

Guinea/Guinea-Bissau: Dispute Concerning Delimitation of the Maritime Boundary, February 14, 1985

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GUINEA/GUINEA-BISSAU: DISPUTE CONCERNING
DELIMITATION OF THE MARITIME BOUNDARY,
FEBRUARY 14, 1985

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I. INTRODUCTION

The delimitation of the maritime boundary between the Republic of Guinea-Bissau and its southern neighbor, the People's Revolutionary Republic of Guinea was announced on February 14, 1985, in an award¹ issued by an International Arbitral Tribunal at the Peace Palace in The Hague. The arbitration, which notably was accomplished in only 24 months,² was the first post-colonial African dispute submitted to

1. Guinea/Guinea-Bissau: Dispute Concerning Delimitation of the Maritime Boundary, *I.L.M.* Vol. XXV, No. 2, Mar. 1986, at 251-305 [hereinafter cited as 25 *I.L.M.*].

2. The *comprise* was signed on February 18, 1983. The Memorials, or briefs, were filed on January 20, 1984. Oral arguments began August 21, 1984, and the Award was announced on February 14, 1985. *See id.*

binding arbitration, and has established the general principles needed to guide the current delimitation disputes on the African Atlantic seaboard.

II. THE ORIGIN OF THE DISPUTE

The land boundary between the two Guineas was established by the Convention of 12 May 1886³ which was entered into by France and Portugal to delimit their colonial land holdings in West Africa. This boundary has survived Guinea's independence from France in 1958⁴ and Guinea-Bissau's independence from Portugal in 1973.⁵

The maritime delimitation between the two states has not enjoyed such a stable history. Recent discussions pursuant to this delimitation began in September 1959, when the French ambassador to Lisbon and the Portuguese Prime Minister met in Portugal.⁶

The meeting was triggered by the possibility that petroleum deposits exist off the Guinean coast. This possibility already prompted Portugal to award concessions for oil exploration in the area.⁷ In April 1960, a Franco-Portuguese agreement was reached establishing a delimitation of the Contiguous Zone following a 240° Azimuth drawn from the Cape Roxo lighthouse (1220N 01643W) which is located at Guinea-Bissau's northernmost coastal point.⁸ From 1963 until 1974, a Portuguese hydrographic naval vessel collected data throughout the disputed coastal region and was never challenged by a Guinean vessel.⁹

In June 1964, Guinea unilaterally established the lateral limits of its territorial sea along the north latitude of 10° 56' 42" with Portuguese Guinea and the 9° 03' 18" north latitude with Sierra Leone. This decree was followed by grants of fishing concessions and the area was

3. Franco-Portuguese negotiations to delimit their African possessions started on October 22, 1885 pursuant to provisions of the 1885 General Act of Berlin Conference which contained conditions for African colonization. The 1886 Convention was ratified in Lisbon on August 31, 1887. *See* Appendix A.

4. The People's Revolutionary Republic of Guinea gained independence from France on October 2, 1957.

5. The Republic of Guinea-Bissau proclaimed independence from Portugal on September 24, 1973.

6. France was responsible for Senegal's foreign affairs, and was not acting on behalf of independent Guinea. The primary concern at the September 8 and 10, 1959 meetings was to avoid granting overlapping oil concessions.

7. 25 *I.L.M.*, *supra* note 1, para. 63, at 281.

8. The April 26, 1960, agreement was by letters exchanged by the Portuguese Prime Minister and the French Ambassador to Lisbon. They held no subsequent formal discussions about the matter.

9. 25 *I.L.M.*, *supra* note 1, para. 29, at 267.

patrolled by the Guinean navy. The decree was published by the United Nations in 1970.¹⁰

Portugal continued its oil concessions off the Guinean coast and claimed exclusive fishing jurisdiction in an area overlapping Guinea's claimed waters.¹¹ These Portuguese decisions were published in the Official Journal, without Guinean protest. During this period, Portugal privately considered Guinea's actions to be illegal, as evidenced by secret naval instructions¹² which denounced Guinea's actions as being in violation of Article 12, Paragraph 1, of the Geneva Convention on Territorial Sea and the Contiguous Zone.

In 1973, Guinea-Bissau gained its independence from Portugal and adopted all Portuguese laws not incompatible with its own. Later that year, Guinea-Bissau published its claim of territorial seas in the Official Journal.¹³ Guinea-Bissau's claim was substantially the same as that claimed by Portugal. Again, Guinea did not protest that the claim overlapped its own. By 1975, Guinea-Bissau had denounced all of the Portuguese oil concessions off the Guinean coast and started its own seismic research operations in the area subject to both nations' claims of territoriality, between the north parallels of 10° 39' 04" and 08° 30' 16".

In April 1977, Guinea-Bissau initiated maritime delimitation negotiations¹⁴ with Guinea. Both countries acknowledged that a settlement was necessary in order to develop the maritime resources - no oil company was willing to invest substantially in the area as long as such investment might result in unexpected financial obligation to two states, or termination of the right to work in the area as a result of a dispute. While Guinea would not budge from the limit of the 10° 54' 42" north latitude, negotiations remained open and a second meeting was held in January, 1978.¹⁵ After the January 1978 meeting, negotiations dead-

10. The degree established an outer limit of 130 nautical miles from a straight baseline extending from the southwest corner of the island of Sene to the island of Tamara, and prohibited foreign fishing in the area except by agreement. In a subsequent decree published on December 31, 1965, and made public at the United Nations in 1977, Guinea extended the limit to 200 nautical miles.

11. The Portugal law-decree of June 27, 1967, established a straight baseline system which included the Bijagos Archipelago, and extended beyond the 10° 56' 42" north latitude.

12. The 1971-1972 confidential instructions to the Portuguese Navy were disclosed by Guinea-Bissau during the arbitral procedure.

13. Guinea-Bissau's claim expressly included the waters established in the Portuguese law-decree of June 27, 1967.

14. The first meetings were held in Conakry, Guinea, on April 13-19, 1977.

15. The second meetings were held in Bissau, Guinea-Bissau, on January 24-25,

locked and subsequent meetings held in August 1978¹⁶ and July 1980¹⁷ were fruitless. No agreement was reached.

