulfil, and on various evidentiary material.

i) THE LOCATION OF BP 91(I) (GRANITE KNOB) CORRESPONDS TO THE FINAL PILLAR AS REQUIRED BY THE 1986 COMPROMIS

112. Since the Granite Knob is very close to the shore, it fulfils the condition of being the final pillar.

ii) BP 91(I) (GRANITE KNOB) IS LOCATED "AT THE POINT OF RAS TABA ON THE WESTERN SHORE OF THE GULF OF AQABA" AS REQUIRED BY THE 1906 AGREEMENT AND BY THE 1986 COMPROMIS

113. This expression appeared in all the documents related to the 1906 delimitation and demarcation, as well as in Shoucair's book of 1916. As mentioned above (para. 57), the word "Ras", when used in relation to a shore, means a cape, promontory, or headland. A cape is:

[a] relatively extensive land area jutting seaward from a continent or large island which prominently marks a change in or interrupts notably the coastal trend.²⁷

²⁶ "... it is a very uneven wall, at times only a few feet high and running back in little gullies and other times rising almost cliff-like. That is south of Wadi Khadra. It is a very broken wall." (Rushworth, V.R., p. 649; see also V.R., p. 560.)

²⁷ *A Dictionary of Geological Terms*, American Geological Institute, New York, 1962, as quoted in Egypt's Counter-Memorial.

114. As can be seen on various large-scale maps and, in particular, on the aerial photographs of the area, the promontory on which the Granite Knob is located is the only cape in that area.²⁸ It is a piece of land that protrudes into the sea which prominently marks a change in the coastal trend. The feature of the Ras continues also under the water into the sea as can be discerned by the bare eye of the layman. On some maps this area is designated as Ras Taba and on others as Ras el-Masri. The fact that these two names refer to the same cape is well illustrated by the sketch map included in Ms. J. M. C. Plowden, *Once in Sinai* (1940), which describes her 1937 journey. On the map, reproduced on page 279 of her book, the cape is very conspicuous and it is accompanied by the words "Ras el-Misri (Taba Point)". Probably she used the expression Taba Point instead of Ras Taba because of the sharp-pointed configuration the promontory has on her sketch.

115. The identification of Ras Taba as the cape on which the Granite Knob is located²⁹ also corresponds to the description in Shoucair's book:²⁹

The beginning of the separating boundary was made at a small hill (Akamah saghirah) on its [the Wadi's] left side at ["ind" in Arabic] its mouth at the Gulf which was named "Ras Taba".

The Granite Knob is certainly a "small hill", and the cape on which it is located is on the left side of the Wadi by its mouth at the Gulf. It fits this description much better than both 91(E) and the Parker location.

116. The map published in Rushdi Pasha's book on *The Question of Aqaba* (1910-11) also confirms that the cape on which the Granite Knob is located bears the name of Ras Taba. On this map the triangle near the shore, i.e. the astronomical station on the Granite Knob, is surrounded by the words Ras Taba, Ras being written (in Arabic) to its right and Taba to its left.

iii) 91(I) ON THE GRANITE KNOB IS CLEARLY INTERVISIBLE WITH AGREED BP 90

117. Neither any of the Parties nor the majority has contested the existence of intervisibility between agreed BP 90 and 91(I) (Granite Knob).

118. It follows that the Granite Knob fulfils the three conditions for the correctness of BP 91: it fits the location of the final pillar on the shore, it is situated on Ras Taba, and it is intervisible with BP 90.

119. Now I shall proceed to examine the various pieces of evidence that prove that the boundary ended at the Granite Knob.

120. Of major importance is the information contained in the *Statistical Yearbook of Egypt for 1909*. In describing the boundaries of Egypt in the east, it is said that "[t]he boundary follows the line laid down in 1907 from Rafa, near El Arish, to the head of the Gulf of Aqaba

²⁸ D. Rushworth, V.R., pp. 565, 609.

²⁹ N. B. Shoucair, *op. cit.*, note 7, at p. 62.

at Taba (lat. 29°29'12" N. and long. 34°55'05" E., granite knob on the shore) . . .". This is a twofold description: the *Yearbook* mentions specifically the Granite Knob and in addition it gives the precise coordinates which correspond to Wade's coordinates for astronomical station B.1, which was located on the Granite Knob (see Wade's Report, pp. 11 and 49).

121. The majority opinion denies the probative value of this entry. First, it states that "the evidentiary value of such technical publications, designed to provide general information, is low, for such publications are not designed as authoritative statements about boundaries. They fall within the category of what could be described as encyclopaedic reference books and not administrative acts" (para. 220).

122. However, judicial precedent shows that the probative value of statistical material has been recognized. Thus, the Chairman of the tribunal that decided the *Rann of Kutch* case (1968) quoted with approval a passage from a book by Tupper on the tests to be applied in determining the status of certain territories. One of the tests is: "Is it included in Foreign or State territory in our statistical returns?"³⁰ Further on, after reviewing a long list of records, reports, statistical abstracts, and gazetteers, the Chairman observed that "special significance must be attached to those statements made by the competent British authorities in official publications . . .".³¹

123. It follows that the probatory value of statistical information depends on the authority of the publisher. The *Statistical Yearbook of Egypt for 1909* was published by the Ministry of Finance, Statistical Department, and printed at the National Printing Department in Cairo. There is thus no doubt that it is a statement by a competent authority in an official government publication. One may safely assume that the Ministry of Finance was very careful and precise in describing Egypt's boundaries since the power to levy taxes usually ends at the boundary.

124. Second, the majority opinion recalls that "that reference to the terminal point of the boundary disappeared [from the *Yearbook*] in the following years, and certainly throughout the critical period of the Mandate there is no evidence that either Egypt or Great Britain relied upon that one, isolated reference to the granite knob as evidence of the terminal point" (para. 220).

125. However, the disappearance of certain information in later editions does not show that it was erroneous. On the contrary, since the details concerning the description of *all* the boundaries of Egypt were deleted, such an interpretation would mean a disclaimer of the information concerning all those boundaries, which certainly was not intended.

126. The fact that there is no evidence that Egypt and Great Britain relied on the above entry during the mandatory period, does not detract from the persuasiveness of the information included in the *Yearbook* on the location of the boundary.

³⁰ *Reports of International Arbitral Awards*, Vol. 17, at p. 530.

³¹ *Ibid.*, pp. 551-552.

127. Lastly, according to the majority, the probatory value for 91(I) (Granite Knob) of the entry made in the *Yearbook* for 1909 is weakened by the fact that it "refers to the coordinates of the astronomical station B.1, which was on the top of the granite knob" (para. 220), whereas 91(I) is on the lower flank.

128. However, the *Yearbook* does not mention an astronomical station, nor does it speak of the *summit* of the Granite Knob. It merely mentions coordinates which correspond to those of the astronomical station (mentioned in Wade's Report, p. 49), and the "granite knob on the shore". According to Mr. D. Rushworth, in the context of an overall review that a yearbook gives, the location of 91(I) on the lower flank is reconcilable with the reference to the terminus on the Granite Knob coupled with the coordinates of astronomical station B.1 (V.R., p. 566).

129. Another proof for the location of the boundary at the Granite Knob is the fact that a cairn was situated between the Knob and the sea, probably in order to signal the vicinity of the boundary. The presence of this cairn has been shown by the photo taken around 1936 and reproduced in the volume on *Western Arabia and the Red Sea* (1946), published in the series of Geographical Handbooks prepared by the British Naval Intelligence Division during the Second World War.

130. The majority opinion claims that the photograph "does not prove that the stones formed a boundary pillar. The object is even so badly recognizable that it cannot be said what it really was" (para. 221).

131. However, the meaning of the photo emerges clearly from the description near the top of the opposite, directly facing page (p. 92) which says that:

on the long southward-projecting promontory of Taba, 5 miles south of the Palestine police-post, is an Egyptian post, on the frontier between Egypt and Palestine, which is marked by a cairn.

It follows that the stones on the photo constituted a cairn which was near the end of the boundary.

132. The location of the boundary at the Granite Knob was confirmed by several important maps, e.g.:

- (1) the map attached to Owen's General Report, 1906;
- (2) the map attached to Wade's Report, 1907;
- (3) the 1909 Turkish military map;
- (4) the 1916 Turkish-German map;
- (5) the map included in Rushdi's book (1910-11);
- (6) the map included in Hertslet's *Map of Africa by Treaty*, 3rd edition, Vol. III, No. 373, p. 1201, H.M. Stationery Office, 1909.

133. On most of these maps the boundary ends at a triangle which marks an astronomical station, i.e. either A.1 or B.1 on the Granite Knob. Due to the scale of the map it is not possible to tell positively which of the two stations the triangle represents, but since B.1 was higher up and it is the one which was in fact used during the 1906 survey and delimitation, it is highly probable that this station was designated by the triangle.

134. On the Turkish version of the 1916 Turko-German map, the line ends even to the west of the triangle.

135. According to the majority, the map evidence is not conclusive. First, it is said that “[o]n the maps attached to the Owen and Wade Reports, the boundary line ends at the eastern edge of the triangle” (para. 219). However, what counts is that the boundary ends at the triangle.

136. The majority mentions three other maps of that period on which the boundary does not end at the Granite Knob:

- (1) the 1907 British War Office map;
- (2) the 1906 Survey Department of Cairo map;
- (3) the 1911 Survey Department of Cairo map.

137. Although the location on these maps is not identical with the Granite Knob, the line still seems to run to a location far removed from 91(E). It runs to the west of the cliffs on which 91(E) is located, whereas the line claimed by Egypt, i.e. between agreed BP 90 and 91(E), is practically east of that line of cliffs.

138. Moreover, among the maps of that period (1906-1915), more weight should be given to those attached to the Owen and Wade Reports: “[t]hey were produced by the people who were on the ground and we are very clear as to exactly how they were produced . . . and they have been published . . . They seem to me to be the key maps in the whole business” (D. Rushworth, V.R., p. 613).

139. The majority opinion questions the value of the maps that support the location of the Granite Knob as the end of the boundary by pointing to the fact that these maps are drawn on a very small scale while the triangles are relatively large (para. 219). Whatever may be the impact of the smallness of the scale on other aspects of those maps, with regard to the southern end of the boundary they clearly show that the line ends at the triangle, which corresponds to the astronomical station on the Granite Knob.

140. As the majority points out, “[a]ll later maps (from 1915 on), except the 1916 Turkish-German map, show the line passing through BP 91(E) or both 91(E) and the Parker site . . .” (para. 219). But since, as explained above (paras. 7-49), the recognized boundary is the line that was established in 1906, the earlier maps made close to that date are of much greater importance than the later ones.

141. The location of the boundary at the Granite Knob has also been confirmed by the Turkish presence in the area.

142. This presence is mentioned in records of various travellers. Thus Meistermann, in the 1909 edition (repeated in 1913) of his book *Guide du Nil au Jourdain*, says that “en deçà de l’oasis [referring to the Bir and the palms] passe la nouvelle frontière de l’empire ottoman, sur laquelle veille un poste de soldats turcs, casernés dans un petit fort. La route fléchit vers l’est et contourne un petit cap, ras el Masri . . .”. Baedeker, in his 4th edition of *Palestine et Syrie* (1912), also says that “aussitôt après [after the Bir and the Palms] on franchit la frontière turco-égyptienne (postes militaires turcs). On contourne en 1h. le cap

ras el Masri . . .”. Moreover, this Turkish presence in the area is also confirmed by the *Sudan Intelligence Report* of April 1913, which says “that a Pasha with two guns has arrived in Akaba. The guns are said to have been placed in position at Taba and J. Bereio”.

143. The majority considers that these facts “are not conclusive as to where the boundary line actually ran” (para. 221).

144. However, even if these indices do not describe the precise location of the line, they prove that it could only be near the Wadi (i.e. at the Granite Knob) or in it (i.e. at Bir Taba), and definitely not at the site of 91(E) which is up on the cliffs quite remote from the mouth of the Wadi.

145. Second, the majority considers that “[a] Turkish presence in the Wadi Taba could also be explained by other grounds, such as the right under Article 6 of the 1906 Agreement for Turkish soldiers to cross over to the Egyptian side to draw water from the well at Bir Taba” (para. 221).

146. However, although Article 6 permits Turkish soldiers to “benefit by the water which remained west of the separating line”, it is not clear that in order thus to “benefit”, the soldiers were permitted to cross the line (see the telegram dated 2nd October 1906 and the letters dated 6th and 13th October from M. De C. Findlay to Sir Edward Grey and telegram of 12th September 1906 from Sir N. O’Conor to Sir Edward Grey concerning the water). In any case, it is clear that they were not permitted to cross the line when armed (Article 7 of the 1906 Agreement). When Meistermann and Baedeker spoke of “poste de soldats turcs casernés dans un petit fort” and “postes militaires turcs”, they certainly did not mean the mere presence of unarmed soldiers.

147. As for the alternative location for 91 proposed by Israel, i.e. the Bir Taba location, this alternative was based on the following considerations:

(1) Undoubtedly, there is intervisibility between this location and agreed BP 90.

(2) Several texts and descriptions specifically mention Bir Taba as the boundary (see majority opinion, para. 151).

148. Comparing the Bir Taba and the Granite Knob alternatives, the question arises which of the two corresponds better to the requirements that pillar 91 has to fulfil. Both of them may be considered as the final location near the shore, both are intervisible with agreed BP 90, and both are supported by evidence. Since the Granite Knob alternative is the one that is located on the cape of Ras Taba, I believe that it is the correct location for BP 91.

149. To sum up, the location of 91 on the western slope of the Granite Knob conforms to the description in the 1906 Agreement as well as the Wade and Owen Reports since it is on Ras Taba, it is the first eastern cliff which strikes the Gulf, and it overlooks the Wadi; it is the location for the final pillar since it is near the waterfront; it is located on the only cape or promontory in the area which bears the name Ras Taba on some maps, Ras el-Masri on others, and both names on one sketch

map; it also corresponds to the description in Shoucair's book; and it is clearly intervisible with agreed BP 90. The fact that the boundary line ends at the Granite Knob is supported by the *Statistical Yearbook of Egypt for 1909*, by the 1936 photo of a cairn in its vicinity, by many maps of the period immediately following the 1906 Agreement, and by the Turkish presence in the vicinity (described by two skilled and experienced observers and by a British Intelligence Report).

E. *Conclusion and the problem of non licet*

150. When considering the location of BP 91, several basic facts have to be remembered. First we are dealing with a two-stage renvoi which leads us to the recognized boundary of the mandatory period defined in terms of the 1906 Agreement. Whatever may be the situation under general international law, there can be no doubt that in this case the parties recognized the legal 1906 line and not any "situation on the ground".

151. If, as the majority opinion assumes, the two parties—Egypt and Great Britain—during the period of the Mandate had wished to recognize the line of the pillars actually existing in 1923 (or, perhaps, in 1926, the year in which the recognition took place), they could have expressly said so, instead of referring to the 1906 line.

152. Moreover, there is a logical flaw in the majority's opinion: if, as my colleagues assume, the pillars existing on the ground at that time, i.e. at 91(E) and at the Parker site, constituted the recognized boundary, how can such recognition be reconciled with the fact that Egypt claims not to have had any knowledge prior to the oral hearings of this Arbitration of the pillar that was at the Parker site (see, e.g., Egypt's Rejoinder, p. 34; V.R., pp. 659, 691, and 801)?

153. Turning now to the question which claim better suits the line laid down by the 1906 Agreement, it is obvious that the location of 91(I) conforms to the description in the Agreement as well as in Wade's and Owen's Reports: south of BP 90, the line runs along the eastern margin of the Wadi and ends at the place where the eastern cliffs strike the Gulf, i.e. at the Granite Knob. The Egyptian location for 91, on the other hand, is *beyond* the first group of cliffs, the line between this location and agreed BP 90 is mainly east of the hills above Wadi Taba, and 91(E) itself hardly overlooks the Wadi.

154. 91(I) (Granite Knob) is confirmed by most of the early maps, while 91(E) conforms to the post-1915 maps. However, the earlier maps are the more relevant ones since they describe the situation in the period to which the act of recognition refers.

155. The designation of the Granite Knob instead of the site of 91(E) for a boundary pillar is also in conformity with the *travaux préparatoires* surrounding the conclusion of the 1906 Agreement. Mr. M. De C. Findlay, Deputy to Lord Cromer and Acting Agent and Consul-General in Egypt at that time, mentioned in his letters of 10th July and 30th July 1906 to Sir Edward Grey, the British Foreign Secretary, that the British-Egyptian negotiators had expressed themselves to be prepared, in exchange for Turkish concessions in the northern part of the

boundary (in particular in the Kusseima area), to take into consideration Turkey's needs in the south for the protection of Aqaba (see also Owen's General Report, p. 6). Turkey's great concern in this matter was also described in Rushdi Pasha's book on *The Question of Aqaba* (1910-11). An Egyptian, viz. British, outpost on the cliff of 91(E) would certainly have constituted a danger for Aqaba and hence it is quite logical that since Turkey renounced her claim to Kusseima and Ein Kadiss, Captain Owen and his team left the cliff on which 91(E) is situated to Turkey.

156. Last but not least, in the eyes of an expert surveyor, the Granite Knob is a much better suited location of a boundary than 91(E) or the Parker location (D. Rushworth, V.R., pp. 561-565).

157. Turning now to the three conditions that BP 91 has to fulfil—intervisibility with BP 90, being the final pillar and being at the point of Ras Taba (see *supra*, paras. 54-76; 91-96; 111-118)—it is obvious that the Granite Knob fulfils them, and 91(E) does not. The majority is therefore in a dilemma. Since my colleagues have ruled that the pillars which actually existed on the ground during the period of the Mandate, whatever be their origin, have to be sanctioned, they have preferred 91(E) to the Granite Knob. But since this location does not fulfil the three conditions, the majority opinion practically disregards these conditions by using an unconvincing reasoning.

158. As to intervisibility, my colleagues consider that the situation on the ground prevails even if it contravenes a mandatory requirement expressly included in the 1906 Agreement (paras. 74-75).

159. As to the condition that BP 91 has to be the final pillar and on the point of Ras Taba, my colleagues are of the opinion that both the Parker site and 91(E) can be considered as final and on the Ras, although logically only one pillar can be the final one, and according to Wade and Owen only one pole was erected on the Ras (see also *supra*, paras. 61-65).

160. In fact, the Parker site and 91(E) are mutually exclusive with regard to the fulfilment of the two conditions of being the final pillar and at the point of Ras Taba. If the Parker pillar existed, then by no stretch of imagination could 91(E) be the final pillar and on Ras Taba.

161. On the other hand, the existence of the Parker pillar is no impediment to a finding for 91(I) on the Granite Knob since the case for this location is based on the recognition of the 1906 line by the authorities during the period of the Mandate, irrespective of any pillars which may have existed on the ground between 1923 and 1948.

162. When a Tribunal is confronted with a limited choice and none of the alternatives conforms to the law or the Compromis, it has a duty to refrain from designating a location, and it cannot artificially increase its powers or discretion by disregarding its limitations.

163. Probably the majority resorted to the above interpretation in order to avoid a situation wherein it would not have been able to give a positive decision on the disputed location of the pillar, perhaps fearing the spectre of a *non liquet* ruling. But a ruling that neither Party has proven its case is a far cry from *non liquet* and has nothing to do with it.

According to Sir Gerald Fitzmaurice, in a case “where the parties request the tribunal to decide exclusively by reference to a certain specific criterion . . . or where the question put to the tribunal directs it to such a criterion as the basis of decision . . . but where . . . the arguments of neither party find any support by reference to this particular criterion . . .”, the result would be that the tribunal cannot give a decision and such abstention would not be considered a *non liquet*.³²

164. The majority’s decision to consider that two locations fulfil the conditions of being at the location of the final pillar and of being on the shore at Ras Taba practically amounts to disregarding these conditions. The words of the Compromis do not permit the Tribunal to overlook these explicit conditions.

165. In conclusion, it is necessary to emphasize the incomplete result created by the decision of the majority. Since my colleagues have adopted a location for BP 91 which is not at the end of the boundary on the shore, the question where the line is to run from BP 91 remains open.

IV. *The Ras an-Naqb Area: Pillars 85, 86, 87*

166. In this area as well, the main disagreement between the majority’s opinion and mine concerns the relative weight of the 1906 line, on the one hand, and the situation on the ground in the critical period, on the other hand. The majority considers that there is conformity between the pillars existing *de facto* and the line established by the 1906 Agreement, and that if there had been a contradiction, the former should prevail. With all due respect, I think that there is a discrepancy between the 1906 line and the actual pillars, and that the 1906 line should be preferred since this is the one that was recognized during the period of the Mandate.

167. The disagreement concerning this discrepancy depends mainly on the identification of certain geographical features in relation to which the Agreement defines the boundary.

168. There are old pillars in the area at the locations claimed by Egypt, and on the various maps the boundary runs in accordance with Egypt’s claim.

169. With regard to this area, the Agreement defines the boundary as follows:

The . . . line . . . follows along the eastern ridge [or heights or summits—according to other translations] overlooking Wadi Taba to the top of Jebel Fort; . . . From Jebel Fort to a point not exceeding 200 metres to the east of the top of Jebel Fathi Pasha . . .

Thus, the location of the boundary pillars depends on the identification of Wadi Taba, Jebel Fort, and Jebel Fathi Pasha.

170. The majority has accepted the correctness of Egypt’s claim and has expressed the opinion that this claim is not contradicted by the location of the physical features mentioned in the 1906 Agreement. According to the majority opinion, on several maps the physical features

³² Sir Gerald Fitzmaurice, “The Problem of non-*liquet*: Prolegomena to a Re-statement”, in *Mélanges offerts à Charles Rousseau*, Paris, Pedone, pp. 89-112, at p. 95.

of Jebel Fort and Jebel Fathi Pasha in relation to which the boundary is defined in the Agreement, are situated in accordance with Egypt's claim (the Wade Aqaba-Rafah sketch map of July 1906, the Wade Topographical Sketch Map of July 1906, the 1907 British War Office Map). As to the identity of Wadi Taba, it is based according to Egypt on the premise that this Wadi continues to the north under the name of Wadi Gasairiya, or that it does not stretch farther north than the bifurcation of the wadis which occurs north of agreed pillar 89 (the latter alternative has been adopted by the majority opinion).

171. I have come to the conclusion that the Israel location for these features is more in conformity with the 1906 Agreement and that it excludes the Egyptian location for the boundary.

172. As to Wadi Taba, it seems to me that the wording of the above provision of the Agreement implies, contrary to the majority's opinion, that the Wadi continues to the north, to the vicinity of Jebel Fort ("following along the eastern ridge overlooking Wadi Taba to the top of Jebel Fort . . ."). The fact that the Wadi continues much farther north beyond the bifurcation is confirmed by Owen's "Rough Map" (sent on 3 June 1906 to Lord Cromer) on which Wadi Taba continues to the north, to the Nakhl road. Moreover, from Wade's Report too one gets the clear impression that the Wadi continues farther north: Wade mentions a delay caused by the fact that the Turkish depot at the Mufraq by an oversight had not received orders to vacate that station, and then adds: "Next morning they had left and we descended into Wadi Taba . . ." (p. 53). This sentence conveys the impression that Wadi Taba goes north to the vicinity of the Mufraq. Similarly, and perhaps even more convincingly, in his journal for 18 October, we find the following entry: "In the morning we found post vacated. Descended into Wadi Taba and set up a beacon on its east cliff at a point from which the beacon on Gebel "Fort" is visible . . ." (p. 65). This entry shows that the Wadi reaches the area of the Mufraq, and that the first pillar south of Jebel Fort was already on the cliffs of Wadi Taba. Moreover, according to Owen, even Jebel Fathi, which is located farther north than Jebel Fort, "overlooks part of Wadi Taba" (Owen's General Report, p. 6); it follows that the Wadi has to continue far north.

173. As to the question *where* is the continuation of the Wadi to the north, one has to remember that north of agreed pillar 89 the Wadi bifurcates into three tributaries, the western one named Wadi Haneikiya and the eastern one Wadi Gasairiya. On the maps, the middle one has no name on it, and it is logical that it should be the continuation (or the northern part) of Wadi Taba since it has no other name and since it merges naturally, without any break, into the southern Wadi Taba. The middle tributary perfectly suits the text of the Agreement since it has a range of mountains on its eastern side, going almost as far north as Israel's location for Jebel Fort (86(I)).

174. Egypt's definition of Wadi Taba is not convincing. If, as Egypt has claimed in its Rejoinder, Wadi Gasairiya were the northern part of Wadi Taba, then the boundary line would run to a certain extent *west* of the Wadi, whereas the 1906 Agreement provides that it should be

east of Wadi Taba. Moreover, the two Parties have agreed to add a new pillar, No. 88, on a certain hill; although they disagree on the exact location of the pillar, there is agreement about the hill on which it should be located. This hill is to the west of Wadi Gasairiya, whereas it is to the east of the middle tributary claimed by Israel to be the northern Wadi Taba.

175. As to the alternative Egyptian claim that there is no northern Wadi Taba and that it stretches only from the Gulf to the bifurcation of the three tributaries (V.R., p. 748), this claim contradicts the wording of the 1906 Agreement (which, as mentioned above, speaks of a Wadi that goes almost up to Jebel Fort), the Owen rough map, Wade's Report, and Owen's Report.

176. As to the identification of Jebel Fort: Israel's Jebel Fort (86(I)) corresponds to the description in the 1906 Agreement since it is just to the north of northern Wadi Taba, at the end of the eastern mountains overlooking the Wadi. The mountain identified by Israel as Jebel Fort, much more than the Egyptian one, looks like a fortress: it is the most dominant feature on the plain, it dominates the plateau to the north-west, and it can be seen from Aqaba. The mountain identified by Egypt as Jebel Fort, on the other hand, is in fact in the lower area, below the plateau.

177. Moreover, at the Israeli Jebel Fort there stands a cairn of stones shaped like a truncated pyramid (according to the description card for 86(I) in Appendix A to the Compromis). This could have been one of the original temporary markers which the Commissioners erected in 1906 at some places in order to mark the locations before the erection of the telegraph poles (as recorded in Wade's Report, p. 61).

178. Again, the topography of Israel's Jebel Fathi conforms more than Egypt's location with Owen's description, according to which Jebel Fathi "commands the flank of the upper part of the Nakb and Jebel Raschdi . . . and also overlooks part of Wadi Taba" (Owen's General Report, p. 6).

179. Several maps of that period describe the physical features of the two mountains—Jebel Fort and Jebel Fathi Pasha—in accordance with Israel's claim: Wade's 1907 map, the 1909 Turkish military map (only Jebel Fathi, Jebel Fort not being marked), the 1911 Survey Department of Cairo map (on this map Jebel Fort is even farther west than according to Israel's claim). With regard to the last mentioned map, the majority considers it uncertain as to which feature the words Jebel Fathi Pasha exactly refer (para. 202). The uncertainty flows from the location of those words in their transcription in Roman letters, whereas it is clear that the name in Arabic letters points to the location claimed by Israel for this mountain. Each of these maps comes from a different source, and hence their special importance. Of particular weight is the Wade 1907 map attached to his Report: it has the advantage of being made by a professional surveyor who participated as the leading expert in the relevant proceedings—the survey, the delimitation (the conclusion of the 1906 Agreement), and the demarcation. Moreover, his 1907 map was

adopted by the British Foreign Office in Hertslet's *Map of Africa by Treaty*, 3rd edition, Vol. III, p. 373.

180. As mentioned above, the Tribunal relies on three maps which allegedly confirm the Egyptian location for Jebel Fort and Jebel Fathi Pasha, two of them being early (1906) sketches by Wade. His 1907 map, however, confirms the Israeli location. It is submitted that preference should be given to the 1907 Wade Report map: it may be assumed that, unless another conclusion is justified by special circumstances, a later map made by the same surveyor is an improvement over the earlier ones and is more accurate.

181. Although according to the 1906 Agreement the boundary should go through the top of Jebel Fort and through "a point not exceeding 200 metres to the east of the top of Jebel Fathi Pasha", on the maps which support Israel's identification of these features, the boundary line does not pass through them. It appears, however, that where on a map there is a contradiction between, on the one hand, a description of physical features or topographical details inserted on the basis of a survey (in this case Wade's survey) and, on the other hand, a boundary line which may have been added later by a draughtsman, it is the physical features to which more weight should be given.³³

182. It thus follows that the Israeli locations for pillars 85, 86 and 87 are more in conformity with the physical description of the 1906 Agreement, and, after due consideration, I have come to the conclusion that this fact carries more weight than the location of the boundary line on maps and the location of the existing pillars, since the act of recognition in the period of the Mandate referred to the line established by the 1906 Agreement and not to any pillars which may contradict it. Moreover, one has to remember that the erection of the masonry pillars in 1906-07 was not part of the demarcation process (*supra*, paras. 25-28) and that apparently the pillars that existed at the time of the Mandate were not the original ones (majority opinion, para. 107; see also *supra*, para. 40).

183. As to the question whether the boundary line as traced on maps or its geographical description in the 1906 Agreement should prevail, in the present circumstances it is the geographical description which should carry more weight. If the original map which was part of the Agreement had been found, it would of course have been relevant, and any contradiction between the text and the map would have had to be resolved on the basis of the rules on interpretation of treaties. But even in such a case, probably "the description in the treaty should prevail".³⁴

184. To sum up: the Egyptian locations for pillars 85, 86, 87 conform to pillars existing on the ground and to the boundary traced on the maps. The Israeli locations, on the other hand, conform to the physical description of various geographical features by which the 1906

³³ See D. V. Sandifer, *Evidence Before International Tribunals*, revised edition, 1975, p. 236. See also Mr. Rushworth's testimony on map-making, V.R., p. 567 et seq.

³⁴ G. Ress, *op. cit.*, note 12, at p. 421.

Agreement has described the boundary. Under such circumstances, it is the geographical description which has to be preferred due to the supremacy of the Agreement.

V. *Pillar Number 88*

185. With regard to BP 88 both the factual and the legal situations are unique. BP 88 is to be a new pillar on the boundary, so there was no old pillar nor remnants thereof for the Parties to consider. The fact that the Parties asked the Tribunal to decide the location of a boundary pillar of the recognized international boundary between Egypt and the former mandated territory of Palestine at a place where no pillar previously existed amply demonstrates that the task of the Tribunal is not limited to determining where pillars existed during the period of the Mandate but rather extends to the decision on the proper location of pillars of the legal boundary. The boundary indicated on maps may have assisted the Parties in determining on which hill to place BP 88, but such map evidence was of no assistance to the Tribunal since the locations of 88(I) and 88(E) are on the same hill and the distance between them is too small (44.63 metres) to appear on the available maps. Rather, the Tribunal could only distinguish between the claimed locations on the basis of the terms of the 1906 Agreement and the way it was implemented by the 1906 Joint Commission with respect to the placement of neighbouring pillars.

186. Israel's location for BP 88 is based on the premise that the Wadi to the west of the hill on which BP 88 should stand is Wadi Taba, and we know from the Agreement that this sector of the boundary should run "along the eastern ridge overlooking Wadi Taba . . .". Thus BP 88 should be at a place where it overlooks the Wadi from the east.

187. Even though the majority does not accept the Israeli identification of Wadi Taba, it should have preferred the Israeli location for BP 88 since the nearest pillars in that region, agreed BP 89 and agreed BP 90, both also stand on the western side of the ridge, overlooking the nearby Wadi, whatever its name, from the east. It is thus logical that BP 88 too should be on the western side of the ridge. (A comparison with 87(E) in this context is not helpful since 87(E) is on top of a small peak and therefore one cannot say that it is on the eastern or on the western side. 87(I), however, is on the western side of the ridge.)

188. The majority has instead decided that "[a]s no other criterion is available, the Tribunal has to base its decision on the straight line criterion to which the parties to the 1906 Agreement repeatedly referred . . ." (para. 213), and they have applied this principle by choosing for BP 88 the location which is closest to a straight line between BP 87(E) and BP 89.

189. This reasoning is both unnecessary, as discussed above, and erroneous. There is no valid basis for the straight line criterion south of Jebel Fort because straight lines are not mentioned for this sector of the boundary in the 1906 Agreement and neither Wade nor Owen refer to such a line. In fact, south of Jebel Fort, the line formed by the telegraph poles was not straight, but changed direction at every pillar. The general

directive that the boundary line should run in an approximately straight line from Rafah on the Mediterranean to the terminus on the Gulf of Aqaba (see majority opinion, paras. 29, 32-34) cannot serve as a criterion in view of the limitation involved in the adverb "approximately", coupled with the smallness of the distance between the two claimed locations, and the configuration of the boundary in the southern sector. It should also be remembered that neither of the Parties has based its arguments with regard to BP 88 on the relevance of a straight line.

VI. *Conclusions*

190. The Tribunal has been asked to decide, in accordance with the 1979 Treaty of Peace, the 1982 Agreement, and the 1986 Compromis, the location of certain boundary pillars of the recognized international boundary of the period of the Mandate, as this constitutes the boundary between Egypt and Israel.

191. The boundary recognized by Egypt and Great Britain is the line established by the 1906 Agreement, which does not necessarily coincide with the line formed by the pillars that existed *de facto* on the ground during the critical period.

192. The 1906 line, as laid down in the Agreement and described by Wade and by Owen, confirms the location on the Granite Knob for BP 91 in the Taba area, and the locations of 85(I), 86(I), and 87(I) in the Ras an-Naqb region. The proper location for the new pillar No. 88 is at 88(I) on the ridge that overlooks the adjoining Wadi, as do the neighbouring pillars.

193. Unfortunately, however, my colleagues have preferred to locate BP 88 at 88(E) since it is closer to a straight line—a method which in my opinion is not applicable to this area. As to the other pillar locations in dispute, the majority has preferred to sanction the situation which existed *de facto* on the ground during the critical period and this has led them to adopt the location claimed by Egypt.

194. The location chosen by my colleagues in the Taba area does not fulfil a mandatory requirement of the 1906 Agreement, i.e. inter-visibility, and two conditions included in the 1986 Compromis, i.e. that it has to be the final pillar on the boundary and situated at the point of Ras Taba on the western shore of the Gulf of Aqaba.

195. With all due respect, I wish to repeat that in my opinion 91(I) (Granite Knob) is the right location for BP 91, according to the 1906 Agreement, the 1986 Compromis, the relevant maps (1906-1916), and various other pieces of evidence.

196. It is regrettable that the majority has not decided for 91(I) on the Granite Knob, which would have solved the dispute fully, but instead has decided for the location claimed by Egypt, which is not only the wrong one because it does not fulfil the criteria of the 1906 Agreement and the 1986 Compromis, but also leaves unresolved the course of the boundary line beyond 91(E).

Ruth LAPIDOTH

APPENDIX A

Arbitration Compromis

Egypt and Israel,

Reaffirming their adherence to the provisions of the Treaty of Peace of 26 March 1979, and their respect for the inviolability and sanctity of the recognized international boundary between Egypt and the former mandated territory of Palestine,

Recognizing that a dispute has arisen, as defined in Article II of this Compromis, on the location of fourteen boundary pillars of the recognized international boundary between Egypt and the former mandated territory of Palestine as stipulated in accordance with the Annex, which the parties wish to resolve fully and finally,

Recalling their obligation under the United Nations Charter to settle disputes by peaceful means,

Considering the conclusion and implementation of this agreement as an integral part of the process of furthering peaceful and good relations between them,

Affirming their intention to fulfill in good faith their obligations, including their obligations under this Compromis,

Recalling their obligation to settle disputes in accordance with Article VII of the Treaty of Peace,

Confirming their commitment to the provisions of the agreement of 25 April 1982, between them,

Having resolved to establish an arbitration tribunal,

Have agreed to submit the dispute to binding arbitration, in accordance with the following procedures:

Article I

1. The arbitration tribunal (hereinafter called "the Tribunal") shall be composed of the following members: Hamed Sultan, nominated by the Government of Egypt, Ruth Lapidot, nominated by the Government of Israel, Pierre Bellet, Dietrich Schindler, and Gunnar Lagergren, who shall be the President of the Tribunal.

2. Once the Tribunal has been constituted, its composition shall remain unchanged until the award has been rendered. However, in the event a member nominated by a government is or becomes unable for any reason to perform his or her duties, the original nominating government shall designate a replacement member, within 21 days of such a situation. The President shall consult with the parties in the event the President believes such a situation has arisen. Each party is entitled to inform the other party in advance of the individual it would designate in the event of such a situation occurring. In the event the President of the Tribunal or a non-national member of the Tribunal is or becomes unable for any reason to perform his or her duties, the two parties shall meet within seven days and shall endeavor to agree on a replacement within 21 days.

3. Where a vacancy has been filled after the proceedings have begun, the proceedings shall continue from the point they had reached at the time the vacancy had occurred. The newly appointed arbitrator may, however, require that the oral proceedings and visits be recommenced from the beginning.

Article II

The Tribunal is requested to decide the location of the boundary pillars of the recognized international boundary between Egypt and the former mandated territory of Palestine, in accordance with the Peace Treaty, the April 25, 1982 Agreement, and the Annex.

Article III

1. Each party will be entitled to submit to the Tribunal any evidence which that party considers relevant to the question.

2. A party may, by notice in writing through the registrar, call upon the other party to make available to it any specified document or other evidence which is relevant to the question and which is, or is likely to be, in the possession or under the control of the other party.

3. At any time during the arbitral proceedings the Tribunal may call upon either party to produce additional documents or other evidence relevant to the question within such a period of time as the Tribunal shall determine. Any documents or other evidence so produced shall also be provided to the other party.

4. The Tribunal may request that a nonparty to this Compromis provide to it documents or other evidence relevant to the question. Any documents or other evidence so provided shall be transmitted simultaneously to both parties.

5. The Tribunal will review all documents and other evidence submitted to it.

Article IV

1. The participation of all Tribunal members shall be required for the award. The presence of all members shall also be required for all proceedings, deliberations and decisions other than the award except that the President may determine that the absence of not more than a single member from any proceeding, deliberation, or decision other than the award, is justified for good cause.

2. In the absence of unanimity, decisions, including the award, will be taken by a majority vote of the members.

Article V

1. The seat of the Tribunal shall be at Geneva, Switzerland.

2. The President of the Tribunal shall, with the approval of the parties, appoint a registrar who shall be located at the seat of the Tribunal. The President and the parties shall endeavor to reach agreement on the appointment of the registrar within 21 days of the entry into force of this Compromis. The registrar shall be the regular channel of communications to and from the Tribunal. The President shall serve in

such capacity until the registrar is appointed. The proceedings under this Compromis will not be delayed by the inability of the parties to agree on the appointment of a registrar.

Article VI

1. The remuneration of the members of the Tribunal shall be borne equally by both parties.
2. The general expenses of the Tribunal shall be borne equally by both parties.
3. Each party shall bear its own expenses incurred in, or for, the preparation and presentation of its case.
4. The parties shall agree upon the amount of remuneration of the members, in consultation with the President.
5. The registrar, in consultation with the President, shall keep a record of all general expenses and shall render a final accounting to the parties.
6. The Tribunal may, in consultation with the parties, engage such staff and obtain such services and equipment as may be necessary.

Article VII

1. Within 21 days of the entry into force of this Compromis, each party shall appoint its agent for the purposes of the arbitration.
2. Each party may nominate a deputy or deputies to act for its agent. The agent may be assisted by such counsel, advisors and staff as the agent deems necessary.
3. Each party shall communicate the names and addresses of its respective agent and deputy or deputies to the other party and to the Tribunal.

Article VIII

1. The Tribunal shall apply the provisions of this Compromis.
2. Within 30 days of the entry into force of this Compromis, the Tribunal shall meet.
3. The proceedings shall consist of written pleadings, oral hearings and visits, to sites which the Tribunal considers pertinent, in accordance with the following schedule:
 - (A) The written pleadings shall include the following documents:
 - (i) A memorial, which shall be submitted by each party to the Tribunal within 150 days of the first session of the Tribunal, and
 - (ii) A counter-memorial, which shall be submitted by each party to the Tribunal within 150 days of the exchange of memorials, and
 - (iii) A rejoinder, if a party, after informing the other party, notifies the registrar within 14 days of the exchange of counter-memorials of its intention to file a rejoinder. In the event of such notification by one party, the other party shall also be entitled to submit a rejoinder. The rejoinders shall be submitted to the Tribunal within 45 days of the notification.

Written pleadings shall be filed simultaneously with the registrar and then be transmitted simultaneously by the registrar to each party. Notwithstanding this provision, a party may file its pleading at the end of the time period specified, even if the other party has not done so.

The Tribunal may, if it deems it necessary, or at the request of one party, and after hearing the views of the parties, decide, for good cause, to extend the time periods for the submission of written pleadings. By agreement, the parties may exchange their written pleadings prior to the expiration of the period provided in paragraph 3 of this article.

The original of every pleading shall be signed by the agent. It shall be accompanied by a copy of the pleading, certified by the respective agent, and by 30 additional copies for communication by the registrar to the other party. It shall also be accompanied by copies, certified by the respective agent, for communication by the registrar to each of the members of the Tribunal. Any documents and maps quoted or referred to in a pleading shall, whenever possible, be annexed to the pleading. The registrar shall specify such additional copies as may be required.

After the end of the written pleadings, no additional papers or documents may be submitted, except with the permission of the Tribunal. The Tribunal shall provide the other party an opportunity to respond if it has permitted the submission of an additional paper or document.

The registrar shall file all submissions received. The registrar shall make such files available for perusal by either party on request, and shall inform the other party of such requests.

(B) The oral hearings and the visits shall be conducted in such order and in such manner as the Tribunal shall determine. The Tribunal shall endeavor to complete its visits and the oral hearings within 60 days of the completion of the submission of written pleadings.

The oral hearings and the deliberations shall be held at the seat of the Tribunal or such place as the Tribunal, with the agreement of the two parties, may determine. Each party shall be represented at the oral hearings by its agent and/or deputies and by such counsel and advisors as it may appoint.

If a party submits an affidavit to the Tribunal in support of its case, the other party shall, on request, be given an opportunity to cross-examine the deponent. Each party will be permitted to present witnesses and to cross-examine witnesses of the other party at the oral hearings.

Each party shall facilitate the visits of the Tribunal. The agent of each party, and such other individuals as the agent may determine, shall be entitled to accompany the Tribunal during the visits. Members of the Tribunal shall be accorded by each party the privileges and immunities applicable under customary international law. The Tribunal shall be accompanied by such expert, technical or other staff as it deems necessary.

(C) If the Tribunal determines that without good cause a party has failed within the prescribed time to appear or present its case at any

stage of the proceedings, the Tribunal may determine how to proceed with the arbitration process and to render its award on the merits.

(D) At the time of the rendering of the award, the award and the written pleadings shall be made public, unless otherwise agreed by the parties. The registrar shall keep a transcript of the oral hearings, and it shall be made available to the parties as soon as possible. With the agreement of the two parties, this transcript shall be made public at the time of the rendering of the award.

4. Subject to these provisions, the Tribunal shall, as the need arises and as appropriate, and after consulting with the parties, decide on any necessary supplementary procedures, taking into account international practice.

5. The Tribunal may engage experts. The Tribunal shall hear and take the views of the parties into consideration before any such engagement.

Article IX

1. A three-member chamber of the Tribunal shall explore the possibilities of a settlement of the dispute. The three members shall be the two national arbitrators and, as selected by the President of the Tribunal sometime before the submission of the suggestions, one of the two non-national arbitrators.

2. After the submission of counter-memorials, this chamber shall give thorough consideration to the suggestions made by any member of the chamber for a proposed recommendation concerning a settlement of the dispute. Suggestions based upon the memorials, the counter-memorials, and other relevant submissions shall be presented to the chamber commencing from the month immediately preceding the counter-memorials. The chamber shall thereafter consider these suggestions, and the counter-memorials, during the period after submission of the counter-memorials until the completion of the written pleadings. Any proposed recommendation concerning a settlement of the dispute which obtains the approval of the three members of the chamber will be reported as a recommendation to the parties not later than the completion of the exchange of written pleadings. The parties shall hold the report in strictest confidence.

3. The arbitration process shall terminate in the event the parties jointly inform the Tribunal in writing that they have decided to accept a recommendation of the chamber and that they have decided that the arbitration process should cease. Otherwise, the arbitration process shall continue in accordance with this Compromis.

4. All work pursuant to the above paragraphs absolutely shall not delay the arbitration process or prejudice the arbitral award, and shall be held in the strictest confidence. No position, suggestion, or recommendation, not otherwise part of the presentation of a party's case on the merits, shall be brought to the attention of the other members of the Tribunal, or be taken into account in any manner by any members of the Tribunal in reaching their arbitral decision.

Article X

The written and oral pleadings, and the decisions of the Tribunal, and all other proceedings, shall be in English.

Article XI

1. In accordance with the provisions of the agreement of 25 April 1982:

(A) Egypt and Israel agree to invite the MFO to enter Taba and maintain security therein through the establishment of an observation post in a suitable topographic location under the flag of the MFO in keeping with the established standards of the MFO. Modalities for the implementation of this paragraph have been discussed and concluded by Egypt and Israel through the liaison system before the signature of the Compromis. The interpretation and implementation of this paragraph shall not be within the jurisdiction of the Tribunal.

(B) During the interim period any temporary arrangements and/or any activities conducted shall not prejudice in any way the rights of either party or be deemed to affect the position of either party or prejudice the final outcome of the arbitration in any manner.

(C) The provisions of the interim period shall terminate upon the full implementation of the arbitral award.

2. The Tribunal shall have no authority to issue provisional measures concerning the Taba area.

Article XII

1. The Tribunal shall endeavor to render its award within 90 days of the completion of the oral hearings and visits. The award shall state the reasons upon which it is based.

2. The award shall be deemed to have been rendered when it has been presented in open session, the agents of the parties being present, or having been duly summoned to appear.

3. Two original copies of the award, signed by all members of the Tribunal, shall immediately be communicated by the President of the Tribunal to each of the agents. The award shall state the reason for the absence of the signature of any member.

4. The Tribunal shall decide the appropriate manner in which to formulate and execute its award.

5. Any member of the Tribunal shall be entitled to deliver a separate or dissenting opinion. A separate or dissenting opinion shall be considered part of the award.

6. The Tribunal shall at the joint request of the parties incorporate into its award the terms of any agreement between the parties relating to the issue.

Article XIII

1. Any dispute between the parties as to the interpretation of the award or its implementation shall be referred to the Tribunal for clarification at the request of either party within 30 days of the rendering of

the award. The parties shall agree within 21 days of the award on a date by which implementation will be completed.

2. The Tribunal shall endeavor to render such clarification within 45 days of the request, and such clarification shall become part of the award and shall not be considered a provisional measure under the provisions of Article XI (2) of this Compromis.

Article XIV

1. Egypt and Israel agree to accept as final and binding upon them the award of the Tribunal.

2. Both parties undertake to implement the award in accordance with the Treaty of Peace as quickly as possible and in good faith.

Article XV

This Compromis shall enter into force upon the exchange of instruments of ratification.

DONE at Giza on the 11th day of September 1986.

For the Government of the Arab Republic of Egypt

Nabil ELARABY
Badr HAMMAM

For the Government of the State of Israel

A. TAMIR
David KIMCHE

Witnessed by: Richard W. MURPHY
Alan J. KRECJKO

ANNEX

1. A dispute has arisen on the location of the following boundary pillars of the recognized international boundary between Egypt and the former mandated territory of Palestine: 7, 14, 15, 17, 27, 46, 51, 52, 56, 85, 86, 87, 88, and 91. The parties agree that boundary pillars 26 and 84 are on the straight lines between boundary pillars 25 and 27, and 83 and 85, respectively, and that the decision of the Tribunal on the locations of boundary pillars 27 and 85 will establish the locations of boundary pillars 26 and 84, respectively. The parties agree that if the Tribunal establishes the Egyptian location of boundary pillar 27, the parties accept the Egyptian location of boundary pillar 26, recorded in Appendix A; and, if the Tribunal establishes the Israeli location of boundary pillar 27, the parties accept the Israeli location of boundary pillar 26, recorded in Appendix A. The parties agree that if the Tribunal establishes the Egyptian location of boundary pillar 85, the parties accept the Egyptian location of boundary pillar 84, recorded in Appendix A; and if the Tribunal establishes the Israeli location of boundary pillar 85, the

parties accept the Israeli location of boundary pillar 84, recorded in Appendix A. Accordingly, the Tribunal shall not address the location of boundary pillars 26 and 84.

2. Each party has indicated on the ground its position concerning the location of each boundary pillar listed above. For the final boundary pillar No. 91, which is at the point of Ras Taba on the western shore of the Gulf of Aqaba, Israel has indicated two alternative locations, at the granite knob and at Bir Taba, whereas Egypt has indicated its location, at the point where it maintains the remnants of the boundary pillar are to be found.

3. The markings of the parties on the ground have been recorded in Appendix A.

4. Attached at Appendix B is the map referred to in Article II of the Treaty of Peace, which provides:

The permanent boundary between Egypt and Israel is the recognized international boundary between Egypt and the former mandated territory of Palestine, as shown on the map at Annex II, without prejudice to the issue of the status of the Gaza Strip. The parties recognize this boundary as inviolable. Each will respect the territorial integrity of the other, including their territorial waters and airspace.

A 1:100,000 map is included in order to permit the indication of the locations of the 14 disputed boundary pillars advanced by the parties and provides an index to Appendix A. The Tribunal is requested to refer to the general armistice agreement between Egypt and Israel dated 24 February 1949.

5. The Tribunal is not authorized to establish a location of a boundary pillar other than a location advanced by Egypt or by Israel and recorded in Appendix A. The Tribunal also is not authorized to address the location of boundary pillars other than those specified in paragraph 1.

APPENDIX B

AGREEMENT signed and exchanged at Rafeh on (13 Shaban, 1324, 18th Ailul 1322), 1st October, 1906, between the Commissioners of the Turkish Sultanate and the Commissioners of the Egyptian Khedivate, concerning the fixing of a separating administrative line between the Vilayet of Hejaz and Governorate of Jerusalem and the Sinai Peninsula.

EL MIRALAI Staff Officer Ahmed Muzaffer Bey, and El Bimbashi Staff Officer Mohammed Fahmi Bey as Commissioners of the Turkish Sultanate, and Emir El Lewa Ibrahim Fathi Pasha and El Miralai R. C. R. Owen Bey as Commissioners of the Egyptian Khedivate, having been entrusted with the delimitation of the administrative separating line between the Vilayet of Hejaz and Governorate of Jerusalem and the Sinai Peninsula, have in the name of the Turkish Sultanate and the Egyptian Khedivate agreed as follows:

Article 1. The administrative separating line, as shown on map attached to this Agreement, begins at the point of Ras Taba on the western shore of the Gulf of Akaba and follows along the eastern ridge overlooking Wadi Taba to the top of Jebel Fort, from thence the separating line extends by straight lines as follows:

From Jebel Fort to a point not exceeding 200 metres to the east of the top of Jebel Fathi Pasha, thence to that point which is formed by the intersection of a prolongation of this line with a perpendicular line drawn from a point 200 metres measured from the top of Jebel Fathi Pasha along the line drawn from the centre of the top of that hill to Mofrak Point (the Mofrak is the junction of the Gaza-Akaba and Nekhl-Akaba roads). From this point of intersection to the hill east of and overlooking Thamilet-el-Radadi—place where there is water—so that the Thamila (or water) remains west of the line, thence to top of Ras Radadi, marked on the above-mentioned map as (A 3), thence to top of Jebel Safra marked as (A 4), thence to top of eastern peak of Um Guf marked as (A 5), thence to that point marked as (A 7), north of Thamilet Sueilma, thence to that point marked as (A 8), on west-north-west of Jebel Semaui, thence to top of hill west-north-west of Bir Maghara (which is the well in the northern branch of the Wadi Ma Yein, leaving that well east of the separating line), from thence to (A 9), from thence to (A 9 *bis*) west of Jebel Megrach, from thence to Ras-el-Ain, marked as (A 10 *bis*), from thence to a point on Jebel Um Hawawit marked as (A 11), from thence to half distance between two pillars (which pillars are marked at (A 13)) under a tree 390 metres south-west of Bir Rafeh, it then runs in a straight line at a bearing of 280° of the magnetic north—viz., 80° to the west—to a point on a sand-hill measured 420 metres in a straight line from the above-mentioned pillars, thence in a straight line at a bearing of 334° of the magnetic north—viz., 26° to the west—to the Mediterranean Sea, passing over hill of ruins on the sea-shore.

Art. 2. The separating line mentioned in Article 1 has been indicated by a black broken line on duplicate maps (annexed to this Agreement), which shall be signed and exchanged simultaneously with the Agreement.

Art. 3. Boundary pillars will be erected, in the presence of the Joint Commission, at intervisible points along the separating line, from the point on the Mediterranean shore to the point on the shore of the Gulf of Akaba.

Art. 4. These boundary pillars will be under the protection of the Turkish Sultanate and Egyptian Khedivate.

Art. 5. Should it be necessary in future to renew these pillars, or to increase them, each party shall send a representative for this purpose. The positions of these new pillars shall be determined by the course of the separating line as laid down in the map.

Art. 6. All tribes living on both sides shall have the right of benefiting by the water as heretofore—viz., they shall retain their ancient and former rights in this respect.

Necessary guarantees will be given to Arab tribes respecting above.

Also Turkish soldiers, native individuals and gendarmes, shall benefit by the water which remained west of the separating line.

Art. 7. Armed Turkish soldiers and armed gendarmes, will not be permitted to cross to the west of the separating line.

Art. 8. Natives and Arabs of both sides shall continue to retain the same established and ancient rights of ownership of waters, fields, and lands on both sides as formerly.

Commissioners of the Turkish Sultanate,

(Signed) Miralai Staff Officer MUZAFFER
Bimbashi Staff Officer FAHMI

Commissioners of the Egyptian Khedivate,

(Signed) Emir Lewa IBRAHIM FATHI
Miralai R. C. R. OWEN

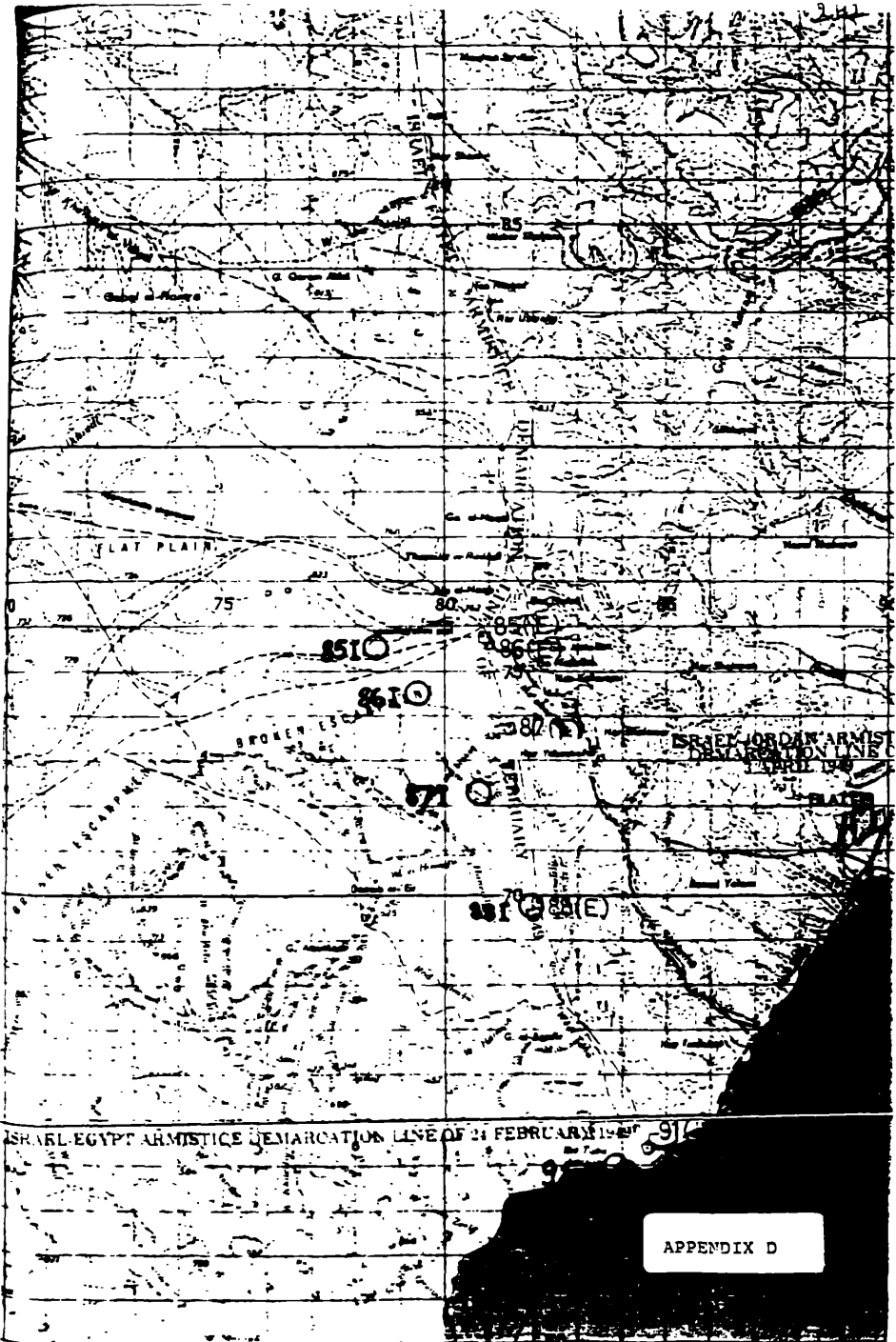
APPENDIX C

MAP No. 1



THE EGYPT - ISRAEL ARBITRATION TRIBUNAL
ESTABLISHED IN ACCORDANCE WITH THE COMPROMIS
SIGNED 11 SEPTEMBER 1986.

APPENDIX D



PART II

**Case concerning the delimitation of maritime boundary
between Guinea-Bissau and Senegal**

Decision of 31 July 1989

**Affaire de la délimitation de la frontière maritime
entre la Guinée-Bissau et le Sénégal**

Sentence du 31 juillet 1989

AFFAIRE DE LA DÉLIMITATION DE LA FRONTIÈRE
MARITIME ENTRE LA GUINÉE-BISSAU ET LE SÉNÉGAL*

SENTENCE DU 31 JUILLET 1989

Delimitation of maritime boundaries—The question of the binding character of an exchange of letters between colonial powers on the former colonies in respect of their boundaries—Law applicable to the interpretation of a treaty—The question of interpretation of a treaty in accordance with the international law that existed at the time of its conclusion—The question of nullity of a treaty because of its incompatibility with peremptory norms of international law—The question of nullity of a treaty because the process of its ratification was inconsistent with internal law—Succession of States in respect of treaties—The effect of non-registration of a treaty with the Secretary-General of the United Nations on its validity—The issue as to whether a treaty on delimitation of maritime boundaries can determine maritime zones or spaces which did not exist at the time of the conclusion of the treaty.

M. Barberis, *président*

M. Gros, M. Bedjaoui, *arbitres*

M. Torres Bernárdez, *greffier*

En l'affaire de la détermination de la frontière maritime *entre* la République de Guinée-Bissau, représentée par :

S. E. M. Fidélis Cabral de Almada, ministre de l'éducation, de la culture et des sports, comme agent; S. E. M. Pio Correia, secrétaire d'Etat aux transports, comme co-agent; S. E. M. Boubacar Touré, ambassadeur de la Guinée-Bissau auprès de la Belgique, de la Communauté économique européenne et de la Suisse, M. João Aurigema Cruz Pinto, juge à la Cour suprême, le lieutenant de vaisseau Feliciano Gomes, chef de l'Etat-Major de la Marine, M. Mário Lopes, chef de cabinet du président du Conseil d'Etat, Mme Monique Chemillier-Gendreau, professeur à l'Université de Paris VII, M. Miguel Galvão Teles, avocat, M. António Duarte Silva, ancien assistant de la Faculté de droit de Lisbonne, ancien professeur à l'Ecole de droit de Guinée-Bissau, comme conseillers; M. Maurice Baussart, géophysicien, M. André de Cae, géophysicien, comme experts;

* The Award was rendered in French and Portuguese.

On 23 August 1989, Guinea-Bissau filed in the Registry of the International Court of Justice an Application instituting proceeding against Senegal in respect of a dispute concerning the existence and the validity of the Award. The Court delivered its judgment on 12 November 1991 upholding the existence and the validity of the Award. For the judgment of the Court see, *Case concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, ICJ, *Reports* (1991).

et la République du Sénégal, représentée par :

S. E. M. Doudou Thiam, avocat à la Cour, ancien bâtonnier, membre de la Commission du droit international, comme agent; M. Birame Ndiaye, professeur de droit, M. Ousmane Tanor Dien, conseiller diplomatique du Président de la République du Sénégal, M. Tafsir Malick Ndiage, professeur de droit, comme co-agents; M. Daniel Bardonnat, professeur à l'Université de droit, d'économie et de sciences sociales de Paris, associé de l'Institut de droit international, M. Lucius Cafilisch, professeur à l'Institut universitaire de hautes études internationales de Genève, membre de l'Institut de droit international, M. Paul De Vischer, professeur émérite à la Faculté de droit de l'Université catholique de Louvain, membre de l'Institut de droit international, M. Ibou Diaïte, professeur à la Faculté des sciences juridiques et économiques de Dakar, comme conseils; M. Samba Diouf, ingénieur géologue, M. André Roubertou, ingénieur hydrographe, Mme Isabella Niang, maître-assistante à la Faculté des sciences de Dakar, M. Amadou Tahirou Diaw, maître-assistant à la Faculté des sciences de Dakar, comme experts;

Le Tribunal, ainsi composé, rend la sentence suivante :

1. Les Gouvernements de la République du Sénégal et de la République de Guinée-Bissau ont signé à Dakar le 12 mars 1985 un accord de compromis d'arbitrage ainsi conçu :

Le Gouvernement de la République du Sénégal et le Gouvernement de la République de Guinée-Bissau,

Reconnaissant qu'ils n'ont pu résoudre par voie de négociation diplomatique le différend relatif à la détermination de leur frontière maritime,

Désirant, étant donné leurs relations amicales, parvenir au règlement de ce différend dans les meilleurs délais, et à cet effet ayant décidé de recourir à un arbitrage,

Sont convenus de ce qui suit :

Article premier

1. Le Tribunal arbitral (ci-dessous appelé le Tribunal) sera composé de trois membres désignés de la manière suivante :

Chaque Partie nommera un arbitre de son choix;

Le troisième arbitre qui fera fonction de Président du Tribunal sera nommé d'un commun accord par les deux Parties; ou, à défaut, ce choix sera effectué d'un commun accord par les deux arbitres, après consultation des deux Parties.

2. Les trois membres du Tribunal sont obligatoirement des ressortissants d'Etats tiers.

Les arbitres devront être désignés dans un délai de 60 jours après la signature du présent compromis.

3. Au cas où le Président ou un autre membre du Tribunal viendrait à faire défaut, la vacance serait comblée par un nouveau membre désigné par le Gouvernement qui a nommé le membre qui doit être remplacé dans le cas des deux arbitres désignés respectivement par les deux Gouvernements, ou par renouvellement de la procédure prévue au paragraphe précédent dans le cas du Président.

