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INTERNATIONAL COURT OF JUSTICE

CASE CONCERNING LAND AND MARITIME DELIMITATION AND SOVEREIGNTY OVER ISLANDS

(GABON/EQUATORIAL GUINEA)

COUNTER-MEMORIAL OF THE GABONESE REPUBLIC

VOLUME I

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[Translation by the Registry]

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INTRODUCTION

1. On 15 November 2016, in Marrakech, the Gabonese Republic (hereinafter "Gabon") and the Republic of Equatorial Guinea (hereinafter "Equatorial Guinea") signed a special agreement to submit the dispute defined in Article 1 of that instrument (hereinafter the "Special Agreement") to the International Court of Justice.

I. General geographical context

2. Gabon is located in Central Africa; it sits on the equator, to the south of the Bight of Biafra, in the Gulf of Guinea (see **sketch-map No. 1.1** below, p. 2). A former French colony, Gabon became independent on 17 August 1960. Its capital is Libreville. Gabon currently has a population of approximately 2,226,000[1].

3. Gabon borders Equatorial Guinea to the north-north-west, Cameroon to the north, and the Republic of the Congo to the east and south. In addition to its mainland region, it comprises the islands of Mbanié, Cocotiers and Conga; these islands lie adjacent to Gabon's northern coast, on the edge of Mondah Bay, which is formed by the estuary of the Mondah River, in the south-eastern part of Corisco Bay (see **sketch-map No. 8.1** below, p. 136).

4. Also located in Central Africa, Equatorial Guinea is a former Spanish colony that became independent on 12 October 1968. The country currently has a population of approximately 1,403,000[2].

5. Equatorial Guinea consists of continental Equatorial Guinea (Río Muni), bordered by Gabon to the south and east and by Cameroon to the north, and insular Equatorial Guinea, of which Bioko (where Equatorial Guinea's capital, Malabo, is located) and Annobón are the largest islands. Separated by Sao Tome and Principe, Equatorial Guinea's two main islands are 350 nautical miles apart. They are each surrounded by a fringe of islands and rocks. Insular Equatorial Guinea also includes, in Corisco Bay, the island of Corisco and its satellite islands Leva (or Laval)[3] and Hoco, as well as Elobey Grande and Elobey Chico (see **sketch-map No. 8.1** below, p. 136).

6. Equatorial Guinea disputes Gabon's sovereignty over the islands of Mbanié, Cocotiers and Conga (see satellite image below, p. 3). These three maritime features, which have a reduced surface area above sea level at high tide, lie on the edge of Mondah Bay[4]. Mbanié is the largest of the three, with a surface area of approximately 20 hectares at low tide and 6.6 hectares at high tide; it is located approximately 10 nautical miles from Gabon's mainland coast, 18 nautical miles from the mainland

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[1] 2020 World Bank data, available online at: https://data.worldbank.org/indicator/SP.POP.TOTL?locations=GQ.

[2] 2020 World Bank data, available online at: https://data.worldbank.org/indicator/SP.POP.TOTL?locations=GA.

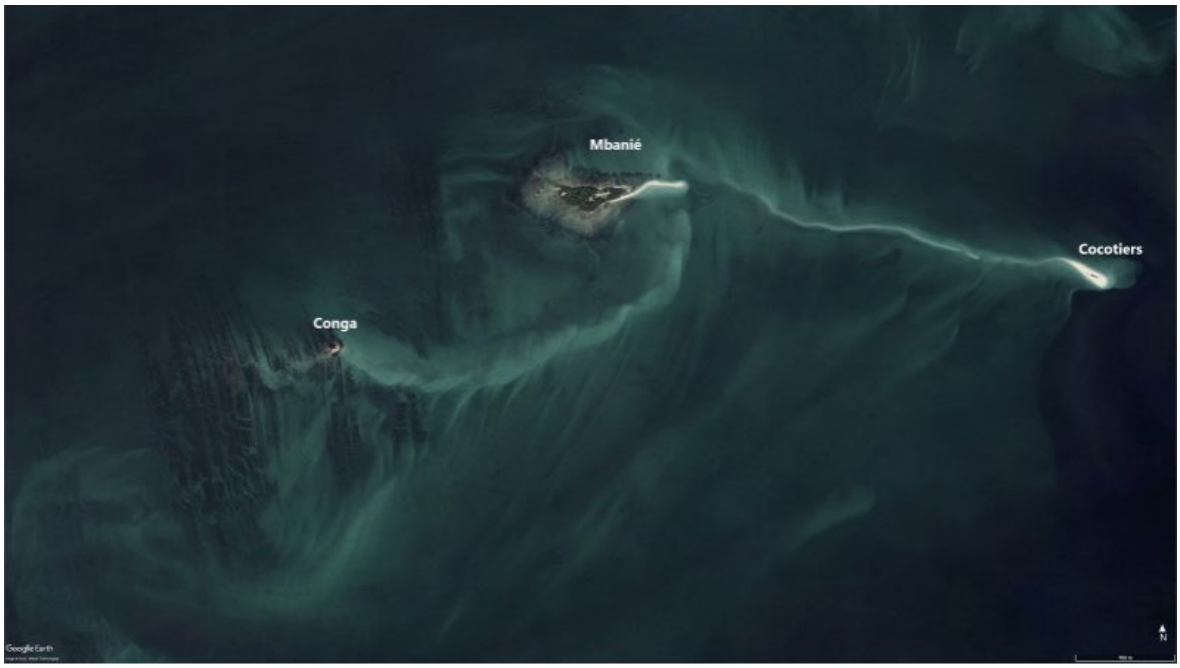
[3] The islet of Laval was also known as "Leva" during the colonial period: see, for example, Enrique d'Almonte's 1:200,000-scale map of continental Spanish Guinea *(Muni. Guinea Continental Española)* published in 1903 (Counter-Memorial of Gabon (hereinafter "CMG"), Vol. II, Ann. C[10]). Equatorial Guinea seems to have the same understanding of the situation (see Memorial of Equatorial Guinea (hereinafter "MEG"), Vol. I, para. 3.11). The toponym "Leva", however, is still used on contemporary maps, with the name "Laval" used to refer to a sandbank north-west of Mbanié (see MEG, Vol. II, Figure 2.3, and CMG, Vol. 1, sketch-map No. 8.1 on p. 136 below).

[4] See CMG, Vol. II, Anns. P1 (satellite image from November 2015) and P2 (aerial view of the islands of Conga and Mbanié, taken on 17 March 2022 at 9.50 a.m., at low tide), and Ann. V1.

coast of Equatorial Guinea and 5.5 nautical miles from Corisco Island[5]. Although historical records do not show Mbanié to have been permanently inhabited in the past, in 1972 Gabon established a small police station on the island, whose staff have rotated on a monthly basis ever since.

Sketch-map No. 1.1
General geographical context

[5] See CMG, Vol. II, Anns. P3 (aerial view of the island of Mbanié from the east, taken on 17 March 2022 at 9.51 a.m., at low tide), P4 (aerial view of the island of Mbanié from the north-west, taken on 17 March 2022 at 9.58 a.m., at low tide) and P5 (aerial view of the island of Mbanié from the south-east, taken on 17 March 2022 at 9.56 a.m., at low tide), and Ann. V1.



Annex P1
Satellite image of the islands of Mbanié, Cocotiers and Conga from November 2015 (captured on Google Earth on 30 March 2022), with annotations

7. Cocotiers is an uninhabited cay with a surface area of approximately 10 hectares at low tide and 0.3 hectares at high tide that lies 9.5 nautical miles from the mainland coast of Gabon[6]. At low tide, Mbanié and Cocotiers are connected by a 1.5-nautical-mile sandspit[7]. Conga has a surface area of 160 hectares at low tide (including the vast sandbank that surrounds it and dries out at low tide) and 0.3 hectares at high tide[8]; it lies 1.1 nautical miles south-west of Mbanié and 9.5 nautical miles from the mainland coast of Gabon.

II. Procedural history

8. On 5 March 2021, Equatorial Guinea officially notified the Special Agreement to the Registrar of the Court.

9. By an Order dated 7 April 2021, the Court fixed the time-limits for the filing of the first written pleadings: 5 October 2021 for the Memorial of Equatorial Guinea, and 5 May 2022 for the Counter-Memorial of Gabon.

[6] See CMG, Vol. II, Ann. P6 (aerial view of the island of Cocotiers from Mbanié (from the north-west), taken on 17 March 2022 at 9.50 a.m., at low tide) and Ann. V1.

[7] See CMG, Vol. II, Anns. P6 (aerial view of the island of Cocotiers from Mbanié (from the north-west), taken on 17 March 2022 at 9.50 a.m., at low tide) and P1 (satellite image of the islands of Mbanié, Cocotiers and Conga from November 2015 (captured on Google Earth on 30 March 2022)), and Ann. V1.

[8] See CMG, Vol. II, Ann. P7 (aerial view of the island of Conga from the south (from Cape Esterias), taken on 17 March 2022 at 9.54 a.m., at low tide) and Ann. V1.

10. On 5 October 2021, Equatorial Guinea filed its Memorial in the Registry of the Court. This Counter-Memorial responds to that pleading within the time-limit fixed by the above-mentioned Order.

III. The dispute before the Court

11. The dispute between Gabon and Equatorial Guinea is a continuation of the rivalries and disagreements arising between France and Spain over possessions in the Gulf of Guinea during the colonial period. These disagreements led to the signing, on 27 June 1900 in Paris, of the Special Convention on the delimitation of French and Spanish possessions in West Africa, on the coasts of the Sahara and the Gulf of Guinea (hereinafter the "Paris Convention")[9]. This instrument is the sole legal title enforceable against Gabon, as the successor State of France, in its relations with Equatorial Guinea.

12. Owing to inaccuracies and omissions in the Paris Convention, disputes continued to arise between the two colonial Powers regarding certain sections of the land boundary and sovereignty over the islands of Mbanié, Cocotiers and Conga. After independence, these disagreements resurfaced. Talks were thus initiated, on Gabon's proposal, in the early 1970s. Meetings were held in Bata (in 1971) and in Libreville (in April-May 1972) but failed to prevent tensions from escalating between the two countries, which led the Conference of Heads of State and Government of Central and East Africa to entrust the Heads of State of the People's Republic of the Congo (Marien Ngouabi) and Zaire (Mobutu Sese Seko) with the task of mediation. In pursuance of this mandate, a summit was held in Kinshasa on 17 September 1972, following which Gabon and Equatorial Guinea agreed to settle their dispute within the African framework and by peaceful means. A second mediation summit of the Conference of Heads of State and Government of Central and East Africa was held in Brazzaville from 11 to 13 November 1972.

13. At the bilateral level, the normalization of relations between Gabon and Equatorial Guinea was evidenced by three meetings between the two Heads of State: in Libreville, in Gabon, in July 1973 and July 1974, and in Santa Isabel and Bata, in Equatorial Guinea, in September 1974. This final meeting concluded with the signing, on 12 September 1974, of the Bata Convention delimiting the land and maritime frontiers of Equatorial Guinea and Gabon. This Convention confirms, amends and supplements the Paris Convention. It modifies the lines that were agreed in Paris, when so required by the situation on the ground, and establishes a maritime boundary, which had not been done in 1900. Moreover, it confirms Equatorial Guinea's sovereignty over Corisco Island and the Elobey Islands, and Gabon's sovereignty over Mbanié, Cocotiers and Conga. The Bata Convention is binding between the Parties, who regarded it as such until it was called into question by Equatorial Guinea, giving rise to renewed tensions between the two States.

14. In response to this resurgence of tensions, a first mediation was proposed by United Nations Secretary-General Kofi Annan in 2003. Entrusted to Mr Yves Fortier, it concluded in October 2006. In April 2008, United Nations Secretary-General Ban Ki-moon proposed a second mediation, led by Mr Nicolas Michel, during which the Parties explored the possibility of settling their dispute through the Court; this mediation ended in 2014. In January 2016, the Secretary-General appointed a third mediator, Mr Jeffrey Feltman. This third and final mediation resulted in the Parties adopting the text of the Special Agreement, which was signed on 15 November 2016 in Marrakech.

[9] Convention on the delimitation of French and Spanish possessions in West Africa, on the coasts of the Sahara and the Gulf of Guinea, Paris, 27 June 1900, bilingual version (CMG, Vol. III, Ann. 47). See also MEG, Vol. III, Ann. 4.

15. Gabon has participated actively and in good faith in every attempt to find a peaceful resolution to its dispute with Equatorial Guinea. It signed the Bata Convention of 12 September 1974 and the Special Agreement of 15 November 2016 in this same spirit.

16. With regard to the Special Agreement, Gabon will demonstrate in this Counter-Memorial that Equatorial Guinea's interpretation of Article 1 of that instrument — and thus of the Court's task — is erroneous.

17. In its Memorial, Equatorial Guinea claims that "[t]he phrase 'legal titles' in Article 1, paragraph 1, and the reference in paragraph 4 to the invocation of 'other legal titles', indicate that the Parties have agreed that the Court's task is to determine all Legal Titles having the force of law between them, not just those emanating from particular treaties and conventions". As Gabon will show in Chapter V below, the term "legal title" must be understood in the strict sense of a "document endowed by international law with intrinsic legal force for the purpose of establishing territorial rights"[10]. Therefore, any other document not meeting this definition cannot constitute a legal title within the meaning of Article 1 of the Special Agreement, as Gabon consistently emphasized during the United Nations mediation which led to that instrument's conclusion. Indeed, the dispute before the Court arose further to Equatorial Guinea denying that the Bata Convention existed. The express mention of the legal titles concerned in Article 1 thus states that the Parties were referring to treaties and conventions relating to the delimitation of their maritime and land boundaries and to sovereignty over the islands of Mbanié, Cocotiers and Conga.

18. Committed to the United Nations ideals of peace and international co-operation, and to respect for the fundamental principles of international law, Gabon remains convinced that the edifice of international law and international legal certainty depend on the undertakings made by the subjects of that law, lest the cornerstone of the entire international treaty system, the *pacta sunt servanda* rule, should be undermined. This is particularly true as regards the principle of consent to the Court's jurisdiction.

19. The dispute submitted to the Court must therefore be resolved solely by determining which instruments have the force of law between the Parties. In view of the foregoing, this Counter-Memorial aims to set out Gabon's reasons for requesting the Court to declare that the legal titles having the force of law with regard to the delimitation of the Parties' common land boundary are the Paris Convention and the Bata Convention, and that the only legal title having the force of law as regards the delimitation of their common maritime boundary and sovereignty over the islands of Mbanié, Cocotiers and Conga is the Bata Convention.

IV. Structure of the Counter-Memorial

20. Gabon will begin by recalling the historical background to provide a better understanding of the origins of this case (**Part One**). To that end, it will examine in turn:

(a) the events leading up to the Paris Convention (**Chapter I**);

(b) the period from the Paris Convention to the Bata Convention (**Chapter II**);

(c) the conclusion of the Bata Convention in 1974 (**Chapter III**); and

[10] See *Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 582, para. 54. See also *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002*, p. 667, para. 88.

(d) relations between Gabon and Equatorial Guinea after the signing of the Bata Convention (**Chapter IV**).

21. Gabon will then present the legal titles having the force of law between the Parties (**Part Two**). After recalling the subject of the dispute and the task of the Court (**Chapter V**), Gabon will endeavour to expand on the following points:

(a) The Bata Convention has the force of law between the Parties (**Chapter VI**).

(b) The legal titles in respect of the land boundary are the Bata Convention and the Paris Convention (**Chapter VII**).

(c) The legal title relating to sovereignty over the islands is the Bata Convention (**Chapter VIII**).

(d) The legal title relating to the maritime boundary is the Bata Convention (**Chapter IX**).

22. This written pleading is supported by 22 maps, seven photographs and two audiovisual recordings, reproduced in Volume II, as well as 177 annexes, reproduced in Volumes III, IV and V.

PART ONE
HISTORICAL BACKGROUND

CHAPTER I
THE EVENTS LEADING UP TO THE PARIS CONVENTION

1.1 The almost concurrent settlement of France and Spain in the Gulf of Guinea led inexorably to an overlapping of their respective territorial claims, and all attempts made in the nineteenth century to resolve the dispute were unsuccessful (**I**). It was within the broader framework of territorial transactions between France and Spain in Africa that the two colonial Powers concluded, on 27 June 1900 in Paris, the Convention on the delimitation of French and Spanish possessions in West Africa, on the coasts of the Sahara and the Gulf of Guinea. That instrument established the land boundary and attributed to Spain three of the islands then in dispute (Corisco Island and the two Elobey Islands) (**II**). Yet the Convention's silence on sovereignty over the other island features lying off the mainland coast of Gabon, on the edge of Mondah Bay, as well as the lack of demarcation on the ground continued to stoke uncertainty and protests on both sides (**III**).

I. The Franco-Spanish dispute behind the Paris Convention

1.2 France and Spain settled in the east of the Gulf of Guinea from 1839 and 1843, respectively (**A**). After the colony of Spanish Guinea was founded in 1858, they were soon competing in their claims of sovereignty in the region (**B**). It was following the failure of an initial attempt to resolve their dispute through the convening of a mixed boundary commission that the two States devised the transactional approach on which the Paris Convention is based (**C**).

A. The establishment of the colonial Powers in the region

1.3 The first Europeans to explore the Bight of Biafra — the eastern part of the Gulf of Guinea, bordered by the coasts of present-day Nigeria, Cameroon, Equatorial Guinea and Gabon — were the Portuguese in 1470[11]. In 1472, Fernando Pó discovered the island that for many years bore his name, but which is now known as Bioko, the main island of Equatorial Guinea. Lopo Gonçalves left that island the following year and headed south, exploring the coast as far as present-day Cape Lopez[12], discovering en route the mouth of the Komo River, a broad and deep estuary that the Portuguese named Gabon[13]. Ruy de Sequeira reached Cape St Catherine in November 1473 and landed on the island of Sao Tome one month later, while the islands of Annobón and Principe, situated respectively to the south-west and north-east of Sao Tome, were discovered in January 1474[14] (see **sketch-map No. 1.1** above, p. 2).

1.4 On 11 March 1778, Portugal and Spain signed a treaty of amity and commerce at El Pardo, the principal aim of which was to fix their boundaries in South America[15]. This treaty also gave Spain its first presence in sub-Saharan Africa — and in the Gulf of Guinea in particular — from which it had previously been excluded by the Treaty of Tordesillas of 7 June 1494, which accorded exclusive

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[11] J. Bouchard, "Les Portugais dans la baie de Biafra au XVIème siècle", *Africa: Journal of the International African Institute*, Vol. XVI, No. 4 (1946), p. 218.

[12] Cape Lopez (originally Cape Lopo Gonçalves) is in the Ogooué delta and is home to Port-Gentil, the second most populous city of Gabon.

[13] J. Bouchard, *op. cit*., p. 218.

[14] *Ibid.*, p. 219.

[15] Treaty of Amity, Guarantee and Commerce between Spain and Portugal (the "Treaty of El Pardo"), 11 Mar. 1778 (MEG, Vol. III, Ann. 1).

authority over that region to Portugal. Now, under Article XIII of the Treaty of El Pardo, the Portuguese islands of Annobón and Fernando Pó were ceded to Spain, and Spanish subjects were granted the right to trade freely on the coast and in the ports of the Gulf of Guinea, notably those of Gabon[16]. France acceded to the Treaty of El Pardo on 8 August 1783[17].

1.5 Spain did not initially set up any military or commercial establishments on the two islands it had just acquired; it abandoned them for a time. It was not, as Equatorial Guinea writes, "[s]hortly after signing the 1778 Treaty"[18], but in February 1843 that Spain (re)took possession of the islands of Fernando Pó — which had been occupied by the British in 1827 — and Annobón[19]. This taking of possession was sealed by the agreements of allegiance that Spain concluded in 1843 with a number of local chiefs, to which Equatorial Guinea refers in its Memorial[20]. These agreements went beyond the rights enjoyed by Spain under the Treaty of El Pardo, since they also concerned the island of Corisco[21].

1.6 France, for its part, began its commercial exploration of the coast of the Gulf of Guinea in 1839, also concluding several agreements with local chiefs.

1.7 On the instructions of the Minister of the French Navy, in 1839 Lieutenant Bouët-Willaumez, captain of *La Malouine*, began exploring Corisco Bay and the Gabon Estuary, which he described in very favourable terms:

> "[I]nto this vast basin run the Mooney [Muni] River to the NE and the Moondah River to the SSE, which are accessible to large vessels several leagues from their mouths, but strewn with banks and rocks, which make navigating them dangerous for the unaccustomed.
>
> . . . . . .
>
> Corisco Bay would therefore be one of the most beautiful basins of the African coast were it not for the multitude of islands, islets, rocks and banks that make navigating it and its rivers rather challenging.
>
> . . . . . .
>
> To the SSW of Corisco Island, and amidst the reefs that pepper that part of the bay, are the two small islets of Laval and Bayna [Mbanié], uninhabited but covered with trees.

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[16] See Art. XIII of the Treaty of El Pardo (MEG, Vol. III, Ann. 1). See also D. Tomas Lopez's map *Golfo de Guinéa* (1778), reproduced as Figure 3.1 of MEG.

[17] Ch. De Martens, *Guide diplomatiqu*e (1837), pp. 79-80.

[18] MEG, Vol. I, para. 3.2.

[19] "Equatorial Guinea", "History" section, in Encyclopaedia Britannica online: https://www.britannica.com/place/Equatorial-Guinea.

[20] MEG. Vol. I, paras. 3.3-3.5.

[21] See Declaration of the Spanish Royal Commissioner for the islands of Fernando Pó, Annobón and Corisco on the Coast of Africa, 16 Mar. 1843 (MEG, Vol. V, Ann. 110); Declaration of the Spanish Royal Commissioner for the islands of Fernando Pó, Annobón and Corisco on the Coast of Africa, 17 Mar. 1843 (MEG, Vol. V, Ann. 111).

> Finally, the Elobey Islands, once known as the Mosquitos Islands, sit in the NE of the bay, in front of the mouth of the Mooney River, and form, together with the large island of Corisco, the widest and most easily navigable channel in the bay."[22]

1.8 During that expedition, Bouët-Willaumez signed an agreement with King Denis, village chief of the left bank of the Gabon Estuary, by which the latter ceded to France two leagues of land on the left bank of the Gabon River for the construction of "all buildings, fortifications or houses [France] deems appropriate"[23].

1.9 In the years that followed, France concluded several other agreements with local chiefs, which marked an extension of its sphere of influence over the coasts of Corisco Bay (see **sketch-map No. 1.2**[24] below, p. 11). Thus, on 18 March 1842, King Louis, a chief of the right bank of the Gabon Estuary, gave France complete and full sovereignty over his territory and a plot of land on which to build a base or fortification[25]. On 27 April 1843, King Quaben, in turn, recognized France's sovereignty and agreed to a potential French settlement on his lands[26]. On the orders of Bouët-Willaumez, now Governor of Senegal and Dependencies, the Gabon trading post was officially established on 3 September 1843, with the construction of a fort, a blockhouse and three barracks on territory ceded by King Louis, known as "Okolo post"[27]. On 1 April 1844, a few days after King Glass had ceded sovereignty over his territory to France[28], the Governor of Senegal and Dependencies concluded a general treaty with nine chiefs of the Gabon Estuary "for the purpose of recording their unanimous recognition of the sovereignty of France" over "the Gabon River and all land, islands, peninsulas and capes found in or on that river . . . on either bank"[29].

1.10 In the ensuing years, France signed a number of other treaties of sovereignty, protectorate and amity with other local chiefs both in and outside the Gabon Estuary, including, for example, with Koako, King of the Muni River, who entered into an alliance with France on 4 September 1845[30]; the principal chiefs of Cape Esterias (the northern tip of the mouth of the Gabon River) on

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[22] L.-E. Bouët-Willaumez, *Nautical Description of the Coast of West Africa between Senegal and the Equator (started in 1838 and completed in 1845)*, 1848 (CMG, Vol. III, Ann. 7), pp. 179-180; see also H. Deschamps, "Quinze ans de Gabon (Les débuts de l'établissement français, 1839-1853)", *Revue française d'histoire d'outre-mer*, Vol. 50, Nos. 180-181 (1963), p. 291.

[23] Treaty between France and King Denis of Gabon and Senegal, 9 Feb. 1839 (MEG, Vol. III, Ann. 2). See also H. Deschamps, *op. cit*., p. 292.

[24] This sketch-map is based on one drawn up by the French administration in around 1885 and entitled "Rivière Muny — Traités français" (CMG, Vol. II, Ann. C2), to which have been added the main treaties reached between France and the local chiefs settled on the banks of the Gabon and on the Elobey Islands.

[25] Treaty ceding sovereignty and an area of territory concluded between Lieutenant Commander Bouët and King Louis, 18 Mar. 1842 (CMG, Vol. III, Ann. 1).

[26] Supplementary article to the treaty reached with King Louis on 18 Mar. 1842, concluded between King Quaben and A. Baudin, in charge of the West Coast of Africa Station, 27 Apr. 1843 (CMG, Vol. III, Ann. 2).

[27] H. Deschamps, *op. cit*., pp. 298-300.

[28] Treaty between Baron Darricau de Traverse, captain of the *Eperlan*, and Mr Amouroux, Master Mariner, of the one part, and King Glass, of the other part, 28 Mar. 1844 (CMG, Vol. III, Ann. 3).

[29] Treaty recognizing France's sovereignty over the Gabon River, signed by Commander Bouët, Governor of Senegal and Dependencies, and the kings and chiefs signatories of earlier treaties, 1 Apr. 1844 (CMG, Vol. III, Ann. 4).

[30] Agreements reached with Koako, King of the Danger or Mooney River, by Lieutenant Commander Auguste Baudin, 4 Sept. 1845 (CMG, Vol. III, Ann. 6).

18 September 1852[31]; the king and chiefs of Elobey Grande on 23 April 1855[32], who, together with the chiefs of the neighbouring island of Elobey Chico, reaffirmed their allegiance to France five years later[33]; and the Sekiani tribes on the Muni (Danger) River on 17 October 1867[34].

[31] Treaty of sovereignty and protection concluded with the named Outambo, Bouendi-Adiemba, Ivaha and Mabélé, principal chiefs of Cape Esterias, by Mr Vignon, officer in charge of the fortified Gabon trading post, acting under the delegated authority of the Commander-in-chief of the West Coast of Africa Station, Inspector-General of the Gulf of Guinea trading posts, 18 Sept. 1852 (CMG, Vol. III, Ann. 8).

[32] Treaty of sovereignty and protection concluded with King Battaud, Prince Battaud, and principal chiefs Naqui, Bori N'Pongoué, Bappi and Oniamon by Mr Guillet, officer in charge of the fortified Gabon trading post, acting under the delegated authority of the Commander-in-chief of the West Coast of Africa Station, 23 Apr. 1855 (CMG, Vol. III, Ann. 9).

[33] Treaty between the chiefs of the two Elobey Islands and Mr Ropert, Chief of Staff of the Naval Division of the West Coast of Africa, 17 Oct. 1860 (CMG, Vol. III, Ann. 13).

[34] Declaration of allegiance to France made by the Sekiani chiefs based on the Danger River, 17 Oct. 1867 (CMG, Vol. III, Ann. 17).

Sketch-map No. 1.2
Agreements concluded by France with the local chiefs up to 1885

B. The origin of the dispute between Spain and France regarding their rights in the Gulf of Guinea

1.11 Having taken possession of the islands of Fernando Pó, Annobón and Corisco[35], Spain officially founded the colony of Spanish Guinea on 13 December 1858[36]. At that time, France was already well established in Gabon, and — contrary to what Equatorial Guinea alleges[37] — Spain's claims did give rise to protest. On 23 May 1860, the Commander-in-chief of the Naval Division of the West Coast of Africa, in charge of France's trading post in Gabon, protested to the Governor of Spanish possessions in Fernando Pó about the latter's appointment of a Governor of Corisco, Cape St Jean and the Elobey Islands, stating that this act infringed upon France's rights in the region[38].

1.12 The dispute was subsequently raised at the diplomatic level. In August 1860, the French Ambassador to Madrid informed the Spanish Minister of State that France objected to the territorial implications which Spain, expanding its claims to include the Elobey Islands and the mainland coast, believed derived from its taking possession of Corisco Island[39]. One year later, the Minister of State responded to those objections, reiterating Spain's claims both to Corisco Island and to the Elobey Islands, Cape St Jean and the Muni (or Danger) River, as "dependencies" of Corisco[40].

1.13 The two States put forward various proposals for the settlement of their disputes relating to the islands and the mainland coast, but were unable to reach a mutual agreement[41]. On the ground, the colonial authorities continued to dispute sovereignty over the mainland coast between the Muni (or Danger) River and the Mondah River, and over the Elobey Islands[42], while France expanded its settlement north of the Muni River, as far as the Campo River.

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[35] See above, para. 1.5, and MEG, Vol. I, para. 3.5.

[36] Royal order on the status of the colony of Spanish Guinea, 13 Dec. 1858 (as reproduced by the Commander-in-chief of the Naval Division of the West Coast of Africa and enclosed with his Letter No. 156 to the French Minister for the Colonies, 24 May 1860) (CMG, Vol. III, Ann. 10).

[37] MEG, Vol. I, para. 3.6.

[38] Letter No. 59 from the Commander-in-chief of the Naval Division of the West Coast of Africa to the Governor-General of Spanish possessions in Fernando Pó, 23 May 1860 (copy enclosed with his Letter No. 156 to the French Minister for the Colonies, 24 May 1860) (CMG, Vol. III, Ann. 10), pp. 1-2. A reply was provided by the Governor-General of Fernando Pó (Letter from the Governor-General of Fernando Pó to the Commander-in-chief of the Naval Division of the West Coast of Africa, 28 May 1860 (CMG, Vol. III, Ann. 11), pp. 3-4).

[39] Letter from the French Minister for Foreign Affairs to the French Minister for Algeria and the Colonies, 11 Aug. 1860 (CMG, Vol. III, Ann. 12).

[40] Letter from the Spanish Minister of State to the French Ambassador to Spain, 8 Aug. 1861, enclosed with the Letter from the French Minister for Foreign Affairs to the French Minister for the Navy and the Colonies, 28 Aug. 1861 (CMG, Vol. III, Ann. 14).

[41] See France's proposal in the dispatch from the French Minister for Foreign Affairs to the French Ambassador to Madrid (for subsequent presentation to the Spanish Minister of State), 19 May 1863 (as enclosed with the Letter from the French Minister for Foreign Affairs to the French Minister for the Navy and the Colonies, 19 May 1863 (CMG, Vol. III, Ann. 15), pp. 4-5 of the dispatch), and the rejection of that proposal by the Spanish Minister of State (Mr de Calonge) in the Note Verbale to the French Ambassador to Spain, 7 June 1867 (as transmitted in the Letter from the French Minister for Foreign Affairs to the French Minister for the Navy and the Colonies, 19 July 1867 (CMG, Vol. III, Ann. 16)).

[42] See the exchange between the Commander-in-chief of the Naval Division of the West Coast of Africa and the Governor-General of Fernando Pó of 11 and 15 Dec. 1867, enclosed with Letter No. 585 from the Commander-in-chief of the Naval Division of the West Coast of Africa to the French Minister for the Navy and the Colonies, 19 Dec. 1867 (CMG, Vol. III, Ann. 18). See also the report of 23 Aug. 1873 of the captain of the *Marabout* on returning from a tour of Corisco Bay, enclosed with Letter No. 257 from the Commander of Gabon to the French Minister for the Navy, 24 Aug. 1873 (CMG, Vol. III, Ann. 19) and Letter No. 113 from the Commander of Gabon to the French Minister for the Colonies, 4 Oct. 1875 (CMG, Vol. III, Ann. 20).

1.14 The Franco-German Protocol of 24 December 1885, concluded within the framework of the Berlin Conference, established the Campo River and certain astronomical lines as both the southern boundary of German Kamerun and the northern boundary of French possessions in the Gulf of Guinea[43] (see map below, pp. 15 and 16). As far as both France and Germany were concerned, Spain was thus not in possession of any territory on the continent in 1885. Moreover, Equatorial Guinea's Memorial does not provide, in its account of this period, any documentary evidence of a Spanish settlement on the coast at that time[44].

C. The failure of the work of the Franco-Spanish Mixed Boundary Commission (1886-1891)

1.15 In December 1885, Spain and France established a Franco-Spanish mixed commission to draw up a settlement to the boundary dispute concerning the coasts of the Gulf of Guinea and the Sahara (in the Cap Blanc area). The Commission started work in March 1886 and continued until 1891[45].

1.16 In the Gulf of Guinea, France laid claim to the entire area between Gabon and the Campo River[46], while Spain claimed sovereignty over the Elobey Islands, over Corisco and over the mainland territories bordered by the Mondah River to the south and the Campo River to the north, which were included in Spain's claims as "dependencies" of the said islands[47]. As the basis for its claims, France invoked the treaties concluded with the indigenous chiefs[48], while Spain relied primarily on the Treaty of El Pardo[49] and on the agreement reached on 18 February 1846 with a certain Orejeck, whom Equatorial Guinea describes in its Memorial as King of Corisco Island, the Elobeys and their dependencies ("Rey de la Isla de Corisco, Elobey y sus dependencias")[50].

1.17 Examined *in extenso*, the Commission's work paints a picture that is far from the one sketched out in Equatorial Guinea's Memorial[51], whereby France and Spain agree on their respective rights and titles of sovereignty in relation to both the island areas and the mainland territories. On the contrary, the "protocols" (a term used to refer to the minutes of the negotiation sessions) of this work and their "annexes" (the analytical notes produced by each side) show that there were numerous disagreements between the two States, and that their interpretations of the titles invoked were not only at variance, but also fluctuating on both sides.

1.18 The most fiercely debated points of disagreement were as follows:

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[43] Protocol between France and Germany concerning French and German possessions on the west coast of Africa and in Oceania, Berlin, 24 Dec. 1885 (CMG, Vol. III, Ann. 21), pp. 2-3. See also MEG, Vol. I, para. 3.8.

[44] MEG, Vol. I, paras. 3.7-3.8.

[45] *Ibid*., paras. 3.9-3.10.

[46] Annex to Protocol No. 15 of the Franco-Spanish Commission for the Northern Delimitation of Gabon, 24 Nov. 1886 (CMG, Vol. III, Ann. 23), p. 2.

[47] Annex to Protocol No. 14 of the Franco-Spanish Commission for the Northern Delimitation of Gabon, 12 Nov. 1886 (CMG, Vol. III, Ann. 22), pp. 3-4.

[48] See above, paras. 1.6-1.10. For a brief description of the titles invoked by France (and the dispute between France and Spain), see "Chronique des faits internationaux", *Revue générale de droit international public* (1901), pp. 369-376.

[49] See above, para. 1.4.

[50] See MEG, Vol. I, para. 3.5; *Record of Annexation*, 18 Feb. 1846 (MEG, Vol. V, Ann. 112).

[51] *Ibid*., paras. 3.10-3.12.

(a) Spain's particularly broad interpretation of the scope of the Treaty of El Pardo, on which it based its claims of sovereignty not only over the islands of Fernando Pó and Annobón — expressly mentioned in that instrument — but also over the island of Corisco and the Elobey Islands, over what the parties referred to as Corisco Bay itself, and over the mainland territory adjacent to that bay.

(b) The basis of sovereignty over the islands of Corisco Bay, in particular Corisco Island and the Elobey Islands: Spain claimed a title on the basis of the Treaty of El Pardo, in conjunction with the agreements it had concluded with the local chiefs in 1843 and 1846[52]. However, while the latter were invoked from time to time, Spain seemed to regard them as at best merely confirmation of its conventional title and did not present them as constituting a title in themselves[53]. Spain also argued that France had recognized its sovereignty. France, for its part, denied that it had given any form of recognition but indicated nonetheless that it would be prepared to do so in the future for Corisco Island, while vigorously opposing any further expansion of Spanish possessions[54].

(c) The determination of the meaning of the phrase "dependencies of Corisco", which appears in the agreement concluded by Spain with Chief Orejeck in 1846, on which the Spanish plenipotentiaries based their claims over the whole of Corisco Bay and the adjacent mainland territory. To quote Spain's position as it was presented to the French delegation:

> "[t]he island of Corisco, the two Elobeys and their dependencies are under the sovereignty of Spain. These dependencies include the coast south of the left bank of the Campon River, Corisco Bay and the Muni and Munda Rivers."[55]

France objected, contending that the authority of the chiefs of Corisco did not extend beyond that island, and therefore that Spain could not rely on the use of the term "dependencies" in the agreements concluded with the local chiefs to expand its claims to include the mainland coast and all the island features of Corisco Bay[56].

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[52] MEG, Vol. I, paras. 3.3-3.5.

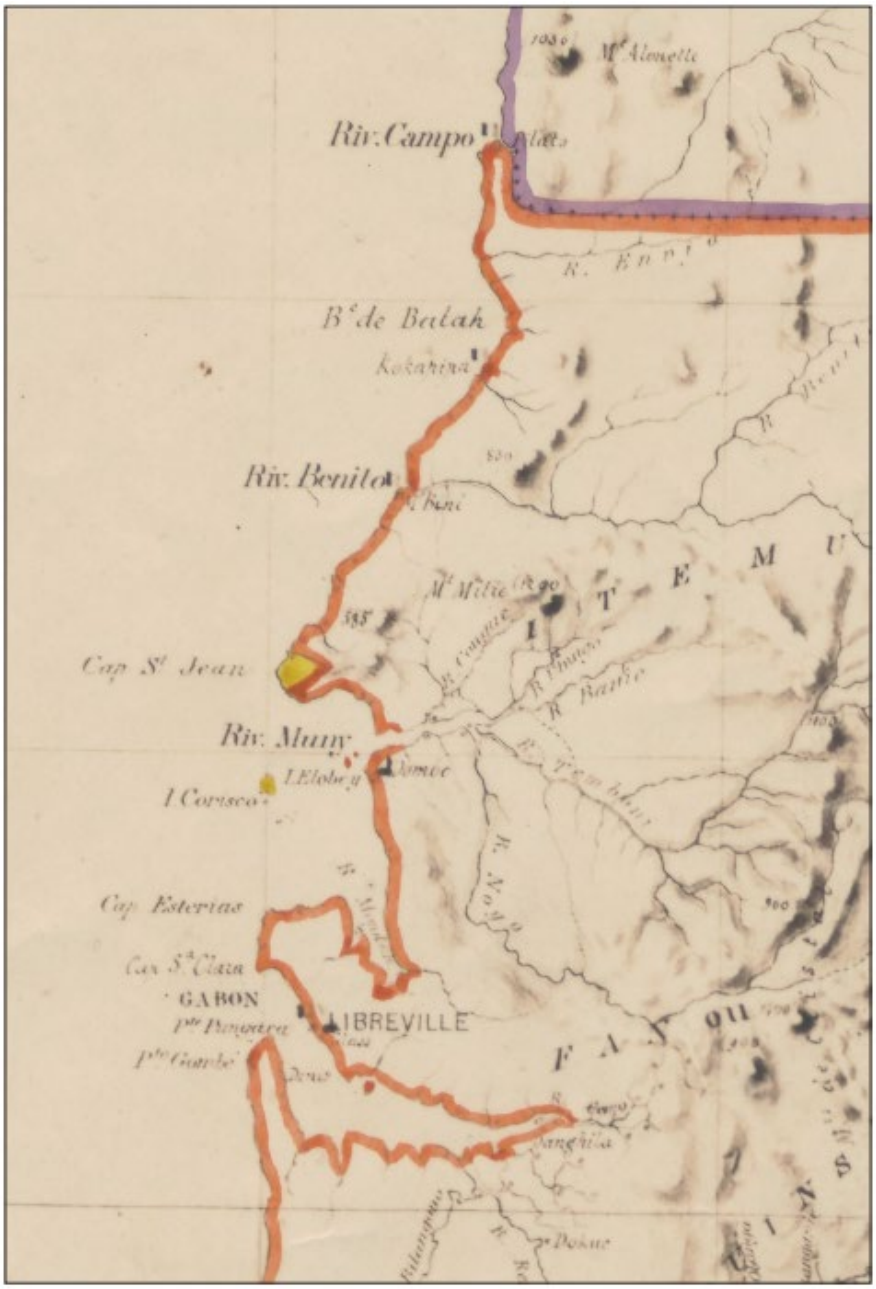
[53] Annex to Protocol No. 14 of the Franco-Spanish Commission for the Northern Delimitation of Gabon, 12 Nov. 1886 (CMG, Vol. III, Ann. 22).

[54] Annex to Protocol No. 20 of the Franco-Spanish Commission for the Northern Delimitation of Gabon, 28 Feb. 1887 (CMG, Vol. III, Ann. 26), pp. 19 and 42. See also the references cited below, fn. 56.

[55] Annex to Protocol No. 14 of the Franco-Spanish Commission for the Northern Delimitation of Gabon, 12 Nov. 1886 (CMG, Vol. III, Ann. 22), pp. 3-4. See also Annex to Protocol No. 16 of the Franco-Spanish Commission for the Northern Delimitation of Gabon, 6 Dec. 1886 (CMG, Vol. III, Ann. 24), pp. 9-10; Annex to Protocol No. 19 of the Franco-Spanish Commission for the Northern Delimitation of Gabon, 18 Feb. 1887 (CMG, Vol. III, Ann. 25), *passim*; Annex to Protocol No. 23 of the Franco-Spanish Commission for the Northern Delimitation of Gabon, 28 Mar. 1887 (CMG, Vol. III, Ann. 28), p. 8; Annex No. 2 to Protocol No. 27 of the Franco-Spanish Commission for the Northern Delimitation of Gabon, 27 June 1887 (CMG, Vol. III, Ann. 30), pp. 8-9.

[56] Annex to Protocol No. 20 of the Franco-Spanish Commission for the Northern Delimitation of Gabon, 28 Feb. 1887 (CMG, Vol. III, Ann. 26), pp. 19 and 42; Annex to Protocol No. 25 of the Franco-Spanish Commission for the Northern Delimitation of Gabon, 18 Apr. 1887 (CMG, Vol. III, Ann. 29), p. 9; Annex to Protocol No. 21 of the Franco-Spanish Commission for the Northern Delimitation of Gabon, 14 Mar. 1887 (CMG, Vol. III, Ann. 27), pp. 16-35; Annex to Protocol No. 28 of the Franco-Spanish Commission for the Northern Delimitation of Gabon, 11 July 1887 (CMG, Vol. III, Ann. 31), pp. 10-11.

Annex C3
Map of French Congo by Bouvier, showing the limits of Spanish (in yellow), German (in purple) and French (in red) possessions, 1886 (excerpt)



Annex C3
Map of French Congo by Bouvier, showing the limits of Spanish (in yellow), German (in purple) and French (in red) possessions, 1886 (excerpt)

1.19 Despite numerous meetings, the two States were unable to reconcile their respective positions, since the titles invoked by both sides were unclear and their interpretations at odds. The Commission took note of this and decided to leave the law there: the Spanish party, declaring itself ready to "begin work on the practical matter of transactions", accepted the French delegates' proposal that "each nation's plenipotentiaries meet outside the sessions to prepare the framework for transactions that w[ould] subsequently be submitted to the Commission for approval"[57]. Since the two States' proposals remained irreconcilable, Spain and France ultimately envisaged submitting

[57] Protocol No. 32 of the Franco-Spanish Commission for the Northern Delimitation of Gabon, 31 Oct. 1887 (CMG, Vol. III, Ann. 32), pp. 1-2.

their dispute to arbitration. That plan failed because the two parties were unable to agree on the determination of the territories in dispute[58]. The negotiations were then suspended, never to resume[59].

1.20 In the period between 1891 (when the meetings of the Mixed Commission came to an end) and 1900, both States each reaffirmed their respective positions[60], while at the same time trying to avoid tensions on the ground whenever possible. With regard to the island possessions in Corisco Bay, France recognized Spain's *de facto* authority over Corisco Island, but not over the Elobey Islands or Mbanié, which continued to be depicted as outside Spanish sovereignty[61]. The 1895-1896 episode involving France's putative plan to establish a post on Mbanié thus only further illustrates that the two States maintained their competing claims, and in no way attests to any recognition of sovereignty, as Equatorial Guinea claims in its Memorial[62].

II. The conclusion and implementation of the Paris Convention (1900)

1.21 In early 1900, the two States entered into new negotiations on completely different bases. Having noted that attempts to partition the territories based on legal titles had led to an impasse, they focused this time on discussions of a transactional nature. In response to the opinion of the French Minister for the Colonies that

> "th[e] search for a transactional solution must be the sole objective of the new negotiations, and . . . to this end, the representatives of France and Spain must focus exclusively on the *de facto* situation of the two Powers north of the Congo. Any discussion of the law, besides reigniting debates fully exhausted in the previous talks, could . . . only serve to underline the irreconcilable differences between the two sides' interpretations of the instruments on which, since and including the Treaty of El Pardo of 1 March 1778, the claims of the two Powers have been based"[63],

the President of the Spanish Council gave the following assurance:

> "the objective of the Spanish Government is in no way to re-examine the titles invoked by the two Powers to justify their claims: this aspect of the question was already discussed at length by the Mixed Commission that met in Paris between 1886 and 1891, and . . . the Spanish plenipotentiaries were unable to reach an agreement with their French counterparts.

---

[58] Protocol No. 43 of the Franco-Spanish Commission for the Northern Delimitation of Gabon, 25 Apr. 1891 (CMG, Vol. III, Ann. 33). France wanted the territories involved in the arbitration to be limited to the coastal basins of the Muni, Benito and Campo Rivers (pp. 2-3, 9); Spain, for its part, rejected this limitation to the coast (pp. 3 and 6), and the inclusion of Elobey Chico in the arbitration, since France had failed to produce any legal title in respect of that island (pp. 11-12).

[59] Protocol No. 44 of the Franco-Spanish Commission for the Northern Delimitation of Gabon, 27 June 1891 (CMG, Vol. III, Ann. 34), p. 1.

[60] A statement of the rights of Spain over certain territories in the Gulf of Guinea, 1896 (CMG, Vol. III, Ann. 35); Internal Note for the French Ministry of Foreign Affairs relating to the "Disputed territories of Muny — Resumption of negotiations", 24 June 1899 (CMG, Vol. III, Ann. 36).

[61] Geographic Service of the French Army, sheet No. 34 (Libreville) of the map of Africa (Equatorial region), scale 1:2,000,000, prepared and drawn by the Head of the Engineer Corps, Regnauld de Lannoy de Bissy (known as the "Lannoy map"), versions from 1892 (CMG, Vol. II, Ann. C4) and 1896 (CMG, Vol. II, Ann. C7). See also Geographic Service of the Colonies (J. Hansen), Map of French Congo, scale 1:1,500,000, 1895 (CMG, Vol. II, Ann. C6).

[62] MEG, Vol. I, paras. 3.13-3.15.

[63] See Letter from the French Minister for the Colonies to the French Minister for Foreign Affairs, 26 Jan. 1900 (CMG, Vol. III, Ann. 40), p. 3; Letter No. 18 from the Ambassador of France to Spain to the French Minister for Foreign Affairs, 8 Feb. 1900, summarizing an enclosed Note of 6 Feb. 1900 from the Spanish Minister of State (CMG, Vol. III, Ann. 41), p. 3.

> This Government would therefore like the new negotiations to take an essentially practical approach by, of course, identifying solutions that will put an end to this longstanding and contentious issue, partitioning the territories in a way that fully preserves the interests of both nations."[64]

1.22 This was not therefore, contrary to what Equatorial Guinea seems to believe[65], a continuation of the purely legal work of the Mixed Commission based solely on a comparison of the titles invoked, but rather a change in the approach followed by the parties to resolve their dispute.

1.23 Determined to find a practical solution to their dispute by means of the transactional approach already initiated, within three months France and Spain had negotiated the Paris Convention, which fixed the land boundary between their possessions in the Gulf of Guinea, gave France a first option to purchase the mainland and islands attributed to Spain (Corisco and the two Elobey Islands) should the latter seek to dispose of them, and conferred rights on the nationals of the two States, in particular the right of free navigation in the parties' territorial waters for the purpose of accessing the boundary river, the Muni (**A**). The Paris Convention also set out the means by which the boundary fixed therein was to be demarcated: through the establishment of a mixed commission, whose field work, deemed unreliable by the Parties, was never formally approved or redone by them (**B**).

A. The negotiation of the Paris Convention

1.24 When the negotiations resumed on these new bases in Paris in 1900, Spain was represented by its Ambassador to Paris, Fernando de León y Castillo, and France by an official from the French Ministry of Foreign Affairs, René Lecomte. Naturally, these negotiators had only a very limited knowledge of the terrain.

1.25 The talks advanced rapidly, the two States having each set out the red lines of their claims and the areas of territory that they were willing to relinquish. Spain's red line was the Elobey Islands and the island of Corisco, as evidenced by the "Red Book" (a collection of Spanish *travaux préparatoires*) transmitted to Paris, which summarized Spain's position[66]. Not once does this book mention the islands of Mbanié, Cocotiers and Conga.

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[64] Note from the Spanish Minister of State to the French Ambassador to Spain, 6 Feb. 1900 enclosed with Letter No. 18 from the Ambassador of France to Spain to the French Minister for Foreign Affairs, 8 Feb. 1900 (CMG, Vol. III, Ann. 41), p. 2 (original: "el propósito del Gobierno español no es de ningún modo, entrar otra vez en el examen de los títulos alegados por ambas Potencias para justificar sus pretensiones : tal aspecto de la cuestión fue ya ampliamente discutido por la Comisión mixta reunida en Paris desde 1886 á 1891, sin que, a pesar de sus conciliadoras disposiciones y de la riquera de datos geográficos, históricos aportados al debate, pudieran los Plenipotenciarios españoles llegar á un acuerdo con sus colegas franceses. El deseo de este Gobierno sería, pues, dar a la nueva negociación un carácter esencialmente práctico, abordando desde luego aquellas soluciones proprias para terminar prontamente tan antigua y enojosa cuestión por medio de un reparto de territorios que deje enteramente á salvo los intereses de ambas naciones").

To facilitate the reading of this Counter-Memorial, Gabon has chosen to quote in the body of the text the (French or English) translation of any Spanish and, in some cases, German documents, and to include the original text in a footnote.

[65] MEG, Vol. I, para. 3.13.

[66] J. Pérez Caballero and F. Silvela, "Informe de la sección de política referente á la anterior real orden", 22 Nov. 1899 (CMG, Vol. III, Ann. 38), p. 13; Telegram from F. de León y Castillo to the President of the Council of Ministers and Spanish Minister of State, 2 Apr. 1900 (CMG, Vol. III, Ann. 44), p. 35.

1.26 At a meeting of 24 April 1900, Mr Lecomte verbally relayed a preliminary draft agreement to Mr de León y Castillo. The initial versions of the two main provisions, as far as delimitation was concerned, read as follows:

> "First provision: 'The boundary between the French and Spanish possessions in the Gulf of Guinea shall begin at the point where the thalweg of the Muni River intersects a straight line traced from the Coco Beach point to the Diéké point. It shall, then, proceed along the thalweg of the Muni River and of the Utamboni River until it reaches the source of that river, and shall proceed along the parallel running through the source of the said river until this parallel intersects the meridian 8° 50' east of Paris. From this point, the line of demarcation shall be formed by said meridian 8° 50' east of Paris until it meets the southern border of the German colony of Kamerun.
>
> In the event that the source of the Utamboni River lies to the east of the meridian 8° 50' east of Paris, it is that meridian which, starting at its intersection with the said river, shall form the boundary until it meets the southern border of the German colony of Kamerun.'
>
> Second provision: 'The French Government shall have the right of first refusal in the event that the Spanish Government wishes to cede in any way, in whole or in part, its possessions on the coast, as recognized in this Convention, as well as the Elobey Islands and the Island of Corisco.'"[67]

1.27 The second draft provision reflected earlier discussions between the parties regarding the Elobey Islands and the island of Corisco. Given the economic and security risks associated with those islands (lying at the mouth of the Muni River, they could become a hotbed for contraband that would be difficult to stop), France wished to obtain a first option to purchase them, in exchange for recognizing Spain's sovereignty[68].