The adverse economic impact of the dispute finally forced Guinea and Guinea-Bissau to confer. In December 1982,¹⁸ representatives of the countries agreed to submit the dispute to an Arbitral Tribunal. On February 18, 1983, the states signed a Special Agreement¹⁹ to submit to arbitration their dispute concerning the delimitation of the maritime boundary between Guinea and Guinea-Bissau.

III. THE SPECIAL AGREEMENT BETWEEN THE PEOPLE'S REVOLUTIONARY REPUBLIC OF GUINEA AND THE REPUBLIC OF GUINEA-BISSAU

The object of the Special Agreement between Guinea and Guinea-Bissau was to create an Arbitral Tribunal which would effect the delimitation of the maritime boundary between the two states. The Agreement first provided that the Tribunal would be comprised of three members. One member was to be appointed by Guinea-Bissau.²⁰ One was to be appointed by Guinea,²¹ and one was to be agreed upon by both parties to serve as President of the Tribunal. Because the parties could not agree on the third member, the two appointed members selected the third.²² Guinea and Guinea-Bissau approved the selection, as provided by the Special Agreement in the event that the two parties could not agree on the joint appointment.

The two states then requested that the Tribunal decide three questions according to the relevant rules of international law:

1. Did the Convention of 12 May 1886 between France and Portugal establish the maritime boundary between the respective possessions of those two states in West Africa?
2. What judicial effect can be attributed to the protocols and doc-

1978.

16. The third meetings were held in Conakry during August, 1978.

17. The fourth meeting was held in Bissau on July 14, 1980.

18. This conference was held in Bissau on December 28-29, 1982, subsequent to the signing of the new Convention of the Law of the Sea at Montego Bay.

19. See Appendix B.

20. The Government of Guinea-Bissau appointed Mr. Mohammed Bedjaoui as a member of the Tribunal.

21. The Government of Guinea appointed Mr. Keba Mbaye as a member of the Tribunal.

22. The two appointed members selected Mr. Manfred Lachs to be President of the Tribunal.

uments annexed to the Convention of 1886 for the interpretation of the aforesaid Convention?

3. According to the answers given to the above-mentioned questions, what is the course of the boundary between the maritime territories appertaining respectively to the Republic of Guinea-Bissau and the People's Revolutionary Republic of Guinea?²³

The Special Agreement specified that the proceedings would be adversarial in nature. It provided procedural rules for submission of the memorials, counter-memorials, oral arguments, subsequent clarifications of the award, and possible requests for revision if a new element to the dispute surfaced after the award was final. Upon reaching a decision, the Tribunal was bound to provide the parties with full reasoning, as well as a map depicting the delimitation.

IV. THE PLEADINGS

Memorials were filed by both parties on January 20, 1984, when the Tribunal first met. Counter-memorials were filed within the extended time limit of June 8, 1984. The Tribunal heard oral arguments in 11 sittings between August 21 and September 15, 1984,²⁴ all held in accordance with the rules set forth in the Special Agreement.

Guinea-Bissau requested that the Tribunal respond to the questions presented in the Special Agreement by finding that (1) the 1886 Convention did not establish the maritime boundary between the French and Portuguese possessions in West Africa, (2) the documents annexed to the Convention could not be used to interpret the Convention because the language of the Convention was clear and unambiguous, and (3) the proper maritime boundary between the two Guineas should be an equidistant line drawn from the low-water marks of the coasts of the two states.

Guinea requested the Tribunal to answer the questions posed by the Special Agreement by holding that (1) the 1886 Convention did establish the maritime boundary in dispute, (2) the protocols and documents attached to the Convention confirmed that France and Portugal intended to delimit the territorial waters, and (3) the course of the maritime boundary should be that set forth in the final paragraph of Article I of the 1886 Convention as the "southern limit".

23. 25 *I.L.M.*, *supra* note 1, para. 1 at 256. See also Special Agreement at Article 2, Appendix B.

24. The sittings were held on August 21, 22, 23, 25, 27, 28, and September 10, 11, 12, 14, 15, 1984.

V. THE FIRST AND SECOND QUESTIONS PRESENTED IN THE SPECIAL AGREEMENT: THE TRIBUNAL'S ANALYSIS OF THE 1886 CONVENTION

The first and second questions presented in the Special Agreement addressed the question of the proper interpretation of the 1886 Convention. The first queried the proper interpretation of the last paragraph of Article I, and the second requested a clarification of the judicial effect of preparatory work to the Convention.²⁵ The Tribunal decided these questions in tandem.

A. *Did the Final Paragraph of Article I of the 1886 Convention Establish the Maritime Boundary Between the West African Possessions of France and Portugal?*

With regard to the land boundary between Guinea and Guinea-Bissau, both parties affirmed the modern validity of the Convention as it was agreed to by France and Portugal in 1886. The Organization of African Unity Charter, dated May 25, 1963, and the Vienna Convention on the Succession of States in Respect of Treaties, dated August 23, 1978 both require a newly formed government to respect state boundaries as they exist at the time of the new state's independence.²⁶ The Tribunal also noted that this was an accurate reflection of customary international law.²⁷ The issue then became whether, pursuant to these customs and rules, the last paragraph of Article I of the 1886 Convention established a maritime boundary which would require recognition by Guinea and Guinea-Bissau.

The last paragraph of Article I states:

Shall belong to Portugal all islands located between the Cape Roxo meridian, the coast and the southern limit represented by a line which will follow the thalweg of the Cajet River, and go in a southwesterly direction through the Pilots' Pass to reach 10° 40' north latitude, which it will follow up to the Cape Roxo meridian.²⁸

Guinea submitted a written memorial to the Tribunal stating that this paragraph established the maritime boundary between the respective possessions of France and Portugal in West Africa, seaward to the

25. The Parties disagreed on the precise meaning of the first two questions at the beginning of the proceedings, but these differences were resolved at the oral arguments.

26. 25 *I.L.M.*, *supra* note 1, para. 40, at 271.

27. The boundary also became binding on Guinea and Guinea-Bissau as successor states to France and Portugal by the Principal of *uti possidetis*.