Article 2

Il est demandé au Tribunal de statuer conformément aux normes du droit international sur les questions suivantes :

1. L'Accord conclu par un échange de lettres, le 26 avril 1960, et relatif à la frontière en mer, fait-il droit dans les relations entre la République de Guinée-Bissau et la République du Sénégal ?

2. En cas de réponse négative à la première question, quel est le tracé de la ligne délimitant les territoires maritimes qui relèvent respectivement de la République de Guinée-Bissau et de la République du Sénégal ?

Article 3

Le siège du Tribunal est fixé à Genève (Suisse).

Article 4

Le Tribunal ne pourra statuer que s'il est au complet.

2. Les décisions du Tribunal relatives à toutes questions de fond ou de procédure, y compris toutes les questions concernant la compétence du Tribunal et l'interprétation du compromis, seront prises à la majorité de ses membres.

Article 5

1. Les Parties, dans un délai de 30 jours à partir de la signature du présent compromis, désigneront chacune, pour les besoins de l'arbitrage, un agent et des co-agents, et communiqueront le nom et l'adresse de leurs agents respectifs à l'autre Partie et au Tribunal.

2. Le Tribunal, dès sa constitution, après consultation avec les deux agents, désignera un greffier.

Article 6

1. La procédure devant le Tribunal sera contradictoire. Elle comportera deux phases : l'une écrite et l'autre orale.

2. La phase écrite consistera en :

a) Un mémoire qui sera soumis par la République de Guinée-Bissau, au plus tard quatre mois après la constitution du Tribunal;

b) Un contre-mémoire qui sera soumis par la République du Sénégal, au plus tard quatre mois après le dépôt du mémoire présenté par la République de Guinée-Bissau;

c) Une réplique, présentée par la République de Guinée-Bissau deux mois au plus tard après le dépôt du contre-mémoire par la République du Sénégal;

d) Une duplique présentée par la République du Sénégal deux mois au plus tard après le dépôt de la réplique de la République de Guinée-Bissau.

Article 7

1. Les plaidoiries écrites et orales seront en français et/ou en portugais; les décisions du Tribunal seront dans ces deux langues.

2. Le Tribunal, en tant que de besoin, pourvoira aux traductions et aux interprétations, sera habilité à engager le personnel de secrétariat, à nommer des experts, et prendra toutes mesures quant aux locaux et à l'achat ou à la location d'équipements.

Article 8

Les dépenses générales de l'arbitrage seront arrêtées par le Tribunal et supportées également par les deux Gouvernements; mais chaque Gouvernement suppor-

tera les frais propres entraînés par ou pour la préparation et la présentation de ses thèses.

Article 9

1. Quand les procédures devant le Tribunal auront pris fin, celui-ci fera connaître aux deux Gouvernements sa décision quant aux questions énoncées à l'article 2 du présent compromis.

2. Cette décision doit comprendre le tracé de la ligne frontière sur une carte. A cette fin, le Tribunal sera habilité à désigner un ou des experts techniques pour l'assister dans la préparation de cette carte.

3. La décision sera pleinement motivée.

4. Les deux Gouvernements décident ou non de publier la sentence et/ou les pièces de procédure écrites ou orales.

Article 10

1. La sentence arbitrale sera revêtue de la signature du Président du Tribunal et du greffier. Celui-ci remettra une copie conforme établie dans les deux langues aux agents des deux Parties.

2. La sentence sera définitive et obligatoire pour les deux Etats qui seront tenus de prendre toutes les mesures que comporte son exécution.

3. Le texte original sera déposé aux archives des Nations Unies et de la Cour internationale de Justice.

Article 11

1. Aucune activité des Parties pendant la durée de la procédure ne pourra être considérée comme préjugant de leur souveraineté dans la zone objet du compromis d'arbitrage.

2. Le Tribunal a le pouvoir de prescrire, à la demande de l'une des Parties et si les circonstances l'exigent, toutes les mesures provisoires à prendre pour sauvegarder les droits des Parties.

Article 12

Le présent compromis entrera en vigueur à la date de sa signature.

EN FOI DE QUOI, les soussignés, dûment autorisés par leurs Gouvernements respectifs, ont signé le présent compromis.

FAIT en double exemplaire à Dakar, le 12 mars 1985, en langues française et portugaise, les deux textes faisant également foi.

2. En vertu de l'article premier de ce compromis, ont été nommés membres du Tribunal, par la Guinée-Bissau, M. Mohammed Bedjaoui et, par le Sénégal, M. André Gros dans le délai prévu de 60 jours. En application du même article du compromis, la Guinée-Bissau et le Sénégal ont nommé d'un commun accord M. Julio A. Barberis comme troisième arbitre et Président du Tribunal après un délai d'une année.

3. Dès sa constitution, le 6 juin 1986, le Tribunal, après avoir consulté les agents des Parties, a désigné M. Etienne Grisel comme greffier du Tribunal, conformément à l'article 5, paragraphe 2, du compromis. M. Etienne Grisel ayant par la suite démissionné, le Tribunal, après avoir consulté les agents des Parties, a désigné, le 6 septembre 1988, M. Santiago Torres Bernárdez comme greffier du Tribunal.

4. En application de l'article 5, paragraphe 1, du compromis, le Gouvernement de la Guinée-Bissau a désigné comme agent S. E. M. Fidélis Cabral de Almada et le Gouvernement du Sénégal S. E. M. Dou-dou Thiam.

5. Genève ayant été fixée par l'article 3 du compromis comme siège du Tribunal, un accord relatif au statut, aux privilèges et aux immunités du Tribunal en Suisse a été conclu entre les Parties et l'Etat hôte. L'accord a pris la forme d'un échange de notes entre le Département fédéral des affaires étrangères de la Suisse et les Ambassades de la République du Sénégal à Berne et de la République de la Guinée-Bissau à Bruxelles.

6. La séance constitutive du 6 juin 1986 a eu lieu, en présence des Parties, au Centre international de conférences de Genève.

7. Le 14 mars 1988, le Tribunal a tenu une séance spéciale en la salle de l'Alabama à l'Hôtel de ville de Genève où, au cours d'une cérémonie, les Membres du Tribunal et des délégations des Parties ont été reçus par le Conseil d'Etat de la République et Canton de Genève.

8. Les séances du Tribunal ont eu lieu, tout d'abord, dans des locaux mis à sa disposition par les autorités suisses au Centre international de conférences de Genève et à la Villa Lullin à Genthod (Genève), puis dans des locaux que le Tribunal s'est procurés lui-même, notamment au siège de l'Organisation internationale du Travail.

9. En ce qui concerne la procédure, le Tribunal est convenu de s'inspirer autant que possible des règles de procédure de la Cour internationale de Justice et d'adopter en tant que de besoin des décisions de procédure complémentaires.

10. Le mémoire de la Guinée-Bissau a été déposé le 6 octobre 1986 et le contre-mémoire du Sénégal le 6 février 1987, dans les délais fixés par les dispositions de l'article 6, paragraphe 2, alinéas *a* et *b*, du compromis du 12 mars 1985. A la demande des Parties, le Tribunal a accepté de prolonger les délais prévus à l'article 6, paragraphe 2, alinéas *c* et *d*, du compromis pour la réplique de la Guinée-Bissau et la duplique du Sénégal. La Guinée-Bissau a déposé sa réplique le 6 juin 1987 et le Sénégal sa duplique le 6 octobre 1987, à savoir dans les délais tels que prorogés par le Tribunal.

11. L'affaire s'étant alors trouvée en état, le Tribunal, après avoir consulté les agents des Parties, a fixé la date de l'ouverture de la procédure orale au 14 mars 1988. Il a été convenu que les représentants de la Guinée-Bissau prendraient la parole en premier.

12. Au cours des 16 audiences privées tenues à la Villa Lullin à Genthod (Genève) les 14, 15, 16, 21, 22, 23, 26 et 29 mars 1988, le Tribunal a entendu, pour la Guinée-Bissau, LL. EE. MM. Cabral de Almada et Pio Correia, le lieutenant de vaisseau Gomes, M. Lopes, Mme Chemillier-Gendreau, et MM. Galvão Teles, Duarte Silva, Baus-sart et de Cae; et, pour le Sénégal, S. E. M. Thiam, MM. De Visscher, Bardonnnet, Caflisch, Diaïte, Roubertou et Diouf et Mme Niang.

13. La Guinée-Bissau a fait comparaître comme expert M. Grandin. M. Grandin a fait une déclaration et a répondu aux questions qui lui

ont été posées par le conseil de la Guinée-Bissau. Le Sénégal n'a pas fait comparaître d'autres experts que ceux qui faisaient partie de sa délégation. Aucune des Parties n'a fait comparaître de témoins.

14. Se prévalant de la faculté ouverte par l'article 9, paragraphe 2, du compromis, le Tribunal a désigné, après consultation des agents des Parties, le capitaine de frégate Peter Bryan Beazley comme expert technique du Tribunal.

15. Dans la phase écrite de la procédure, les conclusions ci-après ont été présentées par les Parties :

Au nom de la Guinée-Bissau, dans le mémoire :

Plaise au Tribunal décider que :

— Les règles de la succession d'Etats en matière de traités (art. 11, 13 et 14 de la Convention de Vienne du 23 août 1978 sur la succession d'Etats en matière de traités) ne permettent pas au Sénégal d'opposer à la Guinée-Bissau l'échange de lettres passé le 26 avril 1960 entre la France et le Portugal et qui est d'ailleurs frappé de nullité absolue et d'inexistence;

— Ainsi la délimitation maritime n'a jamais été fixée entre le Sénégal et la Guinée-Bissau;

— La délimitation des mers territoriales des deux Etats se fera en application de l'article 15 de la Convention sur le droit de la mer du 10 décembre 1982 selon le tracé d'une ligne d'équidistance (azimut 247°) à partir des lignes de base des deux Etats;

— Pour la délimitation des plateaux continentaux et des zones économiques exclusives, l'examen de toutes les circonstances pertinentes et la recherche de méthodes adaptées afin d'aboutir à une solution équitable donnant des résultats voisins se situant entre les azimuts 264° et 270°, c'est entre ces deux lignes que devra être fixée la délimitation maritime entre les deux Etats.

Les conclusions dans la réplique de la Guinée-Bissau réitèrent celles du mémoire reproduites ci-dessus à ceci près que dans le premier alinéa le mot "conclu" remplace le mot "passé" pour qualifier l'échange de lettres du 26 avril 1960 et que l'adjectif "absolue" qualifiant la nullité ne figure plus dans la réplique.

Au nom du Sénégal, dans le contre-mémoire :

Plaise au Tribunal :

Rejeter les conclusions de la République de Guinée-Bissau;

Dire et juger :

Que par l'échange de lettres du 26 avril 1960 "au sujet de la frontière en mer entre la République du Sénégal et la Province portugaise de Guinée", la France et le Portugal ont, dans le plein exercice de leur souveraineté et conformément aux principes qui régissent la validité des traités et accords internationaux, procédé à la délimitation d'une frontière en mer;

Que cet Accord, conforté par le comportement ultérieur des parties contractantes autant que par celui des Etats souverains qui leur ont succédé, fait droit dans les rapports entre la République de Guinée-Bissau et la République du Sénégal.

Les conclusions dans la duplique du Sénégal réitèrent celles du contre-mémoire reproduites ci-dessus, à ceci près que dans le dernier alinéa les mots "et complété" sont insérés entre le mot "conforté" et les mots "par le comportement ultérieur".

16. Au cours de la procédure orale, les conclusions ci-après ont été présentées par les Parties :

Au nom de la Guinée-Bissau, à l'audience du 26 mars 1988, après-midi :

Plaise au Tribunal décider que :

1) Le Sénégal ne peut opposer à la République de Guinée-Bissau l'échange de lettres du 26 avril 1960 entre la France et le Portugal.

Une telle inopposabilité découle :

— D'une interprétation correcte des règles de l'*uti possidetis juris*, qui concernent uniquement les frontières terrestres et ne s'étendent pas aux délimitations maritimes;

— De la non-publication de l'Accord au Portugal et en Guinée;

— Du droit des peuples à disposer d'eux-mêmes et du processus de libération du peuple de Guinée-Bissau, déjà entamé à la date de l'Accord franco-portugais;

— Du principe de la souveraineté permanente des peuples et des Etats sur leurs richesses et leurs ressources naturelles, aujourd'hui exprimé dans l'article 13 de la Convention de Vienne sur la succession d'Etats du 23 août 1978.

L'échange de lettres franco-portugais se trouve en outre frappé de nullité absolue pour violation des principes du *ius cogens*; et de nullité pour non-conformité avec la norme fondamentale du droit contemporain en matière de délimitation maritime, et pour violation manifeste de normes du droit interne d'importance fondamentale concernant la compétence pour conclure des traités. Il se trouve également frappé de non-existence.

Ainsi, l'Accord conclu par l'échange de lettres du 26 avril 1960 ne fait pas droit dans les relations entre la République de la Guinée-Bissau et la République du Sénégal, aucune délimitation maritime n'étant fixée entre elles.

2) La délimitation des eaux territoriales entre les deux Etats devra se faire par application de l'article 15 de la Convention sur le droit de la mer du 10 décembre 1982, selon le tracé d'une ligne d'équidistance en direction de l'azimut 247°, à partir des lignes de base des deux Etats.

Pour la délimitation des plateaux continentaux et des zones économiques exclusives, l'examen de toutes les circonstances pertinentes et la recherche des méthodes appropriées afin d'aboutir à une solution équitable donnant des résultats se situant entre les directions des azimuts de 264° et 270°, c'est entre ces deux lignes que devra être fixée la délimitation maritime entre les deux Etats.

Au nom du Sénégal, à l'audience du 29 mars 1988, après-midi :

Plaise au Tribunal :

Rejeter les conclusions du Gouvernement de la République de Guinée-Bissau;

Dire et juger :

Que, par l'échange de lettres du 26 avril 1960 "au sujet de la frontière en mer entre la République du Sénégal et la Province portugaise de Guinée", la France et le Portugal ont, dans le plein exercice de leur souveraineté et conformément aux principes qui régissent la validité des traités et accords internationaux, procédé à la délimitation d'une frontière en mer;

Que cet Accord, conforté et complété par le comportement ultérieur des Parties contractantes autant que par celui des Etats souverains qui leur ont succédé, fait droit dans les rapports entre la République du Sénégal et la République de la Guinée-Bissau;

Quelle que soit la réponse du Tribunal à l'article 2, paragraphe 1, du compromis, et pour l'ensemble des motifs exposés par la République du Sénégal, la frontière en mer entre la République du Sénégal et la République de Guinée-Bissau est constituée par la ligne d'azimut 240° du phare du cap Roxo et par son prolongement rectiligne exhausé à la colonne d'eaux surjacentes;

Que son point d'aboutissement est situé à l'intersection de cette même ligne d'azimut 240° et de la limite des 200 milles marins.

17. Par ordonnance du 18 janvier 1989 du Tribunal, les Parties ont été priées de présenter, avant le 1^{er} avril 1989, une note supplémentaire sur tout renseignement dont elles pourraient avoir connaissance ou qu'elles seraient à même de se procurer relativement aux ressources effectives ou potentielles en matière de pêche et d'hydrocarbures de la zone contestée et à leur localisation géographique. En réponse à cette demande, le Sénégal et la Guinée-Bissau ont déposé, dans le délai fixé, des notes concernant les renseignements mentionnés.

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18. Le différend soumis au Tribunal en vertu du compromis d'arbitrage du 12 mars 1985 reproduit au paragraphe 1 ci-dessus est un différend d'ordre juridique entre la République du Sénégal et la République de Guinée-Bissau, c'est-à-dire entre deux Etats qui sont limitrophes et qui occupent la partie de l'Afrique occidentale baignée par l'océan Atlantique comprise entre, d'une part, la Mauritanie située au nord du Sénégal et, d'autre part, la Guinée située au sud de la Guinée-Bissau, à l'exception, bien entendu, de la partie qui appartient à la Gambie, laquelle est enclavée dans le Sénégal et possède également un littoral sur l'océan Atlantique. En tant que tel, ce différend n'a pu naître qu'après l'accession à la pleine souveraineté et indépendance, sur le plan international, du territoire non autonome qui a été le dernier à être décolonisé. Cela est admis tant par la République du Sénégal que par la République de Guinée-Bissau. Cependant, dans la naissance du différend, l'appréciation que ces deux Etats ont du sens et de la portée à attribuer à certains accords et agissements de leurs Etats prédécesseurs respectifs a joué un rôle de toute première importance.

19. Le Sénégal, territoire français d'outre-mer depuis 1946, devint le 25 novembre 1958, par décision de l'Assemblée territoriale sénégalaise, un Etat autonome au sein de la Communauté instituée alors par la Constitution française, choix qui avait été accepté le 28 septembre de la même année en référendum par le peuple sénégalais. En janvier 1959, le Sénégal, toujours au sein de la Communauté, forma avec le Soudan français la Fédération du Mali. Cette Fédération obtint l'indépendance le 4 avril 1960, accédant pleinement à la souveraineté le 20 juin 1960. Par la suite, la Fédération du Mali s'étant dissoute, le Sénégal devint le 20 août 1960, sous le nom de République du Sénégal, un Etat indépendant et souverain distinct et séparé de celui de la République du Mali (ancien Soudan). La République du Sénégal a été admise aux Nations Unies le 28 septembre 1960. De son côté, la Guinée-Bissau, dont l'indépendance fut proclamée le 24 septembre 1973 par l'Assemblée nationale populaire, avait été jusqu'alors sous l'administration du Portugal. L'indépendance de la Guinée-Bissau a été le fruit d'une longue lutte de libération nationale d'abord politique, puis, à partir du début de 1963, menée militairement par le Parti africain pour l'indépendance de la Guinée et du Cap-Vert (PAIGC) contre le Portugal, qui était à cette époque sous le régime de M. António de Oliveira Salazar. Par un traité conclu à Alger le 26 août 1974, le Portugal reconnut la Guinée-Bissau

comme Etat indépendant et souverain. L'admission de la Guinée-Bissau aux Nations Unies a eu lieu le 17 septembre 1974.

20. Antérieurement aux événements qui ont conduit à la souveraineté et à l'indépendance internationales de la République du Sénégal et de la République de Guinée-Bissau, la France et le Portugal avaient conclu certains accords de délimitation entre leurs possessions respectives d'Afrique occidentale. C'est ainsi que, par une Convention signée à Paris le 12 mai 1886, le Portugal et la France établirent une délimitation entre la Guinée portugaise (aujourd'hui République de Guinée-Bissau), d'une part, et les colonies françaises du Sénégal (aujourd'hui République du Sénégal) au nord et de la Guinée (aujourd'hui République de Guinée) au sud et à l'est, d'autre part, en vertu de laquelle la frontière terrestre entre la Guinée-Bissau et le Sénégal aboutit sur l'océan Atlantique au cap Roxo. Il convient également de noter que la Convention spécifie qu'appartiendront au Portugal

toutes les îles comprises entre le méridien du cap Roxo, la côte et la limite sud formée par une ligne qui suivra le thalweg de la rivière Cajet et se dirigera ensuite au sud-ouest à travers la passe des Pilotes pour gagner 10° 40' latitude nord avec lequel elle se confondra jusqu'au méridien du cap Roxo.

Il n'est pas contesté entre les Parties au présent différend que la délimitation effectuée par cette Convention franco-portugaise de 1886 définit la frontière terrestre entre la République du Sénégal et la République de Guinée-Bissau. Les deux Parties s'accordent également à considérer que la Convention franco-portugaise de 1886 ne définit pas la frontière maritime entre la République du Sénégal et la République de Guinée-Bissau.

21. Or, si les Parties au présent différend sont d'accord sur le sens et la portée de la Convention franco-portugaise de 1886, elles ne le sont pas du tout en ce qui concerne l'Accord conclu, par échange de lettres, le 26 avril 1960 entre la France et le Portugal en vue de définir la frontière en mer entre la République du Sénégal (à l'époque Etat autonome au sein de la Communauté) et le territoire portugais de Guinée. Un décret portugais du 26 février 1958 autorisant le Ministre de l'outre-mer à signer un contrat de concession avec la société Esso avait provoqué des objections de la France. Il s'ensuivit une négociation à Lisbonne, du 8 au 10 septembre 1959, afin de parvenir à un accord de délimitation de la mer territoriale, des zones contiguës et du plateau continental. Le 10 septembre 1959 les négociateurs établirent des "recommandations" qui furent soumises aux deux Gouvernements. La première de ces "recommandations" est à l'origine du contenu de l'Accord du 26 avril 1960. L'Accord fut publié au *Journal officiel* en France ainsi que dans ceux de la Communauté et de la Fédération du Mali, mais non dans le *Journal officiel* du Portugal ni de sa Province de Guinée, et ne fut enregistré au Secrétariat de l'Organisation des Nations Unies ni par la France ni par le Portugal.

22. La République de Guinée-Bissau considère que l'échange de lettres franco-portugais ci-dessus est frappé de nullité et d'inexistence et que, en tout état de cause, il ne lui serait aucunement opposable. Par contre, selon la République du Sénégal, l'Accord franco-portugais du

26 avril 1960 ferait droit dans les rapports entre elle et la République de Guinée-Bissau en ce qui concerne leur frontière maritime. Il en résulte que pour la République de la Guinée-Bissau il n'y aurait aucune délimitation maritime entre elle et la République du Sénégal, une telle délimitation devant en conséquence être effectuée *ex novo*, tandis que pour la République du Sénégal une délimitation maritime existerait déjà et correspondrait à celle résultant de l'Accord franco-portugais du 26 avril 1960. Ces positions divergentes des Parties expliquent que l'article 2 du compromis d'arbitrage du 12 mars 1985 demande au Tribunal de répondre, en premier lieu, à la question de savoir si l'Accord du 26 avril 1960 fait droit dans les relations entre la République du Sénégal et la République de Guinée-Bissau, et qu'il demande également au Tribunal, en cas de réponse négative à cette question, quel serait le tracé de la ligne délimitant les territoires maritimes de la République du Sénégal et de la République de Guinée-Bissau.

23. La République de Guinée-Bissau affirme que quand, en septembre 1977, des négociations entre les Parties commencèrent, sur son initiative, en vue de résoudre la question de la détermination de la frontière maritime entre elles, la Guinée-Bissau n'avait pas même connaissance de l'existence de l'échange de lettres franco-portugais du 26 avril 1960 et que la République du Sénégal ne s'en serait prévalu au cours des négociations qu'à partir de 1978. Pour sa part, le Sénégal affirme qu'il a toujours été au courant des négociations franco-portugaises à l'origine de l'Accord du 26 avril 1960, la délégation française ayant inclus un membre sénégalais, qu'il s'est constamment appuyé sur la frontière maritime des 240° définie par l'Accord de 1960 et que la Guinée-Bissau a également respecté l'Accord, n'a pas protesté contre celui-ci pendant de nombreuses années et que la proclamation d'indépendance de la Guinée-Bissau, en se référant aux frontières des eaux territoriales, admettait implicitement la limite des 240°.

24. Il convient également de signaler dès maintenant que le désaccord entre les Parties au présent différend à propos de l'échange de lettres franco-portugais du 26 avril 1960 ne concerne pas seulement la période postérieure à l'indépendance de la Guinée-Bissau ou la période postérieure au commencement des négociations de 1977 ci-dessus mentionnées. Le désaccord s'étend aussi à la question de l'application qui a été faite de l'Accord de 1960 avant ces dates. Par exemple, la Guinée-Bissau soutient que quand, en 1963, les autorités portugaises ont autorisé les recherches d'hydrocarbures dans la zone, elles l'ont fait sans aucun souci d'une frontière maritime, ce qui prouverait qu'elles considéraient une telle frontière comme inexistante. De son côté, le Sénégal souligne que l'Accord franco-portugais de 1960 a été appliqué par tous les intéressés et que, malgré les incidents survenus dès 1963 entre lui et le Portugal, ce dernier pays n'aurait jamais contesté l'Accord et l'aurait respecté. Le Sénégal soutient qu'il s'est glissé une erreur matérielle dans une réponse donnée par l'administration sénégalaise à l'Ambassade d'Italie, erreur qui aurait été corrigée un mois plus tard, et affirme qu'il a toujours exercé ses compétences étatiques dans la zone (octroi des permis de pêche ou de recherches et d'exploitation d'hydrocar-

bures, protestations contre des violations, etc.) en s'appuyant sur la frontière en mer établie par l'Accord franco-portugais de 1960.

25. D'autres événements marquèrent encore la genèse du différend. Quelques incidents en mer survinrent en effet, en particulier en 1977, en 1978 et, de nouveau, en 1984, quand le Sénégal autorisa la construction de plates-formes de forage dans la zone contestée, ce qui provoqua une protestation de la part du Gouvernement de la République de Guinée-Bissau. D'autre part, en 1985, une loi de la République de Guinée-Bissau concernant un nouveau système de lignes de base droites de ce pays donna lieu à une protestation du Sénégal auprès du Secrétaire général de l'Organisation des Nations Unies.

26. Ces événements n'empêchèrent pas cependant de poursuivre les négociations entre les Parties commencées en 1977, négociations qui, dès 1982, portèrent, pour l'essentiel, sur la conclusion d'un compromis d'arbitrage. Le 12 mars 1985 ce compromis était conclu et, le 7 avril 1986, le choix des trois arbitres était intervenu.

27. Le seul objet du différend soumis par les Parties au Tribunal porte donc sur la détermination de la frontière maritime entre la République du Sénégal et la République de Guinée-Bissau, question qu'elles n'ont pu résoudre par voie de négociation. Il s'agit d'une délimitation entre territoires maritimes adjacents qui concerne des espaces maritimes situés dans l'océan Atlantique au large des côtes du Sénégal et de la Guinée-Bissau. Les Parties n'ont pas manqué de signaler à l'attention du Tribunal, dans leurs pièces écrites aussi bien qu'au cours des plaidoiries, toute une série de données géographiques, géologiques et morphologiques relatives à la zone concernée par la délimitation et à leurs côtes, en vue d'éclairer le Tribunal dans sa tâche. A ce stade du raisonnement, le Tribunal ne voit pas la nécessité de donner une définition précise de la zone où la détermination de la frontière maritime doit s'effectuer, ni de dire quel serait, pour le Tribunal, l'effet des diverses particularités, géographiques notamment, sur la situation juridique.

28. La Guinée-Bissau, dont la côte est très découpée par des estuaires de cours d'eau et bordée par les îles de l'archipel des Bijagos, est située entre la frontière de la Guinée-Bissau avec la Guinée et le cap Roxo. Le Sénégal est au nord de la Guinée-Bissau, et ses côtes s'étendent tout d'abord entre le cap Roxo et la frontière avec le sud de la Gambie, puis de la frontière avec le nord de la Gambie jusqu'à la frontière avec la Mauritanie. Selon le Sénégal, l'Accord franco-portugais de 1960 faisant droit entre les Parties, la frontière maritime entre le Sénégal et la Guinée-Bissau serait constituée par la ligne d'azimut 240° du phare du cap Roxo et par son prolongement rectiligne vers le large. Pour la Guinée-Bissau, par contre, la délimitation des eaux territoriales entre les deux pays suivrait le tracé d'une ligne d'équidistance correspondant à l'azimut 247° à partir de la ligne de base des deux Etats, et celle relative à la délimitation du plateau continental et des zones économiques exclusives, qui lui ferait suite, se situerait entre les azimuts 264° et 270°, ce dernier azimut correspondant à un parallèle.

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29. D'après l'article 2 du compromis arbitral, le Tribunal doit répondre d'abord à la question suivante :

L'Accord conclu par un échange de lettres, le 26 avril 1960, et relatif à la frontière en mer, fait-il droit dans les relations entre la République de Guinée-Bissau et la République du Sénégal ?

30. Avant de passer à l'examen de cette question, il convient de préciser la compétence du Tribunal à ce sujet. Ce Tribunal a été créé par un traité international conclu entre la République de Guinée-Bissau et la République du Sénégal pour décider, en premier lieu, si l'Accord franco-portugais du 26 avril 1960 fait droit entre elles. On pourrait s'interroger sur la compétence d'un tribunal arbitral pour examiner la validité d'un traité conclu par deux Etats qui n'ont pas donné leur consentement à un tel examen et qui n'ont pas participé à la procédure arbitrale. De même, la question pourrait se poser de savoir comment un pays qui n'est pas partie à un traité peut en invoquer la validité ou la nullité.

31. Il convient de relever qu'en l'espèce il ne s'agit pas de deux Etats ayant créé un Tribunal pour qu'il décide de la validité ou de la nullité d'un accord conclu entre d'autres pays qui leur seraient totalement étrangers, comme ce serait le cas, par exemple, si ce Tribunal avait à se prononcer sur la validité ou la nullité d'un accord entre la Norvège et l'Uruguay.

Le présent litige concerne un accord entre deux pays dont les Parties sont les successeurs. Le Sénégal et la Guinée-Bissau sont, respectivement, les successeurs de la France et du Portugal. Quoique la Guinée-Bissau ait déclaré la "table rase" quant à l'application des traités conclus par le Portugal, les deux Parties ont reconnu le principe de l'*uti possidetis* africain proclamé par l'Organisation de l'unité africaine et ils l'ont réitéré expressément dans le présent arbitrage.

En outre, de la conduite observée par la République de Guinée-Bissau et par la République du Sénégal dans cet arbitrage on peut inférer qu'elles agissent en tant que successeurs du Portugal et de la France respectivement, c'est-à-dire en tant qu'Etats qui, par le jeu de la succession d'Etats, se sont substitués au Portugal et à la France dans la responsabilité des relations internationales du territoire de la Guinée-Bissau et du territoire du Sénégal, respectivement. En effet, le fait d'invoquer devant le Tribunal des causes d'inexistence ou de nullité de l'Accord de 1960 ou de se présenter devant lui comme détenteur des droits dérivés de cet Accord implique que l'on se reconnaît comme successeur d'un des Etats qui l'ont conclu.

32. Les deux pays admettent être les successeurs des Etats qui ont conclu l'Accord de 1960, mais leurs avis sont divergents quant aux normes régissant la succession entre Etats. Ainsi, alors que le Sénégal affirme que la succession joue pour l'Accord de 1960, la Guinée-Bissau soutient la thèse contraire.

33. Un Etat successeur peut faire valoir devant un tribunal tous les moyens et toutes les exceptions qu'aurait pu invoquer l'Etat auquel il succède. Par conséquent, la Guinée-Bissau, en tant qu'Etat successeur, a la faculté d'invoquer devant le Tribunal toutes les clauses de nullité qu'aurait pu soulever le Portugal au sujet de l'Accord de 1960. La

Guinée-Bissau peut aussi exposer devant le Tribunal les motifs d'inopposabilité qui, d'après elle, feraient obstacle à la succession en ce qui concerne cet Accord. De même, le Sénégal peut aussi faire valoir devant le Tribunal toutes les causes qui, à son avis, confirmeraient l'existence et la validité de l'Accord et ses effets en l'espèce.

34. Le Tribunal va donc analyser l'Accord de 1960, dans la mesure où il pourrait faire l'objet d'une succession entre Etats et quant à ses effets dans les relations entre la Guinée-Bissau et le Sénégal. La validité de cet Accord dans les relations entre le Portugal et la France et les effets qu'il pourrait encore avoir entre ces deux pays n'est pas mise en cause par la présente sentence, laquelle n'aura évidemment d'effet qu'entre les Parties à l'arbitrage.

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35. La Guinée-Bissau a exposé les diverses raisons sur lesquelles elle se fonde pour affirmer que l'Accord de 1960 ne fait pas droit dans ses relations avec le Sénégal. D'un point de vue juridique, il est possible de classer ces raisons en quatre catégories : I) Causes d'inexistence et de nullité, II) Causes d'inopposabilité, III) Non-enregistrement de l'Accord au Secrétariat de l'Organisation des Nations Unies, et IV) Existence d'un droit de vérification ou de révision. Le Tribunal analysera séparément chacune des raisons invoquées.

I. — LES CAUSES D'INEXISTENCE ET DE NULLITÉ INVOQUÉES PAR LA GUINÉE-BISSAU

36. Dans quelques passages de son mémoire (par exemple p. 117, 129, 130, 158, 164 et 246) et de sa réplique (p. 203 et 339), la Guinée-Bissau parle de l'inexistence de l'Accord de 1960. La compétence de ce Tribunal est fondée sur le compromis arbitral dont il tire son existence et il y trouve les limites de sa juridiction. La première question à laquelle doit répondre le Tribunal est celle-ci : "L'Accord... fait-il droit dans les relations entre la République de Guinée-Bissau et la République du Sénégal ?" Cette question implique l'existence d'un traité. Si, par contre, la question était "Y a-t-il un accord relatif à la frontière en mer... ?", le problème serait différent. Dans cette deuxième hypothèse, l'Etat qui plaiderait l'existence de l'Accord aurait à la prouver. Mais, étant donné les termes de la première question contenue dans l'article 2 du compromis arbitral, l'Accord est présumé exister et celui qui allègue sa nullité doit établir celle-ci. Par conséquent, pour ce qui est de *onus probandi*, les causes d'inexistence signalées par la Guinée-Bissau seront considérées par le Tribunal comme causes de nullité.

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A) *Incompatibilité de l'Accord de 1960 avec des normes internationales du jus cogens*

37. La première cause de nullité invoquée par la Guinée-Bissau est que l'Accord du 26 avril 1960 serait incompatible avec certaines

normes juridiques internationales appartenant au *jus cogens*. En ce sens, la Guinée-Bissau dit dans son mémoire que la règle qui consacre le droit des peuples à disposer d'eux-mêmes aurait le caractère d'une norme impérative. A son tour, cette norme serait "accompagnée de corollaires", qui auraient aussi la caractéristique de faire partie du droit international impératif (p. 140). Parmi ces corollaires se trouverait le principe de la souveraineté permanente sur les ressources naturelles, principe qui, d'après la Guinée-Bissau (PV/3, p. 131), ne serait que "le développement logique" du principe d'autodétermination des peuples.

Pour la Guinée-Bissau la violation, dans le cas présent, des normes du *jus cogens* concernant le droit des peuples à disposer d'eux-mêmes ainsi que la souveraineté permanente sur les ressources naturelles se présenterait sous deux aspects différents : i) en premier lieu, il y aurait une contradiction avec l'Accord de 1960, car celui-ci constituerait une aliénation de territoire, ce qui serait contraire au principe de la souveraineté permanente sur les ressources naturelles; ii) en second lieu, le processus de libération aurait déjà été en cours au moment de la signature de l'Accord, ce qui rendrait celui-ci incompatible avec le principe du droit des peuples à disposer d'eux-mêmes.

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38. La règle de la souveraineté permanente sur les ressources naturelles est précisée dans les résolutions 1803 (XVII) et 2158 (XXI) de l'Assemblée générale des Nations Unies. Le paragraphe I, 1, de la résolution 1803 (XVII) concerne le "droit de souveraineté permanente des peuples et des nations sur *leurs* richesses et *leurs* ressources naturelles", et le paragraphe I, 1, de la résolution 2158 (XXI) réaffirme "le droit inaliénable de tous les pays d'exercer leur souveraineté permanente sur *leurs* ressources naturelles". La règle contenue dans ces résolutions de l'Assemblée générale des Nations Unies garantit à chaque Etat le droit d'exploiter ses propres ressources et reconnaît à chacun le droit de nationaliser les richesses se trouvant sur son territoire et qui seraient exploitées par des entreprises étrangères.

39. L'application du principe de la souveraineté permanente sur les ressources naturelles présuppose que les ressources dont il s'agit se trouvent dans le territoire de l'Etat qui invoque ce principe. Dans le cas présent, l'Accord de 1960 a déterminé quel était le territoire relevant de chaque Etat, c'est-à-dire qu'il établit ce qui appartient à chacun. Avant l'Accord, les limites maritimes n'étaient pas fixées et, par conséquent, aucun des deux Etats ne pouvait affirmer qu'une fraction déterminée de la zone maritime était "sienne". D'un point de vue logique, la Guinée-Bissau ne peut soutenir que la norme qui a déterminé quel était son territoire maritime (l'Accord de 1960) lui a enlevé une partie du territoire maritime qui était "le sien". Cette affirmation ne pourrait avoir de sens que s'il y avait eu une norme juridique antérieure qui aurait attribué ce territoire à la Guinée-Bissau, ce qui n'a pas été démontré au cours du présent arbitrage. Celui qui prétend avoir été dépouillé d'une partie de

son territoire ou de ses ressources naturelles doit d'abord démontrer qu'ils lui appartenaient.

Il en résulte que le principe de la souveraineté permanente sur les ressources naturelles n'est pas applicable au cas présent.

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40. La Guinée-Bissau affirme que la signature de l'Accord de 1960 est en contradiction avec un corollaire qui découle du principe de l'autodétermination des peuples selon lequel, après le déclenchement d'un processus de libération, l'Etat colonisateur ne pourrait conclure des traités portant sur des éléments essentiels du droit des peuples. Cette norme, n'étant qu'un corollaire, dériverait son existence juridique et son caractère impératif du principe fondamental mentionné. Donc, selon la Guinée-Bissau, le principe d'autodétermination des peuples aurait pour conséquence logique une restriction du *jus tractatus* de l'Etat colonisateur à partir du début d'un processus de libération nationale. En outre, cette restriction aurait le caractère de norme de *jus cogens*.

41. La doctrine actuelle du droit international s'est abondamment occupée du *jus cogens*, surtout à partir de la Convention de Vienne sur le droit des traités de 1969. Une partie de cette doctrine fait apparaître le *jus cogens* comme composé de normes d'une hiérarchie supérieure. Les études sur la notion de *jus cogens* et l'identification des normes ayant un tel caractère ont été souvent influencées par des conceptions idéologiques et par des attitudes politiques. Du point de vue du droit des traités, le *jus cogens* est simplement la caractéristique propre à certaines normes juridiques de ne pas être susceptibles de dérogation par voie conventionnelle.

42. Le respect du principe de l'égalité des droits des peuples et de leur droit à disposer d'eux-mêmes est mentionné au paragraphe 2 de l'article premier de la Charte des Nations Unies comme étant un des buts de l'Organisation, et ce principe a fait l'objet ultérieurement de formulations globales ou partielles, dans certains instruments et documents internationaux, notamment dans certaines résolutions de l'Assemblée générale des Nations Unies comme celles concernant la "Déclaration sur l'octroi de l'indépendance aux pays et aux peuples coloniaux" [résolution 1514 (XV)] de 1960, invoquée à plusieurs reprises par la Guinée-Bissau au cours du présent arbitrage (voir par exemple mémoire, vol. I, p. 139, 141 et 145; PV/1, p. 113 et 122; PV/13, p. 112 et 113), et la "Déclaration relative aux principes du droit international touchant les relations amicales et la coopération entre les Etats conformément à la Charte des Nations Unies" [résolution 2625 (XXV)] de 1970.

43. La Guinée-Bissau présente la règle suivant laquelle le *jus tractatus* serait frappé d'une restriction à partir du début d'un processus de libération nationale comme un corollaire du principe du droit des peuples à disposer d'eux-mêmes. De l'avis du Tribunal, la relation entre

ces deux propositions n'est pas un cas de corollaire dans lequel la vérité d'une proposition peut être déduite de l'autre par une simple opération de logique formelle. La Guinée-Bissau n'a pas apporté la preuve ou la démonstration de ce que la relation logique qui existe entre les normes soit celle d'un corollaire. La simple affirmation qu'entre deux propositions il y a une certaine relation logique n'est pas suffisante. La règle invoquée par la Guinée-Bissau a un contenu qui ne peut être déduit du droit des peuples à disposer d'eux-mêmes. Elle constitue une norme juridique indépendante du principe de l'autodétermination et qui est liée plutôt au principe de l'effectivité et aux règles sur la formation de l'Etat dans la sphère internationale.

44. Un Etat né d'un processus de libération nationale a le droit d'accepter ou non les traités qu'aurait conclus l'Etat colonisateur après le déclenchement du processus. Dans ce domaine, le nouvel Etat jouit d'une liberté totale et absolue, et il n'existe aucune norme impérative qui l'oblige à déclarer nuls les traités conclus pendant cette période ou à les récuser.

La Guinée-Bissau n'a pas établi dans le présent arbitrage que la norme invoquée par elle serait devenue une règle de *jus cogens*, soit par la voie coutumière, soit par la formation d'un principe général de droit.

45. Dans le cas présent, la Guinée-Bissau allègue que la France, en signant l'Accord de 1960, a violé au préjudice du Sénégal un corollaire du principe de l'autodétermination des peuples selon lequel l'Etat colonisateur ne pourrait conclure, après le déclenchement d'un processus de libération nationale, des traités portant sur des éléments essentiels du droit des peuples. D'après la Guinée-Bissau cet Accord serait nul et, s'agissant d'une norme du *jus cogens*, le Sénégal n'aurait pas le droit de confirmer le traité. La norme sur laquelle se fonde la Guinée-Bissau existe en droit international, mais, comme il est dit au paragraphe précédent, elle n'appartient pas au *jus cogens*. Le Sénégal avait donc la liberté totale et absolue d'accepter ou non l'Accord de 1960. En vertu de cette faculté, le Sénégal l'a accepté et il invoque maintenant son application devant ce Tribunal. La Guinée-Bissau, pour sa part, n'a pas le droit de demander au Tribunal la nullité de l'Accord de 1960 en se fondant sur une violation par la France de la norme invoquée, au préjudice du Sénégal.

46. La Guinée-Bissau soutient également que le Portugal aurait violé, à son préjudice, la même règle déjà mentionnée, laquelle ne serait qu'un corollaire du principe de l'autodétermination des peuples. Elle affirme plus précisément que le Portugal n'avait pas en 1960 la compétence nécessaire pour signer l'Accord : "Ni l'une ni l'autre des puissances coloniales en 1960 ne disposaient plus de la plénitude de souveraineté nécessaire pour conclure" (PV/3, p. 133).

47. Afin de prouver l'applicabilité de cette règle au cas présent, la Guinée-Bissau cherche à démontrer qu'en avril 1960, date de l'Accord franco-portugais, le processus de libération nationale en Guinée était déjà commencé.

Aussi bien dans sa réplique qu'au cours des audiences, la Guinée-Bissau a surtout retracé l'évolution du processus de libération nationale

dans la province portugaise de Guinée. D'après les preuves fournies, la période qui va de 1955 à 1960 est caractérisée par la fondation, en Guinée ou à l'étranger, de diverses associations, quelques-unes clandestines, qui déclaraient avoir pour but ultime l'indépendance de leur pays. Ainsi, il se crée en 1955 à Bissau le Mouvement d'indépendance nationale de la Guinée portugaise (MING), formé d'un groupe de commerçants, de fonctionnaires et d'étudiants, mouvement qui disparaîtra l'année suivante. En septembre 1956 est fondé à Bissau le Parti africain de l'indépendance (PAI), lequel, à partir d'octobre 1960, s'appellera PAIGC. En 1958 apparaît le Mouvement anticolonial (MAC) qui est le résultat des travaux d'un petit groupe d'études, réuni à Paris en novembre 1957, sur la situation et les perspectives de lutte dans les colonies portugaises. En 1959 est constitué le Front de libération de la Guinée et du Cap-Vert (FLGCV). En 1960, le PAIGC et le Mouvement populaire de libération de l'Angola (MPLA) créent le FRAIN (Front révolutionnaire africain pour l'indépendance des colonies portugaises). Cet organisme n'aura qu'un an d'existence et il sera remplacé en 1961 par la Conférence des organisations nationalistes des colonies portugaises (CONCP).

Pendant cette période, et plus précisément le 3 août 1959, a lieu la répression ouvrière de Pidjiguiti, au cours de laquelle 50 personnes trouvent la mort. Cet événement devient le symbole de la lutte de libération nationale.

Le 3 août 1961, le PAIGC proclame le passage de la lutte politique à l'insurrection nationale. Quelques actes de sabotage sont alors commis, ce qui provoque un grand nombre d'emprisonnements. La lutte armée en Guinée ne commencera qu'en janvier 1963 (réplique, vol. I, p. 213; PV/3, p. 64).

48. Pour sa part, le Portugal avait pour politique de nier l'existence de ses propres colonies. Il se considérait comme un Etat unitaire constitué de provinces situées sur plusieurs continents. Pendant les années 60, le Portugal continua de représenter ses provinces d'outre-mer auprès aussi bien de l'Organisation des Nations Unies que d'autres organisations internationales. En 1972 l'Assemblée générale des Nations Unies, dans sa résolution 2918 (XXVII), affirma "que les mouvements de libération nationale de l'Angola, de la Guinée (Bissau) et du Cap-Vert et du Mozambique sont les représentants authentiques des véritables aspirations des peuples de ces territoires", mais sans désigner lesdits mouvements par leur nom. La résolution 3113 (XXVIII) réitéra cette idée, et enfin la résolution 3294 (XXIX) réaffirma "que le Frente Nacional para a Libertação de Angola, le Movimento Popular de Libertação de Angola, le Partido Africano da Independencia da Guiné e Cabo Verde, le Frente de Libertação de Moçambique et le Movimento de Libertação de São Tomé e Príncipe... sont des représentants authentiques des peuples intéressés". Jusqu'en 1973 le Portugal exerça aux Nations Unies la représentation de la province d'outre-mer de Guinée. Le 17 décembre 1973, la résolution 3181 I (XXVIII) de l'Assemblée générale reconnut les pouvoirs des représentants du Portugal uniquement pour l'Etat situé à l'intérieur des frontières européennes, en leur déniaut toute représentativité pour le Mozambique, l'Angola et la Gui-

née-Bissau. Cette résolution n'était que la conséquence logique de la résolution 3061 (XXVIII) du 2 novembre 1973 par laquelle l'Assemblée générale se félicitait de l'accession à l'indépendance de la Guinée-Bissau.

49. Le Sénégal affirme que le principe d'autodétermination des peuples est apparu après 1960 et ne peut être appliqué rétroactivement. Quant au corollaire que la Guinée-Bissau tire de ce principe, selon lequel l'Etat colonisateur ne pouvait conclure certains traités concernant son territoire colonial à partir du moment où un processus de libération était déclenché, le Sénégal l'a accepté dans les plaidoiries (PV/9, p. 62), mais il nie que la situation en Guinée en 1960 puisse être considérée comme étant celle du déclenchement d'un processus de ce genre.

50. Dans un processus de libération nationale il y a toujours à l'origine un petit groupe d'hommes décidés qui s'organise et qui, petit à petit, développe une activité sur les plans intellectuel, politique et militaire jusqu'à obtenir l'indépendance de leur pays. La durée de ce processus et les méthodes à appliquer dépendent de divers facteurs, parmi lesquels on peut citer la politique de l'Etat colonisateur et l'aide que le mouvement de libération reçoit de l'étranger. Dans le processus de libération on parvient à un stade où les aspirations du mouvement sont précisées et où il est organisé institutionnellement. Après s'être structuré, le mouvement peut commencer à agir et il sort de la clandestinité. L'action n'est pas forcément menée sur le plan de la guérilla, il peut s'agir seulement d'une activité politique. Mais il faut souligner que l'élément décisif du succès ou de l'échec d'un mouvement de libération est toujours le concours de la volonté populaire.

51. Dans ce processus de formation d'un mouvement de libération nationale, la question juridique ne consiste pas à identifier l'instant précis où celui-ci est né en tant que tel. Ce qu'il importe de savoir, c'est à partir de quand son activité a eu une portée internationale.

Ainsi que l'a fait observer le Sénégal, il existe aujourd'hui en Europe occidentale et dans d'autres parties du monde divers mouvements indépendantistes. Il n'est pas possible d'affirmer que l'activité de tel ou tel d'entre eux a une portée internationale du simple fait qu'il s'est constitué en organisation ou qu'il s'est livré à certaines manifestations publiques.

De telles activités ont une portée sur le plan international à partir du moment où elles constituent dans la vie institutionnelle de l'Etat territorial un événement anormal qui le force à prendre des mesures exceptionnelles, c'est-à-dire lorsque, pour dominer ou essayer de dominer les événements, il se voit amené à recourir à des moyens qui ne sont pas ceux qu'on emploie d'ordinaire pour faire face à des troubles occasionnels.

Dans le cas de ce qui était alors la Guinée portugaise, le Tribunal n'a pas à examiner si le processus de libération nationale avait ou non commencé en avril 1960; ce qu'il faut rechercher c'est si les activités par lesquelles ce processus se manifestait en avril 1960 avaient ou non une portée internationale.

52. La Guinée-Bissau a dit à ce propos dans son mémoire (p. 62) en se référant à la période de la signature de l'Accord du 26 avril : "1959/1960, on ne peut pas dire encore que l'intégrité des compétences portugaises soit entamée sur le plan territorial". En outre, à plusieurs reprises a été confirmée dans le présent arbitrage l'affirmation de la sentence arbitrale du 14 février 1985 entre la Guinée et la Guinée-Bissau en ce sens que la guerre de libération n'a commencé qu'en 1963 en Guinée portugaise (réplique, vol. I, p. 213; PV/3, p. 64). Quant aux Nations Unies, ce n'est qu'en novembre 1973, c'est-à-dire après la proclamation de l'indépendance de la Guinée-Bissau, qu'elles adoptent une résolution selon laquelle le Portugal ne représente plus ce pays. Il n'a pas été apporté, en l'espèce, de preuves établissant qu'en 1960 la vie institutionnelle de ce qui était alors la Guinée portugaise connaissait des bouleversements tels que l'Etat dût recourir à des mesures extraordinaires pour assurer le déroulement normal des activités civiles et pour garantir la sécurité publique.

Pour toutes ces raisons, la norme qui restreint la capacité de l'Etat une fois qu'un processus de libération est déclenché n'est pas applicable à la situation qui existait en 1960 en Guinée portugaise.

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B) *Violation du droit interne*

53. La Guinée-Bissau soutient que l'Accord par échange de notes du 26 avril 1960 est nul car, lors de sa signature, aussi bien le Portugal que la France auraient commis une violation de normes du droit interne d'importance fondamentale.

Pour ce qui est du droit portugais, à la signature de l'Accord de 1960, c'est la Constitution du 11 avril 1933 qui était en vigueur. Son article 2 dispose que l'Etat ne peut aliéner aucune partie du territoire national sans le consentement de l'Assemblée nationale. D'autre part, l'article 91, paragraphe 9, précise que l'Assemblée nationale a compétence pour "*definir os limites dos territórios da Nação*". En ce qui concerne la conclusion des accords, la procédure serait indiquée dans les articles 81, paragraphe 7, 91, paragraphe 7, et 102, paragraphe 2. D'après ces articles, il appartenait à l'Assemblée nationale d'approuver les conventions et accords internationaux conclus par le Gouvernement, exception faite des cas d'urgence. La Constitution de 1933 ne prévoyait pas le système d'accords en forme simplifiée. Cette pratique aurait néanmoins été acceptée par le Portugal et elle aurait été utilisée pour les accords portant sur des sujets qui n'étaient pas de la compétence de l'Assemblée nationale (mémoire, p. 112). De l'analyse de ces dispositions la Guinée-Bissau conclut que, selon la Constitution portugaise de 1933, l'Accord de 1960 aurait dû être soumis à l'approbation de l'Assemblée nationale. Cette violation du droit constitutionnel aurait un caractère "manifeste" et, en vertu de la règle codifiée à l'article 46 de la Convention de Vienne sur le droit des traités, l'Accord franco-portugais serait nul.

Le Sénégal n'est pas de cet avis. Son argumentation se fonde sur une interprétation différente des textes constitutionnels ainsi que sur le fait que, en plus du texte écrit de la Constitution, il faudrait considérer "un ensemble de coutumes et de pratiques qui ont sensiblement altéré la signification première des textes constitutionnels" (contre-mémoire, p. 40). En particulier, le Sénégal affirme que la compétence accordée à l'Assemblée nationale par l'article 91 de la Constitution n'est pas exclusive et qu'elle pouvait être déléguée au Gouvernement (article 91, paragraphe 13).

Pour faire cette affirmation il se fonde sur le fait que le chapitre III, titre III de la partie II de la Constitution en vigueur en 1960, concernant les attributions de l'Assemblée nationale, fait une différence entre celles indiquées à l'article 91 et celles mentionnées à l'article 93. Pour ces dernières, la Constitution spécifie qu'il s'agit de "*materia da exclusiva competencia de Assembleia Nacional*", alors que l'article 91 ne contient rien à ce sujet. Cette circonstance, ajoutée à ce qui est dit au paragraphe 13 de l'article 91, permettrait de déduire que les matières mentionnées dans cet article pourraient être déléguées. De même, le Sénégal soutient que l'article 2 ne serait pas applicable à l'Accord de 1960 parce qu'il ne s'agit pas d'une aliénation de territoire mais d'une délimitation territoriale. Le Sénégal expose d'autre part la jurisprudence internationale et les précédents diplomatiques sur la nullité des traités pour cause de violation du droit interne. Sur cette question il parvient à la constatation que la conclusion de l'Accord de 1960 n'implique aucune violation manifeste du droit interne portugais. Il dit à ce propos :

L'Accord de 1960 a été conclu par échange de notes à l'intervention, du côté portugais, d'un homme qui cumulait les fonctions de Chef du Gouvernement, de Ministre des affaires étrangères et d'homme fort du régime politique du Portugal et qu'à ce seul titre un tel engagement bénéficie d'une présomption absolue de validité (contre-mémoire, p. 131).

Le Sénégal affirme aussi que

la "dérive constitutionnelle" que le Portugal a connue durant plus de 35 ans sous le régime autoritaire établi par le Président Salazar a eu pour effet de réduire à un rôle symbolique l'autorité de l'Assemblée nationale et, notamment, les fonctions qui lui avaient été confiées par la Constitution en matière d'approbation des traités internationaux (contre-mémoire, p. 131).

Dans sa réplique, la Guinée-Bissau réitère que, selon la Constitution de 1933, la compétence assignée à l'Assemblée nationale par l'article 91 n'était pas susceptible de délégation (p. 144). La Guinée-Bissau signale que parmi les accords en forme simplifiée souscrits par le Portugal il n'y en a aucun concernant la délimitation (p. 38). Quant à la réalité constitutionnelle vécue pendant le régime de M. António de Oliveira Salazar, la réplique dit que "la Constitution de 1933 n'est jamais devenue, spécialement en ce qui concerne les normes de compétence et de forme, une Constitution nominale" (p. 166). Et, plus loin, elle ajoute : "La Constitution portugaise de 1933 avait force normative et la répartition de compétences et les formes qu'elle établissait devaient être respectées" (p. 168).

La duplique du Sénégal confirme la position de cet Etat sur le régime en vigueur au Portugal en 1960 et sur la validité internationale de

l'Accord signé cette année-là. Quant à la pratique portugaise en matière de délimitation, la duplique fait état de deux accords par échange de lettres conclus avec le Royaume-Uni en 1936/1937 et en 1940.

Dans leurs plaidoiries, les deux Parties ont développé les arguments exposés dans la phase écrite de la procédure.

54. Avant d'analyser la question de la nullité éventuelle de l'Accord franco-portugais pour violation manifeste du droit interne, il faut commencer par déterminer quelle est la loi applicable.

Il existe un principe général selon lequel le droit à appliquer à une situation déterminée doit être celui qui était en vigueur au moment où elle s'est produite (affaire de l'île de Palmas, ONU, *Recueil des sentences arbitrales*, vol. II, p. 845). Par conséquent, le cas présent doit être examiné à la lumière du droit international en vigueur en 1960. Le Tribunal ne s'attardera donc pas à analyser la Convention de Vienne sur le droit des traités (1969), pas plus que la question, débattue dans ce litige, de savoir si l'une de ses clauses, en particulier l'article 46, constitue ou non la codification d'une norme du droit international général.

55. Le fait pour un Etat d'être ou non en conformité avec son droit interne lorsqu'il signe un traité international et l'importance de ce fait sous l'angle du droit des gens n'étaient régis par aucun traité général en 1960. Les normes applicables en la matière appartenaient au droit coutumier. Quant à la pratique judiciaire et arbitrale, il n'existait aucun précédent de traité déclaré nul parce que l'un des Etats contractants aurait violé son droit interne en le signant. Les précédents diplomatiques n'étaient pas uniformes mais, en général, on peut en déduire que seule une violation grave et évidente du droit interne aurait pu justifier une déclaration de nullité d'un traité.

Le Tribunal estime que sa décision à ce sujet doit être régie par le principe de la bonne foi. Celui-ci était, indubitablement, la règle observée par les Etats en 1960 en ce qui concerne la conclusion d'un accord international.

56. Pour examiner si un traité a été conclu conformément au droit interne d'un Etat, il faut tenir compte du droit en vigueur dans le pays, c'est-à-dire du droit tel qu'il est réellement interprété et appliqué par les organes de l'Etat, y compris par ses organes judiciaires et administratifs.

57. Dans cet ordre d'idées, il faut tout d'abord analyser la Constitution politique de la République portugaise de 1933, qui était en vigueur en 1960. D'après ce texte, le Président de la République représente la Nation, dirige la politique extérieure et a la faculté de "*ajustar convenções internacionais*" (article 81, paragraphe 7). L'exercice de cette faculté constitutionnelle du Président fut attribué en 1938 au Ministre des affaires étrangères par le décret-loi 29319. L'article 91, paragraphe 7, dispose que l'Assemblée nationale est compétente pour "*aprovar, nos termos do No. 7º do artigo 81º, as convenções e tratados internacionais*". D'autre part, le paragraphe 9 du même article confère à l'Assemblée nationale la compétence de "*definir os limites dos territórios da Nação*". De plus, l'article 81, paragraphe 7, déjà cité, spécifie

que les traités souscrits par le Président seront soumis par le Gouvernement à l'approbation de l'Assemblée nationale.

Il résulte de ces clauses que la façon ordinaire de conclure un accord international selon la Constitution portugaise était la suivante : signature autorisée par le Président de la République, présentation par le Gouvernement à l'Assemblée et approbation par celle-ci. La Constitution prévoyait aussi que le Gouvernement pouvait "*em casos de urgência, aprovar as convenções e tratados internacionais*" (article 109, paragraphe 2).

58. Dans la pratique, la compétence de l'Assemblée nationale s'est vue restreindre pour deux raisons principales. En premier lieu, au Portugal, ainsi que dans la plupart des pays, la pratique se développa de conclure des accords par échange de lettres. En second lieu, le Gouvernement finit par invoquer régulièrement des raisons d'urgence afin de se substituer à l'Assemblée dans l'approbation des traités internationaux. Le fait, de la part du Gouvernement, d'invoquer systématiquement des raisons d'urgence fit que, ainsi que le dit un commentateur, "*quase tivesse desaparecido a aprovação parlamentar*" (Marcello Caetano, *Manual de Ciência Política e Direito Constitucional*, 6^e éd., Lisbonne, 1972, tome II, p. 617).

D'après la Guinée-Bissau, les accords par échange de lettres portaient sur des sujets qui n'étaient pas de la compétence de l'Assemblée nationale. Pourtant, la pratique de cette époque fait apparaître les choses sous un jour différent. C'est ainsi que l'Assemblée nationale n'est pas intervenue pour approuver la Charte des Nations Unies, ni les accords de 1943 et de 1971 avec les Etats-Unis d'Amérique sur la base des îles Açores, ni les accords de limites des 11 mai 1936/28 décembre 1937 et 29 octobre 1940 avec le Royaume-Uni.

La Guinée-Bissau invoque la nullité de l'Accord de 1960 pour défaut d'approbation parlementaire. Dans le texte de cet instrument, le Ministre des affaires étrangères par intérim du Portugal laissait entendre à son cosignataire, l'Ambassadeur de France, que l'Accord entrait en vigueur au moment de la signature. Lorsque deux pays concluent un accord par échange de lettres, accord qui, pour des raisons constitutionnelles, exige l'approbation du Parlement de l'un d'eux, il est d'usage de faire mention de cette circonstance dans le texte ou au cours de la négociation. Cela ne s'est pas fait en l'occurrence.

59. Si l'on considère le texte de l'Accord du 26 avril 1960, l'intervention sporadique de l'Assemblée nationale dans l'approbation des conventions internationales, le fait que quelques textes aussi importants que la Charte des Nations Unies n'ont pas été approuvés par elle et que l'Accord a été signé par M. António Oliveira Salazar, chef incontesté du régime à caractère autoritaire qui existait alors au Portugal, on peut conclure que le Gouvernement français a eu des raisons de croire, en toute bonne foi, que le traité signé était valable.

60. La Guinée-Bissau fait valoir aussi, comme preuve de la nullité de l'Accord de 1960, que la France aurait violé son droit interne lors de sa conclusion. Le seul Etat qui pourrait invoquer cette cause de nullité

est le Sénégal. La Guinée-Bissau n'a pas qualité pour soumettre cette réclamation au Tribunal.

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II. — LES CAUSES D'INOPPOSABILITÉ INVOQUÉES PAR LA GUINÉE-BISSAU

61. En plus des causes de nullité mentionnées, la Guinée-Bissau soutient que l'Accord conclu entre la France et le Portugal le 26 avril 1960 ne lui est pas opposable, c'est-à-dire que, à supposer même que cet Accord fût valable, la succession d'Etats ne s'opérerait pas dans le cas d'espèce et ses règles ne s'appliqueraient donc pas dans les relations entre le Sénégal et la Guinée-Bissau.

La question de la succession d'Etats en matière de limites a revêtu une importance toute particulière en Amérique pendant le XIX^e siècle en raison de l'accession à l'indépendance des Etats nés de l'empire colonial espagnol. Dans certains cas, les nouveaux Etats décidèrent d'un commun accord que les limites internationales de leurs territoires respectifs seraient celles qui existaient déjà pour marquer les divisions administratives de l'époque coloniale. Dans d'autres cas, les Etats revendiquèrent comme faisant partie de leur territoire national ce qui correspondait auparavant à une vice-royauté, à une audience ou à une capitainerie générale. Dans toutes ces hypothèses, on avait recours à l'ancien droit colonial ("*derecho de Indias*") afin de déterminer les limites internationales entre les nouveaux Etats. Cette façon de fixer les limites internationales est connue sous le nom de *uti possidetis* ou *uti possidetis juris*.

En Afrique, par contre, l'*uti possidetis* a un sens plus large car il concerne aussi bien les limites entre des pays nés d'un même empire colonial que celles qui à l'époque coloniale avaient déjà un caractère international du fait qu'elles séparaient des colonies appartenant à des empires coloniaux différents.

62. Dans le cas présent, les Parties sont d'accord sur le fait que les traités de limites signés pendant la période coloniale continuent d'être valables entre les nouveaux Etats. Pour ce motif, la "table rase" déclarée par l'Assemblée populaire de la Guinée-Bissau le 24 septembre 1973 pour les traités conclus par le Portugal n'est pas applicable aux traités sur les frontières. Ainsi, le Sénégal et la Guinée-Bissau reconnaissent que leur frontière terrestre est déterminée par la Convention franco-portugaise du 12 mai 1886. De même, il est utile de rappeler que l'Organisation de l'unité africaine, dont les deux Parties sont membres, a adopté le 21 juillet 1964 au Caire une résolution par laquelle "tous les Etats Membres s'engagent à respecter les frontières existant au moment où ils ont accédé à l'indépendance" (doc. AGH/Rés. 16).