1.28 On the day of the meeting, the Spanish Ambassador made no comment on the second provision and requested, with regard to the first provision, that the first paragraph be reworded in order to remove the reference to the source of the Utamboni River and to replace the meridian 8° 50' east of Paris with the meridian 11° east of Greenwich, and that the second paragraph be deleted. This resulted in the following text:

> "The boundary between the French and Spanish possessions in the Gulf of Guinea shall begin at the point where the thalweg of the Muni River intersects a straight line traced from the Coco Beach point to the Diéké point. It shall, then, proceed along the thalweg of the Muni River and of the Utamboni River up to the second point at which the first degree north latitude crosses the latter river, near the confluence with the Mouasi River, and shall proceed along this parallel until it intersects the meridian 11° east of Greenwich. From this point, the line of demarcation shall be formed by said

[67] Letter from R. Lecomte to the French Minister for Foreign Affairs, including preliminary draft agreement, 24 Apr. 1900 (CMG, Vol. III, Ann. 45), p. 104. *[This and all subsequent translations of this annex are based on the English text provided in Equatorial Guinea's Memorial, Vol. III, Ann. 4.]*

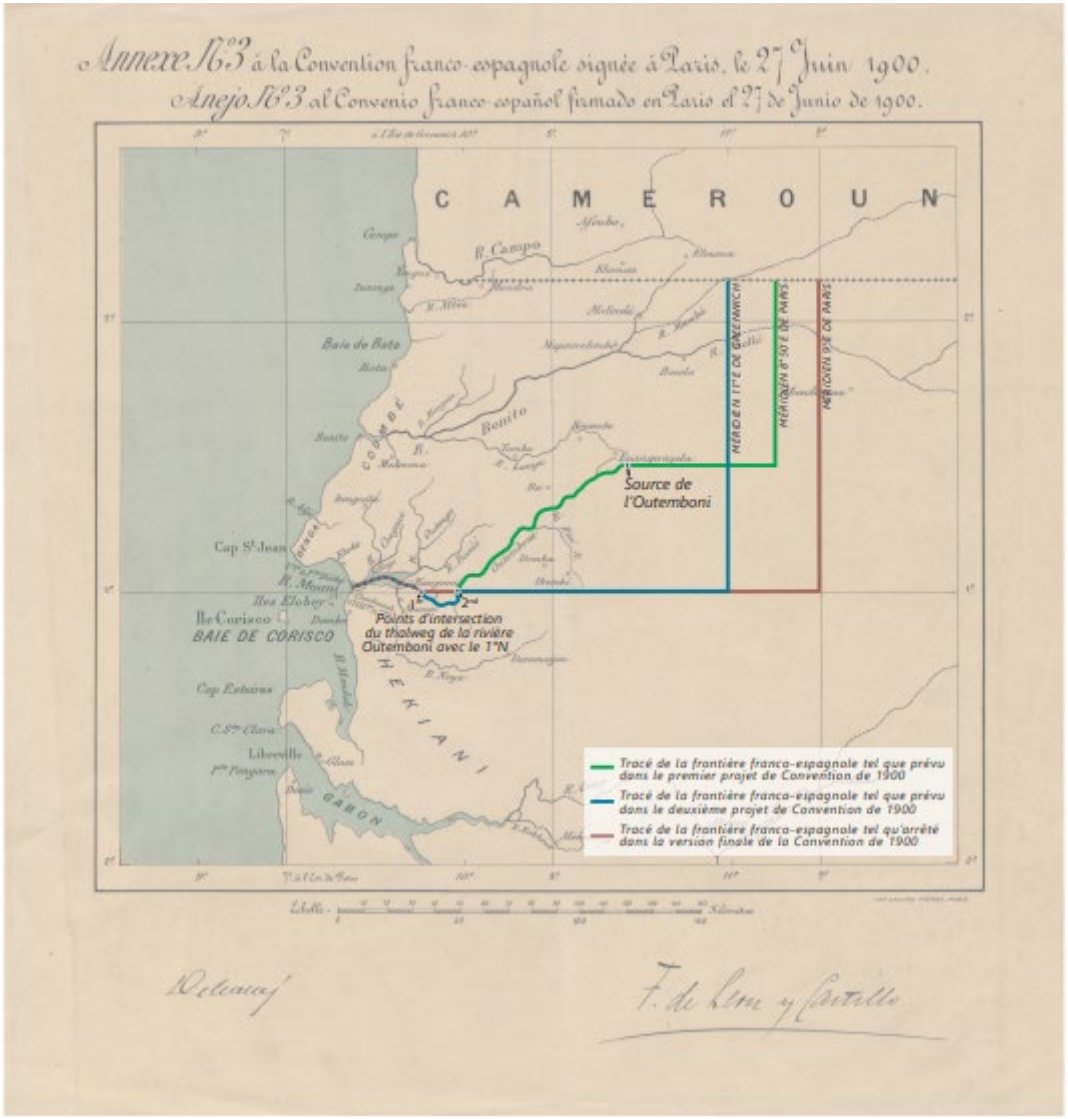
[68] See Letter from the French Minister for the Colonies to the French Minister for Foreign Affairs, 16 Mar. 1900 (CMG, Vol. III, Ann. 43), p. 2. This letter responds to the Letter from the French Minister for Foreign Affairs to the French Minister for the Colonies, 13 Mar. 1900 (MEG, Vol. IV, Ann. 54). See also J. Pérez Caballero and F. Silvela, *op. cit.*, p. 13.

meridian 11° east of Greenwich until it meets the southern border of the German colony of Kamerun."[69]

1.29 As compensation for Spain relinquishing to France the Idjil salt pans in the other region covered by the Paris negotiations — the coast of the Sahara near Cap Blanc — the Spanish Ambassador subsequently obtained two additional adjustments to this version: the point at which the eastward boundary would follow the 1° north parallel of latitude was moved, and the eastern segment of the boundary was shifted eastward, to follow the 9° east of Paris (11° 20' east of Greenwich) meridian rather than the 11° east of Greenwich meridian[70]. These successive proposals are illustrated in **sketch-map No. 1.3** below (see p. 21), in which the envisaged boundary lines have been superimposed onto the map used by the negotiators and ultimately annexed to the Paris Convention.

[69] Letter from R. Lecomte to the French Minister for Foreign Affairs, including preliminary draft agreement, 24 Apr. 1900 (CMG, Vol. III, Ann. 45), p. 5. A version of the 1:1,500,000-scale map of French Congo from the Geographic Service of the Colonies (J. Hansen) published in 1895, on which the two lines corresponding to the first and second proposed boundary lines were drawn in coloured ink — by the negotiators themselves, or by the French party at the very least — is stored in the archives of the French Ministry for Europe and Foreign Affairs, in the cartographic file relating to the negotiations of the 1900 Convention (CMG, Vol. II, Ann. C6).

[70] Letter from F. de León y Castillo to the Spanish Minister of State, 4 May 1900 (CMG, Vol. III, Ann. 46), p. 52.



Sketch-map No. 1.3
Proposed boundary lines

[Green: course of the Franco-Spanish boundary as set out in the preliminary draft of the 1900 Convention; blue: course of the Franco-Spanish boundary as set out in the second draft of the 1900 Convention; brown: course of the Franco-Spanish boundary as set out in the final version of the 1900 Convention]

1.30 The final text of the Convention, signed on 27 June 1900 in Paris, reflects these later adjustments obtained by Spain[71]. France and Spain exchanged ratifications on 20 March 1901[72].

[71] Convention on the delimitation of French and Spanish possessions in West Africa, on the coasts of the Sahara and the Gulf of Guinea, Paris, 27 June 1900, bilingual version (CMG, Vol. III, Ann. 47). See also MEG, Vol. III, Ann. 4. *[This and all subsequent translations of this annex are based on the English text provided in Equatorial Guinea's Memorial, Vol. III, Ann. 4.]*

[72] See Letter from the French Minister for Foreign Affairs to the French Minister for the Colonies, 23 Mar. 1901 (CMG, Vol. III, Ann. 48). See also Decree promulgating the convention concluded in Paris, on 27 June 1900, on the delimitation of French and Spanish possessions in West Africa, on the coasts of the Sahara and the Gulf of Guinea, *Journal officiel de la République française*, 2 Apr. 1901, p. 2190.

B. The content of the Paris Convention

1.31 Articles 1 to 3 of the Paris Convention concern the boundary between France and Spain on the coast of the Sahara and are therefore not relevant in the present case.

1.32 Several provisions relate to French and Spanish possessions in and on the coast of the Gulf of Guinea (Articles 4, 5 and 7). Article 6 and Articles 8 to 10 apply to both regions. The Convention is accompanied by three annexes.

1.33 Article 4 fixes the land boundary in the following terms:

> "The boundary between the French and Spanish possessions on the Gulf of Guinea shall begin at the point where the thalweg of the Muni River intersects a straight line traced from the Coco Beach point to the Diéké point. It shall, then, proceed along the thalweg of the Muni River and of the Utamboni River up to the first point at which the first degree north latitude crosses the latter river, and shall proceed along this parallel until it intersects the 9° longitude east of Paris (11° 20' east of Greenwich).
>
> From this point, the line of demarcation shall be formed by said meridian 9° east of Paris until it meets the southern border of the German colony of Kamerun."

1.34 Article 5 sets out a régime for the use of shared or neighbouring river and sea basins, based on the principles of non-discrimination and reciprocity, and co-operation in matters of policing:

> "For entry by sea into the Muni River, in Spanish territorial waters, French vessels shall enjoy, all the facilities that Spanish vessels enjoy. By way of reciprocity, Spanish ships in French territorial waters shall be treated in the same manner.
>
> Navigation and fishing shall be unhindered for French and Spanish subjects in the Muni and Utamboni Rivers.
>
> The navigation and fishing police in these rivers, in French and Spanish territorial waters, in the vicinity of the entrance to the Muni River — as well as other matters related to border relations, provisions concerning lighting, beacons, water management and use — shall be subject to conventions between the two Governments."

1.35 Article 6 provides that "the rights and advantages derived from articl[e] . . . V . . . shall be exclusively reserved for the subjects of both of the high contracting parties, and may not in any way be transferred or assigned to those of other nations".

1.36 Article 7 concerns the preferential right granted to France and refers specifically to the Elobey Islands and the island of Corisco. It provides:

> "In the event that the Spanish Government wishes to cede in any way, in whole or in part, its possessions recognized in articles I and IV of this Convention, as well as the Elobey Islands and the Island of Corisco, near the border with the French Congo, the French government shall have the right of first refusal under the same conditions as those proposed to the Spanish government."

1.37 Article 8 concerns the demarcation process and the relationship between the provisions of the body of the Convention and its annexes:

> "The boundaries delimited by this Convention shall be recorded on the attached maps (appendices numbers 2 and 3) with the reservations made in Appendix No. 1 to this Convention.
>
> Both Governments agree to designate Commissioners, within four months of exchanging ratifications, who shall be responsible for marking out on the ground the demarcation lines between the French and Spanish possessions, in accordance with and in the spirit of the provisions of the present Convention."

1.38 The final paragraph of Article 8 concerns the effects of fluvial changes on sovereignty over the islands in the rivers:

> "The two contracting powers agree that any subsequent change in the position of the thalweg of the Muni and Utamboni rivers shall not affect the property rights to the islands conferred to each of the two Powers in the Commissioner's report, duly approved by both Governments."

1.39 Appendix No. 1 sets out the framework for the demarcation mission. The purpose of that mission was to draw up maps in order to correct and supplement the topographic and toponymic representations in the cartographic annex to the Convention[73], and to transfer the conventional delimitation line onto those new maps. If any modifications appeared necessary, they had to be approved by the two Governments:

> "Although the course of the demarcation lines on the maps attached to the present Convention (appendices numbers 2 and 3) is generally assumed to be accurate, it cannot be considered an absolutely correct representation until confirmed by new surveys.
>
> Therefore, it is agreed that the Commissioners or local Delegates of both Nations who shall subsequently be responsible for delimiting all or part of the boundaries on the ground, shall use as a basis the description of the boundaries as established in the Convention. At the same time, they may modify the said lines of demarcation in order to determine them more accurately and to rectify the position of the dividing lines of the tracks or rivers, and of the towns or villages marked on the above-mentioned maps.
>
> The changes or corrections proposed by mutual agreement by the said Commissioners or Delegates shall be submitted to the respective Governments for approval."

1.40 The text is accompanied by a cartographic annex, Appendix No. 3, which is referred to in Article 8 and Appendix No. 1. That map is reproduced below, on p. 24[74].

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[73] See below, para. 1.40.

[74] Convention on the delimitation of French and Spanish possessions in West Africa, on the coasts of the Sahara and the Gulf of Guinea, Paris, 27 June 1900, Ann. 3 (CMG, Vol. II, Ann. C9). For a Spanish version of the map, see also MEG, Vol. III, Ann. 4, p. 74.

Annex C9
Convention on the delimitation of French and Spanish possessions in West Africa, on the coasts of the Sahara and the Gulf of Guinea, Paris, 27 June 1900, Appendix No. 3

III. The implementation of the Paris Convention and the failed demarcation (1901-1912)

1.41 In accordance with Article 8 of the Paris Convention, within four months of the exchange of ratifications, the parties appointed the "Commissioners . . ., who shall be responsible for marking out on the ground the demarcation lines between the French and Spanish possessions"[75]. The Spanish section consisted of Messrs Jover y Tovar (head), Vilches and Nieves, and the French, Messrs Bonnel de Mézières (head), Duboc and Roche. The mandate given to the French Commissioners was clear: "Your role, in effect, is outlined by the very text of the Agreement adopted

[75] Convention on the delimitation of French and Spanish possessions in West Africa, on the coasts of the Sahara and the Gulf of Guinea, Paris, 27 June 1900, bilingual version (CMG, Vol. III, Ann. 47), Art. 8.

on June 27, 1900, between the representatives of the two Powers involved"[76]. However the Commissioners may have interpreted their mandate, it did not consist in revising the land delimitation criteria set out in the Convention, as Equatorial Guinea's Memorial suggests[77].

1.42 The Demarcation Commission thus constituted began its work at the end of July 1901[78], starting with a survey of the thalweg of the Muni River (which flows into the sea). The Commissioners proceeded to explore the course of the boundary, determine the astronomical bearings of notable landmarks encountered along the way, and carry out route surveys on either side of the theoretical boundary, before transferring this information onto a map[79]. The two sections of the Commission, which exchanged reports as the mission progressed[80], then had to compare and harmonize their work to arrive at a common course for the boundary consistent with the Paris Convention. No markers were laid, but bark was removed from certain trees to show the waypoints along the route travelled[81].

1.43 The mission ended on 14 October 1901 when the two sections of the Commission reached the 2° 13' north parallel of latitude, i.e. the boundary with the German colony of Kamerun[82].

1.44 On 3 December 1902, the Spanish Government requested that the French and Spanish Commissioners meet "to review their respective work and give it the necessary uniformity"[83]. On 29 December 1902, having recently completed the field map of the demarcation line, the French Commissioners put themselves "at the Spanish Government's disposal to compare [their] work with that of the Spanish Commissioners"[84]. On 15 January 1903, both sections of the Demarcation Commission met in Paris to carry out this comparison and to "establish by mutual agreement the boundary line to be definitively adopted"[85]. On 8 April 1903, Mr Bonnel de Mézières provided the French Minister for the Colonies with the documents prepared by the Demarcation Commission,

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[76] Letter from the French Minister for the Colonies to the Head of the French Commission, 19 June 1901 (MEG, Vol. IV, Ann. 55).

[77] MEG, Vol. 1, paras. 3.41-3.50.

[78] See Letter No. 9 from Mr Bonnel de Mézières to the French Minister for the Colonies, 25 July 1901 (CMG, Vol. III, Ann. 49).

[79] On this *modus operandi*, see the Letter from the French Minister for the Colonies, 11 Sept. 1901 (CMG, Vol. IV, Ann. 51).

[80] See the Letter from Mr Jover y Toyar to Mr Bonnel de Mézières, 29 Aug. 1901, and reply of 12 Sept. 1901 (CMG, Vol. IV, Ann. 50).

[81] A. Cottes, *La mission Cottes au Sud-Cameroun (1905-1908): exposé des résultats scientifiques, d'après les travaux des divers membres de la section française de la Commission de délimitation entre le Congo français et le Cameroun (frontière méridionale) et les documents étudiés au Muséum d'histoire naturelle*, Paris (Ernest Leroux) (1911) (MEG, Vol. III, Ann. 16).

[82] M. Duboc, "Mission de délimitation franco-espagnole du Golfe de Guinée. Historique — Journal de route", *Revue coloniale*, No. 13, July-Aug. 1903 (CMG, Vol. IV, Ann. 58), pp. 47-48.

[83] Letter from the French Minister for Foreign Affairs to the French Minister for the Colonies, 5 Dec. 1902, transmitting the Note Verbale from the Spanish Embassy in Paris to the French Minister for Foreign Affairs, 3 Dec. 1902 (CMG, Vol. IV, Ann. 52).

[84] Note from the French Ministry of Foreign Affairs relating to the Franco-Spanish delimitation of the Gulf of Guinea, 29 Dec. 1902 (CMG, Vol. IV, Ann. 53).

[85] Note Verbale from the Embassy of Spain in France to the French Ministry of Foreign Affairs, 8 Jan. 1903 (CMG, Vol. IV, Ann. 54).

including its proposed description of the boundary, as he himself had drafted it[86]. The French Government then sent these documents to the Spanish Government so that it could examine them before reaching a decision on the proposal and ratifying it[87].

1.45 In July and September 1905, Spain having remained silent since the documents had been sent, the French Ambassador to Madrid followed up with the Spanish Minister of State, seeking a decision from his Government on the ratification of the work of the Demarcation Commission[88]. On 2 October 1905, the two Spanish Commissioners, who had been asked by their Government to check whether the calculations made by the Demarcation Commission in establishing locations along the eastern boundary were accurate, reviewed those calculations and responded that they were, stating that "if there were any errors, they could only be on account of the instruments used, and would be impossible to uncover without carrying out the field operations anew, with more time and in better conditions than those that had been enjoyed by the Commission"[89].

1.46 After thorough examination, however, the French Minister for the Colonies, for his part, pointed out several significant errors[90], relying on the findings of a report of 28 February 1907 by Mr Cottes (a member of the Mixed Commission tasked with demarcating the boundary between Gabon and Kamerun), including: the position of Mitombé creek; the considerable differences in the course of the eastern portion of the land boundary between the maps drawn up by the Spanish and the French sections of the Commission; the position of the 9° east of Paris meridian, which was off by 45 km; and the position of the south-eastern angle of mainland Guinea (the intersection of the 9° east of Paris meridian with the 1° north parallel of latitude), which was off by 35 km in longitude and 15 km in latitude[91].

1.47 Two months later, the Spanish Government officially informed the French Government that it refused to ratify the work of the Demarcation Commission[92]. In its view, the matter could not be settled until fresh cartographic and documentary research by both parties was able to give "a clear

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[86] Letter from the French Minister for the Colonies to the French Minister for Foreign Affairs, 8 Apr. 1903 (CMG, Vol. IV, Ann. 57). In addition to a map and a sketch-map not found in the archives, the demarcation file thus transmitted contained the following documents: (i) the proposed eastern boundary (MEG, Vol. III, Ann. 13), (ii) the proposed southern boundary (MEG, Vol. III, Ann. 14), (iii) the "table[s] of the villages recognized by the Delimitation Commission of Spanish Guinea, with names of chiefs, tribes, and nationality according to the border project", one for the southern boundary (MEG, Vol. III, Ann. 15) and the other for the eastern boundary (Table of villages recognized by the Delimitation Commission of Spanish Guinea, with chiefs of tribes and nationality according to the proposed boundary, eastern boundary, 20 Mar. 1903 (CMG, Vol. IV, Ann. 55)), (iv) the route followed by the Commission (MEG, Vol. III, Ann. 12) and, lastly, (v) a Note on the assessment of the land ceded by France and Spain, respectively, according to the proposed boundary presented by the Commission, 20 Mar. 1903 (CMG, Vol. IV, Ann. 56)).

[87] See Letter No. 391 from the French Minister for Foreign Affairs to the French Minister for the Colonies, 31 July 1905 (CMG, Vol. IV, Ann. 60), mentioning that he had sent the complete delimitation proposal to the Spanish Government in Sept. 1903.

[88] See Letter No. 124 from the Ambassador of France to Spain to the French Minister for Foreign Affairs, 24 July 1905 (CMG, Vol. IV, Ann. 59); Letter No. 261 from the French Ambassador to Spain to the [Spanish] Minister of State, 10 Sept. 1905, attached to the Letter from the French Minister for Foreign Affairs to the French Minister for the Colonies, 19 Sept. 1905 (CMG, Vol. IV, Ann. 61).

[89] Report of Mr Vilches and Mr Nieves to the Colonial Division of the Spanish Ministry of State, 2 Oct. 1905 (CMG, Vol. IV, Ann. 62), p. 2.

[90] Letter from the French Minister for the Colonies to the French Minister for Foreign Affairs, 1 Dec. 1906 (MEG, Vol. IV, Ann. 55*bis*).

[91] Mr Cottes, "Note on Spanish Guinea", 28 Feb. 1907, appended to the Letter from the French Minister for the Colonies to the French Minister for Foreign Affairs, 5 Mar. 1907 (CMG, Vol. IV, Ann. 63), pp. 2-3.

[92] Letter from the Spanish Minister of State to the Ambassador of France to Spain, 20 Apr. 1907 (CMG, Vol. IV, Ann. 64), p. 2. The technical report referred to in the letter, which addresses the causes of the errors, was reproduced as MEG Ann. 56.

understanding of the merit of [the Commission's] work"[93]. This approach was welcomed by the French Minister for the Colonies[94], and Spain and France exchanged the documents and maps enabling a new analysis of the accuracy of the Demarcation Commission's work to be carried out[95]. It is thus clearly erroneous to consider, as Equatorial Guinea does in its Memorial[96], that the two States accepted the outcome of the Demarcation Commission's work. On the contrary, they agreed that it needed to be redone.

1.48 On 11 July 1908, the Spanish Government sent a Note to the French Minister for Foreign Affairs setting out its own analysis. That Note listed the astronomical errors made by the Demarcation Commission, which had seemingly been caused by the use of defective chronometers[97]. To correct those errors, the Note proposed drawing up a new map of the boundary area by referring, depending on the sector, either to the work of the Demarcation Commission or to more recent astronomical data, considered to be accurate, obtained during (Franco-German and Spanish-German) exploration and demarcation missions carried out since 1901[98].

1.49 Spain and France did not revise the (unratified) work of the Demarcation Commission, nor did they take any further steps to demarcate the boundary fixed by the Paris Convention. Thus, far from accepting the Demarcation Commission's proposal to use natural features to demarcate the boundary, as Equatorial Guinea asserts in its Memorial[99], the two States reaffirmed their commitment to the conventional criterion[100]. However, the lack of demarcation sparked occasional incidents on the ground[101].

1.50 In conclusion, the Paris Convention, the result of a transactional approach which attached no importance to the titles previously put forward by each party, made it possible to resolve a 40-year-old territorial dispute in a few months of negotiations by fixing, if not on the ground, at least in the view of the law, the land boundary between the Spanish and French territories in the Gulf of Guinea, and granting to Spain sovereignty over the Elobey Islands and Corisco Island. Although the process of demarcating that boundary failed for lack of approval by the Spanish and French Governments, those governments never modified the course of the boundary.

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[93] *Ibid*., p. 6.

[94] Letter from the French Minister for the Colonies to the French Minister for Foreign Affairs, 29 June 1907 (CMG, Vol. IV, Ann. 65), p. 1.

[95] Letter from the French Minister for the Colonies to the French Minister for Foreign Affairs, 25 Feb. 1908 (CMG, Vol. IV, Ann. 66).

[96] MEG, Vol. I, para. 3.53.

[97] See Note from Mr d'Almonte of 8 May 1908, transmitted to the French Minister for Foreign Affairs by Letter No. 206 from the Ambassador of France to Spain to the French Minister for Foreign Affairs, 11 July 1908 (CMG, Vol. IV, Ann. 67), pp. 3-7.

[98] *Ibid*., pp. 11-13.

[99] MEG, Vol. I, paras. 3.52-3.53.

[100] Letter from the French Minister for the Colonies to the French Minister for Foreign Affairs, 15 Mar. 1909 (CMG, Vol. IV, Ann. 68), p. 3. See also Letter No. 212 from the French Lieutenant-Governor of Gabon to the Governor-General of the Spanish Territories in the Gulf of Guinea (16 Aug. 1927) (MEG Vol. IV, Ann. 76), p. 2; Letter No. 712 from the Lieutenant-Governor of Gabon to the Governor-General of French Equatorial Africa, 24 Dec. 1927 (CMG, Vol. IV, Ann. 77), pp. 3-4.

[101] See *inter alia* the Letter from the French Minister for the Colonies to the French Minister for Foreign Affairs, 15 Mar. 1909 (CMG, Vol. IV, Ann. 68), pp. 2-3.

CHAPTER II
FROM THE PARIS CONVENTION TO THE BATA CONVENTION

2.1 Following the failure of the Demarcation Commission established under the Paris Convention in 1901 and the rejection of its work by the French and Spanish Governments[102], the delimitation of the land boundary set out in the Paris Convention was confirmed first by the colonial authorities and subsequently by Gabon and Equatorial Guinea. The boundary thus delimited was modified neither in the period from 1912 to 1916 when the German Empire occupied and administered the territories to the south and east of Spanish Guinea (**I**), nor during the colonial period following the withdrawal of the German authorities (**II**), nor after Gabon and Equatorial Guinea became independent (**III**).

I. The period from 1912 to 1916

2.2 On 4 November 1911, the French Republic and the German Empire concluded a convention relating to their possessions in Equatorial Africa (the "Berlin Convention")[103]. In accordance with Article 1 of that instrument, France ceded several territories to Germany, in particular the northern part of Gabon adjacent to mainland Spanish Guinea[104]. The territories thus acquired by Germany were incorporated into the new colony of Neukamerun. The conditions governing the handover of the ceded territories were set out by the two parties in a declaration of 28 September 1912 (the "Bern Declaration")[105]. Under this agreement, the territories to the south of the boundary of Spanish Guinea and those located to the east of that Spanish colony were transferred to German administration in October 1912; they subsequently became the new districts of Muni and Wolö-Ntem[106]. The new territorial situation thus created is shown in **sketch-map No. 2.1** below (see page 29).

2.3 This transfer of territories between France and Germany did not call into question the land boundary with Spanish Guinea established by, and described in, the Paris Convention.

2.4 The German authorities confirmed the existence of that boundary and its course as set out in Article 4 of the Paris Convention by depicting it on the maps of Kamerun which were drawn up by Mr Moisel in 1911 and 1912[107] and of which the Spanish authorities were aware. They also expressed their surprise that there were Spanish posts south of the 1° north parallel of latitude, in particular at the bend in the Utamboni River[108].

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[102] See above, paras. 1.15-1.20.

[103] Convention between France and Germany relating to their possessions in Equatorial Africa, Berlin, 4 Nov. 1911, in J. Basdevant, *Traités et conventions en vigueur entre la France et les puissances étrangères*, Vol. 1 (1918), pp. 118-126.

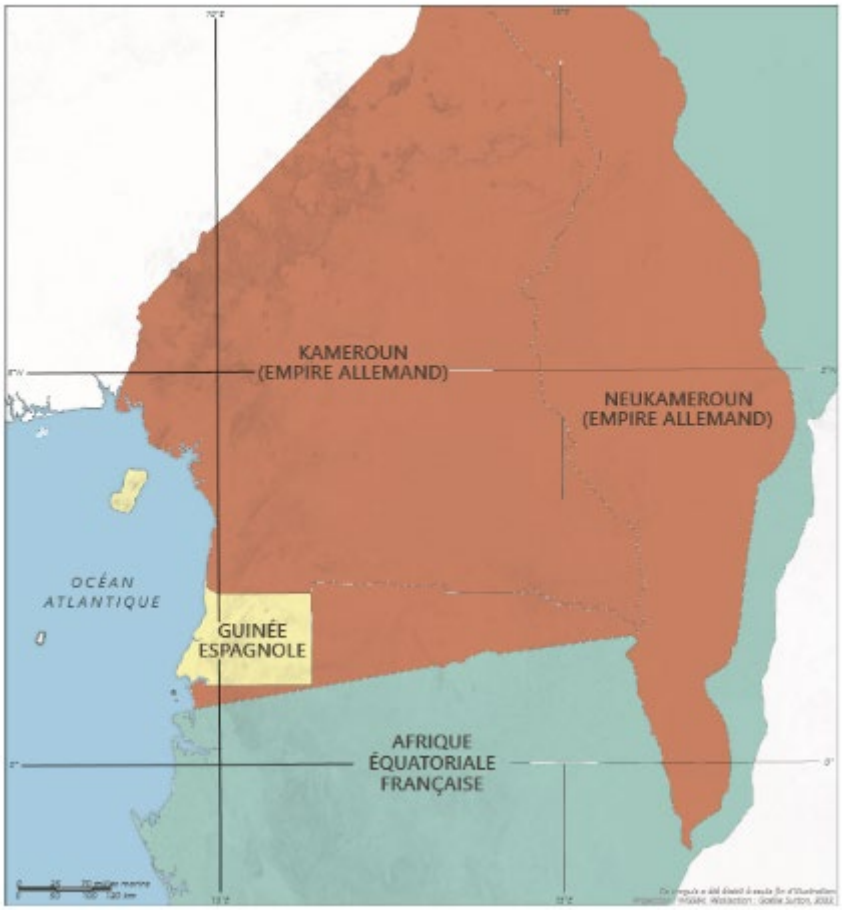
[104] *Ibid.*, Art. 1.

[105] Declaration of the Government of the French Republic and the Government of His Majesty the Emperor of Germany determining the boundary between French Equatorial Africa and Kamerun, setting out the handover conditions for the exchanged territories and settling certain related matters, 28 Sept. 1912, in J. Basdevant, *op. cit.*, pp. 135-153.

[106] Order of the Imperial Governor creating administrative districts in Neukamerun, 6 Mar. 1913 (CMG, Vol. IV, Ann. 70).

[107] Map of Kamerun by Mr Moisel, sheet H1, 2: Kribi, 15 Aug. 1911; sheet I1: Muni; and sheet I2: Ojem, 1 Apr. 1912 (CMG, Vol. II, Ann. C11).

[108] Report of the Head of Ekododo Station, 30 Nov. 1912 (CMG, Vol. IV, Ann. 69), pp. 11-12; Report No. 1380 of the Imperial Government of Kamerun concerning the Muni expedition, 16 July 1914 (CMG, Vol. IV, Ann. 71).



Sketch-map No. 2.1
The limits of German, Spanish and French possessions under the Berlin Convention (1911)

2.5 The Spanish authorities confirmed on several occasions that the boundary line established by the Paris Convention remained valid, as the documents submitted to the case file by Equatorial Guinea show.

(a) In a letter to the Spanish Ambassador to Berlin regarding a proposed new delimitation between Spanish Guinea and the German colonies, the Spanish Minister for Foreign Affairs noted that:

> "the Spanish territory of the Gulf of Guinea is completely surrounded by the new territories acquired by Germany, without the borders being delimited except for parallels 1° and 2° 10' 20" north latitude, and the meridian 9° longitude east of Paris, intangible lines not established on the ground"[109].

The Minister proposed that a future Spanish-German delimitation commission should be tasked with "establish[ing], using signals, the 1° and 2° 10' 20" parallels latitude north, and [the] meridian 9° longitude east of Paris"[110], and with carrying out an "on-site study of the natural

[109] Letter from the Spanish Minister for Foreign Affairs to the Ambassador of Spain to the German Empire, 4 Feb. 1914 (MEG, Vol. IV, Ann. 62) (Equatorial Guinea's translation of the original Spanish: "el territorio español del Golfo de Guinea queda rodeado en todas sus partes por los nuevos territorios adquiridos por Alemania, sin que las fronteras estén delimitadas nada mas, que por los paralelos 1° y el de 2° 10' y 20" ambos de latitud Norte, y el meridiano 9° de longitud Este de Paris, lineas inmateriales no fijadas sobre el terreno").

[110] *Ibid.*, p. 225 (Equatorial Guinea's translation of the original Spanish: "fijar por medio de señles los paralelos de un grado, y el de 2° 10' 20" ambos de latitud Norte, y el meridiano 9° de longitud Este de Paris").

boundaries that may comprise the border, once approved by both the governments of Madrid and Berlin"[111].

(b) The report of Mr Olshausen, a German member of the Spanish-German Commission formed in May 1914, also confirms that the boundary line established by the Paris Convention continued to apply between Germany and Spain. Although the purpose of the astronomical and topographic surveys conducted by the Commission was to establish a delimitation line along rivers and other identifiable features on the ground, the starting-point remained the existing boundary. Mr Olshausen noted in this regard the agreement with the Spanish Commissioner that:

> "the two commissions should abstain from exercising [S]tate sovereign rights, in particular of administrative acts and jurisdiction, in the respective foreign territory; in this respect, the agreement entered into in July of last year is still valid, according to which the theoretical border should be binding as drawn on Moisel's map until the new borders have been determined"[112].

(c) It was on this basis, moreover, that from the moment he arrived in the region, Mr Olshausen protested against Spain's presence in Asobla, which according to the Moisel map lay to the south of the 1° north parallel of latitude[113].

2.6 The work of the Spanish-German Delimitation Commission was cut short by the First World War, before an agreement on a boundary line following natural features — and the Utamboni River in particular — could be reached by the Commission, contrary to what Equatorial Guinea claims in its Memorial[114]. In support of its position, Equatorial Guinea has produced a French-language version of a document[115] which it has entitled a "Decree Signed by the German Empire and the Kingdom of Spain for the Delimitation Between Spanish Guinea and the Protectorate of Cameroon", and which it has filed under "Colonial legislation" in its annexes. However, the document in question is not a decree signed by the two States. The title that appears in the document is "Acte" (translated by Equatorial Guinea as "Record"). The document is dated 19 August 1914 and is signed by the German and Spanish Commissioners only. It contains an account of the work and the investigations carried out by the Commission. In a letter sent to the French authorities in 1919, the Spanish Commissioner himself referred to the document, describing it as "un acta de los trabajos realizados y de las comprobaciones hechas, acta que fué firmada por mi como Jefe de la mision española, y por el Dr. Olshausen como Jefe de la mision Alemana"[116], which Equatorial Guinea has conveniently mistranslated as "an agreement on the work completed and verifications made . . . [, which] was signed by me as head of the Spanish mission and by Dr. Olshausen as head of the German mission"[117]. Equatorial Guinea's linguistic manoeuvring cannot change the nature of this

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[111] *Ibid.* (Equatorial Guinea's translation of the original Spanish: "estudien sobre el terreno los limites naturales que en su día deben constituir las fronteras, una vez que merezcan la sanción de ambos Gobiernos de Madrid y Berlín").

[112] Report No. 4, Imperial German Muni Expedition, 16 June 1914 (MEG, Vol. IV, Ann. 63) (Equatorial Guinea's translation of the original German: "die beiden Kommissionen sich der Ausübung staatlicher Hoheitsrechte, insbesondere von Verwaltungsakten und der Gerichtsbarkeit, auf dem jeweilig fremdstaatlichen Gebiete zu enthalten haben; in dieser Hinsicht gilt nach wie vor die im Juli v. Js. getroffene Abrede, wonach die theoretische Grenze in der auf der Moiselschen Karte eingezeichneten Weise massgebend sein soll, bis die neuen Grenzen festgelegt sind").

[113] Report No. 1380 of the Imperial Government of Kamerun concerning the Muni expedition, 16 July 1914 (CMG, Vol. IV, Ann. 71).

[114] MEG, Vol. I, paras. 3.59-3.60.

[115] MEG, Vol. V, Ann. 115.

[116] Letter from the Governor-General of Spanish Guinea to the Governor-General of French Equatorial Africa, 1 May 1919 (MEG, Vol. IV, Ann. 67) (our translation: "un procès-verbal relatif aux travaux effectués et aux investigations faites, procès-verbal qui a été signé par moi, chef de la mission espagnole, et par le Dr. Olshausen, chef de la mission allemande").

[117] *Ibid.*, p. 275 (Equatorial Guinea's translation).

document, however: it is simply a record, a working document, signed by the German and Spanish Commissioners, describing the work carried out and the investigations conducted. Moreover, the Commissioners expressly "waive[d], for the moment, expressing itself on the general question of the exchange of territories between the two Colonies"[118].

2.7 Equatorial Guinea also wrongly claims that the Spanish-German Commission identified or assigned "the nationality of the towns in the area" based on their location in relation to the Utamboni River[119]. In the record signed on 19 August 1914, the members of the Commission simply recorded their findings regarding the towns and villages in the region in relation to the "astronomical observations made by the two sections [and] the routes followed"[120]; in other words, they determined the geographical co-ordinates of those locations or their representation on the Moisel map, in order to ascertain whether they lay to the north or south of the 1° north parallel of latitude, the boundary established by the 1900 Paris Convention. This was very clearly confirmed a few years later by the Governor-General of Spanish Guinea, Mr Barrera, who was a member of the Spanish-German Commission and a signatory of that protocol:

> "[I]n 1914, regarding the land for the Spanish-German delimitation mission, the geographical location of some of these places was verified; it was seen that several of them were located north of the first parallel north and[,] therefore, were in Spanish territory."[121]

2.8 In early 1916, the German forces withdrew and France regained possession of the territories previously ceded to Germany, effectively ending the colony of Neukamerun. The Treaty of Versailles formalized Germany's renunciation of "all her rights and titles over her oversea possessions"[122]. This brief period of German rule did not bring about changes to the delimitation established by the Paris Convention; on the contrary, the German and Spanish authorities confirmed that the boundary established by the Paris Convention remained in force. The Treaty of Versailles marked a return to the *status quo ante*.

II. The period from 1918 to 1960

2.9 After France regained full control over the territory of present-day Gabon, and until Gabon's independence in 1960, the practical uncertainties generated by the lack of demarcation continued to grow. Nevertheless, between 1918 and 1960, France and Spain neither demarcated nor modified their common boundary in Equatorial Africa. As independence approached for Gabon and

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[118] MEG, Vol. V, Ann. 115, p. 63.

[119] MEG, Vol. I, paras. 3.59-3.60.

[120] MEG, Vol. V, Ann. 115, pp. 63-64.

[121] Letter from the Governor-General of Spanish Guinea to the Governor-General of French Equatorial Africa, 1 May 1919 (MEG, Vol. IV, Ann. 67) (Equatorial Guinea's translation of the original Spanish: "pero comprobada en 1914, sobre el terreno por la misión hispano-alemana de delimitación, la situación geográfica de algunos de aquellos lugares, se vió, que bastantes de entre ellos esban emplazados al Norte del paralelo de un grado de latitud Norte y por lo tanto, en territorio español").

[122] Treaty of Peace between the United States of America, the British Empire, France, Italy and Japan, and Belgium, Bolivia, Brazil, China, Cuba, Ecuador, Greece, Guatemala, Haiti, the Hejaz, Honduras, Liberia, Nicaragua, Panama, Peru, Poland, Portugal, Romania, the Serb-Croat-Slovene State, Siam, Czecho-Slovakia and Uruguay, of the one part, and Germany, of the other part, Versailles, 28 June 1919, *Consolidated Treaty Series*, Vol. 225, p. 188, Art. 119. See also *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 331, para. 34.

Equatorial Guinea, the delimitation established by the Paris Convention remained in force and applicable.

A. The ongoing uncertainty surrounding the land boundary

1. *The southern boundary of Spanish Guinea*

2.10 Equatorial Guinea suggests in its Memorial that, despite the delimitation agreed between France and Spain in 1900, the Spanish colonial authorities administered territories to the south of the 1° north parallel of latitude without protest from the French colonial authorities[123]. Once again, this presentation of the facts does not reflect the reality and is contradicted by the documents submitted by Equatorial Guinea.

2.11 Throughout the colonial period, the lack of demarcation and boundary markers inevitably gave rise to border incidents. These incidents were fuelled by differences of opinion regarding the geographical location of places on either side of the 1° north parallel of latitude.

2.12 The incidents were reported by the colonial and central authorities of France to their Spanish counterparts. In fact, the letters from the Governor-General of Spanish Guinea to the Governor of French Gabon dated 22 November 1917 and 1 May 1919, which feature prominently in Equatorial Guinea's Memorial[124], concern incidents in and incursions by the Spanish authorities into territories which France considered to be a part of Gabon[125]. The Spanish authorities justified their actions by explaining that, according to the information at their disposal, the locations in question were situated well north of the 1° north parallel of latitude and thus in Spanish territory under the Paris Convention. Moreover, in a letter of 16 August 1927, the Governor of the Colony of Gabon vigorously protested against the incursions of the Spanish authorities, emphasizing that:

> "Without a doubt, the borders determined in the Convention signed by France and Spain on June 29, 1900, were never determined on site. But this imprecision of our borders does not justify the encroachments indicated above that were indicated in the villages that are clearly dependent upon our government."[126]

2.13 The French colonial authorities also notified their superiors of multiple incidents, particularly along the southern boundary of Spanish Guinea, and informed them of the protests sent to the Spanish authorities[127].

2.14 In 1928, Spain agreed to leave "all the disputed villages whose positions did not allow it to claim with absolute certainty that they were located in Spanish territory", pending the final

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[123] MEG, Vol. I, paras. 3.54-3.56.

[124] *Ibid.*, paras. 3.68-3.84 and 6.36-6.40.

[125] Letter from the Governor-General of the Spanish Territories in Africa to the Governor of French Gabon, 22 Nov. 1917 (MEG, Vol. IV, Ann. 65); Letter from the Governor-General of Spanish Guinea to the Governor of French Equatorial Africa, 1 May 1919 (MEG, Vol. IV, Ann. 67).

[126] Letter No. 212 from the Lieutenant-Governor of Gabon to the Governor-General of the Spanish Territories in the Gulf of Guinea, 16 Aug. 1927 (MEG, Vol. IV, Ann. 76).

[127] Letter No. 639 from the Governor-General of French Equatorial Africa to the French Minister for the Colonies, 24 Dec. 1920 (CMG, Vol. IV, Ann. 73); Letter No. 507 from the Governor-General of French Equatorial Africa to the French Minister for the Colonies, 15 Sept. 1927 (CMG, Vol. IV, Ann. 74).

settlement of the matter[128]. Referring to this agreement, the Governor-General of French Equatorial Africa noted that: "Under these conditions, it is important that neither side take any action that might have a bearing on that final settlement."[129]

2.15 France, moreover, consistently reaffirmed its rights under the Paris Convention. In 1936, the Order of the Governor-General of French Equatorial Africa on the limits of the departmental subdivisions of the region of Gabon[130] confirmed, in its definition of the northern limits of the border subdivisions of Cocobeach and Mitzic, that France was committed to the 1900 land boundary delimitation line, namely the 1° north parallel of latitude. The northern limit of the Cocobeach subdivision was described as follows:

> "Until its intersection with the Abanga River, the boundary of Spanish Guinea as defined by the Treaty of 29 June 1900, i.e.: 'From the point where the thalweg of the Muni River intersects a straight line traced from the Coco Beach point to the Diéké point[;] along the thalweg of the Muni River and of the Utamboni River up to the first point at which the first degree north latitude crosses the latter river. The boundary shall then proceed along this parallel'"[131].

The northern limit of the Mitzic subdivision was also consistent with the delimitation set out in the Paris Convention: "The boundary between Gabon and Spanish Guinea (1° north parallel of latitude until its intersection with the 9° east of Paris meridian (11° 20' [east] of Greenwich)".[132]

2.16 It was not until 1937 that the authorities of Spanish Guinea first claimed[133] that the 1° north parallel of latitude constituted the boundary only from its second point of intersection with the Utamboni River, leaving the territories to the north of the bend in the river to Spanish Guinea[134]. This position was vigorously rejected by the French authorities:

> "This interpretation is unquestionably wrong. The wording of Article 4 of the [Paris] Convention leaves no room for doubt in this regard: 'The boundary shall proceed along the thalweg of the Muni River and of the Utamboni River up to the first point at which the first degree north latitude crosses the latter river, and shall proceed along the Paris parallel of longitude'.
>
> It is thus a simple question of fact. It is a case of determining the point at which the parallel first crosses the river. That point is in fact located some distance upstream of Kanganié: from there, the Utamboni drops below the parallel and, after curving

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[128] Letter No. 497 from the Governor-General of French Equatorial Africa to the Lieutenant-Governor of Gabon, 3 Nov. 1928 (CMG, Vol. IV, Ann. 78).

[129] *Ibid.*

[130] Order of the Governor-General of French Equatorial Africa, 5 Nov. 1936 (CMG, Vol. IV, Ann. 87).

[131] *Ibid.*, Art. 1, pp. 1-2. The date of 29 June 1900 in the original is an error; the Paris Convention was signed on 27 June 1900. *[This and all subsequent translations of this annex are based on the English text provided in Equatorial Guinea's Memorial, Vol. III, Ann. 4.]*

[132] *Ibid.*, p. 4.

[133] See the explanations concerning the boundary in the vicinity of this river provided by the Governor-General of Spanish Guinea in his letter of 27 Jan. 1920 (MEG, Vol. IV, Ann. 69).

[134] Letter No. 439 from the French Minister for the Colonies to the Governor-General of French Equatorial Africa, 3 May 1937 (CMG, Vol. IV, Ann. 88); Letter-telegram No. 1222 from the Deputy-Governor to the Governor-General of French Equatorial Africa, 19 June 1937 (CMG, Vol. IV, Ann. 89). See also Letter No. 18 from the Head of the Cocobeach Subdivision to the Head of the Estuaire Department, 9 Mar. 1940 (CMG, Vol. IV, Ann. 90).

broadly, heads northward and crosses the 1° north parallel of latitude for the second time."[135]

2. ***The eastern boundary of Spanish Guinea***

2.17 Until the end of the First World War, the eastern boundary of Spanish Guinea, fixed at the 9° east of Paris meridian under the Paris Convention, was not a source of concern for the colonial Powers. Moreover, Spain did not take effective possession of this part of Spanish Guinea until the early 1920s.

2.18 It was not until 1919, after France had re-established its presence in Gabon, that the colonial administrations, on the proposal of the Governor-General of Spanish Guinea, Mr Barrera, agreed on a provisional boundary line considered more practicable and easier to identify. In an initial letter of 22 November 1917, the Governor-General worded that proposal as follows:

> "en la parte Este del territorio español, entre el paralelo de 2° - 10' - 20" de latitud Norte y el lugar donde nace el rio Kie, podamos considerar come frontera provisional dicho rio, en tanto no se llegue a una delimitación exacta de frontera, con la cual se alejará toto motivo de incidente en casi la mitad Norte de la frontera Este de la Guinea Española"[136].

Equatorial Guinea has included a typed transcript of Governor Barrera's letter in the case file, without identifying its source. It has translated that part of Governor Barrera's proposal as follows:

> "in the eastern part of the Spanish territory, between the 2° 10' 20" N line of latitude and the source of the Kié River, we could consider the temporary border to be that river while there is no exact border delimitation. This would remove any motive for an incident in almost the northern half of the eastern border of Spanish Guinea"[137].

A more accurate translation of this passage would be:

> "in the eastern part of the Spanish territory, between the parallel of latitude 2° 10' 20" North and the location of the source of the Kié river, we can consider this river as a provisional border, as long as an exact delimitation of the border has not yet been established, which will remove any cause for incident in almost all the northern half of the eastern border of Spanish Guinea"[138].

2.19 In his reply, the Governor-General of French Equatorial Africa confirmed that the French central authorities had agreed to the proposal "regarding recognition of the N'KYE stream as the

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[135] Letter No. 439 from the French Minister for the Colonies to the Governor-General of French Equatorial Africa, 3 May 1937 (CMG, Vol. IV, Ann. 88); Letter from the National Commissioner for Foreign Affairs to the National Commissioner for the Colonies, 27 Feb. 1943 (CMG, Vol. IV, Ann. 91).

[136] Letter from the Governor-General of the Spanish Territories in Africa to the Governor of French Gabon, 22 Nov. 1917 (MEG, Vol. IV, Ann. 65).

[137] *Ibid.*

[138] *Ibid.* Gabon's translation of the original Spanish.

provisional border between your colony and the occupied territories of New Cameroon in the hopes that a definitive, exact delimitation may be made"[139].

2.20 Governor Barrera replied on 1 May 1919, endorsing the adoption of the provisional boundary[140]. In the same letter, the Governor-General also put forward more detailed proposals for a provisional line proceeding southward as far as the southern boundary of Spanish Guinea along clearly identified rivers and roads, noting that:

> "this way[,] as long as the borders are not definitively established, [the limits] I have indicated could provisionally be the limits of Spanish territory; these are more tangible limits than the meridian, and this would dispel any incidents"[141].

2.21 The letter also states that these proposals were made on the basis of the 1914 Moisel map[142], on which the roads, towns and rivers are identifiable. Taking the view that this matter should be resolved through diplomatic channels, the French colonial authorities did not respond to the proposal regarding the provisional line in the southern section of the eastern boundary[143].

2.22 Neither in the minds of the French authorities, nor in the wording proposed by the Spanish authorities did the provisional arrangement of 1919 constitute a definitive delimitation or demarcation within the meaning of Article 8 and Appendix No. 1 of the Paris Convention, as Equatorial Guinea claims[144]. Moreover, at no time did those involved invoke those provisions or express a desire to have that provisional arrangement replace the description of the boundary set out in Article 4 of the Paris Convention. It was merely a temporary measure to reduce border incidents pending a final, precise delimitation of the boundary. That precise delimitation never took place.

2.23 The French authorities paid close attention to this matter, particularly because of the uncertainty surrounding the exact geographical location of the Kie River, which was depicted very differently on the 1911 Moisel map than on the one drawn up in 1914[145]. The French Minister for the Colonies stated in this regard that:

> "According to relatively recent work coming from the colony, the Kie largely follows the 9° meridian, the boundary provided for in the 1900 agreement; on the Moisel map, however, the middle section of this watercourse deviates from that meridian by about 9 km: it is essential that I have the position of this river verified, in order to

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[139] Letter No. 03 from the Governor-General of French Equatorial Africa to the Governor-General of the Spanish Territories in the Gulf of Guinea, 24 Jan. 1919 (MEG, Vol. IV, Ann. 66) (Equatorial Guinea's translation of the Spanish version submitted to the case file: "relativa al reconocimiento del riachuelo N'KYÉ como frontera provisional entre vuestra Colonia y los Territorios ocupados del Nuevo-Cameroun, en espera que se efectue una delimitacion exacta definitiva"). Gabon has been unable to locate the French original of this letter.

[140] Letter from the Governor-General of Spanish Guinea to the Governor-General of French Equatorial Africa, 1 May 1919 (MEG, Vol. IV, Ann. 67).

[141] *Ibid.* (Equatorial Guinea's translation of the original Spanish: "de este modo y en tanto no se fijen definitivamente las fronteras, estas que indico podría ser provisionalmente los limites del territorio español, limites mas tangibles que el meridiano, y esto alejaría todo incidente").

[142] *Ibid.* A copy of the map mentioned in Mr Barrera's letter is reproduced in Gabon's annexes: Map of Kamerun by Mr Moisel, sheet I1: Ukoko and sheet I2: Oječm, 1 May 1914 (CMG, Vol. II, Ann. C12).

[143] Note by the Co-ordination Division for French Equatorial Africa on the delimitation of the boundary between Gabon and Spanish Guinea, 15 Sept. 1952 (CMG, Vol. IV, Ann. 92), pp. 2-3.

[144] MEG, Vol. I, paras. 3.67 and 3.70.

[145] See Letter from the Spanish Governor-General, 27 Jan. 1920 (MEG, Vol. IV, Ann. 69).

determine the extent to which the territory accorded to Spain would increase if, the Moisel map having been recognized as accurate, the provisional boundary were to be adopted as final."[146]

2.24 These uncertainties were compounded by the Spanish authorities' claims that the 9° east of Paris meridian lay further east than it appeared on the existing maps[147].

2.25 Notwithstanding the exchanges about the provisional line in the northern section of the eastern boundary of Spanish Guinea, the position of the French authorities regarding the delimitation of this boundary remained unchanged. The boundary shown on the map produced by the French Geographic Service in 1930 continues to follow the meridian[148]. The Order of the Governor-General of French Equatorial Africa on the limits of the departmental subdivisions of the region of Gabon reaffirmed the land boundary delimitation line of 1900, i.e. the 9° east of Paris meridian, in defining the limits of the Bitam and Oyem subdivisions[149]. Provisional sketches by the Geographic Service of French Equatorial Africa, drawn up in 1949 and 1950, also continued to depict the boundary with Spanish Guinea along the astronomical lines set out in Article 4 of the Paris Convention[150].