28. See 1886 Convention at Article I, Appendix A.

Cape Roxo meridian. Guinea-Bissau contended that the paragraph had no purpose other than to designate what islands belonged to Portugal.

The Tribunal analyzed and interpreted the paragraph according to the relevant rules of international law as agreed to by the parties. Although neither state was a party to the Vienna Convention of 29 May 1969 on the Law of Treaties,²⁹ both agreed that Articles 31 and 32 of that Convention constituted the relevant rules of international law governing interpretation of the 1886 Convention.³⁰ Article 31, Paragraph 1 provides that express language must be interpreted in good faith, with each word given its ordinary meaning within its context, considering the purpose of the document. While both agreed that the Convention clearly established Portugal's sovereignty over certain islands off the Guinean coast, each party's "good faith" interpretation of the words in the key paragraph resulted in divergent conclusions.

The parties agreed that the portion of the text describing the Cape Roxo meridian was not a maritime boundary as it extended south because it infringed on territorial waters internationally recognized as appertaining to the coastal region at the time of the Convention. While Guinea-Bissau argued that the remainder of the "limit" logically could not be a maritime boundary, Guinea contended that the description of the segment of the line that does not infringe recognized coastal regions is set off by the words "the southern limit formed by", and therefore has a different purpose than the Cape Roxo line. Guinea argued that this segment of the line formed a maritime boundary extending beyond the islands defined by the paragraph.

The Tribunal found that the disagreement pivoted on the word "limit". Guinea defined "limit" as a boundary. Guinea-Bissau attributed a more general meaning to "limit" - one which merely facilitated definition of the islands over which Portugal was awarded sovereignty. Using both the French and the Portuguese definitions of "limite" at the time of the 1886 Convention,³¹ the Tribunal found that either interpretation was possible and therefore decided that "the paragraph in ques-

29. This was in force since January 27, 1980.

30. The Tribunal relied on these provisions by virtue of an international custom recognized by states. *See* Legal Consequences for States of the Continued Presence of South Africa in Namibia case, 1971 I.C.J. 47; Fisheries Jurisdiction (U.K. and N. Ireland v. Ice.), 1973 I.C.J. 18; Fisheries Jurisdiction (Fed. Rep. of Germ. v. Ice.), 1973 I.C.J. 63.

31. *The Dictionnaire general de la langue francaise du commencement du XVIIe siecle jusqu a nos jours* (The General Dictionary of the French language from the beginning of the 17th century to today), by Hatzfeld and Darmesteter, defines "limite" as the "extreme part where a territory, a domain ends", and defines "boundary" as the "limit which separates the territory of a State from that of a neighboring State."

tion in the Franco-Portuguese Convention of 1886 does contain some uncertainty."³² After examining the terminology and structure of the document as a whole, the Tribunal was not able to resolve the conflicting conclusions.

The map attached to the agreement was of little interpretive value. Land boundaries defined by the Convention were drawn with dashes, and water "limits" were indicated by dotted lines. The dot system of indicating water "limits" was used to indicate the thalweg of the Cajet, which was stipulated to be a boundary, the Cape Roxo meridian, which was agreed *not* to be a boundary, and the "limit" defining the Portuguese islands which line was in dispute. The map provided little insight.

Turning to the "object and purpose of the Convention" as an interpretive aid, Guinea asserted that France and Portugal intended to delimit their African possessions with a "view to eliminating sources of friction between them," and that the definition of maritime possessions would naturally be included in such an accord. Guinea-Bissau contended that only the land possessions of France and Portugal were a concern of the Convention since there was no explicit mention of water delimitation in any part of the Convention. Guinea countered that there was no explicit statement in the Convention that it was concerned only with land possessions. Guinea drew attention to Article V which included rules of navigation and asserted that these rules were "unquestionably" a reference to maritime navigation.³³

The Tribunal considered the "complete absence of the words *waters, sea, maritime or territorial sea*" to be clear evidence that the Convention was essentially concerned with land possessions.³⁴ However, the Tribunal found that the Convention's purpose was sufficiently broad to have included land delimitation as a part of an overall scheme for the distribution of the territories. Express maritime delimitation may have been unnecessary if such delimitation was included in those "other territories where the Convention limited itself to a promise of well-disposed neutrality."³⁵ The Tribunal therefore was compelled to refer to the Vienna Convention on the Law of Treaties for further interpretive devices.

In accordance with paragraphs 2 and 3 of Article 31 of the Vienna Convention on the Law of Treaties, the Tribunal examined subsequent agreements between France and Portugal regarding the interpretation

32. Guinea/Guinea-Bissau: Dispute Concerning Delimitation of the Maritime Boundary, 25 *I.L.M.*, *supra* note 1, para. 50, at 277.

33. *Id.* para. 50, at 277.

34. *Id.* para. 56, at 279.

35. *Id.*

of the 1886 Convention and applications of its provisions. At the 1959-1960 negotiations between France and Portugal, neither country considered the 1886 Convention to have established a maritime boundary. Portugal was then seeking without reference to the 1886 Convention to control an area that the 1886 Convention would have defined as Portuguese internal waters.

Article 31 of the Vienna Convention also allows subsequent practices of the parties to an agreement to be used as interpretive devices. The Tribunal could find no evidence in France and Portugal's actions during the colonial period that they considered the 1886 "limit" to have established a maritime boundary. No document or map of the area showed any water boundary other than the thalweg of the Cajet. The problem never arose until 1958 when Portugal granted a concession south of the 10° 40' north latitude. The French government did not protest in the name of Guinea that they did not believe the 1886 Convention established a maritime boundary.

During the period of decolonization, both Guinea and Guinea-Bissau claimed unilateral jurisdiction over the entire area in question and neither purported to accept the 1886 lateral "limit" as a demarcation.³⁶ In defense of its actions, Guinea denied knowledge of the existence of the 1886 Convention, thereby excusing itself from transgressing the boundary that it now claimed. The Tribunal replied that "it does not seem possible, in the present state of international law and international relations, to invoke against third States ignorance, over so many years, of a widely publicized boundary treaty, the effects of which can be observed on the ground."³⁷

The Tribunal then concluded that "despite the relative scarcity of documents submitted to it, that until 1978 the States signatories to the 1886 Convention and their successor States interpreted the text of the final paragraph of Article I of this instrument as not having established a maritime boundary."³⁸

Under Article 32 of the Vienna Convention, the Tribunal then examined the parties intentions prior to the 1886 Convention as a means of interpretation, thus examining the second question put before the Tribunal in order to answer the first.