Bien que les deux Parties soient d'accord sur le fait que la succession est la règle dans le domaine des traités de frontières, elles diffèrent en ce qui concerne l'étendue du contenu de cette norme. Le Sénégal

soutient qu'il y a eu succession dans le cas présent, tandis que la Guinée-Bissau affirme que jouent des exceptions diverses qui ont pour conséquence que la succession n'opère pas pour l'Accord de 1960.

Le Tribunal analyse ci-dessous les exceptions à la règle de la succession en matière de traités de limites exposées par la Guinée-Bissau.

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A) *La délimitation des frontières maritimes*

63. La Guinée-Bissau soutient que la succession d'Etats ne s'applique pas aux frontières maritimes.

Une frontière internationale est la ligne formée par la succession des points extrêmes du domaine de validité spatial des normes de l'ordre juridique d'un Etat. La délimitation du domaine de validité spatial de l'Etat peut concerner la surface terrestre, les eaux fluviales ou lacustres, la mer, le sous-sol ou l'atmosphère. Dans tous les cas, le but des traités est le même : déterminer d'une manière stable et permanente le domaine de validité spatial des normes juridiques de l'Etat. D'un point de vue juridique, il n'existe aucune raison d'établir des régimes différents selon l'élément matériel où la limite est fixée. L'arrêt de la Cour internationale de Justice en l'affaire *Plateau continental de la mer Egée* constitue en ce sens un précédent [C.I.J. Recueil 1978, p. 35 et 36. Voir aussi affaire *Plateau continental (Tunisie/Jamahiriya arabe libyenne)*, C.I.J. Recueil 1982, p. 98 et 131; affaire *Délimitation de la frontière maritime dans la région du golfe du Maine*, C.I.J. Recueil 1984, p. 246 et suiv.].

64. L'un des arguments invoqués par la Guinée-Bissau est l'absence des cas où la question de la succession s'est posée pour les frontières maritimes. Le droit de la mer, sauf pour des questions de navigation et pour quelques autres concernant la pêche, ne s'est développé qu'à une période relativement récente et on ne peut prétendre trouver des précédents au siècle dernier, époque où les Etats de l'Amérique latine accédèrent à l'indépendance. Une analyse des litiges survenus dans cette partie du monde et concernant les frontières démontre qu'il n'a été question des frontières maritimes que dans deux cas : celui du canal de Beagle et celui de la baie de Fonseca. Dans le premier, il s'agissait de l'interprétation du Traité de limites argentine-chilienne de 1881, et, par conséquent, la règle de l'*uti possidetis* n'a pas été appliquée. Par contre, s'agissant de la baie de Fonseca, la Cour centraméricaine de Justice décida que les limites avec la haute mer que la Couronne de Castille avait établies dans cette baie étaient dévolues en 1821 à la République fédérale de l'Amérique centrale et, postérieurement, au Salvador, au Honduras et au Nicaragua (*Anales de la Corte de Justicia centroamericana*, t. VI, nos 16-18, p. 100 et 131).

Un autre précédent qu'on peut citer est la Convention anglo-danoise du 24 juin 1901 concernant les limites des pêcheries qui, par succession du Danemark, est restée applicable à l'Islande jusqu'en

1951; mention en fut faite par sir Humphrey Waldock dans son opinion individuelle en l'affaire *Compétence en matière de pêcheries (C.I.J. Recueil 1974, p. 106 et suiv.)*.

Il est possible enfin de faire état de plusieurs cas de succession en matière de limites maritimes concernant l'Asie, conséquence de la décolonisation qui a suivi la seconde guerre mondiale. Les cartes géographiques de la Malaisie, des Philippines et du Brunéi, par exemple, présentent comme limites maritimes des lignes dont l'origine remonte à l'époque coloniale. Si les cas de succession d'Etats aux frontières maritimes ne sont pas nombreux, la Guinée-Bissau, pour sa part, n'a invoqué aucun précédent dans lequel on aurait appliqué la "table rase" à une frontière maritime établie à l'époque coloniale.

65. Un autre argument avancé par la Guinée-Bissau pour différencier les frontières terrestres des frontières maritimes est que ces dernières ne fixent de limites que pour certaines matières, telles que la pêche ou l'exploitation des ressources naturelles. Au contraire, les frontières terrestres fixeraient des limites juridictionnelles qui seraient valables pour toute activité ou dans tous les domaines. En réalité cela n'est pas exact. Il existe de nombreux cas où la frontière terrestre entre deux pays n'est pas concrétisée par une ligne unique mais par plusieurs. Ainsi, on peut citer des exemples où la limite sur la surface terrestre ne coïncide pas avec la limite fixée pour le sous-sol, en général quand l'exploitation de mines se trouve en jeu. Dans des fleuves séparant deux Etats, il y a parfois une limite pour ce qui concerne la division des îles et une autre, différente, pour la division des eaux. La ville où siège ce Tribunal est précisément séparée de la France par deux lignes de délimitation différentes.

Le fait qu'une frontière délimite des juridictions dans tous les domaines ou seulement pour quelques-uns d'entre eux n'est pas une raison valable d'établir des régimes juridiques différents.

66. La thèse soutenue par la Guinée-Bissau au cours du présent arbitrage n'est pas compatible avec l'attitude qui avait été la sienne jusqu'à ce jour. En effet, dans la note 3032/CNE/SG/77 adressée le 4 novembre 1977 par le Comissariado de Estado dos Negocios Estrangeiros à l'Ambassade du Sénégal il était affirmé que la frontière maritime entre les deux Etats était fixée par la Convention franco-portugaise de 1886 (mémoire, annexe 6 bis). Le même critère était maintenu dans la note du 3 avril 1979 adressée par le représentant de la Guinée-Bissau au représentant spécial du Secrétaire général de l'Organisation des Nations Unies à la troisième Conférence sur le droit de la mer (réplique, annexe 3). Bien que, plus tard, et comme conséquence de la sentence arbitrale du 14 février 1985 dans l'affaire *Délimitation de la frontière maritime (Guinée/Guinée-Bissau)*, il ait été reconnu que la Convention de 1886 avait seulement défini les frontières terrestres, ces notes démontrent que la Guinée-Bissau acceptait la succession d'Etats en matière de frontières maritimes. Le compromis arbitral du 18 février 1983, souscrit par la Guinée-Bissau et la Guinée, invoque "la déclaration solennelle de la réunion des chefs d'Etat et de gouvernement de l'Organisation de l'unité africaine tenue au Caire du 17 au 21 juillet 1964, au cours de

laquelle les Etats Membres firent le serment de respecter les frontières existant au moment où ils ont accédé à l'indépendance". Etant donné que le compromis arbitral concernait seulement la délimitation d'une frontière maritime, cette mention signifie que les deux Parties ont reconnu que ce principe était applicable à cette catégorie de frontières. Et, dans les plaidoiries du même arbitrage, la Guinée-Bissau a aussi reconnu que la succession d'Etats opère en matière de traités sur les frontières maritimes (plaidoiries, compte rendu intégral n° 8, p. 76 et 77).

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B) *Durée de l'Accord*

67. La question de l'ancienneté de l'Accord est exposée de deux points de vue par la Guinée-Bissau. D'une part, elle soutient que sont nuls les traités internationaux conclus par un Etat colonisateur au sujet d'un territoire dépendant, dès lors que le processus de libération est entamé et que les traités en question portent sur des éléments essentiels du droit des peuples à disposer d'eux-mêmes. D'autre part, elle affirme que seuls sont opposables à l'Etat successeur les traités internationaux ayant une certaine durée, durée qu'elle ne précise pas. Ainsi, dans son mémoire, la Guinée-Bissau se réfère à l'*uti possidetis* et déclare que "... la logique et les fondements du principe entraînent qu'il ne s'applique qu'aux traités conclus de longue date" (p. 87). Et, plus loin, elle signale "la nécessité de distinguer les délimitations anciennes de celles plus récentes qu'il faudrait alors soustraire au champ d'application de la règle de l'*uti possidetis*" (p. 89).

68. Le Tribunal a déjà précisé que l'Accord de 1960 fut souscrit 13 ans avant l'indépendance de la Guinée-Bissau et à une époque où le processus de libération en Guinée portugaise n'avait pas d'effets sur le plan du droit des gens. Les accords portant sur les limites signées par l'Etat colonisateur avant que le processus de libération n'ait eu une portée internationale ne doivent remplir aucune condition spéciale d'antériorité pour être opposables à l'Etat successeur. La Guinée-Bissau n'a pu prouver, au cours de cet arbitrage, l'existence d'aucune norme de droit international exigeant cette condition.

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C) *Absence de publicité de l'Accord*

69. La question de la publicité de l'Accord de 1960 a été présentée de diverses façons au cours de la procédure arbitrale.

La Guinée-Bissau a exposé dans son mémoire que l'Accord du 26 avril ne fit l'objet d'aucune publication au Portugal. Elle a précisé à ce propos que l'obligation de le publier était prévue par les articles 81, paragraphe 9, et 150, paragraphe 2, de la Constitution portugaise de 1933. Ce dernier article se rapporte à la publication des actes devant

entrer en vigueur dans les provinces d'outre-mer et il a été renforcé par la suite par la loi organique d'outre-mer des 27 juin 1953 et 25 mai 1955. Cette absence totale de publicité aurait eu comme conséquence que l'Accord de 1960 aurait été ignoré des autorités de la Guinée-Bissau au moment de l'indépendance. A l'appui de cette thèse, ce pays décrit la situation où il se trouvait lors de la déclaration d'indépendance. Il venait de sortir d'une longue guerre de libération qui avait épuisé son peuple et l'avait enfoncé encore davantage dans la pauvreté. En outre, la population était en grande partie analphabète et son niveau culturel était bas (mémoire, p. 64).

70. S'appuyant sur ces faits, la Guinée-Bissau a soutenu que l'Accord de 1960 lui était inopposable parce qu'il lui était inconnu et elle a aussi affirmé que l'inobservation des dispositions constitutionnelles concernant la publicité implique une violation manifeste du droit interne, ce qui justifie la nullité de l'Accord (mémoire, p. 150 et 152).

Le Sénégal, de son côté, a apporté plusieurs preuves tendant à démontrer que l'Accord de 1960 avait fait l'objet de quelque publicité et, dans une certaine mesure, était connu dans les milieux internationaux.

71. Le défaut de publicité a donc été invoqué dans le mémoire de la Guinée-Bissau comme cause de nullité pour violation manifeste du droit interne et comme cause d'inopposabilité de l'Accord.

Cette attitude a été abandonnée dans les plaidoiries, où la Guinée-Bissau a déclaré qu'elle ne posait pas "l'invalidité internationale de l'Accord par absence de publication" mais que "la publicité et l'efficacité interne d'un traité dans une colonie conditionnent la succession à ce traité de l'Etat nouvellement indépendant" (PV/14, p. 164).

72. L'Accord du 26 avril 1960 n'a pas été conclu dans le secret et, au moment de l'indépendance de la Guinée-Bissau (1973), il avait déjà fait l'objet d'une certaine publicité. Son texte fut publié au *Journal officiel* de la République française des 30-31 mai 1960, au *Journal officiel* de la Communauté du 15 juin 1960 et au *Journal officiel* de la Fédération du Mali du 20 août 1960. De même, l'Accord figure dans le *Recueil des traités et accords* de la France (t. II, p. 12 à 14) publié en 1966 ainsi que dans la *Revue générale de droit international public* (vol. 64, 1960, p. 891 et 892). L'Accord fut aussi invoqué par les Parties en litige dans les affaires *Plateau continental de la mer du Nord* et il fut mentionné par le juge Fouad Ammoun dans son opinion individuelle jointe à l'arrêt de la Cour internationale de Justice dans ces affaires (*C.I.J. Recueil 1969*, p. 126). Il est aussi mentionné dans le volume 4 du *Digest of International Law* de Whiteman (1965), dans l'ouvrage de J. Lang intitulé "Le plateau continental de la mer du Nord" (Paris, 1970, p. 114) et dans le commentaire publié dans l'*Annuaire français de droit international* (1969, p. 236).

73. L'argumentation de la Guinée-Bissau procède de l'idée que, en raison de l'absence de publicité, l'Accord de 1960 n'était pas opposable à la population de la Guinée portugaise d'après la législation alors en vigueur. Partant de ce fait, la Guinée-Bissau affirme que, si le traité n'était pas opposable à la population de la colonie portugaise, il ne l'est pas davantage à l'Etat successeur dans ce territoire (PV/3, p. 21).

74. Il faut souligner d'abord que l'obligation du Portugal de publier l'Accord dans sa province africaine de Guinée relevait exclusivement du droit interne portugais. De même, l'obligation que le Portugal aurait pu avoir de publier officiellement cet Accord à Lisbonne était aussi une obligation du droit interne portugais. Le manquement à cette obligation ne peut donc pas être considéré comme un manquement par le Portugal à une obligation qui lui serait imposée par le droit international. Le seul aspect de la publication des traités qui fasse l'objet d'une réglementation internationale est celui qui a trait à l'enregistrement des traités, notamment au Secrétariat de l'Organisation des Nations Unies, question qui sera examinée par le Tribunal plus loin.

75. Cela dit, il convient maintenant de reprendre l'argumentation de la Guinée-Bissau, exposée au paragraphe 73. Selon ce raisonnement, à cause de l'indépendance la succession aurait eu lieu entre la Guinée portugaise et la Guinée-Bissau. Du point de vue du droit international, ce point de départ est erroné, car la succession de souveraineté s'est produite entre le Portugal et la Guinée-Bissau. Une succession d'Etats a toujours lieu entre Etats, le Portugal et la Guinée-Bissau dans le cas d'espèce, pas entre une partie d'un Etat, comme l'était la Guinée portugaise en 1960, et un Etat nouveau créé sur le même territoire. La violation éventuelle du droit interne consistant en ce que le Portugal n'a pas dûment publié l'Accord de 1960 dans son ancienne colonie africaine ne peut être invoquée par son successeur sur le plan international comme cause d'inopposabilité de cet Accord. Et on peut encore moins faire valoir cette inopposabilité par rapport à un Etat tiers qui a donné à l'Accord la publicité requise. Il faut ajouter aussi que, comme il a été indiqué au paragraphe 72, l'Accord de 1960 n'était pas un traité secret. Les concepts d'accord non publié et d'accord secret ne sont nullement synonymes.

76. La Guinée-Bissau dit aussi qu'elle n'a pas reçu de notification de la part du Portugal relativement à l'Accord de 1960, qu'elle lui a même demandé des éclaircissements à ce sujet, mais qu'elle n'a jamais reçu de réponse (PV/1, p. 92). La question des notifications échangées entre le Portugal et la Guinée-Bissau sur l'Accord de 1960 et l'éventuelle responsabilité qui pourrait en découler intéressent les rapports entre ces deux pays et ne relèvent pas de la compétence de ce Tribunal.

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III. — NON-ENREGISTREMENT DE L'ACCORD DE 1960 AU SECRÉTARIAT DE L'ORGANISATION DES NATIONS UNIES

77. En plus des causes de nullité et d'inopposabilité examinées, la Guinée-Bissau soutient aussi (mémoire, p. 152 à 156 et 159) que, comme l'Accord de 1960 n'a pas été enregistré au Secrétariat de l'Organisation des Nations Unies (Article 102 de la Charte), il ne peut être invoqué dans le présent arbitrage.

78. Sur ce point, il y a lieu de souligner que le Tribunal n'est pas un organe des Nations Unies et que, par conséquent, la disposition de l'Article 102, paragraphe 2, de la Charte n'est pas applicable.

En outre, il convient de relever qu'il ne semble pas logique d'affirmer que l'Accord de 1960 ne peut être invoqué devant ce Tribunal, de la part d'un pays qui a conclu un compromis arbitral attribuant à ce même Tribunal compétence pour décider précisément si cet Accord fait droit entre les Parties. L'absence d'enregistrement de l'Accord du 26 avril 1960 n'est pas une raison valable pour empêcher les Parties de s'en prévaloir dans le présent arbitrage.

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IV. — EXISTENCE D'UN DROIT DE VÉRIFICATION OU DE RÉVISION

79. La Guinée-Bissau soutient aussi que, si l'Accord de 1960 lui était opposable, elle

serait fondée à exiger la vérification du caractère équitable de la ligne découlant de cet accord, y compris dans le cadre d'une éventuelle application de cet accord (réplique, p. 274).

Selon elle, ce droit de vérification ou de révision de l'Accord existe lorsqu'un traité conclu sous le régime des Conventions de Genève de 1958 régit, par le jeu de la succession, les relations d'un Etat qui n'a jamais été partie à ces conventions, mais qui est en revanche partie à la Convention de Montego Bay.

Cet argument est présenté par la Guinée-Bissau à titre subsidiaire (réplique, p. 273 et 274), dans l'hypothèse où l'Accord de 1960 lui serait opposable. La thèse principale de ce pays est que l'Accord de 1960 lui est inopposable, car il s'agit d'une frontière maritime pour laquelle la succession serait inopérante (voir *supra*, paragraphes 63 à 66).

Le droit de vérification ou de révision invoqué par la Guinée-Bissau peut avoir son origine, soit dans le droit conventionnel, soit dans le droit non écrit. En ce qui concerne le droit conventionnel, la Guinée-Bissau se fonde sur la Convention de Montego Bay, particulièrement sur les articles 74 et 83. Le Tribunal se borne à constater que la Convention de 1982 ne s'applique pas en l'espèce attendu qu'elle n'est pas encore entrée en vigueur. Cela ne veut pas dire qu'il interprète les articles 74 et 83 de cette Convention de manière à reconnaître l'existence d'un droit de révision ou de vérification. Pour ce qui a trait au droit non écrit, il n'existe actuellement en droit international positif aucune norme coutumière ni aucun principe général de droit autorisant les Etats qui ont conclu un traité valable concernant une délimitation maritime, ou leurs successeurs, à vérifier ou à réviser son caractère équitable.

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V. — LE DOMAINE DE VALIDITÉ MATÉRIEL DE L'ACCORD DE 1960

80. De l'analyse faite par le Tribunal dans les sections I, II, III et IV de la présente sentence se dégage la conclusion que l'Accord de 1960 est valable et opposable au Sénégal et à la Guinée-Bissau.

Quant à la frontière maritime, cet Accord prescrit :

Jusqu'à la limite extérieure des mers territoriales, la frontière serait définie par une ligne droite, orientée à 240°, partant du point d'intersection du prolongement de la frontière terrestre et de la laisse de basse mer, représenté à cet effet par le phare du cap Roxo.

En ce qui concerne les zones contiguës et le plateau continental, la délimitation serait constituée par le prolongement rectiligne, dans la même direction, de la frontière des mers territoriales.

Ce texte détermine clairement la frontière maritime pour ce qui a trait à la mer territoriale, à la zone contiguë et au plateau continental. Ces trois domaines constituaient le droit de la mer en 1960, date de la signature de l'Accord. Toutefois le Sénégal a développé devant le Tribunal la thèse selon laquelle l'Accord de 1960 devrait être interprété comme s'appliquant aussi à la délimitation des zones économiques exclusives et, en ce sens, il a avancé plusieurs arguments que le Tribunal analysera séparément.

81. Le premier argument est énoncé dans le contre-mémoire (p. 316, note 534) et fait référence au compromis arbitral. Le Sénégal constate que les Parties, chacune pour des motifs différents, interprètent l'article 2 du compromis arbitral dans le sens qu'on devrait arriver à fixer une frontière en mer unique. Cela signifierait, d'après le Sénégal, que si le Tribunal parvenait à la conclusion que l'Accord de 1960 fait droit, la frontière tracée par cet Accord devrait valoir pour toute l'étendue du plateau continental et également pour les zones économiques exclusives.

Le compromis arbitral du 12 mars 1985 est le traité qui a créé le Tribunal et qui en définit la compétence, les pouvoirs délégués par les Parties et les règles principales régissant sa constitution, mais il ne contient aucune règle particulière sur le droit matériel à appliquer aux questions auxquelles le Tribunal doit répondre. L'article 2 du compromis dit simplement que le Tribunal doit statuer "conformément aux normes du droit international". Il n'y a pas dans le compromis de dispositions énonçant des règles matérielles spéciales applicables à l'affaire. Par rapport au droit de fond, le compromis de 1985 ne contient donc aucune norme spécifique et se borne à demander au Tribunal de décider selon le droit des gens.

82. Un deuxième argument a été présenté par le Sénégal au cours des plaidoiries (PV/10, p. 213). Selon cet argument, interpréter l'Accord de 1960 dans le sens qu'il ne s'appliquerait qu'à certains territoires et non pas à l'ensemble des espaces maritimes reviendrait à soutenir implicitement que cet Accord est partiellement valable et partiellement nul, ce qui serait contraire à certaines règles sur la divisibilité des dispositions des traités.

Il ne s'agit pas ici d'une question de nullité. Le Tribunal a déjà dit clairement dans la présente sentence que l'Accord de 1960 est valable, entièrement valable. La question que le Tribunal doit maintenant résoudre concerne exclusivement l'interprétation de cet Accord et non pas sa validité ou sa nullité. Or l'interprétation du sens et de la portée d'un texte conventionnel est une opération juridique qui ne doit pas être

confondue avec celle tendant à déclarer la nullité d'un traité ou d'une de ses clauses.

83. Le Sénégal considère aussi que la pratique subséquente à l'Accord de 1960 et l'acquiescement de chaque Etat à la législation de l'autre sur l'étendue vers le large des différents espaces maritimes auraient donné naissance à un accord tacite ou à une coutume bilatérale qui aurait fixé comme limite pour les eaux de la zone économique exclusive ou la zone de pêche la ligne même de l'Accord de 1960 (duplique, p. 183 et suiv.; PV/11, p. 34, 41 et 42).

Le Tribunal ne recherche pas ici s'il existe une délimitation des zones économiques exclusives fondée sur une norme juridique autre que l'Accord de 1960, telle qu'un accord tacite, une coutume bilatérale ou une norme générale. Il cherche seulement à voir si l'Accord, en lui-même, peut être interprété de manière à englober la délimitation de l'ensemble des espaces maritimes actuellement existants.

84. Le Sénégal soutient enfin que l'Accord de 1960 doit être interprété en tenant compte de l'évolution du droit de la mer. Il faudrait prolonger et exhausser la frontière maritime établie par l'Accord selon les exigences fonctionnelles, tout à fait essentielles pour maintenir des rapports de bon voisinage et de sécurité. Un accord de délimitation ne devrait pas comporter de lacunes, et celles-ci doivent être comblées selon le bon sens et la nature des choses (PV/11, p. 42).

85. Le Tribunal estime que l'Accord de 1960 doit être interprété à la lumière du droit en vigueur à la date de sa conclusion. C'est un principe général bien établi qu'un fait juridique doit être apprécié à la lumière du droit en vigueur au moment où il se produit, et l'application de cet aspect du droit intertemporel à des cas comme celui de la présente espèce est confirmée par la jurisprudence en matière de droit de la mer (*International Law Reports*, 1951, p. 161 et suiv.; *The International and Comparative Law Quarterly*, 1952, p. 247 et suiv.).

A la lumière de son texte et des principes de droit intertemporel applicables, le Tribunal estime que l'Accord de 1960 ne délimite pas les espaces maritimes qui n'existaient pas à cette date, qu'on les appelle zone économique exclusive, zone de pêche ou autrement. Ce n'est, par exemple, que très récemment que la Cour internationale de Justice a confirmé que les règles relatives à la "zone économique exclusive" peuvent être considérées comme faisant partie du droit international général en la matière (*C.I.J. Recueil 1982*, p. 74, *Recueil 1984*, p. 294, *Recueil 1985*, p. 33). Interpréter un accord conclu en 1960 de manière à comprendre aussi la délimitation d'espaces comme "la zone économique exclusive" impliquerait une véritable modification de son texte et, selon un *dictum* bien connu de la Cour internationale de Justice, un tribunal est appelé à interpréter les traités et non pas à les réviser (*C.I.J. Recueil 1950*, p. 229, *Recueil 1952*, p. 196, *Recueil 1966*, p. 49). Il ne s'agit pas ici de l'évolution du contenu, ni même de l'étendue, d'un espace maritime qui aurait existé en droit international lorsque l'Accord de 1960 a été conclu, mais bel et bien de l'inexistence en droit international d'un espace maritime comme la "zone économique exclusive" à la date de la conclusion de l'Accord de 1960.

Par contre, en ce qui concerne la mer territoriale, la zone contiguë et le plateau continental, la question se présente tout autrement. Ces trois notions sont expressément mentionnées dans l'Accord de 1960 et elles existaient à l'époque de sa conclusion. En fait, l'Accord lui-même spécifie que son objet est de définir la frontière en mer "en tenant compte des Conventions de Genève du 29 avril 1958", élaborées par la première Conférence des Nations Unies sur le droit de la mer, et ces Conventions de codification définissent les notions de "mer territoriale", de "zone contiguë" et de "plateau continental". En ce qui concerne le plateau continental, la question de savoir jusqu'à quel point la ligne frontière se prolonge peut se poser aujourd'hui, étant donné l'évolution accomplie par la définition du concept de "plateau continental". En 1960 deux critères servaient à déterminer l'étendue du plateau continental : celui de la ligne bathymétrique de 200 mètres et celui de l'exploitabilité. Ce dernier impliquait une conception dynamique du plateau continental, puisque sa limite extérieure était fonction du développement de la technologie et, par conséquent, susceptible de se déplacer de plus en plus vers le large. En vertu du fait que le "plateau continental" existait dans le droit international en vigueur en 1960 et que la définition du concept d'un tel espace maritime comportait alors le critère dynamique indiqué, on peut conclure que l'Accord franco-portugais délimite le plateau continental entre les Parties dans toute l'étendue de la définition actuelle de cet espace maritime.

Pour ce qui est de cette question, il ne reste donc qu'à préciser le sens et la portée de l'expression "une ligne droite orientée à 240°" dans l'Accord de 1960.

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86. Au sujet de l'expression qui vient d'être mentionnée, la Guinée-Bissau a fait observer (réplique, p. 252) qu'il n'y a pas de "ligne droite" sur le globe terrestre et qu'il en résulte une imprécision technique qui rendrait l'Accord inapplicable, car il n'est pas précisé si la ligne en question est une ligne loxodromique ou géodésique. A une distance de 200 milles de la côte, l'écart entre les deux types de ligne serait de plusieurs kilomètres.

L'Accord de 1960 comporte-t-il vraiment une imprécision technique sur ce point qui le rendrait inapplicable ? Pour répondre à cette question, il faut déterminer le sens exact de l'expression "une ligne droite orientée à 240°" dans l'Accord de 1960. Il est certain que les mots "ligne droite" peuvent se rapporter à une ligne tracée aussi bien sur une carte en projection de Mercator que sur une carte utilisant un autre système. Il n'est pas douteux non plus qu'une ligne droite tracée sur une carte en projection de Mercator acquiert une certaine courbure lorsqu'elle est reportée sur une autre carte marine, de même qu'une ligne droite tracée sur une carte marine employant une projection autre que la projection de Mercator devient courbe après sa transposition sur une carte établie selon ce dernier système.

Mais le texte de l'Accord de 1960 ne parle pas seulement d'une "ligne droite", il fait également état d'une "ligne... orientée à 240°". Cela permet d'écarter toute ligne géodésique, car une telle ligne ne remplirait pas la condition d'observer l'orientation de 240°, attendu qu'elle offre la particularité de ne pas couper les méridiens et les parallèles sous un angle constant. La seule ligne qui remplirait une telle condition serait une loxodromie. En outre, sur le croquis attaché aux travaux préparatoires de l'Accord de 1960, la ligne de 240° apparaît comme une ligne loxodromique. Il y a donc lieu de conclure que la "ligne droite orientée à 240°" que vise l'Accord de 1960 est une ligne loxodromique.

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87. En tenant compte des conclusions ci-dessus auxquelles le Tribunal est parvenu et du libellé de l'article 2 du compromis arbitral, la deuxième question, de l'avis du Tribunal, n'appelle pas une réponse de sa part.

Au surplus, le Tribunal n'a pas jugé utile, étant donné sa décision, de joindre une carte comprenant le tracé de la ligne frontière.

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88. Vu les motifs qui ont été exposés, le Tribunal *décide* par deux voix contre une :

De répondre à la première question formulée dans l'article 2 du compromis arbitral de la façon suivante : l'Accord conclu par un échange de lettres, le 26 avril 1960, et relatif à la frontière en mer, fait droit dans les relations entre la République de Guinée-Bissau et la République du Sénégal en ce qui concerne les seules zones mentionnées dans cet Accord, à savoir la mer territoriale, la zone contiguë et le plateau continental. La "ligne droite orientée à 240°" est une ligne loxodromique.

Pour : M. Julio A. Barberis, président,
M. André Gros (arbitre).

Contre : M. Mohammed Bedjaoui (arbitre).

FAIT à Genève, le trente et un juillet mil neuf cent quatre-vingt-neuf, en deux exemplaires, en français et en portugais, le texte français faisant foi. Ces exemplaires seront déposés aux archives du Secrétariat de l'Organisation des Nations Unies et de la Cour internationale de Justice.

Le Président,
(Signé) Julio A. BARBERIS

Le Greffier,
(Signé) Santiago TORRES BERNARDEZ

M. Julio A. Barberis, président, joint une déclaration à la sentence.
 M. Mohammed Bedjaoui, arbitre, joint à la sentence l'exposé de son opinion dissidente.

(Paraphé) J. A. B.

(Paraphé) S. T. B.

Déclaration de M. Julio A. Barberis

J'estime que la réponse donnée par le Tribunal à la première question posée par le compromis arbitral aurait pu être plus précise. En effet, j'aurais répondu à cette question de la façon suivante :

L'Accord conclu par un échange de lettres, le 26 avril 1960, et relatif à la frontière en mer, fait droit dans les relations entre la République de Guinée-Bissau et la République du Sénégal en ce qui concerne la mer territoriale, la zone contiguë et le plateau continental, mais il ne fait pas droit quant aux eaux de la zone économique exclusive ou à la zone de pêche. La "ligne droite orientée à 240°" visée dans l'Accord du 26 avril 1960 est une ligne loxodromique.

Cette réponse partiellement affirmative et partiellement négative est, à mon avis, la description exacte de la situation juridique existant entre les Parties. Comme la Guinée-Bissau l'a suggéré au cours de cet arbitrage (réplique, p. 248), cette réponse aurait habilité le Tribunal à traiter dans la sentence la deuxième question posée par le compromis arbitral. La réponse *partiellement* négative à la première question aurait attribué au Tribunal une compétence *partielle* pour répondre à la deuxième, c'est-à-dire pour le faire dans la mesure où la réponse à la première question eût été négative.

Dans ce cas, le Tribunal aurait été compétent pour délimiter les eaux de la zone économique exclusive* ou la zone de pêche entre les deux pays. De cette façon, le Tribunal aurait pu trancher le différend d'une manière complète car, en vertu de la réponse à la première question du compromis arbitral, il aurait déterminé la limite pour la mer territoriale, la zone contiguë et le plateau continental, comme la sentence vient de le faire, et moyennant la réponse à la deuxième question, le Tribunal aurait pu déterminer la limite pour les eaux de la zone économique exclusive ou la zone de pêche, limite qui aurait pu ou non coïncider avec la ligne établie par l'Accord de 1960.

(Signé) Julio A. BARBERIS

Opinion dissidente de M. Mohammed Bedjaoui

1. Je regrette de ne pouvoir rejoindre le point de vue de mes deux collègues du Tribunal. Ils ont pu affronter de grands problèmes tels que les normes de *jus cogens* concernant le droit des peuples à disposer d'eux-mêmes et la souveraineté permanente sur les ressources et riches-

* Je me réfère aux "eaux" de la zone économique exclusive et je crois nécessaire d'apporter cette précision car il arrive parfois que cette notion englobe aussi le plateau continental comme, par exemple, à l'article 56 de la Convention de Montego Bay de 1982.

ses naturelles. Au sujet de ce dernier principe, la sentence décide en son paragraphe 39 : "L'application du principe de la souveraineté permanente sur les ressources naturelles présuppose que les ressources dont il s'agit se trouvent dans le territoire de l'Etat qui invoque ce principe. . . Avant l'accord (de 1960), les limites maritimes n'étaient pas fixées, et, par conséquent, aucun des deux Etats ne pouvait affirmer qu'une fraction déterminée de la zone maritime était "sienne".

Je crains que la sentence ne fasse ici une confusion entre le "droit" de tout Etat à un domaine maritime et l'"exercice" effectif de ce droit par une opération concrète de délimitation de la frontière maritime. La Cour internationale de Justice avait considéré le droit de chaque Etat sur "son" plateau continental (c'est-à-dire sur les zones de ce plateau qui *doivent* lui revenir) comme un droit "inhérent", et plus tard la Convention de Montego Bay a consacré elle aussi ce droit dans le même esprit. Le raisonnement du paragraphe 39 de la sentence perd donc de vue le droit "inhérent" de chaque peuple sur "son" domaine maritime même si celui-ci n'est pas encore concrètement délimité. L'une des grandes nouveautés du droit de la mer actuel est qu'il consacre un droit à un territoire maritime qui existe indépendamment et antérieurement à toute délimitation.

Ce paragraphe de la sentence ajoute que, "d'un point de vue logique, la Guinée-Bissau ne peut affirmer que la norme qui a déterminé quel était *son* territoire maritime (l'Accord de 1960) lui a enlevé une partie du territoire maritime qui était "le sien". Cela me paraît comporter une erreur de raisonnement essentielle. En réalité la Guinée-Bissau conteste que l'Accord de 1960 puisse représenter "la norme qui a déterminé quel était *son* territoire maritime" et c'est la raison pour laquelle elle a précisément soutenu que cet accord est nul. La norme est pour la Guinée-Bissau non pas l'Accord de 1960 mais le droit "inhérent" de tout Etat côtier.

2. Mais était-il nécessaire pour le Tribunal de s'engager dans ces voies qui l'entraînaient vers des solutions contestées ? Pour exprimer mon opinion dans le présent différend, il me suffira, quant à moi, d'examiner la question de l'opposabilité de l'échange de notes franco-portugais du 26 avril 1960 avant celle de sa validité. Le premier point à déterminer me paraît en effet de savoir si la Guinée-Bissau est liée ou non par cet accord. Ce n'est qu'après avoir vérifié qu'un accord est opposable à un Etat que l'examen de la validité de cet accord revêt un sens, faute de quoi cet examen demeure d'un intérêt théorique.

3. La présente opinion dissidente comporte deux volets. Je suis parvenu à la conclusion que l'Accord du 26 avril 1960 est inopposable à la Guinée-Bissau de sorte que je n'ai nullement à me prononcer sur la validité de cet accord. J'ai ainsi le devoir tout d'abord d'expliquer, dans un premier volet, comment je suis arrivé à cette conclusion. Celle-ci m'imposera alors, et ce sera le second volet, de procéder à une délimitation *ex novo* des espaces maritimes relevant de chacune des deux Parties.

4. Dans la première partie, le problème qui se pose à titre de point de départ est celui de la qualité juridique de la République de Guinée-Bissau par rapport à l'échange de lettres franco-portugais du 26 avril 1960. Le Portugal et la France, Etats ayant eu chacun en ce qui le concerne la responsabilité des relations internationales l'un de la Guinée-Bissau et l'autre du Sénégal, ont négocié les 8, 9 et 10 septembre 1959 deux "recommandations" dont la première a fait l'objet le 26 avril 1960 d'un échange de lettres constituant un accord en forme simplifiée. Au moment de la négociation comme à celui de la signature de cet accord, le Portugal était encore la puissance administrante de la Guinée-Bissau. La libération de la Guinée-Bissau a entraîné une succession d'Etats par décolonisation, et on peut dire que le Portugal avait la qualité d'Etat prédécesseur et la Guinée-Bissau celle d'Etat successeur. Je ne me prononce pas sur la date exacte, ni même approximative, à laquelle ils ont pris l'un et l'autre ces qualités respectives, date sur laquelle les deux parties au différend ont amplement disputé. Je me borne à considérer le fait.

5. La relation France-Sénégal est un peu plus complexe. Certes l'indépendance du Sénégal a donné naissance là aussi à une situation de succession d'Etats par décolonisation et le Sénégal est juridiquement un Etat successeur de la France, Etat juridiquement prédécesseur. Mais quelle était la qualité du Sénégal à la date précise de la conclusion de l'Accord de 1960 ? A la date du 26 avril 1960, sinon même à celle du 8 septembre 1959, date du début des négociations, le Sénégal n'était plus juridiquement un "territoire d'outre-mer" de la France, c'est-à-dire un territoire encore dépendant de celle-ci. A la différence de la Guinée-Bissau, qui n'est à aucun moment apparue comme un Etat dans toute la phase de négociation et de conclusion de l'accord, le Sénégal, lui, a figuré déjà comme un Etat. C'est ainsi que le territoire maritime à délimiter concernait, selon les termes mêmes de l'accord, d'une part la "République" du Sénégal et d'autre part la "Province portugaise" de Guinée. D'un côté, nous sommes en présence d'une délégation du "Portugal", Etat affichant et professant une volonté unitaire, et, de l'autre, d'une délégation dite de la "Communauté" française. Le Portugal déclarait agir pour son compte au sujet de "sa" "province" guinéenne, tandis que la France se présentait "au nom de la République française et de la Communauté", selon l'accord.

6. Mais il faut être plus précis encore à ce sujet, car il ne semble pas que, à cette date finale du processus d'indépendance du Sénégal, la France ait pu entreprendre quoi que ce fût dans cette région "en son nom propre". Par ailleurs, si les formes juridiques, en rapport avec la naissance de la Communauté française de 1958, imposaient effectivement que la France parlât au nom de la "Communauté", d'autres textes et d'abord l'accord lui-même ont précisé qu'elle agissait plus précisément "au nom de la République du Sénégal". La note interne du 26 avril 1960, n° 941.1, de M. Franco Nogueira indique en son paragraphe 2 que le Gouvernement français a conclu l'accord "en son nom propre et au nom de la République du Sénégal". Un spécialiste du droit d'outre-mer français, le professeur François Luchaire, considère que,

au regard de la Constitution française de 1958, les pays africains sous administration française devaient être réputés avoir obtenu leur indépendance juridiquement au jour où, en septembre 1958, leurs populations ont été appelées à se prononcer sur leur statut futur. Leur vote pour savoir s'ils entendaient ou non rester dans la Communauté française constituait un véritable vote d'autodétermination; l'option de l'indépendance immédiate complète était en effet offerte, tout comme celle de membre de la Communauté française; elle y était aussi ouverte que la seconde. La Guinée de Conakry en avait du reste profité¹.

7. De fait, la République du Sénégal, c'est-à-dire l'Etat que cette République suppose nécessairement, a été créée à la suite de ce vote d'autodétermination. De fait aussi, et *a fortiori* en 1960, le Sénégal était autonome lors de la conclusion de l'accord. Il ne fait donc pas de doute qu'il n'est pas possible de considérer le Sénégal comme ayant accédé à l'accord par voie de succession. Du reste, il était clair dans les termes que le Sénégal avait "participé" à la négociation et à la conclusion de cet accord. Sa participation intervint même à un double titre, dans la mesure d'une part où la délégation qui a négocié et conclu cet accord était celle de la "Communauté" dont le Sénégal faisait partie, et d'autre part où l'un des membres de la délégation, M. Latrihle, était de nationalité sénégalaise, au dire de la Partie sénégalaise au présent différend. Ainsi il paraît évident que le Sénégal a participé et non pas succédé à l'accord. Par ailleurs, la Partie sénégalaise au différend a produit devant le Tribunal une correspondance diplomatique du Ministre des affaires étrangères de France au Premier Ministre du Sénégal annonçant à ce dernier l'ouverture de la négociation à Lisbonne et le priant de désigner un représentant à cette négociation. Le Sénégal se trouve ainsi dans une situation hybride. S'il est certain qu'il n'est pas partie à l'Accord de 1960 par voie de succession, c'est qu'il était une partie contractante originale, tant par la voie de la représentation d'Etat que par celle de la participation directe au titre à la fois de membre de la Communauté et de membre participant effectif. Il devait être considéré d'une part comme ayant donné un mandat de représentation à la France et d'autre part comme participant direct et effectif par l'intermédiaire de l'un de ses ressortissants.

8. Si l'analyse ci-dessus est correcte, il en ressort qu'au regard de cet accord la situation juridique de chacune des deux Parties à la

¹ C.I.J., Différend frontalier Burkina Faso/Mali, arrêt du 22 décembre 1986, *Recueil 1986*, p. 653, opinion individuelle du juge *ad hoc* François Luchaire :

"... Le processus colonial doit être considéré comme totalement achevé lorsque les populations d'une colonie ont été à même d'exercer (leur) droit de libre détermination. Pour ce qui concerne les territoires d'outre-mer français* le phénomène colonial a donc disparu le 28 septembre 1958 lorsque par un acte de libre détermination — par un référendum dont personne n'a contesté la sincérité — ces territoires ont choisi leur statut. C'est ainsi que le Sénégal avait alors choisi le statut "d'Etat membre de la Communauté" en 1958 et "à compter de cette date les territoires d'outre-mer français ne peuvent donc plus être considérés comme des colonies."

* Le Sénégal était un territoire d'outre-mer français.

présente instance était radicalement différente : le Sénégal était un Etat partie à l'accord, tandis que la Guinée-Bissau était un Etat tiers au même accord. Avant d'en venir à cette qualité de la Guinée-Bissau, il importe de relever au passage que le reproche fait par la Guinée-Bissau au Sénégal de n'avoir pas fait une déclaration de succession à l'accord ne paraît nullement fondé. Le Sénégal n'était pas successeur à l'accord, mais bien un Etat partie qui n'avait aucunement à faire une telle déclaration.

9. Ainsi donc, sur le point particulier des "acteurs" de la succession d'Etats, on doit tenir pour établi d'une part que le Sénégal n'était pas un Etat successeur mais bien un Etat partie à l'accord, pour y avoir tant participé que s'y être fait représenter, et que la France n'était pas un Etat prédécesseur, mais plutôt un Etat partie elle-même, ou du moins un Etat mandaté ayant pouvoir de représentation. Si la France estime avoir agi au nom du Sénégal, c'est alors une affaire de représentation et de mandat et non une question de succession d'Etats. Dans la relation Portugal/Guinée-Bissau par contre, le Portugal était en 1958 et 1960 un Etat unitaire responsable de "sa province de Guinée" et était donc l'Etat partie à cet accord, tandis qu'à son indépendance la Guinée-Bissau pouvait être considérée comme un Etat tiers à l'accord, à la suite de la déclaration générale de non-succession faite par l'Assemblée populaire de Guinée-Bissau le 24 septembre 1973. Autrement dit le droit de la succession d'Etats ne peut être introduit comme droit applicable à l'espèce, ni du fait de la France, ni de celui du Portugal, d'ailleurs étrangers tous deux au procès, non plus que du fait du Sénégal, mais seulement grâce à la Guinée-Bissau, qui du reste en a vite épuisé la ressource en se déclarant Etat tiers au regard de l'accord.

10. Si de la question des "acteurs" de la succession d'Etats, on passe à présent à celle de la "matière successorale", on observe que l'échange de lettres franco-portugais de 1960 est un instrument conventionnel, disons "bilatéral" pour simplifier la relation complexe, hybride et ambiguë qu'il établissait entre le Portugal d'une part et la France, la Communauté et le Sénégal d'autre part; à ce titre disons que :

1) C'est un *traité* (sans qualifier davantage le nombre des Etats participants);

2) C'est un traité de *frontière*; et

3) C'est un traité de *frontière maritime*.

11. Sur le premier point relatif au contenu formel de l'acte, la Guinée-Bissau a adopté une position claire et constante. Par application du principe de la *tabula rasa*, elle a rejeté toute succession à l'échange de lettres franco-portugais du 26 avril 1960, pour avoir écarté tous les traités conclus par le Portugal et applicables à la province guinéenne. Si on s'en tient à la déclaration générale précitée de 1973, ainsi qu'à la pratique des Nations Unies et au droit coutumier de la succession d'Etats, l'Etat successeur est, au nom du principe de la *tabula rasa*, surtout dans le cas de succession par décolonisation, un Etat "tiers" par rapport à tous les accords et traités auxquels il n'a pas expressément fait

acte de succession. Le principe de la *tabula rasa* évoque bien cette condition juridique particulière dans laquelle se trouve l'Etat successeur. Le principe est la non-succession, sauf décision contraire, tacite ou expresse, de l'Etat considéré. Aussi bien pour les traités multilatéraux que pour les accords bilatéraux, l'Etat successeur part d'une situation de non-succession qui fait de lui un Etat tiers aux accords dès le point de départ de la *tabula rasa*. L'idée essentielle qui anime en effet la Convention de Vienne du 23 août 1978 sur la succession d'Etats en matière de traités est que l'Etat successeur, sauf cas exceptionnels précisés par la Convention, ne devient pas automatiquement partie aux traités conclus par son prédécesseur pour le territoire transféré. L'article 16 de la Convention de Vienne précitée dispose que dans le cas de la décolonisation : "Un Etat nouvellement indépendant n'est pas tenu de maintenir un traité en vigueur et d'y devenir partie du seul fait qu'à la date de la succession d'Etats le traité était en vigueur à l'égard du territoire auquel se rapporte la succession d'Etats." Il faut relever de surcroît la circonstance dirimante en l'espèce, à savoir que l'Accord de 1960 ne paraissait nullement avoir été mis en vigueur par la puissance administrante en Guinée dite portugaise. Et, dans son rapport à l'Assemblée générale, la Commission du droit international, qui transmettait à cette dernière le projet qui allait devenir la Convention de Vienne, déclarait : "Un Etat nouvellement indépendant *aborde son existence internationale libre de toute obligation* de continuer à appliquer les traités en vigueur à l'égard de son territoire"² (souligné par moi). Dans la présente affaire, la Guinée-Bissau ne s'est pas contentée d'invoquer, pour un cas d'espèce déterminé, dans une circonstance particulière, le principe de la *tabula rasa* relativement à tel traité; elle a fait beaucoup plus : une déclaration *générale* de non-succession. C'est un fait dont il serait difficile de ne pas tenir compte juridiquement.

12. C'est dire, au passage, qu'il n'est pas possible de souscrire à l'affirmation du paragraphe 31 de la sentence où l'on relève que "*le fait d'invoquer* devant le Tribunal des causes d'inexistence ou de nullité de l'Accord de 1960... *implique* que l'on se reconnaît comme successeur d'un des Etats qui l'a conclu" (souligné par moi). Le raisonnement qui inspire le paragraphe 31 aurait été irréprochable si la Guinée-Bissau avait elle-même "invoqué" le bénéfice de l'accord. Tel n'est pas le cas. Elle se défend au contraire contre son application. De plus, la Guinée-Bissau ne fait pas valoir seulement l'inexistence ou la nullité de cet accord, mais surtout son inopposabilité qu'elle a plaidée à *titre principal*, fait qu'il importe de souligner et que le paragraphe 31 semble regrettamment perdre de vue. Or l'inopposabilité implique, elle, et de toute évidence, que la Guinée-Bissau n'est pas successeur à cet accord. Ce serait une situation paradoxale que de considérer une déclaration générale de *non-succession* aux traités comme impliquant à titre de

² Rapport A/9610, dans *Annuaire de la Commission du droit international*, 1974, vol. II, 1^{re} partie, p. 166 à 280 (voir commentaire sous article numéroté 15).

point de départ. . . une succession à l'un d'entre eux. La *tabula rasa* ne peut pas "impliquer" son contraire³.

13. Si l'on prend en considération l'élément factuel incontestable de déclaration de non-succession, la situation se présente sous une double face :

a) La Guinée-Bissau, et c'est son droit, a rejeté toute succession à tous les accords sauf manifestation de volonté contraire. Il n'y a pas eu, concernant l'Accord de 1960, dont elle ignorait d'ailleurs l'existence, une telle manifestation. Force donc est de considérer *comme point de départ*, et selon la norme de la *tabula rasa* en matière de succession d'Etats, que la Guinée-Bissau est un Etat tiers à l'Accord de 1960;

b) Il convient de rechercher, à travers ce mécanisme, ou d'autres, de la succession d'Etats, si, malgré sa déclaration générale de non-succession, la Guinée-Bissau pourrait être liée néanmoins par un tel accord, en raison en particulier de la nature de celui-ci.

14. Il reste en effet à savoir si, par son contenu matériel de traité de "frontière" et de frontière "maritime", l'échange de lettres de 1960 comporte une spécificité telle qu'elle permettrait de mettre en échec ce principe du droit international de la succession d'Etats qu'est la *tabula rasa*. C'est le second point à examiner. De fait, la théorie de la *tabula rasa* comporte une exception pour les traités et régimes de frontière. Je m'abstiens pour l'instant de préciser davantage la nature de celle-ci.

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15. Un premier temps de la démonstration est nécessaire :

Il faut tout d'abord se demander si la Guinée-Bissau adhère à l'idée d'automatisme dans la succession aux traités de frontières. La question n'est pas superflue dès lors que l'*uti possidetis* pour les frontières terrestres a été combattu dès l'origine par quelques Etats africains. Il faut donc savoir si la Guinée-Bissau comptait au nombre de ceux-là et si dans la présente affaire elle a marqué quelque distance à l'égard de cette exception au principe de la *tabula rasa* en matière de traités de frontières.

³ Cela dit on ajoutera, à titre tout à fait subsidiaire, que la qualité d'Etat successeur ne dépend pas nécessairement de la position adoptée par cet Etat à l'égard d'un accord déterminé. D'abord parce qu'on peut imaginer qu'un Etat qui n'a nullement la qualité d'Etat successeur puisse invoquer dans une instance le bénéfice d'un traité tout en étant tiers par rapport à ce traité, si sa situation entre dans les exceptions qui existent au principe de l'effet relatif des traités. Ce seul fait d'invoquer le traité ne peut lui valoir la qualité générale d'Etat successeur. Ensuite et à l'inverse la qualité d'Etat successeur n'est conditionnée exclusivement ni par la succession aux traités ni par la succession à l'un d'entre eux en particulier, l'Accord de 1960. La succession d'Etats embrasse d'autres traités que celui de 1960 et d'autres matières que les traités. Même si un Etat invoque l'application intégrale de la *tabula rasa*, il n'en est pas moins vrai qu'il peut être un Etat dif successeur, au regard d'autres domaines. C'est bien le cas de la Guinée-Bissau, qui est un Etat successeur du Portugal mais nullement à cause du fait, inexact d'ailleurs, qu'il aurait "invoqué" l'Accord de 1960.

16. L'OUA a admis le principe de l'*uti possidetis* qu'elle a consacré indirectement dans sa Charte de mai 1963 et plus directement dans sa résolution du Caire de 1964. Comme le dit l'arrêt de la Chambre de la C.I.J. dans l'affaire du Burkina Faso/Mali :

Les nombreuses déclarations faites par des responsables africains, lors de l'indépendance de leur pays, contenaient en germe les éléments de l'*uti possidetis* : elles confirmaient le maintien du *statu quo* territorial au moment de l'accession à l'indépendance et posaient le principe du respect aussi bien des frontières résultant des accords internationaux que de celles issues de simples divisions administratives internes. La Charte de l'Organisation de l'unité africaine n'a pas négligé le principe de l'*uti possidetis*, mais elle ne l'a qu'indirectement évoqué en son article 3 aux termes duquel les Etats membres affirment solennellement le principe du respect de la souveraineté et de l'intégrité territoriale de chaque Etat. Mais dès la première conférence au sommet qui suivit la création de l'Organisation de l'unité africaine, les chefs d'Etat africains, par leur résolution susmentionnée [AGH/Rés. 16 (I)], adoptée au Caire en juillet 1964, tinrent à préciser et à renforcer le principe de l'*uti possidetis juris* qui n'apparaissait que de façon implicite dans la charte de leur organisation⁴.

17. La Guinée-Bissau n'a pas manifesté son hostilité à l'égard de ce principe, alors que certains autres Etats l'ont fait, tels le Maroc ou la Somalie. On peut donc tenir pour acquis que le principe s'impose à elle, dès lors qu'elle n'a jamais nié son caractère obligatoire, ni au cours de sa lutte de libération nationale, ni depuis son indépendance. Par ailleurs, elle n'a à aucun moment plaidé, en la présente affaire, contre le principe de l'*uti possidetis*, alors qu'elle aurait pu tenter de le faire. Au reste, l'un des points d'accord entre les Parties dans cette instance est précisément le respect du principe de l'*uti possidetis*. Là où elles divergent entre elles, c'est sur l'étendue de ce principe et non pas sur son existence et son caractère obligatoire.

18. Dès lors, il est tout à fait superflu, aux fins de la présente affaire, de s'appesantir plus longuement sur le caractère général et obligatoire du principe de l'*uti possidetis*. Toute réserve, hésitation, discussion ou interrogation portant sur le principe est sans pertinence ici, qu'elle se fonde sur le principe de l'autodétermination qui a paru comme conceptuellement contradictoire avec l'*uti possidetis*, ou qu'il s'agisse de toute autre considération, dès lors que, pour la présente affaire, les deux Parties ont affirmé clairement leur adhésion à ce principe. C'est à mes yeux un élément du droit applicable voulu par les Parties, au-delà de toute autre considération de droit international général qui pourrait justifier et imposer l'application de ce principe.

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19. Dans la sentence il est question d'un principe d'*uti possidetis* qui serait spécifiquement africain. Au paragraphe 61, notamment, la sentence a voulu distinguer entre, d'une part, l'expérience de l'Amérique latine au XIX^e siècle, où seules les frontières coloniales administratives, comme celles de la Couronne d'Espagne, avaient été érigées en

⁴ C.I.J., Arrêt du 22 décembre 1986, *Recueil 1986*, p. 565 et 566, par. 22.

frontières internationales intangibles et, d'autre part, l'expérience de l'Afrique au xx^e siècle, où toutes les frontières, qu'elles aient existé entre deux empires coloniaux ou au sein d'un même empire colonial, ont été érigées en frontières internationales également intangibles. Est-ce à dire que le principe de l'*uti possidetis* ne protège pas les frontières anciennement établies entre deux empires coloniaux en Amérique latine, et héritées par exemple aujourd'hui tant par le Brésil antérieurement portugais que par les États voisins, ex-colonies espagnoles, anglaises, françaises ou hollandaises ? En tout état de cause, je ne crois pas qu'il faille opposer l'*uti possidetis* latino-américain à un *uti possidetis* qui serait proprement "africain" et typiquement tel. Cela me paraît infondé. La doctrine ne me semble le faire nulle part. La sentence fait ici une innovation aux conséquences incontrôlables et à l'utilité indémontrée.

20. Mais ce qu'il est piquant d'observer à ce sujet pour la suite, c'est que la sentence opère ainsi une distinction, à des fins juridiques je suppose, donc en vue d'établir un régime juridique différencié entre les frontières terrestres selon qu'elles séparent deux anciens empires coloniaux ou au contraire qu'elles existent dans le cadre d'un même ancien empire colonial. Ce faisant, la sentence paraît prête à prendre deux directions contradictoires, d'une part pousser implicitement à une différenciation de régimes juridiques pour des frontières terrestres, mais d'autre part affirmer une unité de régime pour des frontières terrestres et maritimes. Si l'on trouve assez de raisons pour distinguer déjà entre les régimes des frontières terrestres, à plus forte raison devrait-on s'interdire de reconnaître un même régime juridique à la fois aux frontières terrestres et maritimes.

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21. Il convient maintenant de savoir si les délimitations maritimes donnent naissance sur le plan juridique à de véritables frontières, à l'instar des frontières terrestres. La Guinée-Bissau a soutenu qu'il était illégitime d'assimiler les délimitations maritimes aux frontières terrestres de sorte que l'*uti possidetis*, dont elle ne nie pas le caractère obligatoire pour les frontières terrestres, ne trouve pas, selon elle, application pour les délimitations maritimes. Le Sénégal, qui soutient le contraire, a alors reproché à la Guinée-Bissau de tenter de nier aux limites maritimes la qualité et le caractère de frontières.

22. Sur ce point, j'estime que les délimitations maritimes donnent lieu à l'existence de "frontières" véritables. L'étendue des compétences de l'État est sans doute différente pour les limites maritimes par rapport aux frontières terrestres. Mais cette différence est de degré non de nature, même si certaines limites maritimes ne "produisent" pas une exclusivité et une plénitude de compétence étatique. Serait-elle une différence de nature qu'elle n'empêcherait nullement, à mon point de vue, de considérer une limite maritime comme équivalant à une "frontière", dès lors qu'on entend par là une ligne ayant pour fonction de

distinguer le domaine d'exercice des compétences de l'Etat par rapport aux espaces où se développe la juridiction d'un autre Etat ? Il est exact que le droit de la mer, du moins dans l'état actuel de son développement, a mis en forme une série de compétences reconnues à l'Etat côtier qu'il serait difficile d'assimiler toutes à une souveraineté étatique, c'est-à-dire à une plénitude et à une exclusivité de compétences par l'Etat qui en bénéficie. Mais cela ne suffit pas pour créer une différence fondamentale entre les limites maritimes et les frontières terrestres, au point de soutenir que les premières ne constitueraient pas des frontières; d'autant plus d'ailleurs que même dans le domaine des frontières terrestres, on observe une certaine diversification de régimes.

23. D'ailleurs, je ne pense pas que le Sénégal interprète correctement la position de la Guinée-Bissau. Celle-ci ne me paraît pas avoir soutenu que les limites maritimes ne sont pas des frontières. Elle a simplement soutenu que ces limites-là, qui sont des frontières aussi, obéissent toutefois à un régime juridique distinct et récent qui les différencie des frontières terrestres, au point que cette différence justifie, selon elle, une différence de traitement quant à l'*uti possidetis*. C'est cette question qu'il convient d'examiner à présent.

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24. Dans le souci de vérifier le sens des mots par application des règles d'interprétation codifiées par la Convention de Vienne de 1969 sur le droit des traités, les Parties se sont livrées à des considérations sémantiques qui me paraissent toutes secondaires et superflues. La Guinée-Bissau s'est plu à relever de nombreux textes, dont ceux des Conventions de Genève de 1958 et de la Convention de Montego Bay de 1982 sur le droit de la mer, qui vont jusqu'à éviter apparemment d'utiliser l'expression "frontière" pour désigner les "délimitations" maritimes. Sans nier que ces dernières "produisent" des lignes séparatrices qui sont de véritables frontières, la Partie guinéenne observe toutefois que le sens ordinaire du terme "frontière", et surtout son sens juridique, réserve l'usage de ce mot aux terres et que l'*uti possidetis* n'est applicable qu'à ces frontières terrestres. Tel n'est pas le point de vue du Sénégal, qui estime qu'on ne peut exclure les délimitations maritimes de la catégorie de frontières assujetties à l'*uti possidetis* pour la seule raison que ces délimitations ne sont pas mentionnées ni dans les textes pertinents visant l'*uti possidetis*, ni dans les travaux préparatoires, ni dans la doctrine.

25. A. Thomas, dans son *Dictionnaire général de la langue française du commencement du XVII^e siècle à nos jours (1890-1900)*, a défini la "limite" comme la "partie extrême ou s'arrête un territoire, un domaine", et la "frontière" comme la "limite qui sépare le territoire d'un Etat de celui d'un Etat voisin". Le Tribunal arbitral des deux Guinée, dans sa sentence du 14 février 1985, considère quant à lui que le "terme "limite" . . . n'a pas le sens juridique précis de frontière mais un sens plus large". On ne peut aller plus loin sur le plan sémantique et il

convient de relativiser beaucoup les conséquences qu'on peut tirer de l'usage de tous ces mots⁵.

26. Par contre, il est un fait incontestable et nullement contesté par les Parties que les textes pertinents relatifs au principe de l'*uti possidetis* n'indiquent nulle part que l'expression "frontière" vise aussi les frontières maritimes. Mais les Parties tirent de ce fait des conséquences diamétralement opposées. La Guinée-Bissau en conclut que le principe ne s'étend pas à cette catégorie de frontières (RGB, p. 88), tandis que le Sénégal en déduit pour sa part que le silence des textes signifie simplement que ceux-ci n'établissent aucune distinction entre frontières terrestres et maritimes (CMS, p. 162). Le silence est effectivement d'une interprétation toujours difficile et parfois hasardée en droit. Je considère que dans le cas présent il s'agit d'un silence d'exclusion plutôt que d'inclusion implicite. L'obligation de succéder aux traités de frontières ne s'applique pas aux délimitations maritimes car les auteurs des textes en question n'avaient eu à aucun moment en vue cette catégorie particulière de traités et il n'existait d'ailleurs pas de traités de limites maritimes qu'on pût transmettre à l'Etat successeur. Et, de fait, je ne connais pas personnellement d'exemple d'un accord de cette sorte imposé à un Etat successeur par application du principe de l'*uti possidetis*.

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27. Il n'existe pas de "travaux préparatoires" susceptibles d'éclairer sur les intentions des auteurs de la Charte de l'Organisation de l'unité africaine et de la résolution adoptée au Caire en 1964 par les chefs d'Etat d'Afrique, lorsqu'ils se sont référés, implicitement dans la Charte et explicitement dans cette résolution, au principe de l'intangibilité des frontières héritées de la colonisation. Ayant été toutefois mêlé d'assez près, à un titre ou à un autre, aux préoccupations africaines des années 60, je puis porter un témoignage personnel. En donnant droit de cité à l'*uti possidetis*, les dirigeants africains avaient *exclusivement* en vue la question de l'intangibilité des frontières terrestres. A la suite des indépendances africaines en chaîne des années 60, il a été donné naissance à une situation où d'une part plusieurs ethnies coexistaient dans un même Etat (Etat polyethnique) et où d'autre part une même ethnie se trouvait à cheval sur deux ou plusieurs Etats (ethnie multinationale). Seule la crainte des Etats africains nouvellement indépendants de voir cette situation potentiellement explosive faire éclater des Etats encore fragiles après les reflux coloniaux a poussé les dirigeants africains à consacrer l'intangibilité des frontières *terrestres* et à "rati-

⁵ On remarquera simplement qu'après que la chambre de la Cour internationale de Justice eut utilisé l'expression "frontière" maritime dans son arrêt concernant le golfe du Maine en empruntant cette formulation au texte du compromis conclu entre les deux Parties, la Cour a décidé prudemment dans une autre affaire de ne plus suivre la formulation des Parties. L'affaire en cours intitulée d'abord "Frontière maritime dans la région située entre le Groenland et Jan Mayen" est ainsi devenue "Délimitation maritime dans la région située entre le Groenland et Jan Mayen".

fier'' sagement, une seconde fois en quelque sorte, l'Acte général de Berlin, qui, par le partage de l'Afrique, avait été historiquement à l'origine de cette situation. On n'avait jamais songé aux frontières maritimes, qui ne pouvaient intéresser qu'un horizon différent, le milieu aquatique, où par définition ces problèmes ethniques ne se posaient pas.