2.26 The Spanish local authorities, for their part, sought to turn the provisional line into a fait accompli. The documents included in the case file by Equatorial Guinea show that Governor Barrera attempted unilaterally to impose Spain's presence in the Kie area and beyond (particularly along the southern section of the eastern boundary as unilaterally proposed by him) by building a road and setting up military posts, taking advantage of the fact that the French authorities at that time did not have reliable geographical information[151]. Nevertheless, the legislative texts adopted by the central authorities defining the status of Spanish possessions in the Gulf of Guinea and their territorial subdivisions continued to fix the eastern limits of Ebebiyin and N'Sork, which neighboured French Gabon, along a straight line ("*linea recta*"), rather than in relation to the Kie River or other rivers or roads nearby[152].

3. *The lack of boundary demarcation between French Gabon and Spanish Guinea*

2.27 Although the French authorities were aware of the need to demarcate the boundary set out in the Paris Convention and to install markers on the ground, they did not consider it the right

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[146] Letter from the French Minister for the Colonies to the French Minister for Foreign Affairs, 24 Nov. 1919 (CMG, Vol. IV, Ann. 72). The document attached by Equatorial Guinea as Ann. 68 does not contain that letter, but rather an unrelated document of the Spanish authorities.

[147] See the Note by the Co-ordination Division for French Equatorial Africa on the delimitation of the boundary between Gabon and Spanish Guinea, 15 Sept. 1952 (CMG, Vol. IV, Ann. 92), pp. 2-3.

[148] French National Geographic Institute ("IGN"), Map of West Africa, scale 1:5,000,000, 1930 (CMG, Vol. II, Ann. C13).

[149] Order of the Governor-General of French Equatorial Africa, 5 Nov. 1936 (CMG, Vol. IV, Ann. 87), pp. 2-3.

[150] Provisional sketch-map drawn up by the Geographic Service of French Equatorial Africa, Cameroon, Oyem sheet, Jan. 1949 (CMG, Vol. II, Ann. C16) and Ebolowa sheet, Sept. 1950 (CMG, Vol. II, Ann. C18).

[151] See, for example, Letter from the Spanish Governor-General, 27 Jan. 1920 (MEG, Vol. IV, Ann. 69); Letter from the Spanish Governor-General, 8 Dec. 1920 (MEG, Vol. IV, Ann. 70); Letter from French Minister for the Colonies, 27 July 1921 (MEG, Vol. IV, Ann. 71).

[152] Decree adopting an organic statute, 13 Apr. 1935 (CMG, Vol. IV, Ann. 85), first basis.

time to enter into such a long and costly process with Spain[153]. No concrete measures were taken to that end[154]. France preferred to continue to show restraint on the ground, in order to avoid incidents, while reaffirming its rights in respect of the disputed territories[155].

2.28 In the early 1950s, the Geographic Service of the Spanish Army published two new maps of Spanish Guinea, one at a scale of 1:200,000, entitled "Carta itineraria de la Guinea continental Española" (Road map of mainland Spanish Guinea)[156], and the other at a scale of 1:100,000, entitled "Mapa topográfico y forestal de Guinea" (Topographic and forest map of Guinea)[157]. Equatorial Guinea has, incidentally, reproduced an excerpt from that second map in its Memorial, but has not provided the map in its entirety[158]. The accuracy of the new maps was deemed by the French National Geographic Institute to be "as good as one might hope"[159]. Neither depicts the boundaries of mainland Spanish Guinea[160]. However, the French Geographic Service noted at the time that those maps did show the inaccuracies of the earlier cartographic work, including the maps drawn up by Mr Moisel, which had served as a point of reference in the discussions between the French and Spanish authorities in the region. It observed that:

> "The inhabitants of the border area have tacitly adopted a *modus vivendi* based on habits formed by the Spanish which are roughly consistent with the 27 June 1900 Convention as interpreted by the Moisel map. That map's inaccuracies favoured one or the other of the parties concerned, but it was impossible to know which one. This *modus vivendi*, which took account of the realities to some degree, did not reflect the official positions. In fact, neither the French and the Spanish nor the inhabitants of the border area and the administration spoke the same language, and each time a new incident arose, neither side understood the other and reams of paper were exchanged to no avail."[161]

2.29 It is also clear from the new Spanish maps that "the current situation on the ground largely reflects the theoretical boundary line"[162]. However, a comparison of the cartographic material reveals some encroachments by Spanish Guinea on Gabonese territory (in particular at the bend in the Utamboni River on the southern boundary and near the Kie River on the eastern boundary) and a

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[153] Letter No. 594 from the French Minister for the Colonies to the French Minister for Foreign Affairs, 3 Nov.1927 (CMG, Vol. IV, Ann. 75); Letter No. 1396 from the French Minister for Foreign Affairs to the French Minister for the Colonies, 14 Nov. 1927 (CMG, Vol. IV, Ann. 76); Note by the Co-ordination Division for French Equatorial Africa on the delimitation of the boundary between Gabon and Spanish Guinea, 15 Sept. 1952 (CMG, Vol. IV, Ann. 92).

[154] Note by the Co-ordination Division for French Equatorial Africa on the delimitation of the boundary between Gabon and Spanish Guinea, 15 Sept. 1952 (CMG, Vol. IV, Ann. 92); Note by the General Government of French Equatorial Africa on the delimitation of the boundary between Gabon and Spanish Guinea, 16 Sept. 1952 (CMG, Vol. IV, Ann. 93). See also Note No. 378 by the IGN for the Directorate of Political Affairs, 9 Jan. 1953 (CMG, Vol. IV, Ann. 94).

[155] Letter from the National Commissioner for Foreign Affairs to the National Commissioner for the Colonies, 27 Feb. 1943 (CMG, Vol. IV, Ann. 91).

[156] Road map of mainland Spanish Guinea, 1951-1952 (CMG, Vol. II, Ann. C19).

[157] Topographic and forest map of Spanish Guinea, 1949-1960 (CMG, Vol. II, Ann. C20).

[158] MEG, Vol. II, Figure 3.13.

[159] Note No. 378 by the IGN for the Directorate of Political Affairs, 9 Jan. 1953 (CMG, Vol. IV, Ann. 94).

[160] *Ibid.*

[161] *Ibid.*

[162] Letter No. 242 from the Minister for Overseas France to the French Minister for Foreign Affairs, 8 Mar. 1953 (CMG, Vol. IV, Ann. 96); Letter from the Minister for Overseas France to the Governor-General of French Equatorial Africa, 9 Mar. 1953 (CMG, Vol. IV, Ann. 97).

slight encroachment by French Gabon on Guinean territory north of the 1° north parallel of latitude, near Medouneu[163].

2.30 The French diplomatic authorities were therefore well aware that these differences could only be resolved through negotiations with Spain. While they expressed a desire to hold such discussions at a later date, they considered that now was "not the right time"[164]. The situation remained unchanged until Gabon became independent.

B. The uncertainty surrounding sovereignty over the islands of Mbanié, Cocotiers and Conga

2.31 Until the end of the colonial period, a great deal of uncertainty remained concerning sovereignty over the islands of Mbanié, Cocotiers and Conga.

2.32 The French authorities regularly carried out beaconing work and ensured the upkeep of the beacons and buoys they had installed in the immediate vicinity of Mbanié, Cocotiers and Conga[165]. Moreover, charts drawn up by the French Navy in 1932[166] and by the French National Geographic Institute in 1935[167] and 1950[168] specifically show the island of Corisco and the Elobey Islands to be under Spanish sovereignty, but not Mbanié, Cocotiers or Conga.

2.33 Nor did the Spanish authorities include the islands of Mbanié, Cocotiers and Conga in domestic legislation defining the extent of Spanish Guinea's territorial dominion. The organic statute adopted by Decree of 22 July 1931 defined the "Spanish territories in the Gulf of Guinea" as including the islands of Fernando Pó, Annobón, Corisco, Elobey Grande, Elobey Chico and the mainland territory of Spanish Guinea[169]. The organic statute amended in 1935 also fails to mention Mbanié, Cocotiers or Conga, either in its definition of the districts of the Spanish territories in the

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[163] Note No. 378 by the IGN for the Directorate of Political Affairs, 9 Jan. 1953 (CMG, Vol. IV, Ann. 94); Note by the Geographic Service of French Equatorial Africa and Cameroon, 9 Feb. 1953 (CMG, Vol. IV, Ann. 95); Letter No. 242 from the Minister for Overseas France to the French Minister for Foreign Affairs, 8 Mar. 1953 (CMG, Vol. IV, Ann. 96); Letter from the Minister for Overseas France to the Governor-General of French Equatorial Africa, 9 Mar. 1953 (CMG, Vol. IV, Ann. 97); Note on the common boundary between French Equatorial Africa and Cameroon, and between French Equatorial Africa and Spanish Guinea, 22 Dec. 1953 (CMG, Vol. IV, Ann. 99); Note No. 545 by the IGN for the Directorate of Political Affairs, 8 July 1953 (CMG, Vol. IV, Ann. 98). With regard to the latter encroachment, the IGN noted, moreover, that "[i]n the minds of the authorities which decided the course of the MITZIC-EDOUME road, that road should lay entirely in French territory and at a distance of at least 1 km from the boundary" *(ibid.)*.

[164] Letter No. 308/AL from the French Minister for Foreign Affairs to the Minister for Overseas France, 15 Feb. 1954 (CMG, Vol. IV, Ann. 100).

[165] Letter from the French Minister for the Colonies to the Head of the Navy's Hydrographic Service, 4 July 1931 (CMG, Vol. IV, Ann. 79); Letter No. 349 from the Lieutenant-Governor of Gabon to the French Minister for the Colonies, 29 Sept. 1932 (CMG, Vol. IV, Ann. 82); Letter from the Inspector-General of Public Works for the Colonies to the Head of the Central Lighthouses and Beacons Service, 10 Nov. 1932 (CMG, Vol. IV, Ann. 83); Letter from the Head of the Lighthouses and Beacons Service to the Inspector-General of Public Works for the Colonies, 18 Nov. 1932 (CMG, Vol. IV, Ann. 84). See also the Hydrographic chart of Corisco Bay based on the Spanish and German surveys of 1913-1914, No. 3037, 1932 (CMG, Vol. II, Ann. C14).

[166] Hydrographic chart of Corisco Bay based on the Spanish and German surveys of 1913-1914, No. 3037, 1932 (CMG, Vol. II, Ann. C14).

[167] Sketch-map of French Africa, scale 1:1,000,000, Libreville sheet, 1935 (CMG, Vol. II, Ann. C15).

[168] Map of the French Congo, scale 1:2,000,000, 1950 (CMG, Vol. II, Ann. C17).

[169] Decree adopting an organic statute, 22 July 1931 (CMG, Vol. IV, Ann. 80), first basis. See also Letter No. 407 from the Ambassador of France to Spain to the French Minister for Foreign Affairs, 25 July 1931 (CMG, Vol. IV, Ann. 81).

Gulf of Guinea or as part of the territorial subdivision of Kogo, even though the island of Corisco and the Elobey Islands are specifically mentioned[170].

2.34 In 1955, after carrying out new surveys, the French Hydrographic Service sought to install a beacon on Cocotiers[171]. The Spanish authorities protested. The French authorities considered that they were within their rights[172], given that only Spain's sovereignty over the Elobey Islands and the island of Corisco were formally recognized by the Paris Convention[173]. The work was eventually carried out by France with the agreement of the Spanish local authorities, which nonetheless never bore the costs of installing or maintaining the beacon[174].

2.35 Even after this incident, Spain made no mention of the islands of Mbanié, Cocotiers or Conga in its legislation. The Spanish Law of 30 July 1959 on the organization and legal régime of the African provinces makes no reference to Mbanié[175], even though a proposal to this effect was included in the bill included in the case file by Equatorial Guinea[176]. Nor does the Decree of 12 June 1959 defining blocks for the exploration and exploitation of oil resources include the maritime spaces generated by Mbanié, Cocotiers or Conga[177]. Article 172 of that Decree, of which Equatorial Guinea has reproduced only a brief excerpt[178], merely states that Block No. 1 includes "the islands of Elobey and Corisco and their territorial waters".

2.36 Moreover, the question of the maritime delimitation between Gabon and Spanish Guinea had not been discussed by the colonial Powers. In the wake of Gabon's independence, the Legal Service of the French Ministry of Foreign Affairs noted:

> "As far as the Legal Service is aware, prior to the entry into force of the Agreement of 15 July 1960 transferring powers of the Community to the Gabonese Republic, France did not conclude any international agreements [relating to maritime boundaries] that might bind Gabon as the successor State. The Government in Libreville

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[170] Decree adopting an organic statute, 13 Apr. 1935 (CMG, Vol. IV, Ann. 85), first basis. See also Decree adopting an organic statute, 14 Nov. 1935 (CMG, Vol. IV, Ann. 86), Art. 1.

[171] MEG, Vol. I, paras. 3.26-3.32.

[172] See Note by the Gabonese Ministry of Public Works, Habitat and Town Planning regarding the construction of a beacon on the island of Cocotiers in Mondah Bay, 25 Sept. 1972 (CMG, Vol. V, Ann. 127).

[173] Letter No. 438/AL from the Minister for Foreign Affairs to the Minister for Overseas France, 6 May 1955 (MEG, Vol. IV, Ann. 94).

[174] Letter No. 247 from the captain of the *Beautemps-Beaupré* and the hydrographic mission on the west coast of Africa to the Governor of Overseas France, 8 Oct. 1955 (CMG, Vol. IV, Ann. 101); Letter from the Head of the Lighthouses and Beacons Service to the Director-General of Public Works for French Equatorial Africa, 26 Jan. 1956 (CMG, Vol. IV, Ann. 102); Note No. 301/AMF by the Gabonese Ministry of Public Works, Habitat and Town Planning regarding the construction of a beacon on the island of Cocotiers in Mondah Bay, 16 Sept. 1972 (CMG, Vol. V, Ann. 124); Letter No. 302/SMF from the Gabonese Ministry of Public Works, Habitat and Town Planning to the Special Advisor to the Office of the French President, 10 Oct. 1972 (CMG, Vol. V, Ann. 129). See also Hydrographic Service of the French Navy, *Lights and Fog Signals, C Series, English Channel and Eastern Atlantic Ocean* (MEG, Vol. V, Ann. 132).

[175] Law No. 46/1959 on the organization and legal régime of the African provinces, 30 July 1959 (CMG, Vol. IV, Ann. 104).

[176] Spanish bill on the terms for the reorganization of the Spanish territories of Guinea, 4 March 1958 (MEG, Vol. V, Ann. 131). See also MEG, Vol. I, para. 3.34.

[177] See MEG, Vol. I, para. 3.35.

[178] Spanish Decree No. 977/1959, 12 June 1959 (CMG, Vol. IV, Ann. 103); see also MEG, Vol. V, Ann. 135.

is thus free to enact in this area whatever rules it considers most appropriate and to enter into agreements with its neighbours as it sees fit."[179]

III. The period following the independence of Gabon and Equatorial Guinea (1960-1974)

2.37 Gabon and Equatorial Guinea gained independence on 17 August 1960 and 12 October 1968, respectively. The questions and uncertainties surrounding the course of the land boundary agreed in the Paris Convention and those concerning sovereignty over Mbanié, Cocotiers and Conga continued to be a focus of the new Gabonese Republic's relations first with Spain and then with Equatorial Guinea, after the latter's independence. In addition, there was the question of maritime delimitation, arising in the context of the extension of the States' maritime rights.

A. Questions concerning sovereignty over Mbanié, Cocotiers and Conga

1. *The initial negotiations relating to maritime delimitation*

2.38 In 1963, Gabon fixed the limit of its "territorial waters" at 12 nautical miles[180]. The Spanish authorities, which had previously claimed a territorial sea of only 6 nautical miles, do not appear to have expressed any objection to that extension. The question of maritime delimitation soon resurfaced, however, as hydrocarbon exploration activities developed in the region[181].

2.39 In 1967, Gabon granted a hydrocarbon exploration permit in the north of its maritime area. Contrary to what is claimed by Equatorial Guinea, the northern limit of this concession was not defined in the Gabonese texts as the "median line between Gabon's mainland and Spain's island possessions, including Mbañe, Cocoteros, and Conga"[182]. The Gabonese Decree reproduced by Equatorial Guinea defines the limit of the concession simply by reference to the "common maritime border between Gabon and Equatorial Guinea"[183], giving no further details as to the course of that boundary, which had still to be delimited at that time.

2.40 That same year, the Spanish authorities proposed to Gabon that negotiations be held on the question of maritime delimitation; Gabon accepted that proposal[184]. The Spanish authorities appear, moreover, to have prepared several internal documents for the purpose of establishing their position on the maritime delimitation[185]. None of these documents mentions sovereignty over Mbanié, Cocotiers or Conga. In a confidential report, officials at the Spanish Ministry of Industry did, however, suggest that the starting-point of the delimitation should be the Corisco baseline, because "if we start from the island Cocotier or Bane [(Mbañe)], we greatly fear that those

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[179] Note No. 555 by the Legal Service for the Community Affairs Service, 23 Sept. 1960 (CMG, Vol. IV, Ann. 105), pp. 1-2.

[180] Law No. 10/63 establishing the Maritime Code of Gabon, 12 Jan. 1963 (CMG, Vol. IV, Ann. 106), Art. 5.

[181] See Dispatch No. 28/DAM from the Ambassador of France to Gabon to the French Minister for Foreign Affairs, 4 Feb. 1965 (CMG, Vol. IV, Ann. 108).

[182] MEG, Vol. I, para. 3.98.

[183] Decree No. 391/PR-MENCM-DMG granting the Gulf Oil Company and Shell Gabon jointly and severally a mining research permit valid for liquid and gas hydrocarbons, referred to as the "Libreville Maritime Concession", 2 Aug. 1967 (MEG, Vol. VI, Ann. 181).

[184] Note from the Spanish Minister for Foreign Affairs, 14 Nov. 1967 (MEG, Vol. V, Ann. 145).

[185] MEG, Vol. I, paras. 3.87-3.89.

negotiations will be clouded with difficulties"[186]. Those negotiations did not take place before Equatorial Guinea became independent.

2.41 Until the end of its colonial rule, Spain continued to remain ambiguous on the question of the islands of Mbanié, Cocotiers and Conga in its legislation defining the territorial configuration of its colony[187], as had previously been the case[188].

2.42 Gabon, for its part, renewed the "Libreville Marine" permit in 1969[189]. In 1970, the northern limit of the concession was fixed at co-ordinates Y = 112.700 under the UTM system (or at the 1° 01' 10.6" north parallel of latitude, in degrees)[190], leaving the "zones of influence of the islands of KORISKO and ELOBEY, which belong to Equatorial Guinea", to be determined in accordance with the principles and rules of international law in this regard[191].

2.43 On 4 June 1970, Gabon proposed to Equatorial Guinea that they hold negotiations with a view to determining their common maritime boundary[192]; this proposal was accepted by Equatorial Guinea a few days later[193].

2.44 Before the negotiations could take place, the two States adopted several texts and decrees concerning the extent of their respective "territorial waters"[194]. By Presidential Decree of 24 September 1970, Equatorial Guinea unilaterally fixed the limits of its "territorial waters" in the southern part of the Río Muni province [195]; this text was the first to mention the islands of Mbanié, Cocotiers and Conga[196]. Equatorial Guinea's Permanent Mission to the United Nations explained, moreover, that "this protective Decree" had been adopted "because of the unusual geographical position of the islands and islets"[197].

2.45 Negotiations between Gabon and Equatorial Guinea concerning the maritime delimitation opened in Bata in February 1971. According to the reports of the French Ambassador to Libreville,

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[186] Confidential report by the Spanish Ministry of Industry, 12 July 1966 (MEG, Vol. IV, Ann. 103) (Equatorial Guinea's translation of the original Spanish: "si nosotros partimos de la isla Cocotier o la de Bañe, mucho nos tememos que dichas negociaciones van a estar sombradas de dificultades").

[187] See Law No. 191/1963, 30 Dec. 1963 (MEG, Vol. V, Ann. 140); Law regarding the separation and legal system of Fernando Pó and Río Muni (MEG, Vol. V, Ann. 143). See also Decree No. 1043/1968 publishing the official map of blocks in the marine areas of zone II (Río Muni), 2 May 1968 (CMG, Vol. IV, Ann. 109).

[188] See above, paras. 2.33 and 2.35.

[189] Decree No. 670/PR/MMERH/DMG, 24 Sept. 1969 (MEG, Vol. VI, Ann. 183).

[190] Decree No. 689/PR/MMERH/DMG, 14 May 1970 (MEG, Vol. VI, Ann. 184), Art. 1.

[191] *Ibid.*, Art. 3.

[192] Note Verbale No. 1966/MAE-C/DAAP from the Gabonese Ministry of Foreign Affairs to the Embassy of Equatorial Guinea in Gabon, 4 June 1970 (CMG, Vol. V, Ann. 112).

[193] Note No. 1524 from the Ministry of Foreign Affairs of Equatorial Guinea to the Ambassador of Equatorial Guinea to Gabon, 15 June 1970 (CMG, Vol. V, Ann. 113).

[194] MEG, Vol. I, paras. 4.4-4.5.

[195] Presidential Decree No. 17/1970, 24 Sept. 1970 (MEG, Vol. VI, Ann. 186).

[196] *Ibid.*, Art. 1 *(a)*.

[197] Note Verbale No. 558 from Equatorial Guinea's Permanent Mission to the United Nations to the United Nations Secretary-General, 8 Oct. 1970 (CMG, Vol. V, Ann. 114). See also Airgram No. A-1798 from the US Mission to the United Nations to the US Department of State, 21 Oct. 1970 (MEG, Vol. VI, Ann. 155).

that meeting went well[198]. During the meeting, Gabon proposed that "the seaward boundary follow the parallel drawn from the middle of the mouth of the Muni River", with adjustments made for the areas of Equatorial Guinea's territorial waters around the Elobey Islands and the island of Corisco[199]. The two Parties continued their discussions at a second meeting in Libreville in March 1972. In particular, they reaffirmed "the validity of the Paris Convention (1900) that they state[d] . . . they [had] adopted as the basic document for delimitation of [the] maritime borders"[200]. To that end, they sought to obtain more detailed information on the Convention from the former colonial Powers[201]. While Equatorial Guinea proposed a delimitation in accordance with the terms of the 1970 Presidential Decree[202], Gabon reiterated and clarified the proposal made at the first meeting in Bata:

> "The maritime boundary between Equatorial Guinea and Gabon would begin at the Thalweg intersection point of the Muni river with the straight line drawn from Cocobeach Point to Dieke Point, according to the Paris Convention. It would then extend to the west along the parallel, passing through the point defined above.
>
> A band of 3 nautical miles would be reserved around the Corisco, Elobey Chico and Elobey Grande islands, conceded to Spain by the Paris Treaty, from their coasts constituting the territorial sea, under Equatorial Guinean jurisdiction, except with regard to their southeast border, which would be delimited by a broken line located at an equal distance from their coast to the nearest Gabonese coast, as follows:
>
> 1. <u>For Elobey island</u>, a line defined by the following coordinates:
>
> Point I: X = 561.900
> Y = 112.700
>
> Point [II]: X = 560.600
> Y = 107.850
>
> Point III: X = 557.500
> Y = 104.700
>
> Point IV: X = 553.100
> Y = 101.900
>
> Point V: Intersection of the line of the territorial waters with the parallel Y = 112.700
>
> 2. <u>For Corisco island</u>, a line defined by the following coordinates:
>
> Point VI: X = 545.800
> Y = 97.250

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[198] Dispatch No. 57/DAM from the Ambassador of France to Gabon to the French Minister for Foreign Affairs, 23 Mar. 1971 (CMG, Vol. V, Ann. 115).

[199] *Ibid.*

[200] Report prepared by the Gabon-Equatorial Guinea Joint Commission after the meeting in Libreville from March 25 to 29, 1972, 29 Mar. 1972 (MEG, Vol. VII, Ann. 199), para. 2.1.

[201] Telegram No. 145 from the Embassy of France in Gabon to the French Ministry of Foreign Affairs, 29 Mar. 1972 (CMG, Vol. V, Ann. 117).

[202] Report prepared by the Gabon-Equatorial Guinea Joint Commission after the meeting in Libreville from March 25 to 29, 1972, 29 Mar. 1972 (MEG, Vol. VII, Ann. 199), paras. 3.1-3.3.

Point VII: X = 540.400
Y = 94.100

Point VIII: X = 534.400
Y = 91.000"[203].

2.46 The line for Corisco Island, defined in points VI to VIII, is equidistant from the coast of that island of Equatorial Guinea and the coast of Mbanié. The maritime delimitation thus proposed by Gabon is shown for illustrative purposes in **sketch-map No. 2.2** below (see page 44).

2.47 During this meeting in Libreville, the two delegations also agreed on the next steps in the negotiations and confirmed their desire to conclude an international agreement on the maritime delimitation[204]. A third meeting took place in Bata in June 1972, but no progress was made[205].

2.48 Following this third meeting, President Bongo reached out directly to President Macías Nguema in an attempt to break the deadlock in the negotiations[206]. According to diplomatic records from the time, the President of Equatorial Guinea rejected the proposals of his Gabonese counterpart, claiming that they constituted "a flagrant violation of the territorial integrity of [his] country"[207]. In response, President Bongo expressed his regret at this rejection, but stated that he was pleased that President Macías Nguema shared his commitment to the Paris Convention, which, "for us, is and has always been the basic document which unequivocally determines the land boundaries between [the] two countries"[208].

[203] *Ibid.*, para. 4.1.

[204] *Ibid.*, para. 8.2.

[205] Communiqué on the joint meeting between Gabon and Equatorial Guinea, 27 June 1972, appended to the Letter from the Embassy of France in Gabon to the French Ministry of Foreign Affairs, 6 July 1972 (CMG, Vol. V, Ann. 118).

[206] See Note Verbale from the Gabonese Ministry of Foreign Affairs and Co-operation, 12 Sept. 1972 (CMG, Vol. V, Ann. 123).

[207] Letter from the President of Equatorial Guinea to the President of Gabon, 20 July 1972 (CMG, Vol. V, Ann. 119).

[208] Letter from the President of Gabon to the President of Equatorial Guinea, 30 Aug. 1972 (CMG, Vol. V, Ann. 120).

Sketch-map No. 2.2
The proposed maritime delimitation put forward by Gabon in 1972

2. *The Mbanié incident and its aftermath*

2.49 These discussions notwithstanding, there was an increase in the number of incidents in the waters adjacent to the islands of Mbanié, Cocotiers and Conga. On several occasions, Gabonese fishermen were harassed by the authorities or citizens of Equatorial Guinea; shots were even fired at a Gabonese boat[209]. In order to ensure the safety of its nationals and fishermen operating on those Gabonese islands and in the waters adjacent to them, Gabon established a small police station on Mbanié on 23 August 1972. The Gabonese police found Equatorial Guineans on the island, some of whom were armed; their weapons were confiscated. The Equatorial Guineans were later released[210].

[209] See Note Verbale from the Gabonese Ministry of Foreign Affairs and Co-operation, 12 Sept. 1972 (CMG, Vol. V, Ann. 123). See also the Letter from the Gabonese Minister for Foreign Affairs and Co-operation to the Ambassador of Equatorial Guinea to Gabon, 21 Feb. 1972 (CMG, Vol. V, Ann. 116).

[210] Note Verbale from the Gabonese Ministry of Foreign Affairs and Co-operation, 12 Sept. 1972 (CMG, Vol. V, Ann. 123).

2.50 That police operation drew fierce protests from Equatorial Guinea[211]. Moreover, the President of Equatorial Guinea was quick to claim, without basis, that Gabon had occupied all the islands of the Río Muni province[212].

2.51 To ease tensions between the two States and help them to settle their dispute peacefully within the African framework, the Conference of Heads of State and Government of Central and East Africa, meeting in Dar-es-Salaam from 7 to 9 September 1972, entrusted President Mobutu (Republic of Zaire) and President Ngouabi (People's Republic of Congo) with a good offices mission.

2.52 At the first meeting of the four presidents, on 17 September 1972 in Kinshasa, President Bongo and President Macías Nguema resolved to "settle their dispute within the African framework and by peaceful means", to "renounce all use of force" and to "immediately cease all forms of reciprocal attacks in the press, both written and spoken"[213]. It was also decided to establish a commission to examine every aspect of the problem and to recommend ways and means by which the dispute might be definitively resolved[214]. On 18 September 1972, that Commission resolved, among other things, to consult Spain and France on "which Power was responsible for the administration of the islands of Mbana, Cocotier and Conga before the Gabonese Republic and the Republic of Equatorial Guinea gained independence"[215]. This request for information further stated:

> "Indeed, nowhere does the Convention of 27 June 1900, which establishes the delimitation of French and Spanish possessions in the Gulf of Guinea, expressly mention the island of Mbane, sovereignty over which is now the subject-matter of the dispute between the Gabonese Republic and the Republic of Equatorial Guinea"[216].

2.53 The French Government transmitted its views on the matter on 27 September 1972, arguing that "the Convention of 27 June 1900 attributes . . . sovereignty [over Mbanié] to France, and therefore to Gabon as the successor State"[217]. Spain claimed otherwise in the statement it submitted to the Committee[218].

2.54 The final meeting of the four presidents took place in Brazzaville from 11 to 13 November 1972. After discussions, including on the Commission's report, the Presidents of Gabon and Equatorial Guinea agreed to the "neutralization of the disputed zone in Corisco Bay" and the "delimitation by the OAU *ad hoc* Commission of the maritime boundary between the Gabonese Republic and the Republic of Equatorial Guinea in Corisco Bay, in accordance with the spirit of the

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[211] Note Verbale No. 2581 from the Ministry of Foreign Affairs of Equatorial Guinea to the Gabonese Embassy in Equatorial Guinea, 1 Sept. 1972 (CMG, Vol. V, Ann. 121); Dispatch No. 162/DAM from the Ambassador of France to Equatorial Guinea to the French Minister for Foreign Affairs, 9 Sept. 1972 (CMG, Vol. V, Ann. 122).

[212] See the Telegram from the Minister for Foreign Affairs of Equatorial Guinea to the Permanent Representative of Equatorial Guinea to the United Nations (MEG, Vol. VI, Ann. 164). See also the Telegram addressed to the President of the Security Council by the Representative of Equatorial Guinea, 11 Sept. 1972, doc. S/10789.

[213] Final communiqué on the mission, Kinshasa, 17 Sept. 1972 (CMG, Vol. V, Ann. 125).

[214] *Ibid.*

[215] See Telegram No. 670/672 from the Embassy of France in Kinshasa to the French Ministry of Foreign Affairs, 19 Sept. 1972 (CMG, Vol. V, Ann. 126).

[216] *Ibid.*

[217] Telegram No. 304/12 from the French Ministry of Foreign Affairs to the Embassy of France in Kinshasa, 27 Sept. 1972 (CMG, Vol. V, Ann. 128).

[218] Spanish memorandum on sovereignty over and the administration of the islands of Mbanié, Conga and Cocotiers, 16 Oct. 1972 (CMG, Vol. V, Ann. 130).

Charter of the Organization of African Unity"[219]; they also undertook "to comply with the spirit of the Brazzaville Conference held November 11 to 13, 1972"[220].

B. Questions concerning the land boundary

2.55 After 1960, the land boundary set out in the Paris Convention was challenged neither by Spain nor, after 1968, by Equatorial Guinea. Indeed, both Gabon and Equatorial Guinea reaffirmed the validity of that instrument, to which they agreed they had succeeded[221]. Furthermore, in 1965, the former colonial Power in Gabon stated that Gabon's boundaries with Río Muni had been "defined in the Paris Treaty of 27 June 1900"[222].

2.56 In its Memorial, Equatorial Guinea nevertheless implies that, after Gabon gained independence, Gabon and Spain confirmed the existence of a boundary other than the one set out in the Paris Convention. It makes much of the so-called Agreement concerning Circulation and Border Exchange signed by Spain and Gabon in 1966[223]. However, Equatorial Guinea does not deny that this agreement never entered into force[224]; it merely refers in a footnote to an excerpt from the Court's Judgment in the *Qatar* v. *Bahrain* case[225], most likely to give this unratified text a value it cannot possess. In any event, the negotiations held at Gabon's initiative in the mid-1960s were in no way intended or designed to define or clarify the course of the land boundary; they were simply concerned with determining transboundary relations between Gabon and the mainland possessions of Spain in the Gulf of Guinea. More importantly, all the documents included in the case file by Equatorial Guinea are merely unilateral proposals made during the negotiations. At best, these exchanges demonstrate that, shortly after Gabon gained independence, the uncertainty surrounding the course of the land boundary on the ground and Spanish Guinea's encroachments on Gabonese territory to the south of the 1° north parallel of latitude and to the east of the 9° east of Paris meridian, which had been noted by the French authorities in the 1950s[226], were still ongoing; the same can also be said of Gabon's encroachment to the north of the 1° north parallel of latitude, near Medouneu[227].

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[219] Final communiqué of the Conference of the Heads of State and Government of Central and East Africa, Brazzaville, 13 Nov. 1972, (MEG, Vol. VII, Ann. 201) (Equatorial Guinea's translation of the original Spanish: "La neutralización de la zona litigiosa en la bahía de Corisco" and "La delimitación por la Comisión ad hoc de la O.U.A. de las fronteras marítimas entre la República Gabonesa y la República de Guinea Ecuatorial en la bahía de Corisco conforme al espíritu de la Carta de la O.U.A.").

[220] *Ibid.* (Equatorial Guinea's translation of the original Spanish: "conformarse al espíritu de la Conferencia de Brazzaville del 11 al 13 de noviembre de 1972").

[221] Letter from the President of Equatorial Guinea to the President of Gabon, 20 July 1972 (CMG, Vol. V, Ann. 119); Letter from the President of Gabon to the President of Equatorial Guinea, 30 Aug. 1972 (CMG, Vol. V, Ann. 120).

[222] Dispatch No. 3/DAM from the Ambassador of France to Gabon to the French Minister for Foreign Affairs, 7 Jan. 1965 (CMG, Vol. IV, Ann. 107).

[223] MEG, Vol. I, paras. 3.103-3.104 and 3.108.

[224] *Ibid.*, para. 3.103 *(in fine)*.

[225] *Ibid.*, fn. 190, referring to *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Merits, Judgment, I.C.J. Reports 2001*, p. 68, para. 89.

[226] See above, para. 2.28.

[227] See General Directorate of African Territories and Provinces, *Étude de la frontière entre le Gabon et le Río Muni — Points de croisement* (1965) (MEG, Vol. III, Ann. 6) ("Moffut Highway in Río Muni to Medoneu in Gabon"). Gabon notes that the document contained in Ann. 6 can only be a survey undertaken unilaterally by the Spanish State or the authorities of Río Muni. In any event, it is not an international agreement or instrument as Equatorial Guinea's categorization of this document seems to suggest.

2.57 From March 1974 onwards, several incidents, which Equatorial Guinea has chosen to overlook in its Memorial, occurred in the northernmost sector of the land boundary between Gabon and Equatorial Guinea, near Ebebiyin, in Equatorial Guinea, and Bitam, in Gabon. Gabonese nationals were driven from their plantations in the region, and one Gabonese national was abducted by Equatorial Guinean forces[228]. At the end of May 1974, Equatorial Guinea erected a boundary post on the left bank of the Kie River, in Gabonese territory[229]. On 17 June 1974, a team from the Gabonese police force removed this boundary marker[230]. In view of the very tense situation, and with the military forces of both States present on either side of the boundary, the Gabonese local authorities tried to initiate talks with their counterparts from Equatorial Guinea. However, the Gabonese emissaries sent out on 18 June 1974 were intercepted as soon as they crossed the river, arrested and transferred to Ebebiyin in Equatorial Guinea[231].

2.58 The Gabonese Ambassador to Malabo travelled to Ebebiyin at the end of June 1974 at the invitation of and accompanied by the Deputy-Minister for Foreign Affairs of Equatorial Guinea. On his return, he reported that "the border incident which had arisen between Gabon and Equatorial Guinea was the result of deliberate confusion on the part of Equatorial Guinea's authorities between the rectilinear boundary fixed by the Treaty of Paris at 11° 20' longitude east and the meandering course of the Kie River, which in several places lies to the east of that line"[232]. To appease tensions in the area, the two representatives agreed that the two Gabonese emissaries detained in Equatorial Guinea would be released and confirmed that "Equatorial Guinea's boundary marker on the river bank would not be replaced until [they] had reported back to their respective Heads of State"[233].

2.59 In conclusion, throughout the colonial period and after Gabon and Equatorial Guinea gained independence, there remained a great deal of uncertainty with regard to sovereignty over the islands of Mbanié, Cocotiers and Conga. Moreover, no changes were made to the boundary delimited by the Paris Convention, despite these evident uncertainties and inconsistencies, and the incidents that arose. The incidents that took place near Ebebiyin in early 1974 ultimately gave fresh impetus to the boundary negotiations between Gabon and Equatorial Guinea.

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[228] Record No. 497/4.GEND.CAB.S.G. from the Commander-in-chief of the Gendarmerie to the President of Gabon, 21 June 1974 (CMG, Vol. V, Ann. 133), p. 1.

[229] See also the Telegram from the Embassy of the United Kingdom in Cameroon, 16 July 1974 (MEG, Vol. VI, Ann. 175).

[230] Record No. 497/4.GEND.CAB.S.G. from the Commander-in-chief of the Gendarmerie to the President of Gabon, 21 June 1974 (CMG, Vol. V, Ann. 133), p. 1.

[231] *Ibid.*, p. 2.

[232] Telegram No. 65/66/67 from the Embassy of France in Equatorial Guinea to the French Ministry of Foreign Affairs, 25 June 1974 (CMG, Vol. V, Ann. 134).

[233] *Ibid.*

CHAPTER III
THE CONCLUSION OF THE BATA CONVENTION

3.1 In 1974, meetings, discussions and negotiations continued between the highest authorities of Gabon and Equatorial Guinea with the aim of finding a solution to the questions of the delimitation of their land and maritime boundaries and of sovereignty over the islands of Mbanié, Cocotiers and Conga. They led to the conclusion, at Bata in September 1974, of the Convention delimiting the land and maritime frontiers of Equatorial Guinea and Gabon (the "Bata Convention").

3.2 In its Memorial, Equatorial Guinea does not deny that the Presidents of the two States met in Bata in September 1974[234]. However, apart from a single sentence, it provides no information about the circumstances or outcomes of that meeting, as if these immensely important events never took place. It also remains silent on the events, discussions and press conferences which took place shortly after that State visit and which confirm that a convention was signed by the two Presidents during their meeting in Bata.

I. The preliminary talks on resolving the territorial and boundary questions

3.3 On 13 July 1974, Presidents Bongo and Macías Nguema travelled together to Bitam (in Gabon) and Ebebiyin (in Equatorial Guinea) to discuss the boundary between the two States in that region[235] and recent worrying incidents[236].

3.4 According to information provided to the French Ambassador by President Bongo on his return, the "misunderstandings" about the course of the land boundary were successfully resolved at that meeting and a "*modus vivendi*" was agreed[237]. President Macías Nguema had recognized "the boundary line as it was defined by the earlier agreements"[238]. President Bongo also reported to the French Ambassador to Libreville that President Macías Nguema "had acknowledged, in particular, that the crossroads located 2.5 km to the west of the River Kie [also known as the 'carrefour international'] was indeed the point at which the three boundaries of Gabon, Equatorial Guinea and Cameroon met"[239]. Furthermore, the two Heads of State agreed "to establish a joint commission charged with verifying and definitively establishing, along its entire length, the course of the

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[234] MEG, Vol. I, p. 84. The interest shown by Equatorial Guinea in this meeting is so slight that it has not even bothered to number the paragraph in which it acknowledges the historical reality.

[235] Telegram No. 76 from the Embassy of France in Equatorial Guinea to the French Ministry of Foreign Affairs, 14 July 1974 (CMG, Vol. V, Ann. 136); Information bulletin No. 82/GAB/AFA/CD from the military attaché at the Embassy of France in Gabon, 18 July 1974 (CMG, Vol. V, Ann. 140); Dispatch No. 101/DAM from the Ambassador of France to Gabon to the French Minister for Foreign Affairs, 1 Aug. 1974 (CMG, Vol. V, Ann. 144); "Fin du malentendu frontalier entre le Gabon et la Guinée Équatoriale", *Cameroun Tribune*, 15 July 1974 (CMG, Vol. V, Ann. 137).

[236] See above, paras. 2.57-2.59.

[237] Telegram No. 561/563 from the Embassy of France in Gabon to the French Ministry of Foreign Affairs, 15 July 1974 (CMG, Vol. V, Ann. 138), p. 1.

[238] *Ibid.*

[239] *Ibid.*

mainland boundary between Gabon and Equatorial Guinea"[240]. These details are corroborated by other sources[241], including from Malabo[242].

3.5 Diplomatic correspondence from the time also indicates that, following that meeting, both Gabon and Equatorial Guinea sought to gather factual and documentary evidence about their common boundary from the former colonial Powers, in order to complete the technical negotiation process. Hence, shortly after the meeting of July 1974, the Ambassador of France to Gabon informed his superiors that President Bongo had asked to be provided with documents from the French archives relating to the delimitation of the boundary[243]. The authorities of Equatorial Guinea also sought assistance from, and even the intervention and mediation of, the authorities of the former colonial Powers[244].

3.6 Moreover, the Gabonese authorities made clear their legal position on the determination of a maritime boundary consistent with the relevant principles of international law. A Note from a legal adviser at the Ministry of Mines, Industry, Energy and Hydraulic Resources dated 6 August 1974 recalled that "[a] further meeting of experts is planned for the delimitation of the maritime boundaries between Equatorial Guinea and Gabon"[245]. The conclusions and proposals of the Note's author regarding the maritime boundary and the creation of enclaves around the Elobey Islands and the island of Corisco are in line with the position adopted by Gabon during the negotiations[246] and were reiterated, at least in part, during the discussions that took place in September 1974, and in the text of the Bata Convention.

II. President Bongo's State visit to Equatorial Guinea and the signing of the Bata Convention

3.7 On 9 September 1974, President Bongo, accompanied by a large Gabonese delegation, embarked on a State visit to Malabo in Equatorial Guinea at the invitation of President Macías Nguema. On 11 September, that visit continued to Bata, on mainland Equatorial Guinea, before President Bongo returned to Libreville on the evening of 12 September. The President of Equatorial Guinea was accompanied in Malabo and Bata by a sizeable entourage which included, among others,

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[240] *Ibid.*, p. 2.

[241] Telegram No. 2676 from the United States Embassy in Cameroon to the US Secretary of State, 15 Aug. 1974 (CMG, Vol. V, Ann. 146); Information bulletin No. 82/GAB/AFA/CD from the military attaché at the Embassy of France in Gabon, 18 July 1974 (CMG, Vol. V, Ann. 140), p. 4. See also "Fin du malentendu frontalier entre le Gabon et la Guinée Équatoriale", *Cameroun Tribune*, 15 July 1974 (CMG, Vol. V, Ann. 137); "Gabon — Guinée Équatoriale: Négociation éclaire", *Jeune Afrique*, 27 July 1974 (CMG, Vol. V, Ann. 143).

[242] Telegram No. 78/79 from the Embassy of France in Equatorial Guinea to the French Ministry of Foreign Affairs, 15 July 1974 (CMG, Vol. V, Ann. 139); Telegram No. 85 from the Embassy of France in Equatorial Guinea to the French Ministry of Foreign Affairs, 20 July 1974 (CMG, Vol. V, Ann. 141).

[243] Telegram No. 561/563 from the Embassy of France in Gabon to the French Ministry of Foreign Affairs, 15 July 1974 (CMG, Vol. V, Ann. 138), p. 2; Letter No. 200/DAM/1 from the French Minister for Foreign Affairs to the Secretary of State for Culture, 26 Aug. 1974 (CMG, Vol. V, Ann. 147). Similar requests were also made before the meeting of 13 July 1974. See, for example, Telegram No. 556/557 from the Embassy of France in Gabon to the French Ministry of Foreign Affairs, 12 July 1974 (CMG, Vol. V, Ann. 135).

[244] Telegram No. 78/79 from the Embassy of France in Equatorial Guinea to the French Ministry of Foreign Affairs, 15 July 1974 (CMG, Vol. V, Ann. 139); Telegram No. 85 from the Embassy of France in Equatorial Guinea to the French Ministry of Foreign Affairs, 20 July 1974 (CMG, Vol. V, Ann. 141).

[245] Note by the technical adviser on the maritime boundaries between Equatorial Guinea and Gabon, 6 Aug. 1974 (CMG, Vol. V, Ann. 145), p. 1.

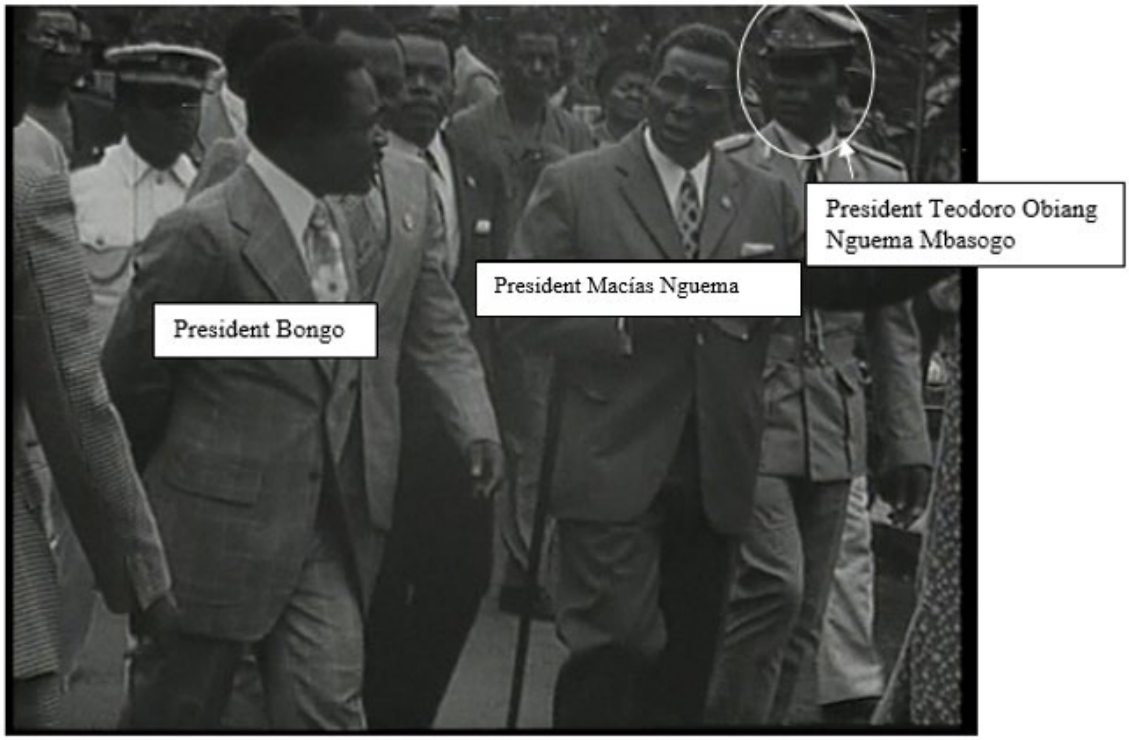
[246] Report prepared by the Gabon-Equatorial Guinea Joint Commission after the meeting in Libreville from March 25 to 29, 1972, 29 Mar. 1972 (MEG, Vol. VII, Ann. 199), paras. 4.1-4.3. See also above, para. 2.45.

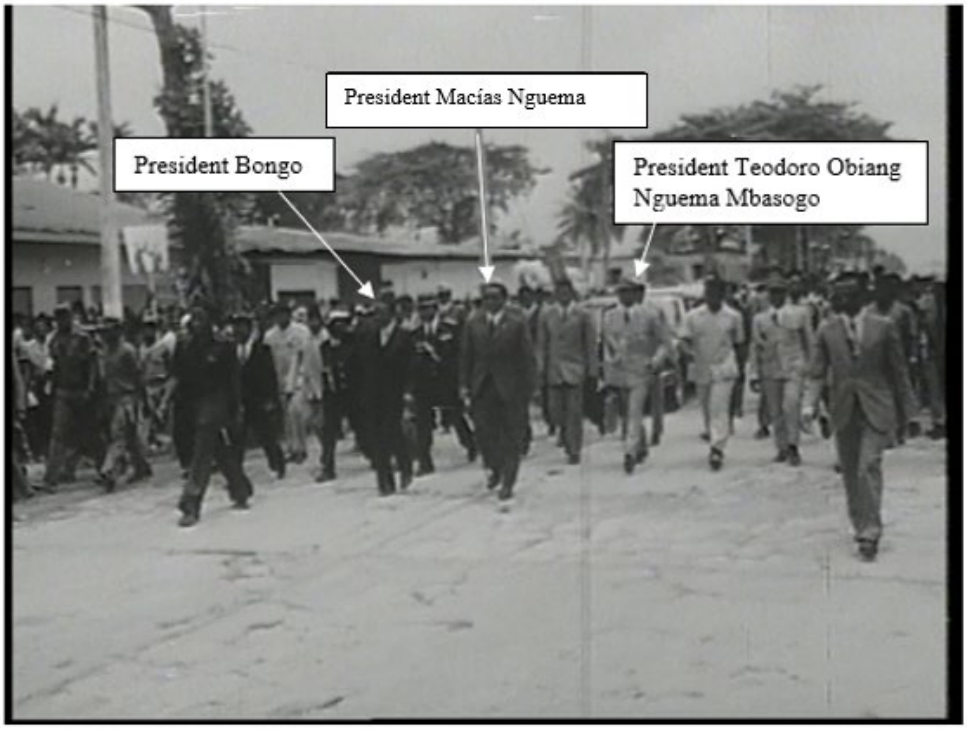
the current President of Equatorial Guinea, Mr Teodoro Obiang Nguema Mbasogo, who can be seen in the photographs published by the weekly newspaper *L'Union*[247].

The current President of Equatorial Guinea also appears repeatedly in a news report put together by the Gabonese television services[248].

[247] "'Tout est réglé!' avec la Guinée Équatoriale", *L'Union*, 20 Sept. 1974 (CMG, Vol. V, Ann. 150), p. 1.

[248] Audiovisual report on the State visit of President Bongo to Equatorial Guinea and its transcription (CMG, Vol. II, Ann. V2).