36. Guinea's prior claim of the 10° 54' 42" north latitude as its lateral limit was over 14 nautical miles north of the 10° 40' "limit" established in the 1886 Convention.

37. 25 *I.L.M.*, *supra* note 1, para. 65, at 282.

38. *Id.* para. 67, at 282.

B. *What Legal Interpretive Effect Could be Attributed to the Protocols and Documents Annexed to the 1886 Convention?*

Guinea submitted that the protocols and annexed documents confirmed the establishment of the maritime boundary while Guinea-Bissau claimed that the preparatory work did exactly the opposite. Again, the Tribunal first looked to specific wording of the 12 protocols to determine their proper interpretation. As in the examination of the Convention itself, the Tribunal found that the protocols were concerned with land, not maritime, possessions. In fact, waters were mentioned only once in the protocols³⁹ in a paragraph that was later deleted and replaced with the paragraph in question.

The initial draft of the paragraph stated that "the limits of the territorial waters will be formed, in the north, by a line extending from Cape Roxo three miles out to sea in a southwesterly direction; in the south, but a line which will follow the thalweg of the Cajet River. . . ." The Portuguese delegate to the Convention proposed the uncontested change in the wording which resulted in the final paragraph of Article I of the 1886 Convention. In the final version the paragraph reads, "Shall belong to Portugal, all islands located between the Cape Roxo meridian, the coast and the southern limit represented by a line which will follow the thalweg of the Cajet River. . . ." No explanation was provided for either the Portuguese change or the ready French acceptance thereof, but the Portuguese suggestion of defining the possessed islands by a series of lines was a contemporary practice as evidenced by many contemporary treaties.⁴⁰ The Tribunal found that the absence of any textual evidence to substantiate that a maritime boundary was established indicated that the 1886 negotiators meant only to determine the land boundaries of their colonial possessions.⁴¹

This conclusion is not only supported by the Tribunal's previous analysis of the Convention itself, but also by the historical setting of the document and the negotiations which produced it. The concept of territorial sea, as opposed to the open high sea, had been established at

39. While the specific mention of "waters" appeared only once, the words "possessions" and especially "territory" appears quite frequently.

40. 25 *I.L.M.*, *supra* note 1, para. 81 at 287-88. Other contemporary treaties which define possession of islands by lines include the United States Peace Treaty with Great Britain, 1783 (defining Atlantic Coastal Islands); Treaty between the United States and Russia 1867 (defining islands off Alaska); The Spanish-American Peace Treaty of 1898 (defining the Phillippine Archipelago); and the map appended to the Sino-British Treaty of 1898 (defining the islands and territory of Hong Kong). *See id.*

41. 25 *I.L.M.* para. 82 at 288.

the time of the Convention. In 1886, France was in favor of a three mile territorial limit while Portugal laid claim to a six mile limit. If the Parties to the Convention had intended to establish a maritime delimitation, this difference necessarily would have surfaced at the negotiations.

The Tribunal thus concluded that France and Portugal did not accomplish, nor did they intend to accomplish, the establishment of a maritime delimitation by the 1886 Convention. The word "limit", therefore, did not have the legal meaning of a boundary, but rather the more general meaning which merely was used to facilitate the definition of Portugal's island possessions.

In reply to the questions presented to it by Guinea and Guinea-Bissau, the Tribunal stated:

(a) The protocols and documents annexed to the Franco-Portuguese Convention of 12 May 1886 have an important role to play in the legal interpretation of Article I of this Convention.

(b) This Convention did not determine the maritime boundary between the respective possessions of France and Portugal in West Africa.⁴²

VI. THE DELIMITATION OF THE MARITIME BOUNDARY BETWEEN THE REPUBLIC OF GUINEA-BISSAU AND THE PEOPLE'S REVOLUTIONARY REPUBLIC OF GUINEA.

The Tribunal then proceeded to the third question which required it to establish the maritime boundaries between the two parties according to the relevant rules of international law.

Following the 1984 *Gulf of Maine* case, decided by the International Court of Justice,⁴³ the Tribunal stated the international customary law could provide "only a few basic legal principles, which lay down guidelines to be followed with a view to reaching an essential objective." The Tribunal's express essential objective was to find "an equitable solution [to the dispute] with reference to the provisions of Article 74, paragraph 1, and Article 83, paragraph 1, of the Convention of 10 December 1982 on the Law of the Sea." The rules referred to allowed the Tribunal to examine the factors of each case against the backdrop of the considerations of law.

The Tribunal considered present circumstances in light of the "physical, mathematical, historical, political, economic, or other

42. 25 *I.L.M.*, *supra* note 1, para. 84 at 288.

43. *Gulf of Maine*, 1984 I.C.J. 246 para. 81, at 290.

facts”⁴⁴ from which they evolved. These factors were not, however, exhaustive, and the Tribunal examined all facets of the case in order to effect the most equitable and fair result possible. It stressed that each delimitation was unique and the must be a result of the consideration of the circumstances of each particular case and the particular characteristics of the region being examined, based on equitable and objective principles.

The Tribunal first noted that the maritime zones claimed by each party were prolongations out to sea of the land territories of the two states, that they were extensive, and that they overlapped, creating the dispute. The Tribunal then noted that a delimitation designed to obtain an equitable result between the two parties could not ignore other delimitations already made or still to be made in the region. Due to the nature of the West African coastline and the fact that there were few settled maritime boundaries fixed in the area, the Tribunal found it necessary to consider the effect its decision would have on neighboring countries’ maritime claims. The central concept of the Tribunal’s analysis was that each State should control the waters opposite its coast.

The wisdom of this holistic approach was underscored by the fact that Guinea-Bissau was also disputing its northern maritime boundary with Senegal in a separate proceeding, and the Guinea/Sierra Leone maritime delimitation had not yet been established. The Tribunal especially wanted to avoid the problems inherent in the concave nature of the middle of the west African coastline, particularly the possible enclavement, or cutoff effect, that the states innermost on the West African arc could suffer.