28. On aura aussi remarqué que, à aucun moment dans les travaux préparatoires, ceux-là accessibles, concernant, d'une part, la Convention de Vienne sur la succession d'Etats en matière de traités et, d'autre part, celle sur la succession d'Etats en matière de biens, archives et dettes d'Etat, toutes deux ayant consacré sur le plan international le principe de l'intangibilité de l'héritage colonial dans le domaine des traités et régimes frontaliers, on ne trouve nulle part dans les déclarations des délégations participantes la moindre allusion aux frontières maritimes, à des époques pourtant (1978 et 1983) où la Convention sur le droit de la mer de 1982 était largement dans tous les esprits. J'ai vécu ces travaux préparatoires en une quadruple qualité de membre de la Commission du droit international, de rapporteur spécial sur la succession d'Etats en matière de biens, archives et dettes d'Etat, de chef de délégation à la Conférence des plénipotentiaires de Vienne de 1978 et d'auteur-expert des Nations Unies à celle de 1983.

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29. Il ne faut pas non plus perdre de vue la réalité que le simple bon sens rappelle, à savoir que pour protéger un héritage, il faut encore que cet héritage . . . existe ! Il serait vain de créer une règle concernant une catégorie qui n'existe pas. Les pères fondateurs des institutions politiques africaines pouvaient d'autant moins songer à légiférer sur la question de l'intangibilité des frontières maritimes que celles-ci n'existaient pratiquement pas. *En fait, il n'y avait tout simplement pas d'héritage colonial à préserver en matière de frontières maritimes !* Il n'est donc pas exact d'affirmer que les dirigeants africains (et même les plénipotentiaires de Vienne de 1978 et de 1983) visaient les frontières maritimes lorsqu'ils légiféraient sur la question de l'intangibilité des frontières héritées de la colonisation.

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30. Il faut également bien se représenter que la prétention visant à étendre aujourd'hui le champ d'application de l'*uti possidetis* aux frontières maritimes survient au moment où l'application de ce principe aux frontières terrestres elles-mêmes ne va pas sans difficultés⁶. En effet, on observe dans les temps présents une résurgence des critiques adressées au principe de l'*uti possidetis* en Afrique et au moins un des conseils du

⁶ Cf. parmi une très abondante littérature, l'ouvrage récent de Marie-Christine Aquarone, *Les frontières du refus. Six séparatismes africains*, Paris, éditions du CNRS, 1988.

Sénégal, qui soutient aujourd'hui devant le Tribunal l'extension du principe aux frontières maritimes, s'était interrogé dans ses travaux scientifiques sur la solidité et la validité du même principe pour les frontières terrestres elles-mêmes. Des conflits frontaliers ont éclaté sur le continent. On présente l'*uti possidetis* sans jamais oublier de rappeler qu'il s'applique à des frontières présentées par ailleurs avec une insistance aujourd'hui renouvelée, comme "injustes", "artificielles" et conçues au gré des intérêts des empires coloniaux. Cela alimente encore plus les impatiences à l'égard de ce qui est considéré comme un droit certes, mais un droit "injuste" cependant et cela menace la solidité de l'édifice. Un nouveau discours politique sur les frontières terrestres africaines se développe, à tel point que les instances régionales tentent de saisir toutes occasions pour faire confirmer la validité du principe ainsi menacé — sans du reste jamais songer l'étendre aux frontières maritimes. Il est un fait que dans ce nouveau discours on revient sans cesse sur ce caractère "arbitraire" des frontières (terrestres) parce qu'elles enferment les Etats dans des cadres spatiaux qui ne coïncident pas avec, entre autres, les réalités ethniques et historiques des peuples africains. Cela n'est pas du tout une démarche de nature à favoriser le maintien du *statu quo*, c'est-à-dire le respect dû au principe de l'*uti possidetis juris*. D'autant plus que ce discours, sensible à la crise économique et aux fléaux du sous-développement qui frappent plus durement que jamais le continent africain, n'hésite plus à opposer les pays "favorisés" (grande étendue territoriale, richesse du sous-sol et du sol, débouchés sur la mer...), et les pays "défavorisés" (minuscules, pauvres en ressources, enclavés...), clivage que les partages coloniaux ont aggravé par les tracés frontaliers.

31. Or c'est précisément en cette période où le principe de l'*uti possidetis* reçoit dangereusement des coups de boutoir et ne parvient que difficilement à maintenir son intégrité en vue d'une saine application à ces frontières coloniales terrestres qu'il est proposé d'étendre le champ d'application de ce principe aux limites maritimes. Le moins qu'on puisse dire est que cette proposition de développement spatial du principe prend à rebrousse-poil une certaine opinion publique africaine.

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32. On doit bien noter cependant que le Sénégal s'était défendu de l'assimilation pure et simple des deux types de frontières. Il reconnaît l'existence de spécificités propres à chacun d'eux et soutient qu'aujourd'hui s'est développée une diversification du concept de frontière au fur et à mesure que de nouveaux espaces sont découverts par l'homme. Cela me paraît parfaitement exact. Ce qui l'est moins en revanche c'est de partir précisément de cette constatation comme justification pour aligner en toute automaticité le statut juridique des délimitations de ces nouveaux espaces sur celui des territoires terrestres. Une réaction plus naturelle nous préparerait à tout le contraire, c'est-à-dire qu'à cette diversification du concept devrait correspondre une diversification corrélatrice de statuts. L'évolution dira plus tard si une unification de statuts

ou de régimes s'imposera, en faisant valoir par exemple une certaine identité d'objet et de finalité pour ces différentes limites et frontières. Elle dira aussi, cette évolution, jusqu'où l'unification de statuts pourra aller. Mais partir de l'unification, par un postulat invérifiable, serait préjuger cette évolution d'une part et assimiler, par des analogies sinon douteuses du moins fragiles, des espaces différents par nature d'autre part. Le droit, dans ses processus de création normative, ne procède pas ainsi. Je n'aperçois pas, dans l'état actuel du droit, au nom de quel critère on pourrait justifier l'application automatique de l'*uti possidetis* à deux types d'espaces différents et le faire ainsi pour un principe qui, comme celui-là, constitue une exception à la *tabula rasa* et à la souveraineté de l'Etat, donc d'interprétation stricte.

33. En d'autres termes, les deux Parties sont sinon d'accord, du moins pas très éloignées l'une de l'autre, sur le fait que les règles applicables en droit international à la frontière terrestre ne sont pas toutes transposables à la frontière maritime, ne serait-ce qu'à cause de la différence physique des deux espaces et à la nature différente des deux milieux. De là, le problème est de savoir si le principe de l'*uti possidetis* figure parmi ces règles non transposables d'une catégorie de frontière à l'autre. Pour sa part la Guinée-Bissau a longuement insisté sur la nature différente des espaces en cause, sur les liens radicalement différents que chacun d'eux entretient avec les populations concernées et sur la nature distincte des droits que l'Etat exerce dans chaque cas. Le Sénégal pour sa part ne conteste pas les différences de statut juridique entre les deux institutions puisque manifestement chacune d'elles obéit à certaines règles qui lui sont propres. Mais il ne va pas jusqu'à reconnaître que le principe de l'*uti possidetis* compte au nombre des normes qui doivent rester propres aux frontières terrestres et il l'étend aux frontières maritimes principalement parce qu'il trouve une parenté d'objectif entre les deux institutions, dont la finalité est d'éviter les conflits et d'instaurer la paix entre les populations.

34. Je considère que les différences de milieux sont patentes et irréductibles; que la notion de souveraineté et ses conséquences telles que l'inviolabilité territoriale n'ont pas, ou pas encore, leur place dans les espaces maritimes de sorte que l'Etat étranger peut mener certaines activités dans ces espaces placés sous juridiction d'un autre Etat; que de même une autre notion, celle d'effectivité, développe ses effets, jusqu'à ce jour, plus difficilement dans les espaces maritimes que dans les espaces terrestres; et qu'enfin, contrairement aux accords frontaliers terrestres, qui sont librement négociés sans devoir obéir à une logique préétablie, les accords de délimitations maritimes obéissent aujourd'hui quant à eux à un principe général d'équité. Mais surtout, si ces règles et d'autres encore existent pour différencier les deux institutions, à plus forte raison il me paraît imprudent d'aligner l'une sur l'autre ces deux institutions, sans motif impérieux, en appliquant à toutes les deux indifféremment une norme telle que l'*uti possidetis* qui est pourtant un principe très vigoureux et très "lourd" au point de tenir en respect le principe sacro-saint de la souveraineté de l'Etat. Si, dans l'état actuel de développement du droit de la mer, le statut et le régime juridiques des

délimitations maritimes n'accordent pas de souveraineté à l'Etat côtier, comme je l'ai relevé, je ne vois pas comment on peut logiquement affirmer que l'accord qui établit précisément ces délimitations maritimes est assimilable au traité de frontière terrestre qui établit, lui, en revanche la souveraineté de l'Etat.

35. En conséquence il ne me paraît pas douteux que les limites maritimes sont des frontières, mais d'une nature ou d'une catégorie différente. Elles connaissent, et doivent connaître de ce seul fait, un statut et un régime juridiques que cette différence a déjà imposés pour ce qui concerne les procédures de conclusion des accords qui les créent. De ce seul fait aussi elles n'appellent pas *nécessairement* l'application du principe de l'*uti possidetis*.

36. Certes la sentence précise avec raison, en son paragraphe 63, que "la délimitation du domaine de validité spatiale [des normes de l'ordre juridique de l'Etat] peut concerner la surface terrestre, les eaux fluviales ou lacustres, la mer, le sous-sol ou l'atmosphère". Elle ajoute que "d'un point de vue juridique il n'existe aucune raison d'établir des régimes différents selon l'élément matériel où la limite est fixée". Je crains de ne pouvoir suivre le Tribunal. En matière de frontières, le droit aérien, le droit de l'espace et le droit de la mer n'obéissent pas aux mêmes principes, règles et schémas que le droit des frontières terrestres. Il est parfaitement exact que dans tous les cas de délimitation le but est le même, à savoir déterminer d'une manière stable et permanente le domaine de validité spatiale des normes juridiques d'un Etat. Mais les normes applicables pour réaliser de telles délimitations doivent nécessairement être *adaptées au milieu* auquel elles s'appliquent et à l'élément matériel propre à ce milieu. Le droit n'est pas une construction abstraite complètement détachée de la réalité qu'elle entend régir. La différence entre les éléments matériels appelle très naturellement une différence de régimes juridiques et lorsqu'il n'en va pas ainsi dans certains cas, parce qu'une même construction juridique comporte parfois assez de plasticité pour s'adapter partiellement à deux éléments matériels différents, ce n'est là qu'une exception qui confirme la règle.

37. La sentence rejette, en son paragraphe 65, l'argument de la Guinée-Bissau d'après lequel les frontières maritimes ne fixent de limites que pour certaines matières, telles que la pêche ou l'exploitation des ressources naturelles, alors que les frontières terrestres établissent toutes les compétences en toute plénitude. La sentence relève au contraire qu'"il existe de nombreux cas où la frontière terrestre entre deux pays n'est pas concrétisée par une ligne unique mais par plusieurs". Il est exact en effet qu'on peut citer des exemples où la limite sur la surface terrestre ne coïncide pas avec la limite fixée pour le sous-sol, en général quand l'exploitation de mines se trouve en jeu. Mais la sentence ne répond pas directement à l'argument de la Guinée-Bissau. Cette dernière a raison de faire observer que le *droit commun* des frontières maritimes et celui des frontières terrestres diffèrent matériellement, en ce que le premier est particulier et le second général. Si toutefois on constate dans la réalité des régimes particuliers dans les frontières terrestres aussi, cela ne constitue que l'exception confirmant la règle.

Cette exception, pour aussi fréquente qu'on peut l'imaginer, n'est rien d'autre qu'un *aménagement conventionnel* précis qui est toujours possible mais qui n'en reste pas moins exorbitant du droit commun des frontières terrestres.

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38. Je ne puis suivre la Partie sénégalaise lorsqu'elle fait valoir que : "La distinction que la Guinée-Bissau établit entre accords de délimitations maritimes et accords de délimitations terrestres du point de vue de leur forme et du point de vue de leur statut au regard des règles de la succession d'Etats ne repose sur aucune règle de droit international positif. Au contraire, tous les auteurs sont d'accord pour dire qu'il n'y a pas de différence d'objet ou d'autorité entre traités en forme solennelle et accords en forme simplifiée." (PV/9, p. 21.) Il est exact que les deux catégories de traités possèdent juridiquement une autorité égale; mais la différence essentielle réside dans leur mode de conclusion justifié par le fait que les traités en forme solennelle passent par une procédure lourde parce qu'ils sont considérés comme politiquement plus importants. Le Sénégal a rappelé que l'accord de Munich du 29 septembre 1938 portant cession de territoire a été conclu en forme simplifiée. C'est justement l'exemple à éviter car beaucoup d'auteurs ont conclu à la nullité de cet accord. Si, comme le déclare le Sénégal, la stabilité des frontières terrestres se justifie par des raisons tenant à la paix des populations qui occupent ces territoires, cette *ratio legis* suffit par elle-même à justifier une non-assimilation pour les espaces maritimes qui ne peuvent être occupés de la même manière par les populations.

39. Je vois un autre argument se profiler pour rejeter la thèse du Sénégal. Celui-ci invoque le point de vue du juge Gilbert Guillaume qui, alors qu'il était directeur des affaires juridiques au Ministère français des affaires étrangères, écrivait ce qui suit : "Ni la zone économique exclusive, ni le plateau continental ne peuvent être assimilés au *territoire* au sens de l'article 53 de la Constitution française", celui qui règlemente la cession de territoire. C'est dire qu'au moins en ce qui concerne la manière de les traiter dans la Constitution française, les limites maritimes possèdent leur spécificité et ne peuvent être assimilées au territoire terrestre. N'est-ce pas tout ce que souhaitait démontrer la Guinée-Bissau ? Il y a dans cette remarque assez de raisons pour considérer comme tout le contraire d'une évidence le fait d'appliquer automatiquement le principe de l'*uti possidetis* en le transposant, sans aucune précaution et par un simple et irrésistible automatisme, du cas des frontières terrestres à celui des limites maritimes.

40. La prudence s'impose en effet, car il ne faudrait pas perdre de vue le fait que le principe de l'*uti possidetis* constitue une exception au caractère relatif des traités, donc une exception qui limite le principe de la souveraineté d'Etat. Or, en saine doctrine, une exception doit être d'interprétation stricte. On ne saurait étendre automatiquement une exception imposant à l'Etat successeur un traité de frontière terrestre au cas d'une délimitation maritime. L'avenir pourra peut-être conduire à

l'assimilation des frontières maritimes aux frontières terrestres, à la suite d'une évolution possible. Mais il ne paraît pas légitime de procéder dès maintenant à une confusion automatique de statuts.

41. Il faut observer qu'en fin de compte la Partie sénégalaise, ce faisant, esquisse un régime juridique assez sélectif des limites maritimes. D'un côté elle soutient que les accords portant sur des délimitations maritimes sont des instruments fondamentaux pour la paix des peuples et de ce fait doivent être protégés par une intangibilité que fournit opportunément une extension du champ d'application initial du principe de l'*uti possidetis*. Mais dans le même temps elle affirme que ces accords, pour aussi fondamentaux et élevés qu'ils soient, peuvent être conclus selon la procédure la plus légère et la plus dépouillée qui soit en droit international, c'est-à-dire celle des accords en forme simplifiée qui ne requiert ni d'un côté ni de l'autre le contrôle et l'approbation des représentants des peuples, ceux-là mêmes dont on cherche à garantir la paix et la sécurité.

42. Je crains que, en déclarant l'Accord de 1960 opposable à la Guinée-Bissau *contre sa volonté* manifestée dès 1973 et toujours présente aujourd'hui, le tribunal de céans n'ait apporté une innovation juridique de taille aux conséquences majeures. L'une de ces implications signifierait que les espaces maritimes sont soumis à la compétence exclusive et plénière de l'Etat côtier, c'est-à-dire à sa souveraineté totale, ce qui bouleverserait le droit de la mer actuel tel qu'il vient d'être codifié par la communauté internationale dans la Convention de Montego Bay. Il est difficile d'échapper à cette conséquence : on ne peut par exemple prétendre que les limites maritimes sont assimilables aux frontières terrestres qui sont tributaires du principe de l'*uti possidetis*, sans toutefois aller jusqu'à affirmer que toutes les règles du droit international applicables aux frontières terrestres sont transposables pour les frontières maritimes. Le souci de cohérence interdit une sélection opportune de règles en fonction de critères indéterminés.

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43. Selon le Sénégal, la Guinée-Bissau, qui soutient devant le tribunal de céans l'inapplicabilité de l'*uti possidetis* aux limites maritimes, a elle-même fait valoir le contraire en d'autres circonstances. Le Sénégal rappelle en effet que dans le passé la Partie guinéenne "elle-même n'a fait aucune distinction entre frontières terrestres et maritimes en ce qui concerne le principe de l'*uti possidetis*" (CMS, p. 158). C'est ainsi que le représentant permanent de la Guinée-Bissau auprès des Nations Unies à New York, l'Ambassadeur Gil Fernandez, a pu déclarer en sa lettre du 30 avril 1979 : "Le Gouvernement de la République de Guinée-Bissau, fidèle aux principes de l'Organisation de l'unité africaine (OUA), réaffirme son engagement à respecter les frontières héritées de la colonisation. En conséquence le seul document juridique que nous reconnaissons comme valable pour la délimitation des eaux territoriales et du plateau continental entre notre pays et la République du Sénégal est la Convention franco-portugaise de 1886" (PV/9, p. 32), sur

la base de laquelle la seconde recommandation du 10 septembre 1959 avait été mise au point par les négociateurs du futur Accord de 1960. Le Tribunal a repris à son compte l'argument sénégalais (paragraphe 66 de la sentence). Je ne puis le suivre. Il est indéniable que par cette lettre la Guinée-Bissau aurait admis l'application de l'*uti possidetis* aux frontières maritimes si la Convention de 1886 avait réellement établi une frontière maritime. Mais cela n'est pas le cas si l'on veut bien se référer à la sentence arbitrale rendue le 14 février 1985 par le Tribunal arbitral dans l'affaire des deux Guinée.

44. Invoquant le même type d'argumentation, le Sénégal a rappelé un autre fait sur lequel le Tribunal l'a suivi (paragraphe 66 de la sentence). Par une note de protestation du 4 novembre 1977 contre l'arraisonnement qu'il a fait d'un chalutier guinéen, l'*Ilha de Fogo*, au parallèle du cap Roxo, la Guinée-Bissau a souligné les conséquences graves, selon elle, de "toute tentative de révision unilatérale du Traité franco-portugais de 1886 quant à l'intangibilité des frontières héritées de la colonisation" (PV/9, p. 33 et 34 à 40). On sait que selon la sentence du 14 février 1985 la Convention de 1886 avait établi un polygone enveloppant les îles de Guinée-Bissau et délimitant ce que le Portugal considérait comme "ses eaux intérieures" dans sa colonie. Un tel polygone n'est pas une frontière maritime.

Le Tribunal de céans relève que le compromis arbitral passé le 18 février 1983 entre la Guinée-Bissau et la Guinée s'est référé au principe de l'intangibilité des frontières héritées de la colonisation. Le Tribunal en a conclu que, "étant donné que le compromis arbitral concernait seulement la délimitation d'une frontière maritime, cette mention signifie que les deux Parties ont reconnu que ce principe était applicable à cette catégorie de frontières" (paragraphe 66 de la sentence). Cette vue des choses n'est pas fondée. Dans l'affaire citée Guinée/Guinée-Bissau, la Convention de 1886, qui était en cause, déterminait les frontières terrestres et cela suffit pour expliquer la référence à la déclaration de 1964 sur l'intangibilité des frontières coloniales.

45. Dans le même esprit, le Sénégal a fait valoir — et le Tribunal a retenu — la thèse que la Guinée-Bissau serait d'autant moins crédible qu'elle aurait elle-même soutenu un point de vue radicalement contraire dans une instance opposant les deux Guinée (PV/9, p. 33). La Cour internationale de Justice a précisé les conditions dans lesquelles l'*estoppel* peut être invoqué (*Barcelona Traction*, première phase, *Recueil 1964*, p. 23; *Plateau continental de la mer du Nord*, *Recueil 1969*, p. 26, paragraphe 30; et surtout *Golfe du Maine*, *Recueil 1984*, paragraphes 130 à 146). L'*estoppel* a été vu par la doctrine sous l'angle de l'expression unilatérale de volonté d'un Etat formulée en des circonstances antérieures et sur laquelle il ne peut revenir sans porter atteinte aux principes fondamentaux de la bonne foi et de l'équité. Selon la Cour "l'*estoppel* [est] lié à l'idée de forclusion" (*Golfe du Maine*, paragraphe 130) plus qu'à celle d'acquiescement. "La forclusion serait d'ailleurs l'aspect procédural et l'*estoppel* l'aspect de fond du même principe" (*ibid.*). Un Etat ne peut faire aujourd'hui ce qu'il a contesté hier.

Mais en l'espèce je ne peux pas suivre les conclusions du Tribunal (paragraphe 66 de la sentence). D'une part, il y a lieu de nuancer beaucoup la réalité, les points de vue successifs de la Guinée-Bissau, d'une procédure à l'autre, n'étant nullement aussi contradictoires qu'on le dit ici. Il ne faut pas se borner à la référence aux pages 76 et 77 du compte rendu des plaidoiries guinéennes dans cette procédure-là. La lecture complète des pages 75, 76, 77 et 78 de ce compte rendu montre au contraire que la Guinée-Bissau a contesté très nettement et très clairement l'applicabilité de l'*uti possidetis* aux limites maritimes. D'autre part, il est clair que le principe de l'autorité relative de la chose jugée fait que chaque affaire est un "*unicum*" indépendant de celui qui le précède et de celui qui le suit. Ensuite, la stratégie des Parties est libre et elle peut varier d'une affaire à une autre. Les Parties ne sont nullement liées par une attitude prise antérieurement par elles; à plus forte raison un tribunal reste-t-il entièrement souverain et libre par rapport tant à la décision d'un autre tribunal arbitral que, plus encore, par rapport à la stratégie retenue par une Partie dans une affaire qui lui est soumise et davantage encore dans une affaire qui l'a précédé devant une instance différente. Enfin et surtout — et à supposer même que la Guinée-Bissau eût plaidé dans la précédente affaire l'application de l'*uti possidetis* aux frontières maritimes, ce qui n'est pas le cas — ce n'est pas parce que la Guinée-Bissau a cru à une erreur que le Tribunal doit impérativement adopter celle-ci. Une erreur reste une erreur même si celui qui la dénonce aujourd'hui l'a faite hier, comme la Guinée-Bissau.

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46. Restait enfin l'analyse de la jurisprudence de la Cour internationale de Justice à laquelle les deux Parties à la présente instance se sont livrées pour y rechercher un appui à leurs thèses respectives. Le Tribunal de céans y a fait une allusion (paragraphe 63 de la sentence) en épousant le point de vue sénégalais. Cette jurisprudence se réduit en vérité à un seul arrêt, celui rendu par la Cour internationale de Justice en l'affaire *Mer Egée* et où un passage se lit comme suit :

Qu'il s'agisse d'une frontière terrestre ou d'une limite du *plateau continental*, l'opération de délimitation entre Etats voisins est essentiellement la même. Elle comporte le même élément inhérent de stabilité et de permanence et est soumise à la règle qui veut qu'un traité de limites ne soit pas affecté par un changement fondamental de circonstances.

Les deux Parties à la présente instance interprètent différemment cette jurisprudence. On sait que, pour établir l'incompétence de la Cour, la Turquie avait invoqué la réserve que la Grèce avait faite à l'Acte d'arbitrage de 1928 pour exclure les différends sur le statut territorial. La Cour n'a pu donner raison à la Turquie qu'en comprenant parmi les différends de cette nature ceux concernant l'étendue géographique du plateau continental, ce qui lui valut des critiques sévères de la doctrine. Langavant souligna que la Cour, en cet arrêt, avait donné à la notion de plateau continental un effet rétroactif, alors même que cette notion était juridiquement inconnue en 1928.

47. Il ne faut pas non plus perdre de vue que cet arrêt isolé, et peut-être même de circonstance, doit être ramené à ses proportions

réelles. La Cour aurait été la dernière à nier que les espaces maritimes sont des "territoires". En tant que tels, ils devaient donc être couverts par la réserve grecque à l'Acte d'arbitrage de 1928 qui visait les différends sur le statut "territorial". Par ailleurs l'arrêt se réfère au "changement fondamental de circonstances". La Partie sénégalaise à la présente instance assimile la succession d'Etats à un changement fondamental de circonstances, ce qui n'est peut-être pas tout à fait illégitime. Mais on peut se demander toutefois si l'invocation de cette circonstance ne doit pas être réservée seulement à l'Etat contractant originaire pour tout bouleversement qui se produirait chez lui, l'Etat successeur étant un Etat tiers non concerné par le traité ou par quelque changement chez lui. Quoi qu'il en soit, cette jurisprudence de 1978 inspirée assurément par une conception "territoriale" et géographique du plateau continental fondée sur la notion de prolongement naturel, est aujourd'hui dépassée par la définition juridique de ce plateau qui prend largement en compte le critère de distance.

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48. On ne peut pas considérer comme allant tout à fait de soi l'extension de l'*uti possidetis* aux frontières maritimes, alors même que celles-ci ne sont apparues que récemment en droit moderne de la mer. C'est pourquoi d'ailleurs le Tribunal de céans n'a pu relever que deux cas, et il le reconnaît (paragraphe 64 de la sentence), où des frontières maritimes ont été en jeu en Amérique latine, continent par excellence de l'*uti possidetis*⁷. Encore le premier cas, celui du canal de Beagle, n'est-il

⁷ Tout au plus pourra-t-on ajouter, vraiment en marge, une affaire entre le Nicaragua et le Royaume-Uni concernant la souveraineté du premier sur "la côte des Mosquitos et tranchée par une sentence arbitrale de l'Empereur d'Autriche François-Joseph I^{er}. Dans cette affaire le principe de l'*uti possidetis*, bien solidement implanté sur la terre ferme, est allé pour ainsi dire jusqu'à son extrême limite lorsqu'il parvint jusqu'à la côte des Indiens Mosquitos et jusqu'au port franc de San Juan del Norte, sans jamais s'aventurer au-delà, en mer. Le mémoire du Gouvernement du Nicaragua ("Exposé par le Gouvernement de Sa Majesté britannique", Paris, Typographie Georges Chamerot, 1879, en français) précisait que "le port de San Juan del Norte et la côte des Mosquitos ont appartenu, de tout temps, à la souveraineté de l'Espagne, aux droits de laquelle a succédé le Nicaragua" (p. 24). Et, faisant toujours application d'un *uti possidetis* exclusivement terrestre, le même mémoire ajoutait : "Tous les droits territoriaux de l'Espagne sur les anciennes possessions ont fait retour aux Etats qui se sont formés plus tard, et cette propriété doit être considérée comme appartenant à ces mêmes Etats..." (*ibid.*, p. 59). Le Royaume-Uni n'avait même pas accepté que la côte fût nicaraguayenne par succession d'Etats, à plus forte raison une quelconque portion d'espace maritime. Les conclusions du contre-mémoire du Royaume-Uni comportent un point 15 ainsi rédigé : "(15) *That the limits of the port of Greytown* (c'est le port de San Juan del Norte) *described in the decree of 20 February 1861* (c'est un décret du Nicaragua), *as extended three miles to the East and three to the West, from the central point of the City should be revised, and that the northern limits of the Port should be defined.*" (Tous les documents concernant cette affaire, écritures des Parties et sentence de l'Empereur d'Autriche, sont regroupés, certains en documents manuscrits en espagnol ou en allemand gothique, dans l'ouvrage récent "*Der Wiener Schiedsspruch von 1881* : e. Dokumentation zur Schlichtung d. Konfliktes zwischen Grossbritannien u. Nicaragua um Mosquitia (eingeleitet u. hrsg. von Günter Kahle unter Mitw. von Barbara Potthast.—Köln; Wien: Böhlau, 1983".)

nullement pertinent, la règle de l'*uti possidetis* n'ayant pas été appliquée, comme l'indique le Tribunal lui-même. Il ne reste donc plus qu'*un cas* isolé et atypique, celui de la baie de Fonseca, qui met en jeu un problème plutôt de *mer territoriale* et de *baie historique* et pour lequel la Cour centraméricaine de justice décida, selon le Tribunal de céans, que les limites avec la haute mer que la Couronne de Castille avait établies dans cette baie étaient dévolues en 1821 à la République fédérale d'Amérique centrale et, postérieurement, au Salvador, au Honduras et au Nicaragua.

49. L'affaire est très spécifique, intéressant un golfe ceinturé par trois Etats, le Honduras, El Salvador et le Nicaragua, et considéré comme une "baie historique" à l'instar "des baies de Chesapeake et Delaware aux Etats-Unis ou de celles de Conception, Chaleur et Miramiche au Canada", déclare l'arrêt de la Cour centraméricaine. Le golfe de Fonseca fut découvert au *xvi^e* siècle par les Espagnols et, à l'émancipation de l'Amérique centrale, cette possession fut transférée, indivise, au "patrimoine" de la République fédérale centraméricaine formée de *cinq* Etats. Le golfe de Fonseca constituait en réalité *une mer territoriale indivise*. Si l'*uti possidetis* avait réellement été appliqué à la frontière maritime entre cette baie et la haute mer pacifique, les cinq pays fédérés, et non pas seulement les trois côtiers (Honduras, El Salvador et Nicaragua) auraient chacun eu droit (je ne sais pas comment d'ailleurs) à une partie de cette baie indivise. Par la suite, lorsque la République fédérale fut dissoute, ce ne sont pas les trois Etats côtiers mais seulement deux d'entre eux, le Honduras et le Nicaragua, qui conclurent en 1960 un traité de partage de la baie. C'est un traité qui a déterminé leurs droits respectifs et non pas l'*uti possidetis*. La Convention pour la délimitation des frontières entre le Nicaragua et le Honduras a fixé en 1900 les frontières terrestres entre les deux pays ainsi qu'une ligne divisoire dans les eaux du golfe de Fonseca, considéré comme eaux territoriales et eaux d'une baie historique.

50. Je n'aperçois donc rien dans la sentence de la Cour centraméricaine du 9 mars 1917, rendue dans cette affaire très particulière du golfe de Fonseca, *dont les eaux étaient traditionnellement et intégralement assimilées aux territoires terrestres*, qui puisse indiquer clairement que la haute juridiction centraméricaine de San José de Costa Rica a entendu appliquer et consacrer le principe de l'*uti possidetis* aux frontières maritimes proprement dites.

51. Changeant de continent, la sentence du Tribunal de céans invoque "un autre précédent" (paragraphe 64) qui aurait été créé par la Convention anglo-danoise du 24 juin 1901 concernant les limites des pêcheries, qui, par succession du Danemark, est restée applicable à l'Islande jusqu'en 1951. La sentence prête un peu trop à l'opinion individuelle de sir Humphrey Waldock (*C.I.J. Recueil 1974*, p. 106). Il y aurait eu application de l'*uti possidetis* pour les frontières maritimes si en l'espèce la Convention anglo-danoise de 1901 avait été imposée automatiquement à l'Islande. Or tel n'est pas le cas. L'Islande, devenue indépendante, a négocié directement avec le Royaume-Uni un nouveau traité, en forme d'échange de lettres, en date du 11 mars 1961. Ainsi le

Royaume-Uni a conservé, pour peu de temps d'ailleurs, son activité traditionnelle de pêche dans les eaux proches de l'Islande non pas en vertu de l'*uti possidetis*, mais par accord entre les deux Parties.

52. Quant à la référence aux limites maritimes concernant l'Asie (Malaisie, Philippines et Brunéi), auxquelles le Tribunal de céans renvoie (paragraphe 63 *in fine*), elle n'est absolument pas pertinente. Il ne suffit pas d'affirmer que "les cartes géographiques de la Malaisie, des Philippines et du Brunéi, par exemple, présentent comme limites maritimes les lignes dont l'origine remonte à l'époque coloniale". Il faut surtout prouver que lesdites lignes ont été imposées à ces Etats nouvellement indépendants par application d'une règle supposée d'obligation de succéder aux traités coloniaux de délimitation maritime. La réponse est radicalement non. C'est par la voie conventionnelle que ces limites ont été acceptées par les Etats intéressés.

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53. Je passerai très rapidement sur la question soulevée par la Guinée-Bissau et selon laquelle un traité de frontière hérité par l'Etat successeur en vertu de l'*uti possidetis* implique en général une certaine ancienneté. La sentence décide en son paragraphe 68 *in fine* que "la Guinée-Bissau n'a pu prouver, au cours de cet arbitrage, l'existence d'aucune norme de droit international exigeant cette condition" (celle de la "durée" de l'accord en vue de son opposabilité). Il y a là une erreur. Tout d'abord la Guinée-Bissau n'a jamais soutenu devant le Tribunal "l'existence d'une norme de droit international". Elle a invoqué non pas une norme mais la logique de l'institution. Mais de plus et quoique postérieure à l'accord franco-portugais de 1960, la résolution 2625 (XXV) adoptée à l'unanimité par l'Assemblée générale des Nations Unies le 24 octobre 1970 et portant Déclaration sur les sept principes de droit international touchant les relations amicales et la coopération entre Etats conformément à la Charte, est applicable à l'espèce car elle ne faisait que codifier des principes coutumiers. Or cette déclaration avait tenu à préciser à deux reprises que le territoire d'une colonie est "*séparé et distinct*" de celui de la puissance administrante et le demeure aussi longtemps que ce territoire n'a pas obtenu son indépendance. Il est clair en effet que, sous l'empire de la Charte des Nations Unies, il n'est pas du pouvoir de la puissance administrante de disposer du statut territorial de la colonie, surtout dans la période dite "suspecte" où elle est en difficultés avec un mouvement d'indépendance, comme c'était le cas en Guinée-Bissau en 1960.

Ainsi l'Accord de 1960 paraît avoir disposé du statut territorial d'un territoire non autonome qui jouissait d'un droit "inhérent" à un espace maritime. Un tel droit est préexistant à toute délimitation.

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54. Le principe fondamental de l'effet relatif des traités ne permet de toute évidence de développer cet effet qu'entre les Parties contrac-

tantes, sauf exceptions légales limitativement prévues. La Guinée-Bissau n'existait pas en tant qu'Etat en 1960, date de la conclusion de l'accord considéré ici et il est donc clair qu'elle n'était pas un Etat partie à cet instrument. Dès lors, elle ne peut avoir que la qualité d'Etat tiers par rapport à l'accord en question. Ce statut est d'ailleurs dans la logique du droit international de la succession d'Etats, dont le principe de la *tabula rasa* signifie bien que l'Etat successeur aborde la succession *ex nihilo*, en n'accueillant un accord que par l'effet de sa volonté exprimée d'y succéder. La Guinée-Bissau est incontestablement un Etat tiers de ce point de vue.

55. Elle le serait, dans cette perspective, même si l'accord considéré avait été préalablement "reçu régulièrement dans le droit colonial en vigueur dans la province portugaise de Guinée. Or tel n'est même pas le cas, et la Guinée-Bissau n'avait même pas eu connaissance de l'existence de cet échange de lettres de 1960. La condition formelle de validité et d'opposabilité de l'accord dans ce territoire alors dépendant était sa publication en Guinée-Bissau par les autorités administrantes portugaises. Les Parties à la présente instance se sont opposées à diverses reprises sur la question de la notoriété et de la publicité de l'Accord de 1960 par les divers Etats ou entités concernés. Bien des démonstrations présentées sur ce point me paraissent superflues ou non pertinentes. Il importe peu que l'accord considéré ait été publié par la France, tant dans son *Journal officiel* que dans celui de la Communauté, ou par le Sénégal dans le *Journal officiel* de la Fédération du Mali⁸. Le propos exclusif ici est de savoir si, d'une manière ou d'une autre, l'accord considéré a bénéficié d'une notoriété et d'une publicité en territoire guinéen.

56. De ce point de vue, le seul qui devrait intéresser le Tribunal sur cette question, la situation est à la fois claire et édifiante. Tout d'abord, il n'est pas contesté par le Sénégal que l'échange de lettres n'a fait l'objet d'aucune publication officielle à Lisbonne de la part de la Partie contractante portugaise. Ce fait est déjà par lui-même assez inexplicable, même par une dérive constitutionnelle. Une condition de forme fait donc défaut. Je fais cette constatation sans me prononcer sur les conséquences juridiques internes ou internationales de cette imperfection juridique formelle. Je l'évoque tout simplement parce que Lisbonne est un des relais indispensables pour le passage de l'accord de l'ordre juridique métropolitain à celui de la province portugaise de Guinée. Dans ce relais "métropolitain", ou ce point d'appui, est inexistant.

57. Mais même s'il avait existé, il n'aurait pas suffi, à lui seul, à faire entrer l'accord franco-portugais dans l'ordre juridique colonial en vigueur en Guinée-Bissau. Car en effet, traditionnellement — et sur ce point le système juridique portugais ressemble au français pour

⁸ On remarquera au surplus que même cette publication à Dakar n'a pas empêché les autorités sénégalaises elles-mêmes d'ignorer l'existence de cet accord lorsqu'elles ont officiellement répondu à l'Ambassade d'Italie sur ce point comme suit : "Il n'existe pas d'accord international; les deux pays acceptent pour le moment le tracé de la frontière maritime héritée de l'époque coloniale, c'est-à-dire : le tracé au 272 à partir du point de chute de la frontière terrestre." (Contre-mémoire, vol. II A : Annexe 3.)

l'outre-mer —, un texte de loi adopté ou de traité conclu par la puissance administrante ne peut être automatiquement étendu à la colonie ou au territoire d'outre-mer, sans quoi les habitants de la métropole et ceux de la colonie auraient eu exactement les mêmes droits et les mêmes devoirs, ce qui n'aurait pas correspondu à la philosophie du système colonial. Pour qu'un texte pût trouver application dans un territoire non autonome, il devait y être expressément introduit dans le droit de ce territoire, pas seulement d'ailleurs par une simple publication de ce texte dans ce territoire, mais par une décision appropriée des autorités métropolitaines. Bref, le territoire non autonome était placé sous l'empire de ce qu'on appelait le *principe de spécialité législative* et le *principe de spécialité conventionnelle*; leur dénomination même est suffisamment évocatrice du régime législatif et conventionnel très spécial du territoire non autonome.

58. Or, à l'inexistence du "relais" métropolitain s'est ajoutée l'absence de toute décision d'application à la Guinée-Bissau et de toute publication d'ailleurs, si bien que l'Accord de 1960, conclu à Lisbonne, est resté en quelque sorte juridiquement "retenu" dans cette même capitale, comme s'il n'intéressait nullement le territoire guinéen qui en était pourtant le support, ou plus exactement comme si la puissance administrante entendait, contrairement à son propre droit, affirmer que l'application de l'accord ne regardait pas le peuple et le territoire guinéens mais dépendait exclusivement du pouvoir central de Lisbonne. Cela paraît si vrai que le Portugal non seulement n'a pas publié l'accord en Guinée-Bissau ni pris une décision réglementaire ou législative pour le déclarer applicable à ce territoire, mais paraît avoir tout fait pour rendre cet accord véritablement "étranger" à la Guinée-Bissau.

59. C'est ainsi que le décret portugais du 22 novembre 1963, qui aurait été une occasion idéale et exceptionnelle de rendre la Guinée-Bissau concernée par cet accord puisqu'il définissait ou redéfinissait le territoire de cette province portugaise, a complètement ignoré cet accord. A moins de considérer que le Portugal avait une conception du territoire qui se limitait au territoire terrestre en excluant complètement le territoire maritime (ce qui serait une justification supplémentaire et inattendue de la distinction entre frontières terrestres et frontières maritimes aux fins d'inapplication de l'*uti possidetis* à ces dernières !), force est de constater que la puissance administrante semblait avoir une conception qui lui était propre quant au destinataire final de l'accord. Pour le Portugal cet instrument exprimait *sa* souveraineté et *sa* responsabilité internationales, le territoire de Guinée-Bissau ne constituant qu'un point d'appui ou un support de cette souveraineté.

60. De même, le Gouvernement du Portugal ne semble nullement avoir cherché à mettre à profit l'adoption de son décret-loi du 27 juin 1967 fixant les lignes de base droites de la Guinée-Bissau, pour faire référence à cet échange de lettres du 26 avril 1960. On ne trouve pas la moindre trace de celui-ci même dans le préambule du décret-loi. Et pourtant si l'on pouvait à la rigueur considérer le décret de 1963 comme visant exclusivement le territoire terrestre, on ne peut plus en dire autant du décret-loi de 1967.

61. Il n'entre pas dans ma mission de rechercher l'explication de ce comportement du Portugal. Je me borne à le constater. De même, me contenterai-je de constater qu'après ces textes réglementaires de 1963 et 1967 qui concernaient directement la Guinée-Bissau, le Portugal a pris un texte intéressant, lui, un de ses organes centraux, en l'occurrence l'état-major de la marine nationale portugaise, sans pour autant viser non plus l'Accord de 1960. Il s'agit des instructions du pouvoir central de Lisbonne à sa marine de guerre, dites "Instructions militaires confidentielles", datées de 1971, et visant assez étrangement les deux "recommandations" du 10 septembre 1959, comme si ni l'une ni l'autre n'avaient été concrétisées par l'Accord du 26 avril 1960. Il y a là une énigme et selon toutes apparences une manière de méconnaître cet instrument, qui va au-delà de sa non-publication, comme s'il s'agissait d'une dénonciation de l'accord considéré.

62. Quelle que soit l'explication qu'on trouverait à ce comportement, il reste, et c'est l'essentiel ici, que le Portugal n'a procédé ni pour ce qui concerne son territoire métropolitain (aux fins d'application de l'accord par ses organes centraux) ni pour ce qui regarde sa province d'outre-mer directement intéressée, à une publicité officielle de l'accord. Je ne puis qu'en conclure que l'Accord du 26 avril 1960 est juridiquement inachevé. Cela suffit à bloquer, pour ce qui concerne cet instrument, le mécanisme de la succession d'Etats déclenché en 1974 par l'accession de la Guinée-Bissau à l'indépendance.

63. Mais de plus, à l'inexistence du "relais" juridique de Lisbonne, et à celle de l'autre relais dans la province coloniale, s'ajoute l'absence de tout relais établi par la Guinée-Bissau indépendante. Celle-ci, Etat successeur du Portugal, mais Etat tiers à l'accord particulier de 1960 qui n'était d'ailleurs jamais entré dans son ordre interne colonial, a appliqué par la déclaration générale de non-succession formulée par l'Assemblée populaire le 24 septembre 1973 le principe de la *tabula rasa* qui suppose les traités antérieurs effacés de son territoire. Du reste, sur ce point, la Guinée-Bissau n'a eu aucun mal à gommer l'Accord de 1960 dont on sait qu'elle ne pouvait le reconnaître faute même de le connaître et dont on a observé aussi qu'il n'y avait laissé aucune trace par la volonté du Portugal.

64. Par la suite, la Guinée-Bissau avait demandé au Portugal de lui communiquer la liste des accords conclus par lui et intéressant l'ancienne province coloniale. La Partie guinéenne a signalé, et la Partie sénégalaise n'a pas contesté, que la Guinée-Bissau a demandé le 3 janvier 1978 au Portugal des renseignements sur les engagements internationaux du Portugal concernant la Guinée-Bissau (PV/1, traduction, p. 5). En particulier, la Guinée-Bissau, qui venait d'avoir quatre mois auparavant des entretiens avec le Sénégal, en septembre 1977, sur la délimitation maritime entre les deux pays, a demandé au Portugal de la renseigner sur l'existence ou non d'un traité en ce domaine, sur la valeur juridique des recommandations du 10 septembre 1959, ainsi que sur les procédures internes portugaises de signature, ratification et publication du traité éventuel de délimitation maritime. Le Portugal n'a donné aucune réponse à ces demandes (PV/1, p. 6, traduction, et p. 74 à 113 du

texte original) jusqu'à la fin de la procédure orale en mars 1988 en la présente affaire.

65. Ce silence du Portugal est à rapprocher du comportement de la puissance administrante en 1963, 1967 et 1971, qui semblait ignorer l'Accord de 1960 pour des raisons inconnues. Un tel silence paraît bien se situer dans la logique de ces divers comportements antérieurs. Il y a là un faisceau d'éléments cohérents dont le résultat inévitable sera d'empêcher le déclenchement automatique du phénomène de la succession d'Etats. Un tel blocage de celle-ci par le fait du comportement du Portugal se conjugue avec le fait volontaire de non-succession souverainement décidé par la Guinée-Bissau. Le non-consentement à être lié par l'Accord de 1960 a connu trois manifestations significatives, l'une générale en 1973, lorsque l'Assemblée populaire de Guinée-Bissau a déclaré faire application du principe de la *tabula rasa* pour tous les traités antérieurs à l'indépendance, l'autre particulière, lorsque les dirigeants du nouvel Etat ont proclamé leur indépendance sans mentionner les limites maritimes du nouvel Etat dont la déclaration d'indépendance avait pourtant défini l'assiette territoriale d'une manière précise, la troisième enfin, également spécifique, lorsque le Gouvernement de la Guinée-Bissau a prié celui du Portugal de le renseigner tout particulièrement sur l'existence éventuelle d'un accord de délimitation maritime et n'a obtenu aucune réponse.

66. Dans leur déclaration d'indépendance les dirigeants de la Guinée-Bissau ont poussé le souci de la précision jusqu'à livrer des chiffres sur la superficie de leur territoire; ils auraient sûrement été aussi précis et n'auraient pu oublier ou négliger l'Accord de 1960 sur la limite maritime avec le Sénégal s'ils en avaient connu l'existence et accepté d'y succéder. Le territoire, dit cette déclaration, "couvre une superficie terrestre de 36 125 km² et les eaux territoriales, ce qui correspond à la zone désignée dans le passé comme colonie de Guinée portugaise". Pour aussi assimilable au territoire terrestre qu'elles le soient en raison du plein exercice de la souveraineté sur leur étendue, la mention des "eaux territoriales" dans cette déclaration n'en témoigne pas moins du souci évident des dirigeants de la Guinée-Bissau de ne pas négliger le milieu maritime. Ils auraient de ce fait fait référence à la limite en mer avec le Sénégal si, la connaissant, ils avaient eu l'intention d'y succéder. Tenus par leur déclaration générale de *tabula rasa*, ils se devaient alors d'y apporter une exception expresse et claire s'ils avaient "connu" et "reconnu" l'accord.

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67. C'est dire, pour toutes les raisons évoquées ci-dessus, que je regrette de ne pouvoir suivre le point de vue exprimé aux paragraphes 70 à 76 de la sentence. On y décrit abondamment la publicité reçue par l'Accord de 1960 dans "les milieux internationaux", ainsi qu'en France, au Mali et au Sénégal. Ces développements-là sont strictement sans pertinence, car :

a) "La publicité et l'efficacité interne d'un traité dans une colonie conditionnent la succession de l'Etat nouvellement indépendant à ce

traité" (PV/14, p. 164). C'est bien cela l'"inopposabilité". Cela signifie que le problème n'est pas la connaissance de l'accord par les "milieux internationaux" (paragraphe 70 de la sentence), ou par la France, le Sénégal ou le Mali (paragraphe 72 de la sentence), mais par la Guinée-Bissau à laquelle on oppose ledit accord. Or, sur ce point, la sentence n'apporte pas et ne peut pas apporter la preuve de la connaissance du traité par la Guinée-Bissau, faute de sa publication dans ce territoire (en plus de la non-publicité dans le territoire métropolitain).

b) La Guinée-Bissau n'a jamais soutenu que "l'Accord du 26 avril 1960... a... été conclu dans le secret" (début du paragraphe 72 de la sentence). Elle affirme, et c'est la réalité, que le comportement du Portugal (absence de publication tant à Lisbonne qu'à Bissau, abstention soigneuse de citer l'accord au moins à deux importantes occasions dans deux textes fondamentaux où il aurait dû normalement figurer et intéressant la Guinée-Bissau) a abouti à entourer cet accord d'une grande discrétion, du côté portugais, tant au Portugal que dans la colonie.

c) Les références données au paragraphe 72 sont donc sans pertinence et auraient dû rester étrangères à la sentence. Les publications qu'elles visent ont au surplus été faites dans des pays étrangers et dans des langues étrangères à la Guinée-Bissau.

68. Il est clair, certes, que le Portugal n'avait pas une obligation imposée par le droit international de publier tant à Lisbonne qu'à Bissau l'Accord de 1960 (cf. le paragraphe 74 de la sentence). Il est exact qu'il s'agissait seulement d'une obligation de droit interne portugais. Si la Guinée-Bissau avait engagé une action en responsabilité *contre le Portugal* pour cette violation, le Tribunal arbitral aurait été en droit de la débouter car il ne s'agit pas d'une obligation de droit international. Mais la situation est toute différente ici; la Guinée-Bissau ne revendique rien contre le Portugal; elle se borne à se défendre dans une instance et à se protéger contre un texte que le Portugal s'est abstenu de lui faire connaître et qu'un Etat tiers par rapport à elle, le Sénégal, lui oppose. Vouloir traiter de la même manière ces deux situations différentes n'est pas correct. La Guinée-Bissau n'a pas demandé au Tribunal de condamner le Portugal et ce, ni pour violation d'une obligation de droit international (qui d'ailleurs n'existe pas), ni pour manquement à une obligation de droit interne portugais (pour lequel le Tribunal est d'ailleurs incompétent). Par contre, elle demande bien au Tribunal de prendre cette violation du droit interne portugais à tout le moins comme *un fait* et de tirer de la constatation de ce simple fait les conséquences évidentes qui en découlent quant à l'inopposabilité de l'accord (et non quant à sa nullité ou son inexistence). Je ne vois pas comment il serait possible d'esquiver ce fait et de ne pas tenir compte de cet élément, capital en l'espèce, de l'ignorance de l'accord par la Guinée-Bissau.

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69. Je dois à présent vérifier si l'inopposabilité à la Guinée-Bissau de l'échange de lettres du 26 avril 1960, que je déduis tant de l'inap-

plicabilité du principe de l'*uti possidetis* aux délimitations maritimes que de l'absence de publicité, trouve confirmation ou infirmation dans la pratique étatique subséquente à l'accord en question. Du fait que je n'examine pas le problème de la validité de l'accord entre toutes les Parties contractantes, je n'envisagerai pas la question de la confirmation de cette validité par le comportement subséquent de la France, du Portugal ou du Sénégal. Il importe donc de limiter l'examen à la pratique de la Guinée-Bissau, la seule pertinente dès lors qu'il s'agit de vérifier uniquement l'inopposabilité de l'Accord de 1960 à cet Etat.

70. Mais avant de procéder à cet examen, je voudrais rappeler comme suit le contexte juridique et l'esprit dans lequel cette analyse de la pratique de la Guinée-Bissau me paraît devoir être entreprise :

a) Il est plus qu'évident qu'un Etat ne peut imposer une délimitation territoriale unilatéralement à un autre Etat (C.I.J., affaire *Plateau continental Tunisie-Libye*, Recueil 1982, paragraphes 87, 90, 92 et 95; affaire *Golfe du Maine*, Recueil 1984, paragraphes 81 et 112). Le tribunal des deux Guinée a considéré comme contraires au droit international et inopposables à la Guinée-Bissau les décrets par lesquels le Président de la République de Guinée, M. Sékou Touré, prétendait fixer la frontière maritime internationale entre son pays et la Guinée-Bissau en suivant des parallèles. Me référant à un cas pourtant moins radical, je ne partage pas pour autant l'opinion individuelle du juge Ago qui, en l'affaire *Plateau continental Tunisie-Libye*, 1982, avait estimé que la réglementation adoptée le 16 avril 1919 par le Gouvernement italien de la Tripolitaine et de la Cyrénaïque *délimitait* la frontière maritime entre la Tunisie et la Libye, du seul fait que la voix de la Tunisie ne s'était pas élevée pour s'y opposer. Lorsqu'il s'agit d'une frontière, qu'elle soit maritime ou terrestre d'ailleurs, officiellement reconnue comme telle, on doit nécessairement être plus exigeant en raison de l'importance politique de l'opération. En tout cas, l'établissement d'une frontière doit résulter d'un accord et ne pas se fonder fragilement sur l'absence d'opposition de la part de l'une des parties;

b) Dans l'évaluation soigneuse de la pratique ultérieure des Etats, il faut rappeler que jamais une pratique ne peut aboutir à créer des effectivités dans le domaine maritime comme elle pourrait en établir dans le domaine terrestre;

c) Comme l'a dit la Cour internationale de Justice dans son arrêt de 1969 en l'affaire *Plateau continental de la mer du Nord*, "l'acquiescement... suppose... une acceptation claire et constante" (C.I.J. Recueil 1969, p. 26, paragraphe 145). La pratique d'un Etat n'engendre de droits et d'obligations que dans la mesure où elle s'avère suffisamment uniforme, constante et non contradictoire pour fonder l'existence d'un accord explicite;

d) Enfin, nous croyons appliquer le droit là où nous ne créons parfois qu'un climat d'un saisissant surréalisme. C'est ce qui risque de se produire en particulier si on applique les mêmes critères pour déceler et analyser la pratique dans deux Etats aussi différents qu'un Etat développé et un autre qui ne l'est pas. La pratique exprime réellement un choix, une volonté et une rationalité lorsqu'elle est le fait d'un Etat

développé maîtrisant son arsenal juridique, connaissant parfaitement l'état de ses engagements internationaux et possédant les moyens matériels et technologiques appropriés pour les comportements qu'il adopte en toute connaissance de cause. Par contre, est-on certain que la pratique reflète effectivement un choix et une volonté libres lorsqu'elle est le fait de pays écrasés par un sous-développement en tous domaines, ne possédant parfois même pas dans leur administration centrale un service juridique, si modeste ou nominal soit-il, ne disposant souvent pas des archives coloniales, ni d'agents en nombre et en qualification, ni encore moins de moyens matériels ou techniques pour connaître leurs droits et les exercer en fait conformément à leurs intérêts ? Dans ce contexte réel, je n'ai nullement été surpris par exemple que la Guinée-Bissau n'ait jamais connu le texte de l'Accord de 1960. De même, n'ai-je eu à aucun moment le moindre doute sur la parfaite bonne foi du Sénégal à travers ses attitudes successives, quand d'abord il parut ignorer l'existence de l'Accord de 1960 — tant en 1977 lors des premières négociations avec la Guinée-Bissau que dans ses correspondances contradictoires avec l'Ambassade d'Italie — et lorsque, ensuite, il découvrit et opposa à la Guinée-Bissau l'existence de cet accord. Il y a là quelques exemples qui expriment certaines réalités de beaucoup de pays en voie de développement qui, confrontés à de dures difficultés de toute nature, agissent ponctuellement dans le quotidien bien plus pour assurer une survie précaire que pour faire valoir intégralement leurs droits ou en créer correctement d'autres. De telles réalités recommandent une grande prudence, voire une sérieuse réserve, pour accueillir la pratique comme source de droit en de telles circonstances. Ce serait un droit bien fragile que celui qui reposerait exclusivement sur une pratique observée dans ces conditions.

71. C'est sous le bénéfice de ces observations que je voudrais analyser la pratique subséquente de la Guinée-Bissau. Ce qui frappe c'est que tout laisse penser que la Guinée-Bissau n'a jamais connu l'existence de l'Accord de 1960 avant que le Sénégal ne l'invoque devant elle et qu'elle n'adresse en 1978 une note au Portugal le priant de l'informer sur d'éventuelles négociations à son sujet. Tout examen de la pratique de la Guinée-Bissau depuis la proclamation de son indépendance jusqu'aux premières négociations sénégal-guinéennes (1973-1977) me paraît donc s'exclure de lui-même, comme me paraît s'exclure aussi tout examen portant sur la période postérieure à la cristallisation du différend (1985 à aujourd'hui). C'est donc de l'automne 1977 au printemps 1985 qu'il faut examiner le comportement de la Guinée-Bissau. Il est clair, et ce n'est pas une surprise car on pouvait s'y attendre, que rien dans le comportement de la Guinée-Bissau ne permet d'accréditer l'idée qu'elle a accepté la ligne d'azimut de 240° établie par l'Accord de 1960.

72. La Partie sénégalaise a cependant fait valoir que la Guinée-Bissau a respecté cette ligne pendant cette période et a considéré ce fait comme une reconnaissance de l'Accord de 1960. L'argument est dangereux. S'il fallait le suivre, cela signifierait que la bonne foi ne peut jamais exister entre Etats et qu'il ne faut jamais la présumer dans les

relations internationales. Et, pourtant, quoi de plus normal, en tout cas de plus recommandable, que ce devoir d'abstention de l'Etat en tout ce qui peut préjuger une négociation ou une décision juridictionnelle à venir ? Je ne vois pas de raison — et la Partie sénégalaise n'en a avancé aucune — de suspecter la Guinée-Bissau d'un comportement contraire à celui de tout Etat qui est tenu de bonne foi de respecter la zone litigieuse en attendant l'issue du règlement en cours.

73. Je ne peux que tenir pour irréprochable l'attitude de la Guinée-Bissau quand, pendant toute cette période, elle s'est abstenue d'entreprendre une quelconque activité dans la zone litigieuse en attendant l'issue du différend. Attitude irréprochable et aussi parfaitement cohérente car, durant la même période, la Guinée-Bissau a élevé des protestations chaque fois qu'elle apprenait que le Sénégal déployait quant à lui des activités dans cette zone. Ces deux attitudes de la Guinée-Bissau se complètent et s'éclairent mutuellement. En respectant la ligne des 240°, cet Etat n'a pas acquiescé à l'Accord de 1960 puisqu'il a fait des représentations au Sénégal pour des activités dans la zone litigieuse.

74. Les Parties se sont livrées à de longues démonstrations pour se répondre mutuellement sur de nombreux points touchant la pratique subséquente, mais ne me paraissent pas pertinents. J'en évoque quelques-uns à titre surabondant. La Partie sénégalaise a en particulier soutenu que "les comportements de l'Etat prédécesseur peuvent également lier l'Etat successeur" (PV/9, p. 104), en interprétant la sentence Palmas du 4 avril 1928 et celle du Tribunal des deux Guinée du 14 février 1985. Autrement dit, un Etat successeur qui a dûment exprimé son refus de succéder à un accord déterminé reste néanmoins lié... par un tel accord du fait de la pratique de son prédécesseur fondée elle-même sur cet accord ! C'est d'abord remettre en cause le principe de la *tabula rasa*, un des principes fondamentaux du droit de la succession d'Etats en matière de traités, parce qu'en effet, dans cette conception, l'Etat successeur, quoi qu'il fasse, ne parvient jamais à se défaire d'un accord conclu par son prédécesseur : s'il l'évacue par la grande porte, par une déclaration de non-succession, cet accord l'envahit par la fenêtre, grâce à une succession forcée à la pratique subséquente de l'Etat prédécesseur. Et la situation serait la même, selon le Sénégal, si l'accord n'avait pas existé du tout : "Quand bien même l'Accord de 1960 n'aurait pas existé, la Guinée-Bissau se serait trouvée liée par la frontière en mer de 240° du cap Roxo en raison du seul comportement notoire du Portugal" (PV/9, p. 104). Cette thèse est inacceptable parce que aboutissant à un résultat absurde et pour de nombreuses autres raisons dont la moindre est que "qui peut le plus peut le moins"; si l'Etat successeur est admis à invoquer le principe de la *tabula rasa* pour écarter un accord, on ne voit pas comment il pourrait être lié par une simple pratique, ou par n'importe quelle autre conséquence de cet accord.

75. Au surplus, ce serait faire en la circonstance grand cas de la pratique erratique, incohérente et sans épaisseur du Portugal, lequel n'a d'ailleurs jamais invoqué l'accord dans ses relations internationales, et dont les textes pertinents de droit colonial se rapportant à la Guinée-Bissau ont été pris dans l'ignorance ou la méconnaissance de cet accord.

Si le droit international tire, assez prudemment du reste, des conséquences juridiques de la pratique des Etats, la démarche ne peut être légitime que pour autant qu'elle concerne les *Etats auteurs et acteurs directs* de cette pratique. Hors de là, et en particulier s'il s'agit d'*Etats successeurs*, on débouche inévitablement sur des absurdités.

76. Le Sénégal s'est ainsi référé, entre autres, à la pratique pétrolière de la Guinée-Bissau, dans laquelle il aperçoit deux phases. Durant la première (1973-1977), le nouvel Etat est resté silencieux et ce silence est interprété par le Sénégal comme un assentiment au comportement de l'ancienne puissance administrante. Outre qu'il vient d'être répondu à cet argument, il faut observer que le silence est d'interprétation périlleuse en droit et que s'agissant de pratique relative à un traité de frontière, ce silence paraît insuffisant. Durant la seconde phase, le Sénégal considère que le respect par la Guinée-Bissau de la ligne de 240° dans les contrats pétroliers (accord Petrominas du 9 février 1984) constitue une pratique confirmative. Il a été répondu à cet argument aussi, qui perd de vue le principe de la bonne foi avec laquelle un Etat doit agir pour respecter la zone litigieuse en attendant l'issue du différend.

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77. Au terme de l'analyse ci-dessus, il m'apparaît que l'échange de lettres franco-portugais du 26 avril 1960 est un traité pour lequel la Guinée-Bissau n'a pas exprimé son consentement à être liée. De ce fait, il ne lui est pas opposable en tant que "traité" d'abord. Il m'apparaît ensuite que sa nature de traité établissant une "frontière maritime" ne permet pas de le placer sous l'empire du principe de l'*uti possidetis juris* et ne saurait donc lui valoir de la part de la Guinée-Bissau une succession automatique et obligatoire par exception aux principes de la souveraineté des Etats, du libre consentement à être lié par un traité et de l'effet relatif des traités.

78. Etant ainsi parvenu à la conclusion que l'échange de lettres franco-portugais de 1960 n'est pas opposable à la Guinée-Bissau et ne peut donc faire droit entre celle-ci et le Sénégal pour la délimitation de leur frontière en mer, je me dois à présent de procéder *ex novo* à cette délimitation.

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79. La première question qui se pose est celle du droit applicable pour réaliser une telle opération. L'Accord de 1960 n'étant pas opposable, ni cet accord ni les sources de droit auxquelles il renvoie ne seraient pertinents en l'espèce. En conséquence, et en particulier, on ne peut prendre en considération les "principes contenus dans le rapport de la Commission du droit maritime des Nations Unies et des textes des articles 1, 2 et 4 de la Convention sur la mer territoriale et la zone contiguë conclue à la Conférence sur le droit de la mer qui a eu lieu à

Genève en 1958⁹. Ce passage déterminait le droit appliqué pour conclure l'Accord de 1960 et non pas le droit applicable au présent litige désormais sans lien avec ledit accord. Le rejet de l'Accord de 1960 entraîne le rejet du droit qui a servi à le conclure¹⁰.