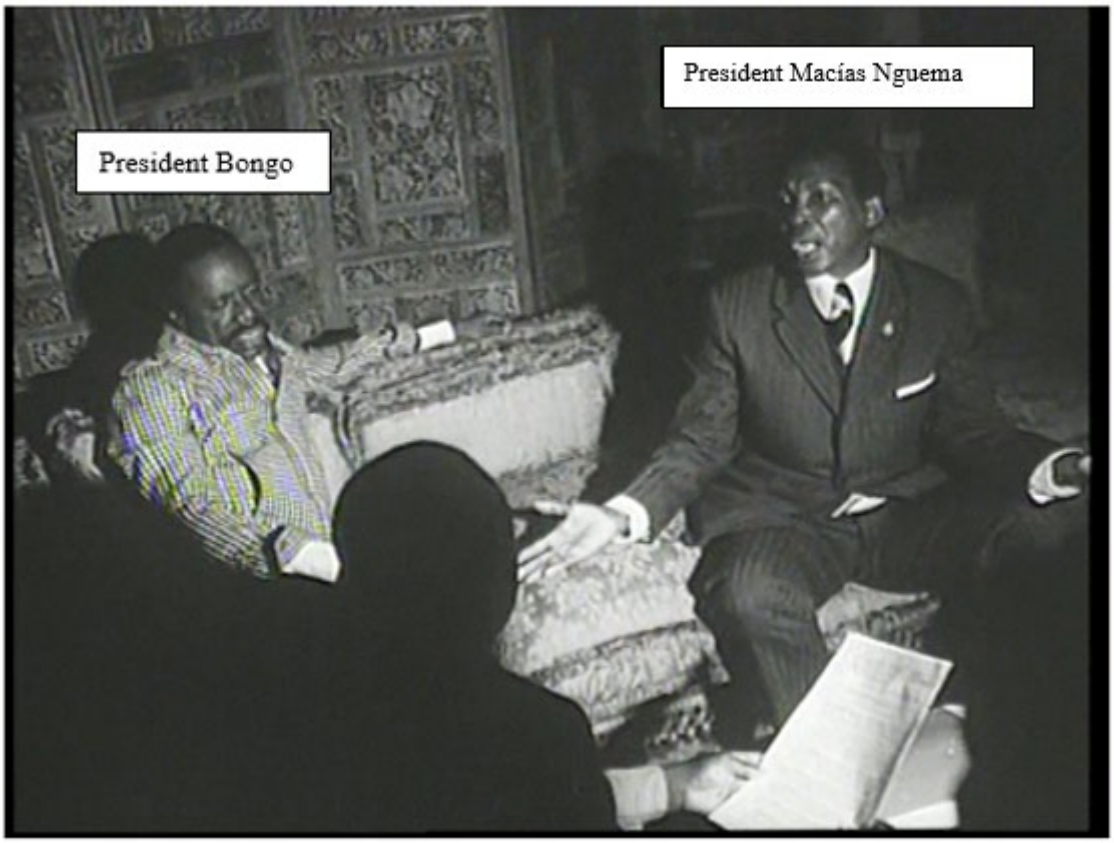




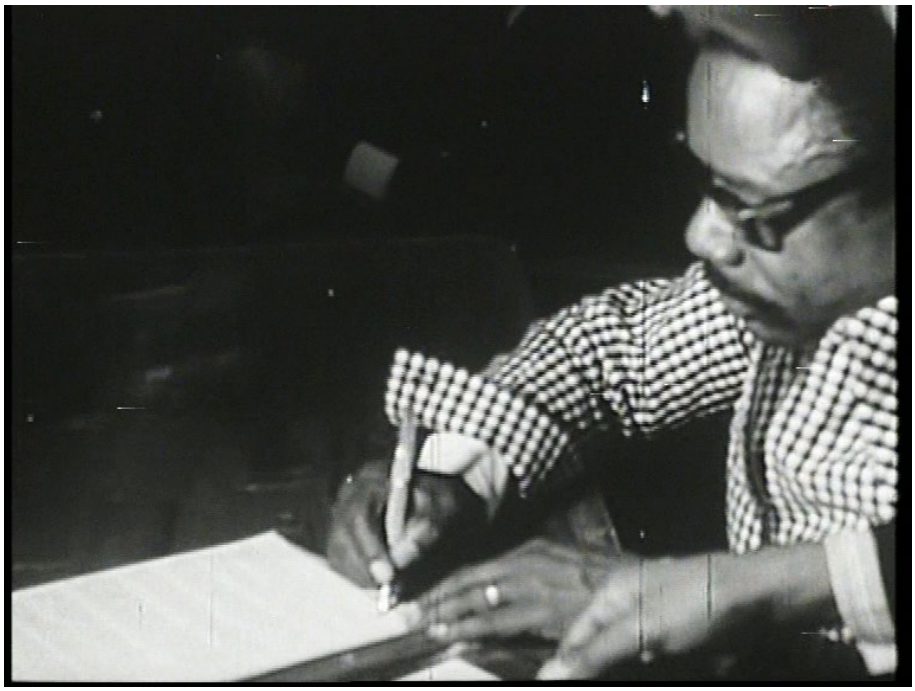
3.8 During that visit, the two Parties' experts continued to discuss the delimitation of the land and maritime boundaries, in the spirit of the agreement reached by the two Presidents during the visit and discussions of July 1974[249]. Negotiations between the two Presidents and their respective experts continued. The Bata Convention ratifying the agreement reached by the Parties was signed on 12 September 1974, at the end of the State visit. The Gabonese television services filmed part of the

[249] See above, paras. 3.3-3.6.

negotiations and the signing of the Convention[250]. Some stills from that news report are reproduced below.



[250] Audiovisual report on the State visit of President Bongo to Equatorial Guinea and its transcription (CMG, Vol. II, Ann. V2).



3.9 The images show the two Presidents surrounded by other members of their delegations, discussing documents and maps. They also show the two Presidents signing a document. The commentary accompanying those images states:

> "The talks between the two Heads of State made it then possible to resolve definitively the question of the delimitation of the boundaries between Equatorial Guinea and Gabon. This is a significant step which disposes of what for both countries has at times been a vexed issue. 'Everything is settled', President Bongo was able to declare with great satisfaction on his return to Libreville."[251]

3.10 A week after the signing of the Bata Convention, the Gabonese weekly *L'Union* ran the headline: "'Tout est réglé!' avec la Guinée Équatoriale" ("'Everything is settled!' with Equatorial Guinea")[252]. It also reported that "President Bongo and his counterpart from Equatorial Guinea held substantial exchanges which resulted in the publication of a final communiqué", the "most important excerpts"[253] of which were reproduced. Those excerpts include the following, under the heading "Delimitation of boundaries":

> "At the bilateral level, both Heads of State took turns extolling the quality of the wide variety of ties, the depth of fraternal sentiment and the cordiality of the relations which had always bound their two peoples. They agreed that it was necessary to give fresh impetus to developing existing relations between the two countries. To this end, they signed a convention on the delimitation of the land and maritime boundaries between the Gabonese Republic and the Republic of Equatorial Guinea."[254]

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[251] *Ibid.*

[252] "'Tout est réglé!' avec la Guinée Équatoriale", *L'Union*, 20 Sept. 1974 (CMG, Vol. V, Ann. 150), p. 1.

[253] *Ibid.*, p. 3.

[254] *Ibid.*

3.11 The article in the weekly newspaper *L'Union* is accompanied by several photographs. One shows the two Heads of State signing a document at their meeting in Bata, surrounded by their colleagues. According to its caption, that photograph shows the signing of the "final communiqué"[255].

III. The content of the Bata Convention

3.12 Despite its best efforts, Gabon has not been able to locate in its archives an original of the Bata Convention signed on 12 September 1974. At Gabon's request, the French Ministry of Foreign Affairs has, however, located a certified copy of the French and Spanish versions of that document, which was sent by President Bongo to the French Ambassador to Libreville shortly after the signing[256]. A copy of that certified copy, the original of which remains in the archives of the French Ministry of Foreign Affairs[257], is appended to this Counter-Memorial, as Annex 155.

3.13 The text is entitled "Convention délimitant les frontières terrestres et maritimes de la Guinée Équatoriale et du Gabon" in French and "Convención delimitando las fronteras terrestres y maritimas de la Guinea Ecuatorial y del Gabón" in Spanish*. The text itself consists of a preamble and ten articles.

(a) Article 1 describes "the boundary between the Republic of Equatorial Guinea and the Gabonese Republic on the coast of the Gulf of Guinea", reproducing almost verbatim the text of Article 4 of the Paris Convention. It states, however, that this description of the boundary is "[s]ubject to the provisions of article 2".

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[255] *Ibid.*

[256] See also below, para. 3.22.

[257] Letter No. 12/AL from the Ambassador of France to Gabon to the Gabonese Minister for Foreign Affairs, Co-operation and Francophonie, 6 Jan. 2004 (CMG, Vol. V, Ann. 172).

* In English, the "Convention [delimiting] the land and maritime frontiers of Equatorial Guinea and Gabon". All translations of quotations from this instrument are taken from *UNTS*, Vol. 2248, pp. 100-102, available here: https://treaties.un.org/doc/Publication/UNTS/Volume%202248/v2248.pdf.

(b) Article 2 provides for the transfer of an area of territory from Equatorial Guinea to Gabon and, "[i]n compensation", for the transfer of an area of territory from Gabon to Equatorial Guinea.

(c) Under Article 3, the "High Contracting Parties recognize, on the one hand, that Mbane island forms an integral part of the territory of the Gabonese Republic and, on the other, that the Elobey Islands and Corisco Island form an integral part of the territory of the Republic of Equatorial Guinea".

(d) Article 4 establishes "[t]he maritime frontier between the Republic of Equatorial Guinea and the Gabonese Republic" and grants Equatorial Guinea "water areas" surrounding the Elobey Islands and Corisco Island, while specifying the dimensions of those areas.

Sketch-map No. 3.1 below (see p. 57) shows the boundary between Gabon and Equatorial Guinea in accordance with Articles 1 to 4 of the Bata Convention.

(e) Article 5 establishes the facilities to be granted to ships of Equatorial Guinea in Gabonese territorial waters "[f]or access by sea to the River Muni as well as to the Elobey Islands and Corisco Island". This provision further states that "[t]he same shall apply, on a reciprocal basis, to Gabonese ships in the territorial waters of Equatorial Guinea" and sets out special arrangements for policing and fishing on the Muni and Utamboni Rivers. Article 6 states that these rights and privileges are reserved exclusively for nationals of the two Parties.

(f) Articles 7 and 8 provide, first, for the drawing up of protocols to determine the "precise boundaries" of the exchanged land areas and to specify the procedures for the application of the Convention, and, second, for the marking of the boundaries.

(g) Article 9 contains provisions relating to the settlement of disputes "arising from the application or interpretation ~~of the present treaty~~ of the present Convention"[258].

(h) Article 10 states that "[t]he present Convention shall enter into force on the date of signature thereof".

3.14 The two Presidents have placed their signatures at the foot of both language versions: in the French version, President Bongo's signature is on the left and President Macías Nguema's signature is on the right. In the Spanish version, President Macías Nguema's signature is on the left and President Bongo's signature is on the right.

3.15 In the French version, a note appears beneath the two signatures: "The two Heads of State agree to proceed subsequently with a new text of article 4 to bring it into conformity with the Convention of 1900."

3.16 In the Spanish version, this note does not appear in typewritten form. However, that version contains a handwritten and initialled note in the left-hand margin of the second page. That note reads as follows: "El articulo 4º sera examinado por los dos Jefes de Estado ulteriormente, conforme la Convención de 1900."[259]

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[258] *Ibid.* The corrections to the text shown in the citation have been made by hand. They are initialled.

[259] This handwritten note appears, in part, in the Spanish version of the Bata Convention appended as Ann. 217 to the Memorial of Equatorial Guinea (MEG, Vol. VII). The translation entered into the case file by Equatorial Guinea states: "[handwritten note]: [illegible] subsequently, in accordance with the 1900 Convention".

Sketch-map No. 3.1
The boundary delimited by the Bata Convention

IV. The declarations of the two Presidents following the State visit and the signing of the Convention in Bata

3.17 On his return to Libreville, President Bongo declared that everything was resolved between Gabon and Equatorial Guinea[260]. The French Ambassador to Libreville reported that, during a press conference at Libreville airport, the Gabonese President had announced that "he had signed with President Macías Nguema an agreement on the delimitation of the two countries' 'land and maritime' boundaries and that the issue had been definitively resolved"[261].

3.18 A few weeks later, President Bongo notified the French Ambassador to Libreville of the outcome of his visit to Malabo and Bata. According to the record of that meeting, drawn up by the

[260] "'Tout est réglé!' avec la Guinée Équatoriale", *L'Union*, 20 Sept. 1974 (CMG, Vol. V, Ann. 150); Audiovisual report on the State visit of President Bongo to Equatorial Guinea and its transcription (CMG, Vol. II, Ann. V2); Telegram No. 1139 from the United States Embassy in Cameroon to the US Secretary of State, 14 Sept. 1974 (CMG, Vol. V, Ann. 149).

[261] Telegram No. 691/692 from the Embassy of France in Gabon to the French Ministry of Foreign Affairs, 13 Sept. 1974 (CMG, Vol. V, Ann. 148).

Ambassador for his superiors, President Bongo "first declared that the question [of the delimitation of the boundaries between Gabon and Equatorial Guinea] had been completely and definitively resolved"[262]. The Ambassador continued:

> "While the discussions at the expert level had proved arduous and it had been necessary for the two Presidents to act as intermediaries, it had nevertheless been possible to draw up an agreement and for the two Heads of State to sign a convention, dated 12 September.
>
> Thus, the maritime boundary had been determined and Gabon's rights over the island of Mbanié and over the enclave formed by the town of Medouneu to the north of the first parallel had been recognized. In return, some concessions had been made to Equatorial Guinea along the eastern boundary, close to the towns of Ebebiyin and Ngong."[263]

3.19 Moreover, President Bongo had emphasized the fact that "[i]t was a convention . . . and not a treaty, in order to avoid parliamentary ratification, which could have been used as a pretext for a further challenge, or even a calling into question of the agreement"[264].

3.20 On 1 October 1974, the President of Equatorial Guinea received the Ambassador of France to Equatorial Guinea and informed him of the negotiations relating to the boundary with Gabon[265]. According to the French Ambassador's report, the description given by President Macías Nguema during this meeting of the details of the agreement reached on the delimitation of the land boundary and the exchange of certain territories[266] was in keeping with the text of the Convention of 12 September 1974 and, more specifically, with Articles 1 and 2 thereof. The President also confirmed "that he had relinquished to Gabon *de jure* sovereignty over M'Banie, Cocotier and Conga"[267]. Finally, he referred to the maritime boundary as described in Article 4 of the Bata Convention, explaining that the Gabonese delegation had insisted on this solution[268], and added that "[h]e would nevertheless have preferred the boundary between the two countries' territorial waters to be fixed, as the land boundary was, along the 1° north parallel of latitude and for there to be no break between the territorial waters adjacent to Río Muni and those surrounding the group of islands made up of Corisco, Elobey Grande and Elobey Chico"[269].

3.21 On 13 October 1974, the day after Equatorial Guinea's national day, President Macías Nguema informed diplomatic representatives of the outcome of the negotiations on the delimitation of Equatorial Guinea's boundaries with Gabon[270]. Once again, he confirmed that negotiations had

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[262] Dispatch No. 141/DAM from the Ambassador of France to Gabon to the French Minister for Foreign Affairs, 7 Nov. 1974 (CMG, Vol. V, Ann. 156), p. 2.

[263] *Ibid.*

[264] *Ibid.*, p. 3.

[265] Dispatch No. 40/DA/DAM-2 from the Ambassador of France to Equatorial Guinea to the Directorate of African and Madagascan Affairs at the French Ministry of Foreign Affairs, 2 Oct. 1974 (CMG, Vol. V, Ann. 152), pp. 4-5.

[266] *Ibid.*, pp. 5-7.

[267] *Ibid.*, p. 7.

[268] *Ibid.*, p. 8.

[269] *Ibid.*, p. 7.

[270] Dispatch No. 43/DA/DAM-2 from the Ambassador of France to Equatorial Guinea to the Directorate of African and Madagascan Affairs at the French Ministry of Foreign Affairs, 14 Oct. 1974 (CMG, Vol. V, Ann. 153); Telegram No. 3385 from the United States Embassy in Cameroon to the US Secretary of State, 16 Oct. 1974 (CMG, Vol. V, Ann. 154).

taken place in Bata between the two Heads of State during the State visit of September 1974[271] and that both Parties had made concessions regarding the land boundary[272]. He further explained that he "had drawn a definitive line under the matter" and had "renounced any further discussion of land boundaries"[273]. The President of Equatorial Guinea also conceded that he had "completely relinquished [Equatorial Guinea's] sovereign rights over M'Banie, Cocotier and Conga"[274]. He presented the solution contained in the Bata Convention in respect of maritime delimitation, while suggesting that Equatorial Guinea had proposed slight modifications that would better serve Equatorial Guinea's interests[275].

3.22 As stated during a meeting with him[276], the Gabonese President transmitted a certified copy of the French and Spanish versions of the Convention signed on 12 September 1974 to the French Ambassador to Libreville by letter dated 28 October 1974[277]. In that letter, President Bongo explained that he "considered it useful to adhere to the unobtrusive international practice that encourages friendly countries to keep each other apprised of developments in their relations with third States"[278]. The French Ambassador to Libreville transmitted President Bongo's letter and the certified copy of the Bata Convention to the Ministry of Foreign Affairs in Paris[279].

3.23 At a meeting with the French Ambassador to Malabo on 23 December 1974, President Macías Nguema reiterated the remarks he had made to the Ambassador on 1 October[280] and to the diplomatic corps on 13 October[281]; he added "that he wanted and had always wanted peace and, moreover, could not risk conflict with a sister country like Gabon, despite the injustice suffered as regards the territorial waters of Corisco and the two Elobeys"[282]. These remarks confirmed that a settlement of the issues relating to the delimitation of the land and maritime boundaries and to sovereignty over the islands of Mbanié, Cocotiers and Conga had indeed been reached, even if the President of Equatorial Guinea was not entirely satisfied with the outcome.

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[271] Dispatch No. 43/DA/DAM-2 from the Ambassador of France to Equatorial Guinea to the Directorate of African and Madagascan Affairs at the French Ministry of Foreign Affairs, 14 Oct. 1974 (CMG, Vol. V, Ann. 153), pp. 3-4.

[272] *Ibid.*, p. 4.

[273] *Ibid.*, p. 5.

[274] *Ibid.*, p. 5. See also Telegram No. 3385 from the United States Embassy in Cameroon to the US Secretary of State, 16 Oct. 1974 (CMG, Vol. V, Ann. 154), item B (4).

[275] Dispatch No. 43/DA/DAM-2 from the Ambassador of France to Equatorial Guinea to the Directorate of African and Madagascan Affairs at the French Ministry of Foreign Affairs, 14 Oct. 1974 (CMG, Vol. V, Ann. 153), p. 6. See also Telegram No. 3385 from the United States Embassy in Cameroon to the US Secretary of State, 16 Oct. 1974 (CMG, Vol. V, Ann. 154), item C.

[276] Dispatch No. 141/DAM from the Ambassador of France to Gabon to the French Minister for Foreign Affairs, 7 Nov. 1974 (CMG, Vol. V, Ann. 156), p. 3.

[277] Letter from the President of Gabon to the Ambassador of France to Gabon, 28 Oct. 1974 (CMG, Vol. V, Ann. 155). See also, for a copy of the letter without annexes, MEG, Vol. VI, Ann. 176.

[278] *Ibid.*

[279] Dispatch No. 141/DAM from the Ambassador of France to Gabon to the French Minister for Foreign Affairs, 7 Nov. 1974 (CMG, Vol. V, Ann. 156), p. 2.

[280] See above, para. 3.20.

[281] See above, para. 3.21.

[282] Telegram No. 134 from the Embassy of France in Equatorial Guinea to the French Ministry of Foreign Affairs, 23 Dec. 1974 (CMG, Vol. V, Ann. 157).

3.24 Information supplied by the diplomatic authorities in Malabo and Libreville also confirms the existence of the Bata Convention.

(a) In April 1975, the French Ambassador to Malabo expressed his surprise at the lack of checks carried out by the Gabonese authorities in the area between Mongomo and Ebebiyin[283]; he nevertheless relayed the Gabonese Ambassador's remarks that the "principle of Gabonese sovereignty over the area is in no way undermined" and that Gabonese forces in the region had "been ordered to remain vigilant"[284]. The Gabonese Ambassador had also assured his French counterpart that Gabon "ha[d] not relinquished its demands regarding the territorial waters around Corisco and the two Elobeys and [was] conducting careful monitoring there too"[285].

(b) The United States Embassy reported that "Macías fe[lt] last years *[sic]* 'settlement' was imposed upon him by Bongo" and the "maritime bound[a]ry settlement [was] also very shaky"[286].

(c) In a detailed report on relations between Gabon and Equatorial Guinea, the French Ambassador to Equatorial Guinea recalled the incidents and sovereignty disputes that had occurred, first over Mbanié, Cocotiers and Conga in 1972 and, second, in relation to the land boundary at Ebebiyin in 1974[287]. He confirmed that these matters had been settled "by a convention signed at Bata on 12 September 1974 by the Presidents of Gabon and Equatorial Guinea", faithfully summarized the content of that instrument and appended a typed copy of its text to his report[288].

3.25 The Bata Convention signed by the Presidents of Gabon and Equatorial Guinea during the State visit of 12 September 1974 resolved the territorial and boundary disputes between Gabon and Equatorial Guinea and allowed for the normalization of their bilateral relations.

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[283] Dispatch No. 92/DAM/2 from the Ambassador of France to Equatorial Guinea to the French Minister for Foreign Affairs, 11 Apr. 1975 (CMG, Vol. V, Ann. 158).

[284] *Ibid.*

[285] *Ibid.*

[286] Telegram No. 621 from the United States Embassy in Gabon, 29 Apr. 1975 (CMG, Vol. V, Ann. 159).

[287] Dispatch No. 255/DAM/2 from the Ambassador of France to Equatorial Guinea to the French Minister for Foreign Affairs, 28 Nov. 1976 (CMG, Vol. V, Ann. 160).

[288] *Ibid.*

CHAPTER IV
RELATIONS BETWEEN GABON AND EQUATORIAL GUINEA AFTER THE SIGNING OF THE BATA CONVENTION

4.1 The Bata Convention brought an end to the tensions between the two States, and the next 25 years were marked by peaceful relations and the implementation of a policy of co-operation in several areas (**I**). It was not until 1999 that the boundary dispute crystallized, when Equatorial Guinea called into question the commitments made in the Bata Convention (**II**). Gabon and Equatorial Guinea then sought unsuccessfully to settle their dispute through the United Nations mediation process (**III**).

I. The easing of relations and the establishment of close co-operation between Gabon and Equatorial Guinea (1974-1999)

4.2 Gabon and Equatorial Guinea concluded several co-operation agreements attesting to their good relations and the absence of any major disputes between them (**A**). Notwithstanding Equatorial Guinea's short-lived opposition to Gabon's sovereignty over the islands of Mbanié, Cocotiers and Conga in 1984 (**B**), this bilateral co-operation continued peacefully until 1999 (**C**).

A. The conclusion of multiple co-operation agreements

4.3 Following the conclusion of the Bata Convention, questions concerning the land and maritime boundaries, on the one hand, and sovereignty over the islands of Mbanié, Cocotiers and Conga, on the other, were no longer discussed between the two States. The authorities of Equatorial Guinea, and the Minister Secretary General of the Presidency of the Republic of Equatorial Guinea in particular, confirmed that these matters had been settled by the Bata Convention[289].

4.4 Relations between Gabon and Equatorial Guinea normalized and intensified. These good neighbourly relations were not affected by the violent overthrow in mid-1979 of President Macías Nguema (who was tried before a military tribunal and executed the same year) and the seizure of power by Mr Teodoro Obiang Nguema[290]. No fewer than nine co-operation agreements were concluded by the two States between 197[9] and 1984. Demonstrating the willingness to develop sound and sustainable co-operation, the first of these was the General Co-operation Agreement, which was signed on 13 November 1979 by the Ministers for Foreign Affairs of Gabon and Equatorial Guinea[291]. Under Article 1 of that instrument:

> "The Contracting Parties agree jointly to pursue, to the greatest extent possible and in a spirit of fraternal solidarity, their efforts to strengthen economic, social, cultural, scientific and technical co-operation in all areas of common interest to their two countries, with a view to making a substantial contribution to their development."[292]

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[289] M. Liniger-Goumaz, *La Guinée Équatoriale, un pays méconnu* (1980) (CMG, Vol. V, Ann. 165), pp. 228-229; D. Ndongo Bidyogo, *Historia y tragedia de Guinea Ecuatorial* (1977) (CMG, Vol. V, Ann. 161), p. 219.

[290] See "Quand Teodoro Obiang s'emparait du pouvoir par un putsch en Guinée Équatoriale", Radio France Internationale, 3 Aug. 2019 (available online at: https://www.rfi.fr/fr/afrique/20190803-guinee-equatoriale-teodoro-obiang-putsch (consulted on 28 Apr. 2022)). See also A. Artucio, *The Trial of Macias in Equatorial Guinea: The Story of a Dictatorship*, Commission internationale de Juristes and International University Exchange Fund (1979) (available online at: https://www.icj.org/wp-content/uploads/1979/01/Equatorial-Guinea-fair-trial-trial-observation-report-1979-eng.pdf (consulted on 28 Apr. 2022)).

[291] General Co-operation Agreement between the Government of the Gabonese Republic and the Government of the Republic of Equatorial Guinea, Libreville, 13 Nov. 1979 (CMG, Vol. V, Ann. 16[4]).

[292] *Ibid.*, Art. 1.

4.5 At the first meeting of the high-level joint commission established by the Agreement, a large number of draft co-operation agreements in various areas were discussed, including a friendship and good neighbourliness agreement and an agreement relating to employment and the free movement of people[293]. Between 1979 and 1984, the two States signed nine agreements on subjects as numerous as they were varied[294]:

(a) the (above-mentioned) General Co-operation Agreement in 1979;

(b) the Petroleum Co-operation Agreement in 1979;

(c) the Agreement on Aviation in 1980;

(d) the Cultural Agreement in 1980;

(e) the Commercial Agreement in 1980;

(f) the Co-operation Agreement on Telecommunications in 1981; and

(g) the Co-operation Agreement on Shipping in 1983.

4.6 The Petroleum Co-operation Agreement reached on 13 November 1979 by Presidents Bongo and Obiang Nguema was thus one of the first agreements concluded within the framework of this co-operation[295]. In it, the two States gave important mutual undertakings with respect to both on- and offshore petroleum:

(a) Gabon agreed to share with Equatorial Guinea the benefit of its "petroleum experience acquired on its national territory, and to assist and support the Republic of Equatorial Guinea in gaining access to the technical and financial assistance facilities offered by international organizations of which Gabon is a member"[296].

(b) Gabon and Equatorial Guinea granted the Gabonese national petroleum company PETROGAB "an exclusive petroleum exploration and production right in the offshore area located between the north parallel of latitude 1° 01' 14" (one degree, one minute, fourteen seconds) and north parallel 0° 41' 32" (zero degrees, forty-one minutes, thirty-two seconds)"[297]. The zone thus awarded to the Gabonese national petroleum company — shown in **sketch-map No. 4.1** below (see p. 63) — lay immediately to the south of the maritime boundary agreed in 1974 and encompassed the "water areas" around the island of Corisco and the Elobey Islands.

(c) The two States created the "Gabon-Equatorial Guinea Joint Petroleum Company for the purposes of all financial, commercial, technical and other operations directly or indirectly linked to the petroleum industry in Equatorial Guinea"[298]. Gabon agreed to provide the technical and financial

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[293] Minutes of the first meeting of the high-level Gabon-Equatorial Guinea joint commission, 26-30 July 1980 (MEG, Vol. VII, Ann. 202).

[294] See the list of bilateral agreements concluded by Gabon and published on the website of the Gabonese Ministry of Foreign Affairs: http://www.diplomatie.gouv.ga/object.getObject.do?id=534&msclkid=1370018eb0fe11ecb54a0b78ae6ad097 (consulted on 28 Apr. 2022).

[295] Petroleum Co-operation Agreement between the Republic of Equatorial Guinea and the Gabonese Republic, Libreville, 13 Nov. 1979 (CMG, Vol. V, Ann. 163).

[296] *Ibid.*, Art. 5.

[297] *Ibid.*, Art. 6.

[298] *Ibid.*, Art. 7.

means needed for that joint company to function[299] and, in exchange, Equatorial Guinea granted the latter "a right of first refusal in respect of all currently available petroleum exploration and production zones [in the territory of Equatorial Guinea]"[300].

Sketch-map No. 4.1
Permit granted to PETROGAB under Article 6 of the Petroleum Co-operation Agreement of November 1979

[299] *Ibid.*, Art. 8.

[300] *Ibid.*, Art. 10.

4.7 In the ten years that followed the conclusion of the Bata Convention, the two States were spurred on by a genuine desire for meaningful co-operation between them. Such a desire — and the conclusion of these numerous agreements — would not have been possible if, as Equatorial Guinea claims[301], there had been a years-long boundary dispute between the Parties over the exercise of their respective sovereignties.

4.8 Moreover, none of these many agreements — including the General Co-operation Agreement — makes any mention of a boundary dispute between Gabon and Equatorial Guinea, even though several of them, such as the Agreement on Aviation and the Co-operation Agreement on the Movement of Goods and People and on Employment, involve transboundary co-operation.

B. Equatorial Guinea's short-lived change of heart on sovereignty over Mbanié, Conga and Cocotiers

4.9 In the year following the signing of the Petroleum Co-operation Agreement, Gabon proposed extending its scope to mining activities[302]. Equatorial Guinea's delegation flatly rejected that proposal, however, claiming that Equatorial Guinea had denounced the 1979 Agreement on the ground that it "had not been negotiated by Equato-Guinean experts"[303]. In spite of this categorical stance adopted by Equatorial Guinea, and in order to find a mutually acceptable solution, the two States began revising the 1979 Agreement in accordance with Article 11 thereof[304]. In 1982, the *ad hoc* Commission tasked with revising the Petroleum Co-operation Agreement met and recorded the proposals of both Parties in respect of several provisions of the 1979 Agreement. As regards Article 6, Equatorial Guinea put forward an amendment aimed at terminating PETROGAB's exclusive right and granting one to a joint Gabonese-Equatorial Guinean company, over an area to be determined[305].

4.10 Two years later, in 1984, the *ad hoc* Commission met again to continue negotiations on the nature and extent of a joint exploitation zone and the modification of Article 6. The Parties noted, however, that their respective positions remained irreconcilable[306]. The Gabonese delegation proposed that the area defined in Article 6 of the 1979 Agreement should be jointly exploited[307]. The delegation from Equatorial Guinea, for its part, considered the entire area to be under its sovereignty alone. It invoked

> "Article 7 of its Constitution, which determines the national territory of the Republic of Equatorial Guinea, comprised in its maritime part of the islands of BIOCO, CORISCO,

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[301] MEG, Vol. I, paras. 5.1 *et seq*.

[302] Minutes of the first meeting of the Gabon-Equatorial Guinea high-level joint commission, Malabo, 26-30 July 1980 (MEG, Vol. VII, Ann. 202).

[303] *Ibid.*

[304] Petroleum Co-operation Agreement between the Republic of Equatorial Guinea and the Gabonese Republic, Libreville, 13 Nov. 1979 (CMG, Vol. V, Ann. 163), Art. 11.

[305] Minutes of the *ad hoc* Commission on the revision of the Petroleum Co-operation Agreement between the Republic of Equatorial Guinea and the Gabonese Republic, Libreville, 18 Mar. 1982 (CMG, Vol. V, Ann. 167), pp. 3-4. See also MEG, Vol. VII, Ann. 203.

[306] Minutes of the second meeting of the *ad hoc* Commission on the revision of the Petroleum Co-operation Agreement between the Republic of Equatorial Guinea and the Gabonese Republic, Libreville, 13 Sept. 1984 (CMG, Vol. V, Ann. 169), p. 4.

[307] *Ibid.*, p. 3.

> ANNOBON, ELOBEY GRANDE, ELOBEY CHICO and surrounding islets, and the recent Convention on the Law of the Sea signed in Jamaica in 1982"

in support of its conclusion that

> "the area proposed by the Gabonese party falls entirely under the sovereignty of Equatorial Guinea, it being understood that recourse to the legal texts does not signify a boundary delimitation but the demonstration of Equatorial Guinea's sovereignty over that area".

It should be noted that, logically, Equatorial Guinea did not however mention the islands of Mbanié, Cocotiers and Conga, whose destiny had been settled by the Bata Convention[308].

4.11 Yet the following year, in November 1985, Equatorial Guinea disputed Gabon's sovereignty over the islands of Mbanié, Conga and Cocotiers. The *ad hoc* Commission met at Bata. The perimeter of the joint exploitation zone was not raised and discussions focused on the baselines to be taken into account in determining the two States' maritime boundaries[309]. Equatorial Guinea put forward a baseline which did not include Mbanié, Conga and Cocotiers and which, as shown in **sketch-map No. 4.2** below (see p. 66), connected the following points:

> "Cap Saint-Jean — Ugoni Point (Corisco) — Yoke Point passing through Leva — Masaka Point (Grande Elobey) — Elobey (Petite Elobey) to . . . Yeke Point (Rio Muni Coast)"[310].

4.12 Gabon, for its part, established a base point on Mbanié[311], thereby demonstrating its sovereignty over that island. Even though Equatorial Guinea did not include Mbanié in its baseline, it nevertheless claimed sovereignty over it. It "rejected the baseline put forward by the Gabonese party because it passed through the island of Mbanié, which it considered an integral part of the national territory of the Republic of Equatorial Guinea, together with the islands of LEVA, OCHO, CONGA and COCOTIERS"[312].

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[308] *Ibid.*, p. 4.

[309] Minutes of the Gabon-Equatorial Guinea *ad hoc* Commission responsible for the delimitation of the maritime boundary in Corisco Bay between the Gabonese Republic and the Republic of Equatorial Guinea, Bata, 16 Nov. 1985 (MEG, Vol. VII, Ann. 208).

[310] *Ibid.*, p. 4.

[311] *Ibid.*

[312] *Ibid.*

Sketch-map No. 4.2
The baselines claimed by Gabon and Equatorial Guinea at the bilateral meeting of November 1985

[In red: baseline claimed by Gabon; in green: baseline claimed by Equatorial Guinea]

C. The resumption of peaceful co-operation between the two States

4.13 Between 1985 and 1999, i.e. for almost 15 years, diplomatic relations between Gabon and Equatorial Guinea were conducted in a climate of peaceful and fraternal co-operation and in a spirit of good neighbourliness. In fact, this co-operation continued for many years on a variety of matters, including during the mediation held under the auspices of the United Nations. Thus were concluded an agreement on the construction of a boundary bridge, a co-operation agreement establishing a permanent joint commission on transboundary security, an agreement on a reciprocal visa waiver for holders of diplomatic, official and service passports, a treaty of amity and good

neighbourliness, a general co-operation agreement and an agreement on regular diplomatic consultations[313].

4.14 These fruitful exchanges and the frequency of these diplomatic meetings notwithstanding, the question of sovereignty over Mbanié, Cocotiers and Conga and the related question of the boundaries were raised on only one occasion, in January 1993, at a meeting of the *ad hoc* Boundary Commission. The matters discussed within the Commission were varied (immigration, judicial co-operation) and the status of the boundaries was just one of the items addressed[314]. Although Equatorial Guinea had not raised the question of boundaries since 1985, it again claimed sovereignty over Mbanié, Conga and Cocotiers[315]. However, it had not objected to the Presidential Decree by which Gabon had some months earlier confirmed its position as stated in 1985 regarding its baseline in the maritime area between Cocobeach and Cape Lopez, to the south of Libreville[316]. This line — shown in **sketch-map No. 4.3** below (see p. 68) — connected points on Cocobeach (1° 00' 02" N, 9° 34' 58" E), Mbanié (0° 48' 39" N, 9° 22' 50" E), Cape Esterias (0° 35' 19" N, 9° 19' 01" E), Ngombe Point (0° 18' 35" N, 9° 18' 19" E) and Cape Lopez (0° 37' 54" S, 8° 42' 13" E)[317]. These provisions were subsequently notified to the Secretary-General of the United Nations[318].

4.15 After that meeting, diplomatic relations continued in a peaceful and fraternal atmosphere. It was not until eight years later that Equatorial Guinea once again raised the — already settled — question of sovereignty over the islands off the coast of Gabon.

II. The calling into question of the Bata Convention by Equatorial Guinea

4.16 In early 1999, Equatorial Guinea decided to abandon the negotiations in favour of unilateral action.

4.17 First, it set about unilaterally drawing its maritime boundaries by promulgating a decree-law "designating the median line as the maritime boundary"[319]. Article 1 of that decree-law established "[t]he boundaries of the territorial sea and the exclusive economic zone" of Equatorial Guinea in the region of Bioko and Río Muni by geodetic lines connecting 124 points identified by their geographical co-ordinates. As can be seen in Equatorial Guinea's Figure 6.1[320], Equatorial Guinea thus incorporated Mbanié, Cocotiers and Conga into its baseline, then drew a "median line"

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[313] See the Agreement between Gabon and Equatorial Guinea relating to the construction of a boundary bridge and a section of paved road with crossings between the two countries, 3 Aug. 2007 (CMG, Vol. V, Ann. 176), and the list of bilateral agreements referred to above, fn. 294.

[314] Final communiqué of the Gabon-Equatorial Guinea *ad hoc* Boundary Commission, Libreville, 20 Jan. 1993 (MEG, Vol. VII, Ann. 211), p. 2.

[315] Report of the "boundaries" sub-commission of the Gabon-Equatorial Guinea *ad hoc* Boundary Commission, Libreville, 19 Jan. 1993 (MEG, Vol. VII, Ann. 209), p. 2.

[316] Decree No. 2066/PR/MHCUCDM defining the baselines from which is measured the breadth of the territorial sea, 4 Dec. 1992 (MEG, Vol. VI, Ann. 192).

[317] *Ibid*., Art. 2.

[318] Letter No. 2162/MAECF/DF from the Gabonese Minister for Foreign Affairs to the Secretary-General of the United Nations, 23 Sept. 1999 (CMG, Vol. V, Ann. 170). See also *Bulletin du Droit de la mer*, No. 42 (2000), p. 179.

[319] Decree No. 1/1999 designating the median line as the maritime boundary of the Republic of Equatorial Guinea, 6 Mar. 1999, *Bulletin du Droit de la mer*, No. 40 (2000), p. 28. See also MEG, Vol. VI, Ann. 193.

[320] MEG, Vol. I, p. 124.

between that baseline and mainline Gabon, whose maritime projections were largely cut off. Gabon immediately objected by Note Verbale from its Embassy in Malabo[321].

4.18 Two months later, Equatorial Guinea concluded a maritime delimitation agreement with Sao Tome and Principe[322]. One segment of the delimitation line between the islands of Sao Tome and Principe, on the one hand, and the island of Bioko and Río Muni, on the other, lay well to the south of the maritime boundary established by the Bata Convention and outside the maritime areas in which Equatorial Guinea could claim to exercise sovereign rights[323].

Sketch-map No. 4.3
Gabon's baseline under the Presidential Decree of 4 December 1992

[321] Note Verbale from the Embassy of Gabon in Equatorial Guinea to the Ministry of Foreign Affairs of Equatorial Guinea, 13 Sept. 1999 (MEG, Vol. VI, Ann. 178).

[322] Treaty Regarding the Delimitation of the Maritime Boundary Between the Republic of Equatorial Guinea and the Democratic Republic of Sao Tome and Principe, Malabo, 26 June 1999 (MEG, Vol. III, Ann. 10).

[323] *Ibid.*, Art. 2 *(b)*.

4.19 Two years later, in 2001, the *ad hoc* Boundary Commission met in Libreville. As far as the land boundary was concerned, while the States did not raise any particular difficulties in this regard, they decided to postpone discussion of the questions relating thereto (notably consular matters and questions relating to transboundary movement) to a subsequent meeting of the *ad hoc* Commission[324]. As regards the maritime boundary, the delegation from Equatorial Guinea abandoned the maximalist position it had adopted a few months earlier. It proposed to Gabon that

> "the maritime border [be delimited] by disregarding the island[s] of MBANIE, CONGA and COCOTIER in order to display the general panorama and trace a median line between the two territories and then examine the situation of the islands after the line is traced"[325].

4.20 A final meeting was held in Malabo in May 2003. Recalling the legal instruments governing the discussions, the Gabonese delegation invoked "the Convention delimiting the land and maritime frontiers of Equatorial Guinea and Gabon, signed at Bata on 12 September 1974"[326]. Equatorial Guinea denied the existence of the Bata Convention, even though it had been negotiated and signed by the two States' most senior officials:

> "[t]he Republic of Equatorial Guinea has no knowledge or awareness of the existence of the alleged Convention delimiting the land and maritime frontiers of Equatorial Guinea and Gabon since 1974. For that reason, the Republic of Equatorial Guinea disputes the existence and the validity of that Convention."[327]

4.21 The Parties had reached a stalemate and their positions were irreconcilable.

III. Mediation and the signing of the Special Agreement

4.22 Gabon and Equatorial Guinea have taken part in three mediation procedures in an attempt to resolve their dispute amicably. Only the first mediation, conducted by Mr Yves Fortier between 2003 and 2006, sought to settle the entire dispute. The other two, conducted by Mr Nicolas Michel between 2008 and 2012 and by Mr Jeffrey Feltman in 2016, related solely to the negotiation of the Special Agreement by which the present proceedings were instituted.

4.23 In July 2003, during an interview with the United Nations Secretary-General, the Heads of State of Equatorial Guinea and Gabon accepted his offer of good offices for the peaceful settlement of their territorial dispute. Mr Yves Fortier was appointed as mediator, and his mandate — jointly agreed upon by the two States — was "to assist both countries in finding a consensual settlement of the issues of sovereignty over three small islands in that bay (Mbanie, Cocotiers and Congas islands) and of their land and maritime boundary"[328].

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[324] Minutes of the Gabon-Equatorial Guinea *ad hoc* Boundary Commission, Libreville, 31 Jan. 2001 (MEG, Vol. VII, Ann. 212), p. 4.

[325] *Ibid.*

[326] Minutes of the Gabon-Equatorial Guinea *ad hoc* Boundary Commission, Malabo, 23 May 2003 (CMG, Vol. V, Ann. 171), p. 4. For a Spanish version of these minutes, see MEG, Vol. VII, Ann. 213.

[327] *Ibid.*, p. 5.

[328] Joint communiqué of the Gabonese Republic and the Republic of Equatorial Guinea regarding the mediation process relating to their territorial dispute, 19 Jan. 2004 (CMG, Vol. V, Ann. 173); Addis-Ababa Protocol, 6 July 2004 (CMG, Vol. V, Ann. 175).

4.24 Nine meetings were held between July 2003 and December 2004 under the auspices of the mediator[329]. The question of sovereignty over the islands of Mbanié, Conga and Cocotiers and the delimitation of the maritime boundary was discussed at length, to no avail. During that period, Equatorial Guinea objected to Gabon's registration of the Bata Convention with the Secretariat of the United Nations on 2 March 2004[330].

4.25 The question of the maritime boundary was soon overshadowed and the mediation focused primarily on negotiating a joint development agreement: in July 2004, the two States concluded a memorandum of understanding in the presence of the United Nations Secretary-General, at the end of which they undertook to negotiate in good faith an "agreement that will lead to joint exploration of the island in dispute, while they continue the demarcation of their border".[331]

4.26 The negotiations failed and in April 2008, the new United Nations Secretary-General, Mr Ban Ki-moon, proposed that the Parties submit to a new mediation procedure. Mr Nicolas Michel, Under-Secretary-General for Legal Affairs and United Nations Legal Counsel, was appointed as mediator[332]. Gabon and Equatorial Guinea agreed to seise the International Court of Justice for the purpose of resolving their dispute, and hence the principal objective of the mediation became negotiating the terms of the Special Agreement[333].

4.27 In 2012, following numerous exchanges of views[334], the text of the Special Agreement had largely been agreed but Article 1, relating to the subject of the dispute between the Parties, constituted a major obstacle to its conclusion[335]. Once again, the two States were unable to reach a consensus, the Special Agreement was not signed and the negotiations failed.

4.28 Four years later, in July 2016, United Nations Secretary-General Ban Ki-moon appointed a new mediator, Mr Jeffrey Feltman, Under-Secretary-General for Political Affairs.

4.29 Only two mediation meetings were held, in January and April 2016, during which the text of the Special Agreement — in particular Article 1 — was finalized. In November 2016, Gabon and Equatorial Guinea signed the Special Agreement by which the present proceedings were instituted in the margins of the United Nations Climate Change Conference (COP 22) in Marrakech.

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[329] These meetings were held in July and December 2003, and in January, March, April, June, August, October and December 2004.

[330] Gabon and Equatorial Guinea, Convention [delimiting] the land and maritime frontiers of Equatorial Guinea and Gabon, Bata, 12 Sept. 1974, Objection to the Authenticity of the Convention: Equatorial Guinea, 18 Mar. 2004, *UNTS*, Vol. 2251, A-40037, p. 387, and 7 and 26 Apr. 2004, *UNTS*, Vol. 2261, A-40037, p. 308.

[331] "Secretary-General Commends Leaders of Gabon, Equatorial Guinea for Agreement to Peacefully Resolve Border Dispute", *UN News*, [6] July 2004 (MEG, Vol. III, Ann. 35); for the French version, see https://press.un.org/fr/2004/SGSM9407.doc.htm?msclkid=9b5ad876b66c11eca83ba7e91d2dcdcf (consulted on 28 Apr. 2022).

[332] "Former UN Legal Chief to Mediate Dispute Between Equatorial Guinea, Gabon", *UN News*, 17 Sept. 2008 (MEG, Vol. III, Ann. 39).

[333] *Ibid.*

[334] This second mediation involved 12 meetings, in June and July 2008, in January, March, May and November 2009, in January, March, May and July 2010, in March 2011 and in May 2012.

[335] Note from United Nations Under-Secretary-General L. Pascoe, 15 Mar. 2010 (MEG, Vol. III, Ann. 42).

PART TWO
THE TITLES HAVING THE FORCE OF LAW BETWEEN THE PARTIES

CHAPTER V
THE SUBJECT OF THE DISPUTE AND THE TASK OF THE COURT

5.1 Under Article 1 of the Special Agreement entitled "Submission to the Court and Subject of the Dispute":

> "1. The Court is requested to determine whether the legal titles, treaties and international conventions invoked by the Parties have the force of law in the relations between the Gabonese Republic and the Republic of Equatorial Guinea in so far as they concern the delimitation of their common maritime and land boundaries and sovereignty over the islands of Mbanié/Mbañe, Cocotiers/Cocoteros and Conga.
>
> To this end:
>
> 2. The Gabonese Republic recognizes as applicable to the dispute the Special Convention on the delimitation of French and Spanish possessions in West Africa, on the coasts of the Sahara and the Gulf of Guinea, signed in Paris on 27 June 1900, and the Convention delimiting the land and maritime frontiers of Equatorial Guinea and Gabon, signed in Bata on 12 September 1974.
>
> 3. The Republic of Equatorial Guinea recognizes as applicable to the dispute the Special Convention on the delimitation of French and Spanish possessions in West Africa, on the coasts of the Sahara and the Gulf of Guinea, signed in Paris on 27 June 1900.
>
> 4. Each Party reserves the right to invoke other legal titles."

5.2 Commenting on this provision, Equatorial Guinea states in the introduction to its Memorial:

> "The Special Agreement determines the Court's jurisdiction, which extends to deciding which of the legal titles, treaties and international conventions ('Legal Titles') invoked by either Party, in the Special Agreement or in the course of these proceedings, have the force of law between the Parties."[336]

Gabon has no objection to this assertion, which is simply a gloss of Article 1 of the Special Agreement, it being observed that it leaves open the fundamental question of what is meant by the phrase "legal titles".

5.3 In this regard, Equatorial Guinea, which pays no heed to the express and specific reference to only "treaties and international conventions" in that provision, merely asserts somewhat ambiguously at the end of the same paragraph of its Memorial that:

> "[t]he phrase 'legal titles' in Article 1, paragraph 1, and the reference in paragraph 4 to the invocation of 'other legal titles', indicate that the Parties have agreed that the Court's

[336] MEG, Vol. I, para. 1.4. See also para. 5.1: "the dispute identified in that Agreement was submitted to the Court".

task is to determine all Legal Titles having the force of law between them, not just those emanating from particular treaties and conventions."

This negative definition is Equatorial Guinea's sole attempt to defend its interpretation of the concept of "legal titles". Thereafter, without making any effort whatsoever to substantiate this assertion, the other Party devotes itself almost exclusively to describing the territorial and boundary dispute between the two States, without paying any further attention to the terms of the Special Agreement, save for reasserting from time to time — and against all reason — its strict application thereof[337].

5.4 In reality, contrary to the text of the Special Agreement, Equatorial Guinea implicitly postulates that the Court is invited to pronounce on all the facts and legal arguments underpinning its positions on the merits with regard to the entire territorial and boundary dispute between itself and Gabon. It is therefore essential to clarify the task that the Parties have entrusted to the Court, which consists solely in establishing the legal titles applicable to the delimitation of both the land and maritime boundaries between the two States and the determination of sovereignty over the islands referred to in paragraph 1 (**I**). This inevitably raises the question of what is meant by the words the "legal titles . . . invoked by the Parties", whose applicability the Court must assess (**II**).

I. The sole task of the Court is to determine the applicable legal titles

5.5 It is clear from a mere reading of Article 1 of the Special Agreement that the case submitted to the Court is not a traditional territorial or boundary dispute — whatever the differences between the two may be[338]. This case is a necessary step towards the resolution of the territorial and boundary dispute between Gabon and Equatorial Guinea, who, on the basis of the Court's judgment, will then bring a definitive end to that dispute, which is broader in scope than the one submitted to the Court by the Parties. The case before the Court relates exclusively to the question of which legal titles have the force of law in the relations between the Parties. The proper interpretation of the Special Agreement, in accordance with the rules of interpretation set out in Articles 31 to 33 of the 1969 Vienna Convention on the Law of Treaties, leaves no doubt in this regard: the dispute submitted to the Court is limited to the identification of the applicable legal title or titles (**A**). In keeping with the fundamental principle of respect for the Parties' consent to its jurisdiction, the Court's task in the present case is circumscribed by this limitation (**B**).

A. A dispute limited to the identification of the applicable legal titles

5.6 Gabon acceded to the Vienna Convention[339], which Equatorial Guinea has neither signed nor ratified, on 5 November 2004. However, this is of no real importance for the present case: few treaty provisions have been granted customary status so unanimously and consistently as the "general

[337] See, *inter alia*, paras. 7.8 and 7.20.

[338] See *Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, pp. 563-564, para. 17.

[339] *UNTS*, Vol. 2286, p. 289. See also the webpage devoted to the status of the Vienna Convention on the Law of Treaties, accessible via the list of *Multilateral Treaties Deposited with the Secretary-General*: https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII1&chapter=23&Temp=mtdsg3&clang=_en (consulted on 19 Apr. 2022).

rule of interpretation" codified in Article 31[340]. And although the jurisprudence on the customary status of the rules laid down in Articles 32 and 33 is less extensive, that status has nonetheless been confirmed in a number of judicial and arbitral decisions[341] and in authoritative legal writings[342]. It is therefore necessary to interpret this key provision of the Special Agreement in accordance with the guidelines codified in the Vienna Convention and with reference to the relevant canons of interpretation, and to apply the general rule of interpretation as codified in Article 31, having recourse, where necessary, to the "supplementary means of interpretation" referred to in Article 32. This essentially entails drawing on the *travaux préparatoires* of the Special Agreement. The application of these guidelines leads to a single conclusion: the case submitted to the Court may be characterized as neither a boundary dispute nor a territorial dispute; rather, it is a necessary step towards the definitive settlement of a broader dispute, and is concerned solely with the authoritative legal titles having the force of law between the Parties for the purposes of the land and maritime delimitation and the determination of sovereignty over the three islands.

1. *The interpretation of the Special Agreement in accordance with the ordinary meaning to be given to its terms in their context*

5.7 Under Article 31 of the Vienna Convention:

> "1. 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.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> *(a)* any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

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[340] See, among the ample jurisprudence: *Arbitral Award of 31 July 1989 (Guinea-Bissau* v. *Senegal), Judgment, I.C.J. Reports 1991*, p. 70, para. 48; *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, pp. 21-22, para. 41; *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 812, para. 23; *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999*, p. 1059, para. 18; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002*, p. 645, para. 37; *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France), Judgment, I.C.J. Reports 2008*, p. 222, para. 123, and p. 232, para. 153; *Maritime Dispute (Peru* v. *Chile), Judgment, I.C.J. Reports 2014*, p. 28, para. 57; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Preliminary Objections, Judgment, I.C.J. Reports 2021*, p. 95, para. 75.

[341] On Art. 32, see *inter alia*: *Maritime Delimitation in the Indian Ocean (Somalia* v. *Kenya), Preliminary Objections, Judgment, I.C.J. Reports 2017*, p. 29, para. 63; *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment, I.C.J. Reports 2018*, pp. 320-321, para. 91; *Jadhav (India* v. *Pakistan), Judgment, I.C.J. Reports 2019*, pp. 437-438, para. 71; *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2019*, p. 598, para. 106; *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Judgment, I.C.J. Reports 2020*, p. 19, para. 61; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Preliminary Objections, Judgment, I.C.J. Reports 2021*, p. 95, para. 75. On Art. 33, see *LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 502, para. 101; *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 116, para. 33; *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2019*, p. 598, para. 106.

[342] M.E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Nijhoff, Leiden/Boston (2009), Art. 33, p. 461; O. Corten and P. Klein, (eds.), *The Vienna Conventions on the Law of Treaties: A Commentary*, Oxford, OUP (2011) Vol. I, pp. 843-846, paras. 4-8; D. Alland, "L'interprétation du droit international public", *Recueil des cours de l'Académie de droit international* (2014), Vol. 362, p. 158.

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended."

5.8 As the Court noted in its Judgment of 3 February 1994:

"in accordance with customary international law, reflected in Article 31 of the 1969 Vienna Convention on the Law of Treaties, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose. Interpretation must be based above all upon the text of the treaty. As a supplementary measure recourse may be had to means of interpretation such as the preparatory work of the treaty and the circumstances of its conclusion."[343]

This principle is fully applicable when interpreting the instrument by which the parties submit a case to the Court[344]: "An arbitration agreement . . . is an agreement between States which must be interpreted in accordance with the general rules of international law governing the interpretation of treaties."[345]

5.9 In accordance with well-established jurisprudence, the components comprising the general "rule" of interpretation must be considered as a whole and are inseparable from each other[346], and it is purely for the sake of completeness that they are considered in turn below. In this case, be it simply the ordinary meaning of the terms of Article 1 of the Special Agreement (i), the place of those terms in the wider context of the Special Agreement (ii), or the object and purpose of the Special Agreement more generally (iii), they all bear out the same interpretation of Article 1 of that instrument.