The Tribunal examined the various unilateral delimitations previously established by each state, and rejected all. Further, it did not consider any prior baselines established by each state to define the 200-mile exclusive economic zone, stating that these baselines had no practical consequence where the present dispute over the lateral delimitation was concerned.⁴⁵ Thus limiting itself to formulating a new delimitation based on the objective of an equitable result for each state, the Tribunal examined possible solutions.

Guinea-Bissau argued in favor of a slightly modified equidistance delimitation, like that accomplished by the Arbitration Tribunal in the case of France and the United Kingdom in 1977.⁴⁶ Basing much of its argument on the *North Sea Continental Shelf* cases,⁴⁷ Guinea-Bissau

44. *Id.* para. 89, at 289.

45. *Id.* para. 96, at 292.

46. 25 *I.L.M.*, *supra* note 1, paras. 99-100, at 293-94.

47. *North Sea Continental Shelf*, 1969 I.C.J. 4.

averred that the equidistance method incorporated the factor of coastal proximity and avoided a situation in which one of the two parties loses zones located nearer its coast than the coast of the other party.

Guinea-Bissau's position was ultimately rejected by the Tribunal after an extensive analysis of the West African coastline. Guinea-Bissau's coastline is convex, and as such, would benefit from the equidistance rule because such maritime boundaries would produce a fan-shaped maritime zone. The boundary at the outer limit would be substantially longer than its coastline. This method would produce further inequity because of the nature of coastline to the north and south of Guinea. Guinea would be effectively encompassed by non-territorial waters. Guinea-Bissau to the north and Sierra Leone to the south would have fan-shaped territorial water, and thus Guinea would be prevented from extending its "maritime territory" as far seaward as internationally permitted.

Using the 1982 *Tunisia/Libya*⁴⁸ decision of the International Court of Justice as authority, Guinea stated that no particular method of delimitation should be given priority. Guinea offered a system of parallels of latitude as the optimum solution. This system would avoid enclavement problems because parallels of latitude never meet. Guinea pointed out that this system corresponded to the methods it was using to establish its delimitation with Sierra Leone, and that this system had already been applied between Gambia and Senegal, and, to some extent, between Kenya and Tanzania. The system also complied with the "southern limit" referred to in the final paragraph of Article I of the 1886 Convention.

The Tribunal itself noted that until 1958, this "southern limit" was not breached by either France or Portugal.⁴⁹ The "southern limit" coincided with a short segment of the land boundary, *i.e.*, that which passes for about 20 miles along the Pilots' Pass, and is a geographical prolongation of the land boundary, generally perpendicular to the coast. This fact is consistent with the Court's emphasis in the *Tunisia/Libya* case that the position of the demarcation's intersection with the coastline should be taken into account.⁵⁰ The Tribunal noted that although it could not confirm through interpretation of the 1886 Convention that the "southern limit" was the legal demarcation, it was not prohibited from establishing this line if such an action produced an equitable result. For these reasons, the Tribunal favored the "southern

48. *Tunisia/Libya*, 1982 I.C.J. 18.

49. *25 I.L.M.*, *supra* note 1, paras. 105 at 295, 25 at 266, 62 at 281.

50. *Id.* para. 106, at 295-96.

limit" until it drew abreast of the island of Alcatraz.

Beyond Alcatraz, the 10°, 40' north latitude produced the danger of enclaving Guinea-Bissau if the Senegal/Guinea-Bissau demarcation was accomplished by the equidistance method as it would be, based on the current status of negotiations then occurring between the two states. The Tribunal therefore abandoned the "southern limit" as it approached Alcatraz.⁵¹

Stressing that it must construct a delimitation which would be integrated into present and future delimitations as a whole, considering the configuration of the coastal islands and the nature of the continental shelf, the Tribunal then proposed an equitable maritime boundary between Guinea and Guinea-Bissau.

- a) First following the "southern limit" of the 1886 Convention, *i.e.*, the Pilots' Pass from the mouth of the Cajet River and the parallel of the 10° 40' north latitude, as far as the island of Alcatraz. Because, in this way, the island in question would have only 2.25 nautical miles of territorial waters to the north - and there is even less reason to grant more in this direction in that the "southern limit" marked the maximum claim by Guinea in its conclusions - the Tribunal would consider it equitable to grant it, at least towards the west, the 12 nautical miles provided for in the 1982 Law of the Sea Convention, without however taking into account any reefs. The "southern limit" could therefore be adopted as far as 12 miles west of Alcatraz.
- b) The line would then go in a southwesterly direction, being *grosso modo* perpendicular to the line joining the Almadies Point and Cape Shilling. This would give just one straight line bearing 236. The Tribunal considers that such a line would reduce the risk of enclavement to a minimum and, in this respect, would be more satisfactory than any line drawn perpendicular to the other lines envisaged . . .⁵²

VII. TESTING THE DELIMITATION

After proposing the maritime boundary, the Tribunal tested it against the circumstances offered by the parties for consideration with regard to the delimitation. These were not insignificant. The States requested that the Tribunal draw the same line for the territorial waters,

51. *Id.* paras. 107-09, at 296-97.

52. *Id.* para. 11, at 298.

the exclusive economic zone and the continental shelf.

The first circumstance to be considered was the structure and nature of the continental shelf. Guinea-Bissau claimed that the subsurface geographical features of the continental shelf, such as natural trenches, be considered supportive of the equidistance line. Following these trenches would constitute a natural prolongation of Guinea's territory. Article 76 of the Convention on the Law of the Sea and the *North Sea Continental Shelf* cases suggest that such material topography should be considered when forming the line.

The Tribunal did not entangle itself in these laws or their application to the present dispute. It found that the continental shelf opposite each of the two Guineas was one and the same.⁵³ The Tribunal did not consider relatively minute undulations in the continuous shelf as controlling the delimitation.