Et de toutes les façons l'accord ne pouvait pas concerner la zone exclusive, inconnue à l'époque. Par ailleurs le Sénégal, qui avait ratifié les Conventions de Genève de 1958, avait dénoncé d'abord le 9 juin 1971 la Convention à laquelle il est fait référence ci-dessus et relative à la mer territoriale et à la zone contiguë et ensuite le 1^{er} mars 1976 la Convention sur le plateau continental, tandis que la Guinée-Bissau n'a jamais adhéré à aucune de ces Conventions, de sorte que les Parties au présent différend sont toutes deux étrangères à ce droit conventionnel international.

80. Quant à la Convention de Montego Bay du 10 décembre 1982 sur le droit de la mer, la Guinée-Bissau et le Sénégal l'ont ratifiée tous deux; mais elle n'est pas encore entrée en vigueur. Il est clair cependant que cette particularité ne les fait nullement échapper à l'application de cette convention. Celle-ci doit s'imposer à eux non pas en tant qu'ensemble de règles conventionnelles internationales (puisque non encore entrées en vigueur), mais en tant qu'ensemble de règles acceptées par eux. Certes, en l'espèce les deux Parties ne sont pas d'accord entre elles et se contestent mutuellement le droit d'invoquer telle ou telle règle ou à l'inverse la liberté de s'en affranchir. Mais l'opération de ratification de la Convention par chacune des deux Parties signifie disponibilité de chaque Partie à l'appliquer à toute autre qui accepterait d'en faire autant. La ratification représente un engagement définitif et final qui, en toute bonne foi, impose à chacun des deux Etats de se considérer comme obligatoirement lié à l'égard de l'autre par la Convention.

81. Mais pour couper court à toute discussion, il faut observer que le Sénégal et la Guinée-Bissau ont prié le Tribunal de céans de trancher le présent différend "conformément aux normes du droit international". Cela justifie à l'évidence de tenir compte des règles coutumières et de tout ce qui est devenu coutumier dans le droit conventionnel international de la mer tant de 1958 que de 1982, et quelles que soient les positions particulières ou le statut juridique spécifique de chaque Partie à l'égard de l'une ou de l'autre Convention. Déjà, le tribunal franco-britannique dans l'affaire *Mer d'Iroise* avait, dans sa sentence du 30 juin 1977, déclaré devoir "prendre en considération l'évolution du droit de la mer", et, de son côté, la Cour internationale de Justice, dans l'affaire *Délimitation du plateau continental Tunisie/Libye*, avait estimé qu'elle aurait "tenu compte d'office des travaux de la Conférence même si

⁹ Compte tenu des conversations du 10 septembre 1958, fait par le Ministre portugais des affaires étrangères, point II, par. A.

¹⁰ On aura sans doute observé que le droit de référence pour les deux Parties contractantes de l'Accord de 1960 est constitué par l'une, et non par toutes les Conventions de Genève de 1958, la seule convention sur la mer territoriale et la zone contiguë, ce qui pourrait confirmer que les Parties non seulement n'avaient pas en vue la zone économique exclusive, à l'époque inconnue, mais ne voulaient en fait, au départ, délimiter conventionnellement que la mer territoriale et la zone contiguë.

les Parties n'en avaient rien dit dans le compromis" (lequel l'avait effectivement priée de les prendre en considération). Les juridictions internationales, tant arbitrales que judiciaires, ont donc pris en compte *ex officio* les règles coutumières du droit de la mer dans son "évolution" et à travers les "travaux" de la Conférence. A plus forte raison doit-on retenir le *texte* définitif de ces "travaux" concrétisant cette évolution, chaque fois que ce texte recèle une règle coutumière.

82. Dès lors, il n'est pas nécessaire de se prononcer sur des questions, devenues secondaires dans cette perspective, et soulevées par l'une des Parties à l'encontre de l'autre. C'est ainsi que tout examen paraît superflu sur le point de savoir si le droit de dénonciation unilatérale par un Etat d'un traité multilatéral est ou non possible alors que le traité considéré ne l'a pas prévu, comme c'est le cas pour les Conventions de Genève de 1958.

83. En conclusion, le Tribunal ayant été prié de juger conformément aux normes de droit international, le droit applicable est bien ce droit international coutumier, appliqué, interprété et développé par les décisions judiciaires et arbitrales. En fin de compte, les deux Parties au présent différend sont d'accord, somme toute, sur le droit applicable, lorsque l'une considère qu'il se ramène à la "recherche d'une solution équitable au moyen de principes équitables, l'équidistance étant une méthode parmi tant d'autres pour parvenir à une telle solution" (Contre-mémoire du Sénégal, paragraphe 330) et que l'autre Partie en convient parfaitement (Réplique de la Guinée/Bissau, p. 275).

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84. Il importe de déterminer la zone litigieuse le plus simplement possible. Elle me paraît tout naturellement délimitée par les prétentions des Parties consignées dans leurs conclusions respectives : au sud, il s'agit de la ligne des 240° partant du phare du cap Roxo et obtenue par application de l'échange de lettres franco-portugais du 26 avril 1960 telle que la demande la République du Sénégal; au nord, c'est une ligne qui partirait du cap Roxo et qui aurait pour direction un parallèle d'azimut 270°, telle que semble la demander la République de Guinée-Bissau. C'est à l'intérieur de ce triangle représentant la zone disputée que la ligne séparatrice des domaines maritimes respectifs des deux Parties devra être tracée.

85. La zone litigieuse est bien celle comprise entre les lignes d'azimuts 270° et 240° qui situent les prétentions extrêmes des deux Parties à partir du cap Roxo¹¹.

¹¹ Les prétentions du Sénégal sont bien déterminées : c'est la ligne des 240° fixée par l'accord franco-portugais de 1960; celles de la Guinée-Bissau sont nécessairement indéterminées car elle réclame une délimitation *ex novo* et attend précisément du Tribunal qu'il fixe une ligne. Toutefois, la vision que la Guinée-Bissau croit avoir d'un résultat équitable de la délimitation l'a poussée à proposer au Tribunal des chiffres qui, au fil de l'argumentation, se situent dans une fourchette entre 262° et 270°, sans d'ailleurs jamais atteindre ce dernier chiffre maximal correspondant à un parallèle. Je le prends ici à titre indicatif comme limite extrême.

La ligne séparatrice que je dois tracer se situera donc nécessairement à l'intérieur de l'angle formé par ces deux lignes d'azimuts 270°/240°. Mais alors, il peut paraître étrange et même contraire à l'équité que la position de la ligne soit ainsi par avance enfermée dans un angle défini par les Parties, c'est-à-dire qu'elle soit "prédéterminée" alors même que je suis invité à procéder à une délimitation *ex novo* dont ni les Parties ni moi-même ne pouvons connaître le résultat avant même toute application des principes équitables aux circonstances pertinentes de l'affaire. Cela paraîtrait une manière d'orienter le choix des arbitres ou de dicter leur solution, cette limitation de la liberté d'appréciation et de jugement étant incompatible avec la fonction juridictionnelle. L'hypothèse dans laquelle une ligne "produite" par application des principes équitables du droit moderne de la mer se situerait soit en deçà de 240°, soit au-delà de 270°, serait alors embarrassante pour l'arbitre comme pour les Parties. Il naîtrait par là un conflit entre les exigences de l'équité qui imposeraient en ce cas une ligne en dehors de cet angle 240°/270° et les demandes respectives des Parties au-delà desquelles l'arbitre ne peut se prononcer sans enfreindre le principe *ultra petita*. En cette situation, on ne doit pas perdre de vue que l'arbitre est tenu par les termes du compromis et par ceux des conclusions des Parties. Ce sont les uns et les autres qui assignent et déterminent sa mission sans laquelle il ne pourrait exister ni délimitation équitable, ni délimitation de quelque nature que ce soit.

86. Cependant, avant de se demander si le conflit envisagé dans l'hypothèse embarrassante considérée ci-dessus est soluble et comment il peut l'être, il faut savoir si un tel conflit peut effectivement surgir dans la réalité concrète. Car chacune des deux Parties considère que sa solution est équitable, soit à la suite de l'Accord de 1960, soit par application de principes et méthodes appropriés. Il est donc hautement du domaine du raisonnable d'escompter que la solution équitable à laquelle l'arbitre doit parvenir en toute indépendance de jugement, se situera nécessairement quelque part entre les prétentions extrêmes des deux Parties et nullement ailleurs. Les deux Parties ont travaillé devant le Tribunal sous le contrôle critique et vigilant l'une de l'autre. Il est raisonnable de penser qu'elles ont balisé toutes les plages du possible pour les arbitres. Il reste malgré tout que la manière dont le juge ou l'arbitre est amené à apprécier l'équité d'une solution se trouve limitée en fait par la volonté des Parties elles-mêmes.

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87. Bien entendu, cette zone disputée à laquelle je me dois de limiter mon examen ne se confond nullement avec l'ensemble plus vaste des domaines maritimes des deux Parties. Celui de la Guinée-Bissau est compris entre une ligne encore indéterminée située quelque part dans la zone litigieuse et une seconde ligne coïncidant avec l'azimut de 236° au départ du point de chute de la frontière terrestre entre la Guinée-Bissau et la Guinée (frontière tracée par la sentence arbitrale du 14 février 1985).

88. Quant au domaine maritime du Sénégal, il a la particularité d'être constitué par deux espaces très distincts, l'un situé en deçà de la frontière maritime sud-gambienne et représenté par tout ou partie de la zone disputée selon la sentence du Tribunal de céans et l'autre correspondant à une tout autre zone s'étendant au-delà de la frontière maritime nord-gambienne et se poursuivant jusqu'à la limite maritime pour l'instant indéterminée entre le Sénégal et la Mauritanie¹².

Cette situation d'un Sénégal possédant deux domaines maritimes séparés très distinctement par le domaine d'un autre État est assez exceptionnelle dans le monde sans être toutefois unique. Dans la mer des Caraïbes, le domaine maritime des Pays-Bas (au titre des îles d'Aruba, de Curaçao et de Bonaire) scinde celui du Venezuela, ainsi que celui de la République dominicaine; une situation analogue est observable entre les Antilles françaises et la même République dominicaine; dans le golfe arabo-persique, le domaine maritime de l'Émirat d'Ajman sépare en deux celui de l'Émirat de Sharjah; sur l'Atlantique, l'espace maritime portugais divise en deux celui de l'Espagne; en Méditerranée, le domaine maritime de la Principauté de Monaco interrompt celui de la France; il en est de même de toutes les enclaves comme Hong Kong ou Singapour ou Gibraltar ou Ceuta. Mais il est incontestable que le cas du Sénégal est le plus typique et le plus saisissant sans doute à cause du fait que les frontières maritimes gambiennes sont constituées par deux parallèles qui hachent au couperet les espaces maritimes du Sénégal.

89. Contrairement à cette réalité, le Sénégal a plaidé l'*unité* de son territoire maritime, en enclavant le domaine maritime de la Gambie, apparemment, d'une part, pour mieux justifier la prise en compte par le Tribunal de la longueur de l'ensemble du littoral sénégalais et, d'autre part, pour mieux vérifier le caractère équitable de la ligne des 240° par un calcul de proportionnalité entre les longueurs de côtes et les surfaces maritimes. Il a en effet soutenu que "la zone économique gambienne se trouve complètement enclavée dans celle du Sénégal, et de façon

¹² Le Sénégal a soutenu avoir établi conventionnellement avec la Mauritanie la frontière maritime qui sépare ces deux États. Le document produit par lui devant le Tribunal, outre qu'il constituait un document "nouveau" sur le plan de la procédure, et qu'il était par endroits illisible, n'était en réalité qu'un simple procès-verbal d'une réunion ministérielle tenue en janvier 1971 à Saint-Louis-du-Sénégal et poursuivie à Nouakchott. A la section VI de ce procès-verbal consacrée à la "détermination et délimitation de la frontière maritime", on lit que "la frontière maritime sera déterminée par la normale à la côte de l'océan Atlantique à partir de la borne définie ci-dessus". Cette borne est celle qui était prévue par le décret français du 8 décembre 19... (33 ou 35 ?, chiffres illisibles) et qui devait être construite sur l'emplacement des ruines de la "maison G..." (nom illisible). Il faut donc observer :

- i) Qu'il ne s'agit pas d'un traité;
- ii) Que ce simple procès-verbal illisible n'est même pas signé et qu'il peut n'avoir constitué qu'un simple projet dans des négociations qui n'auraient pas abouti;
- iii) Qu'il comporte d'ailleurs un paragraphe 4 précisant qu'"après *approbation* de ces *conclusions*, les deux gouvernements désigneront une commission d'experts qui devra matérialiser sur le terrain le tracé *proposé*, à une date dont le choix est laissé à l'initiative du Gouvernement du Sénégal";
- iv) Et que le Sénégal n'a apporté aucune preuve de l'"approbation" de cette "proposition" de tracé par les deux gouvernements.

nette... La zone économique du Sénégal est bien d'un seul tenant et (...) la présence de la Gambie n'introduit aucune rupture incontournable (Réplique de la Guinée-Bissau, p. 329)" [PV/12, p. 211].

90. Ce point de vue me paraît infondé. L'espace maritime prolongeant vers le large celui de la Gambie au-delà de 200 milles ne peut pas revenir au Sénégal et permettre à celui-ci d'assurer la jonction entre ses deux domaines maritimes de part et d'autre de la Gambie. Si le Sénégal se réfère bien à la zone économique exclusive, l'espace considéré vers le large au-delà des 200 milles ne peut appartenir ni à la Gambie ni au Sénégal; il relève soit de la haute mer, soit de la zone économique de l'Etat en vis-à-vis, le Cap-Vert, puisque la largeur de la zone économique exclusive ne saurait excéder les 200 milles. Et, si l'on se réfère au plateau continental, cette même étendue située au-delà de 200 milles en prolongement du domaine gambien ne pourrait pas non plus appartenir au Sénégal. Ou bien elle reviendrait à la Gambie si son plateau continental peut géologiquement se poursuivre au-delà des 200 milles (à supposer d'ailleurs que les droits de l'Etat en vis-à-vis, le Cap-Vert, le permettent), ou bien elle relèverait de la zone internationale des fonds marins constituant le patrimoine commun de l'humanité. Qu'il s'agisse donc de la zone économique exclusive ou du plateau continental, on ne voit pas quelle peut être la base du titre juridique du Sénégal. Ainsi l'espace gambien représente une barrière étanche scindant en deux le domaine maritime sénégalais.

91. Quoi qu'il en soit, même si l'espace maritime du Sénégal était d'un seul tenant, cela ne serait pas une circonstance propre à faire prendre en considération la totalité de la longueur du littoral sénégalais pour la solution de la présente espèce. Comme je le préciserai plus loin, il convient de prendre en compte uniquement la côte pertinente dans l'espèce considérée et celle-ci est ici le littoral de la Casamance. Par ailleurs, pour vérifier *a posteriori* l'équité du résultat obtenu, il n'est pas nécessaire de se référer à la superficie totale des deux domaines maritimes du Sénégal de part et d'autre de celui de la Gambie. La surface de la zone sud est la seule pertinente à cette fin, car l'équité exige seulement qu'un kilomètre de côte du Sénégal puisse avoir approximativement le même pouvoir générateur de zones du plateau continental qu'un même kilomètre de côte de la Guinée-Bissau.

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92. La détermination du droit applicable à laquelle il a été procédé aux paragraphes 79 à 83 ne fournit en matière de délimitation maritime que certains principes de base visant à réaliser un but essentiel qui est d'"aboutir à une solution équitable" (articles 74 et 83 de la Convention de Montego Bay). C'est ce que le Tribunal arbitral franco-britannique de 1977, puis la Chambre de la Cour en l'affaire *Golfe du Maine* ont appelé la "norme fondamentale". Les règles applicables sont celles qui permettent de considérer que des étendues de sol sous-marin adjacentes aux côtes d'un Etat font partie du plateau continental de celui-ci (règles sur le titre juridique) et celles qui permettent, au vu de titres juridiques

concurrents avancés par des Etats voisins, de procéder à une délimitation entre ces Etats (règles de délimitation proprement dites). Les facteurs à prendre en considération pour procéder à cette délimitation ne sont plus qualifiés expressément d'“équitables”, puisqu'il ne s'agit pas là d'une qualité intrinsèque mais d'un caractère qui se vérifie dans un contexte déterminé. L'adjectif équitable semble ainsi réservé au résultat au point qu'il a été soutenu que l'équité est passée du plan des moyens à celui du résultat.

93. Cette évolution a rencontré de sévères critiques dans la doctrine, d'ailleurs curieusement adressées plus souvent au juge ou à l'arbitre qu'au législateur lui-même, qui en est pourtant le vrai responsable. On a pu regretter que soient détruits “les acquis de la construction juridique de 1958, de l'arrêt de 1969 et de la sentence de 1977 par l'emploi d'une formule vide de contenu”¹³. On a parlé de l'“impressionnisme juridique” dont la Cour aurait fait preuve dans l'affaire *Plateau continental Tunisie-Libye*¹⁴. On a déploré le caractère intuitif et arbitraire de ses jugements¹⁵. Mais c'est le législateur international lui-même qui a conféré au juge et à l'arbitre un tel pouvoir d'appréciation, en lui donnant comme outil cette norme, qui méritait d'autant moins d'être baptisée norme “fondamentale” qu'elle était quasiment vide de contenu. Comme le remarque un auteur, “la liberté d'appréciation dont jouissent les juges reflète très fidèlement leur situation d'un droit dont les tensions et les mouvements contradictoires qui le parcourent en tous sens débouchent sur des compromis où la souplesse confine parfois à la vacuité”¹⁶. A cette relative vacuité de la norme s'ajoute la fluidité, voire l'insaisissabilité du concept d'équité, qui m'ont amené avec les présidents Jimenez de Arechaga et José Maria Ruda à défendre la Cour et à appeler la doctrine à ne pas s'étonner d'un certain “subjectivisme prétorien [que] les plus belles dissertations juridiques sur l'équité ne parviendront pas à éliminer . . .”¹⁷.

94. Je n'en suis que plus à l'aise pour regretter la conception que la Cour internationale de Justice s'est faite de la “norme fondamentale”, dont le contenu, vidé déjà par le législateur, l'a été davantage et inutilement par sa jurisprudence. La Cour internationale de Justice a en effet pris position sur cette question dans l'affaire *Plateau continental*

¹³ Opinion dissidente du juge Gros, affaire *Golfe du Maine*, C.I.J. Recueil 1984.

¹⁴ Decaux, dans *Annuaire français de droit international*, 1982, p. 358; Elizabeth Zoller, “Recherche sur les méthodes de délimitation du plateau continental”, dans *Revue générale de droit international public*, 1982, p. 655.

¹⁵ Opinion dissidente du juge Koretsky, C.I.J., *Mer du Nord*, Recueil 1969, p. 166; opinions dissidentes du juge Gros, C.I.J., *Tunisie-Libye*, Recueil 1982, p. 150, 152, 156, et C.I.J., *Golfe du Maine*, Recueil 1984, p. 377, 379, 382; opinions dissidentes des juges Oda et Schwebel, Recueil 1982, p. 161, 181 et 183; Elizabeth Zoller, *op. cit.*, p. 677 et 678; Eric David, “La sentence arbitrale du 14 février 1985 sur la délimitation de la frontière maritime Guinée-Guinée-Bissau”, dans *Annuaire français de droit international*, 1985, p. 365; Queneudec, “L'affaire du plateau continental entre la France et le Royaume-Uni”, dans *Revue générale de droit international public*, 1979, p. 74 et 75.

¹⁶ Eric David, *op. cit.*, p. 365.

¹⁷ Opinion conjointe des juges Ruda, Bedjaoui et de Arechaga, C.I.J., *Délimitation du plateau continental Malte-Libye*, Recueil 1985, p. 90.

entre la Tunisie et la Libye. Elle a considéré que la formule suivant laquelle "l'application de principes équitables doit aboutir à un résultat équitable" est une simple façon de s'exprimer qui, "bien que courante, n'est pas entièrement satisfaisante, puisque l'adjectif "équitable" qualifie à la fois le résultat à atteindre et les moyens à employer pour y parvenir". Elle a alors ajouté :

C'est néanmoins le résultat qui importe : les principes sont subordonnés à l'objectif à atteindre. L'équité d'un principe doit être appréciée d'après l'utilité qu'il représente pour aboutir à un résultat équitable. Tous les principes ne sont pas en soi équitables; c'est l'équité de la solution qui leur confère cette qualité. Les principes qu'il appartient à la Cour d'indiquer doivent être choisis en fonction de leur adéquation à un résultat équitable. Il s'ensuit que l'expression *principes équitables* ne saurait être interprétée dans l'abstrait : "C'est une vérité première de dire que cette détermination doit être équitable, le problème est surtout de définir les moyens par lesquels la délimitation peut être fixée de manière à être reconnue comme équitable¹⁸."

95. Mais s'il est vrai que, comme l'affirme la Cour, "tous les principes ne sont pas en soi équitables", alors le fait de préciser que les principes (en plus du résultat) doivent être équitables n'est pas dépourvu de sens. Cela signifie donc que le juge devrait écarter les principes qui ne sont pas équitables. Ainsi, il paraît nécessaire d'affirmer que la rédaction nouvelle de l'article 83 de la Convention de Montego Bay n'avait pas pour but de préconiser n'importe quel principe pourvu que le résultat final soit équitable. Cet article devait en réalité être interprété de façon plus exigeante en obligeant de vérifier le caractère équitable tant au niveau des principes retenus qu'à celui du résultat obtenu. C'est à une double opération et à une pesée double que l'article 83 devrait inviter. Et c'est la seule voie pour sortir le droit des délimitations maritimes de l'arbitraire.

96. D'ailleurs, le passage cité ci-dessus de l'arrêt de la Cour en 1982 ne semble pas avoir tenu compte réellement des circonstances dans lesquelles l'expression "principes équitables" a finalement disparu du texte définitif de l'article 83. Cela fut le résultat d'un compromis aux termes duquel l'expression "principes équitables" n'a été supprimée que moyennant la suppression aussi de la mention "la méthode de l'équidistance le cas échéant".

97. Il est vrai que la Convention de 1982, œuvre monumentale de compromis divers, a ramené, dans sa difficile recherche du consensus général, à la portion congrue la "norme fondamentale". Mais ce n'est pas une raison pour que les juridictions internationales ramènent celle-ci à moins encore. Dans un premier mouvement la Cour a affirmé en 1982, en l'affaire *Tunisie-Libye* citée ci-dessus, que l'expression "principes équitables" devait être entendue comme si l'épithète "équitable" n'existait pas. Et deux ans plus tard dans un second mouvement, la même Cour, par sa Chambre en 1984, a considéré que même les "principes" en question n'existaient pas encore (*C.I.J. Recueil 1984*, p. 290) et qu'il conviendrait de les qualifier plus modestement de "critères" (*C.I.J. Recueil 1984*, p. 292). Il y a là une dérive judiciaire assez

¹⁸ *C.I.J. Recueil 1982*, par. 70.

fâcheuse, dans la mesure où de proche en proche disparaissent tant le caractère équitable des principes que les principes eux-mêmes, pour enfin ne retenir que le résultat. Le juge ou l'arbitre ne saurait posséder un pouvoir discrétionnaire dans le choix des principes à appliquer. Il doit dégager des principes qui sont eux-mêmes équitables. La vérification du caractère équitable doit en conséquence s'effectuer à deux niveaux différents : celui des moyens employés et celui du résultat obtenu grâce à ces moyens.

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98. La présente espèce pose un problème de délimitation essentiellement latérale entre deux Etats qui sont limitrophes, même si une partie des côtes de la Guinée-Bissau apparaît en très discrète opposition vis-à-vis des côtes du Sénégal. Les règles valables pour le titre juridique d'un Etat sur son plateau continental sont distinctes des normes applicables pour une opération de délimitation et un problème de cohérence entre ces deux séries de règles se pose alors, surtout lorsqu'il s'agit de procéder à une délimitation frontale. Mais, s'agissant ici d'une délimitation latérale, cette question de cohérence se pose moins.

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99. Examinons les facteurs géographiques pertinents en l'espèce. Ils sont au nombre de trois : la configuration du littoral, la direction générale de celui-ci et sa longueur. Pour appréhender ces trois caractéristiques de la nature et procéder à une comparaison qui, dans certains cas, doit être chiffrée, l'homme est contraint de se livrer à des opérations, de procéder à des constructions et de faire diverses mesures, les unes et les autres ne pouvant qu'approximativement respecter la nature. C'est ainsi qu'il donne une évaluation chiffrée des longueurs d'un littoral, îles comprises, qu'il "lisse" la façade maritime pour livrer arithmétiquement une direction générale des côtes, et qu'il trace des lignes de base normales ou droites aux fins de délimitation. Les évaluations ainsi fournies par les Etats à travers leur législation, ou par leurs conseils dans une instance juridictionnelle, sont de ce fait fort rarement convergentes, là où pourtant la géographie fournit des éléments physiques irréductibles et inescamotables d'une réalité qui devrait s'imposer indiscutablement à tous. L'équité doit en conséquence rester vigilante à ce premier stade déjà, face à ces approximations certes nécessaires pour l'entendement de l'homme, mais parfois trop complaisamment sollicitées par lui dans ses tentations de corriger la nature à son avantage.

100. Les deux Parties n'ont en effet pas la même vision de la réalité géographique; elles possèdent deux lectures différentes d'une question pourtant de pur fait. Elles ont chacune sa perspective et ont fait chacune ses prises de vue selon la distance qu'on prend par rapport à l'objectif à examiner. Pour trancher ces désaccords partisans, j'ai le devoir de ne pas examiner de très loin comment se présente toute la côte

occidentale de l'Afrique. Je ne puis, du moins dans cette phase d'identification et de prise en compte des facteurs géographiques pertinents, regarder encore de plus haut, comme d'un satellite, toute la carte de l'Afrique. Cela ne m'intéresse pas non plus de regarder la Terre à partir de Sirius, et de dire, détaché, qu'elle est ronde et convexe. Ce qui est pertinent c'est la côte, ou plus exactement la portion de côte de chacun des deux Etats qui demandent la détermination de leur frontière en mer. Il faut envisager et retenir ces littoraux tels qu'ils sont en configuration réelle, avec ce qu'ils ont et rien que ce qu'ils ont.

101. Pour toutes ces raisons, je ne ferai usage, dans toute la mesure possible, que des données brutes de la nature en recourant au strict minimum aux extrapolations de l'homme. Je ne voudrais ici, en particulier, nullement utiliser les lignes de base droites sur lesquelles les deux Parties ont savamment et longuement discuté.

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102. Si je m'en tiens à cette ligne de conduite de recherche équitable des facteurs géographiques, je constate ce qui suit :

Tout d'abord un regard global sur les deux pays montre que la situation ici est un mélange de banalité et de forte originalité à la fois. Le Sénégal et la Guinée-Bissau sont deux Etats limitrophes, dont la position géographique l'un à l'égard de l'autre établit un rapport d'adjacence entre eux et appelle donc une délimitation latérale.

Mais l'un de ces deux Etats limitrophes, le Sénégal, a la quadruple particularité :

- i) De posséder un littoral à configuration "banale" surtout au sud, où la côte est rectiligne de manière frappante;
- ii) D'avoir un Etat tiers en vis-à-vis, le Cap-Vert, à une distance inférieure à deux fois 200 milles;
- iii) De posséder un littoral interrompu par un autre Etat tiers, la Gambie, avec lequel il a conclu en 1975 un accord de délimitation maritime donnant comme frontières en mer deux parallèles; et enfin
- iv) De n'avoir produit aucun document pertinent établissant que la délimitation ait eu lieu avec le Cap-Vert à l'ouest et avec la Mauritanie au nord.

Le second Etat partie à la présente instance arbitrale, la Guinée-Bissau, a quant à lui la triple particularité :

- i) D'avoir une façade maritime qui est tout le contraire de la banalité grâce, d'une part, à ses côtes particulièrement échanquées et déchiquetées et, d'autre part, à la présence d'un grand "bouclier" d'îles conférant à cette façade une convexité certaine;
- ii) De posséder de ce fait une partie de ses côtes en très partielle et très discrète opposition par rapport à celles du Sénégal; et
- iii) D'avoir obtenu par une sentence arbitrale du 14 février 1985 une frontière en mer avec la Guinée-Conakry constituée par une ligne brisée épousant un azimut de 236°.

103. Le littoral du Sénégal a une configuration lissée par les soins de la nature elle-même sur la majeure partie de sa longueur. La côte ne connaît pas un dessin tourmenté. Elle n'éclate pas en îles, îlots et rochers. La partie pertinente de cette côte à prendre en considération en la présente affaire est celle limitée au sud de la Gambie. Cette démarche me paraît entièrement justifiée à ce premier stade, où doit prévaloir l'approche micro-dimensionnelle tenant compte des longueurs de côtes pertinentes, c'est-à-dire de celles qui, en toute équité, possèdent un pouvoir générateur de zones de plateau continental sans risque d'entraîner un effet d'enclavement, un butoir ou un écran pour d'autres longueurs de côtes, ou une divergence trop injustifiée. De ce point de vue, la côte sénégalaise de Casamance me paraît constituer équitablement le littoral "pertinent" aux fins de la présente délimitation. Ce littoral pertinent de Casamance est pratiquement rectiligne et "poli", à une exception près, celle de la côte allant du cap Roxo au cap Skirring, qui n'est d'ailleurs que de 5 milles. La nature vient ici au secours de l'homme, qui n'a pas besoin de recourir à des extrapolations hasardées pour déterminer tant la direction générale de cette côte pertinente que sa longueur. Le Sénégal a été doté là par cette nature d'un littoral qui n'est ni convexe ni concave mais bien rectiligne et épousant une direction générale pratiquement nord-sud, d'azimut 358° environ, à dire d'expert indépendant qui lui trouve une longueur de 44 milles.

104. Dans toute opération de délimitation, qu'elle soit frontale ou latérale, la jurisprudence internationale ne prend en général en considération que les longueurs de côtes "pertinentes". Elle écarte les portions de côtes géographiquement étrangères à l'opération de délimitation à effectuer¹⁹.

¹⁹ En vérité la jurisprudence internationale offre une gamme complète de solutions, depuis la prise en compte d'une portion seulement du littoral de chaque Partie, jusqu'à l'invocation des longueurs de côtes d'Etats tiers (voisins), en passant par la prise en considération de la totalité des côtes des deux Parties au différend. Mais il s'agit, pour les deux dernières hypothèses, de cas d'espèce; seule me paraît être d'une solide permanence jurisprudentielle le recours à la notion d'une partie qualifiée de "pertinente" des côtes des deux Etats litigants. La totalité de la longueur du littoral des deux Parties a été retenue par le Tribunal arbitral des deux Guinée, depuis le cap Roxo jusqu'à la pointe Sallatouk, parce que "les Parties ont fondé leur argumentation sur le littoral ainsi entendu" (paragraphe 92 de la sentence du 14 février 1985). Le même Tribunal arbitral est même allé au-delà en intégrant les longueurs de côtes d'Etats voisins parce qu'il était préoccupé de répartir en toute équité le facteur de la "divergence", et il a forgé le concept de "littoral long" qu'il a opposé à celui de "littoral court". Il négligeait ainsi le point de vue du juge Koretsky selon lequel "les considérations "macrogéographiques" n'ont absolument aucune pertinence, sauf dans l'hypothèse improbable où l'on souhaiterait redessiner la carte politique d'une ou de plusieurs régions du monde" (C.I.J., *Plateau continental de la mer du Nord*, Recueil 1969, p. 162). Il me paraît cependant légitime de recourir, en tant que de besoin, à la macrogéographie, mais seulement *a posteriori* et à titre de simple vérification du caractère équitable du résultat obtenu par la microgéographie des côtes "pertinentes", et encore seulement lorsque les circonstances peuvent s'y prêter. C'est à ces conditions que ce double champ de vision successif serait valable.

Dans beaucoup d'autres affaires, c'est la notion logique de côtes "pertinentes" qui est appliquée par la jurisprudence internationale. Il suffit de citer l'affaire *Délimitation du plateau continental Malte-Libye* (C.I.J. Recueil 1985) ou encore l'affaire *Plateau continental Tunisie-Libye* (C.I.J. Recueil 1982, par. 131 et 132).

105. Je reviendrai plus loin plus complètement sur cette question lorsqu'il faudra vérifier le caractère équitable d'une délimitation par la prise en compte du rapport de proportionnalité entre les longueurs de côtes et les surfaces maritimes attribuées. Je me borne pour l'instant aux remarques ci-après. Dans l'affaire *Délimitation du plateau continental entre Malte et la Libye*, un conseil de Malte avait développé une théorie qualifiée de "projection radiale" ou multidirectionnelle des côtes de Malte pour faire valoir en l'espèce considérée la majeure partie de la longueur des côtes de Malte face à celles beaucoup plus étendues de la Libye. Ecartant sans hésitation cette théorie de la projection tous azimuts des côtes, la Cour a retenu les parties des côtes maltaises qui font strictement face à celles de la Libye. A la théorie de la projection multidirectionnelle, elle a préféré celle de la projection frontale. Il en va de même lorsqu'il s'agit d'une délimitation latérale concernant deux Etats limitrophes dont la Cour ne prend que les longueurs des parties de côtes adjacentes qu'elle estime "pertinentes", c'est-à-dire nécessaires à l'opération de délimitation. La relation géographique entre les côtes de deux Etats ne peut être génératrice d'un rapport juridique créateur d'espaces maritimes que si cette relation géographique est possible. Or elle ne peut l'être que si elle est établie entre des parties de côtes appropriées ou pertinentes. Dans une délimitation entre la France et l'Italie ou l'Espagne, le juge ne prendrait pas en considération la longueur de toutes les côtes françaises, celles de la Manche et de l'Atlantique comprises. Il n'existe pas de relation géographique créatrice de droit entre ces deux dernières et les côtes méditerranéennes de l'Italie ou de l'Espagne. Elles sont étrangères les unes aux autres. De plus, le juge ne retiendrait même pas toute la longueur de la côte française en Méditerranée, mais plus sûrement la longueur des côtes du golfe du Lion pour une délimitation avec l'Espagne, et celles des côtes du golfe de Gènes pour une délimitation avec l'Italie.

106. Mais au surplus, dans la présente affaire, la délimitation faite entre la Gambie et le Sénégal crée une situation juridique très particulière, décrite déjà ci-dessus et aboutissant à l'existence de deux espaces maritimes distincts relevant du Sénégal. Seul le littoral sénégalais de Casamance générateur d'un espace maritime et d'un plateau continental dans la partie sud concerne la présente affaire. La délimitation sénégalogambienne constitue une circonstance établissant une rupture dans l'ensemble du littoral sénégalais dont le juge ne saurait éviter de tenir compte. On ne peut établir de relation entre les côtes sénégalaises au nord de la Gambie et les côtes de la Guinée-Bissau, mais seulement entre ces dernières et les côtes sénégalaises au sud de la Gambie qui leur sont adjacentes. Cette rupture est "incontournable".

107. Il sera enfin observé au passage que le Sénégal ne pouvait pas emporter la conviction dès lors qu'il a demandé la prise en compte de la longueur de l'ensemble de ses côtes, alors que dans le même temps il a proposé au Tribunal de retenir un tronçon long de 5 milles entre le cap Roxo et le cap Skirring dont l'influence dans le cadre d'une ligne d'équidistance se serait fait sentir jusqu'à 200 milles au large, rendant

ainsi nulle toute autre influence du restant de la côte sénégalaise dont il revendiquait la prise en compte.

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108. Quant à la Guinée-Bissau, elle offre en revanche à la vue du géographe, de l'expert et du juriste un littoral dont l'originalité est assez marquée pour ne pas passer inaperçue. Le littoral de Guinée-Bissau, avec ses grandes îles, ses îlots, ses rochers et ses fragments de masses terrestres, a la particularité incontestable d'avancer dans la mer. C'est un "bouclier" terrestre tenu par un gigantesque Neptune face aux flots. Cet ensemble d'îles est consubstantiel à la masse terrestre et constitue une partie du littoral à de nombreux endroits submergés par les eaux. La mer a envahi la terre en laissant visibles des parties de ce littoral sous forme d'îles. S'il existe une caractéristique très frappante, c'est bien en ce pays la présence des îles. C'est ce qui identifie et singularise la Guinée-Bissau. La capitale de cet Etat est elle-même située dans une île et le nom du pays est lui-même emprunté à une île. L'insularité d'une partie de la Guinée-Bissau, dont la capitale, constitue bien une circonstance pertinente comme rarement c'est le cas. De plus il existe une relation si étroite entre la mer et la terre, une telle intimité entre elles, qu'on ne sait plus distinguer le bras de mer du bras de terre. L'expression de Saint-John Perse à propos de la presqu'île de Giens, endroit privilégié où "la terre accompagne l'homme à la mer", s'applique parfaitement à la Guinée-Bissau.

109. Si par la pensée on découvre un instant ce territoire des eaux qui le submergent, on s'aperçoit que la terre ferme se continue en une pente très douce de 0,4 %, à raison donc de 4 mètres par kilomètre, jusqu'à une distance de près de 100 km vers le grand large. Enlevons, toujours par la pensée, cette mince pellicule d'eau et on s'aperçoit alors que le pays possède un prolongement qui mérite pleinement ici d'être qualifié de "naturel". La façade maritime de Guinée-Bissau n'est pas composée d'îles lointaines, isolées de la terre et éloignées les unes des autres. La réalité montre au contraire que ces îles constituent une avancée du territoire terrestre sur la masse duquel elles sont chevillées. Toutes ensemble elles figurent le socle terrestre émergé, après inondation du continent. Elles connaissent une faible profondeur d'eau, moins de 20 mètres pour certaines et moins de 10 mètres pour la plupart. Certaines îles toutes proches du continent, comme celle de Bolama, sont telles que les animaux peuvent les atteindre à marée basse, comme l'a fait remarquer le président Grant des Etats-Unis dans sa sentence arbitrale du 21 avril 1870²⁰.

110. Quand j'essaie d'enlever par la pensée cette mince pellicule d'eau pour découvrir ce spectacle de la nature, en fait je n'ai pas besoin de le faire; la nature le fait tous les jours pour moi. Le phénomène de la

²⁰ Moore, *History and Digest of International Arbitrations to which the United States has been a Party*. Washington, 1898, vol. II, p. 1921.

marée montre cette intimité extraordinaire entre la terre et la mer puisque 8 000 km², c'est-à-dire un quart du territoire terrestre de la Guinée-Bissau, sont tous les jours découverts et recouverts par la mer dans un flux et reflux incessants. Il est rare de trouver un pays comparable dont le quart du territoire disparaît tous les jours pour ressurgir ensuite. On ne peut trouver une circonstance plus pertinente que ce bouclier d'îles d'une Guinée "semi-insulaire".

111. Il n'est donc pas possible de gommer ces îles qui constituent le vrai littoral de la Guinée-Bissau. Si en effet la façade maritime est toute terre qui borde la mer, et si le littoral est la limite de la terre ou le lieu de jonction ou de contact de la terre avec la mer, c'est bien alors ce bouclier dense composé d'une multitude d'îles, c'est cette gigantesque patte d'oie, ou ces hippopotames assoupis dans l'eau, qui constituent le littoral de la Guinée-Bissau. Celle-ci n'est pas du tout un Etat archipelagique au sens où l'entend la Convention de Montego Bay ou au sens géographique commun; mais elle est sûrement un Etat semi-insulaire, dont les îles revêtent une grande importance pour la détermination de la courbure de la façade maritime de ce pays, de la direction générale de celle-ci et de la longueur de son littoral.

112. En conséquence, le fait géographique ainsi considéré, et ne pouvant l'être autrement, confère à la façade maritime de la Guinée-Bissau une forme générale incontestablement convexe. La longueur du littoral guinéen, en tenant compte des îles et selon une méthode pondérée, est de 154 milles à dire d'expert indépendant.

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113. Mais les données de la nature, à prendre normalement en compte dans une délimitation, ne se ramènent pas exclusivement à celles livrées par la géographie côtière des deux parties au présent différend. Faut-il retenir pour examen les données géologiques et géomorphologiques comme éléments pertinents aux fins de la délimitation? Sur cette question, ma réponse, articulée en deux temps, s'alimentera aux considérations théoriques qui ont, à la suite d'une rapide évolution, négligé le recours aux solutions décryptées dans les plis et replis mystérieux des sites géologiques et géomorphologiques, puis, dans un second temps, aux considérations purement pratiques qui, en l'espèce, montrent que ces facteurs géologiques et autres ne sont d'une pertinence que très limitée et tout compte fait d'aucun secours pour l'approche d'une solution.

114. L'idée de "limite naturelle", constituée par des montagnes, des cours d'eau, ou divers accidents caractéristiques de la nature, n'a jamais pu s'imposer aux Etats pour la délimitation de leurs frontières terrestres alors même que cette limite est visible à l'œil nu. Il est douteux que la science juridique accepte pour les espaces maritimes ce qu'elle refuse pour les espaces terrestres, et donne droit de cité à des "limites naturelles" constituées par un accident géologique important et significatif alors qu'une telle limite, elle, n'est même pas visible à l'œil nu.

L'homme qui a toujours boudé le relief terrestre pourtant visible ne pouvait que boudier davantage le relief sous-marin qui échappe à sa vue.

115. C'est peut-être pourquoi la notion de "prolongement naturel" a si mal résisté à la poussée du concept de "distance" qui tend à occulter les facteurs géologiques et géomorphologiques. C'est aussi pourquoi le juriste possède une définition juridique du plateau continental assez affranchie de celle du géologue ou du géographe. C'est encore pourquoi les facteurs géologiques et géomorphologiques revêtent une importance quasiment nulle dans la pratique conventionnelle des Etats²¹. C'est enfin pourquoi la jurisprudence internationale n'a tenu compte ni de la "fosse norvégienne" (C.I.J., *Plateau continental de la mer du Nord*, *Recueil 1969*, paragraphes 4 et 45), ni de la "fosse centrale" (Tribunal franco-britannique pour la *mer d'Iroise*, 1977, paragraphe 107), ni du "sillon tripolitain" (C.I.J., *Plateau continental Tunisie/Libye*, *Recueil 1982*, paragraphe 66), ni du "chenal nord-est" (C.I.J., *Délimitation dans le golfe du Maine*, *Recueil 1984*, paragraphes 51 et 56), ni enfin de la "rift zone" ou "zone d'effondrement" (C.I.J., *Plateau continental Malte/Libye*, *Recueil 1985*).

116. Mais il convient tout aussitôt d'observer qu'au stade actuel d'évolution du droit de la mer et de la jurisprudence internationale correspondante, il serait sans doute hasardeux d'affirmer que les facteurs géologiques et géomorphologiques ont complètement perdu toute pertinence et ne sont générateurs d'aucune conséquence juridique. La jurisprudence de la Cour en l'*affaire du plateau continental de la mer du Nord* de 1969 et celle du Tribunal arbitral de la *mer d'Iroise* de 1977 ne sont peut-être pas assez nettes sur ce point. Mais dès les affaires *Tunisie/Libye* (C.I.J. *Recueil 1982*, paragraphe 80) et *Golfe du Maine* (C.I.J. *Recueil 1984*), la Cour et l'une de ses Chambres ont bien montré que si le "sillon tripolitain" pour la première ou le "chenal nord-est" pour la seconde avaient l'un et l'autre marqué une solution de continuité certaine, elles auraient considéré ce facteur géologique comme pertinent. Ainsi la jurisprudence internationale n'a jamais indiqué expressément que ces facteurs géologiques doivent être toujours écartés dans l'absolu et quelles que soient les circonstances. Le fait que la jurisprudence n'ait pas tenu compte de la géologie s'explique semble-t-il non pas par la non-pertinence en soi de ce facteur, mais par l'insuffisance des preuves scientifiques avancées dans tel ou tel cas d'espèce. C'est l'absence de tel phénomène géologique pertinent, ou le caractère douteux de sa présence, qui a entraîné la jurisprudence à ne pas tenir compte de la géologie.

117. Dans l'*affaire Tunisie/Libye*, la Cour internationale de Justice est même allée jusqu'à déclarer qu'elle "n'exclut pas forcément que certaines configurations géomorphologiques du fond de la mer *ne constituent pas vraiment des interruptions du prolongement naturel* d'une

²¹ L'accord de délimitation entre la Colombie et la République dominicaine n'a pas pris en compte la fosse d'Aruba pourtant profonde de 4 600 mètres; la prodigieuse "fosse des Caymans" (profonde de 2 900 m, longue de 1 700 km et large de 100 km) ne semble pas avoir beaucoup compté dans l'accord Cuba-Haïti.

partie par rapport au prolongement naturel de l'autre, puissent néanmoins *être retenues aux fins de la délimitation* comme circonstances pertinentes, propres à la région" (C.I.J. Recueil 1982, paragraphe 68, p. 58).

118. En vérité la Cour, qui a pour fonction d'appliquer et non pas de créer le droit, n'a pas décidé elle-même de l'éclipse des facteurs géologiques, due plutôt à l'action du législateur international. Le destin des facteurs géologiques est nécessairement lié à celui du concept de prolongement naturel. Or la Convention de Montego Bay du 10 décembre 1982 a reconnu le titre juridique de l'Etat côtier sur son plateau continental par la mise en œuvre d'un concept de "distance", venu s'ajouter, et parfois se substituer, à celui de "prolongement naturel". Si la Convention de 1982 n'a nullement négligé le concept de "prolongement naturel" (son article 76 s'y réfère dès le premier paragraphe), elle n'en a pas moins introduit spectaculairement un autre critère, celui de distance.

119. Le relatif effacement du concept de prolongement naturel par rapport à celui de distance ne pouvait qu'entraîner l'éclipse des considérations géologiques et morphologiques. La Cour internationale de Justice qui mit en avant, dans son arrêt de 1969 en l'affaire *Plateau continental de la mer du Nord*, la notion de prolongement naturel, l'a tenue elle-même pour un principe essentiellement relatif. L'absence de coïncidence entre la notion juridique de plateau continental et sa réalité physique, l'absence de lien impératif et nécessaire entre le fondement du titre de l'Etat côtier sur son plateau continental et les principes de délimitation, le fait que la Cour a le devoir de faire triompher l'équité comme résultat plus que le principe du prolongement naturel qui parfois n'y concourt pas, et enfin les nouvelles tendances du droit de la mer exprimées dans les articles 76 et 83 de la Convention de Montego Bay, ont contribué à ce relatif effacement de l'institution du prolongement naturel et, par voie de conséquence, des facteurs géologiques et géomorphologiques.

120. Je n'ai pas observé de désaccord fondamental sur le plan théorique entre la Guinée-Bissau et le Sénégal au sujet tant du concept de prolongement naturel que des facteurs géologiques et géomorphologiques. Minimisant plus ou moins ou négligeant peu ou prou les considérations théoriques et analyses jurisprudentielles évoquées ci-dessus, les deux Parties se sont laissées entraîner l'une et l'autre à recourir à la géologie. Sur la légitimité de ce recours aux facteurs physiques sous-marins ainsi que sur la place de la notion de prolongement naturel, elles s'accordent (Contre-Mémoire, paragraphes 319 et 322; Réplique, p. 286 et 287). Mais chaque Partie a tenté de déduire de ces caractéristiques physiques de la zone des éléments favorables à sa thèse. Selon la Guinée-Bissau, la structure et les sédiments des fonds marins de la région donnent aux failles qui s'y trouvent une direction est-ouest qui justifierait une ligne de délimitation d'azimut 270° entre les espaces maritimes des deux Etats (Réplique, p. 287; PV/5, p. 153 et 154). Mais, pour le Sénégal, le relief et les structures géologiques des fonds marins de la région donnent une direction nord-est (Contre-Mémoire,

paragraphes 319 et 322; *ibid.*, paragraphes 19 à 49 et annexes 7 et 8; Duplique, paragraphes 434 à 454, PV/11, p. 153, 154 à 160, 161 et 251).

121. Je ne peux suivre aucune des deux Parties sur ce terrain-là. D'abord pour les raisons que j'ai indiquées ci-dessus et qui montrent assez, à la suite de l'analyse de la jurisprudence internationale, une relative défaveur à l'égard du relief et des structures des fonds sous-marins. "La géographie oui, la géologie non". Et ensuite parce que, de l'avis même des deux Parties, la géologie sous-marine de la région ne connaît pas d'accidents exceptionnels et majeurs. La Guinée-Bissau a reconnu que "ces failles... *ne sont pas importantes*", même si elles sont "non négligeables". Les différenciations géologiques ou morphologiques des fonds marins devant le Sénégal et la Guinée-Bissau ne se révèlent pas suffisantes pour constituer des limites naturelles pour leurs domaines maritimes respectifs. On ne perdra pas de vue non plus le fait qu'il ne s'agit pas en l'espèce de délimiter seulement le plateau continental, mais de tracer aussi avec une limite latérale unique la ligne divisoire établissant la zone économique exclusive, pour laquelle la structure géologique ou géomorphologique des fonds marins est strictement sans pertinence. C'est tout au plus si les indicateurs géologiques ou géomorphologiques, pour aussi discrets qu'ils soient, peuvent constituer des éléments complémentaires de vérification *a posteriori* du caractère équitable de la délimitation obtenue par la combinaison d'autres facteurs.

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122. Il convient à présent de songer à une méthode de délimitation permettant d'obtenir une ligne, c'est-à-dire de faire une construction intellectuelle qui, appliquée aux facteurs pertinents déjà identifiés, produirait une solution équitable. A la différence d'une règle, une méthode n'est par définition pas obligatoire.

Si la proximité vise le lien juridique existant entre le dessin de la façade maritime d'un Etat et les surfaces maritimes engendrées par celle-ci, la manière classique d'appliquer la règle de la proximité est de faire appel tout naturellement à la méthode de l'équidistance. Aucun point de la ligne obtenue par ce mode de délimitation ne doit être plus proche de la côte d'un Etat que de celle de l'autre Etat, sur toute la longueur de cette ligne.

Mais les lignes de base choisies par les Parties peuvent devenir en l'espèce assez déterminantes. Si l'on choisit par exemple l'une des trois lignes de base de la Guinée-Bissau et qu'on la rapporte à la ligne de laisse normale du Sénégal, on obtiendra, selon la Guinée-Bissau, non pas une mais trois lignes d'équidistance et le résultat en serait 20 000 km² de différence entre les cas extrêmes (PV/6, p. 183).

123. Par ailleurs, la méthode d'équidistance risque en l'espèce de produire certains effets "pervers". Par exemple, si l'on calculait les distances à partir du rivage continental sans tenir compte de l'existence des îles Bijagos qui forment un vaste archipel, on méconnaîtrait la forte

réalité géographique de la Guinée-Bissau. En revanche, le fait de traiter comme un point de la côte un îlot isolé et éloigné de l'archipel peut comporter l'inconvénient de créer un littoral fictif. Si l'on s'appuie sur un saillant de la côte très proche du point de départ de la délimitation mais qui s'écarte de la direction générale de la côte, on crée aussi un littoral fort éloigné du réel. C'est ce qui se produit avec le promontoire formé par le cap Skirring qui joue le rôle d'un butoir dans le mécanisme de l'équidistance et empêche la ligne obtenue d'exprimer tout le dessin de la côte cachée par ce butoir. Ainsi la côte du Sénégal ne serait prise en compte que pour 5 milles (distance entre le cap Roxo et le cap Skirring) alors que la ligne d'équidistance est censée avoir effet jusqu'à 200 milles. Et si l'on prend des points saillants proches l'un de l'autre pour déterminer des points d'équidistance, la position de ces derniers devient de plus en plus incertaine à mesure qu'on s'éloigne de la côte, ce qui risque d'aboutir à des marges d'erreur considérables. Une ligne d'équidistance jusqu'à 200 milles risque d'être très inéquitable si elle est prédéterminée par la prise en compte des points du cap Skirring et du cap Roxo situés seulement à 5 milles l'un de l'autre.

Bref, l'équidistance, qui n'est pas du tout en soi inéquitable, aboutit, à partir d'une certaine distance de la côte, 50 à 100 milles, à une indétermination qui rend arbitraire le tracé de la ligne avec tous les risques d'iniquité (Réplique, p. 304). Comme au surplus le mécanisme de son tracé ne prend en compte que certains points critiques du littoral, ourlets ou saillants de la côte, elle n'assure pas l'équité dans les surfaces attribuées.

124. Etant donné ces inconvénients et quelques autres de la méthode d'équidistance en l'espèce, la Guinée-Bissau a suggéré l'application d'autres modes de délimitation, dont l'un est celui de la "courbe médiane". Celle-ci a été définie par des points en mer situés à la même distance curviligne du point frontière que les deux points associés sur chaque littoral et à égale distance de ces deux points (Mémoire, p. 225). Elle aurait le mérite "de franchir l'opacité des points butoirs", de rester "insensible aux accidents de la ligne de rivage quels qu'ils soient" et de "prend[re] en compte tout le littoral de chacun des deux pays voisins" (*ibid.*). Cette méthode produirait, selon la Guinée-Bissau, une ligne d'azimut 264°.

125. Le Sénégal considère que cette méthode peut se révéler utile dans des situations très complexes, mais qu'elle ne serait pas adaptée à des configurations simples ou caractérisées par les lignes de base droites. Il la tient pour "parfaitement arbitraire" car son résultat dépendrait de la distance choisie entre d'une part le point d'aboutissement de la frontière terrestre (cap Roxo) et d'autre part les points de construction sur les lignes de base. Ainsi le résultat de la méthode serait tributaire de la ligne de base utilisée par la Guinée-Bissau et contestée par le Sénégal. Celui-ci ajoute que la courbe médiane proposée par la Guinée-Bissau donnerait "une frontière complète qui serait construite pour sa grande partie sur deux éléments géographiques seulement : côté Sénégal, un tronçon de côte très voisin de la frontière sud de la Gambie; côté Guinée,

les seuls bancs du Rio Grande. Dans les deux cas un butoir parfait qui masque complètement la géographie des deux pays'' (PV/12, p. 184).

En bref, le Sénégal reproche essentiellement à la méthode d'une part l'effet très réduit qu'elle donnerait au segment cap Roxo-cap Skirring et d'autre part la prise en compte intégrale des lignes de base droites guinéennes du 17 mai 1985 joignant le cap Roxo aux bancs du Rio Grande (PV/12, p. 213; Contre-Mémoire, paragraphes 447 et 448; Duplique, paragraphe 433).

126. L'expert du Tribunal a analysé la méthode de la courbe médiane et son application à l'espèce. Les résultats de cette méthode paraissent dépendre assez largement des distances retenues. En d'autres termes, la méthode semble présenter un élément de subjectivité. Appliquée à des lignes de côtes réelles, elle peut, selon les intervalles choisis, profiter à l'une ou à l'autre Partie. De surcroît, s'il s'agit de lignes droites (lignes de base ou direction générale de la côte), le recours à cette méthode devient un cas particulier d'application de l'équidistance consistant à prendre la bissectrice de l'angle formé par les lignes considérées. La méthode proposée n'élimine pas entièrement ni ne corrige en l'espèce les effets négatifs qu'aurait l'application de l'équidistance classique.

127. Une seconde méthode proposée par la Guinée-Bissau est celle de la "courbe de la distance moyenne" qu'elle définit ainsi : "en chaque point en mer on calcule toutes les distances à l'ensemble des points visibles du littoral et on en prend la valeur moyenne; la courbe sera le lieu des points d'égale distance moyenne" (Mémoire, p. 225). Cette méthode donnerait, selon la Guinée-Bissau, une ligne d'azimut 265°.

Le Sénégal admet que cette méthode permet de corriger deux effets pervers de la méthode classique d'équidistance : le premier est que dans certains cas la totalité d'une frontière maritime peut être conditionnée par un nombre minime de points sur la côte d'un pays donné, voire par un seul point; et le second est que l'équidistance peut conduire à attribuer à des îles un poids disproportionné à leur importance (Contre-Mémoire, paragraphe 366).

128. Le Sénégal reconnaît aussi que la méthode proposée ne privilégie aucun point de la côte. Mais il relève qu'elle n'accorde pas à ces points une valeur équitable, ce qui aboutit, selon lui, à des résultats inacceptables. Elle pénaliserait notamment les Etats dotés d'une longue côte visible et favoriserait les Etats ayant des côtes courtes. Par ailleurs elle aggraverait les inconvénients de la méthode d'équidistance classique pour ce qui concerne les îles. En fait, si la côte visible insulaire entrait en ligne de compte, la distance moyenne serait écourtée du côté de l'Etat exerçant la souveraineté sur les îles considérées et l'espace maritime masqué par les côtes insulaires serait traité comme s'il s'agissait d'un territoire émergé (Contre-Mémoire, p. 366).

129. Le Sénégal résume ci-après d'une façon plus ramassée les griefs qu'il articule à l'encontre de la méthode de la distance moyenne :

- i) Elle privilégie l'Etat dont le littoral visible est moins étendu;

ii) Elle privilégie l'Etat doté d'îles situées à son large. De plus, la Guinée-Bissau fait intervenir à la fois le secteur d'une île visible d'un point en mer et son secteur invisible ou son "ombre propre" (Réplique, p. 308 et 309), ce qui a pour conséquence de pousser vers le nord les points situés en mer à égale distance moyenne;

iii) En procédant au calcul de la proportionnalité, la Guinée-Bissau a tenu compte du seul littoral pertinent du Sénégal, c'est-à-dire la Casamance, mais s'agissant en revanche de l'application de la méthode de la distance moyenne, cette restriction disparaît (PV/12, p. 214 et suiv.).

130. Dans sa réplique, la Guinée-Bissau a reconnu très simplement certains des inconvénients de la méthode de la distance moyenne qu'elle a proposée : "Participant d'une recherche de proximité, la courbe de la distance moyenne garde les défauts inhérents à toute introduction de distance au littoral, notamment avec ses indéterminations lorsque l'éloignement s'accroît. Aussi n'est-elle pas proposée au Tribunal comme pouvant constituer en soi un moyen de délimitation" (Réplique, p. 310). Compte tenu de cette déclaration et des inconvénients déjà signalés de cette méthode, il n'y a pas lieu d'apprécier ici plus avant son utilité pour la présente espèce.

131. La Guinée-Bissau a proposé enfin une troisième méthode de délimitation, celle assez originale de "l'isodistance" (Mémoire, p. 226). Elle est expliquée comme suit : "Selon la logique à la fois naturelle et juridique, le littoral n'est pas une frontière mais une courbe de transition entre zones relevant de la même juridiction. Le littoral est là où aujourd'hui le niveau de la mer s'est arrêté; il a pu s'arrêter plus haut ou plus bas, il pourra le faire dans des siècles. Le littoral n'est donc qu'une des nombreuses courbes. Une ligne de côte n'est pas autre chose qu'une courbe de niveau terrestre d'altitude zéro, c'est-à-dire une isobathe zéro et n'a pas plus de signification que les autres courbes de niveau terrestres ou sous-marines" (PV/6, p. 211). Compte tenu de cela, "la courbe d'isodistance se définit, à partir de la limite des eaux territoriales, comme la ligne d'équidistance des isobathes successives ou bien comme la perpendiculaire à ces isobathes" (PV/6, p. 193). "Courbe d'équidistance des lignes littorales successives qui résulteraient d'un retrait progressif de l'océan, l'isodistance fait la synthèse de la méthode de l'équidistance et des caractères essentiels actuels du plateau continental au sens physique" (PV/6, p. 194 à 200). L'isodistance intègre en somme les deux critères du prolongement naturel et de la distance à la côte (PV/6, p. 201).

132. Ainsi fondée sur le relief sous-marin, cette technique semble contredire l'évolution du droit international contemporain qui enregistre le déclin des facteurs géologiques et géomorphologiques et celui en particulier de la notion de prolongement naturel. Mais cette méthode ne peut pas être récusée en soi pour ce seul fait. Le Sénégal considère que "son originalité n'est égalée que par l'absence de tout fondement dans la pratique et la jurisprudence" (PV/12, p. 251). Mais le fait qu'une méthode n'ait pas reçu la consécration de la pratique des Etats et de la jurisprudence n'est pas décisif car il s'agit précisément d'une méthode

encore neuve. Une objection plus forte est que l'isodistance semble ne pouvoir "s'appliquer qu'à des géographies convenablement lissées... dont tous les éléments perturbateurs, générateurs d'effets pervers inévitables, ont été éliminés au préalable, par des procédés nécessairement étrangers à la méthode elle-même" (PV/12, p. 201), "qui lui enlèvent donc toute objectivité" (PV/12, p. 203).

133. Ce panorama des méthodes de délimitation, de l'équidistance et de ses versions améliorées (courbe médiane, courbe de la distance moyenne et courbe de l'isodistance) suggère l'impossibilité de prendre en compte aucune d'elles en l'espèce.

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134. Dans la présente affaire, il s'avère manifeste que le facteur géographique le plus caractéristique est la présence d'un large bouclier d'îles en Guinée-Bissau. Celle-ci s'est définie comme semi-insulaire, ou même comme amphibie en raison de la remarquable intimité existant entre la terre et la mer dans ce pays. Le problème majeur est donc de déterminer ce que l'équité peut recommander et produire comme traitement pour ces îles. Cela revient à évaluer leur importance exacte par rapport au domaine continental de la Guinée-Bissau (superficie, population, activité économique) et leur degré de rattachement (distance, terrain découvert à marée basse, eaux saumâtres). Ces îles, dont la majorité constitue un ensemble traditionnellement dénommé "archipel des Bijagos" (arquipélago dos Bijagós), sont en fait déterminantes, comme on l'a déjà vu, pour l'appréciation de la nature du littoral de Guinée-Bissau et de la configuration générale de ses côtes. La Guinée-Bissau ne serait pas ce qu'elle est sans les Bijagos. La présence de l'archipel des Bijagos est déterminante en l'espèce autant pour le calcul de la longueur des côtes que pour l'établissement de la délimitation latérale. Quels que soient la méthode ou le procédé de délimitation qu'on applique, il convient de tenir compte de ce trait essentiel de la façade maritime de la Guinée-Bissau constituée par la présence de ces îles et par leur lien étroit avec le continent, ce qui n'est pas sans conséquence sur l'établissement de la direction générale de la côte de la Guinée-Bissau.

135. Le Tribunal des deux Guinée a, quant à lui, distingué trois catégories d'îles :

i) Les îles côtières, proches de la terre ferme et souvent reliées à celle-ci à marée basse, sont "considérées comme partie intégrante du continent";

ii) Les îles Bijagos, dont la plus éloignée est à 37 milles du continent et la plus proche à 2 milles et qui ne sont jamais distantes de plus de 5 milles les unes des autres;

iii) Les îlots éparpillés plus au sud au milieu des hauts fonds²².

²² Sentence du 14 février 1985, par. 95.

136. La troisième catégorie s'élimine d'elle-même en l'espèce. Tout ce qui existe au-delà de la grande île d'Orango vers le sud ne peut avoir aucune influence sur la présente délimitation. On ne retiendra ici que les deux premières catégories. A leur sujet, il surgit cependant le problème de savoir jusqu'où l'on doit aller vers l'ouest au large et cela pose d'une part la question de la prise en compte de l'ensemble dit "Baixos do Rio Grande" (bancs du Rio Grande, avec leurs hauts fonds découvrants, leurs rochers, leurs autres éléments naturels et leur phare) et d'autre part de l'île d'Unhocomo avec sa pointe extrême sud-ouest d'Anqueiêramedi. La Guinée-Bissau a plaidé pour la prise en compte des bancs du Rio Grande et du phare, arguant du fait que sans cela la ligne des 240° paraîtrait inéquitable parce qu'elle serait plus proche de ces bancs que de la côte sénégalaise.