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[343] *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, pp. 21-22, para. 41.

[344] See, *inter alia*, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1995*, p. 18, para. 33; in this passage, the Court moreover cites the extract from the *Libya/Chad* Judgment reproduced above. See also: *Arbitral Award of 31 July 1989 (Guinea-Bissau* v. *Senegal), Judgment, I.C.J. Reports 1991*, pp. 69-70, para. 48; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992*, pp. 582-583, para. 373.

[345] *Arbitral Award of 31 July 1989 (Guinea-Bissau* v. *Senegal), Judgment, I.C.J. Reports 1991*, p. 69, para. 48. The Court was referring here to "an *arbitration* agreement"; the issue remains the same in the context of the seisin of a permanent court.

[346] See *Maritime Delimitation in the Indian Ocean (Somalia* v. *Kenya), Preliminary Objections, Judgment, I.C.J. Reports 2017*, p. 29, para. 64; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Preliminary Objections, Judgment, I.C.J. Reports 2021*, p. 96, para. 78. See also ILC, Draft Articles on the Law of Treaties with commentaries, *Yearbook of the International Law Commission (YILC)* (1966), Vol. II, Commentary on Art. 28, pp. 219-240, paras. 8-9.

(i) The ordinary meaning of the terms

The terms of the Special Agreement

5.10 In its Memorial, Equatorial Guinea adopts an ambiguous position on the interpretation of Article 1, paragraph 1, of the Special Agreement. It asserts that "[t]he Parties have seised the Court with jurisdiction to determine the Legal Titles applicable to sovereignty over the three disputed islands (Mbañe, Cocoteros y Conga), and identify the Legal Titles applicable to the delimitation of their land and maritime boundaries"[347]. This does not, however, prevent Equatorial Guinea, in reproducing the terms of the Court's Judgment in the *Nicaragua* v. *Colombia* case, from characterizing the present dispute as one relating to sovereignty over territory[348].

5.11 Yet Article 1, paragraph 1, of the Special Agreement is drafted in such a way as to leave no room for ambiguity:

> "The Court is requested to determine whether the legal titles, treaties and international conventions invoked by the Parties have the force of law in the relations between the Gabonese Republic and the Republic of Equatorial Guinea in so far as they concern the delimitation of their common maritime and land boundaries and sovereignty over the islands of Mbanié/Mbañe, Cocotiers/Cocoteros and Conga."

The question before the Court concerns "the legal titles, treaties and international conventions" that will subsequently allow the Parties to determine both the course of their maritime and land boundaries and sovereignty over the three islands mentioned, to the exclusion of any other issue.

5.12 The Judgment of 11 September 1992 in the case concerning the *Land, Island and Maritime Frontier Dispute* between El Salvador and Honduras is particularly instructive in this regard. Article 2 of the Special Agreement giving a Chamber of the Court jurisdiction in that case described the subject-matter of the dispute as follows:

> "The Parties request the Chamber:
>
> 1. To delimit the boundary line in the zones or sections not described in Article 16 of the General Treaty of Peace of 30 October 1980.
>
> 2. To determine the legal situation of the islands and maritime spaces."[349]

Commenting on paragraph 2 of that provision, the Chamber of the Court held that:

> "On the face of the text of the Special Agreement, no reference is made to any delimitation by the Chamber. For the Chamber to have the authority to delimit maritime boundaries, whether inside or outside the Gulf, it must have been given a mandate to do so, either in express words, or according to the true interpretation of the Special Agreement. It is therefore necessary, in application of the normal rules of treaty interpretation, to ascertain whether the text is to be read as entailing such delimitation.

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[347] MEG, Vol. I, para. 1.7.

[348] *Ibid.*, para. 6.25, citing *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012*, p. 652, para. 67.

[349] *Compromiso entre Honduras y el Salvador para someter a la decisión de la Corte Internacional de Justicia, Controversia fronteriza terrestre, insular y marítima existente entre los dos Estados, Esquipulas, Republica de Guatemala*, 24 May 1986, entered into force on 1 Oct. 1986 — see *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992,* pp. 356-357, para. 3.

> If account be taken of the basic rule of Article 31 of the Vienna Convention on the Law of Treaties, according to which a treaty shall be interpreted 'in accordance with the ordinary meaning to be given to the terms', it is difficult to see how one can equate 'delimitation' with 'determination of a legal situation . . .' *('Que determine la situación jurídica . . .')* No doubt the word 'determine' in English (and, as the Chamber is informed, the verb *'determinar'* in Spanish) can be used to convey the idea of setting limits, so that, if applied directly to the 'maritime spaces' its 'ordinary meaning' might be taken to include delimitation of those spaces. But the word must be read in its context; the object of the verb 'determine' is not the maritime spaces themselves but the legal situation of these spaces. No indication of a common intention to obtain a delimitation by the Chamber can therefore be derived from this text as it stands."[350]

Accordingly, the Chamber decided that:

> "the Parties, by requesting the Chamber, in Article 2, paragraph 2, of the Special Agreement of 24 May 1986, 'to determine the legal situation of the . . . maritime spaces', have not conferred upon the Chamber jurisdiction to effect any delimitation of those maritime spaces, whether within or outside the Gulf"[351].

5.13 All these findings can be transposed almost word for word to the present case:

(a) "On the face of the text of the Special Agreement, no reference is made to any delimitation by the [Court]"; "[i]t is therefore necessary, in application of the normal rules of treaty interpretation, to ascertain whether the text is to be read as entailing such delimitation".

(b) Of course, the legal titles invoked by the Parties and among which the Court has to choose must "concern" ("s'agissant de"/"en lo que se refiere a") "the delimitation of their common maritime and land boundaries and . . . sovereignty over the islands of Mbanié/Mbañe, Cocotiers/Cocoteros and Conga".

(c) *Yet* "it is difficult to see how" the task of the Court, being solely to "determine" which "legal titles, treaties and international conventions invoked by the Parties have the force of law in the relations between the Gabonese Republic and the Republic of Equatorial Guinea in so far as they concern the delimitation of their common maritime and land boundaries", "can [be] equate[d] . . . with" a request that the Court proceed with that delimitation.

(d) "No indication of a common intention to obtain a delimitation by the [Court]" or a formal attribution of sovereignty over the (only) three islands specifically mentioned in the Special Agreement "can therefore be derived from this text as it stands".

(e) It follows that when the Parties requested the Court in Article 1, paragraph 1, of the Special Agreement of 15 November 2016 "to determine whether the legal titles, treaties and international conventions invoked by the Parties have the force of law in the relations" between them with regard to these two questions, they did "not confer[] upon [it] jurisdiction to effect any delimitation".

5.14 The relevance of the *El Salvador/Honduras* case is not confined to this point alone[352]. In the same Judgment, the Court asked "why, if delimitation of the maritime spaces was intended", the

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[350] *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992*, pp. 582-583, para. 373.

[351] *Ibid.*, p. 616, para. 432 (2).

[352] See also below, para. 5.80.

special agreement had "confin[ed] the task of the Chamber as it relates to the islands and maritime spaces to 'determin[ing] [their] legal situation . . .' *('Que determine la situación jurídica . . .')*"[353]. And it agreed with Honduras in finding that the islands dispute was not a conflict of delimitation[354]. The same is true in this case: the request made in Article 1, paragraph 1, of the Special Agreement, asking the Court to determine *the legal titles* in so far as they concern the delimitation of the Parties' common maritime and land boundaries and sovereignty over the three islands named, cannot be construed as a delimitation request.

5.15 This interpretation is confirmed, moreover, by the Parties' decision to request the Court in Article 1, paragraph 1, of the Special Agreement to "determine" which legal titles "have the force of law" ("font droit" in the French version and "son aplicables" in the Spanish version) in the dispute between the Parties. At no point is the Court asked to apply the legal titles on which the Parties rely. There is a vast difference between "application" and "applicability" — the latter being a prerequisite for, but distinct from, the former. In this case, the Court is simply invited to pronounce on the existence of those legal titles and their enforceability, and to determine whether and to what extent the legal titles invoked by the Parties are applicable "in so far as they concern the delimitation of their common maritime and land boundaries and sovereignty over the islands of Mbanié/Mbañe, Cocotiers/Cocoteros and Conga".

The interpretation of the text of the Special Agreement in the light of other special agreements

5.16 The interpretation of paragraph 1, in accordance with the ordinary meaning to be given to its terms, is confirmed by a comparison with other special agreements by which land and maritime delimitation cases have been submitted to the Court.

5.17 As the Chamber of the Court observed in the *Land, Island and Maritime Frontier Dispute* case between El Salvador and Honduras:

> "In considering the ordinary meaning to be given to the terms of the treaty, it is appropriate to compare them with the terms generally or commonly used in order to convey the idea that a delimitation is intended. Whenever in the past a special agreement has entrusted the Court with a task related to delimitation, it has spelled out very clearly what was asked of the Court: the formulation of principles or rules enabling the parties to agree on delimitation, the precise application of these principles or rules (see *North Sea Continental Shelf* cases, *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* and *Continental Shelf (Libyan Arab Jamahiriya/Malta)* cases), or the actual task of drawing the delimitation line (*Delimitation of the Maritime Boundary in the Gulf of Maine Area* case). Likewise, in the Anglo-French Arbitration of 1977, the Tribunal was specifically entrusted by the terms of the Special Agreement with the drawing of the line." [355]

As stated above[356], the Chamber decided in that case that "the Parties, by requesting [it], in Article 2, paragraph 2, of the Special Agreement of 24 May 1986, 'to determine the legal situation of the . . . maritime spaces', have not conferred upon the Chamber jurisdiction to effect any delimitation of

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[353] *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992*, p. 583, para. 374.

[354] *Ibid.*

[355] *Ibid.*, p. 586, para. 380.

[356] See above, paras. 5.12-5.13.

those maritime spaces, whether within or outside the Gulf"[357], save for the delimitation of "the boundary line in the zones or sections not described in Article 16 of the General Treaty of Peace of 30 October 1980", for which separate treatment was reserved in Article 2 of the special agreement[358].

5.18 The same is true *a fortiori* in this case, in which the Court is simply requested to identify *the legal titles* having the force of law, whether with respect to delimitation or sovereignty over the three islands named in the Special Agreement.

5.19 The subject-matter of this case as it derives from the Special Agreement is thus different from those cases in which the Court was expressly requested to effect a delimitation, as happened, for example, in:

(a) the *Gulf of Maine* case (the course of the maritime boundary in terms of geodetic lines)[359];

(b) the *Land, Island and Maritime Frontier Dispute* case between El Salvador and Honduras, as regards the delimitation of "the boundary line in the zones or sections not described in Article 16 of the General Treaty of Peace of 30 October 1980"[360];

(c) the *Kasikili/Sedudu Island* case between Botswana and Namibia (determination of the boundary around Kasikili/Sedudu Island and of the Island's legal status)[361]; and

(d) the *Frontier Dispute* case between Benin and Niger (the course of the boundary and ownership of the river islands)[362].

5.20 In contrast, the case submitted to the Court by Gabon and Equatorial Guinea is more akin (but not comparable) to the *North Sea Continental Shelf* cases, in which the Court was requested

"to decide the following question:

> What principles and rules of international law are applicable to the delimitation as between the Parties of the areas of the continental shelf in the North Sea which appertain to each of them beyond the partial boundary determined by the above-mentioned Convention of 1 December 1964?"[363]

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[357] *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992*, p. 617, para. 432 (2).

[358] *Ibid.*, p. 357, para. 3.

[359] Special Agreement signed by Canada and the United States of America, 29 Mar. 1979, Art. II — *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Judgment, I.C.J. Reports 1984*, p. 253.

[360] Special Agreement signed by El Salvador and Honduras, 24 May 1986, Art. 2 — *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992*, p. 357, para. 3.

[361] Special Agreement signed by Botswana and Namibia, 15 Feb. 1996, entered into force on 15 May 1996, Art. I — *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999*, p. 1049, para. 2.

[362] Special Agreement signed by Benin and Niger, 15 June 2001, Art. 2 — *Frontier Dispute (Benin/Niger), Judgment, I.C.J. Reports 2005*, p. 95, para. 2, and p. 103, para. 17.

[363] Special Agreement, 2 Feb. 1967, cited in *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 6.

5.21 The Court accordingly found that it had not been asked "actually to delimit the further boundaries which will be involved"[364]. The situation is no different in this case.

5.22 The same parallel may to a certain extent be drawn between this case and the *Continental Shelf* cases between Tunisia and Libya, and Libya and Malta. In both of those cases, the Court was requested in almost identical terms to determine "[w]hat [are the] principles and rules of international law [which may be applied for] [are applicable to] the delimitation of the area of the continental shelf [appertaining] [which appertains]" to each of the parties[365]. In the *Tunisia/Libya* case, the Court was also requested, "in rendering its decision, to take account of equitable principles and the relevant circumstances which characterize the area, as well as the recent trends admitted at the Third Conference on the Law of the Sea"[366]. This was followed by a further question, put in similar terms, regarding the implementation of those principles and rules[367].

5.23 The Court found that "[t]he first part of the request is thus intended to resolve the differences between the Parties regarding the principles and rules of international law which are applicable in the present case"[368] and observed that "the Parties have thus not reserved the right to choose the method to be adopted; instead, they have asked the Court to determine the method for them"[369]. Further, in the *Tunisia/Libya* case, the Court noted with approval that:

> "In the course of the oral argument, both Parties agreed that in this respect the present case would seem to lie between the *North Sea Continental Shelf* cases of 1969, in which the Court was asked only to indicate what principles and rules of international law were applicable to the delimitation, and the Franco-British Arbitration on the Delimitation of the Continental Shelf of 1977, in which the court of arbitration was requested to decide what was the course of the boundary between the portions of the continental shelf appertaining to each of the Parties in the relevant area."[370]

5.24 While the present case entails choosing between legal titles rather than applicable principles or rules, which are broader in scope, it clearly "tends" towards the cases that gave rise to the 1969 Judgment: the Court is certainly not being asked to plot the common maritime and land boundaries of Gabon and Equatorial Guinea. In addition, the decision as to which legal titles have the force of law is confined to those invoked by the Parties.

5.25 As regards determining which titles "have the force of law in the relations between the Gabonese Republic and the Republic of Equatorial Guinea in so far as they concern . . . sovereignty over the islands of Mbanié/Mbañe, Cocotiers/Cocoteros and Conga", the subject-matter may be different, but the wording and the task of the Court remain the same: under the Special Agreement,

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[364] *Ibid.*, p. 13, para. 2.

[365] [Special Agreement signed by the Libyan Arab Jamahiriya and the Republic of Malta, 23 May 1976, Art. 1 — *Continental Shelf ((Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 16, para. 2; Special Agreement signed by the Republic of Tunisia and the Libyan Arab Jamahiriya, 10 June 1977, Art. 1 — *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 21, para. 2.]

[366] Special Agreement signed by the Republic of Tunisia and the Libyan Arab Jamahiriya, 10 June 1977, Art. 1 — *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 21, para. 2.

[367] No such further question appears in the Special Agreement of 11 Nov. 2016 — see above, para. 5.11.

[368] *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 22, para. 18. See also *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 37, para. 23.

[369] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 38, para. 25.

[370] *Ibid.*

the dispute submitted to the Court pertains only to the title or titles conferring sovereignty, as was true (albeit on the basis of more specific wording) in the *Minquiers and Ecrehos* case[371] and in the case concerning *Sovereignty over Certain Frontier Land*[372], among others.

5.26 The same can be said of the *Pedra Branca* case: the Court was requested in the Special Agreement signed by Malaysia and Singapore on 6 February 2003:

> "to determine whether sovereignty over:
>
> a) Pedra Branca/Pulau Batu Puteh;
>
> b) Middle Rocks;
>
> c) South Ledge,
>
> belongs to Malaysia or the Republic of Singapore."[373]

In that case, the Court recalled, most significantly, that:

> "it has been specifically asked to decide the matter of sovereignty separately for each of the three maritime features. At the same time the Court has not been mandated by the Parties to draw the line of delimitation with respect to the territorial waters of Malaysia and Singapore in the area in question."[374]

5.27 The same conclusion must be reached in this case: the fact that the three islands were named in the Special Agreement in no way implies that the Court should rule on the course of the maritime boundary. In reality, the Court's task here is even more circumscribed than in the *Pedra Branca* case, since it consists solely in "determin[ing]" whether the legal titles invoked by the Parties "have the force of law . . . in so far as they concern the delimitation of their common maritime and land boundaries and sovereignty over the islands of Mbanié/Mbañe, Cocotiers/Cocoteros and Conga". The Court is not, therefore, called upon to decide which Party has sovereignty over those territories, and it will be for the Parties to apply in good faith the Court's ruling as to the applicable title.

(ii) The context

5.28 Under Article 31, paragraph 1, of the Vienna Convention, the ordinary meaning of the text of a treaty is inseparable from its context. Article 31, paragraph 2, provides: "The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text" of the treaty as a

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[371] See Art. 1 of the Special Agreement signed by the United Kingdom and France, 29 Dec. 1950 — *Minquiers and Ecrehos (France/United Kingdom), Judgment, I.C.J. Reports 1953*, p. 49; see also p. 59.

[372] See Art. 1 of the Special Agreement signed by Belgium and the Netherlands, 7 Mar. 1957 — *Sovereignty over Certain Frontier Land (Belgium/Netherlands), Judgment, I.C.J. Reports 1959*, p. 211.

[373] Special Agreement signed by Malaysia and the Republic of Singapore, 6 Feb. 2003, Art. 2 — *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment, I.C.J. Reports 2008*, p. 18, para. 2.

[374] *Ibid.*, p. 101, paras. 298 and 299.

whole, the preamble to the treaty[375]. Further, "its meaning is not to be determined merely upon particular phrases which, if detached from the context, may be interpreted in more than one sense"[376].

5.29 In this case, the immediate context is limited to the preamble, the three paragraphs following the first paragraph of Article 1 and the five further articles of the Special Agreement; Articles 2 to 6, however, contain nothing that would be of direct assistance in determining the subject-matter of the dispute.

5.30 These provisions make clear that the dispute relates at its heart to the applicability of conventions or, more precisely, to the applicability of the Bata Convention of 12 September 1974, which Gabon considers to be applicable[377]. As far as the Paris Convention of 27 June 1900 is concerned, the premise of its applicability is accepted by both Parties[378].

5.31 Article 1, paragraph 4, of the Special Agreement, for its part, reserves the right of the Parties to invoke other legal titles which, to quote paragraph 1, may "have the force of law in the relations between the Gabonese Republic and the Republic of Equatorial Guinea in so far as they concern the delimitation of their common maritime and land boundaries and sovereignty over the islands of Mbanié/Mbañe, Cocotiers/Cocoteros and Conga".

(iii) The object and purpose of the Special Agreement

5.32 The preamble — which here is more extensive than is often the case in special agreements submitting a dispute to the Court — is of particular importance for the interpretation of Article 1.

5.33 In general, having recourse to the preamble makes it possible to clarify the object and purpose of the treaty to be interpreted[379] — a step which is as indispensable as analysing the treaty's terms, since the ordinary meaning to be given to those terms must be determined in the light of the object and purpose of the treaty[380]. Accordingly, "the Court can not *[sic]* adopt a construction by implication of the provisions of the [interpreted treaty] which would go beyond the scope of its

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[375] Art. 31, para. 2, of the 1969 Vienna Convention on the Law of Treaties provides that the context comprises in addition "*(a)* any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty" and "*(b)* any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty"; these clarifications are of no relevance in this case.

[376] *Competence of the ILO in Regard to International Regulation of the Conditions of Labour of Persons Employed in Agriculture, Advisory Opinion, 1922, P.C.I.J., Series B, No. 2*, p. 23.

[377] See Art. 1, para. 2.

[378] See Art. 1, para. 2, which sets out Gabon's position, and Art. 1, para. 3, which sets out Equatorial Guinea's position.

[379] See, for example, *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 118, para. 39; *Arbitral Award of 3 October 1899 (Guyana* v. *Venezuela), Jurisdiction of the Court, Judgment, I.C.J. Reports 2020*, p. 476, para. 73.

[380] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1995*, p. 21, para. 40; *LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 506, para. 109; *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 118, para. 39; *Jadhav (India* v. *Pakistan), Judgment, I.C.J. Reports 2019*, p. 439, para. 75.

declared purposes and objects. Further, this contention would involve radical changes and additions to the provisions of the [treaty]."[381]

5.34 In this case, the object and purpose of the treaty — a holistic concept[382] — is very clear from the preamble to the Special Agreement of 15 November 2016: the Parties wish "to settle their dispute peacefully" (final paragraph), the subject of which "is set forth in Article 1" (first paragraph). The third paragraph of the preamble also states that the dispute relates (and relates solely) to the identification of the applicable legal titles, by using the definite article "the" ("with a view to the peaceful settlement of *the* dispute")[383].

5.35 In setting out the object and purpose of the Special Agreement, the preamble therefore also confirms that the Court is not called upon to resolve every dispute that exists between the Parties, but only the limited dispute defined in Article 1. It is also clear from the preamble that any interpretation must be all the more strictly limited, given that the subject of the dispute was determined after "several years of efforts devoted to seeking a solution through negotiation [which] . . . failed to achieve the desired result" (second paragraph).

5.36 *Interpretatio cessat in claris*. "Having before it a clause which leaves little to be desired in the nature of clearness, [the Court] is bound to apply this clause as it stands, without considering whether other provisions might with advantage have been added to or substituted for it."[384] This encapsulates the very essence of the mission of the Court, whose duty it is "to interpret the Treaties, not to revise them"[385].

5.37 Recourse to the general rule of interpretation codified in Article 31 of the Vienna Convention on the Law of Treaties leaves no doubt as to the interpretation of Article 1 of the Special Agreement: the dispute the Court is asked to settle relates — and relates solely — to whether (or not) the legal titles, treaties and conventions invoked by the Parties have the force of law in so far as they concern the land and maritime delimitation and sovereignty over the three islands. Consequently, there is no need to have recourse to supplementary means of interpretation. It is thus only for the sake of completeness that Gabon refers to the *travaux préparatoires* of the Special Agreement below.

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[381] *Rights of Nationals of the United States of America in Morocco (France* v. *United States of America), Judgment, I.C.J. Reports 1952*, p. 196.

[382] See *Tenth report on reservations to treaties by Mr Alain Pellet, Special Rapporteur*, UN doc. A/CN.4/558 and Add. 1-2, 1, 14 and 30 June 2005, *YILC*, 2005, Vol. II, Part One, p. 161, para. 77; *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 24.

[383] Emphasis added.

[384] *Acquisition of Polish Nationality, Advisory Opinion, 1923, P.C.I.J., Series B, No. 7*, p. 20. See also *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 25, para. 51; *LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 494, para. 77.

[385] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Second Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 229. See also *Acquisition of Polish Nationality, Advisory Opinion, 1923, P.C.I.J., Series B, No. 7*, p. 20; *Rights of Nationals of the United States of America in Morocco (France* v. *United States of America), Judgment, I.C.J. Reports 1952*, p. 196; *South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Second Phase, Judgment, I.C.J. Reports 1966*, p. 48, para. 91.

2. *The* travaux préparatoires *confirm Gabon's interpretation of the Special Agreement*

5.38 Under Article 32 of the Vienna Convention:

> "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:
>
> *(a)* leaves the meaning ambiguous or obscure; or
>
> *(b)* leads to a result which is manifestly absurd or unreasonable."

5.39 In this case, the Parties' agreement on the subject of the dispute submitted to the Court is limited, but its meaning is neither ambiguous nor obscure, and its interpretation in accordance with the general rule set out in Article 31 of the Vienna Convention leads to a result which is neither absurd nor unreasonable. In principle, therefore, it is not appropriate to take into consideration the circumstances of the conclusion of the Special Agreement[386]. In any event, recourse to *travaux préparatoires* may serve only "to confirm the meaning resulting from the application of Article 31"[387].

5.40 Moreover, in this case, the *travaux préparatoires* are of limited probative value for at least two reasons. First, the Parties agreed to keep confidential the exchanges and documents presented in the context of the mediation. Second, especially from 2009 onwards, the negotiations conducted in the framework of the United Nations mediation mostly took the form of verbal exchanges with the mediator himself who, after meeting both Parties in turn and *in camera*, made proposals for an agreement.

5.41 Furthermore, the Parties adopted "Standard reservations" in paragraph 10 of the framework document for the mediation conducted by Mr Nicolas Michel:

> "10.1 All documents, statements, representations and proposals transmitted to the Mediator by a Party during the mediation will be deemed strictly confidential and will not be made public or disclosed to the other Party, unless specifically authorized by the Parties.
>
> 10.2 All discussions held in the context of the mediation, as well as all documents, statements, representations and proposals produced either by a Party for the Mediator or by the Mediator for a Party, including any proposals or recommendations which a Party or the Mediator may make, will be without prejudice to the respective legal

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[386] *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992*, p. 584, para. 376; see also, *inter alia*, *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, I.C.J. Reports 1947-1948*, p. 63.

[387] See, for example, *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 27, para. 55; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1995*, p. 21, para. 40; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002*, p. 653, para. 53; *Maritime Dispute (Peru* v. *Chile), Judgment, I.C.J. Reports 2014*, p. 30, para. 66; *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2019*, p. 585, para. 59; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Preliminary Objections, Judgment, I.C.J. Reports 2021*, p. 100, para. 89.

> positions of the Parties and may not be invoked by the other Party in any judicial proceedings."[388]

5.42 The negotiation of the Special Agreement proved to be complex. Indeed, as Equatorial Guinea states, "[b]etween 2009 and 2016, the Parties continued, within the context of the mediation, their efforts to reach a special agreement to bring the case before the Court, but had difficulty agreeing on the definition of subject matter of the dispute to submit to the Court"[389]. This was the main bone of contention between the Parties: indeed, throughout the mediation, Equatorial Guinea endeavoured to bring before the Court all the territorial and boundary disputes between them, while Gabon sought resolutely and successfully to confine these proceedings to the determination of the legal titles by which those disputes might be settled.

5.43 That this difference of views has a central role is abundantly clear from a letter to the United Nations Secretary-General dated 10 March 2004, in which the Minister for Foreign Affairs of Equatorial Guinea emphasizes that "the existence of the purported convention of 1974, which the Government of Gabon claims was signed by the then President of Equatorial Guinea, Mr Macías Nguema, *is disputed*"[390]. This statement is true, and it confirms that the dispute in question does indeed relate to the legal titles on which the Parties may rely for the purposes of delimiting the boundary and determining ownership of the islands.

5.44 Furthermore, in the submissions contained in its Memorial, Equatorial Guinea simply requests the Court to determine:

> "only [the] legal titles, treaties and international conventions that have the force of law in the relations between the Gabonese Republic and the Republic of Equatorial Guinea in so far as they concern the delimitation of their common maritime and land boundaries and sovereignty over the islands of Mbanié/Mbañe, Cocotiers/Cocoteros and Conga"[391].

5.45 Gabon's insistence on limiting the focus of consideration to treaty and conventional titles dates back to the direct negotiations between the Parties[392]. Its resolute opposition during the mediation to any form of wording that might indicate or imply that the dispute of which the Court is seised goes beyond a determination of the applicable legal titles confirms — should confirmation be necessary — that the dispute whose subject is defined in Article 1 of the Special Agreement cannot be understood as a territorial or boundary delimitation dispute. It was only because the subject of the dispute submitted to the Court was strictly limited to the identification of the applicable legal titles invoked by the Parties that Gabon was able to enter into the Special Agreement. This fact has decisive consequences as regards the task entrusted to the Court by the Parties.

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[388] Framework document for the mediation, Geneva, 19 Jan. 2009 (CMG, Vol. V, Ann. 177).

[389] MEG, Vol. I, para. 5.28.

[390] Gabon and Equatorial Guinea, Convention [delimiting] the land and maritime frontiers of Equatorial Guinea and Gabon, Bata, 12 Sept. 1974, Objection to the authenticity of the Convention: Equatorial Guinea, 18 Mar. 2004, *UNTS*, Vol. 2251, A-40037, p. 387 (emphasis added).

[391] MEG, Vol. I, Submissions, p. 143.

[392] See, for example, MEG, Vol. I, para. 5.16, about a session of the Gabon-Equatorial Guinea *ad hoc* Boundary Commission.

B. The consent of the Parties to the jurisdiction of the Court

5.46 Under the terms of Article 38, paragraph 1, of its Statute, the Court's function is "to decide in accordance with international law such disputes as are submitted to it". It is incumbent on the Court to settle such disputes fully but without exceeding the mandate given to it by the parties, failing which it will be in breach of the fundamental principle of consent to jurisdiction (**1**). The decision that the Court is asked to render may not, therefore, go beyond the context of the specific dispute which Gabon and Equatorial Guinea have consented to submit to it; that decision will nonetheless play a decisive role in the resolution, by the Parties, of the wider dispute between them (**2**).

1. *The consent of the Parties, limit to the jurisdiction of the Court*

5.47 In accordance with well-established and consistent jurisprudence, it is ultimately for the Court to assess the scope and precise meaning of a dispute submitted to it[393]. To this end, it must seek to ascertain the actual intention of the Parties as expressed in the Special Agreement: "in interpreting a text of this kind it must have regard to the common intention as it is expressed in the words of the Special Agreement"[394].

5.48 There is no doubt that this dispute, the subject of which is clearly defined in Article 1, is linked to a broader disagreement between the Parties comprising both a "territorial" and a "boundary" dispute[395]. The question put to the Court relates exclusively to the legal titles invoked by the Parties in support of their respective claims regarding the delimitation of their maritime and land boundaries and sovereignty over the three islands; it is a necessary step towards the resolution of that two-pronged dispute, which the Parties will be required to settle on the basis of the future judgment in this case[396].

5.49 This situation is by no means without precedent. "As the Court has observed, applications that are submitted to it often present a particular dispute that arises in the context of a broader disagreement between parties."[397]

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[393] *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the* Nuclear Tests (New Zealand *v.* France) *Case (New Zealand* v. *France), Order of 22 September 1995, I.C.J. Reports 1995*, p. 304, para. 56; *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 448, para. 29; *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2021*, p. 26, para. 53.

[394] *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992*, p. 584, para. 376.

[395] See above, fn. 338.

[396] See above, para. 5.6.

[397] *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019*, p. 23, para. 36, citing prior jurisprudence: "*Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile), Preliminary Objection, Judgment, I.C.J. Reports 2015 (II)*, p. 604, para. 32; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, pp. 85-86, para. 32; *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, pp. 91-92, para. 54; *United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), Judgment, I.C.J. Reports 1980*, pp. 19-20, paras. 36-37."

5.50 In this case, the Court must settle the entire dispute submitted to it, but it must not and cannot rule on any broader dispute or disputes to which that dispute is linked — it being understood that the Court's judgment will contribute to their resolution[398].

5.51 The Court "must not exceed the jurisdiction conferred upon it by the Parties, but it must also exercise that jurisdiction to its full extent"[399]. In this case, the Court is required to rule on the applicability of the "legal titles, treaties and international conventions" invoked by the Parties, but not on the delimitation of the Parties' common maritime and land boundaries or, directly, on sovereignty over the islands.

5.52 The existence of the "broader disagreement between the parties" may well "tempt[]"[400] the Court to delimit the boundaries between the two States or to rule on sovereignty over the islands of Mbanié, Cocotiers and Conga. However, Gabon is in no doubt that, true to its task, the Court will be able to withstand any such "temptation", as the Chamber was able to do in the *Gulf of Maine* case. In that case, Canada and the United States had "chosen to reserve for themselves, as the subject of future direct negotiation with a view to an agreement, the determination of the course of the delimitation line"; the Chamber concluded from this that "their intention . . . to have recourse to judicial settlement must be taken within the limits in which it was conceived and expressed . . . The Chamber concludes that, in the task conferred upon it, it must conform to the terms by which the Parties have defined this task. If it did not do so, it would overstep its jurisdiction."[401]

5.53 In the same spirit, in the *El Salvador/Honduras* case, another Chamber of the Court dismissed Honduras's claim that it was not permissible to interpret the special agreement requesting the Court "[t]o determine the legal situation of the islands and the maritime spaces"[402] as entrusting the Court with "such a half-measure as a determination of the legal situation of such spaces unaccompanied by a delimitation . . . [instead of disposing] completely of a corpus of disputes some elements of which are more than a century old"[403]. Recalling that "the jurisdiction of the Chamber, as of the Court, depends upon the consent of the Parties", the Chamber considered it had "no jurisdiction to effect any such delimitation"[404]. It added:

> "In the present case the Parties have reserved their legal positions . . . on the question whether the legal situation of the waters of the Gulf is such as to require or permit a delimitation; that will be a question for the Chamber to decide. But there can be no such reservation of the question of what the jurisdiction of the tribunal to be seised of the dispute will be, since it is only from the meeting of minds on that point that jurisdiction is created . . . The Chamber concludes that there was agreement between the Parties, expressed in Article 2, paragraph 2, of the Special Agreement, that the

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[398] See below, paras. 5.56 *et seq*.

[399] *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 23, para. 19. See also *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Judgment, I.C.J. Reports 1984*, p. 266, para. 22.

[400] See *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Judgment, I.C.J. Reports 1984*, p. 266, para. 22.

[401] *Ibid.*, para. 23.

[402] See above, para. 5.12.

[403] *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992*, pp. 583-584, para. 375.

[404] *Ibid.*, p. 585, para. 378.

Chamber should determine the legal situation of the maritime spaces, but that this agreement did not extend to delimitation of those spaces, as part of that operation."[405]

5.54 The same is true in this case: if the Court were to go beyond its mandate and respond to questions that have not been put to it in order to settle a dispute that has not been submitted to it, in particular by proceeding to delimit the maritime and land boundaries between the Parties, it would be in breach of the fundamental principle of consent to its jurisdiction, which is "the basis of the Court's jurisdiction in contentious cases"[406]. Thus, "bearing in mind the fact that its jurisdiction is limited [and] that it is invariably based on the consent of the respondent", such jurisdiction "only exists in so far as this consent has been given"[407]. Since "its jurisdiction is based on the consent of the parties and is confined to the extent accepted by them", "[w]hen that consent is expressed in a compromissory clause in an international agreement, any conditions to which such consent is subject must be regarded as constituting the limits thereon"[408].

5.55 In the case concerning the *Arbitral Award of 31 July 1989*, the Court emphasized that "although the two States had expressed in general terms in the Preamble of the Arbitration Agreement their desire to reach a settlement of their dispute, their consent thereto had only been given in the terms laid down by Article 2"[409]. The situation is the same in this case: the two Parties have declared in the preamble of the Special Agreement that they are "[r]esolved to settle their dispute peacefully", but they have consented to the settlement of that dispute only in the terms laid down by Article 1, expressly entitled "Submission to the Court and Subject of the Dispute".

2. *The consequences of the Court's judgment*

5.56 As established above[410], the Special Agreement of 25 November 2016 strictly defines the subject of the dispute submitted to the Court by the Parties and, consequently, the Court's task. In settling the dispute set out in Article 1 of the Special Agreement, that is by determining the legal titles, treaties and conventions which have the force of law between the Parties, the future judgment will nevertheless constitute an important step towards a solution of the wider dispute between them. The words used by the Court in the *Tunisia/Libya* case, in which it was not tasked with delimiting the maritime boundary between the States parties[411], are wholly applicable in the present case:

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[405] *Ibid.* See also the operative clause (para. 432 (2)), cited above, paras. 5.12 and 5.17.

[406] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 71. See also, among the extremely ample jurisprudence: *Monetary Gold Removed from Rome in 1943 (Italy* v. *France, United Kingdom of Great Britain and Northern Ireland, and United States of America), Preliminary Question, Judgment, I.C.J. Reports 1954*, p. 32, or *Arbitral Award of 3 October 1899 (Guyana* v. *Venezuela), Jurisdiction of the Court, Judgment, I.C.J. Reports 2020*, p. 31, para. 113.

[407] *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 16; also cited in *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application by Nicaragua for Permission to Intervene, Judgment, I.C.J. Reports 1990*, p. 133, para. 95.

[408] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 39, para. 88. See also *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment, I.C.J. Reports 2008*, p. 101, para. 298; *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France), Judgment, I.C.J. Reports 2008*, p. 200, para. 48; *Arbitral Award of 3 October 1899 (Guyana* v. *Venezuela), Jurisdiction of the Court, Judgment, I.C.J. Reports 2020*, pp. 486-487, para. 111.

[409] *Arbitral Award of 31 July 1989 (Guinea-Bissau* v. *Senegal), Judgment, I.C.J. Reports 1991*, p. 72, para. 56; see also *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992*, p. 584, para. 376.

[410] See above, paras. 5.6-5.45.

[411] See above, para. 5.22.

> "The Court is of course not asked to render an advisory opinion . . . in the sense of Article 65 of the Statute and Article 102 of the Rules of Court. What the Court is asked to do is to render a judgment in a contentious case in accordance with Articles 59 and 60 of the Statute and Article 94, paragraph 2, of the Rules of Court, a judgment which will have therefore the effect and the force attributed to it under Article 94 of the Charter of the United Nations and the said provisions of the Statute and the Rules of Court"[412].

5.57 Such a task is entirely in keeping with the Court's judicial function, which is to settle the dispute submitted to it, it being understood that the future judgment must be capable of having practical consequences. In this respect, the present case has nothing in common with that of *Northern Cameroons*, in which the Court declined to rule, observing that the judgment sought by the applicant would not be capable of "effective application" [413]. Unlike the latter case, in this instance there exists "an actual controversy involving a conflict of legal interests between the parties"; the judgment that the Court is requested to deliver will clearly "affect existing legal rights or obligations of the parties, thus removing uncertainty from their legal relations"[414] and the Parties will be "in a position to take . . . action" to follow up on it[415]. As the Court recalled in the *Fisheries Jurisdiction* case, "there is no incompatibility with its judicial function in making a pronouncement on the rights and duties of the Parties under existing international law which would clearly be capable of having a forward reach"[416]. Nor is the Court being asked "to deal with issues *in abstracto*", something it refused to do in the *Nuclear Tests* cases[417]. It is simply being asked "to engage in its normal judicial function of ascertaining the existence or otherwise of legal principles and rules applicable"[418] in the relations between the Parties.

5.58 Thus, in the *North Sea Continental Shelf* case[s], the Court fulfilled its task by determining the principles and rules applicable to the delimitation between the parties without defining the line representing the maritime boundary[419]. It should be the same in this case. When the Court, in accordance with its function, has determined which of the legal titles invoked by the Parties are applicable, it will be for the Parties to give effect to that decision.

5.59 It should be noted in this regard that the consequences may be quite different depending on the Court's responses to the questions put to it in the Special Agreement. Although these questions are precise, they remain open: the Court is asked to rule first and foremost on the applicability of two named conventions, the 1900 Paris Convention and the 1974 Bata Convention; however, apart from the fact that Equatorial Guinea wishes to set aside the Bata Convention, the Parties did not rule out invoking other legal titles which the Court could, in principle, consider to be applicable in this case.

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[412] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 40, para. 29.

[413] *Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment*, *I.C.J. Reports 1963*, p. 33.

[414] *Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment*, *I.C.J. Reports 1963*, p. 34. See also *Fisheries Jurisdiction (United Kingdom* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, pp. 19-20, para. 40.

[415] *Ibid.*, p. 37.

[416] *Fisheries Jurisdiction (United Kingdom* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 19, para. 40.

[417] *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, pp. 271-272, para. 59; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 477, para. 62.

[418] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 237, para. 18.

[419] See above, para. 5.20.

5.60 Looking only at the two conventions mentioned in the Special Agreement, it is clear that the discretion left to the Parties in implementing the judgment could differ greatly depending on whether the Court decides that the Bata Convention has the force of law between them or not.

5.61 If the answer is yes (the 1974 Convention is applicable), the essential negotiations between the Parties to implement the judgment would be made considerably easier: this instrument clarifies the course of the land boundary, and the modifications made since the 1900 Paris Convention are particularly welcome for pragmatic reasons; indeed, it was the distribution of the populations of Gabon and Equatorial Guinea in the region that inspired the exchanges of territory set out in Article 2 of the 1974 Convention. In this regard, the Bata Convention, while not completely invalidating the Paris Convention, appears to be a most opportune *lex posterior* by comparison. Furthermore and above all, unlike the 1900 Convention, the 1974 Convention defines the maritime boundary between the two States and is clear on the subject of sovereignty over the principal islands off the coasts of the two States.

5.62 If the answer is no (only the Paris Convention is applicable), all these points would, on the contrary, remain to be discussed between the Parties regardless of the *pacta sunt servanda* principle.

II. The legal titles that can be invoked by the Parties

5.63 The Court's decision depends on the legal titles invoked by the Parties in accordance with the Special Agreement, whether in the document itself or in the course of these proceedings. In its Memorial, Equatorial Guinea refers to a number of instruments and principles which, in its view, are likely to have the force of law between the Parties "in so far as they concern the delimitation of their common maritime and land boundaries and sovereignty over the islands of Mbanié/Mbañe, Cocotiers/Cocoteros and Conga"[420]. Apart from the Paris Convention, however, none of them are relevant legal titles, no doubt because Equatorial Guinea took such little care in defining the concept of "legal title".

5.64 As Gabon underlined in the introduction to this chapter[421], Equatorial Guinea asserts in the opening lines of its Memorial that "the Parties have agreed that the Court's task is to determine all Legal Titles having the force of law between them, not just those emanating from particular treaties and conventions"[422]. It thus invokes arguments in support of its legal position as regards "the delimitation of [the Parties'] common maritime and land boundaries and sovereignty over the islands of Mbanié/Mbañe, Cocotiers/Cocoteros and Conga". The following, for example, are variously invoked by Equatorial Guinea, without the link between these elements and any purported legal titles always being clear: "the Special Convention on the delimitation of French and Spanish possessions in West Africa, on the coasts of the Sahara and the Gulf of Guinea, signed in Paris on 27 June 1900"; "the legal title of the Republic of Equatorial Guinea as the successor State to Spain to all titles to territory . . . based on modifications to the boundary"; "the United Nations Convention on the Law of the Sea signed on 10 December 1982 at Montego Bay"; and "customary international law in so

[420] Special Agreement between the Gabonese Republic and the Republic of Equatorial Guinea, 15 Nov. 2016, Art. 1, para. 1.

[421] See above, para. 5.3.

[422] MEG, Vol. I, para. 1.4.

far as it establishes that a State's title and entitlement to maritime areas derives from its title to land territory"[423].

5.65 As established above[424], this dispute concerns the determination of "*legal* titles", which wording was chosen intentionally by the Parties over the more generic term "titles". It is therefore only legal titles on which the Parties can rely for the twofold purpose stated in Article 1, paragraph 1, of the Special Agreement. This does not deter Equatorial Guinea from equating and confusing the more general concept of "titles" with that of "legal titles" [425], the nature of which should be clarified, while bearing in mind that only the "legal titles" invoked by the Parties can be taken into account (**A**). This is consistent, moreover, with the Court's usual practice of giving precedence to legal titles — and first and foremost to treaties and conventions (which are no different from each other in nature) — over any other "title" (**B**) and, *a fortiori*, over *effectivités*, which cannot be equated with "titles" of any sort, no matter what the definition (**C**).

A. Only "legal titles" can be invoked by the Parties

5.66 Given the confusion maintained by Equatorial Guinea between "legal titles" and the more general term "titles", it is appropriate to revisit the meaning ascribed to each of these concepts.

5.67 As regards "title" first of all, the Court has stated that

> "[t]he term 'title' has in fact been used at times . . . in such a way as to leave unclear which of several possible meanings is to be attached to it; some basic distinctions may therefore perhaps be usefully stated. As the Chamber in the *Frontier Dispute* case observed, the word 'title' is generally not limited to documentary evidence alone, but comprehends 'both any evidence which may establish the existence of a right, and the actual source of that right' (*I.C.J. Reports 1986*, p. 564, para. 18)" [426].

5.68 While Equatorial Guinea does indeed mention the *Burkina Faso/Mali* Judgment, which confirms the distinction to be made between the two concepts, it only partially cites that decision when it asserts that "[t]he 'concept of title' encompasses 'any evidence which may establish the existence of a right, and the actual source of that right'"[427]. It thus fails to add that, in the same paragraph of that decision, the Chamber of the Court made a distinction between the concept of "legal title" and the more general one of "title", stating that

> "[in] this context, the term *'legal title'* appears to denote documentary evidence alone. It is hardly necessary to recall that this is not the only accepted meaning of the word *'title'* . . . In fact, the concept of title may also, and more generally, comprehend both

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[423] *Ibid.*, pp. 143-144.

[424] See above, paras. 5.6-5.45.

[425] MEG, Vol. I, para. 6.11.

[426] *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992*, pp. 388-389, para. 45; *Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 564, para. 18.

[427] MEG, Vol. I, para. 6.11, fn. 306: "*Frontier Dispute (Burkina Faso/Mali), Judgment, I.C.J. Reports 1986*, p. 554, para. 18. See, similarly, *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992*, p. 351, para. 45."

any evidence which may establish the existence of a right, and the actual source of that right" [428].

5.69 In light of this jurisprudence, it is clear that by referring to "the legal titles, treaties and international conventions" having the force of law in the relations between the Parties "in so far as they concern the delimitation of their common maritime and land boundaries and sovereignty" over the three islands, Article 1, paragraph 1, of the Special Agreement invites the Court to consider "legal titles" construed as documentary evidence alone, and not to include the very general concept of "title" as Equatorial Guinea appears to invite the Court to do.

5.70 The context and general structure of the Special Agreement support this interpretation. Not only are the titles explicitly cited by the Parties in paragraphs 2 and 3 conventions, but Article 1, paragraph 1, also expressly adds "treaties and international conventions" immediately after the term "legal titles". "Treaties and conventions" are "documentary evidence"[429], unlike the *effectivités* or very general principles invoked by Equatorial Guinea at the beginning of Chapter VI of its Memorial[430]. Only such legal titles are at issue in this case.

5.71 Furthermore, in another passage of the same *Burkina Faso/Mali* Judgment, the Chamber gave a positive, much firmer and workable definition of the term "territorial title", which is particularly relevant in this case. It is stated in that Judgment, without the least ambiguity, that a "territorial title" is "*a document* endowed by international law with intrinsic legal force for the purpose of establishing territorial rights"[431].

5.72 Similarly, the only possibility contemplated by the French version of the Special Agreement is "les titres juridiques, traités et conventions internationales invoqués par les Parties [qui] font droit" ["the legal titles, treaties and international conventions invoked by the Parties [which] have the force of law"], to the exclusion of any other basis for the Parties' respective claims. The Spanish version of the Special Agreement, which is "equally authoritative" between the Parties, refers to "los títulos jurídicos, tratados y convenios internacionales invocados por las Partes [que] son aplicables" ["the legal titles, treaties and international conventions invoked by the Parties [which] are applicable"]. It thus rules out the possibility for the Parties to invoke anything but documentary evidence: *effectivités* cannot be said to "f[aire] droit" ["have force of law"] or to be "aplicables" ["applicable"] in either the French or Spanish version.

5.73 And although Article 1, paragraph 4, refers to "other legal titles" that may be invoked by the Parties, without specifying the nature of those titles, they are still "legal titles" and not just "titles", and there is no reason to think that the term must be given a different meaning to the one that applies

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[428] *Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 564, para. 18 (emphasis added).

[429] *Ibid.*, p. 606, para. 97.

[430] See MEG, Vol. I, paras. 6.1 *et seq*.

[431] *Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 582, para. 54 (emphasis added). See *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002*, p. 667, para. 88; *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 723, para. 215; *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999 (II)*, p. 1098, para. 84; *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)*, p. 661, para. 100.

in paragraph 1. Here too, the *travaux préparatoires* confirm, if confirmation is needed, that this is indeed what the Parties intended.

5.74 This is evidenced in particular by the negotiations held by the Parties to resolve their dispute, independently of their exchanges during the mediation conducted on behalf of the United Nations Secretary-General that led directly to the adoption of the Special Agreement[432].

5.75 The Parties spoke on many occasions about how to settle their dispute regarding the delimitation of their common boundary. These discussions were limited to determining the legal titles applicable to the Parties as defined above, in other words to identifying the treaties and conventions having the force of law between them, without mention of any *effectivités*[433]. The Parties focused on the existence of the Bata Convention[434], disregarding the relevance of *effectivités* in the hope of finding a resolution to the dispute between Gabon and Equatorial Guinea.

5.76 Moreover, the inevitable inference from the terms of the Special Agreement is that the Court is requested to rule on the legal titles applicable between the Parties, as defined in Article 1 of the Special Agreement, which refers only to the applicable treaty and conventional titles, it being understood that the Parties can invoke other titles of the same nature pursuant to Article 1, paragraph 4.

5.77 The phrase "to this end", inserted between paragraphs 1 and 2 of Article 1, confirms that the legal titles — or "*document[s]* endowed by international law with intrinsic legal force for the purpose of establishing territorial rights" [435] — referred to are treaties and conventions, and that the issue in this case is first to determine whether the Bata Convention has the force of law between the Parties (who agree that the 1900 Paris Convention is applicable), it being understood that other conventional instruments can be invoked (and contested) by the Parties pursuant to paragraph 4.

5.78 Consequently, the Court cannot rule on certain elements relied on by Equatorial Guinea which are not legal titles as such, and many of which are not even "documentary", "hav[ing] the force of law in the relations between the Gabonese Republic and the Republic of Equatorial Guinea in so far as they concern the delimitation of their common maritime and land boundaries and sovereignty over the islands of Mbanié/Mbañe, Cocotiers/Cocoteros and Conga".

5.79 According to Equatorial Guinea, "[a]cquisition of legal title to territory through succession is not controversial"[436]. Certainly not! But succession itself is not a "title", even

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[432] See above, para. 5.41.

[433] See Final communiqué of the Gabon-Equatorial Guinea *ad hoc* Boundary Commission, Libreville, 20 Jan. 1993 (MEG, Vol. VII, Ann. 211); Minutes of the Gabon-Equatorial Guinea *ad hoc* Boundary Commission, Libreville, 31 Jan. 2001 (MEG, Vol. VII, Ann. 212); Minutes of the Gabon-Equatorial Guinea *ad hoc* Boundary Commission, Malabo, 23 May 2003 (CMG, Vol. V. Ann. 171); see also MEG, Vol. VII, Ann. 213; Joint communiqué of the Gabonese Republic and the Republic of Equatorial Guinea regarding the mediation process relating to their territorial dispute, 19 Jan. 2004 (CMG, Vol. V, Ann. 173).

[434] See in particular Minutes of the Gabon-Equatorial Guinea *ad hoc* Boundary Commission, Malabo, 23 May 2003 (CMG, Vol. V, Ann. 171); see also MEG, Vol. VII, Ann. 213; Joint Communiqué of the Gabonese Republic and the Republic of Equatorial Guinea regarding the mediation process relating to their territorial dispute, 19 Jan. 2004 (CMG, Vol. V, Ann. 173).

[435] See above, fn. 431 (emphasis added).

[436] MEG, Vol. I, para. 6.1; see also, for example, para. 6.27.

understood in the broadest sense. It is simply the phenomenon whereby previous titles acquired by the predecessor State are transmitted to the successor State — which, incidentally, Equatorial Guinea appears to accept, albeit ambiguously[437]. The same is true of the principles of *uti possidetis juris* and respect for the borders existing at independence, by which Equatorial Guinea sets great store[438], and of custom, invoked more discreetly, without justification or explanation, only in the Memorial's submissions[439]. These elements are, *a fortiori*, not "legal titles" or, in other words, "documentary evidence" on which it could base its rights.

5.80 The *uti possidetis juris* is of no use to the Parties, moreover, "in so far as . . . the delimitation of their common maritime and land boundaries and sovereignty over the islands of Mbanié/Mbañe, Cocotiers/Cocoteros and Conga" is concerned. As the Court observed in the *El Salvador/Honduras* case, "the *jus* [in the term *uti possidetis juris*] referred to is not international law but the constitutional or administrative law of the pre-independence sovereign"[440]. The two States in the case at hand were not part of the same colonial empire before they gained independence: in such circumstances, the unilateral documents emanating from either colonial Power are obviously not valid legal titles and can at best be considered on a confirmatory basis[441]. If the boundaries concern former colonies falling under different administering Powers, the *uti possidetis* adds nothing to the principle of succession to colonial boundaries — which Gabon in no way calls into question. The same is true of agreements that successor States might conclude between themselves after their independence.