The Tribunal then considered the proportionality between the surface areas of the maritime zones created by the proposed delimitation. It considered the proportionality of the waters to the total surface area of each state. Although it examined this aspect (which, incidentally, produced a proportionate result), the Tribunal stressed that the equal water to land mass test was not a relevant factor in this case.⁵⁴ Rather, the relevant factor was the state's respective maritime facades and their formations, taken as a segment of the entire Atlantic seaboard. The test compared the proportionality of the water surface area granted by the delimitation to the length of its coastline. This test produced equity.

The parties then stressed their economic need for fishing area and potential petroleum industry development. This was in turn linked to each Party's national security. While acknowledging that both were developing countries, the Tribunal followed the *Tunisia/Libya* case and determined that economic problems do not constitute permanent circumstances to be taken into account for purposes of the delimitation.⁵⁵ In the proposed delimitation, the Tribunal ensured that each state controlled the maritime territories situated opposite its coasts and in their vicinity. Its primary purpose was to accomplish the delimitation legally and with equity, so as to avoid a situation where either party could exercise rights which would prevent the other party's right of development or compromise its security.

After examining each parties' objections and special considera-

53. *Id.* para. 19, at 264, 116, at 300.

54. 1969 I.C.J.

55. 1982 I.C.J. para. 20, at 22, 101 at 54.

tions, the Tribunal upheld and confirmed the proposed maritime boundary between Guinea and Guinea-Bissau.⁵⁶

The final task was to draw the boundary on a map in accordance with Article 9, paragraph 2, of the Special Agreement of 18 February 1983 between the two states. Since the parties were unable to agree on the map to be used, the Tribunal chose No. 5979 of the French Navy's hydrographic service, which was based on the most updated surveys of the coastal area and was produced in the small scale needed to accurately depict the boundary.⁵⁷

VIII. CONCLUSION

In granting this award, the Arbitral Tribunal reaffirmed the principle that each maritime delimitation is unique, and as such, should be accomplished by examining the circumstances of each particular case and the characteristics of each particular region. The delimitation of the maritime boundary between Guinea and Guinea-Bissau was based on objective and equitable principles as set forth in the 1982 Convention on the Law of the Sea. This arbitration resulted in one of the few settled maritime boundaries in West Africa, and is serving as a guide for the current Senegal/Guinea-Bissau and Guinea/Sierra Leone maritime delimitation disputes. In March, 1986, the governments of Guinea and Guinea-Bissau issued a joint statement that the states would cooperate in developing their maritime resources for the mutual benefit of their peoples.⁵⁸

Kathleen A. McLarky

56. 25 *I.L.M.* *supra* note 1, para. 125, at 302-03.

57. See Appendix D.

58. 25 *I.L.M.*, *supra* note 1, para 251. The introductory note and the English translation of the official French text were prepared by Robert F. Pietrowski, Jr., who served as lead counsel to the People's Revolutionary Republic of Guinea.

APPENDICES

IX. APPENDIX A

The Franco-Portuguese Convention of 12 May 1886.

The Franco-Portuguese Convention of 12 May 1886 was written in French and Portuguese. The ratified text of 31 August 1887 is as follows:

“Convention on the delimitation of French and Portuguese possessions in West Africa

His Majesty the King of Portugal and of the Algarves and the President of the French Republic, acting in an effort to strengthen, by means of relations of good neighborliness and perfect harmony, the bond of friendship existing between the two countries, have decided to sign, for this purpose, a special Convention to prepare the delimitation of their respective possessions in West Africa, and have appointed their respective plenipotentiaries

Who, having exchanged their full powers, found to be in proper form, have agreed on the following Articles:

Article I

In Guinea, the boundary separating the Portuguese possessions from the French possessions will follow, in accordance with the course indicated on Map number 1 attached to the present Convention:

To the north, a line which, starting from Cape Roxo, will remain as much as possible, according to the lay of the land at equal distance from the Cazamance (Casamansa) and San Domingo de Cacheu (Sao Domingos de Cacheu) rivers, up to the intersection of the meridian of 17° 30' longitude west of Paris with parallel of 12° 40' north latitude. Between this point and the meridian of 16° longitude west of Paris, the boundary will conform to parallel of 12° 40' north latitude.

To the east, the boundary will follow the meridian of 16° west, from parallel 12° 40' of north latitude to the parallel of 11° 40' north latitude.

To the south, the boundary will follow a line starting from the estuary of the Cajet River, located between Catack Island (which will belong to Portugal) and Tristao Island (which will be-

long to France), and following the lay of the land, it will remain, as much as possible, at equal distance from the Rio Componi (Tabati) and the Rio Cassini, then from the northern branch of the Rio Componi (Tabati) and the southern branch of the Rio Cassini (Marigot de Kakondo) first and the Rio Grande afterwards. It will end at the intersection of the meridian of 16° west longitude and the parallel of 11° 40' north latitude.

Shall belong to Portugal all islands located between the Cape Roxo meridian, the coast and the southern limit represented by a line which will follow the thalweg of the Cajet River, and go in a southwesterly direction through the Pilots' Pass to reach 10° 40' north latitude, which it will follow up to the Cape Roxo meridian.

Article II

His Majesty the King of Portugal and of the Algarves recognizes the French protectorate over the territories of Futa-Jallon, as established by treaties signed in 1881 between the Government of the French Republic and the Almamys of Futa-Jallon.

On its part, the Government of the French Republic pledges to refrain from exerting its influence within the limits allocated to Portuguese Guinea in Article I of this Convention. Moreover, it pledges not to alter the treatment granted until now to Portuguese subjects by the Almamys of Futa-Jallon.

Article III

In the Congo region, the boundary between Portuguese possessions and French possessions will follow, in accordance with the course outlined in Map number 2 attached to the present Convention, a line which will start from Chamba Point situated at the confluence of the Loema or Louisa-Loango with the Lubinda, and will remain as far as possible and in accordance with the lay of the land, at equal distance from these two rivers; it will then, from the northernmost source of the Luali River, follow the watershed separating the basin of the Loema or Louisa-Loango from that of the Chiloango, to reach 10° 30' of longitude east of Paris, which it will follow until it meets the Chiloango, which in this area serves as the boundary between Portuguese possessions and the free State of Congo.

Each of the High Contracting Parties pledges to refrain from erecting any structure at Chamba Point which is likely to impede navigation.