137. Les deux Parties se sont très longuement expliquées sur les "Baixos do Rio Grande", lorsqu'elles ont fait valoir chacune son système de lignes de base. Le droit de la mer permet à certaines conditions l'utilisation de hauts fonds découvrants comme points d'appui pour des lignes de base. Selon l'article 13 de la Convention de Montego Bay qui définit le haut fond découvrant, la laisse de basse mer sur un tel haut fond peut être prise comme ligne de base si ce haut fond se trouve entièrement ou en partie à une distance du continent ou d'une île côtière ne dépassant pas la largeur de la mer territoriale, soit 12 milles. Or la distance existant entre ce phare (installé sur ce haut fond) et l'île de Caravela, île côtière comme l'a indiqué le Tribunal arbitral des deux Guinées, est de 11,3 milles.

138. L'article 7, alinéa 4, de la même Convention de 1982 sur le droit de la mer prescrit que les hauts fonds découvrants ne doivent pas être utilisés comme extrémités ou points d'appui de lignes de base droites "à moins que des phares n'y aient été construits". Le Sénégal considère que les lignes de base droites adoptées par la Guinée-Bissau par sa loi du 17 mai 1985 ne lui sont pas opposables principalement *ratione temporis*, d'abord parce qu'elles sont postérieures au compromis du 12 mai 1985 par lequel la Guinée-Bissau et le Sénégal ont constitué et saisi le Tribunal de céans, et ensuite parce qu'elles reposent sur un haut fond découvrant qui, au moment de leur établissement, ne comportait ni phare, ni installation similaire.

139. Il est certain que le projet de construire un phare sur les bancs du Rio Grande date de la fin des années 50, que ce projet a été évoqué au cours des négociations franco-portugaises de 1959 (rapports du capitaine de Boavida), et que le phare a été finalement construit par les autorités de Guinée-Bissau en 1984, c'est-à-dire avant la date du compromis et avant la loi du 17 mai 1985 par laquelle la Guinée-Bissau a défini à nouveau ses lignes de base. L'une des fonctions d'un compromis est d'empêcher les parties de modifier unilatéralement et à leur profit une situation existante. La loi guinéenne du 17 mai 1985 n'a pas à proprement parler modifié la situation à l'avantage de la Guinée-Bissau en créant un droit. Celui-ci a été créé antérieurement, lorsqu'en 1984 la Guinée-Bissau a installé le phare, et cette installation était destinée, depuis 1959 déjà, à permettre de prendre les bancs du Rio Grande

comme point d'appui d'une ligne de base droite. Au surplus, s'il fallait écarter les lignes de base établies en 1985, on retomberait sur celles qui avaient été construites en 1978 et qui sont encore plus favorables à la Guinée-Bissau.

140. Mais quoi qu'il en soit, et quel que soit le bien-fondé de la position de la Guinée-Bissau en ce qui concerne les bancs du Rio Grande, il ne me paraît ni nécessaire ni approprié de poursuivre l'examen des arguments échangés par les Parties à propos de leurs systèmes de lignes de base respectifs. J'avais plus haut pris le parti d'éviter de recourir chaque fois que cela est possible aux constructions de l'homme à partir des données de la nature. Et les systèmes de lignes de base, produit des artifices humains, ont donné lieu, un peu partout, à des poussées vers le large déplorées par la doctrine et prises en compte seulement en partie par le nouveau droit de la mer.

141. Reste le problème de l'île d'Unhocomo, "sentinelle avancée de l'archipel des Bijagos" selon l'expression d'un représentant du Sénégal (PV/12, p. 205 à 210). C'est une île assez exiguë et relativement éloignée de la côte, de sorte que sa prise en considération ne se recommande pas avec une force particulière.

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142. Il convient à présent d'indiquer quel effet l'équité imposerait de donner aux îles. Epurée des îles, la direction générale des côtes guinéennes est calculée comme étant de 132°, mais cette estimation n'est pas équitable car elle ne tient pas compte des îles et la ligne obtenue pour cette direction générale va jusqu'à exclure Bissau, la capitale de l'Etat située dans une île derrière laquelle passerait cette direction générale des côtes. Une orientation générale de la côte tenant compte des îles les plus pertinentes (Caravela à sa pointe extrême sud-ouest d'Acudama, Uomo et Orango à sa pointe extrême sud-ouest) donnerait une orientation générale de la côte guinéenne de 160°.

143. Ainsi si l'on écarte, comme indiqué ci-dessus, les îles du sud de l'archipel des Bijagos, de même que la petite île d'Unhocomo à l'extrême ouest de cet archipel, la direction générale du littoral de la Guinée-Bissau est donnée par la ligne d'azimut 160° tracée du cap Roxo jusqu'à la pointe d'Acudama qui est le point le plus occidental des îles principales de l'archipel. Une telle épure permet d'éviter de donner une importance inconsidérée à l'île exiguë et désolée d'Unhocomo. Quant à la direction générale de la côte continentale de la Guinée-Bissau, elle peut être représentée par la ligne partant du cap Roxo vers le rivage de l'île de Catunco située au nord du Rio Cumbija. Cette direction générale de la côte jusqu'à l'extrémité sud des principaux éléments de l'archipel des Bijagos est représentée, comme cela a été déjà indiqué, par un azimut de 132°.

144. Le Sénégal a soutenu que la tendance actuelle de la pratique des Etats et de la jurisprudence internationale est de n'accorder qu'un effet partiel aux territoires insulaires. Le Tribunal franco-britannique

pour la délimitation en mer d'Iroise n'a accordé qu'un demi-effet à l'archipel côtier des Sorlingues distant de 21 milles seulement des côtes britanniques. La Cour internationale de Justice n'a reconnu qu'un demi-effet à l'archipel côtier des Kerkennah dans l'affaire *Tunisie-Libye*, alors même que cet ensemble insulaire n'est qu'à 11 milles de la côte continentale dont il est séparé par un bras de mer dont la profondeur n'est supérieure à 4 mètres que dans certains chenaux et fosses. De plus, l'archipel est entouré de hauts fonds découvrants formant autour de lui une ceinture large de 9 à 27 km (C.I.J. *Recueil 1982*, paragraphe 128). La Chambre de la Cour, en l'affaire *Délimitation dans la région du golfe du Maine*, n'a accordé qu'un demi-effet pour l'île de Seal au large de la Nouvelle-Ecosse (C.I.J. *Recueil 1984*, paragraphe 222), et c'est un effet seulement d'un quart que la Cour a reconnu aux îles maltaises (C.I.J. *Recueil 1985*, paragraphe 73).

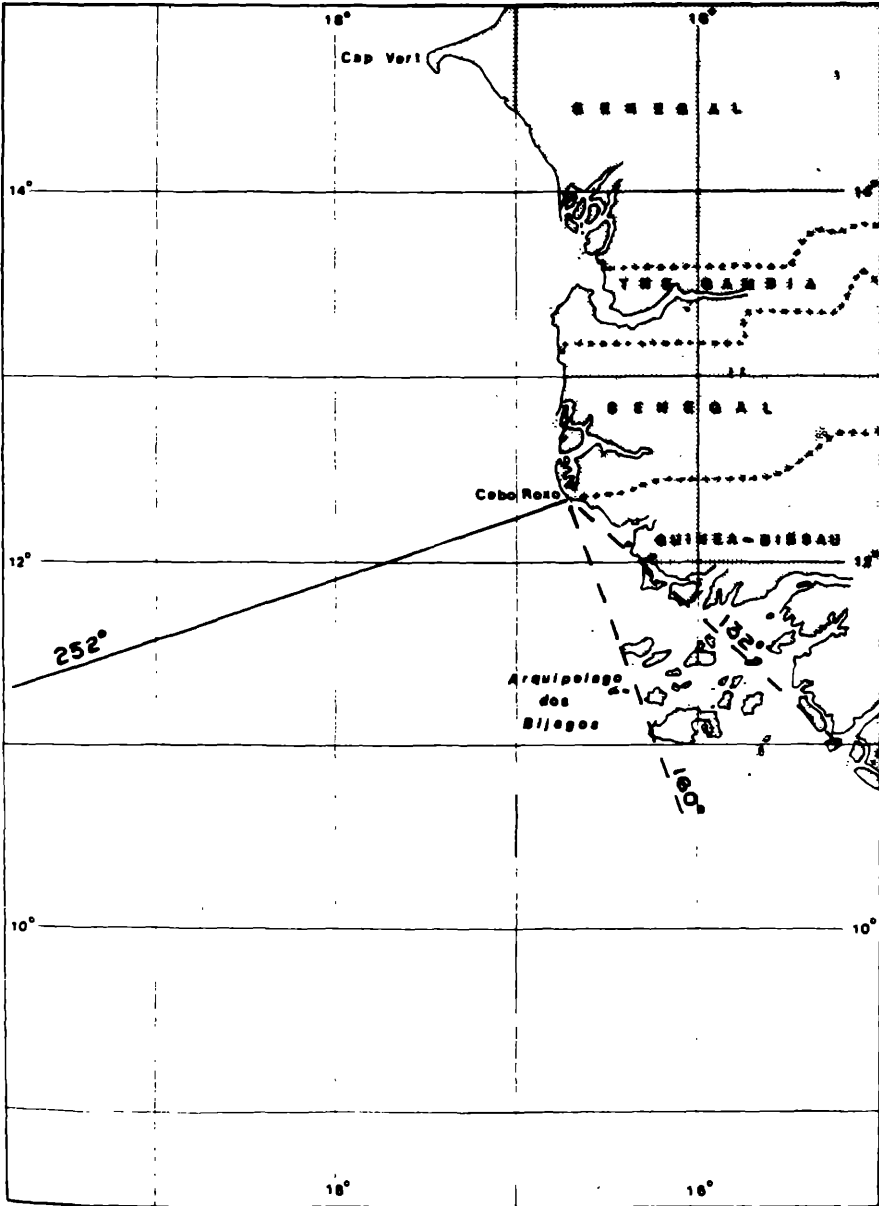
145. La longueur de la façade occidentale de l'archipel, figurée par une ligne allant de la pointe d'Acudama dans l'île Caravela à la pointe d'Ancumbe dans l'île d'Orango est d'environ 33 milles selon l'expert du Tribunal. Cette longueur est relativement comparable à la côte pertinente du Sénégal (Casamance) qui est de 44 milles et qui ne possède pas d'îles. Il ne serait pas équitable de donner à la façade occidentale de l'archipel, allant d'Acudama à Ancumbe, la même importance pour la délimitation qu'à la côte continentale du Sénégal. C'est pourquoi un demi-effet devrait suffire.

146. Dès lors, il convient de tracer à cette fin une ligne constituant la bissectrice de l'angle ayant pour sommet le cap Roxo et pour côtés d'une part la direction générale de la façade occidentale de l'archipel des Bijagos (Roxo-Acudama, 160°) et d'autre part la direction générale de la côte continentale (Roxo-Catunco, 132°). Cela donne une ligne d'azimut 146° concrétisant ce demi-effet insulaire.

147. La République du Sénégal a soutenu que la République de Guinée-Bissau a accepté une ligne d'azimut 240° déterminant la mer territoriale de chacun des deux États. Si tel est le cas, la délimitation à laquelle l'arbitre procède pour les espaces maritimes autres que la mer territoriale doit avoir pour point de départ un point situé à la limite extérieure de cette mer territoriale définie par une ligne orientée à 240°. L'arbitre ne peut pas en effet juger *ultra petita*. Mais en réalité je ne vois nulle part que la Guinée-Bissau ait accepté l'azimut 240° pour sa mer territoriale. Dans ses conclusions, qui la lient et lient le Tribunal, elle a demandé, pour cette partie, l'application du droit de la mer, c'est-à-dire l'équidistance qui, contrairement à l'Accord de 1960, donne un azimut de 247° pour la mer territoriale. Au surplus, ni dans les écritures de la République de Guinée-Bissau, ni dans ses plaidoiries, ni explicitement, ni implicitement, l'azimut 240° n'a été accepté par elle jusqu'à 12 milles. Par conséquent, la question ne se pose pas en termes de jugement *ultra petita*. La ligne qui doit être tracée partira donc nécessairement du cap Roxo sans tenir compte de l'azimut 240°.

148. Il est possible à présent de tracer la ligne qui constitue, dans cette délimitation *ex novo*, la limite maritime entre la République de Guinée-Bissau et la République du Sénégal. On prendra la bissectrice de

Limite maritime entre
la République de Guinée-Bissau
et la République du Sénégal
(252°)



l'angle ayant pour sommet le cap Roxo et pour côtés d'une part la direction générale de la façade maritime guinéenne obtenue après attribution d'un demi-effet à ses îles principales (146°) et d'autre part la direction générale de la côte pertinente sénégalaise (358°). Cela donne une ligne d'azimut 252°.

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149. Il importe maintenant de vérifier le caractère équitable du résultat obtenu. La notion de "longueur de côtes" est un fait physique que la jurisprudence internationale s'est limitée jusqu'ici à utiliser *a posteriori* comme élément de vérification du caractère équitable d'une délimitation proposée, à la suite de la traduction juridique de ce fait physique dans un critère de "proportionnalité" à observer entre les longueurs des côtes et les surfaces maritimes qu'elles génèrent. Les juridictions internationales continuent de prendre la "proportionnalité" comme un critère subsidiaire ou à titre d'élément accessoire.

150. Je le prendrai ici comme élément de vérification aussi, car un autre usage ne se justifierait pas en l'espèce. Mais auparavant, je voudrais faire observer que ce facteur physique devrait être considéré comme plus que cela, c'est-à-dire comme un critère de délimitation à l'instar des autres, spécialement d'ailleurs dans les délimitations frontales comme celle à laquelle la Cour internationale de Justice a procédé en l'affaire *Malte-Libye*. Il est certes clair que ce facteur de proportionnalité n'a pas trouvé sa place dans le fondement du titre car la "norme fondamentale" de l'article 83 de la Convention de 1982 ne le mentionne nulle part. Mais en vérité la norme fondamentale ne mentionne guère plus les autres principes qu'on applique pourtant. Elle se borne à prescrire un résultat équitable. La raison de retenir ce principe est en réalité très forte, car "ce rapport (de proportionnalité) doit être respecté *en vertu* du principe fondamental suivant lequel la délimitation doit être équitable" (*Tunisie-Libye, C.I.J. Recueil 1982, p. 75, paragraphe 103*). Donc déjà une puissante raison qu'il y aurait de le retenir est tirée du lien étroit qu'il entretient tout naturellement avec la notion d'équité qui, elle, est contenue dans la norme fondamentale.

151. Il existe une nécessité logique de prendre en compte, et pas seulement au stade du test *a posteriori*, le facteur de la longueur des côtes exprimé dans le "rapport de proportionnalité", car c'est lui qui exprime quantitativement le pouvoir générateur de zones maritimes. Un tel pouvoir dépend, entre autres, de la longueur des côtes. Chaque Etat côtier possédant un titre égal sur des espaces maritimes, ses côtes sont présumées disposer d'un pouvoir égal d'engendrer un domaine de juridiction maritime. C'est en ce sens qu'on peut parler ici du principe de l'égalité des Etats. Comme l'a dit la Cour c'est la côte, et donc sa longueur, "qui est déterminante pour créer le titre sur les étendues sous-marines bordant ces côtes" (*C.I.J. Recueil 1982, paragraphe 73*). Certes ce n'est pas le fait physique de l'adjacence qui crée le titre juridique sur le plateau continental (affaire *Golfe du Maine, Etats-Unis/Canada, C.I.J. Recueil 1984, paragraphe 103*). Ce qui crée un tel titre, c'est bien

l'existence d'une règle de droit qui a établi un lien logique entre la souveraineté territoriale d'un Etat et les droits que ce même Etat doit avoir sur le plateau continental et les surfaces maritimes qui lui sont adjacentes. Mais il ne faut pas trop jongler avec les abstractions uniquement pour refuser de reconnaître le rôle de la longueur des côtes. La souveraineté territoriale permet d'engendrer des droits sur des espaces maritimes, mais elle est impuissante de toute manière à permettre par elle-même de "concrétiser" ces droits, de quantifier l'étendue des superficies, de tracer une délimitation. La souveraineté territoriale de l'Etat donne seulement "vocation" au plateau continental. L'étendue et les limites de celui-ci sont, quant à elles, déterminées concrètement par la façade maritime en fonction de la géographie de celle-ci, laquelle comprend toutes les caractéristiques physiques, longueur des côtes comprises. Le littoral marin est un paramètre permettant l'utilisation de la mer; il est un moyen (plus ou moins étendu) d'accès à la mer; il est pour cela traduit en unités de mesure.

152. La souveraineté territoriale génère des droits sur des espaces maritimes grâce au littoral (la preuve est qu'elle ne peut pas les engendrer lorsqu'il s'agit d'Etats sans cette façade maritime). Et ce littoral génère une certaine superficie d'espaces maritimes grâce, entre autres, à sa longueur. Dès lors que la souveraineté crée le titre juridique mais qu'elle ne peut le matérialiser qu'au moyen du "support" côtier, c'est ce support qui devient déterminant dans la concrétisation de la superficie de la zone attribuée. Ce support se définit par tous ses éléments constitutifs, dont la longueur.

153. Dans toute affaire de délimitation maritime, le fait physique de la longueur des côtes est un des éléments de la "géographie côtière" qui permet d'établir la "relation côtière" entre deux Etats à cette fin. Cette relation côtière est la somme des caractéristiques que connaissent les côtes pertinentes des deux Etats et elle ne s'établit et se traduit en rapport juridique qu'en intégrant tous les éléments susceptibles de personnaliser ces côtes : leur configuration, leur courbure, leur direction générale, leur projection (radiale ou frontale), le changement de direction de certains de leurs segments, leurs échancrures, leurs saillies, leurs irrégularités, leurs caractéristiques "normales" ou "spéciales", leurs particularités "non essentielles" ou "inhabituelles", leurs relations en tant que côtes adjacentes ou se faisant face, etc. Et bien entendu il serait surprenant et insolite de ne pas tenir compte aussi de leur longueur respective.

154. De fait, la jurisprudence internationale n'a exclu dans aucune affaire le facteur de la longueur des côtes, comme s'il avait, plus que d'autres facteurs, une permanence certaine. Je ne citerai que l'affaire *Golfe du Maine* où la Cour a fortement précisé qu'à son avis "on ne saurait négliger la circonstance d'une *importance indéniable* dans le cas présent, qu'il existe une différence de longueur entre les côtes des deux Etats voisins. . . *Ne pas reconnaître cette réalité serait nier l'évidence*" (C.I.J. Recueil 1984, paragraphe 218). Il en est allé de même dans l'affaire *Malte-Libye*, où les longueurs de côtes des deux Parties étaient si disproportionnées.

155. Comme la Cour internationale de Justice l'avait indiqué en 1969, le test de proportionnalité n'est pas un "rapport mathématique" mais un "rapport raisonnable" (*C.I.J. Recueil 1969*, p. 54). Pour que la différence de longueur de côtes s'incarne dans un critère juridique équitable, il convient d'éviter de l'exprimer dans un rapport arithmétique aveugle par son automatisme et sa rigidité. La recherche d'un résultat équitable appelle la prise en compte de la différence de longueurs dans une formule souple et maniable exprimant dans une mesure raisonnable une correspondance entre le rapport de ces longueurs et celui des surfaces attribuées.

156. Le principe de l'égalité des Etats vient conforter et non pas déstabiliser le critère de proportionnalité ainsi défini. D'abord, une délimitation n'est pas un partage; c'est une opération juridique. L'égalité entre Etats signifie que les souverainetés de la Guinée-Bissau et du Sénégal sont juridiquement d'égale valeur et d'égale portée et donc qu'elles sont susceptibles, l'une comme l'autre, de générer, par leurs projections respectives en mer des zones de plateau continental. Mais le principe de l'égalité entre Etats ne dit pas que chaque Etat a droit à un plateau continental égal en étendue à celui d'un autre Etat. On n'atteint l'égalité juridique qu'en traitant différemment deux éléments physiques eux-mêmes différents : les longueurs de côtes.

157. La souveraineté de la Guinée-Bissau n'est pas plus "intense" que celle du Sénégal en qualité, et *vice versa*. Mais sa traduction concrète, matérielle, quantitative, est différente. Le pouvoir générateur de surfaces maritimes dont chaque Etat dispose avec une "intensité" égale, dépend concrètement de facteurs physiques dont les Etats ne sont pas dotés de manière égale. L'égalité juridique des deux Etats est satisfaite si les côtes de chacun d'eux produisent sensiblement les mêmes effets et donc si chaque kilomètre de l'une ou de l'autre produit le même effet pour l'un comme pour l'autre Etat et génère la même étendue maritime. Dès lors, c'est bien le critère équitable de la proportionnalité qui rend le mieux compte de l'égalité entre Etats.

158. Pour vérifier, par référence aux longueurs de côtes des deux Parties, le caractère équitable de la délimitation faite *ex novo*, il faut définir les espaces maritimes à rapporter à ces longueurs. Cette zone n'est ni la zone litigieuse définie par l'angle 240°/270° enfermant les lignes extrêmes des prétentions des deux Parties, ni la totalité de la superficie de chacun des *domaines maritimes* des deux Etats.

159. La limite septentrionale de la zone pertinente est identifiable sans difficulté. Elle est constituée par la limite maritime méridionale existant entre le Sénégal et la Gambie. Mais il convient de déterminer aussi la longueur de ce parallèle. Cette longueur est celle qu'aurait la ligne établissant une zone économique exclusive, c'est-à-dire 200 milles, car il est hautement probable que le titre sénégalais ne puisse être concurrencé par le titre de l'Etat situé en vis-à-vis, c'est-à-dire le Cap-Vert.

Au sud, les espaces maritimes de la partie méridionale de l'archipel des Bijagos ne peuvent en aucun cas être en chevauchement sur ceux du

Sénégal, et c'est pourquoi ces surfaces devraient être exclues de la zone pertinente qu'on cherche à déterminer aux fins du test de proportionnalité. En conséquence, la limite méridionale de cette zone doit partir de l'intersection de la limite des 200 milles avec la ligne frontière définie par le Tribunal arbitral Guinée-Bissau/Guinée. La limite est donc déterminée par le point de Ponta Ancumbe.

Par ailleurs, et comme on le sait, la Convention franco-portugaise du 12 mai 1886 a disposé qu'appartiendront au Portugal

toutes les îles comprises entre le méridien du cap Roxo, la côte et la limite sud formée par une ligne qui suivra le thalweg de la rivière Cajet et se dirigera ensuite au sud-ouest à travers la passe des Pilotes pour gagner 10° 40' latitude nord avec lequel elle se confondra jusqu'au méridien du cap Roxo.

Les espaces maritimes à l'intérieur du polygone ainsi constitué sont donc des eaux intérieures, relevant de la Guinée-Bissau, hors toute délimitation. Il serait donc déraisonnable d'inclure ces superficies dans la détermination de la zone pertinente.

Pour être cohérente avec cette approche, l'évaluation des étendues d'eau dans la zone pertinente doit exclure toutes les eaux intérieures ainsi que bien entendu le territoire des îles et des hauts fonds découvrants à marée basse.

160. Les longueurs côtières sont, pour le Sénégal, la distance directe du cap Roxo à la frontière méridionale avec la Gambie, soit 44 milles, et, pour la Guinée-Bissau, la distance du cap Roxo à Ponta Ancumbe, soit 85 milles, à dire d'expert. Les longueurs de côtes pertinentes sont donc dans un rapport de 33 à 67. Les superficies maritimes qui reviennent à chacune des deux Parties avec la limite d'azimut 252° sont, selon l'expert, pour le Sénégal, de 52 260 km² et, pour la Guinée-Bissau, de 103 176 km², soit un rapport sensiblement identique au rapport établi entre les longueurs de côtes.

Si toutefois la façade maritime de la Guinée-Bissau est déterminée comme étant la côte continentale pertinente (du cap Roxo à l'île de Catunco), sa longueur serait alors de 111 milles et le rapport serait de 28 à 72. Cela n'est pas disproportionné non plus.

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161. Je ne voudrais pas achever cette opinion sans faire une remarque finale concernant la portée exacte de la mission confiée au Tribunal par le compromis arbitral. Les Parties ont chargé le Tribunal de trancher leur différend de manière complète et définitive, par l'établissement d'une ligne unique délimitant l'ensemble de leurs espaces maritimes respectifs. Il ne me paraît pas que la sentence ait répondu à ce vœu. Celle-ci a donné une réponse partiellement positive à la première question posée par le compromis arbitral dans la mesure où elle a décidé que l'Accord de 1960 fait droit entre les Parties pour la mer territoriale, la zone contiguë et le plateau continental, à l'exclusion de la zone économique exclusive, institution inconnue à la date de la conclusion de cet accord. La sentence rendue est donc partielle en ce qu'elle n'a, en

suivant sa propre logique, ni établi une ligne pour la zone économique exclusive, ni trouvé une solution, impossible d'ailleurs, au problème nouveau auquel elle a abouti, à savoir l'existence de deux lignes là où les Parties, légitimement soucieuses d'éviter tout risque de conflit futur entre elles, souhaitaient une ligne unique. La déclaration du Président du Tribunal montre combien la sentence est incomplète et non conforme à la lettre et à l'esprit du compromis quant à la ligne unique voulue par les Parties. Emanant du Président du Tribunal lui-même, cette déclaration, par son existence autant que par son contenu, justifie de s'interroger plus fondamentalement sur l'existence d'une majorité et la réalité de la sentence.

(Signé) Mohammed BEDJAOUI

PART III

**Case concerning the difference between New Zealand
and France concerning the interpretation or
application of two agreements concluded on 9 July 1986
between the two States and which related to
the problems arising from the *Rainbow Warrior* Affair**

Decision of 30 April 1990

**Affaire concernant les problèmes nés entre
la Nouvelle-Zélande et la France relatifs à l'interprétation
ou à l'application de deux accords conclus
le 9 juillet 1986, lesquels concernaient les problèmes
découlant de l'affaire du *Rainbow Warrior***

Sentence du 30 avril 1990

CASE CONCERNING THE DIFFERENCE BETWEEN NEW ZEALAND AND FRANCE CONCERNING THE INTERPRETATION OR APPLICATION OF TWO AGREEMENTS, CONCLUDED ON 9 JULY 1986 BETWEEN THE TWO STATES AND WHICH RELATED TO THE PROBLEMS ARISING FROM THE RAINBOW WARRIOR AFFAIR*

30 APRIL 1990

Violation of a treaty obligation by a treaty partner—Requirement of good faith to seek consent of the other treaty partner before deviating from the treaty obligation—Requirement of mutual consent of treaty partners—Obligation to act in good faith—Requirement of providing full information in a timely manner to the other treaty partner—Requirement of not impeding a party's efforts to verify the information submitted by the other party—Requirement of allowing the other party a reasonable opportunity to reach an informed decision.

Relationship between the requirement of mutual consent and unilateral acts of treaty partners—Invocation of internal law as a justification for non-performance of treaty obligations—Change of circumstances as a reason for non-compliance with treaty obligations—Circumstances justifying the continuous breach of a treaty obligation—Cessation of a wrongful act.

Customary sources for determining applicable rules and principles of international law—Interpretation of treaties—The law of international responsibility—Circumstances precluding illegality of an otherwise wrongful act (*force majeure*, fortuitous event, distress, state of necessity)—Relationship between breach of a treaty and the law of international responsibility—Law applicable to the determination of the effects of a breach of a treaty.

Tempus commissi delicti—Duration of a treaty obligation—Existence of damage as a prerequisite for relief—Types of damage (material, economic, legal, moral, political)—Appropriate remedies (*restitutio in integrum*, satisfaction in the form of a declaration of cessation of the wrongful act and declaration of obligation)—Reparation in the form of an indemnity for non-material damages.

Eduardo Jiménez de Aréchaga, Chairman
Sir Kenneth Keith,
Prof. Jean-Denis Bredin, Members
Registrar: Michael F. Hoellering
Assistant Registrar: Philippe P. Chalandon

* The Award was rendered in English and French.

I. AGREEMENT TO ARBITRATE

1. On 9 July 1986 the Governments of France and of New Zealand concluded in Paris by an Exchange of Letters* an Agreement submitting to arbitration any dispute concerning the interpretation or application of two other Agreements concluded on the same date, which related to the problems arising from the *Rainbow Warrior* affair.

The text of the letter sent by the Prime Minister of France and accepted by the New Zealand Government runs as follows:

I have the honour to refer to the two Agreements concluded today in the light of the ruling of the Secretary-General of the United Nations.

On the basis of that ruling, I have the honour further to propose that any dispute concerning the interpretation or application of either of these two Agreements which it has not been possible to resolve through the diplomatic channel shall, at the request of either of our two Governments, be submitted to an Arbitral Tribunal under the following conditions:

(a) each Government shall designate a member of the Tribunal within 30 days of the date of the delivery by either Government to the other of a written request for arbitration of the dispute, and the two Governments shall, within 60 days of that date, appoint a third member of the Tribunal who shall be its Chairman;

(b) if, within the times prescribed, either Government fails to designate a member of the Tribunal or the third member is not agreed the Secretary-General of the United Nations shall be requested to make the necessary appointment after consultations with the two Governments by choosing the member or members of the Tribunal;

(c) a majority of the members of the Tribunal shall constitute a quorum and all decisions shall be made by a majority vote;

(d) the decisions of the Tribunal, including all rulings concerning its constitution, procedure and jurisdiction, shall be binding on the two Governments.

If the foregoing is acceptable to the Government of New Zealand, I would propose that the present letter and your response to it to that effect should constitute an agreement between our two Governments with effect from today's date.

2. On 14 February 1989 the Parties concluded in New York the following Supplementary Agreement relating to the present Arbitral Tribunal:

The Government of New Zealand and the Government of the French Republic
 RECALLING the three Agreements concluded by Exchanges of Letters of 9 July 1986 following the ruling of the Secretary-General of the United Nations relating to the *Rainbow Warrior* affair;

RECALLING FURTHER that the third Agreement establishes an arbitral procedure for the settlement of any dispute concerning the interpretation or application of either of the first two Agreements which it has not been possible to settle through the diplomatic channel;

NOTING that the Government of New Zealand by diplomatic Note of 22 September 1988 requested that this procedure be used to settle such a dispute;

NOTING ALSO that in accordance with the third Agreement an Arbitral Tribunal has been constituted comprising:

Dr. Eduardo Jiménez de Aréchaga, Chairman of the Tribunal, appointed by the two Governments;

* For the exchange of letters see United Nations, *Reports of International Arbitral Awards*, vol. XIX, pp. 216-221.

Sir Kenneth Keith, designated by the Government of New Zealand,
Mr. Jean-Denis Bredin, designated by the Government of the French Republic;
BEARING IN MIND the provisions of the third Agreement;

BELIEVING it desirable to supplement those provisions of the third Agreement relating to the functioning and procedures of the Tribunal;

HAVE AGREED AS FOLLOWS:

Article 1

1. Subject to paragraphs 2, 3, and 4 of this Article, the composition of the Tribunal shall remain unchanged throughout the period in which it is exercising its functions.

2. In the event that either the arbitrator designated by the Government of New Zealand or the arbitrator designated by the Government of the French Republic is, for any reason, unable or unwilling to act as such, the vacancy may be filled by the Government which designated that arbitrator.

3. The proceedings of the Tribunal shall be suspended during a period of twenty days from the date on which the Tribunal has acknowledged such a vacancy. If at the end of that period the arbitrator has not been replaced by the Government which designated him the proceedings of the Tribunal shall nonetheless resume.

4. In the event that the Chairman of the Tribunal is, for any reason, unable or unwilling to act as such, he shall be replaced by agreement between the two Governments. If the two Governments are unable to agree within a period of forty days from the date on which the Tribunal has acknowledged such a vacancy, the Secretary-General of the United Nations shall be requested to make the necessary appointment after consultation with the two Governments. The proceedings of the Tribunal shall be suspended until such time as the vacancy has been filled.

Article 2

The decisions of the Tribunal shall be made on the basis of the Agreements concluded between the Government of New Zealand and the Government of the French Republic by Exchanges of Letters on 9 July 1986, this Agreement and the applicable rules and principles of international law.

Article 3

1. Each Government shall, within fourteen days of the entry into force of this Agreement, appoint an Agent for the purposes of the arbitration and shall communicate the name and address of its Agent to the other Government and to the Chairman of the Tribunal.

2. Each Agent may appoint a deputy or deputies. The names and addresses of such deputies shall also be communicated to the other Government and to the Chairman of the Tribunal.

Article 4

1. The Tribunal shall meet at New York at such days and times as it may determine after consultation with the Agents.

2. The Tribunal after consultation with the Agents shall designate a Registrar and may engage such staff and secure such services and equipment as it deems necessary.

Article 5

1. The procedure shall consist of two parts: written and oral.

2. The written pleadings shall consist of:

(a) A Memorial, which shall be submitted by the Government of New Zealand to the Registrar of the Tribunal and to the French Agent within eight weeks after entry into force of this Agreement;

(b) A Counter-Memorial, which shall be submitted by the Government of the French Republic to the Registrar of the Tribunal and the New Zealand Agent within eight weeks after the date of receipt by the French Agent of the New Zealand Memorial;

(c) A Reply, which shall be submitted by the Government of New Zealand to the Registrar of the Tribunal and the French Agent within four weeks after the date of receipt by the New Zealand Agent of the French Counter-Memorial;

(d) A Rejoinder, which shall be submitted by the Government of the French Republic to the Registrar of the Tribunal and the New Zealand Agent within four weeks after the date of receipt by the French Agent of the New Zealand Reply;

(e) Such other written material as the Tribunal may determine to be necessary.

3. The Registrar shall notify the two Agents of the address for deposit of written pleadings and other written material.

4. Each document shall be communicated in six copies.

5. The Tribunal may extend the above time limits at the request of either Government.

6. The oral hearings shall follow the written proceedings after an interval of not less than two weeks.

7. Each Government shall be represented at the oral hearings by its Agent or deputy Agent and such counsel and experts as it deems necessary for this purpose.

Article 6

Each Government shall present its written pleadings and oral submissions to the Tribunal in English or in French. All decisions of the Tribunal shall be delivered in both languages. Verbatim records of the oral proceedings shall be produced each day in the language in which each statement was delivered. The Tribunal shall arrange for such translation and interpretation services as may be necessary and shall keep a verbatim record of all oral proceedings in English and French.

Article 7

1. On completion of the proceedings, the Tribunal shall render its Award as soon as possible and shall forward a copy of the Award, signed by the Chairman and the Registrar of the Tribunal, to the two Agents.

2. The Award shall state in full the reasons for the conclusions reached.

Article 8

The identity of the Agents and counsel of the two Governments, as well as the whole of the Tribunal's Award, may be made public. The Tribunal may also decide, after consultation with the two Agents and giving full weight to the views of each, to make public the written pleadings and the records of the oral hearings.

Article 9

Any dispute between the two Governments as to the interpretation of the Award may, at the request of either Government, be referred to the Tribunal for clarification within three months after the date of receipt of the Award by its Agent.

Article 10

The present Agreement shall enter into force on the date of signature.

II. SUMMARY OF THE PROCEEDINGS

3. In accordance with Article 3 of the Supplementary Agreement, each Government communicated to the Chairman of the Tribunal the name and address of its Agent.

The Agent appointed by New Zealand is Mr. Christopher David Beeby, Deputy Secretary, Ministry of External Relations and Trade, New Zealand.

The Agent appointed by France is Mr. Jean-Pierre Puissochet, Counselor of State, Director of Legal Affairs, Ministry of Foreign Affairs, France.

4. On 8 May 1989, the Tribunal met in New York and appointed Michael F. Hoellering as Registrar, and Philippe P. Chalandon as Assistant Registrar.

5. The two Governments filed their written pleadings within the agreed time limits.

On 5 April 1989 the Government of New Zealand submitted a Memorial with Annexes.

On 1 June 1989 the Government of France submitted a Counter-Memorial with Annexes.

On 30 June 1989 and on 27 July 1989 respectively, the parties submitted their Reply with further Annexes and a Rejoinder.

6. With the written stage of the proceedings concluded the Tribunal, following consultations with the Agents of both Parties, fixed the date of the opening of oral proceedings for 31 October 1989. Oral proceedings were held in New York from 31 October to 3 November 1989. The following persons attended:

For New Zealand:

Rt. Hon. D. R. Lange, Attorney General, as Leader of the Delegation,

Mr. C. D. Beeby, Deputy Secretary, Ministry of External Relations and Trade, as Agent and Counsel,

Professor D. W. Bowett, Q.C., Whewell Professor of International Law, University of Cambridge, as Counsel,

Mr. C. R. Keating, Assistant Secretary, Ministry of External Relations and Trade, as Counsel,

Mr. D. J. McKay, Counsellor, Ministry of External Relations and Trade, as Counsel,

Ms. J. A. Lake, Legal Consultant, Ministry of External Relations and Trade, as Counsel;

For France:

Mr. Jean-Pierre Puissochet, Counselor of State, Director of Legal Affairs, Ministry of Foreign Affairs, as Agent and Counsel,

Mr. Prosper Weil, Professor of the Paris University of Law, Economics and Social Sciences, as Counsel,

Mrs. Brigitte Stern, Professor of the University of Paris X at Nanterre, as Counsel,

Mr. Vincent Coussirat-Coustère, Professor of the University of Lille II, as Counsel,

Mrs. Marie-Reine d'Haussy, Assistant Director, Legal Department, Ministry of Foreign Affairs, as Counsel,

Mr. François Alabrune, Secretary, Legal Department, Ministry of Foreign Affairs, as Counsel,

Mr. Jean-Paul Esquirol, Controller-General of the Army, as Expert,

Mr. Jean-Paul Algret, Lieutenant Colonel, as Expert,

Professor Charles Laverdant, Member of the Academy of Medicine, as Expert.

The oral proceedings were recorded in conformity with Article 6 of the Supplementary Agreement.

III. FINAL SUBMISSIONS OF THE PARTIES

7. The final submissions of the parties are as follows:

For New Zealand, in the Memorial:

144. In conclusion, New Zealand respectfully requests the Tribunal to grant the following relief:

- (a) A declaration that the French Republic:
 - (i) breached its obligations to New Zealand by failing to seek in good faith the consent of New Zealand to the removal of Major Mafart and Captain Prieur from the island of Hao;
 - (ii) breached its obligations to New Zealand by the removal of Major Mafart and Captain Prieur from the island of Hao;
 - (iii) is in breach of its obligations to New Zealand by the continuous absence of Major Mafart and Captain Prieur from the island of Hao;
 - (iv) is under an obligation to return Major Mafart and Captain Prieur promptly to the island of Hao for the balance of their three year periods in accordance with the conditions of the First Agreement;
- (b) An order that the French Republic shall promptly return Major Mafart and Captain Prieur to the island of Hao for the balance of their three year periods in accordance with the conditions of the First Agreement.

For France, in the Counter-Memorial:

Conclusion

For all the reasons set out in the foregoing chapters, the Government of the French Republic respectfully requests that the Arbitral Tribunal reject the requests of New Zealand.

For New Zealand, in the Reply:

Conclusion

In its Counter-Memorial France has failed to establish any reason, whether by reference to law or fact, why New Zealand should not be granted the relief it seeks.

Accordingly, New Zealand respectfully maintains its request for a declaration and an order for specific performance, as set out in paragraph 144 of its Memorial.

For France, in the Rejoinder:

Conclusion

For all the reasons set out in the foregoing chapters, the Government of the French Republic once again respectfully requests that the Arbitral Tribunal reject the requests of New Zealand.

Oral conclusions:

For New Zealand:

Mr. President, I have made it clear that New Zealand sees no reason to make any modification of its request to this Tribunal for a declaration and order as set out in paragraph 144 of the New Zealand Memorial.

For France:

Its Agent reaffirmed its earlier "... conclusions whose main thrust is to encourage you to reject the entire New Zealand request".

IV. THE FACTS

The 1986 Ruling and Agreements

8. On 10 July 1985, a civilian vessel, the *Rainbow Warrior*, not flying the New Zealand flag, was sunk at its moorings in Auckland Harbour, New Zealand, as a result of extensive damage caused by two high-explosive devices. One person, a Netherlands citizen, Mr. Fernando Pereira, was killed as a result of this action: he drowned when the ship sank.

9. On 12 July 1985, two agents of the French Directorate General of External Security (D.G.S.E.) were interviewed by the New Zealand Police and subsequently arrested and prosecuted. On 4 November 1985, they pleaded guilty in the District Court in Auckland, New Zealand, to charges of manslaughter and wilful damage to a ship by means of an explosive. On 22 November 1985, the two agents, Alain Mafart and Dominique Prieur, were sentenced by the Chief Justice of New Zealand to a term of 10 years imprisonment.

10. On 22 September 1985, the Prime Minister of France issued a communiqué confirming that the *Rainbow Warrior* had been sunk by agents of the D.G.S.E. under orders. On the same day, the French Minister for External Affairs indicated to the Prime Minister of New Zealand that France was ready to undertake reparations for the consequences of that action.

11. Bilateral efforts to resolve the differences that had arisen subsequently between New Zealand and France were undertaken over a period of several months. In June 1986, following an appeal by Prime Minister Lubbers of the Netherlands, the two Governments formally approached the Secretary-General of the United Nations and referred to him all the problems between them arising from the *Rainbow Warrior* affair for a binding Ruling.

12. On 6 July 1986, the Secretary-General of the United Nations issued the following:

Ruling

The issues that I need to consider are limited in number. I set out below my ruling on them, which takes account of all the information available to me. My ruling is as follows:

1. *Apology*

New Zealand seeks an apology. France is prepared to give one. My ruling is that the Prime Minister of France should convey to the Prime Minister of New Zealand a formal and unqualified apology for the attack, contrary to international law, on the "Rainbow Warrior" by French service agents which took place on 10 July 1985.

2. *Compensation*

New Zealand seeks compensation for the wrong done to it, and France is ready to pay some compensation. The two sides, however, are some distance apart on quantum. New Zealand has said that the figure should not be less than US Dollars 9 million, France that it should not be more than US Dollars 4 million. My ruling is that the French Government should pay the sum of US Dollars 7 million to the Government of New Zealand as compensation for all the damage it has suffered.

3. *The two French service agents*

It is on this issue that the two Governments plainly had the greatest difficulty in their attempts to negotiate a solution to the whole issue on a bilateral basis before they took the decision to refer the matter to me.

The French Government seeks the immediate return of the two officers. It underlines that their imprisonment in New Zealand is not justified, taking into account in particular the fact that they acted under military orders and that France is ready to give an apology and to pay compensation to New Zealand for the damage suffered.

The New Zealand position is that the sinking of the "Rainbow Warrior" involved not only a breach of international law, but also the commission of a serious crime in New Zealand for which the two officers received a lengthy sentence from a New Zealand court. The New Zealand side states that their release to freedom would undermine the integrity of the New Zealand judicial system. In the course of bilateral negotiations with France, New Zealand was ready to explore possibilities for the prisoners serving their sentences outside New Zealand.

But it has been, and remains, essential to the New Zealand position that there should be no release to freedom, that any transfer should be to custody, and that there should be a means of verifying that.

The French response to that is that there is no basis either in international law or in French law on which the two could serve out any portion of their New Zealand sentence in France, and that they could not be subjected to new criminal proceedings after a transfer into French hands.

On this point, if I am to fulfil my mandate adequately, I must find a solution in respect of the two officers which both respects and reconciles these conflicting positions.

My ruling is as follows:

(a) The Government of New Zealand should transfer Major Alain Mafart and Captain Dominique Prieur to the French military authorities. Immediately thereafter, Major Mafart and Captain Prieur should be transferred to a French military facility on an isolated island outside of Europe for a period of three years.

(b) They should be prohibited from leaving the island for any reason, except with the mutual consent of the two Governments. They should be isolated during

their assignment on the island from persons other than military or associated personnel and immediate family and friends. They should be prohibited from any contact with the press or other media whether in person or in writing or in any other manner. These conditions should be strictly complied with and appropriate action should be taken under the rules governing military discipline to enforce them.

(c) The French Government should every three months convey to the New Zealand Government and to the Secretary-General of the United Nations, through diplomatic channels, full reports on the situation of Major Mafart and Captain Prieur in terms of the two preceding paragraphs in order to allow the New Zealand Government to be sure that they are being implemented.

(d) If the New Zealand Government so requests, a visit to the French military facility in question may be made, by mutual agreement between the two Governments, by an agreed third party.

(e) I have sought information on French military facilities outside Europe. On the basis of that information, I believe that the transfer of Major Mafart and Captain Prieur to the French military facility on the isolated island of Hao in French Polynesia would best facilitate the enforcement of the conditions which I have laid down in paragraphs (a) to (d) above. My ruling is that this should be their destination immediately after their transfer.

4. *Trade issues*

The New Zealand Government has taken the position that trade issues have been imported into the affair as a result of French action, either taken or in prospect. The French Government denies that, but it has indicated that it is willing to give some undertakings relating to trade, as sought by the New Zealand Government. I therefore rule that France should:

(a) Not oppose continuing imports of New Zealand butter into the United Kingdom in 1987 and 1988 at levels proposed by the Commission of the European Communities insofar as these do not exceed those mentioned in document COM (83) 574 of 6 October 1983, that is to say, 77.000 tonnes in 1987 and 75.000 tonnes in 1988; and

(b) Not take measures that might impair the implementation of the Agreement between New Zealand and the European Economic Community on Trade in Mutton, Lamb and Goatmeat which entered into force on 20 October 1980 (as complemented by the Exchange of Letters of 12 July 1984).

5. *Arbitration*

The New Zealand Government has argued that a mechanism should exist to ensure that any differences that may arise about the implementation of the agreements concluded as a result of my ruling can be referred for binding decision to an arbitral tribunal. The Government of France is not averse to that. My ruling is that an agreement to that effect should be concluded and provide that any dispute concerning the interpretation or application of the other agreements, which it has not been possible to resolve through the diplomatic channel, shall, at the request of either of the two Governments, be submitted to an arbitral tribunal. (The ruling then made the specific proposals for arbitration which were later incorporated in the Agreement set out in para. 1 of this Award.)

6. The two Governments should conclude and bring into force as soon as possible binding agreements incorporating all of the above rulings. These agreements should provide that the undertaking relating to an apology, the payment of compensation and the transfer of Major Mafart and Captain Prieur should be implemented at the latest on 25 July 1986.

7. On one matter I find no need to make a ruling. New Zealand, in its written statement of position, has expressed concern regarding compensation for the family of the individual whose life was lost in the incident and for Greenpeace. The French statement of position contains an account of the compensation arrangements that

have been made; I understand that those assurances constitute the response that New Zealand was seeking”.

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13. In accordance with paragraph 6 of the Ruling, the French and New Zealand Governments concluded in Paris, on 9 July 1986, by Exchanges of Letters, three Agreements which incorporated the provisions of the Ruling. The first of these Agreements, which relates to the situation of the two French officers, runs as follows:

On 19 June 1986, wishing to maintain the close and friendly relations which have traditionally existed between New Zealand and France, our two Governments agreed to refer all of the problems between them arising from the Rainbow Warrior affair to the Secretary-General of the United Nations for a binding Ruling. In the light of that Ruling, made available on 7 July 1986, I have the honour to propose the following:

The Prime Minister of France will convey to the Prime Minister of New Zealand a formal and unqualified apology for the attack, contrary to international law, on the Rainbow Warrior by French service agents which took place in Auckland on 10 July 1985. Furthermore, the French Government will pay the sum of US\$ 7 million to the Government of New Zealand as compensation for all the damage which it has suffered.

The Government of New Zealand will transfer Major Alain Mafart and Captain Dominique Prieur to the French military authorities. Immediately thereafter, Major Mafart and Captain Prieur will be transferred to a French military facility on the island of Hao for a period of not less than three years.

They will be prohibited from leaving the island for any reason, except with the mutual consent of the two Governments. They will be isolated, during their assignment in Hao, from persons other than military or associated personnel and immediate family and friends. They will be prohibited from any contact with the press or other media, whether in person, in writing or in any other manner. These conditions will be strictly complied with and appropriate action will be taken under the rules governing military discipline to enforce them.

The French Government will every three months convey to the New Zealand Government and to the Secretary-General of the United Nations, through diplomatic channels, full reports on the situation of Major Mafart and Captain Prieur in terms of the two preceding paragraphs in order to allow the New Zealand Government to be sure that these paragraphs are being implemented as agreed.

If the New Zealand Government so requests, a visit to the facility on Hao may be made, by mutual agreement between the two Governments, by an agreed third party.

The undertakings relating to an apology, the payment of compensation and the transfer of Major Mafart and Captain Prieur will be implemented not later than 25 July 1986.

14. In accordance with the Ruling and the First Agreement, officers Mafart and Prieur were transferred from New Zealand to a French military facility on the island of Hao on 23 July 1986, and the other obligations undertaken in para. 2 of the Agreement were implemented.

The Case of Major Mafart

15. On 7 December 1987 the French Ministry of Defence was advised by the commander of the Hao military base that the condition

of Major Mafart's health required examinations and immediate care, which could not be carried out locally. The Minister of Defence then decided to send a medical team to the site. This team was led by a principal Army doctor, Dr. Maurel, from the Val-de-Grace Hospital in Paris.

16. On 10 December 1987 (Hao date), Dr. Maurel sent the Ministry of Defence a message, received in Paris on Friday 11 December, stating that Major Mafart "poses the etiological and therapeutic problem of stabbing abdominal pains in a patient with a history of similar, and still unlabeled, problems. The results of today's examination indicate the need for explorations in a highly specialized environment. His condition justifies an emergency return to a hospital in mainland France. Absent any formal notice from you to the contrary, I propose that this evacuation take place by the Sunday 13 December 1987 aircraft".

17. On 11 December 1987, a Friday, the Minister of Defence conveyed Dr. Maurel's message to the Minister of Foreign Affairs, adding that he planned to proceed with officer Mafart's health-related repatriation. He also asked the Minister of Foreign Affairs to "contact the New Zealand Government through the procedures stipulated in the agreement signed with that Government".

18. On 11 December 1987, at 6.59 p.m. (Paris time; it was 6.59 a.m. on Saturday 12 December in Wellington) the Minister of Foreign Affairs sent the French Ambassador in Wellington a telegram asking him to immediately give the New Zealand authorities a verbal note containing all the information that the French Government had just received (Dr. Maurel's medical opinion was attached to this note). The French Government, referring to the 1986 Agreement, asked "the New Zealand Government to consent to Major Mafart's urgent health-related transfer to a hospital in mainland France".

The French Ambassador was instructed to stress the fact that the only means of transport immediately available between Hao and Paris was the military aircraft leaving Hao Sunday morning. The Ambassador was asked to add that "the state of Major Mafart's health absolutely required that he be examined without delay in a highly specialized medical facility which exists neither in Hao nor in Papeete".

19. On 12 December 1987, between 10 a.m. and 11 a.m. (Wellington time) the French Ambassador contacted a senior official of the New Zealand Ministry of Foreign Affairs, communicating the above message.

20. About 4 hours later, between 2.00 and 3.00 on the afternoon of Saturday, 12 December 1987, the New Zealand Government answered the preceding communication by note verbale which stated that "in order to enable the request to be examined with the care it deserves, the New Zealand Government will require a New Zealand assessment to be made of Major Mafart's medical condition. Accordingly, urgent arrangements are now being made for a suitably qualified New Zealand military doctor to fly on a New Zealand military aircraft to Hao for this purpose". The note added that "the Ministry seeks urgent confirmation that the French authorities will give the necessary clearance for a

military flight to Hao for this purpose. Details of the proposed flight will be given to the Embassy as soon as possible”.

In transmitting the preceding note verbale to his Government the French Ambassador added that the New Zealand Senior official who handed him the note inquired whether the departure date scheduled for Major Mafart’s evacuation, that is, 13 December at 4.00 a.m., was in fact the Hao date. If so, this would correspond to the New Zealand date of Monday 14 December.

21. On 12 December 1987 the French Ambassador in Wellington advised the French Ministry of Foreign Affairs that he was given the following information relating to the projected visit to Hao of a New Zealand military doctor arriving by Air Force plane:

Type of aircraft	P3 ORION
Registration	New Zealand 6204
Flight number	N.P. 0999
Pilot	Lieutenant B. R. Clark
Crew	12 members
Passengers	1 doctor and 1 interpreter
Depart Auckland	Sunday 13 December 7.00 a.m. (New Zealand date and time)
Arrive Hao	Saturday 12 December 4.00 p.m. (French Polynesia date and time)
Call sign	Kiwi 999
Facilities requested	Fuel 35,000 pounds Avtur.

22. On 12 December 1987 at 5.11 p.m. (Paris time), equivalent to 5.11 a.m. on 13 December 1987 (Wellington time), the Ministry of Foreign Affairs sent by telegram to the French Ambassador in Wellington the response to be delivered to the New Zealand authorities. Due to the time shift, this response was received in Wellington early on Sunday morning 13 December 1987, some sixteen hours after the New Zealand proposal in para. 20 above.

The French authorities indicated that, to their great regret, they were unable to

authorize a New Zealand aircraft to make a stop on the Hao military base. Indeed, for imperative reasons of national security, access to this base is strictly regulated and is prohibited to foreign aircraft. This is the reason why Major Mafart and Major Prieur were transported to the Hao base in July 1986 by a French military aircraft, which had come to pick them up at the Wallis airport, to which they had been transported from New Zealand by a New Zealand military plane.

The French authorities added that “the French Government agrees to allow Major Mafart to be examined, as soon he arrives in mainland France, by a physician designated by New Zealand. If applicable, it would be willing to consider covering the cost of sending a New Zealand physician to France, if this solution was preferred by the New Zealand Government”.

23. On 13 December, the French Ambassador advised that the New Zealand Prime Minister could not accept the French proposal

but advanced new proposals, taking into account the impossibility of landing at Hao. According to the New Zealand Memorial, the New Zealand Government put forward two alternatives: that a New Zealand medical doctor be flown to Papeete, Tahiti, by a New Zealand military aircraft, and then onward to Hao by French military aircraft; or, if France preferred, that the New Zealand medical doctor be flown to Papeete by a commercial flight and then onward to Hao by French military aircraft.

The French Ambassador in Wellington advised his Government somewhat differently: "Mr. Lange proposes the following: New Zealand dispatches a military doctor to Papeete as soon as possible by commercial airline. The French party undertakes to transport him to Hao so that he can perform his medical assignment there. After being brought back to Papeete, he returns to New Zealand to submit his conclusions to the New Zealand authorities".

24. On 14 December (Wellington time), the French Ambassador sent the following note to the New Zealand Ministry of Foreign Affairs:

A—The New Zealand request to have Major Mafart examined by a New Zealand physician who would go to Hao, via Papeete, then return to Auckland to report to his Government, who would then make their decision known, would delay the French officer's health-related transfer to mainland France by an excessive period of time that could be as long as several days, given the available transport opportunities. The French authorities feel that this additional delay is absolutely incompatible with the urgency, stressed by the doctor who examined Major Mafart, of transporting the Major to a highly specialized medical facility in mainland France.

B—In carrying out their duty to protect the health of their agents, the French authorities, in this case of *force majeure*, are forced to proceed, without any further delay, with the French officer's health-related repatriation. Major Mafart will leave Hao on Sunday 13 December at 2.00 (local time) on board a military plane that will arrive in Paris on Monday 14 December at about 10.00 (local time) after a technical stop in Pointe-à-Pitre.

C—The French authorities reiterate that they are willing to allow Major Mafart to be examined by a physician chosen by New Zealand, as soon as he arrives in Paris, and that they are even willing to cover the cost of sending a physician from New Zealand for this purpose, if this solution is preferred by the New Zealand Government.

D—All measures have been taken to insure the confidentiality of the entire operation and to see to it that it remains secret, in any event until Major Mafart can be examined in mainland France by the physician designated by the New Zealand authorities".

25. On 14 December 1987 at 9.30 (Paris time), Officer Mafart arrived in Paris. He was taken to the Val-de-Grace Hospital where he was examined and treated by Professor Daly, head of the Val-de-Grace medical clinic, a professor of medicine and a specialist in gastroenterology.

26. A note delivered on 14 December 1987 from the New Zealand Embassy to the French Ministry of Foreign Affairs stated:

New Zealand views with considerable concern, and wishes to record its serious objection to the unilateral action taken, in the absence of New Zealand consent, to transfer Major Alain Mafart to France on Sunday 13 December 1987.

New Zealand regards this action as a serious breach of both the letter and the spirit of the obligations undertaken pursuant to the Ruling of 6 July 1986 by the Secretary-General of the United Nations.

The first approach to the New Zealand Government about a possible medical evacuation of Mafart was made by the Ambassador of France in New Zealand at approximately 10.00 a.m. New Zealand time on Saturday 12 December. From that moment the New Zealand side has acted with great sensitivity to the humanitarian considerations involved and has worked hard, in a sympathetic and pragmatic way, to ensure that both medical requirements and requirements of principle were left in balance.

Within four hours of the receipt of the French request a proposal had been approved by the New Zealand Prime Minister and conveyed to the Ambassador of France which would have enabled examination in Hao of Mafart by a New Zealand doctor the following afternoon.

That proposal was rejected by the French side after 16 hours delay on the basis that it was undesirable that a New Zealand aircraft should land at Hao. New Zealand then immediately offered to transport its doctor to Tahiti, with France providing onward transportation to Hao. That proposal could also have been accomplished in a similar time frame had it not been for the delay on the part of the French authorities.

New Zealand reserves its right to submit the question of Mafart's transfer from Hao to arbitration in accordance with the agreed procedures set out in the Exchange of Letters of 9 July 1986. Nevertheless the New Zealand Government is willing to work constructively with the French Government to reach a resolution of the matter and, to this end, New Zealand awaits the French response to the proposals made today in a separate communication to the Prime Minister of France from the Prime Minister of New Zealand.

27. The letter from the Prime Minister of New Zealand to the Prime Minister of France, dated 14 December 1987, read as follows:

I have been advised that, without the consent of the New Zealand Government, Major Mafart was taken some hours ago by French military aircraft from Hao for medical examination in metropolitan France.

My purpose in writing to you is not to deal with the legality of the action which has been taken—that is clear and will be the subject of a note from the New Zealand Embassy to the Quai d'Orsay—but to explore with you the best means of dealing with the situation which this unilateral action has created.

Your authorities have advised us that a New Zealand doctor may examine Mafart on his arrival in Paris; and arrangements are now being made to enable this to be done. I would of course expect that our doctor's examination of Major Mafart will confirm a medical condition requiring urgent specialist examination. Should our doctor's examination of Major Mafart confirm the need for urgent specialist attention then I suggest that we might proceed on the basis of an agreement as follows:

(a) compliance with the Exchange of Letters of 9 July 1986, by the return of Major Mafart to Hao, will be restored as soon as his medical condition permits and he will be so returned even if further maintenance treatment is required which could be continued on Hao;

(b) the conditions contained in the Exchange of Letters of July 1986 relating to Major Mafart's isolation, including the prohibition of any contact with the press or other media whether in person, in writing or in any other manner will continue to apply during such time as Major Mafart is in metropolitan France;

(c) the French authorities will transmit regularly to the New Zealand Government medical reports on Major Mafart's condition and, if requested, will undertake consultations with a designated New Zealand doctor and permit subsequent examinations;

(d) in the event of disagreement between our two Governments that Major Mafart's medical condition is such as to permit his return to Hao, the issue will be referred to the Secretary-General of the United Nations for his decision;

In the event that our doctor's examination does not confirm a medical condition requiring urgent specialist attention then he shall be returned forthwith to Hao and in the event that there is disagreement as to that then the provisions of (d) shall apply.

I should be grateful for your urgent confirmation that this proposal is acceptable to you.

I think I should add that when Major Mafart is returned to Hao I intend, pursuant to the Exchange of Letters of 9 July 1986, to request the agreement of your Government to a visit to Hao by a representative of the Secretary-General of the United Nations. I should also note, in this regard, that in view of the essential role played by the Secretary-General in this matter, I have thought it proper to advise him of these developments.

I hope that Major Mafart's health will improve.

28. On 14 December 1987 New Zealand sent a doctor to examine Alain Mafart. At 4.00 p.m. (Paris time) officer Mafart was examined by Dr. R. S. Croxson, a national of New Zealand, residing in London. Dr. Croxson, with the cooperation of French authorities and medical doctors, was able to conduct a substantial physical examination of officer Mafart, becoming acquainted with all his health records, in consultation with the French doctors.

Dr. Croxson's report to the New Zealand authorities of 14 December 1987 concerning his examination of Major Mafart read as follows:

Questions Dr. Croxson was asked to address:

(a) whether Mafart has a condition which, in your opinion, required specialist investigation not likely to be available in the presumably limited military facilities on Hao;

(b) whether in your opinion the symptoms and conditions were such as to justify an emergency evacuation;

(c) an account of the nature of the specialist investigations to be undertaken, including the likely length of time for the investigation;

(d) your opinion, if any, on whether or when he would be fit to be returned to Hao;

(e) whether in your opinion the patient may be simply a malingerer.

Conclusions from Dr. Croxson's report on Major Mafart, 14 December 1987:

(a) I believe Mafart needed detailed investigations which were not available on Hao;

(b) Although Dr. Maurel appeared impressed by the severity of his pain and symptoms, when I asked if he thought Mafart might need an emergency operation he hesitated and I had the feeling he did not really feel at this stage that immediate surgery was going to be required but was more impressed by the recurring nature of the symptoms. I think it is therefore highly arguable whether an emergency evacuation as opposed to a planned urgent evacuation was necessary;

(c) 2-3 weeks;

(d) when investigations and observations are completed (possibly 3-4 weeks), as the doctors may wish to keep him under observation to witness a further attack should their investigations not disclose any other significant abnormalities;

(e) all the medical facts are very consistent and I do not think he is a malingerer.

29. On 18 December 1987 Dr. Croxson submitted a second report, which read as follows:

Opinion

The further sequencing and investigations would sound appropriate for somebody with such a longstanding story of recurrent abdominal pain and distension from probable adhesions. The investigations would normally take a further one to two weeks. I do not think that they are being excessively slow on their investigations, but are pursuing them in a fairly logical manner. Perhaps the investigations could be compressed over five or six days rather than the planned two weeks, although I did not take this point up with Professor Daly. Professor Daly offered to discuss by telephone with me the further results on Monday 4 January at the same time.

I did not tape record my conversation with Professor Daly, and I think I was a little limited in not having French interpretation. Nonetheless the results of the investigations and the planned sequencing really do sound quite appropriate. Given the long history, I suspect most clinicians would like to witness an episode of severe pain and abdominal distension. I did not raise the question again of exploratory surgery, nor did Professor Daly indicate to me that there was any question of this at the present time.