5.81 Regarding maritime delimitation, Equatorial Guinea also confuses what forms the basis of a legal title and the possibility of holding one (an entitlement), on the one hand, with possession of an actual title, on the other. The Court is not called upon to pronounce on the possibility of the Parties holding a legal title (their entitlement), but only on the possession of a legal title.

5.82 The Court's Judgment in the case concerning the *Territorial and Maritime Dispute* between Nicaragua and Colombia illustrates this distinction. In that Judgment, the Court recalled the rule invoked by Equatorial Guinea[442], namely that "[t]he title of a State to the continental shelf and to the exclusive economic zone is based on the principle that the land dominates the sea through the projection of the coasts or the coastal fronts"[443]. However, the Court went on to state, still in accordance with that rule, that it was "concerned in [those] proceedings only with . . . Colombian entitlements"[444], and thus refused to consider that the rule in itself constituted a title.

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[437] See *ibid.*, para. 6.28: "The question is: to what continental territory did each of the Parties succeed when they achieved independence? This requires a determination of the land to which France and Spain held Legal Title at the time Gabon and Equatorial Guinea became independent".

[438] *Ibid.*, paras. 6.2-6.9 or paras. 6.17-6.24.

[439] *Ibid.*, p. 144, Submissions, C.3.

[440] *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992*, p. 559, para. 333.

[441] See *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999 (II)*, p. 1078, para. 55; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002*, pp. 650-651, para. 48.

[442] MEG, Vol. I, Submissions, C.3.

[443] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)*, p. 674, para. 140.

[444] *Ibid.*, p. 680, para. 151.

5.83 Gabon of course does not contest that the United Nations Convention on the Law of the Sea (hereinafter "UNCLOS") has the force of law between the Parties. But far from constituting a legal title (or even just a "title" in the broadest possible sense of the term), Articles 15, 74 and 83 of UNCLOS relied on by Equatorial Guinea[445] simply confirm that a conventional title prevails: these provisions all mention the requirement for the Parties to conclude an "agreement"[446] capable of constituting a title; only such an agreement is a title. These provisions are only relevant in this case because they establish that the delimitation can only be based on an agreement: Article 15 because it refers to "failing agreement between them to the contrary", and Article 74, paragraph 4, and Article 83, paragraph 4, in stating that, where there is an agreement in force between the States concerned, questions relating to the delimitation of the continental shelf or the exclusive economic zone "shall be determined in accordance with the provisions of that agreement". In the relations between Gabon and Equatorial Guinea there is such a legal title: the Bata Convention[447].

5.84 Custom, which is general by nature, including when it consists of very general legal principles such as that of *uti possidetis juris*, cannot constitute a title, any more than the provisions of UNCLOS can. Such general principles, like the 1982 Convention, merely define the conditions under which the States concerned can claim a title.

B. The primacy of treaty titles

5.85 Taking account of only actual — documentary — legal titles, certain precedents show that, in matters of territorial titles, regard should be had first and foremost to the treaties and conventions that are binding on the parties. In the context of the dispute submitted to the Court, particular consideration should be given to the Bata Convention, the only treaty concluded between the Parties relating to "the delimitation of their common maritime and land boundaries and sovereignty over the islands of Mbanié/Mbañe, Cocotiers/Cocoteros and Conga".

5.86 In Article 1 of the Special Agreement, the Parties were careful to emphasize the special role of the bilateral conventions which are binding upon them (for Gabon, "the Special Convention on the delimitation of French and Spanish possessions in West Africa, on the coasts of the Sahara and the Gulf of Guinea, signed in Paris on 27 June 1900, and the Convention delimiting the land and maritime frontiers of Equatorial Guinea and Gabon, signed in Bata on 12 September 1974" and, for Equatorial Guinea, "the Special Convention on the delimitation of French and Spanish possessions in West Africa, on the coasts of the Sahara and the Gulf of Guinea, signed in Paris on 27 June 1900"), by referring to them by name.

5.87 Irrespective of the Parties' wish to emphasize the central role of these treaties, conventions — especially bilateral ones — are of particular importance in disputes concerning delimitation or the attribution of sovereignty. As *leges speciales*, they prevail over any other element, including the custom or general principles presented erroneously by Equatorial Guinea as constituting "titles"[448].

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[445] MEG, Vol. I, para. 6.54.

[446] See *ibid.*, para. 6.41.

[447] See below, Chap. VI.

[448] MEG, Vol. I, paras. 6.2 and 6.41, and Submissions, pp. 143-144.

5.88 Similar considerations apply in respect of geographical maps. In this regard, the Court's jurisprudence is particularly well established. Here too, the 1986 Judgment in *Burkina Faso/Mali* is enlightening:

> "Whether in frontier delimitations or in international territorial conflicts, maps merely constitute information which varies in accuracy from case to case; of themselves, and by virtue solely of their existence, they cannot constitute a territorial title, that is, a document endowed by international law with intrinsic legal force for the purpose of establishing territorial rights. Of course, in some cases maps may acquire such legal force, but where this is so the legal force does not arise solely from their intrinsic merits: it is because such maps fall into the category of physical expressions of the will of the State or States concerned. This is the case, for example, when maps are annexed to an official text of which they form an integral part. Except in this clearly defined case, maps are only extrinsic evidence of varying reliability or unreliability which may be used, along with other evidence of a circumstantial kind, to establish or reconstitute the real facts." [449]

Maps cannot serve as legal titles any more than *effectivités* can, unless they are annexed to and form an integral part of the text of a treaty[450]. When that is not the case, cartographic material is merely a tool "to support . . . respective claims of sovereignty"[451] and, even when such a tool is used, "only with the greatest caution can account be taken of maps in deciding a question of sovereignty"[452].

C. The irrelevance of *effectivités*

5.89 Under the Special Agreement, the Court is only called upon to identify the legal titles that have "the force of law in the relations between the Gabonese Republic and the Republic of Equatorial Guinea". The alleged "*effectivités*" relied on by Equatorial Guinea[453] are therefore of no assistance to the Court.

5.90 There can be no doubt that *effectivités* do not constitute a title in themselves[454]; they can be taken into account only *in the absence of a title* or in order to interpret an existing legal title. In the *Burkina Faso/Mali* case, the Chamber of the Court described in no uncertain terms the role of *effectivités* and their relationship with legal titles:

> "Where the act does not correspond to the law, where the territory which is the subject of the dispute is effectively administered by a State other than the one possessing the legal title, preference should be given to the holder of the title. In the event that the *effectivité* does not co-exist with any legal title, it must invariably be taken into consideration. Finally, there are cases where the legal title is not capable of showing

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[449] *Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 582, para. 54; see also in particular: *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999 (II)*, p. 1098, para. 84; *Frontier Dispute (Benin/Niger), Judgment, I.C.J. Reports 2005*, p. 119, para. 44.

[450] *Sovereignty over Certain Frontier Land (Belgium/Netherlands), Judgment, I.C.J. Reports 1959*, p. 220.

[451] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 722, para. 213.

[452] *Ibid*., p. 723, para. 214 citing *Island of Palmas (Netherlands/United States of America)*, 4 Apr. 1928.

[453] See for example in MEG, Vol. I, paras. 3.84, 6.32, 6.33 and 6.35.

[454] See above, paras. 5.85-5.93.

> exactly the territorial expanse to which it relates. The *effectivités* can then play an essential role in showing how the title is interpreted in practice"[455].

5.91 Similarly, citing several cases concerning territorial or boundary disputes, the Court observed that

> "in none of these cases were the acts referred to acts *contra legem*; those precedents are therefore not relevant. The legal question of whether *effectivités* suggest that title lies with one country rather than another is not the same legal question as whether such *effectivités* can serve to displace an established treaty title. As the Chamber of the Court made clear in the *Frontier Dispute (Burkina Faso/Republic of Mali)* case, where there is a conflict between title and *effectivités*, preference will be given to the former (*I.C.J. Reports 1986, Judgment*, pp. 586-587, para. 63)"[456].

5.92 This obviously does not mean that *effectivités* have no role to play in territorial or boundary disputes *where there is an established title*. But the present case is not such a dispute: at this stage, it is simply a matter of identifying the *legal titles which have the force of law*[457], not determining the course of the boundary or stating which of the Parties has sovereignty over the islands.

5.93 Moreover, Equatorial Guinea is well aware that *"effectivités"* cannot constitute legal titles, nor, more broadly, territorial or boundary titles: it never invokes simply the *"effectivités"* as legal titles, and systematically places the term *"infra legem"* before the noun *"effectivités"*[458]. This unconventional and unusual term is a clear sign that, if there is a title, it does not consist in the *effectivités* themselves, but in the legal titles that they reflect. This observation is in keeping with the words of the Special Agreement, in which the Parties agreed to limit the task of the Court to identifying the "legal titles, treaties and conventions" that have the force of law between them.

5.94 Without prejudice to the distinction between "legal titles", "titles" and *"effectivités"*, and even if it were possible to give the term "legal titles" a broader interpretation than that imposed by the text and context of the relevant provisions of the Special Agreement and international jurisprudence, conventional titles would nevertheless prevail over any other title invoked by Equatorial Guinea.

Conclusion

5.95 Without ever defining the concept of legal titles in its Memorial, Equatorial Guinea has relied on various elements in support of its position. In light of the arguments set out above, it is apparent that many of the elements on which it has relied cannot, in any event, be characterized as

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[455] *Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, pp. 586-586, para. 63; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, pp. 353-355, paras. 68 and 70. See also *Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 564, para. 18; *Frontier Dispute (Benin/Niger), Judgment, I.C.J. Reports 2005*, p. 149, para.141.

[456] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 415, para. 223.

[457] See below, Chap. VI.

[458] See MEG, Vol. I, in particular paras. 3.84, 6.32, 6.33 and 6.35.

"legal titles" within the meaning of the Special Agreement of 15 November 2016. This is true of the following:

(a) the legal rules or principles which may give rise to titles — such as the principles of *uti possidetis juris* or territorial integrity, or those set out in UNCLOS — but which can in no way be considered, in themselves, to constitute legal titles;

(b) the maps and sketch-maps on which it relies (often erroneously) and which, if they are not incorporated into a treaty, are not valid titles either; and

(c) the alleged *"effectivités"* which make up a large part of Equatorial Guinea's arguments.

5.96 None of the alternative so-called titles proffered by Equatorial Guinea in its Memorial falls within the provisions of the Special Agreement and can have the force of law between the Parties "in so far as they concern the delimitation of their common maritime and land boundaries and sovereignty over the islands of Mbanié/Mbañe, Cocotiers/Cocoteros and Conga".

5.97 In any event, the legal titles that Equatorial Guinea claims to have acquired from the colonial Powers are inoperative, since they were abrogated by the Paris and Bata Conventions.

CHAPTER VI
THE BATA CONVENTION HAS THE FORCE OF LAW BETWEEN THE PARTIES

6.1 On 12 September 1974, following negotiations that had been under way since 1971[459], President Bongo and President Macías Nguema signed the "Convention delimiting the land and maritime frontiers of Equatorial Guinea and Gabon" at Bata[460]. In accordance with its provisions, this Convention entered into force on that same date and settled the disputes and other difficulties between the two States concerning the delimitation of their land and maritime boundaries and sovereignty over the islands of Mbanié, Cocotiers and Conga.

6.2 In its Memorial, Equatorial Guinea continues to feign ignorance of the existence of this Convention, referring to it as the "[d]ocument presented in 2003". Equatorial Guinea's argument is based solely on the absence of an original of the Bata Convention. However, the existence of this Convention in no way depends on the existence of an original thereof. The question before the Court is whether there exists satisfactory proof of the existence of the Bata Convention, in the absence of an original of that instrument. In light of the documents annexed to this written pleading, in particular the certified copy of the Bata Convention sent by President Bongo to the Ambassador of France to Gabon in the month following its signature, which has been held ever since in the archives of the French Ministry of Foreign Affairs[461], this question can only be answered in the affirmative.

6.3 In the alternative, Equatorial Guinea seeks to demonstrate that, when signing the Bata Convention, the Parties did not intend to enter into a binding instrument under international law. This claim is based on a highly selective reading of the text of the Convention and disregards the context in which it was concluded. The terms used by the Parties in the Bata Convention, as well as the context of its conclusion, leave no doubt as to the instrument's legal force.

I. The existence of the Bata Convention

6.4 In its Memorial, Equatorial Guinea admonishes Gabon for not producing the original of the Bata Convention, alleging that this calls into doubt the very existence of the Convention[462]. Equatorial Guinea had already argued in 2004, even though Gabon had provided it with a copy of the Bata Convention (the document annexed to the Memorial of Equatorial Guinea)[463], that "no Convention exists between Equatorial Guinea and Gabon of 12 September 1974, or of any other date, concerning the land and maritime borders" and that "[i]t is clear that there is no Convention of the type Gabon is claiming"[464]. Equatorial Guinea went as far as accusing Gabon of having acted dishonestly and "in bad faith", decrying the alleged "efforts [of Gabon] to fabricate a treaty which has never existed"[465].

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[459] See above, paras. 2.45-2.54, 2.58-2.59 and 3.1-3.18.

[460] See above, paras. 3.7-3.10.

[461] Letter from the President of Gabon to the Ambassador of France to Gabon, 28 Oct. 1974 (CMG, Vol. V, Ann. 155).

[462] MEG, Vol. I, paras. 7.2-7.3 and 7.7.

[463] MEG, Vol. VII, Ann. 215.

[464] Gabon and Equatorial Guinea, Convention [delimiting] the land and maritime frontiers of Equatorial Guinea and Gabon, Bata, 12 Sept. 1974, Objection to the authenticity of the Convention: Equatorial Guinea, 7 Apr. 2004, *UNTS*, Vol. 2261, A-40037, p. 316.

[465] *Ibid.*, p. 317.

6.5 Gabon recognizes "the well-established principle of *onus probandi incumbit actori*", according to which it is the duty of the party that asserts certain facts to establish the existence of those facts[466]. Although it is for Gabon to demonstrate the existence of the Bata Convention, nothing in international law prescribes a particular method of proof. The parties to a dispute before the Court are free to present any evidence that they consider useful. In 1925, Judge Huber noted, when the Rules of the Permanent Court of International Justice were revised, that "the parties may present any proof that they judge useful, and the Court is entirely free to take evidence into account to the extent that it deems pertinent"[467].

6.6 The Court thus examines "the facts relevant to each of the component elements of the claims advanced by the Parties"[468]. To such end, it will make its own clear assessment of "their weight, reliability and value"[469]. Equatorial Guinea does not appear to be calling these principles into question; moreover, it relies itself on numerous items of indirect evidence in its Memorial, including documents which have been copied and retranscribed, without producing the original documents or identifying their sources[470].

6.7 Indeed, a party has no obligation to produce the original of a document in order to prove its existence[471]. In particular, it may quite legitimately rely on indirect evidence in order to prove the existence of an instrument when the original has been lost or destroyed[472]. In the *United States Diplomatic and Consular Staff in Tehran* case, the Court relied on indirect evidence because the United States had been unable, given the circumstances, "to have access to its diplomatic and consular representatives, premises and archives" in Iran[473]. As noted by Judge Fitzmaurice in his separate opinion annexed to the Judgment in the *Barcelona Traction* case:

> "It has to be admitted that in the absence of the relevant instruments, the foregoing conclusion can only be conjectural. But it is I believe a reasonable conjecture, warranted

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[466] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I),* p. 71, para. 162; MEG, Vol. I, para. 7.7.

[467] Revision of the Rules of Court, 1926, *P.C.I.J., Series D, Addendum to N° 2*, p. 250. See also A. Riddell and B. Plant, *Evidence before the International Court of Justice* (2009), p. 151.

[468] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 200, para. 59; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia)*, *Judgment, I.C.J. Reports 2015 (I)*, p. 74, para. 180.

[469] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*, *Judgment, I.C.J. Reports 2005*, p. 200, para. 59.

[470] See, for example, para. 2.18 above and fn. 691 below.

[471] P. Tomka and V.-J. Proulx, *"The Evidentiary Practice of the World Court"*, *NUS Law Working Paper* (Dec. 2015) p. 12; D. Sandifer, "Documentary Evidence", in *Evidence before International Tribunals* (1975), pp. 202, 209-210.

[472] *Appeal from a Judgment of the Hungaro/Czechoslovak Mixed Arbitral Tribunal (The Peter Pázmány University* v. *The State of Czechoslovakia), Judgment, 1933, P.C.I.J., Series A/B, No. 61*, p. 215 ("With regard to the request of the Agent of the Czechoslovak Government that the Court should call upon the Hungarian Government to produce the originals of the new documents cited, this was due to the mistaken idea that what the Czechoslovak Government was bound to produce was certified true copies of the originals; in point of fact, it was only responsible for the conformity of the documents which it had filed with the secondary sources which it had quoted."). See also United States, Foreign Claims Settlement Commission, *Decisions and Annotations* (1968), p. 645 ("The Commission recognized that as a general rule it would be a rare exception if a claimant had in his possession primary documentary evidence to establish ownership and value of the items of personalty lost aboard a vessel. Accordingly, the Commission granted awards in such cases on the basis of credible secondary evidence."); *Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium* v. *Spain), Second Phase, Judgment, I.C.J. Reports 1970*, separate opinion of Judge Sir Gerald Fitzmaurice, p. 98, para. 58; D. Sandifer, *op. cit*., pp. 202 and 209-210.

[473] *United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran)*, *Judgment, I.C.J. Reports 1980*, p. 3, paras. 11-13.

> by those facts that are known, and by the probabilities involved. Of course the Trust Deeds would, if produced, constitute what is known in Common Law parlance as the 'best' evidence, and unless they could be shown to have been lost or destroyed, it is unlikely that a municipal court would admit secondary evidence of their contents. International tribunals are not tied by such firm rules, however, many of which are not appropriate to litigation between governments."[474]

6.8 Moreover, there exists no ranking in order of importance for different methods of proof. The Court will take indirect evidence into consideration, for instance where such evidence is "wholly consistent and concordant as to the main facts and circumstances of the case"[475]. In the *Corfu Channel* case, the Court held that:

> "this indirect evidence is admitted in all systems of law, and its use is recognized by international decisions. It must be regarded as of special weight when it is based on a series of facts linked together and leading logically to a single conclusion."[476]

6.9 Proof of the existence of the Bata Convention may therefore be adduced by any means in the absence of the original of the treaty, which has been mislaid.

6.10 In this case, there is an extensive body of evidence proving the existence and content of the Bata Convention. This body of evidence is derived from a range of sources and is corroborative.

6.11 First, a certified copy of the Bata Convention is held in the archives of the French Ministry of Foreign Affairs. This copy was sent by the President of Gabon to the Ambassador of France to Gabon with a covering letter dated 28 October 1974, shortly after the Convention's signature on 12 September 1974[477]. Equatorial Guinea produces that letter in the annexes to its Memorial[478] but fails to include its enclosure, namely the contemporaneous certified copy of the original of the Bata Convention. Gabon is producing the letter and its enclosure as Annex 155 to this Counter-Memorial.

6.12 This copy of the Bata Convention bears the signatures of both Presidents and contains duly initialled annotations. The signatures are consistent with those affixed to other contemporaneous documents, the existence and authenticity of which are not in dispute[479]. The covering letter also

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[474] *Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium* v. *Spain), Second Phase, Judgment, I.C.J. Reports 1970*, separate opinion of Judge Sir Gerald Fitzmaurice, p. 98, para. 58. See also *Ambatielos (Greece* v. *United Kingdom), Preliminary Objection, Judgment, I.C.J. Reports 1952*, dissenting opinion of Sir Arnold McNair[, President, and Judges Basdevant, Klaestad and Read], p. 60, according to which a declaration accompanying a treaty had been ratified, even though the United Kingdom's instrument of ratification could not be found owing to the loss of records.

[475] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 40, paras. 62-63; *United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), Judgment, I.C.J. Reports 1980*, p. 10, para. 13.

[476] *Corfu Channel (United Kingdom* v. *Albania), Judgment, I.C.J. Reports 1949*, p. 18.

[477] Letter from the President of Gabon to the Ambassador of France to Gabon, 28 Oct. 1974 (CMG, Vol. V, Ann. 155).

[478] Letter from the President of Gabon to the Ambassador of France to Gabon, 28 Oct. 1974 (MEG, Vol. VI, Ann. 176).

[479] See, for example, the Letter from the President of Gabon to the President of Equatorial Guinea, 30 Aug. 1972 (CMG, Vol. V, Ann. 120); Letter from the President of Equatorial Guinea to the Secretary-General of the United Nations, 21 Jan. 1969 (CMG, Vol. V, Ann. 110); Letter from the President of Equatorial Guinea to the Secretary-General of the United Nations, 30 Aug. 1969 (CMG, Vol. V, Ann. 111).

bears the stamp of the Embassy of France in Gabon, showing the date of 31 October 1974. Neither this copy nor the circumstances of its dispatch to the French authorities raise any doubts as to its authenticity.

6.13 The letter from President Bongo to the Ambassador of France enclosing the certified copy of the Bata Convention was sent following a meeting held by President Macías Nguema with the heads of diplomatic missions to Equatorial Guinea on 13 October 1974. On that occasion, as he had done a few days previously during a discussion with the Ambassador of France to Equatorial Guinea[480], President Macías Nguema confirmed that Equatorial Guinea had reached an agreement with Gabon[481]. Although President Macías Nguema misrepresented to some extent the content of the agreement concerning the maritime boundary, he did acknowledge that an agreement had been reached by the two States on their land boundary and sovereignty over the islands of Mbanié, Cocotiers and Conga[482].

6.14 On his return from Equatorial Guinea, President Bongo also alluded to the signature of the Bata Convention, stating at a press conference that he:

> "had signed with President Macías Nguema an agreement on the delimitation of the two countries' 'land and maritime' boundaries, and that the issue had been definitively resolved"[483].

6.15 A few weeks later, he confirmed to the Ambassador of France to Libreville that the Bata Convention had been signed, and promised to send him a copy thereof[484].

6.16 After President Macías Nguema's overthrow and execution in 1979, representatives of Equatorial Guinea once again confirmed the existence of the Bata Convention at a meeting with the Ambassador of France to Equatorial Guinea in 1984. On that occasion, Marcelino Nguema Onguene, Equatorial Guinea's Minister for Foreign Affairs and Co-operation, explained that he knew, through the Minister Secretary General of the Presidency, who had been present at the discussions between President Bongo and President Macías Nguema in September 1974, that "an agreement had been signed"[485]. Speaking about this meeting, the French Ambassador stated:

> "A scant file from this station's records contains a free translation of the Convention delimiting the land and maritime frontiers of Equatorial Guinea and Gabon

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[480] Dispatch No. 40/DA/DAM-2 from the Ambassador of France to Equatorial Guinea to the Directorate of African and Madagascan Affairs at the French Ministry of Foreign Affairs, 2 Oct. 1974 (CMG, Vol. V, Ann. 152), pp. 5-9. See also above, para. 3.4.

[481] Dispatch No. 43/DA/DAM-2 from the Ambassador of France to Equatorial Guinea to the Directorate of African and Madagascan Affairs at the French Ministry of Foreign Affairs, 14 Oct. 1974 (CMG, Vol. V, Ann. 153); Telegram No. 3385 from the United States Embassy in Cameroon to the US Secretary of State, 16 Oct. 1974 (CMG, Vol. V, Ann. 154).

[482] *Ibid.*

[483] Telegram No. 691/692 from the Embassy of France in Gabon to the French Ministry of Foreign Affairs, 13 Sept. 1974 (CMG, Vol. V, Ann. 148). See also Telegram No. 1139 from the United States Embassy in Cameroon to the US Secretary of State, 14 Sept. 1974 (CMG, Vol. V, Ann. 149) ("In Libreville airport press conference September 12 following return from official visit to Equatorial Guinea, President Bongo announced that the boundary problem between the two countries had been definitively resolved.").

[484] Dispatch No. 141/DAM from the Ambassador of France to Gabon to the French Minister for Foreign Affairs, 7 Nov. 1974 (CMG, Vol. V, Ann. 156), p. 2.

[485] Telegram No. 254 from the Embassy of France in Equatorial Guinea to the French Ministry of Foreign Affairs, 3 Sept. 1984 (CMG, Vol. V, Ann. 168).

> signed on 12 September 1974, which Convention is disputed by Guinea. It provides that '[the boundary] shall start from the point of intersection between the Muni River thalweg and a straight line drawn from the Cocobeach headland to the Dieke headland'. The island of Mbane is expressly ceded to Gabon and, incidentally, it has been occupied by the Gabonese police since then."[486]

This description is consistent with the Bata Convention and by the same token confirms its existence.

6.17 In addition to the numerous items of French and United States diplomatic correspondence referring to the Bata Convention[487], the signature of this Convention in September 1974 was also reported at the time in the press. The meeting and negotiations between the two Presidents from 9 to 12 September 1974 were filmed for a television news item, which reported that the discussions between the two Heads of State had "made it then possible to resolve definitively the question of the delimitation of the boundaries between Equatorial Guinea and Gabon"[488] and showed the two Presidents surrounded by members of their delegations in the process of discussing and signing a document.

6.18 Likewise, on 20 September 1974, the newspaper *L'Union* published the "most important excerpts" from the final communiqué on the meeting between the two Heads of State, which excerpts confirm that the Bata Convention was signed[489].

6.19 The signature and contents of the Bata Convention were subsequently described in a number of publications:

(a) In a book authored by Max Liniger-Goumaz entitled *La Guinée Équatoriale, un pays méconnu* and published in 1980, the author reproduced statements made by Asumu Oyono, the former Secretary General of the Presidency of the Republic of Equatorial Guinea, according to which President Macías Nguema had in 1974 "accepted the cession to Gabon of the islands of Mbañe, Cocoteros and Conga, as well as the area around Kiosi, for a *quid pro quo*, namely the surrender of some 2,000 sq km of national territory"[490]. Although this figure is overstated, the book describes the solution endorsed in the Bata Convention. Asumu Oyono's statements were also relayed in a book published in 1977 by Donato Ndongo Bidyogo, an author and journalist from Equatorial Guinea:

> "According to a statement made by Gaudencio Asumu Oyono, who was then Vice-Minister and Secretary General of the Presidency — and who is now in exile — 'Macías signed an agreement on the new territorial boundaries with President Bongo at Bata. In accordance with this agreement, Equatorial Guinea ceded to Gabon the islands of Mbañe, Cocoteros and Conga; in the area around Kiosi (Ebebiyin, in the north-eastern

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[486] *Ibid.* With regard to the opening of a police station, see above, para. 2.49.

[487] See above, paras. 3.18-3.25.

[488] Audiovisual report on the State visit of President Bongo to Equatorial Guinea and its transcription (CMG, Vol. II, Ann. V2).

[489] See above, paras. 3.10-3.11. "At the bilateral level, both Heads of State took turns extolling the quality of the wide variety of ties, the depth of fraternal sentiment and the cordiality of the relations which had always bound their two peoples. They agreed that it was necessary to give fresh impetus to developing existing relations between the two countries. To this end, they signed a convention on the delimitation of the land and maritime boundaries between the Gabonese Republic and the Republic of Equatorial Guinea" ("'Tout est réglé!' avec la Guinée Équatoriale", *L'Union*, 20 Sept. 1974 (CMG, Vol. V, Ann. 150)).

[490] M. Liniger-Goumaz, *La Guinée équatoriale, un pays méconnu* (1980) (excerpts) (CMG, Vol. V, Ann. 165), p. 229.

tip of Río Muni), Guinea is entitled to 1 km of the fork in the Kie River, surrendering territory from Ngong to Mibang, the villages located 60 km from the town of Mongomo, as well as the village of Nkok-Ekieri. In total, Macías ceded to Gabon more than 2,000 sq km of mainland territory, in addition to the islands mentioned above'. Consequently, a large part of the districts of Ebebiyin and Mongomo, including the town of the President's birth, which he had renamed 'El Ferrol del Caudillo', became Gabonese territory."[491]

(b) In an article published in *Encyclopédie juridique de l'Afrique* in 1982, Monique Chemillier-Gendreau and Dominique Rosenberg confirmed that a convention relating to the delimitation of the boundaries between Gabon and Equatorial Guinea had been signed on 12 September 1974[492].

6.20 Equatorial Guinea cannot therefore in all seriousness claim to have been "taken completely by surprise" by Gabon's citing of this Convention and to have never had sight or heard of this instrument[493].

6.21 Moreover, the Bata Convention is perfectly consistent with the evolution of the Parties' relations from 1970 onwards. It was the logical outcome of the negotiations conducted by the two States between 1970 and 1974 and reflects the considered proposals made during the course of those negotiations[494]. Indeed, in 1971, Gabon had proposed that the maritime boundary should correspond offshore to the parallel traced from the midpoint of the Muni River to its estuary, whilst creating a "cordon" of waters belonging to Equatorial Guinea around the Elobey Islands and the island of Corisco[495], a proposal which was adopted in the Bata Convention.

6.22 The Bata Convention also makes it possible to explain the improvement in the two States' relations after 1974[496]. This change in the Parties' relations coincided with the resolution of their boundary and island dispute through the conclusion of the Bata Convention. While relations between the two States prior to 1974 had been characterized by significant tensions relating to the delimitation of their common boundaries and sovereignty over Mbanié[497], the signature of the Bata Convention put an end to border incidents and allowed the Parties to extend their co-operation in a number of areas[498]. In particular, in 1979, the Parties signed a General Co-operation Agreement and a Petroleum

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[491] D. Ndongo Bidyogo, *Historia y tragedia de Guinea Ecuatorial* (Editorial Cambio 16) (1977), p. 219 (CMG, Vol. V, Ann. 161) (original Spanish text: "Según declaración del entonces vice-ministro y secretario general de la presidencia —hoy en el exilio —, Gaudencio Asumu Oyono, «Macías firmó en Bata con el presidente Bongo un acuerdo de nuevos límites territoriales. Según dicho acuerdo, Guinea Ecuatorial entregó a Gabón las islas de Mbañe, Cocoteros y Conga; en la zona de Kiosí (Ebebiyín, en el extremo nororiental de Río Muni), Guinea tiene derecho a un kilómetro a partir de la bifurcación hacia el río Kie, perdiendo el territorio comprendido desde Ngong hasta Mibang, poblados situados a sesenta kilómetros de la ciudad de Mongomo, así como el pueblo de Nkok-Ekieñ. En total, Macías entregó a Gabón más de dos mil kilómetros cuadrados de territorio continental, más las islas citadas». El resultado es que gran parte de los distritos de Ebebiyín y Mongomo, incluido el pueblo natal del presidente, rebautizado por él como «El Ferrol del Caudillo», han pasado a ser territorio gabonés.").

[492] *Encyclopédie juridique de l'Afrique* (1982) (excerpts) (CMG, Vol. V, Ann. 166), pp. 67, 100-101.

[493] MEG, Vol. I, para. 5.19.

[494] See above, paras. 2.45 and 3.6.

[495] Report prepared by the Gabon-Equatorial Guinea Joint Commission after the meeting in Libreville from March 25 to 29, 1972, 29 Mar. 1972 (MEG, Vol. VII, Ann. 199).

[496] See above, paras. 4.2-4.8.

[497] See above, paras. 2.49-2.54 and 2.57-2.59.

[498] See above, paras. 4.2-4.8.

Co-operation Agreement[499]. Neither document contains any reference to a boundary dispute between the States, which would hardly have been consistent with the signature of such documents. These initiatives were possible because of the context of stability resulting from the delineation of boundaries and the two States' mutual recognition of sovereignty over the islands under the Bata Convention.

6.23 The evidence produced by Gabon points to a single conclusion: the Bata Convention exists, and its contents match those of the copy that Gabon sent to the Ambassador of France to Libreville on 28 October 1974.

II. The authenticity of the text of the Bata Convention

6.24 In its Memorial, Equatorial Guinea attempts to cast doubt on the authenticity of the text of the Bata Convention, without ever formally contesting it. It merely states that it is incumbent upon Gabon to prove the authenticity of the text of the Bata Convention[500]. In support of its argument, Equatorial Guinea once again cites the principle of *onus probandi incumbit actori*, as recognized by the Court.

6.25 Gabon has demonstrated the indisputable existence of the Bata Convention above[501]. In so far as Equatorial Guinea contests the authenticity of the text of the Bata Convention, as it stands in the copy that Gabon sent to the Ambassador of France in October 1974, it is incumbent upon Equatorial Guinea to produce proof in that regard[502]. In any event, the production of an original is not required to prove the authenticity of a text, in particular when the original is no longer in the possession of the party invoking that text[503]. As noted by Vice-President Al-Khasawneh in his dissenting opinion in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*:

> "The paragraph notes that the authenticity of the documents was disputed by the Respondent presumably because 'they were copies of intercepts, but not originals'. But

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[499] See above, para. 4.5; General Co-operation Agreement between the Government of the Gabonese Republic and the Government of the Republic of Equatorial Guinea, Libreville, 13 Nov. 1979 (CMG, Vol. V, Ann. 164); Petroleum Co-operation Agreement between the Republic of Equatorial Guinea and the Gabonese Republic, Libreville, 13 Nov. 1979 (CMG, Vol. V, Ann. 163).

[500] MEG, Vol. I, para. 7.7.

[501] See above, Chap. VI, Part I.

[502] *Sovereignty over Certain Frontier Land (Belgium/Netherlands), Judgment, I.C.J. Reports 1959*, p. 224. See also Iran-United States Claims Tribunal, *Abrahim Rahman Golshani* v. *The Government of the Islamic Republic of Iran*, Final Award No. 546-812-3, 2 Mar. 1993, para. 49, in which the Tribunal held: "The Tribunal believes that the analysis of the distribution of the burden of proof in this Case should be centered around Article 24, paragraph 1 of the Tribunal Rules which states that '[e]ach party shall have the burden of proving the facts relied on to support his claim or defence.' It was the Respondent who, at one point during the proceedings in this Case, raised the defence that the Deed is a forgery. Specifically, the Respondent has contended that the Deed, dated 15 August 1978, was in fact fabricated in 1982. Having made that factual allegation, the Respondent has the burden of proving it. However, the Tribunal need only concern itself with the question whether the Respondent has met that burden if the Claimant has submitted a document inspiring a minimally sufficient degree of confidence in its authenticity. It is therefore up to the Claimant first to demonstrate prima facie that the Deed is authentic."

[503] See above, paras. 6.5-6.8.

it is plain that if the Court insisted on original documents, it would never be able to render any judgments."[504]

6.26 In the present case, Gabon has produced the copy of the Bata Convention which was sent contemporaneously to the Ambassador of France to Gabon and placed in France's archives. This copy bears the signatures and initials of both Presidents. In accordance with the Vienna Convention, the signatures of the contracting States establish the text as authentic and definitive[505].

6.27 The authenticity of this certified copy is beyond doubt and corroborated by the fact that the handwritten annotations thereto, including in particular the amendments made to Articles 6 and 9 replacing the words "of the present treaty" with the words "of the present Convention", which are initialled by both Presidents, are consistent with the description of the Bata Convention given by President Bongo in 1974 to the Ambassador of France to Gabon[506].

6.28 Equatorial Guinea's arguments relating to the registration of the Bata Convention with the United Nations raise no doubts whatsoever as to its authenticity. The copy delivered by Gabon to the United Nations Secretariat matches the text of the Bata Convention produced for the Court[507]. The quality of this copy cannot in itself call the authenticity of the instrument into question. In its letter to the Permanent Representative of Equatorial Guinea to the United Nations, the Secretariat noted in this regard that "the Treaty Section . . . requested Gabon to resubmit clearer copies. This is not an unusual practice when illegible texts are submitted for registration by Member States."[508]

III. The Bata Convention is a treaty which binds the Parties

A. The Bata Convention satisfies the conditions for the signature of a treaty under international law

6.29 The Bata Convention satisfies all the conditions for the signature of a treaty under international law, as codified by the Vienna Convention:

(a) the text of the Bata Convention was adopted by the consent of both States[509], as expressed through the initials and signatures of their respective representatives;

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[504] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, dissenting opinion of Vice-President Al-Khasawneh, p. 325, p. 262.

[505] Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, *UNTS*, Vol. 1155, No. 18232, p. 331, Art. 10.

[506] At a meeting with the Ambassador of France to Libreville, President Bongo stated that "[i]t was a convention . . . and not a treaty, in order to avoid parliamentary ratification, which could have been used as a pretext for a further challenge, or even a calling into question of the agreement". See Dispatch No. 141/DAM from the Ambassador of France to Gabon to the French Minister for Foreign Affairs, 7 Nov. 1974, p. 2 (CMG, Vol. V, Ann. 156). See also above, para. 3.19.

[507] In this regard, Gabon notes that it is in fact the copy of the original rather than the transcription submitted subsequently to the Secretariat which is authoritative. See Letter from the Gabonese Minister of State to the Secretary-General of the United Nations, 5 Feb. 2004 (CMG, Vol. V, Ann. 174).

[508] Letter from the Assistant Secretary-General of the United Nations to the Permanent Representative of Equatorial Guinea to the United Nations, 22 Mar. 2004 (MEG, Vol. III, Ann. 32).

[509] Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, *UNTS*, Vol. 1155, No. 18232, p. 331, Art. 9.

(b) it was established as authentic and definitive by the signatures and initials of those representatives[510]; and

(c) those representatives were the Heads of State of Gabon and Equatorial Guinea[511].

6.30 Therefore, by virtue of their high office, President Bongo and President Macías Nguema validly concluded a treaty, which entered into force on the date of its signature and is binding upon Equatorial Guinea and Gabon.

B. The Bata Convention is a binding instrument

6.31 Equatorial Guinea contends in the alternative that the Bata Convention "does not have, and was never understood or treated as having, the force of law in the relations between the Parties with regard to the delimitation of their common maritime and land boundaries or sovereignty over the islands of Mbañe, Cocoteros and Conga"[512]. This claim is contradicted by the Parties' objective intention, as the latter emerges from the text of the Convention and the context of its signature.

6.32 In order to qualify as a treaty, an agreement must give rise to legally binding obligations. In the *Iron Rhine* case, the arbitral tribunal found that the parties' intention constitutes a key factor distinguishing a non-legally binding instrument from a treaty[513]. This principle was also recognized by the arbitral tribunal in the *Chagos Marine Protected Area* case:

> "While the Tribunal readily accepts that States are free in their international relations to enter into even very detailed agreements that are intended to have only political effect, the intention for an agreement to be either binding or non-binding as a matter of law must be clearly expressed or is otherwise a matter for objective determination. As recalled by the ICJ in *Aegean Sea Continental Shelf*, 'in determining what was indeed the nature of the act or transaction embodied in the [agreement], the [Tribunal] must have regard above all to its actual terms and to the particular circumstances in which it was drawn up' *(Greece* v. *Turkey), Judgment, I.C.J. Reports 1978*, p. 3 at p. 39, para. 96)"[514].

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[510] *Ibid.*, Art. 10.

[511] *Ibid.*, Art. 7.

[512] MEG, Vol. I, para. 7.8.

[513] *Arbitration regarding the Iron Rhine ("Ijzeren Rijn") (Belgium/Netherlands)*, Decision, 24 May 2005, *Reports of International Arbitral Awards (RIAA)*, Vol. XXVII, pp. 91-92, para. 142. See also United Nations, Office of Legal Affairs, *Treaty Handbook* (2013), para. 5.3.4 ("[a] treaty or international agreement must impose on the parties legal obligations binding under international law, as opposed to mere political commitments. It must be clear on the face of the instrument, whatever its form, that the parties intend to be legally bound under international law"); *Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile), Judgment, I.C.J. Reports 2018*, p. 548, para. 126; *Chagos Marine Protected Area Arbitration (Mauritius* v. *The United Kingdom)*, Award, 18 Mar. 2015, *RIAA*, Vol. XXXI, pp. 536 and 538, paras. 423 and 426; *South China Sea Arbitration (Philippines* v. *China)*, Award on Jurisdiction and Admissibility, 29 Oct. 2015, *RIAA*, Vol. XXXIII, pp. 82-85, paras. 213-218.

[514] *Chagos Marine Protected Area Arbitration (Mauritius* v. *United Kingdom)*, Award, 18 Mar. 2015, *RIAA*, Vol. XXXI, p. 538, para. 426. See also O. Schachter, "The Twilight Existence of Nonbinding International Agreements", *American Journal of International Law*, Vol. 71 (1977), pp. 296-297; S. Rosenne, *Developments in the Law of Treaties 1945-1986* (1989), p. 86; A. McNair, *The Law of Treaties* (1961), p. 15; J.E.S. Fawcett, "The Legal Character of International Agreements", *British Yearbook of International Law*, Vol. 30 (1953), p. 385.

The parties' intention is conclusive for the creation of rights or obligations governed by international law[515].

6.33 A State's intention must be established objectively. Thus, in the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, the Court examined the terms of the text recording the purported agreement, without considering the subjective state of mind of the States' representatives when they signed it[516].

6.34 The existence of the intention necessary to give rise to a treaty must be inferred having regard "to its actual terms and to the particular circumstances in which [the instrument in question] was drawn up"[517]. In the present case, the text of the Bata Convention (**1**) and the context of its signature (**2**) confirm the Parties' clear and unequivocal intention to be bound under international law. Contrary to Equatorial Guinea's argument, the subsequent conduct of the Parties does not affect the binding force of this treaty (**3**).

1. ***The text of the Bata Convention***

6.35 The terms used in a treaty constitute the clearest evidence of the parties' intention[518]. Those terms must convey their clear intention to create mutual rights or obligations[519]. That is the case in particular when the contracting parties use terms such as "commit" or when the terms used:

> "do not merely give an account of discussions and summarize points of agreement and disagreement. They enumerate the commitments to which the Parties have consented. They thus create rights and obligations under international law for the Parties. They constitute an international agreement."[520]

6.36 Contrary to Equatorial Guinea's argument[521], the text of the Bata Convention has all the characteristics of a treaty. The document is entitled "Convention delimiting the land and maritime

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[515] *Arbitration regarding the Iron Rhine ("Ijzeren Rijn") (Belgium/ Netherlands)*, Award, 24 May 2005, *RIAA*, Vol. XXVII, pp. 91-92, para. 142. See also S. Rosenne, *op. cit.*, p. 86; R. Jennings and A. Watts, *Oppenheim's International Law* (9th ed., 1996), p. 1202; A. McNair, *op. cit.*, p. 15; J.E.S. Fawcett, *op. cit*., p. 385.

[516] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1994*, pp. 121-122, para. 27.

[517] *Aegean Sea Continental Shelf (Greece* v. *Turkey), Judgment, I.C.J. Reports 1978*, p. 39, para. 96. See also *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1994*, pp. 120-122, paras. 23-30; *South China Sea Arbitration (Philippines* v. *China)*, Award on Jurisdiction and Admissibility, 29 Oct. 2015, *RIAA*, Vol. XXXIII, p. 82, para. 213.

[518] *Temple of Preah Vihear (Cambodia* v. *Thailand), Preliminary Objections, Judgment, I.C.J. Reports 1961*, pp. 31-32; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1994*, pp. 120-122, para. 27.

[519] *Aegean Sea Continental Shelf (Greece* v. *Turkey), Judgment, I.C.J. Reports 1978*, p. 39, para. 96; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1994*, pp. 120-122, paras. 23-30; *South China Sea Arbitration (Philippines* v. *China)*, Award on Jurisdiction and Admissibility, 29 Oct. 2015, *RIAA*, Vol. XXXIII, p. 82, para. 213.

[520] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1994*, p. 121, paras. 24-25; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, pp. 111-112, paras. 162-163.

[521] MEG, Vol. I, paras. 7.10 and 7.15-7.20.

frontiers of Equatorial Guinea and Gabon" and comprises a preamble and ten articles, in which the "High Contracting Parties" give expression to their agreement.

6.37 In the preamble, the "High Contracting Parties" recalled the object and purpose of their agreement. They recognized that "treaties and conventions constitute an important means of developing peaceful cooperation between nations, irrespective of their political regimes". Furthermore, they confirmed their desire "to lay firm foundations for peace between their two countries, notably by definitively establishing their common land and maritime frontiers".

6.38 The purpose of the Bata Convention, namely the recognition of the sovereignty of one State over given land areas and the delimitation of their boundaries, leaves no doubt as to its binding force.

6.39 As acknowledged by Equatorial Guinea[522], in Article 1 of the Bata Convention the Parties delimited their land boundary by reproducing in substance the terms of Article 4 of the Paris Convention (the legal force of which is accepted by Equatorial Guinea), while making Article 1 subject to the provisions of Article 2 of the Bata Convention, whereby the Parties exchanged certain land areas:

> "The area of the Medouneu District situated in the territory of Equatorial Guinea beyond the parallel of latitude 1° north is ceded to the Gabonese Republic, and shall henceforth form an integral part of its territory.
>
> In compensation, the Gabonese Republic cedes to the Republic of Equatorial Guinea, on the one hand, a land area surrounding and including the towns of Ngong and Allen and, on the other, a one kilometre land area of which one of the peaks is the place known as 'carrefour international'. These two land areas, which shall have a total surface area equal to that ceded to the Gabonese Republic, shall henceforth form an integral part of the Republic of Equatorial Guinea."[523]

6.40 The legal obligations deriving from these provisions are clear, final and of immediate effect, as evidenced by the use of the terms "ceded" and "cedes". These obligations are not subject to any conditions or future contingency. On the contrary, the Convention explicitly states that the territory "ceded" to Gabon "shall henceforth form an integral part" of Gabonese territory and, conversely, that the territories which Gabon "cedes" to Equatorial Guinea "shall henceforth form an integral part" of the territory of Equatorial Guinea. Even though, as pointed out by Equatorial Guinea[524], under Article 7 of the Bata Convention, the locations and precise surface areas of the ceded land areas are to be determined subsequently, Articles 1 and 2 nonetheless have immediate binding force. Indeed, there are numerous territorial treaties which provide for subsequent

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[522] *Ibid*., para. 7.17.

[523] Convention delimiting the land and maritime frontiers of Equatorial Guinea and Gabon, 12 Sept. 1974, enclosed with the letter from the President of Gabon to the Ambassador of France to Gabon, 28 Oct. 1974 (CMG, Vol. V, Ann. 155), Art. 2.

[524] MEG, Vol. I, para. 7.18.

demarcation[525] along the lines of the Paris Convention, the binding force of which is accepted by both Parties.

6.41 Under Article 3 of the Bata Convention, "[t]he High Contracting Parties *recognize*, on the one hand, that Mbane Island *forms an integral part* of the territory of the Gabonese Republic, and, on the other, that the Elobey Islands and Corisco Island *form an integral part* of the territory of the Republic of Equatorial Guinea"[526]. The terms used by the Parties are indicative of commitments definitively given. In accordance with the Judgment of the Court in the *Territorial Dispute (Libya/Chad)* case, "[t]he word 'recognize' used in the Treaty indicates that a legal obligation is undertaken"[527].

6.42 In Article 4 of the Bata Convention, the Parties demarcated their maritime boundary, specifying that this boundary "shall consist of a straight line parallel to latitude 1° north, starting from the point of intersection of the Muni River thalweg with the straight line drawn from the Cocobeach headland to the Dieke headland", while however granting to Equatorial Guinea "water areas" around the Elobey Islands and the island of Corisco, the dimensions of which are specified in the same article[528].

6.43 Under Article 5 of the Bata Convention, the two States afford to the ships of Equatorial Guinea guarantees and access to facilities "in Gabonese territorial waters", for the purpose of access by sea to the Muni River, the Elobey Islands and Corisco Island, and likewise on a reciprocal basis to Gabonese ships "in the territorial waters of Equatorial Guinea". The two States also guarantee free fishing and navigation in the Muni and Utamboni Rivers. This provision is similar to one contained in the Paris Convention, which granted to French ships "in Spanish territorial waters" access by sea to the Muni River and, on a reciprocal basis, to Spanish ships "in French territorial waters"[529].

6.44 The Parties also provided for the conclusion of arrangements to settle other questions associated with their border relations, such as the policing of navigation and fishing, as well as lighting and beaconing. Article 6 of the Bata Convention recognizes that the latter grants "rights and privileges", thereby evidencing the acceptance of mutual legal obligations by the Parties. Here again, the Bata Convention largely reproduces the terms used in the Paris Convention, specifying that these rights "shall be reserved exclusively to nationals of the two High Contracting Parties, and may not in any way be transferred or granted to nationals of other nations".

6.45 Article 8 of the Convention provides that "[t]he marking of the frontiers shall be carried out by a team composed of representatives of the two countries". Contrary to Equatorial Guinea's

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[525] R. Jennings and A. Watts, *op. cit.*, p. 662 ("The common practice for land boundaries is, in a boundary treaty or award, to describe the boundary line in words, i.e. to 'delimit' it; and then to appoint boundary commissions, usually joint, to apply the delimitation to the ground and if necessary to mark it with boundary posts or the like, i.e. to 'demarcate' it.").

[526] Convention delimiting the land and maritime frontiers of Equatorial Guinea and Gabon, 12 Sept. 1974, enclosed with the letter from the President of Gabon to the Ambassador of France to Gabon, 28 Oct. 1974 (CMG, Vol. V, Ann. 155), Art. 3 (emphasis added).

[527] *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 22, para. 42.

[528] Convention delimiting the land and maritime frontiers of Equatorial Guinea and Gabon, 12 Sept. 1974, enclosed with the letter from the President of Gabon to the Ambassador of France to Gabon, 28 Oct. 1974 (CMG, Vol. V, Ann. 155), Art. 4.

[529] Convention on the delimitation of French and Spanish possessions in West Africa, on the coasts of the Sahara and the Gulf of Guinea, Paris, 27 June 1900, bilingual version (CMG, Vol. III, Ann. 47), Art. 5.

argument[530], the need for the subsequent marking of the boundary does not affect the Bata Convention's binding force. On the contrary, in accordance with the jurisprudence of the Court, an agreement on future demarcation presupposes a prior delimitation[531]. The Bata Convention is the source of that delimitation.

6.46 Furthermore, the Parties agreed in Article 9 that "[d]isputes arising from the application or interpretation of the present treaty shall be submitted to a joint commission and, if necessary, settled in accordance with Article 33 of the Charter of the United Nations". This provision demonstrates that the Parties intended to be legally bound, to create reciprocal rights and obligations, and to settle any disputes relating to this legal text in accordance with their agreement.

6.47 Lastly, the Bata Convention expressly provides that it "shall enter into force on the date of the signature thereof". This clearly demonstrates that the Convention is indeed a legally binding agreement, and not a mere political declaration. As the Court observed in the case concerning *Maritime Delimitation in the Indian Ocean*, "[t]he inclusion of a provision addressing the entry into force of [an instrument] is indicative of the instrument's binding character"[532].

6.48 The Bata Convention also contains final provisions which are typical of treaties, namely: "Done at Bata, on 12 September 1974 in two originals, in the French and Spanish languages, both texts being equally authentic."

6.49 Equatorial Guinea disputes the binding force of Article 4, and of the Bata Convention as a whole, in particular because of the inclusion of the *nota bene*. It claims that "the reservation on the French text makes clear that there was no final agreement on the course of the maritime boundary"[533]. That is far from being the case.

6.50 According to the terms of the *nota bene*, the Parties agreed "to proceed subsequently with a new text of Article 4 to bring it into conformity with the Convention of 1900" (in the French version of the text "de procéder ultérieurement à une nouvelle rédaction de l'article 4, afin de la mettre en conformité à la Convention de 1900", and in the Spanish version "El articulo 4º será examinado por los dos Jefes de Estado ulteriormente, conforme la Convención de 1900"). This *nota bene* does not mean that Article 4 is without legal import and binding effect. On the contrary, it reaffirms the binding force of Article 4, until such time as the Parties proceed with a new text, should they in fact do so.

6.51 The Parties' agreement on the potential future revision of Article 4 thus cannot call into question the binding force of either Article 4 or of the Bata Convention as a whole. As noted by

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[530] MEG, Vol. I, para. 7.19.

[531] *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 28, para. 56; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, pp. 339-340, para. 49.

[532] *Maritime Delimitation in the Indian Ocean (Somalia* v. *Kenya), Preliminary Objections, Judgment, I.C.J. Reports 2017*, p. 21, para. 42.

[533] MEG, Vol. I, para. 7.16.

Professor Shaw, "the fact that an instrument provides for modification by mutual agreement of its terms does not detract from the fact that a fully delimited frontier line has been established"[534].