In the estuary situated between Chamba Point and the Sea,

the thalweg will serve as a political line of demarcation between the possessions of the High Contracting Parties.

Article IV

The Government of the French Republic recognizes His Most Faithful Majesty's right to exert His sovereign and civilizing influence on the territories separating the Portuguese possessions of Angola and Mozambique, subject to the rights acquired earlier by other Powers, and pledges on its part to refrain from any occupation of that region.

Article V

Portuguese subjects in French possessions on the west coast of Africa, and French citizens in Portuguese possessions on the same coast will, as far as protection of persons and property is concerned, be treated on a footing of equality with the citizens and subjects of the other Contracting Power.

Each of the High Contracting Parties will, in the aforementioned possessions, benefit from most favored nation status for the purposes of navigation and trade.

Article VI

Public property belonging to the High Contracting Parties, situated in the territory mutually ceded, will be exchanged and compensated.

Article VII

A Commission will be entrusted with determining, on the spot, the definitive position of the lines of demarcation provided for in Articles I and II of the present Convention. Its members will be appointed in the following manner:

His Most Faithful Majesty and the President of the French Republic will each appoint two commissioners.

These commissioners will meet at a place to be determined later, by joint agreement of the High Contracting Parties, as soon as possible after the exchange of documents ratifying this Convention.

If a disagreement arises, the aforementioned commissioners will refer back to the governments of the High Contracting Parties.

Article VIII

The present Convention will be ratified, and the ratification documents exchanged in Lisbon as soon as possible.”

X. APPENDIX B

The Special Agreement of 18 February 1983 Between Guinea and Guinea-Bissau.

The Governments of Guinea and Guinea-Bissau signed in Bissau on 18 February 1983 a Special Agreement which provided as follows:

“The Government of the Republic of Guinea-Bissau and the Government of the People’s Revolutionary Republic of Guinea,

Considering the bond of friendly brotherhood and solidarity existing between the two States and their Governments,

Recalling the *Solemn Declaration* of the meeting of the Heads of States and Governments of the Organization of African Unity held in Cairo from 17 to 21 of July 1964, during which the member States agreed under oath to honor the boundaries existing at the time of their independence,

Anxious to resolve promptly and in a friendly manner the question of the delimitation of the maritime boundary between the Republic of Guinea-Bissau and the People’s Revolutionary Republic of Guinea,

Considering that this question of maritime delimitation between the two States was studied by an *ad hoc* commission which met at Bissau on 29 December 1982,

Considering that following the discussions of the aforesaid *ad hoc* commission, the two Parties have agreed:

- a) to consider the Convention of 12 May 1886 as the basic document to pursue the discussions on the maritime boundary delimitation between the two States;
- b) to consider that this Convention defines precisely the on-shore boundary;
- c) as to the maritime boundary, in view of the differences of opinion and interpretation concerning the Convention of 1886, to submit to an appropriate Arbitration Tribunal, acceptable to both Parties, the interpretation of the Convention and the delimitation of the maritime boundary between the two States.

Considering that the *proces-verbal* adopted during this meeting mentions that ‘the delegation of Guinea-Conakry has specified that in its understanding of the Treaty of 12 May 1886, the annexes and protocols signed by the Plenipotentiaries’ shall be taken into account.

Have agreed as follows:

Article 1

1. The Arbitration Tribunal (hereinafter the 'Tribunal') will be composed of nationals of third States, which shall be appointed within 30 days after the signature of this Special Agreement, and shall consist of three (3) Members, hereinafter named:

M. . . . appointed by the Republic of Guinea-Bissau;
M. . . . appointed by the People's Revolutionary Republic of Guinea; the third Arbitrator, who will serve as the President of the Tribunal, will be appointed by mutual agreement of the two Parties; in case they cannot reach agreement, the third Arbitrator shall be appointed by the two Arbitrators acting jointly after consultation with the two Parties.

2. In case the President or another Member of the Tribunal should be unable to serve, the vacancy will be filled by a new Member appointed by the Government that had previously named the Member to be replaced in the case of the two Arbitrators appointed respectively by the two Governments, or by mutual agreement of the two Governments in the case of the President.

Article 2

It is requested of the Tribunal that it decide according to the relevant rules of international law the following questions:

Did the Convention of 12 May 1886 between France and Portugal establish the maritime boundary between the respective possessions of those two States in West Africa?

What judicial effect can be attributed to the protocols and documents annexed to the Convention of 1886 for the interpretation of the aforesaid Convention?

According to the answers given to the two above-mentioned questions, what is the course of the boundary between the maritime territories appertaining respectively to the Republic of Guinea-Bissau and the People's Revolutionary Republic of Guinea?

Article 3

The seat of the Tribunal shall be Geneva (Switzerland).

Article 4

1. The Tribunal shall not rule unless all Members are present.

2. In absence of unanimity, the decisions of the Tribunal regarding all substantive or procedural questions, including all questions concerning the competence of the Tribunal and the interpre-

tation of the Special Agreement, shall be by a majority of its Members.

Article 5

1. Within 30 days after signature of this Special Agreement, the Parties will each appoint, for purposes of the arbitration, an Agent, and will submit to the Tribunal and the other Party the name and address of said Agent.

2. After the Tribunal has been constituted, and after the two Agents have been consulted, the Tribunal will appoint a Registrar.

Article 6

1. The proceedings before the Tribunal will be adversary in nature. Without prejudice to any question relating to the burden of proof, the proceedings shall consist of two phases: written pleadings and oral argument.

2. The written pleadings shall consist of:

- a) A Memorial which will be submitted by each of the Parties within a period not exceeding three (3) months after the constitution of the Tribunal.
- b) A Counter-Memorial which will be submitted by each of the Parties within a period not exceeding two (2) months after the exchange of the Memorials.
- c) Any other pleadings that the Tribunal deems necessary.

3. The Tribunal shall have the power to extend to a maximum of one (1) month the time-limits so fixed, at the request of one of the Parties, or according to its own judgment. The Registrar shall notify the Parties of a mailing address for the filing of their written pleadings and all other documents. Documents presented to the Tribunal shall not be transmitted to the other Party until the Tribunal has received the corresponding pleading from the other Party.