Professor Daly indicated that he had read my full medical report and agreed that it was a totally accurate picture of his (Professor Daly's) medical facts as outlined to me. We did not discuss the acute management of Mafart as it appeared to Dr. Maurel when he arrived at Hao on 10 December.

30. On 19 December 1987 the Ministry of Foreign Affairs of the French Republic addressed a formal note to the New Zealand Embassy, answering the 14 December formal note in the following terms:

The French Government thinks that Major MAFART's transfer to Paris on December 13 to undergo emergency medical examinations and the care necessitated by his condition cannot be analyzed as a failure to meet the obligations under the agreement resulting from the Exchanges of Letters on 9 July 1986 between France and New Zealand, following the intervention of the Secretary-General of the United Nations.

On 11 December, when it appeared imperative to have Major MAFART undergo medical examinations as soon as possible in a highly specialized environment, the New Zealand Ministry of Foreign Affairs was contacted in order to secure the New Zealand authorities' consent to the French officer's transfer to Paris by military flight departing Hao on 14 December. The New Zealand authorities then made their consent contingent upon a doctor's examination of Major MAFART on Hao and, for this purpose, proposed that the required physician be transported to the French military base by a New Zealand military plane. But, as the New Zealand authorities were moreover aware, given the nature of the Hao base, foreign aircraft were excluded from landing there. In this connection, the French Ministry of Foreign Affairs recalls that, when Major MAFART and Captain PRIEUR were transported from New Zealand to Hao, this impossibility was made known and resulted in their being forced to change planes at the Wallis airport.

The solution of having a New Zealand physician come to the Papeete airport and be transferred from that city to Hao by a French plane was also examined. But it was immediately ascertained that, given the technical possibilities and the fact that the doctor would have to return via the same arrangements, so that he could report to his Government, the result of this procedure would have been that no decision could be made for several days.

Under these conditions, the only solution, in the spirit of the Agreement of 9 July 1986 and of the conversations that led up to it, was to evacuate Major MAFART and permit the physician designated by New Zealand to ascertain his state of health as soon as he arrived in Paris. The French Government is happy to point out, in this

regard, that the New Zealand authorities accepted this solution and dispatched Dr. CROXSON to Paris for this purpose.

It noted with satisfaction the very positive appraisal that the New Zealand Government gave of the frankness, candor and full cooperation that Dr. CROXSON enjoyed while carrying out his assignment.

It observes that the conclusions of the report written by this doctor, which were conveyed to it on 16 December by the New Zealand Embassy in Paris, concur with those of the French physicians and show that there were perfect grounds for the decision to transport Major MAFART to a highly specialized facility existing only in mainland France.

The French Government shares the desire expressed by the New Zealand Government, in its note, to participate constructively in the examination of this matter, about which the Prime Minister will send a message to the Prime Minister of New Zealand under separate cover.

31. On 23 December 1987 the Prime Minister of France addressed the following letter to the Prime Minister of New Zealand:

The emergency conditions under which Major MAFART had to be returned to France to undergo medical examinations, which you asked about in your letter of 14 December, must, as you yourself indicate, be examined between us in order to analyze the main elements of the situation.

It is certainly not necessary to recall the details of the circumstances of this transfer, which, I am sure, you are perfectly familiar with. It was following the dispatch of a French military doctor, alerted by the Ministry of Defence, that the necessity became apparent on 11 December of having Major MAFART examined as soon as possible in a highly specialized environment, which could not be found on French territory except in Paris. Through our Ministries of Foreign Affairs, contacts were immediately made for the purpose of obtaining your country's consent, in accordance with the Agreement concluded on 9 July 1986 by the Exchanges of Letters following the intervention of the Secretary-General of the United Nations, which themselves resulted from secret conversations between our two Governments. Your representatives then indicated their desire to be permitted to have Major MAFART examined by a New Zealand physician. However, it was quickly ascertained that this was not possible by direct landing of a New Zealand airplane on the island of Hao, which is a military base closed to foreign aircraft. You will also recall that the transfer of Major MAFART and Captain PRIEUR from New Zealand to Hao had required a change of planes in Wallis, for the same reason.

It also became clear that the solution that your representatives immediately proposed, which consisted of flying a doctor from New Zealand to Papeete, then from Papeete to Hao, by French military plane, and returning this doctor via the same route so that he could report to his Government, would have required a delay of several days, which seemed contrary to the imperative interests of Major MAFART's health.

Under these conditions, the only remaining solution was to defer, until his arrival in Paris, Major MAFART's examination by a doctor of your choosing, which was done. In this regard, I noted the very positive appraisal that you and your staff gave to the quality of the cooperation that Dr. CROXSON enjoyed from the French doctors. The reception given to your compatriot, his access to all the necessary documents, and the in-depth examination of Major MAFART, which he was able to do, showed the spirit of openness that we bring to this matter.

Moreover, as you undoubtedly recall, the eventuality of illness, and, in the case of Captain PRIEUR, of pregnancy, were precisely the conditions that led to the stipulation, in the July 1986 Agreement, of the possibility of leaving the island. This emerges from the secret negotiations of our two Governments, conducted, on respective sides, by Mr. BEEBY and Mr. GUILLAUME, which prepared the way for the intervention of the United Nations Secretary-General, and of which we have kept a very accurate transcript. Dr. CROXSON, at your request, drew up a medical report,

the conclusions of which, not being covered by medical confidentiality, were conveyed to the Ministry of Foreign Affairs by your Embassy in Paris. This report shows that Major MAFART was in need of substantial medical examinations which could not be done in Hao and which were to last several weeks. In response to a question that you asked him, Dr. CROXSON added that Major MAFART was by no means a malingerer and that he was indeed ill.

Thus, all the circumstances of this affair confirm my feeling that we have acted with moderation and discretion and that we should now await the results of the examinations underway in order to be able to appraise the state of Major MAFART's health with better knowledge of the facts.

Such are the indisputable facts, verified by individuals that you designated. You will understand that, under these conditions, I was surprised by the public accusations that you immediately made against this officer and against the French authorities, whereas I had proposed that this operation be kept confidential and that the fact themselves showed the correctness of the decision that I made.

However, I have just learned that you feel, after a new examination of all of the elements of this affair, that there was no longer any point to the intervention of the Secretary-General of the United Nations, to which you alluded to in your letter. This way of seeing things corresponds to the attitude that I personally adopted by refusing to engage in a polemic. Indeed, I am convinced that our two countries today should endeavor to turn the page and resume a constructive relationship, in keeping with the long tradition of friendship between our two nations.

32. On 23 December 1987 the Embassy of New Zealand answered the two communications in paragraphs 30 and 31 above by the following note:

The New Zealand Embassy presents its compliments to the Ministry of Foreign Affairs and has the honour to convey, on instruction, the following response to certain of the assertions contained in the Ministry's Note of 19 December 1987 and the letter to the Prime Minister of New Zealand from the Prime Minister of France delivered in Wellington on 23 December.

New Zealand rejects the view advanced by the French side that the transfer of Major Mafart from Hao was in accordance with the ruling of the United Nations Secretary-General and the Exchanges of Letters of 9 July 1986 between New Zealand and France.

On a point of fact, the sequence of dates set out in the Ministry's Note is inaccurate. New Zealand was advised of Mafart's condition late in the morning of 12 December (New Zealand time). About midnight on 13 December (New Zealand time)—about 39 hours later—advice was given by the French Ambassador in Wellington (and also by the Quai d'Orsay to the New Zealand Embassy) that he had already been removed from Hao.

The request for consent was presented as a humanitarian emergency. New Zealand responded promptly and sympathetically offering to send a New Zealand doctor for an on the spot examination so that, if the medical condition of Mafart justified it, consent could be given within the time frame requested by the French authorities. The quickest option involved a flight direct to Hao. It was a matter for the French authorities to judge whether their position about clearances for foreign aircraft at Hao was of greater importance to them than what was said to be a serious medical emergency. The long delay in responding and the terms of that response called in question the veracity of the so-called emergency.

It is manifestly incorrect to state that the New Zealand side, when confronted with this response from France, suggested an option that would have prevented a decision for several days. The French Ambassador in Wellington was told that the doctor could be transported immediately to Papeete by New Zealand military aircraft (or alternatively, if the French side preferred, civilian aircraft options could be explored) for onward transport to Hao by French military aircraft.

There is no basis in fact for the extraordinary statement that the New Zealand doctor would have had to return to New Zealand to make a report before a decision could be made.

New Zealand formally disputes the suggestion that the decision to evacuate Major Mafart was in accord with the spirit of the Agreement or the Secretary-General's Ruling or any preliminary discussions. It was, on its face, a clear breach of both the letter and the spirit of the Ruling and the Exchanges of Letters—a breach which called in question the credibility of France's commitment to honor undertakings in this matter. There is not and was never at any stage of the discussions between France and New Zealand, an agreement or understanding that New Zealand would automatically agree to a request for medical evacuation. The relevant clause in the Agreement means precisely what it says.

New Zealand also rejects the suggestion that its decision to accept the offer to send a New Zealand doctor to Paris to examine Major Mafart can or could be construed as acceptance by the New Zealand authorities of the evacuation of Mafart without New Zealand consent. That suggestion has no basis in fact and is wholly at variance with the terms of the Embassy's Note 1987/103 of 14 December 1987 which recorded New Zealand's serious objection to the unilateral action taken by France.

New Zealand reiterates that its proposals put forward on 12 and 13 December were made in good faith. New Zealand was not refusing consent but seeking clarification. That could have been accommodated in a number of ways and very quickly. The objective evidence now available confirms that there was in fact no emergency and no justification for the French authorities setting a deadline of the kind that they did. Furthermore, New Zealand could have been advised of the situation considerably earlier. It is also clear beyond any doubt that had there in fact been a genuine emergency, New Zealand's requests for clarification (which were entirely reasonable and appropriate) could have been met within the time frame proposed had France been willing to work positively and constructively to that end. Responsibility for the delay in obtaining New Zealand consent lies at France's door.

33. On the same day, 23 December 1987, the Prime Minister of New Zealand answered the Prime Minister of France in the following terms:

Thank you for your letter which I have received today. I appreciate the sentiments you have expressed about the need to restore and maintain the cordial relations between New Zealand and France. I must say, however, that the fact that you have not in your response addressed the substantive issues that were contained in my letter of 14 December, is a matter of grave concern to me and my Government.

If we are to turn a page as you suggest, then what we need is a satisfactory assurance that as soon as the medical investigations of Major Mafart have been completed and he has undergone any treatment which can only be given in Paris, he will be returned to Hao.

Our medical advice is that these investigations will be completed shortly. I must say to you that, in the absence of a satisfactory response by 30 December to the proposals set out in my earlier letter, we will have no choice but to conclude that France is unwilling to comply with its legal obligations. In that event we will feel compelled to invoke the arbitration provisions of the Secretary-General's Ruling and the Agreement of 9 July 1986.

Let me also say that at no stage have we indicated that there was no role for the United Nations Secretary-General in seeking to resolve this matter. To the contrary, I specifically mentioned this role in my letter and in various public statements. I have discussed the situation with him and we have kept him fully informed and will continue to do so. He has also, as you know, taken various initiatives of his own.

Finally, there are a number of points in your letter (which are also mentioned in recent discussion between our officials) which I do not accept. I have asked the New Zealand Embassy in Paris to convey our views on these matters to the Quai d'Orsay.

I have also asked our Embassy to set in motion a request for a visit to Hao by a third party in accordance with the Ruling and the Agreement of 9 July 1986.

34. On 30 December 1987 the French Ministry of Foreign Affairs sent a note to the New Zealand Embassy answering the New Zealand communications in paras. 32 and 33 above, in the following terms:

The Ministry of Foreign Affairs was surprised by the sharp tone of the referenced documents and therefore feels it is a good idea to respond so as to enable a better understanding of the French Government's point of view.

The Ministry of Foreign Affairs recalls that Major Mafart is currently still undergoing medical examinations, the necessity of which has been acknowledged by both the French doctors and Dr. Croxson. These examinations will not be completed until early January; Dr. Croxson has also indicated that he was on vacation until 4 January. So, today, no one can say what the doctors' conclusions will be.

The Ministry of Foreign Affairs is surprised that, under these conditions of fact, the New Zealand authorities could have doubted the French intentions in connection with respecting the July 1986 Agreement; it goes without saying that Major Mafart will return to Hao when the state of his health permits.

It emphasizes that, on the second and third points brought up in Mr. Lange's letter of 14 December (isolation of Major Mafart, specifically from the press and the media, plus disclosure of medical reports, as well as examinations by a New Zealand doctor), New Zealand has received from the beginning, and will continue to receive, full satisfaction.

A discussion of possible recourse to the Secretary-General of the United Nations in the event of a disagreement between the two Governments over the possibility of returning Major Mafart to Hao, given the state of his health, seems pointless, for the reasons indicated above. However, if the question did arise, the French Government would have the greatest apprehensions about appealing to the Secretary-General of the UN to resolve any dispute over the evaluation of the officer's health. Firstly, this is not the procedure stipulated in the Agreement of 9 July 1986, which in this case expressly provides for settlement by arbitration; secondly, just as the intervention of the high authority represented by the Secretary-General was necessary to solve all the problems born of the Rainbow Warrior incident, so it may seem out of proportion with the limited issue here involved, should it arise.

As for the conditions under which the decision to return Major Mafart to France was made because of the state of his health, the Ministry of Foreign Affairs rejects the New Zealand assertion that the refusal to let a New Zealand airplane land on Hao in itself gives rise to doubt as to the emergency nature of Major Mafart's evacuation. As it has already had occasion to point out, the impossibility of allowing a foreign aircraft to land on Hao is absolute and was well known to New Zealand.

The Ministry of Foreign Affairs notes that New Zealand maintains that there is no factual basis for the statement that the New Zealand doctor who would have been taken to Hao on a French means of transportation after a connection in Papeete would have had to return by the same route to New Zealand in order to report to his Government before a decision could be made. However, it points out that this information was conveyed to it from Wellington by the French Ambassador immediately following the telephone conversation which took place on Sunday 13 December at about 1.00 p.m. between the Ambassador and Mr. Beeby.

It does not share the opinion expressed in note No. 1987/107 as to the spirit of the Agreement resulting from the Exchange of Letters on 9 July 1986. Although leaving the island requires the consent of both Governments, and although this consent should, insofar as circumstances permit, be prior, it remains that the provision in question here was inserted with precisely the possibility of an illness in mind and that, in this case, approval could not be reasonably refused.

The Ministry of Foreign Affairs does not see any need to quibble, at this stage, over the meaning of New Zealand's agreement to send a doctor to Paris and, on this point, refers purely and simply to this doctor's findings, which, in its eyes, corroborate the French doctors' appraisals of the nature of the ailments that Major Mafart is suffering from.

The New Zealand Government has requested the application of the provision of the Agreement of 9 July 1986 which stipulates that "If the New Zealand Government so requests, a visit to the Hao military installation may, by common agreement between the two Governments, be made by an approved third party." Referring to the remarks made by the New Zealand Charge d'Affaires when the note of 24 December was submitted, it is the understanding of the Ministry of Foreign Affairs that the purpose of the request would be to verify the presence of Captain Prieur on Hao. In this regard, it gives the Government of New Zealand the most formal assurance. However, if the New Zealand Government intends to persist in its request, the French Government will agree to it in principle in order to avoid any erroneous interpretation. However, the Ministry of Foreign Affairs does feel that, in this case, there would be no grounds for asking the Secretary-General of the United Nations to designate a representative to make this visit. Indeed, it points out that, as is confirmed by the secret conversations that led up to it, the Exchange of Letters of 9 July 1986 provides that the visit must be made by a third party approved by common agreement between the two Governments. If a visit must take place, France proposes that it be entrusted to Dr. T. Maoate, Vice Prime Minister and Minister of Health of the Cook Islands, given the geographical proximity and the historical ties between the Cook Islands and New Zealand. Dr. Maoate could be transported by a French military airplane either from Papeete or directly from the Cook Islands. In the absence of specific clauses in the Agreement of 9 July 1986, the cost of this mission should be paid by the requesting Government.

35. On 4 January 1988 a third report from Dr. Croxson transcribed what Professor Daly, the doctor in charge of Mafart, proposed to do as follows:

1. To supervise Major Mafart closely and in particular to witness if possible a major crisis at which time he would have a surgical consultation available.
2. To this end Major Mafart must remain close to his department near the hospital. Professor Daly would wish to review him should any new crisis appear and would be seeing him regularly at least once weekly for the next three to four weeks, and in his opinion Mafart should not return to Hao until the diagnosis and plan of treatment is more certain.
3. He feels that Mafart is very tired after the many investigations and explorations and is anxious in view of the diagnosis still not being settled, and he feels that some degree of "convalescence" for about three to four weeks is necessary.
4. He feels that perhaps exploratory surgery might be necessary, but again emphasized that he is not keen on blind laparotomy in view of the danger of new adhesions. I understand that he is proposing to discharge Mafart later this week and to review him once weekly.

Professor Daly and I agreed that this was a difficult clinical problem. Professor Daly also indicated that he would contact me in the event of any major crisis appearing in the next few days, and unless something further developed I would communicate with him next Monday, 11 January.

Professor Croxson concluded:

Professor Daly's point about observing him for a longer period, particularly to try and witness a major episode when one would have a surgical opinion, is a very orthodox and appropriate clinical management.

36. On 5 January 1988 the Embassy of New Zealand conveyed to the French Ministry of Foreign Affairs the following response to the Ministry's note of 30 December 1987:

Without addressing all of the points contained in the Ministry's note and while reserving New Zealand's legal position and, in particular, its right to commence arbitration proceedings, the explicit assurance that Major Mafart will return to Hao when his health permits is very welcome. Furthermore the assurance given with respect to Captain Prieur is also welcomed, and it is hoped that these two assurances, together with the ongoing cooperation at the medical level, will provide a basis for resolving the remaining issues between France and New Zealand.

37. On 11 January 1988 a fourth report from Dr. Croxson was produced. In this report, Dr. Croxson advised that "no clear abnormality has been demonstrated on the previous investigations", adding that "the plan is to examine him again in one week's time or earlier should crisis develop".

38. On 18 January 1988 Dr. Croxson advised that in a telephone conversation with Professor Daly the French Professor told him that "the situation had not altered clinically since last week", that "he has no final firm diagnosis" and that the final report would be available on 27 January 1988.

39. On 21 January 1988 the New Zealand Embassy, being advised that Professor Daly would be preparing a final report on 27 January, expressed the wish to have Major Mafart re-examined by their medical advisor, Dr. Croxson, assisted by a specialist, Dr. Christopher Mallinson, a gastroenterologist practicing in the United Kingdom. This request was agreed to by the French authorities and their examination took place on 25 January 1988.

40. On 28 January 1988 Professor Daly advised that:

Major Alain MAFART was hospitalized on 14 December 1987 at the VAL-de-GRACE hospital where he underwent in-depth radiological, biological and clinical tests. Given the need for close, specialized medical observation and on the basis of the standards of fitness governing military personnel, he must be considered as unfit to serve overseas for an indefinite period.

Prospects—Medical Decision:

1. Given the current uncertainties of the diagnosis, it does not seem warranted to propose an exploratory laparotomy right away for this abdominal ailment.

2. Depending on the subsequent clinical development, various additional tests can be considered:

—barium enema

—Wirsungography and pancreas function

—Mesenteric arteriography

These points have been discussed with Professor MALLINSON and Dr. CROXSON.

3. So, close observation is called for in order to forestall a more acute crisis, which is liable to entail a surgical procedure, or to schedule the aforementioned explorations.

4. So, Major MAFART must be kept in mainland France insofar as this observation can be done only in a modern, well-equipped hospital center.

Because of these exigencies, and pursuant to the standards of fitness governing French military personnel, he is declared unfit to serve overseas for an indefinite period.

41. On 5 February 1988 the Ministry of Foreign Affairs conveyed Professor Daly's report to the New Zealand Embassy, adding that the Ministry "feels that, given the medical conclusions that it has been given, it is not possible at present for Major Mafart to return to the island of Hao. Hence, it is planned that Major Mafart will receive a military assignment in mainland France in which he will continue to be subject to the clauses resulting from the Exchange of Letters of 6 July 1986, specifically as regards contact with the press and other communication media".

42. On 12 February 1988 Dr. Croxson submitted his fifth report, stating, *inter alia*, that:

Dr. Mallinson, consultant gastroenterologist, and myself examined Major Mafart in the Val-de-Grace hospital on Monday 25 January in the presence of and with the assistance of Professor Daly and Dr. Laverdant . . . we reviewed all the investigations, x-rays, laboratory studies which had been carried out . . .

Major Mafart has remained well, since his last report on 18 January, with no major episodes of pain or abdominal distension. He has been eating a light and varied diet and living in a house within the hospital confines . . . He did not appear depressed; his pulse, blood pressure and temperature were normal . . .

The report concluded as follows:

I believe the investigations have proceeded at a very slow pace and could well have been compressed within one to two weeks. There was no evidence produced to show that Major Mafart had an impending obstruction at the time he was evacuated from Hao and certainly if he had, he should have been airlifted to the nearest general surgical center, which we believe exists in Tahiti. It would have been dangerous to have flown him to Paris.

We do not believe that he needs to remain in the confines of a major hospital center for the indefinite future but that he could be returned to Hao now, continue life as normal, rest during minor attacks and obtain treatment from the military medical facilities in Hao if the attacks were of a more severe nature comparable to the satisfactory management of the two previous attacks in July and December which were carried out at Hao.

In the unlikely event that a major crisis with acute irreversible obstruction did occur, and we emphasize that none have appeared in the last 22 years, surgical treatment in Tahiti would be the logical appropriate and safest management. We do not feel that mesenteric angiography nor an ERCP are essential investigations in his management; if they were they could have been carried out by now.

43. On 18 February 1988, the New Zealand Embassy addressed a note to the French Ministry of Foreign Affairs recalling the position of the New Zealand Government:

the unilateral removal of Major Mafart from Hao without the consent of the New Zealand Government constituted a violation of France's obligations to New Zealand under the Ruling of July 1986 by the United Nations Secretary-General and the Agreement of 9 July 1986 between New Zealand and France.

The note added:

The medical reports available to both parties fully support the New Zealand position, which is corroborated by other evidence. There was no medical situation requiring emergency evacuation and the alternative proposals suggested by New Zealand for medical examination prior to giving consent to his departure were reasonable.

Despite the existence of this dispute regarding France's application of the Ruling and the Agreement, and while fully reserving its legal position at every

step, New Zealand has, because of the humanitarian characteristics of the situation, cooperated fully with the French programme of medical examination of Major Mafart.

However, the extended nature of these medical examinations has been a matter of concern to the New Zealand Government and, according to the medical reports, also to Major Mafart himself. Dr. Croxson's reports indicate that they have been unnecessarily extended . . . Dr. Croxson's advice, supported by Dr. Mallinson, is that there is no medical reason for Major Mafart's return to Hao to be any further delayed. The position of the Ministry . . . that Major Mafart is unfit for military service overseas is noted. But in New Zealand's view that is not relevant to the question of compliance with France's obligations to New Zealand under the Agreement. The issue is whether compliance should now be restored. Dr. Croxson's advice is unequivocal. Major Mafart is medically fit to return to Hao. The nature of the assignment, if any, given to him in that place is not an issue.

44. On 21 July 1988 Dr. Croxson presented a final report on Major Mafart that states:

No change in Major Mafart's condition since last examination, 25 January 1988. No major episodes of severe abdominal pain, abdominal distension and none requiring hospitalization or special investigation. My conclusions of my report of 12 February 1988 remain and indeed are strengthened by this further period of five months of observations.

45. According to the French Counter-Memorial Alain Mafart, who was evacuated in December 1987 for health reasons, was declared "repatriated for health reasons" on 11 March 1988. After a temporary assignment at the Head Office of the Nuclear Experimentation Center, he was assigned on 1 September 1988 to the War College in Paris, after passing the entrance examination, for which he had taken the written part in Hao and the oral part in Paris. On 1 October 1988, he was promoted to the rank of Lieutenant Colonel.

Mr. Bos' Visit to Hao

46. On 28 March 1988 an agreed third party, a Netherlands official, designated by the two Governments for the purpose, visited Hao. Mr. Adriaan Bos submitted on 5 April 1988 a report indicating that he had had an interview with Captain Dominique Prieur, and that her military function on Hao is that of officier conseil and officier adjoint. In the former capacity she performs certain social functions, while in the latter she deputizes for the Commander of the base in carrying out certain duties. A few months after arrival on Hao, on 22 July 1986, she was joined by her husband, who is also an officer.

Mr. Bos advised that "there are approximately 17 officers on Hao. Tours of duty on Hao are normally limited to one year". Mr. Bos added that "Dominique Prieur and her husband have access to the normal recreational facilities at the base. As regards contact with her family, Dominique Prieur said that her mother had visited her twice and her parents-in-law once".

The Case of Captain Prieur

47. The French Counter-Memorial states that on 3 May 1988, the French Ministry of Foreign Affairs received a medical report indicating

that Dominique Prieur was 6 weeks pregnant. The report stated that this pregnancy should be treated with special care for several reasons: Mrs. Prieur was almost 39 years old; her gynecological history; the fact that this would be her first child. It also indicated that the medical facilities existing on Hao were unable to provide the necessary medical examinations and the care required by Mrs. Prieur's condition.

48. On the same day, 3 May 1988, the New Zealand Ambassador in Paris was advised of the above information and answered that she would inform her Government. The New Zealand Ambassador noted that she "agrees that the medical facilities existing on Hao are clearly inappropriate, but it was her understanding that Papeete did have all the relevant necessary equipment".

49. The next day, 4 May 1988, the New Zealand Government answered the French Ministry of Foreign Affairs, stating:

While New Zealand's consent is required in terms of the 1986 Agreement, this is not a case where, if the medical situation justifies it, consent would be unreasonably withheld.

The New Zealand Government would like, on the basis of medical consultation, to determine the nature of any special treatment that Captain Prieur might need and the place where the necessary tests and on-going treatment could be carried out if the facilities at Hao are not adequate.

As a first step to coming to an agreement on this basis, the New Zealand authorities are making arrangements for a New Zealand military doctor with the requisite qualifications to fly on the first available flight to Papeete for onward flight to Hao.

The answer added that Dr. Brenner, a civilian consultant to the Royal New Zealand Navy, qualified in obstetrics and gynecology, was standing by to travel to Papeete on that day, 4 May.

50. The French Ministry of Foreign Affairs, on the same day, 4 May, "agreed to the dispatching of Dr. Bernard Brenner to Hao as soon as possible", adding that "this solution was suitable to us and that all the arrangements would be made for the New Zealand doctor's trip to Papeete and his transfer to Hao, definitely on the morning of 5 May".

51. On 5 May 1988, the New Zealand Ministry of Foreign Affairs informed the French Ambassador to New Zealand "that, due to the continuing UTA strike, Dr. Brenner and his interpreter are forced to delay their arrival in Papeete, which they will reach by Air New Zealand. Leaving Auckland on Friday, 6 May at 8.40 p.m., they will arrive in Papeete the same day at 3.25 a.m. (Papeete time). If extreme urgency so requires, a connection to Papeete by military plane could be envisaged".

52. On 5 May 1988 at 11.00 a.m. (French time), the New Zealand Ambassador in Paris was told that the French Government had been informed of a "new development", namely, that Dominique Prieur's father, hospitalized for treatment of a cancer, was dying. The French Government informed the Ambassador that "for obvious humanitarian reasons" Dominique Prieur had to see her father before his death. It was proposed "bearing in mind the previous conversations regarding Mrs. Prieur's pregnancy" that either Dr. Brenner, the New Zealand doctor, leave Auckland within three or four hours on a special flight

for Papeete, whence a military aircraft would take him to Hao, or that Mrs. Prieur leave Hao immediately for Paris, where she would be examined by the New Zealand doctor.

In response to questions communicated via telephone by the New Zealand Ambassador, it was then stated that the Minister of Defence was ready to agree that Dr. Brenner be transported directly from Auckland to Hao by a New Zealand aircraft.

53. According to Annex 47 of the French Counter-Memorial, the New Zealand Ambassador replied on 5 May 1988 that the New Zealand Prime Minister could not be reached but that "while waiting for the Prime Minister's decision, the solution of sending a New Zealand military aircraft to Hao was under study. It was, however, clear that the aircraft could not leave Auckland within the 3 or 4 hour time limit requested by the French Government. A departure would have to be planned instead for Friday morning (New Zealand time)". French authorities then noted that "inasmuch as the New Zealand aircraft would head directly for Hao, its departure from Auckland could be delayed until Friday morning at 7.30 a.m. (New Zealand time). This was the latest possible deadline beyond which Dominique Prieur would run the risk of arriving in Paris too late to see her father".

54. On 5 May 1988 at 9.30 p.m. (Paris time), the New Zealand Ambassador in France informed the French Minister of Foreign Affairs of the following:

A. It was not possible to ready a New Zealand military aircraft to leave for Hao "within the time limit set by France".

B. Mr. Lange was not willing to agree to the departure of Mrs. Prieur from Hao for the reason invoked the same morning by the French Government (the state of health of the interested party's father).

C. The response and offer that New Zealand had made regarding Mrs. Prieur's pregnancy were still valid.

D. New Zealand would not give any guarantee of confidentiality regarding the state of health of Mrs. Prieur's father.

E. New Zealand agreed to send a doctor on Friday morning to verify the state of health of Mrs. Prieur's father.

55. On 5 May 1988 at 10.30 p.m. (French time), the following response was given to the New Zealand Ambassador:

A. The French Government considers it impossible, for obvious humanitarian reasons, to keep Mrs. Prieur on Hao while her father is dying in Paris. The French officer will therefore depart immediately for Paris.

B. We agree that a New Zealand doctor may contact the doctors treating Dominique Prieur's father and, if those doctors agree to it, may examine the patient.

C. Our offer of a medical examination of Mrs. Prieur, upon her return to metropolitan France, by a doctor chosen by New Zealand, remains valid.

56. On 6 May 1988 a telegram sent by the French Minister of Foreign Affairs to the French Ambassador at Wellington confirmed that Mrs. Prieur had left on board the special flight on Thursday, 5 May at 11.30 p.m. (Paris time), and that she was expected in Paris on 6 May in the evening.

57. On 10 May 1988 the New Zealand Embassy presented the following note to the French Ministry of Foreign Affairs referring to the discussions which took place on 3, 4 and 5 May 1988 between the Cabinet of the Minister of Foreign Affairs and the Embassy concerning Captain Dominique Prieur:

The Government of New Zealand feels obliged to place on record at this time its concern about the actions of the former French Government with respect to France's obligations to New Zealand under international law in connection with the Agreement following from the Ruling of 6 July 1986 by the Secretary-General of the United Nations and incorporated in the Exchange of Letters between France and New Zealand of 9 July 1986. New Zealand must protest these actions in the strongest possible terms.

In this connection New Zealand must also recall the previous violations of those solemn undertakings when Major Mafart was removed from Hao in December 1987 without New Zealand's consent and when, contrary to the clear medical indications of adequate fitness, French authorities refused to restore compliance. New Zealand has sought to retain a cooperative relationship with France, including the activation of a medical team to visit Hao last week to examine Captain Prieur. Last week's unilateral acts by the former French Government constitute a further serious violation of legal obligations under the Agreement concluded under the auspices of the United Nations Secretary-General and give rise to a further legal dispute between France and New Zealand.

Prior to the events of last week New Zealand had publicly committed itself to seeking to resolve these problems through the diplomatic channel. It remains New Zealand's very strong wish to restore a climate of mutual confidence in its relations with France, and, accordingly, New Zealand continues to be willing to seek a settlement under which France would voluntarily return Major Mafart and Captain Prieur to Hao. An agreement whereby both officers could undergo specialist medical treatment in Tahiti, if that became necessary, and subject to appropriate conditions, could be envisaged.

The alternative approach is that the actions of the former French Government in this matter should be subject to independent review in accordance with the arbitration agreement between France and New Zealand. New Zealand awaits the response of the new French administration.

58. On 16 May 1988 the father of Captain Prieur died.

59. On 21 July 1988 Dr. Croxson examined both Major Mafart and Captain Prieur and advised as to the latter as follows:

The investigations and examinations by the French medical attendants and my clinical examination would all be consistent with an approximately 18-week pregnancy which is proceeding uneventfully. Results of the amniocentesis to exclude important chromosome abnormalities are awaited. No special arrangements for later pregnancy or delivery are planned, and I formed the opinion that management would be conducted on usual clinical criteria for a 39-year-old, fit, healthy woman in her first pregnancy.

60. According to the French Counter-Memorial, Dominique Prieur was assigned to the Head Office of the Nuclear Experimentation Center in Villacoublay. She was on leave until 7 November 1988, corresponding to military furlough that she had not taken previously. She then received twenty-two weeks maternity leave, pursuant to French labor law. She gave birth to her child on 15 December 1988.

61. On 22 September 1988 the New Zealand Government presented a note to the French Ministry of Foreign Affairs and referring to its notes of 18 February and 10 May 1988 (paras. 43 and 57) stated:

Extensive efforts have been made in the intervening months to resolve this dispute through the diplomatic channel. The Government of New Zealand greatly regrets the fact that constructive proposals to this end which it advanced on 10 August 1988 met no satisfactory response from the French Government. The New Zealand Government is therefore forced to the conclusion that all reasonable efforts to resolve this dispute have been exhausted. The Embassy is therefore instructed to advise that the Government of New Zealand hereby requests, in accordance with the Ruling of the Secretary-General of the United Nations and the Agreement of 9 July 1986 between New Zealand and France, that the dispute be submitted to an arbitral tribunal.

V. DISCUSSION

The Contentions of the Parties

62. New Zealand contends that France has committed six separate breaches of the international obligations it assumed under Clauses 3 to 7 of the First Agreement of 9 July 1986, three in respect of each agent. New Zealand submits that, taken chronologically, these breaches of obligations were: first, France's failure to seek in good faith its consent to the removal of the two agents from Hao; second, the removal of the two agents without New Zealand's consent; and, third, the continued failure to return the two agents to Hao.

63. With respect to the first breach, New Zealand maintains that the mutual consent provision carried with it three subsidiary obligations to act in good faith, namely, to give full information in a timely manner about circumstances in which consent was to be sought; not to impede New Zealand's efforts to verify this information; and, finally, to give its Government a reasonable opportunity to reach an informed decision.

New Zealand alleges that when Major Mafart was hospitalized in Hao in July 1987 its Government was not informed that a medical problem had arisen, nor was it advised in December that a medical doctor had been sent from France. The information furnished had no detailed description of the medical history and no explanation of the necessity for an air journey in excess of 20 hours to Paris, as against a flight of a little more than an hour to the excellent facilities in Papeete.

New Zealand further states that its proposal for an immediate medical examination in Hao by a New Zealand doctor encountered difficulties and obstructions such as the invoked absolute impossibility for a foreign military aircraft to land at Hao. It lays stress on the fact that the alleged impossibility was not absolute, as shown by the fact that a United States military aircraft had landed there previously, and, six months later, in the case of Captain Prieur, permission for landing in Hao was granted.

New Zealand also submits that in the case of Major Mafart reasonable time was not given, in fact less than 48 hours, to reach an informed decision and in the case of Captain Prieur France failed to seek New Zealand's consent in good faith, for consent was never, in fact, sought on either the grounds of her pregnancy or on the grounds of her father's illness. It states that while it was preparing to examine the alleged need for special treatment of the pregnancy and where it might be carried out,

just three days before Presidential elections in France, the New Zealand Government was told that the terminal illness of Captain Prieur's father required her immediate removal.

64. The second set of breaches which New Zealand asserts is the removal of the two agents from Hao without New Zealand consent. New Zealand points out that France has acknowledged in these proceedings that it removed the two agents without New Zealand's consent; thus, the French Republic has admitted a *prima facie* breach and the only question is whether it can legally justify that breach.

New Zealand contends that the mutual consent provision allows the departure from Hao when and only when both Governments were agreed that circumstances justified that departure. It also considers that in making such decisions both Governments are obliged to act in good faith. The provision reads that the two agents "will be prohibited from leaving the island for any reason, except with the mutual consent of the two Governments". The words "for any reason" and the words "except with mutual consent", in New Zealand's view, cannot be dismissed as superfluous but have a function and a meaning, expressly excluding any unilateral right to remove either agent. Any removal, for any reason, it argues, required the consent of New Zealand; moreover, the word "prohibited" emphasized the strictness of the regime established and the complete unacceptability of any exceptions to it.

65. The third set of breaches, according to New Zealand, consists in France's failure to return the agents: in the case of Major Mafart, France invokes, *inter alia*, French military law to excuse the continuous breach of the obligation to return him to Hao, alleging that he is not fit for military service overseas. However, New Zealand observes that Major Mafart is fit enough to attend the War College, and points out that it is not asking that he go overseas in active service or fight a war: a certificate by a French medical doctor that in terms of French military law Major Mafart is unfit for service overseas has no bearing on the question whether he should be in Hao. Anyway, it adds, Major Mafart can be placed under any necessary medical supervision in Hao and good medical support facilities exist nearby in Tahiti.

Recalling Article 27 of the Vienna Convention on the Law of Treaties, New Zealand asserts that it is not open to France nor to any other State to invoke the provisions of its own internal law as a justification for non-performance of its treaty obligations.

As to Captain Prieur, removed from Hao because of the illness of her father, France has stated that after his death, she was placed on maternity leave pursuant to the French military code and therefore could not be sent back to Hao as long as her pregnancy continued; subsequent to the birth, France has asserted that she can not be sent back with a baby.

New Zealand finds that these reasons fail to justify the continuous breach resulting from the fact that Captain Prieur has not been sent back to Hao.

It points out that whether Captain Prieur wishes to take the child to Hao is irrelevant; there are many children on the island, which has a

civilian population of some 1,100 people. Just as the First Agreement allowed Captain Prieur's husband to live with her in Hao, it will allow her husband and child to accompany her or not, as she chooses.

New Zealand adds that there are countless examples in the South Pacific involving teachers, missionaries, administrators and others, where European families with small children have lived in small atoll communities less civilized than those on Hao.

66. For its part, the French Republic maintains that the clause prohibiting the two agents from leaving the island except with the consent of the two Governments is intended for one of the two following possibilities: either a special situation, particularly illness, or, as in the case of Captain Prieur, pregnancy, which would render their remaining on the island inconceivable, or a joint desire by the two Governments to shorten the total length of their stay. It stresses that, both in December 1987, for Major Mafart, and in May 1988, for Captain Prieur, the first possibility was involved.

France acknowledges that it did not obtain New Zealand's prior consent, but it nevertheless seems to France that, bearing in mind the reason that made the transfer to Paris necessary, and the very special circumstances under which that transfer was made, its action bore no stain of illegality under the 1986 Agreement and the rules and principles of international law.

It believes, moreover, that legitimate reasons have prevented the return of the officers in question to their island, and that in any case, the obligation to return can have no existence after 22 July 1989, the expiration date of the 1986 Agreement.

67. In the case of Major Mafart, the French Republic recalls that on 7 December 1987, the Ministry of Defence received from the commander of the base at Hao a message indicating that Major Mafart's state of health required immediate examinations and care that could not be provided on the atoll.

A principal Army physician, Dr. Maurel, was dispatched to the site and his report indicated that Major Mafart's condition necessitated "explorations in a highly specialized environment" and therefore "emergency repatriation to a hospital in mainland France". The French Republic adds that its authorities made every possible effort, during that weekend, bearing in mind the difficulties in communication between the two capitals, to obtain New Zealand's consent within the time available to the repatriation of Major Mafart for health reasons; to that end, the *note verbale* presented by the French Ambassador in Wellington on Saturday morning contained all the information that Paris had, and Dr. Maurel's message was attached.

As for the denial of access to the base of a New Zealand aircraft, the French Republic asserts that New Zealand knew about the prohibition because the transfer of officers in July 1986 was organized according to this rule; moreover, the description of the flight in question, with a crew of 12 members, seemed like a provocation. But at the same time, in order to respond to New Zealand's concerns, it was proposed that a doctor

designated by the latter should examine Major Mafart upon his arrival in Paris. In addition, there was a misunderstanding regarding the place from which the doctor sent by New Zealand to Hao should make his report: the information that French authorities had was that this doctor was to return to New Zealand to present his conclusions. This would have had the effect of delaying Major Mafart's departure by several days. Under these conditions, the French Republic adds, the French authorities made the decision for an immediate repatriation for reasons of health, notwithstanding the terms of the Agreement.

68. As for Major Mafart's stay in mainland France, he arrived in Paris on 14 December and was immediately hospitalized. He remained in the hospital until 6 January 1988, being subject to medical supervision within the hospital's confines.

The French Republic stresses that the New Zealand doctor sent to verify the agent's state of health, Dr. Croxson, examined him on the day of his arrival in Paris and submitted a report in the form of responses to a series of questions, concluding that the condition of the party in question necessitated specialized examinations which could not be carried out in Hao and that the officer was not a malingerer. As for the emergency evacuation, Dr. Croxson's response reflects doubt about the degree of emergency and not about the existence of an emergency.

The French Republic also points out that Dr. Croxson was kept regularly informed about the officer's state of health, and that he examined him again on several occasions, being accompanied, on 25 January, by a British gastroenterologist, Dr. Mallinson. On 27 January, Professor Daly issued his final report on Major Mafart, in which, in accordance with the rules of fitness governing French military personnel, "Major Mafart was declared unfit to serve overseas for an indeterminate period".

Dr. Croxson's report of 16 February, written with Dr. Mallinson's assistance, reaches a contrary conclusion, asserting that Major Mafart could return to Hao. But in the face of this difference of opinion, France maintains that the military status of the two officers, with all the consequences that entails, particularly as regards the exclusive competence of the French military physicians and the conclusiveness of their opinion, is one of the essential elements of the 1986 Agreement. France states that the French authorities consequently were not in a position to return Mafart to Hao.

69. As for Captain Prieur, France explains that on 3 May 1988 the Ministry of Foreign Affairs received a report indicating that Mrs. Prieur was six weeks pregnant, that it was a risky pregnancy, and that the facilities on Hao would not permit the carrying out of the necessary examinations and care. The New Zealand response said that this was not a case in which, if the medical situation justified it, the consent of New Zealand would be unreasonably refused and proposed that a New Zealand doctor take the first available flight to Papeete and be transported from there by a French aircraft, making his report from Hao. But since the airline was on strike Dr. Brenner's voyage would be delayed 30 hours. Then, on 5 May, it was learned in Paris, the French

Republic adds, that Mrs. Prieur's father was dying, which gave the situation a dramatic urgency because it was necessary, for obvious humanitarian reasons, that Mrs. Prieur see her father again before he died. To bring about this last meeting, the French authorities proposed certain solutions, one of which was that Dr. Brenner be transported directly to Hao by a New Zealand military aircraft. But information was received from New Zealand to the effect that a New Zealand military aircraft could not take off until the morning of 6 May. The French authorities replied that, inasmuch as this aircraft would go directly to Hao, its departure from Auckland could be delayed until Thursday morning at 7.30, Wellington time. After that deadline, Dominique Prieur would risk arriving too late to see her father alive. The New Zealand authorities then indicated that it was impossible to get a New Zealand military aircraft ready within the stated time.

On 5 May, one hour after the response from the New Zealand Government was received, the French Government informed New Zealand that it considered it impossible to keep Mrs. Prieur on Hao while her father was dying in Paris and that she was departing immediately for France.

70. As regards Captain Prieur's stay in mainland France, the French Republic maintains that, having returned to France to be present for her father's last moments, she was obliged to remain there throughout her pregnancy, and after the birth of her child on 15 December 1988, obvious humanitarian considerations prevented her being returned either with or without her child.

71. In summary, it results from the foregoing that New Zealand contends that the removal of the two agents from the island of Hao without its consent, the circumstances of those removals and the continued failure of France to return them to Hao are breaches of the international obligations contained in the First Agreement.

The French Government, on its part, does not contest the fact that the provisions of the Agreement have not been literally honored, since the two officers' return to mainland France was not preceded by New Zealand's formal agreement, and they did not remain on the island of Hao for the three-year period that had been agreed. It believes nevertheless that because circumstances of extreme urgency were involved, its actions do not constitute internationally wrongful acts.

The Applicable Law

72. The first question that the Tribunal must determine is the law applicable to the conduct of the Parties.

According to Article 2 of the Supplementary Agreement of 14 February 1989:

The decisions of the Tribunal shall be taken on the basis of the Agreements concluded between the Government of New Zealand and the Government of the French Republic by Exchange of Letters of 9 July 1986, this Agreement and the applicable rules and principles of international law.

This provision refers to two sources of international law: the conventional source, represented by certain bilateral agreements concluded between the Parties, and the customary source, constituted by the “applicable rules and principles of international law”.

The customary source, in turn, comprises two important branches of general international law: the Law of Treaties, codified in the 1969 Vienna Convention, and the Law of State Responsibility, in process of codification by the International Law Commission.

The Parties disagree on the question of which of these two branches should be given primacy or emphasis in the determination of the primary obligations of France.

While New Zealand emphasizes the terms of the 1986 Agreement and related aspects of the Law of Treaties, France relies much more on the Law of State Responsibility. So far as remedies are concerned both are in broad agreement that the main law applicable is the Law of State Responsibility.

73. In this respect, New Zealand contests three French legal propositions which it describes as bad law. The first one is that the Treaty of 9 July 1986 must be read subject to the customary Law of State Responsibility; thus France is trying to shift the question at issue out of the Law of Treaties, as codified in the Vienna Convention of 1969.

New Zealand contends that the question at issue must be decided in accordance with the Law of Treaties, because the treaty governs and the reference to customary international law may be made only if there were a need (1) to clarify some ambiguity in the treaty, (2) to fill an evident gap, or (3) to invalidate a treaty provision by reference to a rule of *jus cogens* in customary international law. But, it adds, there is otherwise no basis upon which a clear treaty obligation can be altered by reference to customary international law.

A second French proposition contested by New Zealand is that Article 2 of the Supplementary Agreement of 14 February 1989 refers to the rules and principles of international law and thus, France argues, requires the Tribunal to refer to the Law of International Responsibility. New Zealand contends that Article 2 makes clear that the Tribunal is to decide in accordance with the Agreements, so the Treaty of 9 July 1986 governs and, consequently, customary international law applies only to the extent it is applicable as a source supplementary to the Treaty; not to change the treaty obligation but only to resolve an ambiguity in the treaty language or to fill some gap, which does not exist since the text is crystal clear. Thus, New Zealand takes the position that the Law of Treaties is the law relevant to this case.

Finally, New Zealand contests a third French proposition by which France relies upon the general concept of circumstances excluding illegality, as derived from the work of the International Law Commission on State Responsibility, contending that those circumstances arise in this case because there were determining factors beyond France’s control, such as humanitarian reasons of extreme urgency making the action necessary. New Zealand asserts that a State party to a treaty, and

seeking to excuse its own non-performance, is not entitled to set aside the specific grounds for termination or suspension of a treaty, enumerated in the 1969 Vienna Convention, and rely instead on grounds relevant to general State responsibility. New Zealand adduces that it is not a credible proposition to admit that the Vienna Convention identifies and defines a number of lawful excuses for non-performance—such as supervening impossibility of performance; a fundamental change of circumstances; the emergence of a new rule of *jus cogens*—and yet contend that there may be other excuses, such as *force majeure* or distress, derived from the customary Law of State Responsibility. Consequently, New Zealand asserts that the excuse of *force majeure*, invoked by France, does not conform to the grounds for termination or suspension recognized by the Law of Treaties in Article 61 of the Vienna Convention, which requires absolute impossibility of performing the treaty as the grounds for terminating or withdrawing from it.

74. France, for its part, points out that New Zealand's request calls into question France's international responsibility towards New Zealand and that everything in this request is characteristic of a suit for responsibility; therefore, it is entirely natural to apply the Law of Responsibility. The French Republic maintains that the Law of Treaties does not govern the breach of treaty obligations and that the rules concerning the consequences of a "breach of treaty" should be sought not in the Law of Treaties, but exclusively in the Law of Responsibility. France further states that within the Law of International Responsibility, "breach of treaty" does not enjoy any special status and that the breach of a treaty obligation falls under exactly the same legal regime as the violation of any other international obligation. In this connection, France points out that the Vienna Convention on the Law of Treaties is constantly at pains to exclude or reserve questions of responsibility, and that the sole provision concerning the consequences of the breach of a treaty is that of Article 60, entitled "Termination of a treaty or suspension of its application as a result of breach", but the provisions of this Article are not applicable in this instance. But even in this case, the French Republic adds, the State that is the victim of the breach is not deprived of its right to claim reparation under the general Law of Responsibility. France points out, furthermore, that the origin of an obligation in breach has no impact either on the international wrongfulness of an act nor on the regime of international responsibility applicable to such an act; this approach is explained in Article 17 of the draft of the International Law Commission on State Responsibility.

In particular, the French Republic adds, citing the report of the International Law Commission, the reasons which may be invoked to justify the non-execution of a treaty are a part of the general subject matter of the international responsibility of States.

The French Republic does admit, in this connection, that it is the Law of Treaties that makes it possible to determine the content and scope of the obligations assumed by France, but, even supposing that France had breached certain of these obligations, this breach would not entail any repercussion stemming from the Law of Treaties. On the

contrary, it is exclusively within the framework of the Law on International Responsibility that the effects of a possible breach by France of its treaty obligations must be determined and it is within the context of the Law of Responsibility that the reasons and justificatory facts adduced by France must be assessed. Consequently, the French Republic further states, it is up to the Tribunal to decide whether the circumstances under which France was led to take the contested decisions are of such a nature as to exonerate it of responsibility, and this assessment must be made within the context of the Law of Responsibility and not solely in the light of Article 61 of the 1969 Vienna Convention.

75. The answer to the issue discussed in the two preceding paragraphs is that, for the decision of the present case, both the customary Law of Treaties and the customary Law of State Responsibility are relevant and applicable.

The customary Law of Treaties, as codified in the Vienna Convention, proclaimed in Article 26, under the title "*Pacta sunt servanda*" that

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

This fundamental provision is applicable to the determination whether there have been violations of that principle, and in particular, whether material breaches of treaty obligations have been committed.

Moreover, certain specific provisions of customary law in the Vienna Convention are relevant in this case, such as Article 60, which gives a precise definition of the concept of a material breach of a treaty, and Article 70, which deals with the legal consequences of the expiry of a treaty.

On the other hand, the legal consequences of a breach of a treaty, including the determination of the circumstances that may exclude wrongfulness (and render the breach only apparent) and the appropriate remedies for breach, are subjects that belong to the customary Law of State Responsibility.

The reason is that the general principles of International Law concerning State responsibility are equally applicable in the case of breach of treaty obligation, since in the international law field there is no distinction between contractual and tortious responsibility, so that any violation by a State of any obligation, of whatever origin, gives rise to State responsibility and consequently, to the duty of reparation. The particular treaty itself might of course limit or extend the general Law of State Responsibility, for instance by establishing a system of remedies for it.

The Permanent Court proclaimed this fundamental principle in the Chorzow Factory (Jurisdiction) case, stating:

It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation, therefore, is the indispensable complement of a failure to apply a convention (P.C.I.J., Series A, Nos. 9, 21 (1927)).

And the present Court has said:

It is clear that refusal to fulfill a treaty obligation involves international responsibility (Peace Treaties (second phase) 1950, *ICJ Reports*, 221, 228).

The conclusion to be reached on this issue is that, without prejudice to the terms of the agreement which the Parties signed and the applicability of certain important provisions of the Vienna Convention on the Law of Treaties, the existence in this case of circumstances excluding wrongfulness as well as the questions of appropriate remedies, should be answered in the context and in the light of the customary Law of State Responsibility.

Circumstances Precluding Wrongfulness

76. Under the title "Circumstances Precluding Wrongfulness" the International Law Commission proposed in Articles 29 to 35 a set of rules which include three provisions, on *force majeure* and fortuitous event (Article 31), distress (Article 32), and state of necessity (Article 33), which may be relevant to the decision on this case.

As to *force majeure*, it was invoked in the French note of 14 December 1987, where, referring to the removal of Major Mafart, the French authorities stated that "*in this case of force majeure*" (emphasis added), they "are compelled to proceed without further delay with the repatriation of the French officer for health reasons".

In the oral proceedings, counsel for France declared that France "did not invoke *force majeure* as far as the Law of Responsibility is concerned". However, the Agent for France was not so categorical in excluding *force majeure*, because he stated: "It is substantively incorrect to claim that France has invoked *force majeure* exclusively. Our written submissions indisputably show that we have referred to the whole theory of special circumstances that exclude or 'attenuate' illegality".

Consequently, the invocation of "*force majeure*" has not been totally excluded. It is therefore necessary to consider whether it is applicable to the present case.

77. Article 31 (1) of the ILC draft reads:

The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act was due to an irresistible force or to an unforeseen external event beyond its control which made it materially impossible for the State to act in conformity with that obligation or to know that its conduct was not in conformity with that obligation.

In the light of this provision, there are several reasons for excluding the applicability of the excuse of *force majeure* in this case. As pointed out in the report of the International Law Commission, Article 31 refers to "a situation facing the subject taking the action, which leads it, as it were, *despite itself*, to act in a manner not in conformity with the requirements of an international obligation incumbent on it" (Ybk.ILC, 1979, vol. II, para. 2, p. 122, emphasis in the original). *Force majeure* is "generally invoked to justify *involuntary*, or at least unintentional conduct", it refers "to an irresistible force or an unforeseen external event

against which it has no remedy and which makes it 'materially impossible' for it to act in conformity with the obligation", since "no person is required to do the impossible" (*Ibid.*, p. 123, para. 4).

The report of the International Law Commission insists on the strict meaning of Article 31, in the following terms:

the wording of paragraph 1 emphasizes, by the use of the adjective "irresistible" qualifying the word "force", that there must, in the case in point, be a constraint which the State was unable to avoid or to oppose by its own means . . . The event must be an act which occurs and produces its effect without the State being able to do anything which might rectify the event or might avert its consequences. The adverb "materially" preceding the word "impossible" is intended to show that, for the purposes of the article, it would not suffice for the "irresistible force" or the "unforeseen external event" to have made it *very difficult* for the State to act in conformity with the obligation . . . the Commission has sought to emphasize that the State must not have had any option in that regard (Ybk. cit., p. 133, para. 40, emphasis in the original).

In conclusion, New Zealand is right in asserting that the excuse of *force majeure* is not of relevance in this case because the test of its applicability is of absolute and material impossibility, and because a circumstance rendering performance more difficult or burdensome does not constitute a case of *force majeure*. Consequently, this excuse is of no relevance in the present case.

78. Article 32 of the Articles drafted by the International Law Commission deals with another circumstance which may preclude wrongfulness in international law, namely, that of the "distress" of the author of the conduct which constitutes the act of State whose wrongfulness is in question.

Article 32 (1) reads as follows:

The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the conduct which constitutes the act of that State had no other means, in a situation of extreme distress, of saving his life or that of persons entrusted to his care.

The commentary of the International Law Commission explains that " 'distress' means a situation of extreme peril in which the organ of the State which adopts that conduct has, at that particular moment, no means of saving himself or persons entrusted to his care other than to act in a manner not in conformity with the requirements of the obligation in question" (Ybk. cit., 1979, p. 133, para. 1).

The report adds that in international practice distress, as a circumstance capable of precluding the wrongfulness of an otherwise wrongful act of the State, "has been invoked and recognized primarily in cases involving the violation of a frontier of another State, particularly its airspace and its sea—for example, when the captain of a State vessel in distress seeks refuge from storm in a foreign port without authorization, or when the pilot of a State aircraft lands without authorization on foreign soil to avoid an otherwise inevitable disaster" (*Ibid.*, p. 134, para. 4). Yet the Commission found that "the ratio of the actual principle suggests that it is applicable, if only by analogy, to other comparable cases" (*Ibid.*, p. 135, para. 8).

The report points out the difference between this ground for precluding wrongfulness and that of *force majeure*: "in these circumstances, the State organ admittedly has a choice, even if it is only between conduct not in conformity with an international obligation and conduct which is in conformity with the obligation but involves a sacrifice that it is unreasonable to demand" (Ybk. cit., p. 122, para. 3). But "this choice is not a 'real choice' or 'free choice' as to the decision to be taken, since the person acting on behalf of the State knows that if he adopts the conduct required by the international obligation, he, and the persons entrusted to his care, will almost inevitably perish. In such circumstances, the 'possibility' of acting in conformity with the international obligation is therefore only apparent. In practice it is nullified by the situation of extreme peril which, as we have just said, characterizes situations of distress" (Ybk. cit., p. 133, para. 2).

The report adds that the situation of distress "may at most include a situation of serious danger, but not necessarily one that jeopardizes the very existence of the person concerned. The protection of something other than life, particularly where the physical integrity of a person is still involved, may admittedly represent an interest that is capable of severely restricting an individual's freedom of decision and induce him to act in a manner that is justifiable, although not in conformity with an international obligation of the State" (*Ibid.*, p. 135, para. 10). Thus, this circumstance may also apply to safeguard other essential rights of human beings such as the physical integrity of a person.

The report also distinguishes with precision the ground of justification of Article 32 from the controversial doctrine of the state of necessity dealt with in Article 33. Under Article 32, on distress, what is "involved is situations of necessity" with respect to the actual person of the State organs or of persons entrusted to his care, "and not any real 'necessity' of the State".

On the other hand, Article 33, which allegedly authorizes a State to take unlawful action invoking a state of necessity, refers to situations of grave and imminent danger to the State as such and to its vital interests.

This distinction between the two grounds justifies the general acceptance of Article 32 and at the same time the controversial character of the proposal in Article 33 on state of necessity.

It has been stated in this connection that there is

no general principle allowing the defence of necessity. There are particular rules of international law making allowance for varying degrees of necessity, but these cases have a meaning and a scope entirely outside the traditional doctrine of state of necessity. Thus, for instance, vessels in distress are allowed to seek refuge in a foreign port, even if it is closed . . . ; in the case of famine in a country, a foreign ship proceeding to another port may be detained and its cargo expropriated . . . In these cases—in which adequate compensation must be paid—it is not the doctrine of the state of necessity which provides the foundation of the particular rules, but humanitarian considerations, which do not apply to the State as a body politic but are designed to protect essential rights of human beings in a situation of distress. (*Manual of Public International Law*, ed. Soerensen, p. 543.)

The question therefore is to determine whether the circumstances of distress in a case of extreme urgency involving elementary human-

itarian considerations affecting the acting organs of the State may exclude wrongfulness in this case.

79. In accordance with the previous legal considerations, three conditions would be required to justify the conduct followed by France in respect to Major Mafart and Captain Prieur:

1) The existence of very exceptional circumstances of extreme urgency involving medical or other considerations of an elementary nature, provided always that a prompt recognition of the existence of those exceptional circumstances is subsequently obtained from the other interested party or is clearly demonstrated.

2) The reestablishment of the original situation of compliance with the assignment in Hao as soon as the reasons of emergency invoked to justify the repatriation had disappeared.

3) The existence of a good faith effort to try to obtain the consent of New Zealand in terms of the 1986 Agreement.

The Case of Major Mafart

80. The New Zealand reaction to the French initiative for the removal of Major Mafart appears to have been conducted in conformity with the above considerations.

The decision to send urgently a medical doctor to Hao in order to verify the existence of the invoked ground of serious risk to life clearly implied that if the alleged conditions were confirmed, then the requested consent would be forthcoming.

Unfortunately, it proved impossible to proceed with that verification while Major Mafart was still on the island. The rule forbidding foreign aircraft from landing in Hao prevented the prompt arrival of a New Zealand medical doctor in a military airplane and accompanied by a large crew. In these circumstances, the maintenance of the pre-existing interdiction of foreign landing cannot be considered as unfounded nor as deliberately designed to impede the New Zealand authorities from verifying the facts or frustrate their efforts to that end. Likewise, difficulties of communication and interpretation of statements made in different languages may explain the misunderstanding as to how and from where the New Zealand doctor would report his conclusions. The parties blame each other for the failure to carry out the verification in Hao, but there were many factors, not the fault of any party, nor questioning their good faith, which prevented the carrying out of that verification in the short time available. The problem arose during a weekend; communications had to be exchanged between Paris and Wellington, with half a day "time difference" between the two cities; various departments were involved, etc. Consequently, the conclusion must be reached that none of the parties is to blame for the failure in carrying out the very difficult task of verifying *in situ* Major Mafart's health during that weekend.

81. The sending of Dr. Croxson to examine Major Mafart the same day of the arrival of the latter in Paris had the same implication indicated above, namely, that if the alleged conditions of urgency jus-

tifying the evacuation were verified, consent would very likely have been given to what was until then a unilateral removal. The reservation made by New Zealand in the formal diplomatic note of 23 December 1987 rejecting the suggestion that its decision to accept the offer to send a New Zealand doctor to Paris to examine Major Mafart could be construed as acceptance of the evacuation only applied to any implication resulting from the sending of Dr. Croxson; it is obvious that the acceptance of that French offer, by itself, could not imply consent to the removal.

But, on the other hand, having accepted the offer to verify whether Major Mafart had required an urgent sanitary evacuation, subsequent consent to that measure would necessarily be implied, unless there was an immediate and formal denial by New Zealand of the existence of the medical conditions which had determined Major Mafart's urgent removal, accompanied by a formal request by New Zealand authorities for his immediate return to Hao, or at least to Papeete. And this did not occur.

On the contrary, Dr. Croxson's first report, of 14 December 1987, accepts that Major Mafart needed "detailed investigations which were not available in Hao" and his answer to the crucial question of whether there was justification for the emergency evacuation is equivocal. He apparently assumes that the only reason for the repatriation was the need for immediate surgery, which was not the case, and he introduces a distinction between emergency evacuation and planned urgent evacuation, but in both alternatives justifying the sanitary evacuation which had been accomplished.

82. It was not until 12 February 1988 when Dr. Croxson, then accompanied by Professor Mallinson, stated: "there was no evidence produced to show that Major Mafart had an impending obstruction at the time he was evacuated from Hao and certainly, if he had, he should have been airlifted to the nearest surgical center which we believe exists in Tahiti. It would have been dangerous to have flown him to Paris". But this was post-facto wisdom: too late to counteract the implications of his previous reports, and the tolerance of the continuation of the treatment for almost two months.

83. This sixth report, dated 12 February 1988, on the other hand, evidences that there was by that time a clear obligation of the French authorities to return Major Mafart to Hao, by reason of the disappearance of the urgent medical emergency which had determined his evacuation. This report, together with the absence of other medical reports showing the recurrence of the symptoms which determined the evacuation, demonstrates that Major Mafart should have been returned to Hao at least on 12 February 1988, and that failure to do so constituted a breach by the French Government of its obligations under the First Agreement. This breach is not justified by the decision of the French authorities to retain Major Mafart in metropolitan France on the ground that he was "unfit to serve overseas".

84. This decision was based on a medical report by Professor Daly. Taking into account the reliance that both parties give to medical

reports concerning the state of health of Major Mafart, both in respect of his removal from Hao and his permanence in France, it becomes necessary to analyze the points of agreement and disagreement of the various medical reports filed in the proceedings and pronounce on the differences which exist between them.