6.52 This conclusion is supported by the reasoning of the Court in the *Territorial Dispute (Libya/Chad)* case. In that case, the Court did not hesitate to recognize the binding effect of the 1955 Treaty between Libya and France, even though its Article 11 provided that

> "[t]he present Treaty is concluded for a period of 20 years. The High Contracting Parties shall be able at all times to enter into consultations with a view to its revision" and that "consultations shall be compulsory at the end of the ten-year period following its entry into force"[535].

6.53 The same reasoning applies in the present case: the simple fact that the *nota bene* contemplates a subsequent revision of Article 4 of the Bata Convention cannot affect the binding force of either that article or of the Bata Convention as a whole.

2. *The context of the signature of the Bata Convention*

6.54 In its Memorial, Equatorial Guinea chooses to disregard a significant number of the events of 1974, as well as certain events which followed the signature of the Bata Convention. And for good reason: those events confirm the signature of the Bata Convention and reveal the intention of both States to resolve all their territorial and boundary disputes by the signature of this binding instrument under international law.

6.55 The context of the signature of the Bata Convention explains the Parties' willingness to confirm, in international law, the delimitation of their boundaries and their acknowledgment of sovereignty over the islands in Corisco Bay. The Bata Convention was the outcome of negotiations between the two States relating to the adjustment of their land boundaries as defined by the Paris Convention, which did not reflect or no longer reflected the reality on the ground and had given rise to numerous incidents between the two States[536]. The Bata Convention therefore resolves the question of sovereignty over the islands, and that of the maritime boundary, which were not dealt with by the Paris Convention.

6.56 Equatorial Guinea does not deny that, between 1970 and 1974, negotiations took place between the two States with a view to delimiting their boundaries and determining sovereignty over the islands off the Gabonese coast. It nonetheless attempts to minimize the significance of those negotiations by failing to mention certain key stages thereof[537].

6.57 The negotiations began after Equatorial Guinea achieved its independence[538]. Owing to uncertainties over the actual course of the land boundary established by the Paris Convention, and because the latter said nothing regarding the maritime boundary and sovereignty over Mbanié,

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[534] M.N. Shaw, "Boundary Treaties and their Interpretation", in *Evolving Principles of International Law*, Brill (2012), p. 249.

[535] *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 37, paras. 72-73.

[536] See above, paras. 2.9-2.59.

[537] MEG, Vol. I, paras. 4.3-4.12.

[538] See above, paras. 2.37 *et seq*.

Cocotiers and Conga, it had quickly become clear that negotiations on these matters were needed between the two States.

6.58 In 1970, the two States expressed their willingness to commence negotiations in order to define their common maritime boundary[539]. Representatives of Gabon and Equatorial Guinea expressed a wish to determine this boundary "in accordance with the principles of international law"[540]. In the course of these negotiations, the representatives of both Parties also stated their intention to resolve their dispute peacefully by entering into an agreement having the Paris Convention as its basis[541].

6.59 Certain border incidents that occurred between 1970 and 1974, in particular along the land boundary[542], underlined the need to settle the delimitation not only of the maritime, but also of the land boundary between the two States. Following an incident on Mbanié in 1972, it had also become clear that any delimitation agreement would in addition have to settle the question of sovereignty over the islands in Corisco Bay[543].

6.60 The border incident that occurred in July 1974 along the eastern land boundary accelerated the negotiations between the two States[544]. At preparatory meetings, the initial outlines of the Bata Convention emerged, including in particular the idea of territorial exchanges between the two States[545]. In the context of these negotiations, a commission was set up for the purpose of establishing the course of the boundaries between the two States[546]. In July 1974, Equatorial Guinea held legal consultations with the USSR and asked Spain to provide the assistance of an expert in international law[547], thus providing further evidence of the willingness of the Government of Equatorial Guinea to negotiate and conclude an agreement under international law. For its part, Gabon set out its position on the maritime boundary, having regard to the relevant principles of international law[548]. The solutions contemplated by Gabon in August 1974 were partially adopted in the final text of the Bata Convention one month later.

6.61 This is the context in which President Bongo's visit to Equatorial Guinea from 9 to 12 September 1974 must be viewed. The signature of the Bata Convention, settling not only the

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[539] Note Verbale No. 1966/MAE-C/DAAP from the Gabonese Ministry of Foreign Affairs to the Embassy of Equatorial Guinea in Gabon, 4 June 1970 (CMG, Vol. V, Ann. 112); Note No. 1524 from the Ministry of Foreign Affairs of Equatorial Guinea to the Ambassador of Equatorial Guinea to Gabon, 15 June 1970 (CMG, Vol. V, Ann. 113).

[540] *Ibid*.

[541] Minutes of the meeting of the Gabon-Equatorial Guinea Joint Commission in Libreville, 25-29 March 1972, 29 Mar. 1972 (MEG, Vol. VII, Ann. 198), para. 2.1.

[542] See above, paras. 2.57-2.59.

[543] See above, paras. 2.49-2.54.

[544] See above, paras. 2.57-2.59 and 3.3-3.6; Letter No. 200/DAM/1 from the French Minister for Foreign Affairs to the Secretary of State for Culture, 26 Aug. 1974 (CMG, Vol. V, Ann. 147), relating that "the Gabonese authorities and the authorities of Equatorial Guinea have decided to proceed with a delimitation of the boundary between the two countries".

[545] Telegram from the Embassy of France in Equatorial Guinea to the French Ministry of Foreign Affairs, 24 July 1974 (CMG, Vol. V, Ann. 142).

[546] Telegram No. 85 from the Embassy of France in Equatorial Guinea to the French Ministry of Foreign Affairs, 20 July 1974 (CMG, Vol. V, Ann. 141).

[547] *Ibid*.

[548] See above, para. 3.6.

question of sovereignty over the islands (which had given rise to the 1972 incident[549]) and that of the maritime boundary, but also the question of the land boundary (which had given rise to the June 1974 incidents[550]), was the culmination of the negotiations between the two States seeking to clarify, adjust and extend the Paris Convention through the signature of another treaty.

3. *The subsequent conduct of the Parties*

6.62 Equatorial Guinea claims that the Bata Convention does not have the force of law between the Parties, as "[d]uring decades of negotiations . . . the document was entirely absent from the relations between the Parties", and "Equatorial Guinea and Gabon never took any of the steps necessary to complete the alleged convention, to conclude the additional agreements that were called for, or to implement any of the material terms found in the text"[551]. But the subsequent conduct of the Parties cannot call into question the existence or binding force of the Bata Convention.

6.63 The rules concerning the termination and suspension of treaties set out in Articles 54 to 62 of the Vienna Convention on the Law of Treaties reflect customary international law[552]. In the absence of a provision in the Bata Convention regarding its denunciation or suspension, it may only cease producing its effects under the conditions specifically enumerated in the Vienna Convention. The subsequent conduct of the parties to a treaty or convention does not feature in those conditions and cannot be sufficient to justify termination[553].

6.64 Equatorial Guinea does not explain on what basis the Bata Convention might no longer have the force of law between the Parties. It makes a brief allusion to the principle of estoppel[554], but this reference, which is confined to a footnote, is hardly relevant. The Court has held that estoppel may not be lightly assumed[555]. Even if the principle of estoppel could be invoked in order to modify or cease applying a conventionally agreed boundary or an acknowledgment of sovereignty by treaty — which is far from being established — Equatorial Guinea adduces no proof of the existence of a clear and unequivocal statement by Gabon, or a change in position to the detriment of Equatorial Guinea on the basis of such a Gabonese statement. Furthermore, the Bata Convention sets out an objective territorial régime[556]. That objective régime has an existence which is not dependent on the treaty that created it[557].

6.65 Equatorial Guinea also invokes the subsequent conduct of the Parties in order to claim that the Bata Convention "was never understood or treated as having . . . the force of law" between

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[549] See above, paras. 2.49-2.54.

[550] See above, paras. 2.57-2.59.

[551] MEG, Vol. I, paras. 7.9 and 7.11.

[552] See, for example, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 47.

[553] See, for example, *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 65, para. 114.

[554] MEG, Vol. I, fn. 367.

[555] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Judgment, I.C.J. Reports 1984*, p. 308, paras. 140-142.

[556] *[Award of the Arbitral Tribunal in the first stage of the proceedings between Eritrea and Yemen]*, Award of 9 Oct. 1998, *RIAA*, Vol. XXII, p. 250, para. 153.

[557] *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 37, paras. 72-73.

the Parties[558]. But such subsequent conduct may not "prevail over the actual terms of the instrument in question"[559].

6.66 In any event, none of the arguments advanced by Equatorial Guinea calls into question the Parties' clear and unequivocal intention to conclude an instrument having binding force under international law, as is clear from the terms used in the Bata Convention and the circumstances of its conclusion.

6.67 First, the mere fact that the Parties did not implement certain provisions of the Bata Convention (including in particular the provisions of the *nota bene* and those of Articles 7 and 8) cannot put in question the existence and binding force of the Convention[560]. The relations between the Parties following the signature of the Bata Convention must be considered in light of the difficult domestic political situation in Equatorial Guinea between 1974 and 1979, which led to a number of countries suspending diplomatic relations with the régime of President Macías Nguema[561]. Moreover, the Bata Convention had to a large extent formally acknowledged a situation which already existed on the ground, in particular as regards the land boundary and sovereignty over the islands. The provisions of the Bata Convention did not therefore require implementation on the ground, or at least not immediate implementation.

6.68 Nor does the absence of "the consent of the Gabonese people" and of ratification "by virtue of a law" cast any doubt on Gabon's intention of concluding a binding treaty under international law[562]. On the contrary, the explanations given by President Bongo to the Ambassador of France to Gabon[563] confirm that the Bata Convention was concluded in the desired form due to his interpretation of the relevant Gabonese constitutional rules. Equatorial Guinea can draw no conclusions under international law from an alleged violation of Gabon's internal law[564].

6.69 Similarly, a failure to seek immediate registration with the United Nations cannot call into question the Parties' intention to conclude a binding agreement under international law. The Court has already rejected this same argument in the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*. Bahrain had:

> "base[d] its contention, that no international agreement was concluded, also upon another argument. It maintains that the subsequent conduct of the Parties showed that they never considered the 1990 Minutes to be an agreement of this kind; and that not only was this the position of Bahrain, but it was also that of Qatar. Bahrain points out that Qatar waited until June 1991 before it applied to the United Nations Secretariat to register the Minutes of December 1990 under Article 102 of the Charter; and moreover that Bahrain objected to such registration. Bahrain also observes that, contrary to what

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[558] MEG, Vol. I, para. 7.8.

[559] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1994*, p. 122, para. 29.

[560] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 65, para. 114.

[561] P. Barnès, "Près de la moitié de la population a fui l[a] dictature du président Ma[c]ias Nguéma", *Le Monde*, 14 June 1978 (CMG, Vol. V, Ann. 162).

[562] MEG, Vol. I, para. 7.22.

[563] Dispatch No. 141/DAM from the Ambassador of France to Gabon to the French Minister for Foreign Affairs, 7 Nov. 1974 (CMG, Vol. V, Ann. 156), p. 3.

[564] Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, *UNTS*, Vol. 1155, No. 18232, p. 331, Art. 46.

> is laid down in Article 17 of the Pact of the League of Arab States, Qatar did not file the 1990 Minutes with the General Secretariat of the League; nor did it follow the procedures required by its own Constitution for the conclusion of treaties. This conduct showed that Qatar, like Bahrain, never considered the 1990 Minutes to be an international agreement."[565]

6.70 Dismissing this argument, the Court observed that:

> "[A]n international agreement or treaty that has not been registered with the Secretariat of the United Nations may not, according to the provisions of Article 102 of the Charter, be invoked by the parties before any organ of the United Nations. Non-registration or late registration, on the other hand, does not have any consequence for the actual validity of the agreement, which remains no less binding upon the parties. The Court therefore cannot infer from the fact that Qatar did not apply for registration of the 1990 Minutes until six months after they were signed that Qatar considered, in December 1990, that those Minutes did not constitute an international agreement."[566]

The same conclusion applies in this case.

6.71 Lastly, the negotiations that resumed following the signature of the Bata Convention do not contradict, but rather corroborate the existence of the Bata Convention.

6.72 Indeed, contrary to the version of the facts presented by Equatorial Guinea, the negotiations that resulted in the signature of the Petroleum Co-operation Agreement in 1979 were focused on petroleum co-operation between the two States, and not on the delimitation of their boundaries[567]. Likewise, the discussions within the *ad hoc* Commission in 1982 concerned the question of petroleum co-operation between the two States, in particular in the area around Corisco Island and the Elobey Islands[568]. It was possible to conduct those negotiations because of the agreement reached on the land and maritime boundaries and on sovereignty over the islands.

6.73 Furthermore, none of the provisions of the 1979 Petroleum Co-operation Agreement and none of the discussions held in 1982 called the Bata Convention into question. On the contrary, the 1979 Petroleum Co-operation Agreement implicitly confirms the maritime boundary established by the Bata Convention, by adopting it as the northern limit of the exclusive exploration and exploitation zone licensed to Société Nationale Pétrolière Gabonaise[569].

6.74 In addition, the Bata Convention produced the intended effect, namely the resolution of the disputes between the two States and an overall improvement in their relations[570]. Indeed, the

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[565] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Jurisdiction and Admissibility, I.C.J. Reports 1994*, p. 122, para. 28.

[566] *Ibid.*, p. 122, para. 29.

[567] See above, para. 4.6.

[568] Minutes of the *ad hoc* Commission on the review of the Petroleum Co-operation Agreement between the Republic of Equatorial Guinea and the Gabonese Republic, Libreville, 18 Mar. 1982 (CMG, Vol. V, Ann. 167), pp. 3-4. See also MEG, Vol. VII, Ann. 204.

[569] Petroleum Co-operation Agreement between the Republic of Equatorial Guinea and the Gabonese Republic, Libreville, 13 Nov. 1979 (CMG, Vol. V, Ann. 163), Art. 6.

[570] See above, paras. 4.3-4.8.

signature of the Bata Convention enabled co-operation between the two States to be extended, in particular on economic, cultural and security matters[571]. Such co-operation was made possible by the settling, through the Bata Convention, of both the dispute over the islands of Mbanié, Cocotiers and Conga and the boundary dispute between Gabon and Equatorial Guinea.

6.75 Finally, the statements made by the Presidents of Gabon and Equatorial Guinea following the signature of the Bata Convention support in every respect the argument of Gabon. Both Presidents confirmed that an agreement had been concluded in September 1974 regarding the delimitation of their boundaries and sovereignty over the islands in Corisco Bay[572].

Conclusion

6.76 The following conclusions can be drawn from the foregoing.

(a) The Bata Convention exists. Its text corresponds to that of the certified copy sent by President Bongo to the Ambassador of France to Libreville on 28 October 1974. Its existence is borne out by diverse yet corroborative pieces of evidence, including: documents held in the diplomatic archives of France and the United States, recording *inter alia* statements made by representatives of Equatorial Guinea and Gabon; contemporaneous publications; press articles; and a documentary film made in 1974. The signature of the Bata Convention is entirely consistent with the evolution of relations between the Parties from 1970 to 1982, in particular the improvement in their relations as from 1974 and the development of bilateral co-operation between the two States which started in that year, on the basis of the settlement of their territorial and boundary disputes.

(b) The Bata Convention is a legally binding instrument under international law. It satisfies the conditions for the conclusion of a treaty, as codified by the Vienna Convention. It entered into force on the date of its signature, namely 12 September 1974. The terms used by the Parties in the Bata Convention and the circumstances of its signature leave no doubt as to their intention to be bound under international law. The subsequent conduct of the Parties in the years following the signature of the Bata Convention also evidences that intention.

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[571] See above, paras. 4.3-4.8.

[572] See above, paras. 3.17-3.25 and 6.13-6.16.

CHAPTER VII
THE LEGAL TITLES IN RESPECT OF THE LAND BOUNDARY

7.1 In its submissions, Equatorial Guinea accepts the following as legal titles having the force of law between the Parties with regard to the delimitation of the land boundary:

(a) the Paris Convention of 1900, "as applied by France and Spain until the independence of Gabon on 17 August 1960 and as continued to be applied by Gabon and Spain until the independence of Equatorial Guinea on 12 October 1968";

(b) for Equatorial Guinea, "all titles to territory, including territorial limits, held by Spain based on modifications to the boundary described in Article 4 of the 1900 Convention in accordance with the terms of the 1900 Convention and international law prior to 12 October 1968"; and

(c) for Gabon, "all the titles to territory, including territorial limits, held by France based on modifications to the boundary described in Article 4 of the 1900 Convention in accordance with the terms of the 1900 Convention and international law prior to 17 August 1960"[573].

In other words, the legal titles concerning the land boundary are, according to Equatorial Guinea, the Paris Convention[574] on the one hand, and the modifications to the boundary delimited by Article 4 of that Convention on the other, said to have been made "in accordance with the terms of the 1900 Convention and international law" during the colonial era[575]. Moreover, Equatorial Guinea disputes that the Bata Convention of 1974 is a legal title having the force of law with regard to the delimitation of the land boundary[576].

7.2 As demonstrated in Chapter VI above, the Bata Convention has the force of law between the Parties. It reproduces and adjusts the delimitation of the entire land boundary between Gabon and Equatorial Guinea resulting from the Paris Convention. The Bata Convention therefore constitutes the legal title concerning that land delimitation (**I**).

7.3 Although the Bata Convention is the legal title covering both the entire land boundary and the maritime boundary, as well as sovereignty over the islands of Mbanié, Cocotiers and Conga, the Paris Convention continues to have the force of law between the two States, in so far as and to the extent that that title has not been modified by the Bata Convention. The Paris Convention therefore remains a residual legal title relating to the land delimitation (**II**).

7.4 However, no other legal title concerning the delimitation of the land boundary has the force of law between the Parties. In particular, the modifications supposedly made by the colonial Powers as invoked by Equatorial Guinea do not constitute any such legal title (**III**).

I. The Bata Convention is a legal title concerning the delimitation of the land boundary

7.5 The Bata Convention constitutes a legal title concerning the delimitation of the land boundary between Gabon and Equatorial Guinea and has the force of law between the two States, as

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[573] MEG, Vol. I, pp. 143-144 (section A of the Submissions).

[574] *Ibid.*, para. 6.29.

[575] *Ibid.*, para. 6.33.

[576] *Ibid.*, para. 7.20.

demonstrated above[577]. It delimits — which is to say defines[578] — the entire land boundary and is an instrument "endowed by international law with intrinsic legal force for the purpose of establishing territorial rights"[579].

7.6 Articles 1 and 2 of the Convention are concerned specifically with the land boundary. They provide as follows:

"Article 1

Subject to the provisions of article 2 below, the boundary between the Republic of Equatorial Guinea and the Gabonese Republic on the coast of the Gulf of Guinea shall start from the point of intersection between the Muni River thalweg and a straight line drawn from the Cocobeach headland to the Dieke headland. It shall proceed along the Muni River thalweg and that of the Outemboni River to the point where that river is first crossed by latitude 1° north, and follow that parallel as far as its intersection with longitude 9° east of Paris (11°20 east of Greenwich).

From the latter point of intersection, the second demarcation between the two States shall follow meridian 9° east of Paris (11°20 east of Greenwich) until it meets the southern frontier of the United Republic of Cameroon.

Article 2

The area of the Medouneu District situated in the territory of Equatorial Guinea beyond the parallel of latitude 1° north is ceded to the Gabonese Republic, and shall henceforth form an integral part of its territory.

In compensation, the Gabonese Republic cedes to the Republic of Equatorial Guinea, on the one hand, a land area surrounding and including the towns of Ngong and Allen and, on the other, a one kilometre land area of which one of the peaks is the place known as 'carrefour international'. These two land areas, which shall have a total surface area equal to that ceded to the Gabonese Republic, shall henceforth form an integral part of the Republic of Equatorial Guinea."

7.7 The text of these two provisions is unambiguous. Article 1 establishes "the boundary between the Republic of Equatorial Guinea and the Gabonese Republic", namely the land boundary between the two States. This boundary is identified via the thalwegs of the Muni and Utamboni Rivers, and then, from the point where the latter river first crosses the 1° north parallel of latitude, by that parallel as far as its intersection with the 9° east of Paris (or 11° 20' east of Greenwich) meridian. From this point, the boundary follows that meridian northward until the boundary with

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[577] See above, paras. 6-1-6.76.

[578] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 359, para. 84; *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 28, para. 56.

[579] *Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 582, para. 54; *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999 (II)*, p. 1098, para. 84; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002*, p. 667, para. 88; *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 723, para. 215; *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)*, p. 661, para. 100.

Cameroon. This boundary is *de facto* identical in form and substance to the boundary delimited by Article 4 of the Paris Convention of 1900[580]. Equatorial Guinea acknowledges this fact[581].

7.8 Under the terms of Article 2, the two States agreed to cede to each other parts of their respective territories, namely the part of the Medouneu District situated to the north of the 1° north parallel of latitude, a land area surrounding and including the towns of Ngong and Allen and "a one kilometre land area of which one of the peaks is the place known as 'carrefour international'" at the northern end of their common boundary. These adjustments decided by the Parties modify the boundary described in the text of Article 1 accordingly.

7.9 Equatorial Guinea believes that this provision amounts to proof that the Bata Convention does not delimit the land boundary between the Parties and merely constitutes an "agreement to continue to seek a final agreement" which "does not possess the force of law 'in so far as [it] concern[s] the delimitation of their common maritime and land boundaries'"[582].

7.10 Article 2 admittedly does not describe the boundary resulting from the exchanges of territory agreed upon. However, that does not mean that this boundary does not exist or is insufficiently *delimited* by the Bata Convention. According to the Court, "[t]o 'define' a territory is to define its frontiers"[583]. As the effect of any delimitation "is an apportionment of the areas of land lying on either side of the line"[584], the exchange of areas of territory by two States necessarily delimits the resulting boundary[585]. Furthermore, as the Permanent Court of International Justice recognized in its advisory opinion on the *Treaty of Lausanne*, "[i]t often happens that, at the time of signature of a treaty establishing new frontiers, certain portions of these frontiers are not yet determined and that the treaty provides certain measures for their determination"[586]. The Permanent Court went on to hold that "[i]t is, however, natural that any article designed to fix a frontier should, if possible, be so interpreted that the result of the application of its provisions in their entirety should be the establishment of a precise, complete and definitive frontier"[587].

7.11 In any event, the Bata Convention contains sufficient detail to determine the extent of the ceded territories, while reserving for a later stage the adoption of protocols "to determine the surface area and precise boundaries of the land area ceded to the Gabonese Republic and that ceded to the Republic of Equatorial Guinea"[588]. The Parties reached a detailed agreement on the territories to be ceded to each other, as evidenced by the corroborative statements made and explanations given by the two Heads of State on the day following the signature of the Bata Convention.

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[580] See below, para. 7.16.

[581] MEG, Vol. I, para. 7.17.

[582] *Ibid*., paras. 7.18 and 7.20.

[583] *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 26, para. 52.

[584] *Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 563, para. 17.

[585] See also *Arbitration between the Republic of Croatia and the Republic of Slovenia*, Final Award, 29 June 2017, para. 574.

[586] *Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne*, *Advisory Opinion, 1925, P.C.I.J., Series B, No. 12*, p. 20.

[587] *Ibid*.

[588] Convention delimiting the land and maritime frontiers of Equatorial Guinea and Gabon, 12 Sept. 1974, enclosed with the letter from the President of Gabon to the Ambassador of France to Gabon, 28 Oct. 1974 (CMG, Vol. V, Ann. 155), Art. 7.

(a) According to the explanations given by President Macías Nguema to diplomats in Malabo:

> "the encroachment of French origin was 91 sq km on the southern boundary, and the encroachment of Spanish origin was 259 sq km on the eastern boundary of Río Muni. President Bongo [had] therefore demanded the surrender of the difference, namely 159 sq km, to be taken from the disputed areas situated to the east of meridian 11° 20', between latitude 1° 37' 30" north and latitude 1° 56' north, and between latitude 2° 6' 30" north and latitude 2° 10' north. Gabon, for its part, would withdraw from the small area occupied by it as far as the Kie River, to the west of meridian 11° 20', between latitude 2° 00' north and latitude 2° 6' 30" north, without this withdrawal requiring any compensation."[589]

(b) During a conversation with the Ambassador of France to Malabo, the President of Equatorial Guinea also confirmed that the question of territorial exchanges had been discussed in detail and that an agreement had been reached. According to the Ambassador's report, President Macías Nguema confirmed to him that:

> "Gabon had agreed to cede a one-kilometre strip of land to the east of meridian 11° 20', but this strip of land, which begins in the north at the Cameroonian boundary (latitude 2° 10' north) and includes Ebebiyin, ends a few kilometres southwards at the place (latitude 2° 6' 30" north) where, changing direction, the Kie River once again crosses to the west of meridian 11° 20'."[590]

The Ambassador went on to state:

> "However, the main difficulty arose in connection with the exchange of the territories occupied *de facto* by Gabon, on the one hand to the north of latitude 1° north, in the vicinity of Medouneu or Akurenam, and by Equatorial Guinea, on the other, to the east of meridian 11° 20' as far as the Kie River, between Ngom (latitude 1° 56' north) and Mongomo (latitude 1° 37' 30" north). It was mutually decided that the exchange would involve areas strictly equal in size. However, although the pocket of Gabonese territory located within the territory of Equatorial Guinea to the north of latitude 1° north comprises, according to President Macías, slightly more than 100 sq km, the pocket of Equatorial Guinea's territory located within Gabonese territory, to the east of meridian 11° 20', comprises 200 sq km.
>
> In order to retain the entirety of the area occupied since the colonial era by Guinean populations, to the east of meridian 11° 20' and, with it, the natural boundary of the Kie River, President Macías proposed surrendering to Gabon approximately 100 sq km more, contiguous with the Gabonese pocket of territory in Medouneu-Akurenam. This solution was not accepted by President Bongo, who wishes to retain to the west of the Kie River the 100 sq km to which he is entitled.
>
> For domestic political reasons, and to ensure that he cannot be accused of favouritism towards the populations around Mongomo, his native city, President Macías then elected to retain the 100 sq km extending southwards from Ngom. The remainder

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[589] Dispatch No. 43/DA/DAM-2 from the Ambassador of France to Equatorial Guinea to the Directorate of African and Madagascan Affairs at the French Ministry of Foreign Affairs, 14 Oct. 1974 (CMG, Vol. V, Ann. 153), p. 4. See also Dispatch No. 40/DA/DAM-2 from the Ambassador of France to Equatorial Guinea to the Directorate of African and Madagascan Affairs at the French Ministry of Foreign Affairs, 2 Oct. 1974 (CMG, Vol. V, Ann. 152), pp. 5-7.

[590] Dispatch No. 40/DA/DAM-2 from the Ambassador of France to Equatorial Guinea to the Directorate of African and Madagascan Affairs at the French Ministry of Foreign Affairs, 2 Oct. 1974 (CMG, Vol. V, Ann. 152), p. 6.

of the area extending to Mongomo will therefore have to be surrendered to Gabon, and the Guinean populations evacuated from it.

In order to compensate for this disruption, President Macías requested that Gabon pay reparations to these populations. His request was turned down, a refusal by which he appears to be exercised."[591]

(c) President Bongo also confirmed during an interview with the Ambassador of France to Libreville that "some concessions had been made to Equatorial Guinea along the eastern boundary, close to the towns of Ebebiyin and Ngong"[592].

7.12 Equatorial Guinea further contends that the lack of any demarcation of the boundary defined by the Bata Convention in accordance with Article 8 thereof precludes it from constituting a legal title with the force of law between the Parties as regards the land delimitation. But that is putting the cart before the horse. As already explained[593], far from disproving the existence of a delimitation, the marking of the boundaries provided for by Article 8 of the Bata Convention could only have been contemplated and agreed if the Parties deemed the boundary to have been delimited with sufficient precision[594]. Moreover, Equatorial Guinea accepts that the Paris Convention constitutes a legal title regarding the delimitation of the land boundary[595], even though that Convention also provides in its Article 8 and Appendix No. 1 for demarcation of the boundary, and such demarcation never took place[596].

7.13 In any event, the preamble of the Bata Convention confirms the Parties' intention of "definitively establishing their common land and maritime frontiers"[597]. The signatories of the Convention both confirmed that it definitively settled the question of their land boundary. President Macías Nguema in particular confirmed that he had "renounced any further discussion of land boundaries"[598].

7.14 In these circumstances, it can only be concluded that the Bata Convention constitutes a legal title concerning the delimitation of the entire land boundary between Gabon and Equatorial Guinea.

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[591] *Ibid*., pp. 6-7.

[592] Dispatch No. 141/DAM from the Ambassador of France to Gabon to the French Minister for Foreign Affairs, 7 Nov. 1974 (CMG, Vol. V, Ann. 156), p. 2. See also above, paras. 3.20-3.23.

[593] See above, para. 6.45.

[594] *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 28, para. 56; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 340, para. 49, and p. 359, para. 84.

[595] See below, para. 7.17.

[596] See above, paras. 1.41.-1.50. See also below, para. 7.32.

[597] Convention delimiting the land and maritime frontiers of Equatorial Guinea and Gabon, Bata, 12 Sept. 1974, enclosed with the letter from the President of Gabon to the Ambassador of France to Gabon, 28 Oct. 1974 (CMG, Vol. V, Ann. 155), preamble.

[598] Dispatch No. 43/DA/DAM-2 from the Ambassador of France to Equatorial Guinea to the Directorate of African and Madagascan Affairs at the French Ministry of Foreign Affairs, 14 Oct. 1974 (CMG, Vol. V, Ann. 153), p. 5.

II. The Paris Convention remains a legal title concerning the delimitation of the land boundary

7.15 There is no disagreement between the Parties on the fact that the Paris Convention constitutes a relevant legal title concerning the delimitation of the land boundary between Gabon and Equatorial Guinea, these two States having succeeded to the rights and obligations provided for in the boundary régime established by that Convention.

7.16 Article 4 of the Paris Convention deals with the delimitation of the land boundary between French and Spanish possessions on the coast of the Gulf of Guinea. It provides as follows:

> "The boundary between the French and Spanish possessions on the Gulf of Guinea shall begin at the point where the thalweg of the Muni River intersects a straight line traced from the Coco Beach point to the Diéké point. It shall, then, proceed along the thalweg of the Muni River and of the Utamboni River up to the first point at which the first degree north latitude crosses the latter river, and shall proceed along this parallel until it intersects the 9° longitude east of Paris (11° 20' east of Greenwich).
>
> From this point, the line of demarcation shall be formed by said meridian 9° east of Paris until it meets the southern border of the German colony of Kamerun."[599]

7.17 In its Memorial, Equatorial Guinea accepts without reservation that the Paris Convention "settled the Spanish and French claims to possessions along the West Coast of Africa by providing for the delimitation of neighbouring Spanish and French territories"[600]. It adds that "Article 4 of the 1900 Convention described the course of the agreed boundary between the Spanish territory of Río Muni and neighbouring French territory"[601]. Equatorial Guinea correctly details the course of the land boundary, as determined and described by Article 4 of the Convention[602], and accepts that this boundary corresponds to the boundary reproduced on the map in Appendix No. 3 to the Paris Convention[603].

7.18 Equatorial Guinea also identifies the Paris Convention as one of the legal titles concerning the delimitation of the land boundary. Nonetheless, and without any explanation, it adds the following qualification: "as applied by France and Spain until the independence of Gabon on 17 August 1960 and as continued to be applied by Gabon and Spain until the independence of Equatorial Guinea on 12 October 1968"[604]. This qualification of the legal title deriving from the Paris Convention is inappropriate. Indeed, it amounts to a barely concealed red herring, aimed at subsuming into that legal title the so-called "*infra legem effectivités*" by which Equatorial Guinea sets great store in its Memorial. In other words, for Equatorial Guinea, it is not the Paris Convention which constitutes the legal title, but rather the factual situation on the ground until 1968, which is

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[599] Convention on the delimitation of French and Spanish possessions in West Africa, on the coasts of the Sahara and the Gulf of Guinea, Paris, 27 June 1900, bilingual version (CMG, Vol. III, Ann. 47). See also MEG, Vol. III, Ann. 4.

[600] MEG, Vol. I, para. 3.36.

[601] *Ibid.*

[602] MEG, Vol. I, para. 3.36. Gabon notes however that, in other parts of its Memorial, Equatorial Guinea advances an inaccurate (or at the very least incomplete) interpretation of the course of the land boundary determined by the Paris Convention. See, for example, *ibid.*, para. 6.29.

[603] *Ibid.*, para. 3.36 and Figure 3.6.

[604] *Ibid.*, p. 143 (Submissions, section A (1)).

presented as proof of the application of that Convention by the Parties. Equatorial Guinea's position in this respect calls for four remarks:

(a) *First*, the Court has not been called upon to determine or delimit the boundary. In the context of the Special Agreement, the application of the legal titles, in other words establishing the course of the land boundary in accordance with one legal title or another, falls outside the Court's jurisdiction. The Court's task is limited to confirming or otherwise whether this or that legal title invoked by one or both of the Parties has the force of law as regards the question of the delimitation of their land boundary[605].

(b) *Second*, the interpretation of a conventional legal title (should any interpretation be necessary) "must be based above all upon the text of the treaty. As a supplementary measure recourse may be had to means of interpretation such as the preparatory work of the treaty and the circumstances of its conclusion"[606]. The text of Article 4 of the Paris Convention is very clear, and no one could have any difficulty in determining the natural and ordinary meaning of the relevant terms of that provision. Moreover, this boundary is represented on a map which forms an integral part of the Paris Convention, as Appendix No. 3 thereof[607]. Equatorial Guinea was itself able to extract from the text of Article 4 alone the course of the land boundary delimited by that provision[608]. In any event, as explained in Chapter V above[609], in the presence of a clear conventional legal title, it is never necessary to examine the effectiveness and constancy of the administration of territories on either side of a boundary in order to determine that boundary's course[610].

(c) *Third*, interpreting a conventional legal title does not mean modifying it. Equatorial Guinea cannot invoke at one and the same time the conventional legal title constituted by the Paris Convention and the factual situation on the ground, which, by its own admission, was not consistent with that legal title. In the absence of a modification, in due and proper form, of the conventional legal title delimiting a land boundary, a divergent factual situation on the ground represents nothing other than non-compliance with that legal title, or a *contra legem effectivité* which does not displace the legal title[611]. Equatorial Guinea appears to be cognizant of the weakness of its position regarding these so-called "*infra legem effectivités*"; indeed, it also invokes "all titles to territory . . . based on modifications to the boundary described in Article 4 of the 1900 Convention"[612]. Only *de jure* modifications of that kind could affect and modify the legal title deriving from the Paris Convention. However, no modification took place prior to 1974[613].

(d) *Fourth*, and in any event, Gabon and Equatorial Guinea have both confirmed and reiterated the conventional legal title created by Article 4 of the Paris Convention, not "as applied" by their respective colonial Powers, but "as written in the text" by France and Spain in 1900. It is not insignificant that Gabon and Equatorial Guinea elected to reproduce almost word for word the

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[605] See above, paras. 5.47-5.55.

[606] *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 22, para. 41.

[607] Convention on the delimitation of French and Spanish possessions in West Africa, on the coasts of the Sahara and the Gulf of Guinea, Paris, 27 June 1900, Ann. 3 (CMG, Vol. II, Ann. C9). See also MEG, Vol. III, Ann. 4. See also above, para. 1.40.

[608] MEG, Vol. I, para. 3.36.

[609] See above, paras. 5.90-5.92.

[610] *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, pp. 38-40, para. 76.

[611] *Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, pp. 586-587, para. 63; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 415, para. 223. See also above, para. 5.91.

[612] MEG, Vol. I, p. 143. See also above, para. 7.1 *(b)*.

[613] See below, paras. 7.22-7.47.

text of Article 4 of the Paris Convention in the Bata Convention, particularly in its Article 1; Equatorial Guinea does not dispute this fact[614]. They could simply have referred to the provisions of the Paris Convention, as with the reference to "the international instruments in force on the date of the constitution of the United Kingdom of Libya" contained in the Treaty of Friendship and Good Neighbourliness concluded by the French Republic and the United Kingdom of Libya in 1955, which the Court was required to interpret in the *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* case[615]. Gabon and Equatorial Guinea could have done the same and referred purely and simply to the boundary resulting from the international instruments in force when they gained their independence. They nonetheless elected to "indicat[e] the frontiers by specifying in words the course of the boundary"[616]. In so doing, Gabon and Equatorial Guinea confirmed and reaffirmed in 1974 the legal title as initially agreed in law by their respective colonial Powers. Even if they did modify in some way the legal title relating to the land boundary — *quod non*[617] — the Parties then elected not to reiterate, confirm or endorse any such modification.

7.19 Being aware of numerous discrepancies between the boundary "defined by the earlier agreements"[618] and the situation on the ground, Gabon and Equatorial Guinea only adapted the legal title agreed upon by the colonial Powers in 1900 to the extent that this appeared to them to be judicious and necessary. The text of Article 2 of the Bata Convention giving effect to this adjustment[619] confirms, moreover, that in the Parties' assessment, this is the only provision which modifies the boundary definitively and with future effect:

(a) With regard to the northern part of the Medouneu District, the Parties took care to specify that it is "situated in the territory of Equatorial Guinea", as it is "beyond the parallel of latitude 1° north", which is to say the boundary delimited by Article 4 of the Paris Convention; it is solely by virtue of Article 2 of the Bata Convention that this area of the Medouneu District would "henceforth form an integral part of [Gabonese] territory".

(b) With regard to the land areas along the 9° east of Paris meridian, the Parties agreed that Gabon "cedes" them to Equatorial Guinea, which necessarily implies that the Parties considered these areas to have previously been part of Gabonese territory. Only the Bata Convention modified the legal title previously constituted by the Paris Convention; the areas of Gabonese territory thus identified would "henceforth form an integral part of the Republic of Equatorial Guinea".

Hence, in the opinion of the Parties, a new convention was necessary to modify the legal title inherited from the colonial Powers; until 1974, this legal title remained unmodified in its original 1900 form.

7.20 In other words, the Parties confirmed by means of the Bata Convention the legal title concerning the delimitation of the land boundary as derived from the text of Article 4 of the Paris Convention, while modifying and replacing it with a new legal title relating to territorial delimitation in the areas identified in Article 2 of the Bata Convention. This was their right:

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[614] See MEG, Vol. I, para. 7.17.

[615] *I.C.J. Reports 1994*, pp. 20-21, paras. 38-39.

[616] *Ibid.*, p. 25, para. 51.

[617] See below, paras. 7.22-7.47.

[618] Telegram No. 561/563 from the Embassy of France in Gabon to the French Ministry of Foreign Affairs, 15 July 1974 (CMG, Vol. V, Ann. 138), p. 1.

[619] See above, para. 7.8.

> "The fixing of a frontier depends on the will of the sovereign States directly concerned. There is nothing to prevent the parties from deciding by mutual agreement to consider a certain line as a frontier, whatever the previous status of that line. If it was already a territorial boundary, it is confirmed purely and simply. If it was not previously a territorial boundary, the agreement of the parties to 'recognize' it as such invests it with a legal force which it had previously lacked."[620]

7.21 For these reasons, the Paris Convention remains a legal title concerning the delimitation of the land boundary, in so far as and to the extent that that title has not been modified or replaced by the Bata Convention.

III. The other purported legal titles invoked by Equatorial Guinea

7.22 Equatorial Guinea also requests that the Court include among the legal titles which have the force of law between the Parties as regards the land delimitation "all titles to territory, including territorial limits" held by the former colonial Powers "based on modifications to the boundary described in Article 4 of the 1900 Convention in accordance with the terms of the 1900 Convention and international law" prior to the independence of Gabon or Equatorial Guinea[621]. It adds, by way of explanation, that the land boundary delimited by the Paris Convention was modified "in practice" and that "the *effectivités* carried out by Spain until 1968, and by Equatorial Guinea subsequently, themselves constitute (or contribute to) sources of Legal Title to the land territory . . . on the Spanish/Equatoguinean side of the modified boundary"[622]. These claims are merely an attempt to evidence the so-called "*infra legem effectivité*s", in particular along the western section of the boundary in the vicinity of the bend in the Utamboni River, on the one hand, and along the eastern section of the boundary in the vicinity of the Kie River, on the other.

7.23 As explained in Chapter V of this Counter-Memorial[623], none of these *effectivités* or modifications "in practice", were they to be proven, constitutes a "legal title", let alone a treaty or convention. This is reason enough to dismiss Equatorial Guinea's claims and submissions in this regard. Examining them does not come within the scope of the task entrusted by the Parties to the Court, and therefore falls outside its jurisdiction.

7.24 Moreover, the explanations above[624] constitute a full and sufficient response to Equatorial Guinea's claims and allegations: even if such modifications of the boundary were proven to have taken place in the past — *quod non* — they would have been repudiated and replaced by the Bata Convention's reaffirmation of the conventional legal title embodied in the Paris Convention, accompanied by the modifications deemed necessary. The 1974 Convention and the 1900 Convention therefore constitute the only legal titles having the force of law between the Parties as regards the delimitation of their common land boundary.

7.25 For the sake of completeness, Equatorial Guinea's allegations and submissions are quite simply incorrect. No modification of the boundary defined by the Paris Convention was effected by

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[620] *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 23, para. 45.

[621] MEG, Vol. I, p. 143.

[622] *Ibid*., para. 6.40.

[623] See above, paras. 5.66-5.77.

[624] See above, para. 7.20.

the Parties "in accordance with the terms of the 1900 Convention and international law", either before 1960 or before 1968; consequently, no *effectivité* is able to confirm such modification. Even if the *effectivités* advanced by Equatorial Guinea did correspond to reality, in the absence of a legal title on which they might be based, those *effectivités* would remain *contra legem* and contrary to the only established legal title recognized by the colonial Powers at the time and confirmed, in part, by Gabon and Equatorial Guinea in 1974.

A. The colonial Powers did not modify the delimitation of the boundary in the vicinity of the Utamboni River

7.26 Equatorial Guinea contends in its Memorial that "both France and Spain, in practice, accepted the 1901 Commission's recommendations, and modified the boundary in the southwest where it followed the Utamboni River and other rivers instead of strictly following the 1° North parallel of latitude"[625]. It claims that the modifications proposed by the 1901 Franco-Spanish Commission in accordance with the provisions of the Paris Convention, which were accepted by the colonial Powers in practice, constitute "[o]ther sources of Spain's title"[626].

7.27 Equatorial Guinea visibly struggles to identify with any precision the legal title on which it seeks to rely: is it the modifications proposed in 1901 in accordance with the Convention? Or the alleged acceptance of such modifications in and through the practice of the colonial Powers? Or is it both?

7.28 In any event, the modifications proposed by the 1901 Commission did not comply with the provisions of the Paris Convention. The parties to the Paris Convention laid down the conditions and constraints to be observed in effecting the demarcation of the boundary. Article 8 describes this demarcation process:

> "Both Governments agree to designate Commissioners, within four months of exchanging ratifications, who shall be responsible for marking out on the ground the demarcation lines between the French and Spanish possessions, in accordance with and in the spirit of the provisions of the present Convention."[627]

Appendix No. 1 to the Convention contains further details of the scope of the task and powers of the Commissioners thus appointed:

> "Although the course of the demarcation lines on the maps attached to the present Convention (appendices numbers 2 and 3) is generally assumed to be accurate, it cannot be considered an absolutely correct representation until confirmed by new surveys.
>
> Therefore, it is agreed that the Commissioners or local Delegates of both Nations who shall subsequently be responsible for delimiting all or part of the boundaries on the ground, shall use as a basis the description of the boundaries as established in the Convention. At the same time, they may modify the said lines of demarcation in order to determine them more accurately and to rectify the position of the dividing lines of the tracks or rivers, and of the towns or villages marked on the above-mentioned maps.

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[625] MEG, Vol. I, para. 6.31.

[626] *Ibid.*, para. 6.33.

[627] Convention on the delimitation of French and Spanish possessions in West Africa, on the coasts of the Sahara and the Gulf of Guinea, Paris, 27 June 1900, bilingual version (CMG, Vol. III, Ann. 47). See also MEG, Vol. III, Ann. 4.

> The changes or corrections proposed by mutual agreement by the said Commissioners or Delegates shall be submitted to the respective Governments for approval."[628]

7.29 These provisions allowed the Delimitation Commission some degree of discretion. Although the Commissioners were required to "use as a basis the description of the boundaries as established in the Convention", they could "modify the said lines of demarcation in order to determine them more accurately and to rectify the position of the dividing lines of the tracks or rivers, and of the towns or villages marked on the above-mentioned maps". This discretion was subject to three constraints:

(a) *First*, discretion had to be exercised "in accordance with and in the spirit of the provisions of the present Convention" (Article 8), and the purpose of any rectification had to be to apportion the geographical and topographical features shown on the map according to the course of the boundary defined in Article 4. Nothing in the text of the Convention empowered the Commissioners to substitute natural lines for the straight lines defined as boundaries. The instructions given to the French Commissioner in 1901 confirm that the line which the Commission had to demarcate was that defined in Article 4 of the Convention[629], no more and no less.

(b) *Second*, modifications could only be proposed by mutual agreement of the Commissioners.

(c) *Third*, such modifications had to be submitted to the respective Governments for approval.

7.30 The proposal of the 1901 Commission failed to comply with these conditions and constraints. Its members were aware that their proposal went beyond the scope of their mission: it in no way concerned the demarcation of the boundary defined by Article 4, but rather — in the words of the Commission itself — a new "Border Project":

> "The Franco-Spanish Commission for Border Demarcation of the Gulf of Guinea . . . meeting in Paris, after having studied the work carried out in the course of local operations, proposes the border described below as the natural border that is the most convenient and most in keeping with the spirit of the Convention"[630].

7.31 The proposed modification seeking to use the Utamboni River instead of the 1° north parallel of latitude was certainly not in keeping with the spirit of the Paris Convention. Indeed, as accepted by Equatorial Guinea[631], the French and Spanish authorities were familiar with the course of both the Muni and Utamboni Rivers. Regardless of this familiarity, and despite a negotiating proposal to delimit the boundary on the basis of the thalweg of the Utamboni River up to its source[632], the parties to the Paris Convention — at the initiative of the Spanish authorities — ultimately agreed on a delimitation based on the 1° north parallel of latitude from the point where the Utamboni River

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[628] *Ibid.*

[629] Letter from the French Minister for the Colonies to the Head of the French Commission, 19 June 1901 (MEG, Vol. IV, Ann. 55).

[630] Franco-Spanish Delimitation Commission, Border Project: Southern Border, 1 Jan. 1902 (MEG, Vol. III, Ann. 14).

[631] MEG, Vol. I, para. 3.37 ("the colonial powers were familiar with the courses of the Muni and Utamboni ('Outemboni' on the A[ppendix No.] 3 map) Rivers near the coast").

[632] See above, paras. 1.26 and 1.28.

is first crossed by that parallel[633]. The Delimitation Commission was not unaware of this. It even endeavoured to identify that point of intersection by means of astronomical measurements[634]. In these circumstances, it would be incongruous to accept through the back door of demarcation a line of delimitation which had been expressly rejected during the negotiation of the Paris Convention.

7.32 In any event, these proposals never received the assent of the French or Spanish authorities[635]. Both Governments rejected the Commission's work because of significant errors in the determination of the astronomical co-ordinates recorded, without stating any position on the proposed boundary; they contemplated a review of all the data, in order to be able to present a proposal for "the drawing of a natural frontier as close as possible to the meridian 9° east of Paris and the parallel of latitude 1° north"[636]. Without the approval of the French and Spanish Governments, the border project advanced by the Delimitation Commission cannot constitute a modification in accordance with the provisions of the Paris Convention. It was ultimately nothing more than a report, a proposal drawn up by a commission which had exceeded its mandate — and which was aware of having done so. Such a document can in no circumstances constitute the source of a legal title.

7.33 Regardless of the question whether or not the proposed modifications might constitute the source of a legal title, it is simply incorrect to state, as Equatorial Guinea does, that the colonial authorities applied these proposals in practice. Equatorial Guinea has not cited a single document or instrument identifying a boundary drawn in accordance with the 1901 Commission's proposals. However, the boundary as described in Article 4 of the Paris Convention, which in this sector follows 1° north parallel of latitude, was reaffirmed by the German (from 1912 to 1916), French and Spanish colonial authorities[637]. It was not until 1937 that the colonial authorities in Spanish Guinea first suggested that "the boundary should follow the 1° north parallel of latitude only from the point where that parallel meets the Utamboni River, upstream from the bend in that river to the south [of that] parallel"[638], albeit without invoking the existence of a purported agreement modifying the Paris Convention on the basis of the 1901 Commission's proposals[639]. The French authorities vigorously rejected this "interpretation" of the Paris Convention in 1937 and 1943[640]. And again in the early 1970s, the authorities of Equatorial Guinea and Gabon confirmed the validity of the Paris Convention in the context of their bilateral relations, without mentioning any boundary modifications deriving from any agreement or practice[641].

7.34 The Bata Convention clearly confirms the 1900 conventional legal title in this region, reiterating that the boundary is constituted by the Utamboni River thalweg to the point where that

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[633] See above, para. 1.28.

[634] Franco-Spanish Delimitation Commission, Itinerary Followed by the Commission, 1901 (MEG, Vol. III, Ann. 12), p. 2.

[635] See above, paras. 1.46-1.49.

[636] Letter from the Minister of State concerning the Borders of Congo and Spanish Guinea, 20 Apr. 1907 (MEG, Vol. IV, Ann. 58).

[637] See above, paras. 2.4-2.7 and 2.10-2.15.

[638] Letter No. 439 from the French Minister for the Colonies to the Governor-General of French Equatorial Africa, 3 May 1937 (CMG, Vol. IV, Ann. 88).

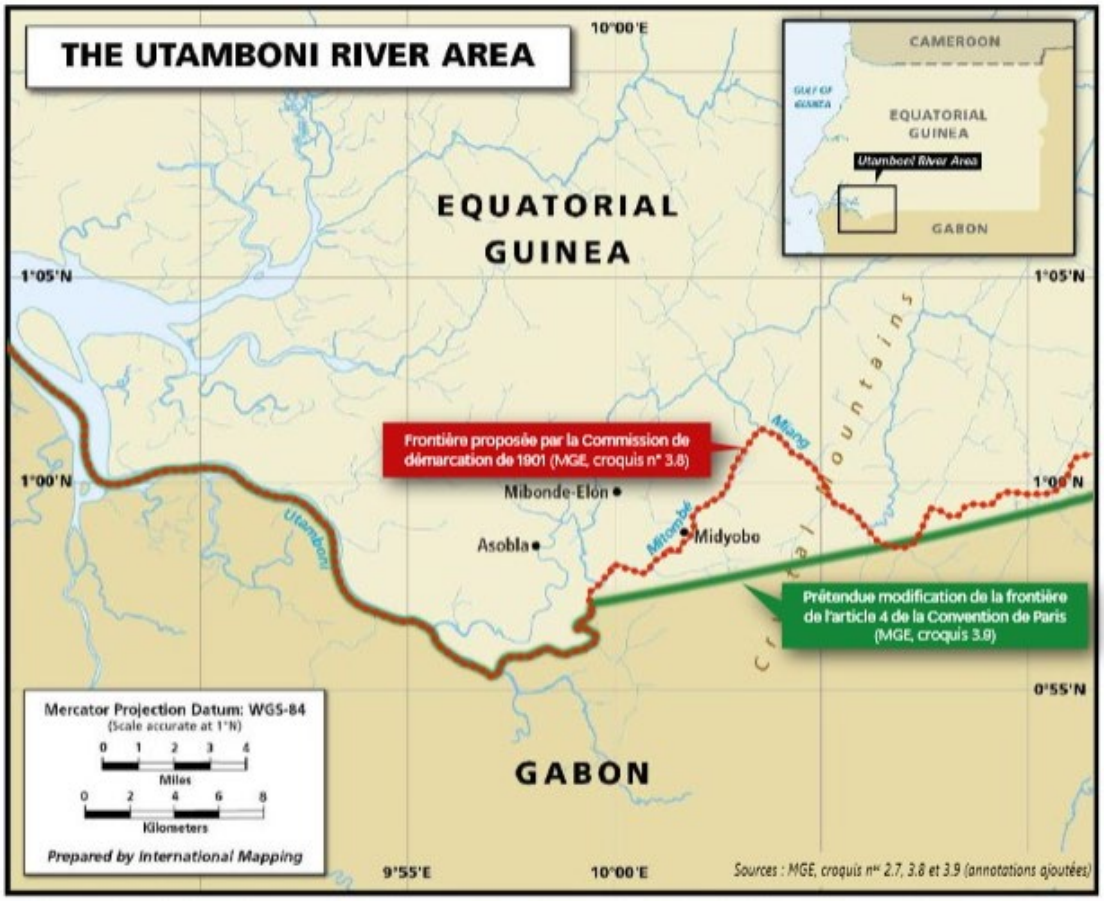
[639] See above, para. 2.16.