4. The oral argument will follow the written pleadings, and will be held in a place and at a date determined by the Tribunal after consultation with the two Agents. The Parties can be represented at the oral arguments by their Agents and by any and all advisors and experts they wish to appoint.

Article 7

1. The written pleadings and the oral arguments will be in French and/or in Portuguese; the decisions of the Tribunal will be in these two languages.

2. The Tribunal, as necessary, will provide for translation and

interpretation, will hire the secretarial staff, and will take all measures as to the premises and the purchase or rental of equipment.

Article 8

The general expenditures of the arbitration staff as well as the salary of the Members of the Tribunal will be equally shared by both Governments, but each Government will sustain the costs of the preparation and the presentation of its own case.

Article 9

1. After the proceedings before the Tribunal have ended, the Tribunal will inform the two Governments of its decision regarding the questions stated in Article 2 of this Special Agreement.

2. This decision must include the drawing of the boundary line on a map. In this regard, the Tribunal will designate one or more technical experts to assist in the preparation of the map.

3. The decision of the Tribunal will be fully reasoned.

4. Any question regarding the subsequent publication of the proceedings will be resolved by agreement between the two Governments.

Article 10

The arbitration award rendered by the Tribunal will be definitive and both Parties shall take all the measures necessary for its execution. Each Party can, within three (3) months following the award, submit to the Tribunal any dispute between the Parties concerning the interpretation and the implementation of the award.

Article 11

1. Revision of the award can be requested by either of the two Parties if any new element has been discovered which could have decisively influenced the award, provided that before the delivery of the award this new element was unknown to the Tribunal and to the Party which requests the revision, and there is no fault on the part of this Party.

2. The request for redivision must be made within a period of six (6) months after the discovery of the new element, and in any case, within five years following the date of the award.

3. During the review procedures, the Tribunal will first determine the existence of the new element, and will judge the admissibility of the request. If the Tribunal judges request admissible, it will render judgment on the merits.

4. The request for revision is brought before a Tribunal composed in the same manner as the one that rendered the award. If for any reason this is impossible, the Parties will mutually agree on another solution.

5. The request for revision shall not suspend the binding nature of the award.

Article 12

1. No activity of the Parties during the course of the arbitral proceedings will be considered to the prejudice their sovereignty in the area which is the object of the Special Agreement.

2. The Tribunal shall have the power to prescribe any interim measures to safeguard the rights of the Parties, at the request of one of the Parties and if the circumstances require it.

Article 13

This Special Agreement shall enter in force on the date of its signature.”

XI. APPENDIX C

Agreement of 30 June 1983 between Guinea and Guinea - Bissau

The two Governments signed another agreement in Bissau on 30 June 1983 providing that:

“The Government of the People’s Revolutionary Republic of Guinea and the Government of the Republic of Guinea-Bissau, noting that since the designation of the two Members of the Arbitral Tribunal they have not been able to agree on the appointment of a third Arbitrator to fill the role of President of this same Tribunal:

Article 1

In accordance with the provisions of Article I, paragraph 1, of the Special Agreement signed in Bissau on 18 February 1983, the two Governments agree that this selection shall be made by common accord of the two appointed Arbitrators, after they have been consulted by their respective Governments.

Article 2

The Arbitrators concerned must perform this mission within a month of the date of signature of this Agreement.

Article 3

The deadline set out in the Special Agreement of 18 February 1983 will thus be extended by whatever amount of time will be required for the appointment of the President of the Tribunal by the two Parties; this applies in particular to the next phase of the procedure agreed to: the filing of the Memorial and Counter-Memorial by each of the Parties (Article 6, paragraphs 2 and 3).

Article 4

The present Agreement will enter into force on the date of its signature.”

XII. APPENDIX D

Agreement of 18 October 1983 between Guinea and Guinea-Bissau

The Governments of Guinea and Guinea-Bissau signed a complementary Agreement in Bissau on 18 October 1983:

“Since the appointment of the two Arbitrators by the two Parties and that of the third Arbitrator called upon to be President was not questioned, the Arbitral Tribunal is legally constituted.

Since the Members constituting the Arbitral Tribunal all reside in The Hague (Netherlands), and due to the numerous appreciable advantages of establishing the aforementioned jurisdiction in that locality, the Parties agree to the following:

Article 1

Article 3 of the Special Agreement between the Government of the Republic of Guinea-Bissau and the Government of the People's Revolutionary Republic of Guinea is modified as follows:

Instead of ‘the seat of the Tribunal shall be Geneva (Switzerland)’ *read* ‘the seat of the Tribunal shall be The Hague (Netherlands).’

Article 2

The present Agreement shall enter in force on the date of its signature.”

XIII. APPENDIX E

The Decision of the Tribunal

THE TRIBUNAL has unanimously decided that:

- 1) the Convention of 12 May 1886 between France and Portugal did not determine a maritime boundary between the respective possessions of those two States in West Africa;
- 2) the protocols and documents annexed to the 1886 Convention have an important role to play in the legal interpretation of the said Convention;
- 3) the line delimiting the respective maritime territories of the Republic of Guinea-Bissau and the Republic of Guinea:
 - a) starts from the intersection of the thalweg of the Cajet River and the meridian of 15° 06' 30" west longitude;
 - b) joins by loxodromic segments the following points:

	<u>LATITUDE NORTH</u>	<u>LONGITUDE WEST</u>
A	10° 50' 00"	15° 09' 00"
B	10° 40' 00"	15° 20' 30"
C	10° 40' 00"	15° 34' 15"

- c) follows a loxodromic line on an azimuth of 236° from point C above to the outer limit of the maritime territories of each States as recognized under general international law.

DONE in French and Portuguese, with the French text being the only one valid in law, at the Peace Palace in the Hague on the fourteenth day of February in the year one thousand nine hundred and eight-five, in three original copies, one of which will be filed in the archives of the Tribunal, the others being transmitted to the Government of the Republic of Guinea and the Government of the Republic of Guinea-Bissau respectively.

(Signed) M. LACHS
President

(Signed) K. MBAYE
Member

(Signed) M. BEDJAOU
Member

(Signed) PILLEPHICH
Registrar

APPENDIX F