The various medical reports by Dr. Croxson and Professor Daly coincide in finding that after several weeks of investigation and exploration no firm diagnosis had been reached and no clear abnormalities had been demonstrated. It is also stated in Dr. Croxson's fifth report that in January 1988 Major Mafart had been discharged from the hospital and was living in a house within the hospital confines, being subject to weekly supervision by Professor Daly. Dr. Croxson also states in that same report that during his visit with Professor Mallinson on 25 January 1988 he verified that "Mafart has remained well since his last report of 18 January, with no major episodes of pain or abdominal distension". A final report by Dr. Croxson on 21 July 1988, after a 5-month period of observation, indicates "no change in Major Mafart's clinical condition since last examination. No major episodes of severe abdominal pain, abdominal distension and none requiring hospitalization or special investigations".

There are no medical reports of French origin questioning or contradicting these assertions of fact; this final report of Dr. Croxson, communicated to the French authorities, has also been presented as an Annex to the French Counter-Memorial.

85. It is against this background that Professor Daly's report declaring Major Mafart "unfit for overseas service" must be examined. In support of his conclusion Professor Daly states that in the case of Major Mafart "close supervision is necessary" and consequently "he must remain in mainland France inasmuch as this follow up can be carried out only in a modern and well-equipped Hospital Center". Professor Daly invokes two grounds in support of his assertion that "close supervision is necessary": this must be done, according to him, with the object of 1) "intercepting an even more acute crisis, which may require surgery" or 2) "planning the above-mentioned explorations".

86. The first ground, the need for surgery, had been discarded by all medical experts as an inappropriate answer to the two crises experienced by Major Mafart, both in Hao, in July 1987 and again in December 1987. Dr. Croxson and Professor Mallinson concurred in the view that the only indication for "surgery would be an acute and irreversible obstruction", adding that "there have been no signs to suggest complete obstruction".

This assertion was not questioned or contradicted by other medical reports.

Since such an intervention may be performed in any normally equipped surgical center, there is no medical justification to retain Major Mafart in metropolitan France for the remote and unlikely event that he would suffer, for the first time in his life, an acute and irreversible obstruction.

87. The second medical reason invoked in Professor Daly's report was the need to "plan the above-mentioned explorations". This sentence refers to the fact that he indicates in his final report that "a number of additional investigations could be contemplated", adding that "these points have been discussed with Professor Mallinson and Dr. Croxson". But the latter pointed out in their report that while they agreed with a "barium-enema X-ray" (which obviously may be performed in any hospital), they had observed that "we do not feel that mesenteric angiography nor an ERCP are essential investigations in (Mafart's) management; if they were they could have been carried out by now". This observation, not contested in any other medical report, is the conclusive answer to the second ground invoked by Professor Daly.

In consequence, there was no medical justification to retain Major Mafart in metropolitan France instead of returning him to Hao in compliance with the First Agreement.

88. The other ground leading Professor Daly to declare Major Mafart "unfit to serve overseas for an undetermined period" was of a legal and not of a medical character: the need to apply the "rules of fitness governing French military personnel".

There is no reason to doubt that Professor Daly in his report and the French authorities in refusing on this ground the return of Major Mafart to Hao were applying the French norms on the subject of physical aptitude for service overseas and in general the French military regulations and statutes.

But compliance with the First Agreement was not dependent on the fact that Major Mafart should have been able to render active service in the military base at the island of Hao. Under the special obligations which the First Agreement imposed on him he was not required to render any military service at all. All that was required from him was to be re-transferred to Hao and remain there until the expiration of the term established in the First Agreement, without any contact with the press and other media. His transfer to Hao was not of a regular military character; it was not an assignment subject to the normal conditions or requirements of a French military posting. Lack of aptitude to serve actively in military service beyond the confines of metropolitan France does not imply lack of aptitude to be re-transferred to Hao and remain there for the required term. It has not been contended, nor even suggested, that the climate or the environment in Hao could affect adversely Major Mafart's health nor that the food available in the island could be the cause of the troubles to his health.

Both parties recognized that the return of Major Mafart to Hao depended mainly on his state of health. Thus, the French Ministry of Foreign Affairs in its note of 30 December 1987 to the New Zealand Embassy referring to France's respect for the 1986 Agreement had said that Major Mafart will return to Hao when his state of health allowed.

Consequently, there was no valid ground for Major Mafart continuing to remain in metropolitan France and the conclusion is unavoidable that this omission constitutes a material breach by the French Government of the First Agreement.

For the foregoing reasons the Tribunal:

- by a majority declares that the French Republic did not breach its obligations to New Zealand by removing Major Mafart from the island of Hao on 13 December 1987;
- declares that the French Republic committed a material and continuing breach of its obligation to New Zealand by failing to order the return of Major Mafart to the island of Hao as from 12 February 1988.

The Case of Captain Prieur

89. As to the situation of Captain Prieur, the French authorities advised the New Zealand Government, on 3 May 1988, that she was pregnant, adding that a medical report indicated that “this pregnancy should be treated with special care . . .” The advice added that “the medical facilities on Hao are not equipped to carry out the necessary medical examinations and to give Mrs. Prieur the care required by her condition”.

90. The New Zealand authorities answered this communication on 4 May 1988, stating that “while New Zealand’s consent is required in terms of the 1986 Agreement, this is not a case where, if the medical situation justifies it, consent would be unreasonably withheld”. This communication added that the New Zealand Government “would like, on the basis of medical consultation, to determine the nature of any special treatment that Captain Prieur might need and the place where the necessary tests and ongoing treatment could be carried out if the facilities at Hao are not adequate”. For this purpose “as a first step to coming to an agreement on this basis”, the New Zealand authorities advised that they were “making arrangements for a New Zealand doctor with the requisite qualifications to fly on the first available flight to Papeete for onward flight to Hao by French military transport”. The nominated doctor was Dr. Bernard Brenner, qualified in obstetrics and gynecology.

91. On 4 May 1988 the French authorities gave their “agreement for sending to Hao, as soon as possible, Doctor Bernard Brenner. The latter would first be taken to Papeete by airliner or by a New Zealand military aircraft, and from there he would be transported to Hao by a French military aircraft” (see para. 50).

However, industrial action by French airline pilots caused the postponement of these plans by one day, until 6 May 1988.

In the interim, on 5 May 1988, the New Zealand Ambassador in Paris was informed “by the Office of the Minister of Foreign Affairs” of a “new element”, namely, that “Dominique Prieur’s father, who is at the Begin Hospital for treatment of a cancer, is dying”, and “his condition is considered critical by the doctors”. The French authorities added that: “we believed that, for obvious reasons of a humanitarian nature, it was essential that Dominique Prieur be able to see her father before his death”. They advised of several solutions that were conceivable (see para. 52).

92. It has been stated in paras. 53 to 56 above that:

The New Zealand Ambassador responded on 5 May that while awaiting the Prime Minister's decision, the solution of sending a New Zealand military aircraft was being studied;

The French authorities had indicated that the departure from Auckland could not be delayed beyond 7.30 a.m. Friday (New Zealand time), "the final deadline" after which France would be running the risk that Dominique Prieur would arrive in Paris too late to see her father alive;

The New Zealand authorities informed the French Government on 5 May 1988 at 9.30 p.m. that they were not ready to give their consent for the reason invoked but that the offer made because of Mrs. Prieur's pregnancy remained valid;

In their response on 5 May at 10.30 p.m., the French authorities stated that the French Government considered it impossible "for obvious humanitarian reasons" to keep Mrs. Prieur on Hao, and that the officer was therefore leaving immediately for Paris;

The French authorities confirmed on 6 May that Mrs. Prieur had left Hao by a special flight on Thursday at 11.30 p.m. (Paris time) and was expected in Paris at the end of the evening on that day (6 May).

93. The facts above, which are not disputed, show that New Zealand would not oppose Captain Prieur's departure, if that became necessary because of special care which might be required by her pregnancy. They also indicate that France and New Zealand agreed that Captain Prieur would be examined by Dr. Brenner, a New Zealand physician, before returning to Paris. Only because of the strike by the U.T.A. airline, the examination that was to take place in Hao on Thursday 5 May had to be postponed until Friday 6 May, since Dr. Brenner would be arriving in Papeete at 3.25 p.m. local time, via Air New Zealand. As the French Republic acknowledges in its Counter-Memorial, "It seemed that we were moving towards a satisfactory solution; New Zealand's approval of Mrs. Prieur's departure seemed probable". Reconciliation of respect for the Agreement of 9 July 1986 and the humanitarian concerns due to the particular circumstances of Mrs. Prieur's pregnancy thus seemed to have been achieved.

94. On the other hand, it appears that during the day of 5 May the French Government suddenly decided to present the New Zealand Government with the *fait accompli* of Captain Prieur's hasty return for a new reason, the health of Mrs. Prieur's father, who was seriously ill, hospitalized for cancer. Indisputably the health of Mrs. Prieur's father, who unfortunately would die on 16 May, and the concern for allowing Mrs. Prieur to visit her dying father constitute humanitarian reasons worthy of consideration by both Governments under the 1986 Agreement. But the events of 5 May (French date) prove that the French Republic did not make efforts in good faith to obtain New Zealand's consent. First of all, it must be remembered that France and New Zealand agreed that Captain Prieur would be examined in Hao on 6 May, which would allow her to return to France immediately. For France, in this case, it was only a question of gaining 24 or 36 hours. Of course, the

health of Mrs Prieur's father, who had been hospitalized for several months, could serve as grounds for such acute and sudden urgency; but, in this case, New Zealand would have had to be informed very precisely and completely, and not be presented with a decision that had already been made.

However, when the French Republic notified the Ambassador of New Zealand on 5 May at 11.00 a.m. (French time), the latter was merely told that Mrs. Dominique Prieur's father, hospitalized for cancer treatment, was dying. Of course, it was explained that the New Zealand Government could verify "the validity of this information" using a physician of its choice, but the telegram the French Minister of Foreign Affairs sent to the Embassy of France in Wellington on 5 May 1988 clearly stated that the decision to repatriate was final. And this singular announcement was addressed to New Zealand: "After all, New Zealand should understand that it would be incomprehensible for both French and New Zealand opinion for the New Zealand Government to stand in the way of allowing Mrs. Prieur to see her father on his death bed . . ." Thus, New Zealand was really not asked for its approval, as compliance with France's obligations required, even under extremely urgent circumstances; it was indeed demanded so firmly that it was bound to provoke a strong reaction from New Zealand.

95. The events that followed confirm that the French Government's decision had already been made and that it produced a foreseeable reaction. Indeed, at 9.30 p.m. (French time) on 5 May, the Ambassador of New Zealand in Paris announced that the New Zealand Government was not prepared to approve Mrs. Prieur's departure from Hao, for the reason given that very morning by the French Government. But the New Zealand Government explained that the "response and New Zealand's offer concerning the consequences of Mrs. Prieur's pregnancy were still valid". France, therefore, could have expected the procedure agreed upon by reason of Mrs. Prieur's pregnancy to be respected. Quite on the contrary, the French Government informed the New Zealand Ambassador at 10.30 p.m. that "the French officer is thus leaving immediately for Paris", and Mrs. Prieur actually left Hao on board a special flight at 11.30 p.m. (Paris time). It would be very unlikely that the special flight leaving Hao at 11.30 p.m. had not been planned and organized before 10.30 p.m., when the French decision was intimated, and even before 9.30 p.m., the time of New Zealand's response. Indeed, the totality of facts prove that, as of the morning of Thursday, 5 May, France had decided that Captain Prieur would leave Hao during the day, with or without New Zealand's approval.

96. Pondering the reasons for the haste of France, New Zealand contended that Captain Prieur's "removal took place against the backdrop of French presidential elections in which the Prime Minister was a candidate" and New Zealand pointed out that Captain Prieur's departure and arrival in Paris had been widely publicized in France. During the oral proceedings, New Zealand produced the text of an interview given on 27 September 1989 by the Prime Minister at the relevant time, explaining the following on the subject of the "Turenge couple": "I take

responsibility for the decision that was made, and could not imagine how these two officers could be abandoned after having obeyed the highest authorities of the State. Because it was the last days of my Government, I decided to bring Mrs. Prieur, who was pregnant, back from the Pacific atoll where she was stationed. Had I failed to do so, she would surely still be there today". New Zealand alleges that the French Government acted in this way for reasons quite different from the motive or pretext invoked. The Tribunal need not search for the French Government's motives, nor examine the hypotheses alleged by New Zealand. It only observes that, during the day of 5 May 1988, France did not seek New Zealand's approval in good faith for Captain Prieur's sudden departure; and accordingly, that the return of Captain Prieur, who left Hao on Thursday, 5 May at 11.30 p.m. (French time) and arrived in Paris on Friday, 6 May, thus constituted a violation of the obligations under the 1986 Agreement.

This violation seems even more regrettable because, as of 12 February 1988, France had been in a state of continuing violation of its obligations concerning Major Mafart, as stated above, which normally should have resulted in special care concerning compliance with the Agreement in Captain Prieur's case.

97. Moreover, France continued to fall short of its obligations by keeping Captain Prieur in Paris after the unfortunate death of her father on 16 May 1988. No medical report supports or demonstrates the original claim by French authorities to the effect that Captain Prieur's pregnancy required "particular care" and demonstrating that "the medical facilities on Hao are not equipped to carry out the necessary medical examinations and to give Mrs. Prieur the care required by her condition". There is no evidence either which demonstrates that the facilities in Papeete, originally suggested by the New Zealand Ambassador in Paris, were also inadequate: on the contrary, positive evidence has been presented by New Zealand as to their adequacy and sophistication.

The only medical report in the files concerning Captain Prieur's health is one from Dr. Croxson, dated 21 July 1988, which appears to discard the necessity of "particular care" for a pregnancy which is "proceeding uneventfully". This medical report adds that "no special arrangements for later pregnancy or delivery are planned, and I formed the opinion that management would be conducted on usual clinical criteria for a 39-year-old, fit, healthy woman in her first pregnancy".

So, the record provides no justification for the failure to return Captain Prieur to Hao some time after the death of her father.

98. The fact that "pregnancy in itself normally constitutes a contra-indication for overseas appointment" is not a valid explanation, because the return to Hao was not an assignment to service, or "an assignment" or military posting, for the reasons already indicated in the case of Major Mafart.

Likewise, the fact that Captain Prieur benefited, under French regulations, from "military leave which she had not taken previously", as well as "the maternity and nursing leaves established by French law" may be measures provided by French military laws or regulations.

But in this case, as in that of Major Mafart, French military laws or regulations do not constitute the limit of the obligations of France or of the consequential rights deriving for New Zealand from those obligations. The French rules "governing military discipline" are referred to in the fourth paragraph of the First Agreement not as the limit of New Zealand rights, but as the means of enforcing the stipulated conditions and ensuring that they "will be strictly complied with". Moreover, French military laws or regulations can never be invoked to justify the breach of a treaty. As the French Counter-Memorial properly stated: "the principle according to which the existence of a domestic regulation can never be an excuse for not complying with an international obligation is well established, and France subscribes to it completely".

99. In summary, the circumstances of distress, of extreme urgency and the humanitarian considerations invoked by France may have been circumstances excluding responsibility for the unilateral removal of Major Mafart without obtaining New Zealand's consent, but clearly these circumstances entirely fail to justify France's responsibility for the removal of Captain Prieur and from the breach of its obligations resulting from the failure to return the two officers to Hao (in the case of Major Mafart once the reasons for their removal had disappeared). There was here a clear breach of its obligations and a breach of a material character.

100. According to Articles 60 (3) (b) of the Vienna Convention on the Law of Treaties, a material breach of a treaty consists in "the violation of a provision essential to the accomplishment of the object or purpose of the treaty".

The main object or purpose of the obligations assumed by France in Clauses 3 to 7 of the First Agreement was to ensure that the two agents, Major Mafart and Captain Prieur, were transferred to the island of Hao and remained there for a period of not less than three years, being subject to the special regime stipulated in the Exchange of Letters.

To achieve this object or purpose, the third and fourth paragraphs of the First Agreement provide that New Zealand will transfer the two agents to the French military authorities and these authorities will immediately transfer them to a French military facility in Hao. The prohibition "from leaving the island for any reason without the mutual consent of the two Governments" was the means to guarantee the fulfilment of the fundamental obligation assumed by France: to keep the agents in Hao and submit them to the special regime of isolation and restriction of contacts described in the fourth paragraph of the Exchange of Letters.

The facts show that the essential object or purpose of the First Agreement was not fulfilled, since the two agents left the island before the expiry of the three-year period.

This leads the Tribunal to conclude that there have been material breaches by France of its international obligations.

101. In its codification of the Law of State Responsibility, the International Law Commission has made another classification of the different types of breaches, taking into account the time factor as an

ingredient of the obligation. It is based on the determination of what is described as *tempus commissi delictu*, that is to say, the duration or continuation in time of the breach. Thus the Commission distinguishes the breach which does not extend in time, or instantaneous breach, defined in Article 24 of the draft, from the breach having a continuing character or extending in time. In the latter case, according to paragraph 1 of Article 25, "the time of commission of the breach extends over the entire period during which the act continues and remains not in conformity with the international obligation".

Applying this classification to the present case, it is clear that the breach consisting in the failure of returning to Hao the two agents has been not only a material but also a continuous breach.

And this classification is not purely theoretical, but, on the contrary, it has practical consequences, since the seriousness of the breach and its prolongation in time cannot fail to have considerable bearing on the establishment of the reparation which is adequate for a violation presenting these two features.

For the foregoing reasons the Tribunal:

- declares that the French Republic committed a material breach of its obligations to New Zealand by not endeavouring in good faith to obtain on 5 May 1988 New Zealand's consent to Captain Prieur's leaving the island of Hao;
- declares that as a consequence the French Republic committed a material breach of its obligations by removing Captain Prieur from the island of Hao on 5 and 6 May 1988;
- declares that the French Republic committed a material and continuing breach of its obligations to New Zealand by failing to order the return of Captain Prieur to the island of Hao.

Duration of the Obligations

102. The Parties in this case are in complete disagreement with respect to the duration of the obligations assumed by France in paragraphs 3 to 7 of the First Agreement.

New Zealand contends that the obligation in the Exchange of Letters envisaged that in the normal course of events both agents would remain on Hao for a continuous period of three years. It points out that the First Agreement does not set an expiry date for the three-year term but rather describes the term as being for "a period of not less than three years". According to the New Zealand Government, this is clearly not a fixed period ending on a predetermined date. "The three-year period, in its context, clearly means the period of time to be spent by Major Mafart and Captain Prieur on Hao rather than a continuous or fixed time span. In the event of an interruption to the three-year period, the obligation assumed by France to ensure that either or both agents serve the balance of the three years would remain". Consequently, concludes the Government of New Zealand, "France is under an ongoing obligation to return Major Mafart and Captain Prieur to Hao to serve out the balance of their three-year confinement".

103. For its part, the French Government answers: "it is true that the 1986 Agreement does not fix the exact date of expiry of the specific regime that it sets up for the two agents. But neither does it fix the exact date that this regime will take effect". The reason, adds the French Government, is that in paragraph 7 of the First Agreement, it is provided that the undertakings relating to "the transfer of Major Mafart and Captain Prieur will be implemented not later than 25 July 1986". Consequently, adduces the French Government, "it is quite obviously the effective date of transfer to Hao which should constitute the *dies a quo* and thus determine the *dies ad quem* . . . The obligation assumed by France to post the two officers to Hao and to subject them there to a regime that restricts some of their freedoms was planned by the parties to last for three years beginning on the day the transfer to Hao became effective; this transfer having taken place on 22 July 1986, the three-year period allotted for the obligatory stay on Hao and its attendant obligations" expired three years after, that is to say, on 22 July 1989.

The French Government adds in the Reply that "a period is quite precisely a continuous and fixed interval of time" and "even if no exact expiry date was expressly stated in advance, this date necessarily follows from the determination of both a time period and the *dies a quo*". The French Government remarks, moreover, that there is no rule of international law extending the length of an obligation by reason of its breach.

104. It results from paragraph 7 of the Agreement of 9 July 1986 that both parties agreed that "the undertakings relating to an apology, the payment of compensation and the transfer of Major Mafart and Captain Prieur" should be implemented as soon as possible. For that purpose, they fixed a completion date of not later than 25 July 1986. In respect of the two agents, the date of their delivery to French military authorities was 22 July 1986, thus bringing to an end their prison term in New Zealand. In order to avoid any gap or interval, paragraph 3 of the Agreement required that the two agents should be transferred to a French military base "immediately thereafter" their delivery. There is no question therefore that the special regimen stipulated and the undertakings assumed by the French Government began to operate uninterruptedly on 22 July 1986. It follows that such a special regime, intended to last for a minimum period of three years, expired on 22 July 1989. It would be contrary to the principles concerning treaty interpretation to reach a more extensive construction of the provisions which thus established a limited duration to the special undertakings assumed by France.

105. The characterization of the breach as one extending or continuing in time, in accordance with Article 25 of the draft on State Responsibility (see para. 101), confirms the previous conclusion concerning the duration of the relevant obligations by France under the First Agreement.

According to Article 25, "the time of commission of the breach" extends over the entire period during which the unlawful act continues to take place. France committed a continuous breach of its obligations,

without any interruption or suspension, during the whole period when the two agents remained in Paris in breach of the Agreement.

If the breach was a continuous one, as established in paragraph 101 above, that means that the violated obligation also had to be running continuously and without interruption. The "time of commission of the breach" constituted an uninterrupted period, which was not and could not be intermittent, divided into fractions or subject to intervals. Since it had begun on 22 July 1986, it had to end on 22 July 1989, at the expiry of the three years stipulated.

Thus, while France continues to be liable for the breaches which occurred before 22 July 1989, it cannot be said today that France is *now* in breach of its international obligations.

106. This does not mean that the French Government is exempt from responsibility on account of the previous breaches of its obligations, committed while these obligations were in force.

Article 70 (1) of the Vienna Convention on the Law of Treaties provides that:

the termination of a treaty under its provisions . . .

(b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its determination.

Referring to claims based on the previous infringement of a treaty which had since expired, Lord McNair stated:

such claims acquire an existence independent of the treaty whose breach gave rise to them (*ICJ Reports*, 1952, p. 63).

In this case it is undisputed that the breaches of obligation incurred by the French Government discussed in paragraphs 88 and 101 of the Award—the failure to return Major Mafart and the removal of and failure to return Captain Prieur—were committed at a time when the obligations assumed in the First Agreement were still in force.

Consequently, the claims advanced by New Zealand have an existence independent of the expiration of the First Agreement and entitle New Zealand to obtain adequate relief for these breaches.

For the foregoing reasons the Tribunal:

— by a majority declares that the obligations of the French Republic requiring the stay of Major Mafart and Captain Prieur on the island of Hao ended on 22 July 1989.

Existence of Damage

107. Before examining the question of adequate relief for the aggrieved State, it is necessary to deal with a fundamental objection which has been raised by the French Government. The French Government opposes the New Zealand claim for relief on the ground that such a claim "completely ignores a central element, the damage", since it does not indicate that "the slightest damage has been suffered, even moral damage".

And, the French Republic adds, in the theory of international responsibility, damage is necessary to provide a basis for liability to make reparation.

108. New Zealand gives a two-fold answer to the French objection: first, it contends that it has been confirmed by the International Law Commission draft on State Responsibility that damage is not a precondition of liability or responsibility and second, that in any event, New Zealand has suffered in this case legal and moral damage. New Zealand asserts that it is not claiming material damage in the sense of physical or direct injury to persons or property resulting in an identifiable economic loss, but it is claiming legal damage by reason of having been victim of a violation of its treaty rights, even if there is no question of a material or pecuniary loss. Moreover, New Zealand claims moral damage since in this case there is not a purely technical breach of a treaty, but a breach causing deep offence to the honour, dignity and prestige of the State. New Zealand points out that the affront it suffered by the premature release of the two agents in breach of the treaty revived all the feelings of outrage which had resulted from the *Rainbow Warrior* incident.

109. In the oral proceedings, France made it clear that it had never said, as New Zealand had once maintained, that only material or economic damage is taken into consideration by international law. It added that there exist other damages, including moral and even legal damage. In light of this statement, New Zealand remarked in the hearings that France recognized in principle that there can be legal or moral damage, and that material loss is not the only form of damage in this case. Consequently, the doctrinal controversy between the parties over whether damage is or is not a precondition to responsibility became moot, so long as there was legal or moral damage in this case. Accordingly, both parties agree that

in inter-State relations, the concept of damage does not possess an exclusive material or patrimonial character. Unlawful action against non-material interests, such as acts affecting the honor, dignity or prestige of a State, entitle the victim State to receive adequate reparation, even if those acts have not resulted in a pecuniary or material loss for the claimant State (cf. Soerensen, *Manual* cit., p. 534).

110. In the present case the Tribunal must find that the infringement of the special regime designed by the Secretary-General to reconcile the conflicting views of the Parties has provoked indignation and public outrage in New Zealand and caused a new, additional non-material damage. This damage is of a moral, political and legal nature, resulting from the affront to the dignity and prestige not only of New Zealand as such, but of its highest judicial and executive authorities as well.

The Appropriate Remedies

On the Request for an "Order" to the French Republic to Return its Agents to Hao

111. It follows from the foregoing findings that New Zealand is entitled to appropriate remedies. It claims certain declarations, to the effect that France has breached the First Agreement.

But New Zealand seeks as well an order for the return of the agents. It asserts in its Memorial, under the title "*Restitutio in integrum*" that "in the circumstances currently before the Tribunal, such a declaration is not, in itself, a true remedy. And the same is true for any order, or declaration of 'cessation' of the breach. For what is required to restore the position of full compliance with the First Agreement is *positive* action by France, i.e., positive steps to return Major Mafart and Captain Prieur to Hao and to keep them for the minimum of three years required by the First Agreement".

New Zealand therefore claims what it calls *restitutio*, in the form of an order for specific performance. In its formal request in its Memorial it seeks an order "that the French Republic shall promptly return Major Mafart and Captain Prieur to the island of Hao for the balance of their three-year periods in accordance with the conditions of the First Agreement". It does not at that stage use the label or title of *restitutio* or specific performance.

New Zealand points out that any other remedy would be inappropriate in this case. While France suggests that the appropriate remedy for non-material damage is satisfaction in the form of a declaration, New Zealand states that a mere declaration that France was in breach would be simply a statement of the obvious, and would not be satisfactory at all for New Zealand. A declaration of the respective rights and duties of the parties, contends New Zealand, would be an appropriate remedy in those cases where it is clear that once the judicial declaration is made, the Parties will conform their conduct to it, but it is not an appropriate remedy in this case because it is clear that France will not return the two agents to Hao unless specifically ordered to do so.

As to cessation, New Zealand contends that an order to that effect will suffice in those cases where the breach consists not of active conduct which is unlawful but of failing to act in a lawful manner; if one wants a party to desist from certain action cessation would be appropriate, but not if one wants a party to act positively.

Finally, as to reparation in the form of an indemnity, New Zealand contends that, at least in cases of treaty breach, what a claimant State seeks is not pecuniary compensation but actual, specific compliance or performance of the treaty, adding that if the party in breach were not expected to comply with the treaty, but need only pay monetary compensation for the breach, States would in effect be able to buy the privilege of breaching a treaty and the norm *pacta sunt servanda* would cease to have any real meaning. It is for this reason, concludes New Zealand, that where responsibility arises from a fundamental breach of treaty, the remedy of restitution, in the sense of an order for specific performance, is the most appropriate remedy.

112. For its part, the French Republic maintains that adequate reparation for moral or legal damage can only take the form of satisfaction, generally considered as the remedy *par excellence* in cases of non-material damage. Invoking the decisions of the International Court of Justice, France maintains that whenever the damage suffered amounts

to no more than a breach of the law, a declaration by the judge of this breach constitutes appropriate satisfaction.

France points out, moreover, that, rather than *restitutio*, what New Zealand is demanding is the cessation of the denounced behavior, i.e., “a remedy aimed at stopping the illegal behavior and consisting of a demand for execution of the obligation which has still not been carried out”, according to the definition of the Special Rapporteur for the International Law Commission on State Responsibility, Professor Arangio-Ruiz.

But, France adds, only illegal behavior that continues up to the day when the problem is posed can be subject to cessation. For cessation to take place, there must be illegal behavior of a continuous nature which persists up to the day when the remedy is applied. Consequently, France adds, this form of reparation presupposes that France’s obligation to maintain the agents on Hao is in effect on the day the Tribunal rules. A State cannot be condemned to carry out an obligation by which it is no longer bound: if the obligation is no longer in effect on the day the judge rules, this judge can state that, in the past, when the obligation was in effect, an illegal act was committed. But the judge cannot give a ruling of *restitutio in integrum* or of *specific performance* of the obligation because once the obligation is no longer in effect, the judge does not have the power to revive it.

The French Republic concludes that it would be impossible to force France to put a stop to a situation that has already ceased to exist; the order for execution in kind cannot be granted since there is no longer anything that can be executed in the future.

113. Recent studies on State responsibility undertaken by the Special Rapporteurs of the International Law Commission have led to an analysis in depth of the distinction between an order for the cessation of the unlawful act and *restitutio in integrum*. Professor Riphagen observed that in numerous cases “stopping the breach was involved, rather than reparation or *restitutio in integrum stricto sensu*” (Ybk. I.L.C. 1981, vol. II, Part I, doc. A/CN.4/342, and Add.1-4, para. 76).

The present Special Rapporteur, Professor Arangio-Ruiz, has proposed a distinction between the two remedies (ILC Report to the General Assembly for 1988, para. 538).

In the field of doctrine, Professor Dominicé has rightly observed that “the obligation to bring an illegal situation to an end is not reparation, but a return to the initial obligation”, adding that “if one speaks, regarding this type of circumstance, of an obligation to give (in the general sense) *restitutio in integrum*, it does not actually mean reparation. What is required is a return, to the situation demanded by law, the cessation of illegal behavior. The victim State is not claiming a new right, created by the illegal act. It is demanding respect for its rights, as they were before the illegal act, and as they remain” (Observations on the rights of a State that is the victim of an internationally wrongful act, *Droit international 2*, Institut des Hautes Etudes Internationales, Paris, 1982, p. 1, 27).

The International Law Commission has accepted the insertion of an article separate from the provisions on reparation and dealing with the subject of cessation, thus endorsing the view of the Special Rapporteur Arangio-Ruiz that cessation has inherent properties of its own which distinguish it from reparation (ILC Report to the General Assembly for 1989, para. 259).

Special Rapporteur Arangio-Ruiz has also pointed out that the provision on cessation comprises all unlawful acts extending in time, regardless of whether the conduct of a State is an action or an omission (ILC Report to the General Assembly for 1988, para. 537).

This is right, since there may be cessation consisting in abstaining from certain actions—such as supporting the “contras”—or consisting in positive conduct, such as releasing the U.S. hostages in Teheran.

There is no room, therefore, for the distinction made by New Zealand on this point (see para. 111).

Undoubtedly the order requested by the New Zealand Government for the return of the two agents would really be an order for the cessation of the wrongful omission rather than a *restitutio in integrum*. This characterization of the New Zealand request is relevant to the Tribunal's decision, since in those cases where material restitution of an object is possible, the expiry of a treaty obligation may not be, by itself, an obstacle for ordering restitution.

114. The question which arises is whether an order for the cessation or discontinuance of the wrongful omission may be issued in the present circumstances.

The authority to issue an order for the cessation or discontinuance of a wrongful act or omission results from the inherent powers of a competent tribunal which is confronted with the continuous breach of an international obligation which is in force and continues to be in force. The delivery of such an order requires, therefore, two essential conditions intimately linked, namely that the wrongful act has a continuing character and that the violated rule is still in force at the time in which the order is issued.

Obviously, a breach ceases to have a continuing character as soon as the violated rule ceases to be in force.

The recent jurisprudence of the International Court of Justice confirms that an order for the cessation or discontinuance of wrongful acts or omissions is only justified in case of continuing breaches of international obligations which are still in force at the time the judicial order is issued. (*The United States Diplomatic and Consular Staff in Teheran Case*, I.C.J. Reports, 1979, p. 21, para. 38 to 41, and 1980, para. 95, No. 1; *The Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, I.C.J. Reports, 1984, p. 187, and 1986, para. 292, p. 149.)

If, on the contrary, the violated primary obligation is no longer in force, naturally an order for the cessation or discontinuance of the wrongful conduct would serve no useful purpose and cannot be issued.

It would be not only unjustified, but above all illogical to issue the order requested by New Zealand, which is really an order for the cessation or discontinuance of a certain French conduct, rather than a *restitutio*. The reason is that this conduct, namely to keep the two agents in Paris, is no longer unlawful, since the international obligation expired on 22 July 1989. Today, France is no longer obliged to return the two agents to Hao and submit them to the special regime.

For the foregoing reasons the Tribunal:

- declares that it cannot accept the request of New Zealand for a declaration and an order that Major Mafart and Captain Prieur return to the island of Hao.

115. On the other hand, the French contention that satisfaction is the only appropriate remedy for non-material damage is also not justified in the circumstances of the present case.

The granting of a form of reparation other than satisfaction has been recognized and admitted in the relations between the parties by the Ruling of the Secretary-General of 9 July 1986, which has been accepted and implemented by both Parties to this case.

In the Memorandum presented to the Secretary-General, the New Zealand Government requested compensation for non-material damage, stating that it was “entitled to compensation for the violation of sovereignty and the affront and insult that that involved”.

The French Government opposed this claim, contending that the compensation “could concern only the material damage suffered by New Zealand, the moral damage being compensated by the offer of apologies”.

But the Secretary-General did not make any distinction, ruling instead that the French Government “should pay the sum of US dollars 7 million to the Government of New Zealand as *compensation for all the damage it has suffered*” (*Ibid.*, p. 32, emphasis added).

In the Rejoinder in this case, the French Government has admitted that “the Secretary-General granted New Zealand double reparation for moral wrong, i.e., both satisfaction, in the form of an official apology from France, and reparations in the form of damages and interest in the amount of 7 million dollars”.

In compliance with the Ruling, both parties agreed in the second paragraph of the First Agreement that “the French Government will pay the sum of US 7 million to the Government of New Zealand as *compensation for all the damage which it has suffered*” (emphasis added).

It clearly results from these terms, as well as from the amount allowed, that the compensation constituted a reparation not just for material damage—such as the cost of the police investigation—but for non-material damage as well, regardless of material injury and independent therefrom. Both parties thus accepted the legitimacy of monetary compensation for non-material damages.

On Monetary Compensation

116. The Tribunal has found that France has committed serious breaches of its obligations to New Zealand. But it has also concluded that no order can be made to give effect to these obligations requiring the agents to return to the island of Hao, because these obligations have already expired. The Tribunal has accordingly considered whether it should add to the declarations it will be making an order for the payment by France of damages.

117. The Tribunal considers that it has power to make an award of monetary compensation for breach of the 1986 Agreement under its jurisdiction to decide "any dispute concerning the interpretation or the application" of the provisions of that Agreement (*Chorzow Factory Case (Jurisdiction)* PCIJ Pubs. Ser A. No. 9, p. 21).

118. The Tribunal next considers that an order for the payment of monetary compensation can be made in respect of the breach of international obligations involving, as here, serious moral and legal damage, even though there is no material damage. As already indicated, the breaches are serious ones, involving major departures from solemn treaty obligations entered into in accordance with a binding ruling of the United Nations Secretary-General. It is true that such orders are unusual but one explanation of that is that these requests are relatively rare, for instance by France in the *Carthage* and *Manouba* cases (1913) (11 UNRIAA 449, 463), and by New Zealand in the 1986 process before the Secretary-General, accepted by France in the First Agreement. Moreover, such orders have been made, for instance in the last case.

119. New Zealand has not however requested the award of monetary compensation—even as a last resort should the Tribunal not make the declarations and orders for the return of the agents. The Tribunal can understand that position in terms of an assessment made by a State of its dignity and its sovereign rights. The fact that New Zealand has not sought an order for compensation also means that France has not addressed this quite distinct remedy in its written pleadings and oral arguments, or even had the opportunity to do so. Further, the Tribunal itself has not had the advantage of the argument of the two Parties on the issues mentioned in paragraphs 117 and 118, or on other relevant matters, such as the amount of damages.

120. For these reasons, and because of the issue mentioned in paragraphs 124 to 126 following, the Tribunal has decided not to make an order for monetary compensation.

On Declarations of Unlawfulness as Satisfaction

121. The Tribunal considers in turn satisfaction by way of declarations of breach. Furthermore, in light of the foregoing considerations, it will make a recommendation to the two Governments.

122. There is a long established practice of States and international Courts and Tribunals of using satisfaction as a remedy or form of reparation (in the wide sense) for the breach of an international obliga-

tion. This practice relates particularly to the case of moral or legal damage done directly to the State, especially as opposed to the case of damage to persons involving international responsibilities. The whole matter is valuably and extensively discussed by Professor Arangio-Ruiz in his second report (1989) for the International Law Commission on State Responsibility (A/CN.4/425, paras. 7-19, and Ch. 3, paras. 106-145; see also Ch. 4, paras. 146-161, "Guarantees of Non-Repetition in the Wrongful Act"). He demonstrates wide support in the writing as well as in judicial and State practice of satisfaction as "the special remedy for injury to the State's dignity, honour and prestige" (para. 106).

Satisfaction in this sense can take and has taken various forms. Arangio-Ruiz mentions regrets, punishment of the responsible individuals, safeguards against repetition, the payment of symbolic or nominal damages or of compensation on a broader basis, and a decision of an international tribunal declaring the unlawfulness of the State's conduct (para. 107; see also his draft article 10, A/CN.4/425/Add.1, p. 25).

123. It is to the last of these forms of satisfaction for an international wrong that the Tribunal now turns. The Parties in the present case are agreed that in principle such a declaration of breach could be made—although France denied that it was in breach of its obligations and New Zealand sought as well a declaration and order of return. There is no doubt both that this power exists and that it is seen as a significant sanction. In two related cases brought by France against Italy for unlawful interference with French ships, the Permanent Court of Arbitration, having made an order for the payment of compensation for material loss, stated that:

in the case in which a Power has failed to meet its obligations . . . to another Power, the statement of that fact, especially in an arbitral award, constitutes in itself a serious sanction (*Carthage* and *Manouba* cases (1913) 11 UNRIAA 449, 463).

Most notable is the judgment of the International Court of Justice in the *Corfu Channel (Merits) Case* (1949 ICJ Reports 4). The Court, having found that the British Navy had acted unlawfully, in the operative part of its decision:

gives judgment that . . . the United Kingdom Government violated the sovereignty of the People's Republic of Albania, and that this declaration of the Court constitutes in itself appropriate satisfaction.

The Tribunal accordingly decides to make four declarations of material breach of its obligations by France and further decides in compliance with Article 8 of the Agreement of 14 February 1989 to make public the text of its Award.

For the foregoing reasons the Tribunal:

- declares that the condemnation of the French Republic for its breaches of its treaty obligations to New Zealand, made public by the decision of the Tribunal, constitutes in the circumstances appropriate satisfaction for the legal and moral damage caused to New Zealand.

Recommendation

124. New Zealand and France have had close and continuing relations since the early days of European exploration of the South Pacific. The relationship has grown more intense and friendly since the beginning of constitutional government in New Zealand exactly 150 years ago. It includes the friendship of many of the citizens of the two countries forged in peace and war, particularly in the two world wars; and, notwithstanding difficulties of great distance, it extends to the full range of cultural, social, economic and political matters.

125. From the time of the acknowledgement by the French Republic of its responsibility for the unlawful attack on the *Rainbow Warrior*, senior members of the Governments of both countries have stressed their wish to re-establish and strengthen those good relations. A critical element in that process is a fair and final settlement of the issues arising from that incident and the later events with which this Award is concerned. So the 1986 Agreements, giving effect to the Secretary-General's Ruling, stress the wish of the two Governments to maintain the close and friendly relations traditionally existing between them. In the hearing before the Tribunal, the Agents of the two Governments emphasized the warming of the relationship, referring for instance to a relevant statement made by Mr. Rocard, the French Prime Minister, during his visit in August 1989 to the South Pacific. Moreover, Mr. Lange, now Attorney-General of New Zealand and from July 1984 to August 1989 Prime Minister, spoke before the Tribunal of the dynamic of reconciliation now operating between the two countries.

126. That important relationship, the nature of the decisions made by the Tribunal, and the earlier discussion of monetary compensation lead the Tribunal to make a recommendation. The recommendation, addressed to the two Governments, is intended to assist them in putting an end to the present unhappy affair.

127. Consequently, the Tribunal recommends to the Government of France and the Government of New Zealand that they set up a fund to promote close and friendly relations between the citizens of the two countries and recommends that the Government of France make an initial contribution equivalent to US Dollars 2 million to that fund.

128. The power of an arbitral tribunal to address recommendations to the parties to a dispute, in addition to the formal finding and obligatory decisions contained in the award, has been recognized in previous arbitral decisions. During the hearings, the New Zealand Attorney-General proposed that the Tribunal make some recommendations. The Agent for France has not challenged in any way the power of the Tribunal to make such recommendations in aid of the resolution of the dispute.

For the foregoing reasons the Tribunal:

— in light of the above decisions, recommends that the Governments of the French Republic and of New Zealand set up a fund to promote close and friendly relations between the citizens of the two countries,

and that the Government of the French Republic make an initial contribution equivalent to US Dollars 2 million to that fund.

VI. DECISION

For these reasons,

THE ARBITRAL TRIBUNAL

1) by a majority declares that the French Republic did not breach its obligation to New Zealand by removing Major Mafart from the island of Hao on 13 December 1987;

2) declares that the French Republic committed a material and continuing breach of its obligations to New Zealand by failing to order the return of Major Mafart to the island of Hao as from 12 February 1988;

3) declares that the French Republic committed a material breach of its obligations to New Zealand by not endeavouring in good faith to obtain on 5 May 1988 New Zealand's consent to Captain Prieur's leaving the island of Hao;

4) declares that as a consequence the French Republic committed a material breach of its obligations to New Zealand by removing Captain Prieur from the island of Hao on 5 and 6 May 1988;

5) declares that the French Republic committed a material and continuing breach of its obligations to New Zealand by failing to order the return of Captain Prieur to the island of Hao;

6) by a majority declares that the obligations of the French Republic requiring the stay of Major Mafart and Captain Prieur on the island of Hao ended on 22 July 1989;

7) as a consequence declares that it cannot accept the requests of New Zealand for a declaration and an order that Major Mafart and Captain Prieur return to the island of Hao;

8) declares that the condemnation of the French Republic for its breaches of its treaty obligations to New Zealand, made public by the decision of the Tribunal, constitutes in the circumstances appropriate satisfaction for the legal and moral damage caused to New Zealand;

9) in the light of the above decisions, recommends that the Governments of the French Republic and of New Zealand set up a fund to promote close and friendly relations between the citizens of the two countries, and that the Government of the French Republic make an initial contribution equivalent to \$US 2 million to that fund.

DONE in English and in French in New York, on the 30 April, 1990.

Eduardo JIMÉNEZ DE ARÉCHAGA
President

Michael F. HOELLERING
Registrar

Arbitrator Sir Kenneth Keith appends a separate opinion to the Decision of the Arbitral Tribunal.

Separate opinion of Sir Kenneth Keith

1. As appears from paras. 2 to 5 and 7 to 9 of the Decision of the Tribunal, I agree with major parts of the Award. In particular I agree — that France committed several serious breaches of the agreement it had entered into in 1986 in accordance with the binding ruling of the United Nations Secretary-General, — that the Tribunal should declare its condemnation of those breaches in its Award which it also decides to make public, and — that the parties should be recommended to establish a Fund, France making the first contribution equivalent to \$US 2 million, to promote close and friendly relations between the citizens of the 2 countries.

2. To my regret and with great respect to my colleagues, I do however disagree with them on two matters—

— the lawfulness of the removal of Major Mafart from the island of Hao (paras. 80-88 of the Award), and
— the duration of the period the two agents were to stay on the island (paras. 102-106).

I have accordingly prepared this separate opinion giving my reasons for that disagreement.

The removal of Major Mafart

3. The Tribunal holds that France did not act in breach of its obligations in removing Major Mafart from Hao on 14 December 1987. Its reason in essence is that a serious risk to life justified the removal of Major Mafart although New Zealand had not consented. The argument is not based on the obligations established by the agreement itself. New Zealand has not breached its obligations under the agreement to consider in good faith the French request for consent. Indeed in para. 80 the majority say that neither government is to blame for the failure in respect of the verification of Major Mafart's health on Hao in the weekend in question. Rather the argument is founded on the law of state responsibility and in particular on distress as a reason precluding the apparent unlawfulness of the departure of Major Mafart without New Zealand's consent.

4. In the words of the test stated by the International Law Commission, the question is whether the relevant French authorities "had no other means, in a situation of extreme distress, of saving [Major Mafart's] life". The commentary to the draft article suggests that the test, while still very stringent, may be a more relaxed one: so it asks will those at risk "almost inevitably perish" unless the impugned action is taken? And it suggests the widening of the situation of distress beyond the protection of life to the protection of "the physical integrity of a person" (see para. 78 of the Award).

5. On my understanding, such an argument is available in law notwithstanding the apparently absolute language of the 1986 agreement on the basis that that agreement has not excluded the operation of the principle. So the apparently absolute rule found in treaty and customary

international law affirming sovereignty over national airspace is not seen as being breached by the entry of foreign aircraft in distress. Similarly I would agree with counsel for France on the lawfulness of the urgent removal of an agent to Papeete for necessary life-saving surgery there following a shark attack at Hao and allowing no time to get New Zealand's prior consent. All legal systems recognize such exceptions to the strict letter of the law.

6. The principle is established and broadly understood. How does it apply to the facts in this case? There are 2 elements—first the threat to the life or the physical integrity of Major Mafart, and second the action taken to deal with that threat. My disagreement with the majority relates to the second matter and specifically to the timing of that action. I agree that the state of Major Mafart's health as known to the French authorities (including Dr. Maurel) on 14 December 1987 required detailed medical investigations not available on Hao. This was confirmed on the very day of Major Mafart's return to Paris by Dr. Croxson, the physician nominated by the New Zealand Government. Indeed the indications are that had the relevant information been provided to the New Zealand authorities in a timely and adequate manner in advance of the departure they would very likely have consented to medical investigations outside Hao. Such consent would almost certainly have been accompanied by conditions, for instance about the course of the investigations and requiring return to Hao when the investigations were satisfactorily completed.

7. I need not however pursue those matters. As indicated, my particular concern is not with the medical situation and the need for medical tests, but with the timing of the French action taken in apparent breach of the 1986 agreement. The particular medical condition had its origins in surgery 22 years earlier. In July of 1987 Major Mafart was in hospital on Hao. On 7 December 1987 the commander of the base there advised the Minister of Defence in Paris that Major Mafart required tests and treatment which could not be provided there. On 9 December 1987 the Minister dispatched a medical team to Hao. The French authorities did not advise the New Zealand authorities of any of these events occurring in 1987—although each of course could have led in due time to a request for consent to Major Mafart's departure. The three-monthly reports provided by France to New Zealand and the United Nations as required by the agreement also gave no hint of the July hospitalization. Those of 21 July and 21 October 1987 simply said that the earlier situation, involving among other things the officers being in their military positions, continued without change.

8. On Thursday 10 December 1987, Dr. Maurel, the senior Army doctor sent from Paris, reported to the Minister of Defence that his examination indicated the need to examine Major Mafart in a highly specialized environment; his state of health required urgent repatriation to a metropolitan hospital. In the absence of formal advice to the contrary from the Minister, he proposed that the evacuation should be made by the aircraft leaving on Sunday 13 December. On Friday 11 December the Minister of Defence advised his colleague the Minister of

Foreign Affairs of these events and the planned removal and asked that the latter “prendre l’attache” of the New Zealand Government within the framework of the procedure included in the 1986 agreement. It was only at this very late stage, at about 7 p.m. on that Friday (Paris time), that steps were taken to seek New Zealand’s consent to the removal. By the time the request was presented to the New Zealand authorities in Wellington between 10 and 11 a.m. on the Saturday morning (Wellington time) a further 3 or 4 hours had passed and the aircraft was due to depart from Hao less than 2 days later.

9. Only 4 hours after receiving the French request, that is between 2 and 3 p.m. on the afternoon of Saturday 12 December, the New Zealand Government responded. It stated that a New Zealand medical assessment had to be made and it proposed that a New Zealand military doctor fly on a New Zealand military aircraft to Hao for that purpose. Later on the Saturday it sought clearances for that flight and it provided the relevant flight information. After the 8-hour flight from Auckland the plane would have been in Hao less than 30 hours after the initial request and fully 12 hours before the proposed departure of the flight from Hao.

10. It was about 16 hours later, on the Sunday morning (Wellington time), that France rejected New Zealand’s proposal—at about the time that the New Zealand aircraft would have left. New Zealand made further proposals in the course of that day, the exact content of which is disputed. Whatever their precise detail, the French authorities at no stage sought clarification (for instance of their surprising understanding of one proposal that the doctor would have to return to New Zealand to make his report). Nor did they make any counter-proposals to enable a timely medical assessment to be made by New Zealand as a basis for the decision whether to consent or not to the departure. Indeed, France’s first written communication since its request made on the Saturday morning was the note delivered in Wellington on the Monday announcing that “in this case of *force majeure*” the French authorities were forced to act without delay, and that Major Mafart “will leave Hao” on Sunday at 2 a.m. (Hao time). The aircraft had presumably already left when the note was delivered.

11. The long delay of about 7 days between the initial request from Hao and the arrival in Paris and the long arduous flight from Hao to Paris of about 20 hours both indicate that this was not a situation of extreme distress. France did not face an immediate medical emergency. It was not a case comparable to the hypothetical shark attack requiring urgent action and treatment (para. 5 above).

12. New Zealand was obliged to consider in good faith any request for consent made by France. It could not however perform that duty without adequate information and time. No one questions the propriety of its request to undertake a medical assessment—and indeed that was facilitated by the French authorities so far as an assessment in Paris was concerned. But the French authorities did not provide to New Zealand an appropriate opportunity to perform the duty and to make a decision before the proposed departure. So there is no indication in the record of

- why France failed to propose alternative arrangements for a New Zealand medical assessment in Hao or Papeete
- why France could not have delayed the flight from Hao for a short time to facilitate the visit
- why France could not have provided fuller medical information earlier—on a basis of confidence, of course.

13. France, in my view, has not established the need to act in apparent breach of its treaty obligations in the way and especially in the time that it allowed. There was no sufficient urgency. The case was not one of extreme distress threatening Major Mafart's physical integrity. France was in a position to facilitate a proper medical assessment by New Zealand in the performance by New Zealand of its good faith obligations under the agreement. It did not meet its obligations in that respect.

14. In the result, this difference within the Tribunal is of limited consequence since we all agree that France was as from 12 February 1988 in breach of its obligation to order the return of Major Mafart to Hao. Moreover, as indicated, I think it highly likely that a properly supported and presented request for consent would have been acceded to—on terms, of course.

Duration of the obligations

15. As the Award says, the parties are in sharp disagreement about the duration of the obligations, undertaken by France, in respect of the stay by the two agents on the island of Hao. In France's view, the obligations came to an end on 22 July 1989, the third anniversary of the transfer of the two agents to the island. That is so even if their removal from the island and their remaining in metropolitan France were unlawful. According to New Zealand, the agents were to spend a total period of 3 years (at least) on the island—whether the period was continuous or, exceptionally, aggregated from shorter, separate stays.

16. The majority of the Tribunal agrees with the French position. The consequence of the expiry of the obligations in July 1989 is that there can now be no order for the return of the agents to the island. I agree that that is the consequence of that date of expiry. As the Tribunal indicates in para. 114 of the Award, that is a sufficient and compelling reason for refusing to make the order for the return of the agents. Accordingly, I do not find it necessary to come to a conclusion on the issues discussed in para. 113—the characterization of the request either as *restitutio* or as cessation, and the differences between them. Could I simply say that I am not sure, for instance, about the validity of the distinction in theory or in practice. It is notable that the International Court in deciding that the respondent States must take positive steps or refrain from unlawful actions in the *Teheran* and *Nicaraguan* cases did not attach such labels (nor did the applicant states in their formal requests). I now turn to my disagreement with the majority's interpretation of the duration of the obligations.

17. We must of course begin with the 1986 agreement. Under its terms the agents

will be transferred to a French military facility on the island of Hao *for a period of not less than three years.*

seront transférés sur une installation militaire française de l'île de Hao, *pour une période minimale de 3 ans.* (emphasis added)

The agents were prohibited from leaving the island for any reason, except with the mutual consent of the two Governments.

18. The Vienna Convention on the Law of Treaties, the parties agree, provides an authoritative statement of the principles of interpretation of treaties. Article 31(1) reads

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.

What is the ordinary meaning of the relevant terms? What does the context indicate? And the object and purpose of the agreement? Those questions involve, in the words of Max Huber, a process of *encerclement progressif*.

19. I begin with the *terms* of the agreement. The transfer to the island and the prohibition on departure involve of course an obligation to stay on the island. During that assignment on the island various additional obligations were imposed to ensure the agents' isolation. To return to the critical phrase, these various obligations relating to the stay on the island were *for, pour* a period of not less than 3 years. The agreement does *not* say that the agents were to be on the island only *during* a 3-year period, and as a result *for* a shorter period in total than 3 years. Counsel for France put the matter very clearly: one of France's obligations under paragraph 3 of the agreement was to transfer and to maintain the two officers on Hao for 3 years ('l'obligation de transférer et de maintenir pendant trois ans les deux officiers sur l'île de Hao').

20. While the words "at least" "minimale" may not make any difference to the ordinary meaning, they certainly give that meaning greater emphasis. That emphasis underlines the importance of this element of the ruling and of the settlement. Moreover, those words, included in the agreement, are an addition to the ruling of the Secretary-General. They are indeed the only such change from the ruling. That one change must have at least that emphatic significance.

21. The *immediate context* provided by other parts of the agreement supports that ordinary meaning of its terms. The agreement places a specific terminal time limit on the obligations imposed on France of apology, and payment, and on the two Governments of transfer. But by contrast it gives no express date for the completion of the obligations relating to being on the island. It is, of course, a date which can be easily calculated since the relevant facts are readily known—either a continuous period of 3 years from the date of transfer, had the two stayed on Hao continuously, or an aggregated period of 3 years if, exceptionally, there was a break in the stay.

22. The *wider context* of the agreement includes, as well, the character of the regime imposed by it. That character is seen in part in its

origins as found in the ruling of the Secretary-General. He was obliged to make a ruling which was equitable and principled (il sera équitable et conforme aux principes pertinents applicables). The parties made frequent references to that ruling in support of their understanding of the meaning of the agreement.

23. At the time of the ruling, agreement, and transfer, the two agents had served less than a year of a 10-year prison term imposed by the Chief Justice of New Zealand following due process of law and pleas of guilty to very serious crimes known to all legal systems. They did not appeal against the sentences, as they were entitled to. They were not eligible to be released on parole until they had served at least 5 years. The French position was that the agents should be immediately released (la libération immédiate); that was, said France, implied by an equitable and principled approach; the agents had acted under orders; and France was willing to apologize and pay compensation to New Zealand (as well as to the private individuals who had suffered from the attack). It was essential to the New Zealand position that there should be no release to freedom, that any transfer should be to custody, and that there should be a means of verifying that. New Zealand could not countenance the release to freedom after a token sentence of persons convicted of serious crimes.

24. As the Governments agree, and the ruling and later agreement indicate, the Secretary-General could not and did not fully adopt the position of either of them—either in respect of the *character* or the *period* of the stay on the isolated island.

25. The *character* of the regime was special. It was neither the New Zealand penal system nor French military service. Rather it was an assignment to an isolated military installation, subject to significant limits on the freedom of the two agents, and especially on their freedom of movement from the island. It is indeed the substantial restrictions on movement which France invokes for its view that it would be impossible or excessively onerous for an order for return to be made, even if it was otherwise appropriate to make it. The weight of the restrictions is briefly reflected in the only comment made by either of the agents about the regime and available to the Tribunal. Captain Prieur told Mr. Adriaan Bos during his inspection visit to Hao on 28 March 1988 that she felt isolated (très isolée) on Hao and was not looking forward (elle appréhendait) to the remainder of her stay which was then due to continue until July 1989. This was so notwithstanding that her husband was living with her on the base and that, as she recalled, she had had visits from her mother and parents-in-law.

26. The *period* of that regime—the stay on the isolated island was to be lengthy, shorter than both the 10 years imposed by the High Court and the 5 year minimum parole period. The period of real constraint on freedom was still going to be significant—a 3-year period in addition to the year that had already been spent in custody in New Zealand before and after conviction. It was not going to be a release to freedom. And yet that is what in real terms the French interpretation of the period could involve since, following a short stay on Hao and an unlawful departure,

the process of attempting with diligence to reach a settlement through diplomatic channels and then, if that attempt were to fail, the setting up and operating of the arbitral process could exhaust all or most of a period expiring in July 1989. That indeed is what has happened in the event. Such an interpretation is not consistent with the *object* of placing a substantial limit on the liberty of the two agents.

27. The terms of the agreement, its context and its object all lead me to the view that the agreement required the agents to be on the island for the full period, whether continuous or aggregated, of 3 years. (It is perhaps unnecessary to make the point that that conclusion is subject to limits which could lawfully and properly be placed on that obligation in accordance with the law of treaties or the law of state responsibility as discussed in paras. 72-79 of the Award.)

28. There are several arguments to the contrary which require consideration. The first is that the extension of obligations beyond the initial 3-year period would result in heavier obligations being placed on the agents. They would be subject not only to isolation on the island for 3 years but also to the obligations relating to limited personal contacts and media silence for the additional period they have been in France. Those obligations would thereby extend to 4 1/2 and 5 years for the two agents.

29. There are two effective answers (at least) to that argument. The first is that, by their terms, the obligations of limited contact and media silence relate only to the time on the island. If France has undertaken or the two parties have agreed that those conditions also applies *off* the island that would be a *new* obligation, separate from the agreement.

30. This is clear from the references to the island in the relevant paragraphs. The third paragraph requires transfer *to the island* for 3 years. The fourth paragraph

- (1) prohibits departure *from the island* without consent;
- (2) requires isolation *during their assignment in Hao* from persons other than military or associated personnel and immediate family and friends; and
- (3) prohibits contact with the press or other media.

It is true that the last prohibition is not expressly limited in a geographic way. But that limit clearly arises from the context.

31. And the limit appears as well from the ruling of the United Nations Secretary-General. That ruling can be used to confirm the meaning gathered from the ordinary meaning of the agreement in context and in the light of its purpose. The Secretary-General set out conditions relating to the two agents in 4 paragraphs—those which appear in paras. 3-6 of the agreement. The second paragraph set out the prohibition on departure, and on personal and media contact, and the first made only a general reference to transfer “to a French military facility on an isolated island outside of Europe”. The Secretary-General continued:

I have sought information on French military facilities outside Europe. On the basis of that information I believe that the transfer of Major Mafart and Captain Prieur to the French military facility on the isolated island of Hao in French Polynesia would best facilitate the enforcement of the conditions which I have laid down in [the four] paragraphs . . . (emphasis added).

In the Secretary-General's mind, the obligations were integrally tied to the isolated island. The conditions were to be met there. That also appears from the provision for a visit by an agreed third party to the island—to determine of course whether the agreement is being complied with there.

32. It is true that France, in response to New Zealand's proposal, undertook to apply the conditions relating to the isolation of Major Mafart when he was in Paris. But that undertaking was a special one to deal only with the period during which Major Mafart was in Paris—France in giving it stated that Major Mafart would return to Hao when his health allowed. And it included the conditions which expressly applied only on the island. That it was a special additional undertaking peculiar to the circumstances appears as well from the lack of any such arrangement between the two governments for Captain Prieur.

33. The second reason for rejecting the argument based on the "heaviness" of the obligations proceeds on the basis—which I reject—that the isolation obligations are capable of directly applying in metropolitan France. The reason for rejection is that those obligations of isolation which are additional to those arising from geography are in fact slight and are much lighter than the obligations of being on the island—obligations which at relevant times were being unlawfully evaded according to the ruling of the Tribunal. The slightness of the obligations, especially those concerning the press, is evidenced by a valuable note, *Les règles de la discipline militaire*, provided to the Tribunal by the Agent of France. The 1972 law on the statut général des militaires places restrictions on the members of the armed forces compared with other citizens. The exceptions concern

- the expression of philosophical, religious and political beliefs in the context of the service;
- the obligation of discretion (réserve) in all circumstances;
- the requirements of military secrets.

34. It was of course by reference to such law that the obligations under the 1986 agreement were to be enforced. In the light of those obligations and of the general position of senior military officers, the statement by the French Agent that Colonel Mafart since July 1989 "still leads a life of total discretion" comes as no surprise at all. The French argument gives quite disproportionate weight to the obligations additional to those arising directly from being on Hao (assuming, that is, that the obligations were capable of direct application off the island) as well as from the officers' military status.

35. France also argues that the New Zealand position produces a result which is "manifestly absurd or unreasonable" (using the words of article 32 of the Vienna Convention on the Law of Treaties—that provision of course not being directly applicable here since France does not

use it to invoke supplementary interpretative material which assists its view). That absurdity or unreasonableness, for France, consists of the prolongation of the obligation of being on Hao beyond 3 years. But in the normal case the obligation would not so extend; if it did so extend, it would be for special reasons based on the consent of the two Governments or on *force majeure* or distress. It would be exceptional, and the prolongation would in any event accord with the ordinary meaning of the provisions in context and in the light of their purpose of imposing a real and not merely a token restraint on the liberty of the two officers.

36. France next argues that a *tempus continuum* is inherent in a contractual obligation of a given time period and that the same holds true for an international treaty obligation. The one case which it cites, *Alsing Trading Company Ltd v. Greece* (1954) 23 Int. L. Reps 633, it is true, involved a contract for a period of 28 years, but the contract *expressly* stated both its beginning and its expiry dates; accordingly it is of no general assistance in the present case. Moreover, general words have to be given meaning in their particular contexts and by reference to their purpose. And the law, including treaty practice, knows many periods of residence which can each be made up of shorter periods where appropriate to the context and purpose—consider treaties and legislation relating to taxation, benefits, citizenship, and electoral rights.

37. The Tribunal perhaps suggests a further argument for the view that the obligations ended in July 1989 in its statement that “the principles of treaty interpretation” are opposed to a more extensive construction of special undertakings (para. 104). I have of course invoked “the general rule of interpretation” stated in the Vienna Convention. The International Law Commission in elaborating that general rule did not incorporate any “principles”. So it thought that it was not necessary to include in the general rule a separate statement of the principle of effective interpretation. It recalled that the International Court had insisted that there are definite limits to the use which may be made of that principle. Rather the Commission, like the Court, emphasized the ordinary meaning of the words in their context and in the light of the agreement’s purpose (para. 6 of the commentary to draft articles 27 and 28, *ILC Yearbook 1966*, Vol. II, p. 219).

38. I have already indicated that those matters lead me to the conclusion that the agreement placed on France an obligation to ensure that the two agents spend three years on Hao.

Kenneth KEITH

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