[640] *Ibid.* See also Letter No. 439 from the French Minister for the Colonies to the Governor-General of French Equatorial Africa, 3 May 1937 (CMG, Vol. IV, Ann. 88); Letter from the National Commissioner for Foreign Affairs to the National Commissioner for the Colonies, 27 Feb. 1943 (CMG, Vol. IV, Ann. 91).

[641] See above, paras. 2.45 and 3.4.

river is first crossed by 1° north parallel of latitude, after which it follows that parallel[642]. No modification or adjustment of the boundary in this region was agreed in 1974, and there is no mention of any alleged modification of the 1900 Convention with regard to the region.

7.35 It is even more surprising that, despite the futile efforts made to prove the existence of a "title" with its source in the border project proposed by the 1901 Commission, the modification of the 1900 boundary allegedly effected by France and Spain, to which Equatorial Guinea ascribes the value of a "title", differs considerably from the Delimitation Commission's proposal. It is sufficient to compare the line proposed by the 1901 Commission, as shown roughly in Figure 3.8 in the Memorial of Equatorial Guinea, with the line representing (according to Equatorial Guinea) "[t]he Parties' Modifications to Article 4 Lines in the Utamboni [Area]", shown in Figure 3.9 in its Memorial. For the purposes of such a comparison, **sketch-map No. 7.1** (on p. 129 below) displays these two lines against the backdrop of Figure 2.7 from Equatorial Guinea's Memorial. The difference between the two lines is significant and remains entirely unexplained. It contradicts Equatorial Guinea's claim that a legal title exists which has the 1901 Commission's proposals as its source.



Sketch-map No. 7.1
The inconsistencies in Equatorial Guinea's position (Utamboni) (comparison of the information contained in Equatorial Guinea's Figures 3.8 and 3.9)

[In red: boundary proposed by the 1901 Delimitation Commission (MEG, Figure 3.8); in green: alleged modification of the boundary in Article 4 of the Paris Convention (MEG, Figure 3.9)]

[642] See above, paras. 7.6 and 7.7.

B. The colonial Powers did not modify the delimitation of the boundary in the vicinity of the Kie River

7.36 With regard to the north-eastern section of the boundary in the vicinity of Ebebiyin and the Kie River, Equatorial Guinea asserts that "the adjustments to the boundary agreed by parties' colonial Governors . . . in accordance with the provisions of the [1900] Convention" constitute another source of the Spanish authorities' title[643]. It adds by way of explanation:

> "Just as Spain and France applied the 1900 Convention by delimiting the boundary in the southwest along natural features, such as the Utamboni River, and human made features rather than the parallel of latitude identified in the text, they adopted the same approach in the northeast. In particular, instead of delimiting the boundary along the meridian 9º East of Paris specified in the Convention, they followed the natural boundary formed by the Kie River for a significant portion of the boundary. This modification was consistent with Article 8 and A[ppendix No.] 1 of the Convention, which authorized the Commissioners and local Delegates to agree to propose changes to the boundaries defined in Article 4, based on their work in the field."[644]

7.37 Here again, however, Equatorial Guinea disregards the facts, as well as the terms of the exchanges between the Spanish and French colonial authorities.

7.38 As recalled above[645], Governor-General Barrera of the Spanish possessions proposed in his letter of 22 November 1917 that the course of the Kie River be considered as a "provisional border as long as an exact delimitation of the border has not yet been established"[646]. The Governor-General of French Equatorial Africa confirmed that the Kie River could be viewed as "the provisional border between your colony and the occupied territories of New Cameroon", adding nonetheless "in the hopes that a definitive, exact delimitation may be made"[647]. In his response, Governor-General Barrera once again stated the reasons for his proposals for a provisional boundary:

> "[T]his way[,] as long as the borders are not definitively established, [the limits] I have indicated could provisionally be the limits of Spanish territory; these are more tangible limits than the meridian, and this would dispel any incidents."[648]

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[643] MEG, Vol. I, para. 6.33.

[644] *Ibid*., para. 3.67.

[645] See above, para. 2.18.

[646] Letter from the Governor-General of the Spanish territories in Africa to the Governor-General of French Gabon, 22 Nov. 1917 (MEG, Vol. IV, Ann. 65). For a full translation of the relevant Spanish text, see above, para. 2.18.

[647] Letter No. 03 from the Governor-General of French Equatorial Africa to the Governor-General of the Spanish Territories in the Gulf of Guinea, 24 Jan. 1919 (MEG, Vol. IV, Ann. 66) (Equatorial Guinea's translation of the Spanish copy produced: "como frontera provisional entre vuestra Colonia y los Territorios ocupados del Nuevo-Camerún, en espera que se efectúe una delimitación exacta definitiva"). Gabon has been unable to locate the French original of this letter.

[648] Letter from the Governor-General of Spanish Guinea to the Governor-General of French Equatorial Africa, 1 May 1919 (MEG, Vol. IV, Ann. 67) (translation by Equatorial Guinea of the original Spanish: "[D]e este modo y en tanto no se fijen definitivamente las fronteras, estas que indico podría ser provisionalmente los limites del territorio español, limites mas tangibles que el meridiano, y esto alejaría todo incidente.").

7.39 This correspondence contradicts Equatorial Guinea's claim that this was a modification of the delimitation effected in accordance with Article 8 and Appendix No. 1 of the Paris Convention[649].

7.40 First of all, neither the Spanish Governor-General nor his French counterpart were appointed by their respective governments as Commissioners or responsible for "marking out on the ground the demarcation lines between the French and Spanish possessions, in accordance with and in the spirit of the provisions of the present Convention", within the meaning of Article 8 of the Paris Convention. Moreover, that is not what they did. They never drew any line of demarcation; indeed, they were never present on the ground in order to discuss such proposals. As explained by Governor-General Barrera in his letter, the proposals were made on the basis of the Moisel map[650], notwithstanding all the inaccuracies it contained[651], and not in the context of any work in the field.

7.41 Being aware of the fact that the two Governors-General were clearly not Commissioners within the meaning of Article 8 and Appendix No. 1 of the Paris Convention, Equatorial Guinea cleverly refers to them both as "local Delegates"[652], in order to create the impression — artificially and without any justification — that they were acting within the scope of Appendix No. 1 of the Paris Convention. However, regardless of this sleight of hand, the designation of the Kie River as a natural boundary fell outside the powers and functions of both Commissioners and local Delegates; as explained above[653], neither the provisions of the Paris Convention nor those of its Appendix No. 1 conferred on the Commissioners or local Delegates the power to substitute natural lines of demarcation for the artificial lines established as the boundary.

7.42 Nothing in the correspondence between the two Governors-General makes it possible to conclude that they acted or believed themselves to be acting in the context of the provisions of the Paris Convention or those of its Appendix No. 1. On the contrary, the proposal of the Spanish Governor-General and the response from his French counterpart confirm that this was not a delimitation or demarcation operation within the meaning of the Paris Convention. Both correspondents recognized that the provisional boundary on the Kie River was intended to prevent and limit border incidents, pending a precise demarcation of the boundary delimited by the Paris Convention. In other words, the Governors-General were not seeking to adopt a river boundary instead of the boundary represented by the 9° east of Paris meridian, as suggested by Equatorial Guinea; the Kie River boundary was merely a temporary and practical solution that did not modify the boundary delimited by the Paris Convention.

7.43 Incidentally, Equatorial Guinea has produced no evidence that either the proposal made by the Governor-General of Spanish possessions or the arrangement arrived at by the two Governors-General was authorized or approved by the Spanish Government, in accordance with the final paragraph of Appendix No. 1 of the Paris Convention. That is extremely doubtful, given that the legal instruments defining the status and territorial subdivisions of Spanish possessions in the Gulf

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[649] See para. 7.27 above for the text of these provisions.

[650] Letter from the Governor-General of Spanish Guinea to the Governor-General of French Equatorial Africa, 1 May 1919 (MEG, Vol. IV, Ann. 67).

[651] See above, para. 2.28.

[652] MEG, Vol. I, paras. 6.31, 6.36 and 6.40.

[653] See above, para. 7.28.

of Guinea, as adopted by Spain in 1935, continued to define the eastern limits of the border districts as a straight line ("*linea recta*")[654].

7.44 France, for its part, never changed its position that Spanish Guinea's eastern boundary was delimited by the line corresponding to the 9° east of Paris meridian[655].

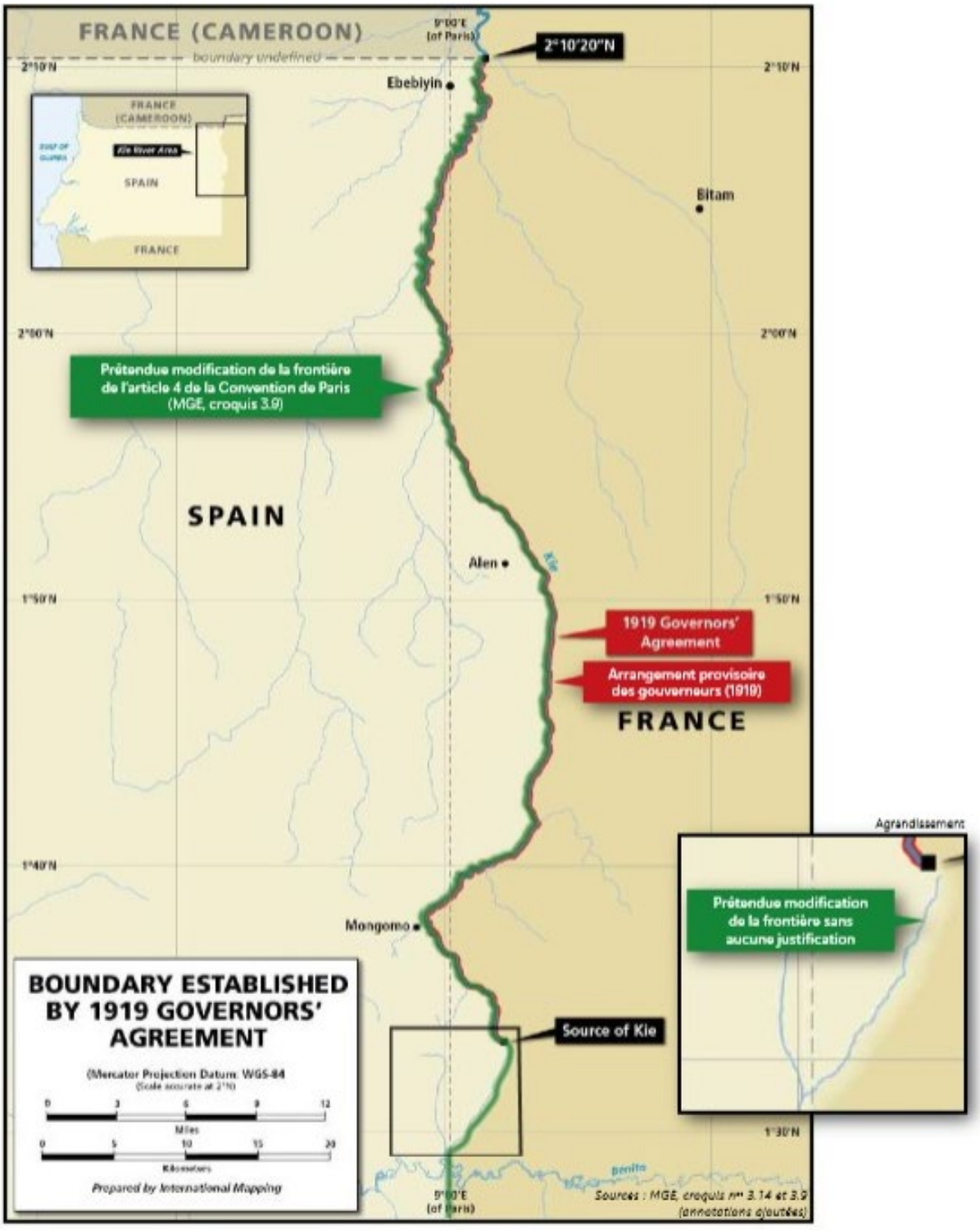
7.45 Furthermore, as with the purported modifications of the boundary in the vicinity of the Utamboni River[656], Equatorial Guinea's position on the alleged modifications of the eastern boundary of Spanish Guinea is contradictory. It emerges from the sketch-maps produced by Equatorial Guinea that it is not only claiming that, on the basis of the arrangement arrived at by the Governors-General, the Kie River constituted the boundary from Cameroon in the north to its source; it also appears to believe that, from the source of the Kie River, this boundary then follows another river, which Equatorial Guinea fails to name, in a south-south-westerly direction until that river crosses the 9° east of Paris meridian. Equatorial Guinea's claims are illustrated by **sketch-map No. 7.2** (see p. 133 below), which reproduces the information contained in Figures 3.9 and 3.14 in the Memorial. While the basis for the modifications relied on by Equatorial Guinea was the arrangement arrived at by the Governors-General in 1919 and the boundary was the course of the Kie River to its source, the modification of the boundary between that river's source and the Benito River remains entirely unexplained. Gabon further notes that Equatorial Guinea has provided no explanations justifying its location of the source of the Kie River, which is clearly shown to the east of the 9° east of Paris meridian; the maps produced by Spain in the 1950s and 1960s suggest that the source is situated to the west of that meridian[657].

[654] Decree adopting an organic statute, 13 Apr. 1935 (CMG, Vol. IV, Ann. 85), first basis.

[655] See above, para. 2.20.

[656] See above, para. 7.35.

[657] Topographic and forest map of Spanish Guinea, 1949-1960 (CMG, Vol. II, Ann. C20), Sheet 4-I, Assoc (1960).



Sketch-map No. 7.2
The inconsistencies in Equatorial Guinea's position (Kie River) (comparison of the information contained in Equatorial Guinea's Figures 3.14 and 3.9)

[In green (top): alleged modification of the boundary in Article 4 of the Paris Convention (MEG, Figure 3.9); in green (bottom): alleged modification of the boundary without any justification]

7.46 In any event, after Gabon and Equatorial Guinea achieved independence, the Presidents of both States visited the site and confirmed that the boundary delimited by and inherited from the colonial Powers was indeed the 9° east of Paris meridian, and not the Kie River[658]. President Bongo informed the Ambassador of France to Libreville that President Macías Nguema had recognized, during their field visit of 13 July 1974, "the boundary line as it was defined by the earlier agreements"[659].

7.47 Whatever the legal title applicable to this section of the boundary may have been prior to 1974, the Bata Convention replaced it with a new definition of the boundary resulting from the exchange of territories under the terms of Article 2[660]. Moreover, Article 2 of the Bata Convention provides for the cession by Gabon to Equatorial Guinea of two land areas to the east of the 9° east of Paris meridian[661]: this cession would have been neither necessary nor appropriate if the boundary had been the Kie River since the 1920s.

Conclusion

7.48 For the reasons set out above, the legal titles having the force of law between the Parties in so far as they concern the delimitation of their land boundary are:

(a) the Bata Convention of 1974, which delimits the entirety of the land boundary between Gabon and Equatorial Guinea in accordance with Articles 1 and 2 thereof; and

(b) the Paris Convention of 1900, and in particular Article 4 thereof, in so far as and to the extent that this title has not been modified by the Bata Convention of 1974.

No other legal title concerning the delimitation of the land boundary exists or has the force of law between the Parties.

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[658] See above, para. 2.56.

[659] Telegram No. 561/563 from the Embassy of France in Gabon to the French Ministry of Foreign Affairs, 15 July 1974 (CMG, Vol. V, Ann. 138), p. 1.

[660] See above, para. 7.8.

[661] See above, para. 7.19 *(b)*.

CHAPTER VIII
THE LEGAL TITLE RELATING TO SOVEREIGNTY OVER THE ISLANDS

8.1 By Article 1 of the Special Agreement, "[t]he Court is requested to determine whether the legal titles, treaties and international conventions invoked by the Parties have the force of law in the relations between the Gabonese Republic and the Republic of Equatorial Guinea in so far as they concern . . . sovereignty over the islands of Mbanié/Mbañe, Cocotiers/Cocoteros and Conga". For there is a dispute between the two Parties regarding the title to sovereignty over those three island features.

8.2 The sovereignty dispute in respect of those islands dates back to colonial times, even though Equatorial Guinea asserts otherwise in its Memorial[662]. It first emerged in the nineteenth century (**I**) and, since it was not resolved by the Paris Convention (**II**), persisted throughout the period leading up to the independence of the two Parties, before coming fully back to the fore in the 1970s (**III**). It was definitively resolved by the Bata Convention, which is therefore the title that has the force of law as regards sovereignty over the islands of Mbanié, Cocotiers and Conga (**IV**).

I. No title was consolidated in the nineteenth century

A. The colonial Powers' competing attempts to take possession

8.3 Title to sovereignty over the island features contested by Gabon and Equatorial Guinea remained uncertain throughout the nineteenth century, which is hardly surprising given the islands' small size and uninhabited status. Although both the Spanish and French authorities were aware of the islands' existence, they were not a source of friction in relations between the two colonial Powers, which competed for sovereignty only over the inhabited islands in Corisco Bay, namely Corisco Island and the two Elobeys, as well as a substantial portion of the mainland coast[663].

8.4 In the nineteenth century, both France and Spain considered the islands and islets in this bay to be under their sovereignty, particularly since their reconnaissance expeditions were often undertaken in parallel or in quick succession. These claims related first and foremost to the bay's inhabited islands, but also at times to the islands of Mbanié, Cocotiers and Conga.

8.5 Spain, which in the more than 70 years following the Treaty of El Pardo had set up no military or commercial establishments on either Fernando Pó or Annobón, began to take a renewed interest in those islands in 1843[664]. At the same time, it sought to expand its possessions to include the island of Corisco, in order to ward off the risk of an English occupation[665].

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[662] MEG, Vol. I, paras. 3.13-3.17, esp. para. 3.17 (no island dispute in the period before 1900), and paras. 3.32-3.35 (no island dispute in the period leading up to independence). See also *ibid*., para. 3.3; Declaration of the Spanish Royal Commissioner for the islands of Fernando Pó, Annobón and Corisco on the Coast of Africa, 16 Mar. 1843 (MEG, Vol. V, Ann. 110).

[663] See above, paras. 1.11-1.14.

[664] See above, para. 1.5.

[665] MEG, Vol. I, para. 3.3.

Sketch-map No. 8.1
The islands off the northern mainland coast of Gabon

8.6 During this period, France further explored the coasts and islands of the Gulf of Guinea. In an 1884 report, the captain of the *Antilope* thus provides a description of Corisco Island, which he had used as an anchoring ground[666]. Other French expeditions made it possible to map Corisco Bay and to document the navigational hazards presented by the various island features[667].

8.7 France and Spain also each signed agreements with the local chiefs with a view to obtaining a title to sovereignty therefrom[668]. Some chiefs entered into such agreements with both States in

[666] Excerpt from a report by the captain of the *Antilope*, which left Nantes for the African coast on 12 June 1843 and returned to Nantes on 6 May 1844 (CMG, Vol. III, Ann. 5).

[667] See above, para. 1.7; L.-E. Bouët-Willaumez, *Nautical Description of the Coast of West Africa between Senegal and the Equator (started in 1838 and completed in 1845)*, 1848 (CMG, Vol. III, Ann. 7), pp. 179-180.

[668] See above, paras. 1.5-1.10.

respect of the same territories. Such was the case with the chiefs of the Elobey Islands[669]. But none of these agreements concerned the islands currently in dispute[670].

8.8 The documents submitted by Equatorial Guinea itself attest to the existence of a dispute over the uninhabited islands off the mainland coast of Gabon, and Mbanié in particular[671]. Far from relinquishing their respective claims for the duration of the talks within the Franco-Spanish Mixed Commission[672], the two States sought to establish a *status quo* applicable to all the disputed territories, including the islands of Mbanié, Cocotiers and Conga. This is clear from a letter sent by the Commissioner General of the French Government to the Spanish Governor of Fernando Pó, which Equatorial Guinea curiously presents as proof that a dispute did not exist[673].

> "I have the honor of confirming to Your Excellency receipt of his letter dated November 5, 1895.
>
> Since our governments ceased measures with a view to settling our dispute in the Gulf of Guinea, *I am no longer qualified to deal with Your Excellency on matters of law. I will therefore respond to his letter by keeping to the facts*.
>
> The information that it mentions regarding establishing a post on an islet located 6 miles to the SE of Corisco is unfounded."[674]

B. The trial-and-error approach of Equatorial Guinea's Memorial

8.9 Equatorial Guinea claims to hold a title to the islands mentioned in Article 1 of the Special Agreement, which it contends was consolidated in the nineteenth century. It struggles to identify that title, however. Equatorial Guinea refers to several titles in paragraphs 6.11 to 6.13 of its Memorial, but fails to provide any actual legal evidence of them or specify which one its favours, let alone which one might have the force of law between the Parties. In its submissions[675], Equatorial Guinea invokes at random inter-State treaties (the Treaty of El Pardo), an agreement with a local chief ("Spain's 1846 Record of Annexation"), unilateral acts of Spain ("1843 Spanish Declaration [and] Spain's 1846 Charter of Spanish Citizenship") and "effective occupation". It is clear that the "bases" relied on by Equatorial Guinea are flawed in two respects: most are not consistent with the concept of legal title as laid down in the Special Agreement[676]. Moreover, the other bases invoked by Equatorial Guinea fail to confirm Spanish sovereignty over the islands in question, and Equatorial

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[669] Treaty of sovereignty and protection concluded with King Battaud, Prince Battaud, and principal chiefs Naqui, Bori N'Pongoué, Bappi and Oniamon by Mr Guillet, officer in charge of the fortified Gabon trading post, acting under the delegated authority of the Commander-in-chief of the West Coast of Africa Station, 23 Apr. 1855 (CMG, Vol. III, Ann. 9); Treaty between the chiefs of the two Elobey Islands and Mr Ropert, Chief of Staff of the Naval Division of the West Coast of Africa, 17 Oct. 1860 (CMG, Vol. III, Ann. 13); for Spain: *Record of Annexation*, 18 Feb. 1846 (MEG Vol. V, Ann. 112).

[670] See above, paras. 1.5-1.10.

[671] Letter No. 367 from the Governor-General of Fernando Pó to the Minister for Spanish Overseas Possessions 2[1] Nov. 1895 (MEG, Vol. IV, Ann. 49); Letter No. 368 from the Governor-General of Fernando Pó to the Commissioner-General of French Congo, 22 Nov. 1895 (MEG, Vol. IV, Ann. 50).

[672] Regarding the work of the Commission, see above, paras. 1.15-1.20.

[673] MEG, Vol. I, para. 3.15.

[674] Letter No. 203 from the Commissioner-General of the French Government in French Congo to the Spanish Governor-General of Fernando Pó and Dependencies, 4 Feb. 1896 (MEG, Vol. IV, Ann. 51) (emphasis added).

[675] MEG, Vol. I, p. 144 (point B).

[676] See above, paras. 5.63-5.65.

Guinea attributes to them a meaning they do not possess. These bases are discussed in greater detail below.

8.10 Equatorial Guinea first puts forward a conventional title based on the 1778 Treaty of El Pardo[677], which is said to have been enjoyed by Spain and to which Equatorial Guinea allegedly succeeded. However, neither Mbanié, Cocotiers and Conga, nor Corisco and the Elobey Islands are covered by the Treaty of El Pardo[678]. No mention is made of them in Article XIII of that instrument, which states:

> "[T]he two High Contracting Parties have agreed that, in order to achieve these and other ends and to compensate in some fashion for all assignments, restitutions and waivers made by the Spanish crown in the first preliminary boundary treaty of October 1, 1777, Her Most Faithful Majesty, on her own behalf and on behalf of her heirs and successors, would cede, as in fact she has ceded and now cedes to His Catholic Majesty and his heirs and successors of the Spanish crown, *the island of Annobon, on the coast of Africa*, with all rights, possessions, and shares associated with said island, in order that it may henceforth be part of the Spanish dominions in the same manner in which it has to date belonged to those of the Portuguese crown; and also all rights and shares that she possesses or may possess to *the island of Fernando del Pó in the Gulf of Guinea*, in order that the vassals of the Spanish crown may establish themselves therein, and engage in trade in the ports and coastlines opposite said island, such as the ports of the Gabon River, the Cameroons, Santo Domingo, Cabo fermoso and others of that district, without thereby preventing or hindering commerce by the vassals of Portugal . . . on that coast"[679].

8.11 Doubting the strength of its own argument for a conventional title, Equatorial Guinea advances an additional title, which it claims is based on "occupation"[680] or "original possession"[681]. It is thus referring to the theory of possession or acquisitive prescription, the classic definition of which derives from Max Huber's well-known dictum in the *Island of Palmas* case:

> "practice, as well as doctrine, recognizes — though under different legal formulae and with certain differences as to the conditions required — that the continuous and peaceful display of territorial sovereignty (peaceful in relation to other States) is as good as a title"[682].

8.12 However, the argument based on occupation must also fail. First and foremost, it is at variance with the conventional title argument, since the theory of possession applies only to *terra nullius*. The Court clearly established as much in its Judgment in the case concerning the *Land, Island and Maritime Frontier Dispute*:

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[677] MEG, Vol. I, paras. 3.2 and 6.12.

[678] See above, paras. 1.4-1.5, 1.18; MEG, Vol. I, para. 3.2.

[679] Ch. de Martens and F. de Cussy, *Recueil manuel et pratique de traités, conventions et autres actes diplomatiques*, Vol. I, 1846, pp. 159-160 (emphasis added). The Spanish version of the Treaty and its English translation are reproduced in MEG, Vol. III, Ann. 1.

[680] MEG, Vol. I, para. 6.11.

[681] *Ibid*., para. 6.12.

[682] *Island of Palmas* case, Award of 4 Apr. 1928, *RIAA*, Vol. II, p. 839, cited in, *inter alia*, *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992*, p. 563, para. 342.

> "The difficulty with application to the present case of principles of law in this category [the right of territorial acquisition based on the continuous and peaceful display of sovereignty] is however that they were developed primarily to deal with the acquisition of sovereignty over territories available for occupation, i.e., *terra nullius*"[683].

And Equatorial Guinea cannot without contradiction invoke both an original, conventional title and a derivative title based on occupation[684].

8.13 The same applies to the title allegedly based on agreements with local chiefs, which is also put forward by Equatorial Guinea[685], albeit in similarly ambiguous terms. Although Equatorial Guinea states in the section heading that "Spain Acquired Legal Title to the Corisco Dependencies in 1843"[686], it asserts in the body of the text that its alleged title to the disputed islands dates back to 1778: "Spain's Legal Title to the Corisco Dependencies consisted of the cession of rights from Portugal in the 1778 Treaty of El Pardo and Spain's original peaceful occupation of the Corisco Dependencies beginning in 1843"[687].

8.14 However, from a legal point of view — the only one that matters here — the invocation of the agreements with local chiefs precludes the theory of *terra nullius* and therefore of occupation:

> "Whatever differences of opinion there may have been among jurists, the State practice of the relevant period indicates that territories inhabited by tribes or peoples having a social and political organization were not regarded as *terrae nullius*"[688].

8.15 From a factual point of view, none of the documents from this period — copies and not signed originals — submitted by Equatorial Guinea establishes an act *à titre de souverain* in relation to any of the disputed islands. Indeed, all concern the *inhabited* islands of Corisco Bay. These documents will be analysed in turn below.

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[683] *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992*, p. 564, para. 343.

[684] See above, paras. 5.89-5.94.

[685] MEG, Vol. I, para. 1.10 ("Spain acquired title to the islands of Corisco Bay as a consequence of: (i) the 1778 Treaty of El Pardo with Portugal; (ii) its uncontested 1843 Declaration of sovereignty over Corisco Island and 1846 signature of a Record of Annexation with King I. Orejeck of Corisco Island, Elobey and their dependencies; and (iv) its uncontested and effective occupation of the islands for the following 122 years. Equatorial Guinea succeeded to this title when it became an independent sovereign State, and has maintained it ever since"), and paras. 1.12 and 6.11.

[686] *Ibid*., p. 104.

[687] *Ibid*., para. 6.12.

[688] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 39, para. 80.

8.16 What Equatorial Guinea refers to as the "Declaration of Corisco" — an untitled proclamation of sovereignty dated 16 March 1843[689] — and the act of 17 March 1843[690] installing a certain Boncoro as "lodesman of Corisco Bay" and "chief of the southern tip of the island of the same name", the first documents by which Spain claims to have taken possession of Corisco Island, relate exclusively to that large, inhabited island. There is nothing in these documents to suggest that they apply to the islands of Mbanié, Cocotiers and Conga.

8.17 The *Carta de Nacionalidad Española dada á los habitantes de Corisco, Elobey, y sus dependencias* of 18 February 1846[691] — which accompanies the *Record of Annexation* of the same date by which a certain Orejeck recognizes as Spanish "la Isla de Corisco, Elobey y sus dependencias", of which he is presented as king[692] — concerns only the inhabited territories; indeed, it is aimed at ensuring that "the *inhabitants* of Corisco and dependencies enjoy the same protection as Spanish residents of the motherland"[693] and that "children who have been or will be born in Corisco or its dependencies, of a father or mother born on the aforementioned islands, shall be recognized as Spaniards"[694]. Yet as Equatorial Guinea recognizes, moreover[695], Mbanié, Cocotiers and Conga have never had a permanent population. Furthermore, in the description of the signatories at the foot of the *Record of Annexation*, Orejeck is identified as the King of Corisco alone[696]. These documents also prove that Spain had never previously exercised any authority over the territories in question[697].

8.18 What Equatorial Guinea refers to as the "letter reaffirming Spanish possession of the island of Corisco" — actually an untitled document dated 20 July 1858[698] — concerns the same territories as those covered by the 1846 documents, i.e. the inhabited territories, since it states with

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[689] MEG, Vol. I, para. 3.3; Declaration of the Spanish Royal Commissioner for the islands of Fernando Pó, Annobón and Corisco on the Coast of Africa, 16 Mar. 1843 (MEG, Vol. V, Ann. 110).

[690] MEG, Vol. I, para. 3.4; Declaration of the Spanish Royal Commissioner for the islands of Fernando Pó, Annobón and Corisco on the Coast of Africa, 17 Mar. 1843, excerpt from *Documents relating to Spain's annexation of Corisco, the Elobeys and their dependencies, and to the Kingdom of Benga* (MEG, Vol. V, Ann. 111). The title given to Annex 111 by Equatorial Guinea *(Original Documents on the Annexation to Spain of Corisco, Elobey and their Dependencies)* is misleading, since it does not match the content of the annex, which is limited to one page (a copy and not the signed original) recalling the declaration made by Juan José de Lerena taking note of Boncoro's allegiance to Spain and installing him, in exchange, as chief and lodesman ("Por la presente queda nombrado Práctico de la bahía de Corisco y Jefe de la punta del Sur de la isla del mismo nombre, el fiel negro Boncoro que quiere ser llamado desde hoy Baldomero Boncoro, lo que se le concede por su manifiesta adhesión a la España y al Jefe de su Gobierno, cuyo nombre toma").

[691] MEG, Vol. I, para. 3.5; Certificate of Spanish nationality given to the inhabitants of Corisco, Elobey and its dependencies, 18 Feb. 1846 (MEG, Vol. IV, Ann. 47) (in the Submissions in Equatorial Guinea's Memorial, this title is translated as *Charter of Spanish Citizenship Given to the Inhabitants of Corisco, Elobey and their Dependencies* (MEG, Vol. I, p. 144)).

[692] *Record of Annexation*, 18 Feb. 1846 (MEG, Vol. V, Ann. 112) (Equatorial Guinea's English translation: "the Island of Corisco, Elobey, and dependencies").

[693] Certificate of Spanish nationality given to the inhabitants of Corisco, Elobey and its dependencies, 18 Feb. 1846 (MEG, Vol. IV, Ann. 47) (emphasis added) (original Spanish text: "disfrutan los habitantes de Corisco y dependencias de la misma protección que los españoles residentes en la madre patria"). On the notion of "dependencies", see also above, paras. 1.16-1.17, and below, paras. 8.24-8.27.

[694] *Ibid*. (original Spanish text: "nacidos ó que nazcan en Corisco y sus dependencias, de padre ó madre nacidos en las citadas islas").

[695] MEG, Vol. I, paras. 2.9-2.11.

[696] *Record of Annexation*, 18 Feb. 1846 (MEG, Vol. V, Ann. 112).

[697] Certificate of Spanish nationality given to the inhabitants of Corisco, Elobey and its dependencies, 18 Feb. 1846) (MEG, Vol. IV, Ann. 47) ("es verdad que en este mismo momento la isla y sus habitantes no quedan todavía regidos por autoridades enviadas por el Gobierno de la Nación", translated by Equatorial Guinea as "it is true that, at this very moment, neither the island nor its inhabitants are yet governed by the authorities sent by the national Government").

[698] MEG, Vol. I, para. 3.6; Letter from the Spanish Ministry of State, 20 July 1958, (MEG, Vol. IV, Ann. 48).

regard to "the island of Corisco and its dependencies" that the Spanish have been *established ("establecido")* there for many years[699].

8.19 The historical documents on which Equatorial Guinea relies, and in particular those which use the term "dependencies", therefore appear to be irrelevant. They do not expressly refer to the islands in dispute (but only to Corisco, its undefined "dependencies" and one of the Elobey Islands, without specifying whether it is Elobey Grande or Elobey Chico). Above all, although these documents do not define the notion of "dependencies" (apart from once mentioning that they include the so-called *"isleta de Elobey"*[700]), they clearly show that the "dependencies" are inhabited territories, which the islands of Mbanié, Cocotiers and Conga were not.

8.20 In addition to the conventional titles in the broad sense (with Portugal and the local chiefs) and the title based on occupation, Equatorial Guinea thus claims a title based on "dependency" or adjacency, although it is not explicitly invoked in its submissions[701]. Indeed, in its Memorial, it refers on numerous occasions to the "Corisco Dependencies", using initial capital letters to suggest the existence of an administrative subdivision or special geographical category encompassing the islands of Mbanié, Cocotiers and Conga. In effect, Equatorial Guinea seems to consider that the concept of "Corisco and its dependencies"[702], which appears in the 1846 and 1858 agreements with the local chiefs[703], was widely known to incorporate the islands in dispute. Yet this was not how it was understood by Spain at the time[704].

8.21 In fact, today as in the past, this phrase does not correspond to any legal reality. Moreover, Equatorial Guinea does not specify what type of adjacency is involved here: as well as historical "dependencies", it refers sometimes to geographical adjacency, based on distance[705], at other times to geomorphological adjacency, based on natural prolongation[706], and at yet others to the theory that a presumption exists in favour of recognizing that a coastal State has a legal title to any island or islet located in its territorial sea[707].

8.22 While the adjacency theory has been advanced as grounds for the appropriation of territories that might appear to be "natural prolongations" of State territory, it has never been recognized in international jurisprudence, unless the criterion of adjacency is established by legal instruments constituting a title to sovereignty. As the Court noted with regard to several small islands

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[699] Original: "en la Isla de Corisco y sus dependencias han estado establecidos los españoles desde muchos años", translated by Equatorial Guinea as "Spaniards have been established on the island of Corisco and its dependencies for many years" (Letter from the Spanish Ministry of State, 20 July 1958 (MEG, Vol. IV, Ann. 48)).

[700] Certificate of Spanish nationality given to the inhabitants of Corisco, Elobey and its dependencies, 18 Feb. 1846) (MEG, Vol. IV, Ann. 47) ("la Isla misma [Corisco] y sus dependencias en las cuales se halla la isleta de Elobey, es española", emphasis in the text, which is a copy of the original).

[701] MEG, Vol. I, p. 144 (point B).

[702] See, *inter alia*, *ibid*., paras. 2.4, 2.7, 3.3, 3.19, 3.20-3.35, 3.85-3.90, 3.99 and 6.11-6.16.

[703] See above, paras. 1.16-1.17 and 8.17.

[704] See above, para. 1.18.

[705] MEG, Vol. I, para. 2.7.

[706] *Ibid*.

[707] *Ibid.*, Vol. I, paras. 3.11 and 3.32.

in the Caribbean in the *Nicaragua* v. *Honduras* case: "proximity as such is not necessarily determinative of legal title"[708].

8.23 Finally, there is the argument of France's alleged recognition of Spanish *effectivités*, which is not explicitly identified as a title in the submissions[709], but which is implied several times in Equatorial Guinea's Memorial. Equatorial Guinea presents it both as recognition of Spain's (unidentified) title to the disputed islands and to show that no objections were raised to acts of sovereignty (which incidentally were never performed in respect of those islands)[710]. Equatorial Guinea refers in particular to Protocols Nos. 17 and 30 of the Franco-Spanish Mixed Commission (1886-1891)[711], arguing that they constitute recognition of Spain's sovereignty over Corisco, Laval (now Leva) and Mbanié[712]. These Protocols — which Equatorial Guinea all too conveniently places in the section entitled "International Treaties and Instruments" in Volume III of its annexes, rather than in the "Delimitation Commission Documents" section that follows[713] — are in no way conventional instruments, but minutes of negotiations. Moreover, the text quoted by Equatorial Guinea is not taken from the "Protocols", but from the "annexes" which set out the parties' negotiating positions[714].

8.24 The two documents in question correspond to annexes in which Spain set out its alleged titles to the disputed territories and the interpretation that it believed should be given to them. Spain asserted that, based on the *Carta de Nacionalidad Española dada á los habitantes de Corisco, Elobey, y sus dependencias* and the *Record of Annexation* of 18 February 1846[715], it had sovereignty over the "dependencies" of the island of Corisco, which it defined as "the coast south of the left bank of the Campon River, Corisco Bay and the Muni and Munda Rivers"[716].

8.25 Spain thus claimed that the "dependencies" of a 16 sq km island (Corisco) covered *(i)* the entire bay in which the island sat (an area of approximately 1,600 sq km); *(ii)* the mainland coast, not limited to the portion of the coastline closest to that island or even to the coastline of the bay (120 km), but the entire coast from the mouth of the Campo River to the north (nearly 170 km from Corisco Island) down to and including the bay to the south; and *(iii)* the two rivers flowing into the bay. In short, according to Spain, the entire bay and the rivers flowing into it, and a mainland coast measuring more than 328 km[717], were "dependent" on the small island of Corisco.

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[708] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 708, para. 161; see also *ibid*., p. 709, para. 164. In *Qatar* v. *Bahrain*, the Court also chose to seek out an original title instead of ruling on the basis of the theory of proximity, which had been invoked by both parties (*Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Merits, Judgment, I.C.J. Reports 2001*, pp. 86-91, paras. 151-165).

[709] MEG, Vol. I, p. 144 (point B).

[710] *Ibid*., paras. 6.12-6.13.

[711] On the role of this Commission, see above, paras. 1.15-1.20.

[712] MEG, Vol. I, paras. 3.11 and 6.12.

[713] Documents reproduced as Anns. 3 and 11, respectively, of MEG, Vol. III.

[714] On this distinction, see above, para. 1.17.

[715] MEG, Vol. I, para. 3.5; Certificate of Spanish nationality given to the inhabitants of Corisco, Elobey and its dependencies, 18 Feb. 1846 (MEG, Vol. IV, Ann. 47); *Record of Annexation*, 18 Feb. 1846 (MEG, Vol. V, Ann. 112).

[716] Annex to Protocol No. 14 of the Franco-Spanish Commission for the Northern Delimitation of Gabon, 12 Nov. 1886 (CMG, Vol. III, Ann. 22), p. 4. See also above, paras. 1.16-1.17.

[717] The coastline claimed by Spain corresponded to the current coast of Equatorial Guinea, as well as the coast between the mouth of the Muni River and Cape Santa Clara to the south.

8.26 The sketch-map below (see p. 144), stored in the archives of the French Ministry of Foreign Affairs, illustrates the extent of Spain's claims.

8.27 In response to this extravagant claim, by which Spain sought to gain a foothold on a substantial portion of a mainland where it did not yet have a presence, the French Commissioners, regarding it as legally untenable, indicated that from a geographical point of view, the term "dependencies" in the agreements that Spain had concluded with the chief of Corisco could at best refer to the islets of Laval (Leva) and Baynia (Mbanié)[718].

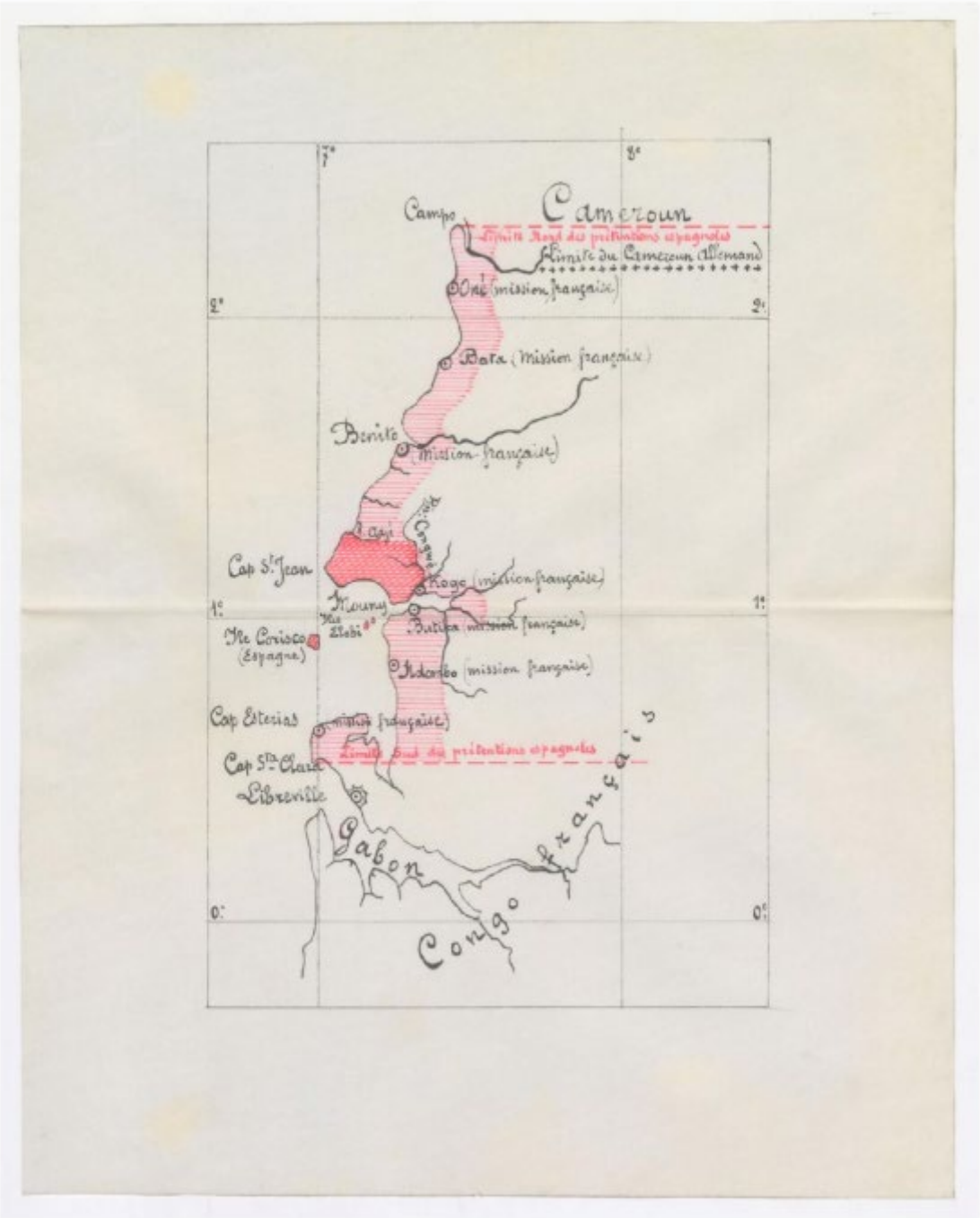
8.28 Equatorial Guinea sets great store[719] by this assertion, which it regards as binding on France. However, it is well established in the jurisprudence that a State is not bound by any position it may have taken in negotiations, at least until it is crystallized in a treaty text. The concessions that a party to a dispute is prepared to make in negotiations, in order to advance its interests, are not binding upon it. As stated in the arbitral award in the *Lac Lanoux* case:

> "[O]ne must not seize upon isolated expressions or ambiguous attitudes which do not alter the legal positions taken by States. All negotiations tend to take on a global character; they bear at once upon rights — some recognized and some contested — and upon interests; it is normal that when considering adverse interests, a Party does not show intransigence with respect to all of its rights. Only thus can it have some of its own interests taken into consideration."[720]

[718] Annex to Protocol No. 17 of the Franco-Spanish Commission for the Northern Delimitation of Gabon, 24 Dec. 1886, pp. 6-7, reproduced as MEG Ann. 11, and Annex to Protocol No. 30, reproduced as MEG Ann. 3.

[719] MEG, Vol. I, paras. 3.11 and 6.12.

[720] *Affaire du Lac Lanoux (Spain/France)*, Award of 16 Nov. 1957, *RIAA*, Vol. XII, p. 311.



Annex C22
Sketch-map depicting Spain's claims in the Gulf of Guinea prior to the Paris Convention

8.29 The Court, like the Permanent Court before it, unequivocally shares this view of the non-binding nature of concessions which a party has signalled it was prepared to make in negotiations that were ultimately unsuccessful:

> "the Court cannot take into account declarations, admissions or proposals which the Parties may have made during direct negotiations between themselves, when such negotiations have not led to a complete agreement"[721],

with the clarification that

> "[t]his observation . . . refers to the common and laudable practice — which, indeed, is of the essence of negotiations — whereby the parties to a dispute, having each advanced their contentions in principle, which thus define the extent of the dispute, proceed to venture suggestions for mutual concessions, within the extent so defined, with a view to reaching an agreed settlement. If no agreement is reached, neither party can be held to such suggested concessions."[722]

8.30 Hence, the most important detail of the negotiations within the Franco-Spanish Mixed Commission, which is entirely overlooked by Equatorial Guinea, is that they were a complete failure. In five years of negotiations (from 1886 to 1891), the two States were unable to agree on their respective legal titles in respect of both the islands and the coast[723]. In such circumstances, it cannot be concluded, as Equatorial Guinea has[724], that France recognized Spain's sovereignty over Mbanié, Cocotiers and Conga, when at the end of the negotiations all the territories remained in dispute.

8.31 As summarized in an internal Note of August 1899 sent by the French Colonial Union — a commercial interest group which called for the expansion of French colonization to the benefit of its members — to the French Ministry of Foreign Affairs:

> "Spain currently occupies the enclave of Cape St Jean, Corisco Island and the Elobey Islands; it settled on the Elobey Islands in 1886, despite France's reservations at the time.
>
> Spain's only real rights concern the possession of Corisco Island and the enclave of Cape St Jean . . .
>
> The French Government claims and is entitled to claim possession of the Elobey Islands and the entire territory contested by Spain on the mainland, with the exception of the small enclave of St Jean.
>
> The 1842 Treaty entered into with the M'Pongoué chiefs of the bay of Gabon gave us rights over Corisco Island, but the Spanish have settled on this island and we have not protested once in 55 years. Therefore, we do not contest their possession of this island, nor do we dispute their possession of the small enclave of Cape St Jean. It belonged to the M'Benga, whose chief, Boucaro, entered into the Treaty of 14 March 1843 with them. Under that Treaty, Chief Boucaro of Corisco ceded the island of Corisco and its dependencies to Spain. Those dependencies and the mainland enclave previously controlled by the M'Benga and now occupied by Spain are one in the same.

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[721] *Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, p. 51, cited, *inter alia*, in *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 270, para. 54, and *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1994*, p. 126, para. 40.

[722] *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992*, p. 406, para. 73, reiterated in *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1994*, p. 126, para. 40.

[723] See above, paras. 1.15-1.20.

[724] MEG, Vol. I, para. 6.13.

Spain has since claimed that the dependencies of Corisco Island extend to the coast between the Moundah and Mouny rivers, and from Cape St Jean to the Campos River. However, the M'Benga could not cede territories that they did not occupy.

This is why we can only recognize Spain's right to possession of Corisco Island and the enclave of St Jean, its one and only dependency.

The situation with the Elobey Islands is quite different. The Spanish may occupy them to our exclusion, but we still have rights there because France has consistently and vigorously protested since Spain's occupation in 1886."[725]

8.32 In conclusion, in the period leading up to the Paris talks in 1900, the disputed territories comprised both the islands and islets of Corisco Bay and a significant portion of the mainland coast.

II. The scope of the Paris Convention with regard to the island territories

8.33 The negotiations within the Mixed Commission had been driven by a desire to identify which of the legal titles invoked by each of the two States had the force of law. They failed because the Parties were unable to agree on the existence and significance of those titles, and on how they should be interpreted[726]. This failure to identify the legal titles led the two colonial Powers to base the subsequent talks on the desire to reach an agreement of a transactional nature[727].

8.34 During the 1900 talks, Spain made it known that Corisco and the Elobey Islands were its red lines[728]; France signalled that it was prepared to relinquish unconditionally all claims to Corisco, while its relinquishment of the Elobey Islands was conditional upon Spain agreeing not to build fortifications on those islands[729]. In general terms, in exchange for relinquishing its claims to the islands and mainland, France wished to obtain from Spain a first option to purchase those territories.

8.35 France's positions are reflected in Article 7 of the Paris Convention, which reads as follows:

"In the event that the Spanish government wishes to cede in any way, in whole or in part, its possessions recognized in articles I and IV of this Convention, as well as the Elobey Islands and the Island of Corisco, near the border with the French Congo, the French government shall have the right of first refusal under the same conditions as those proposed to the Spanish government."

8.36 This provision resolves the sovereignty dispute over the islands mentioned (the Elobey Islands and the island of Corisco), at least in the relations between the two colonial Powers. Indeed,

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[725] Note from the French Colonial Union on the territorial disagreements between France and Spain in the region of Río Mouny, sent to the French Ministry of Foreign Affairs, 1 Aug. 1899 (CMG, Vol. III, Ann. 37), pp. 170, 172-173.

[726] See above, paras. 1.11-1.20.

[727] Letter from the French Minister for the Colonies to the French Minister for Foreign Affairs, 26 Jan. 1900 (CMG, Vol. III, Ann. 40). See also above, paras. 1.15-1.23.

[728] See above, paras. 1.24-1.30.

[729] Letter from the French Minister for the Colonies to the French Minister for Foreign Affairs, 3 Jan. 1900 (CMG, Vol. III, Ann. 39); Letter from the French Ministry of Foreign Affairs to the French Ministry of the Colonies, 15 Mar. 1900 (CMG, Vol. III, Ann. 42), p. 2; Telegram from F. de León y Castillo to the President of the Council of Ministers and the Spanish Minister of State, 2 Apr. 1900 (CMG, Vol. III, Ann. 44).

the inclusion of this preferential right amounted to a recognition by France that the islands named belonged to Spain. In other words, France did not require Spain to demonstrate the existence of a legal title to the Elobey Islands and Corisco prior to 1900, but recognized its sovereignty with all the attendant prerogatives, including *abusus* (the option to cede), where France enjoyed a right of first refusal. From this perspective, and despite what Equatorial Guinea contends[730], the 1900 Convention established rights in the relations between the two States: it was only once the Convention was adopted that Spain's sovereignty became opposable to France.

8.37 However, this Convention does not concern Mbanié, Cocotiers and Conga. It does not mention them either in Article 7 or anywhere else: Article 7 refers only to the Elobey Islands and "the Island of Corisco", in the singular. Although Mbanié, Cocotiers and Conga had long been known to exist, as evidenced by the discussions within the Franco-Spanish Mixed Boundary Commission[731] and various cartographic depictions[732], they do not appear either in the text or on the map in Appendix No. 3 to the Paris Convention (reproduced on p. 24 of this Counter-Memorial). This omission could not have been accidental, given the disagreements surrounding Mbanié in particular, which were reiterated in the period leading up to the negotiations[733].

8.38 As the Court noted in the *Pedra Branca* case, recognition of another State's sovereignty over certain specifically mentioned island territories does not, in principle, extend to nearby maritime features, to which no reference is made:

> "As the Court has stated above (see paragraphs 273-277), it has reached the conclusion that sovereignty over Pedra Branca/Pulau Batu Puteh rests with Singapore under the particular circumstances surrounding the present case [the most significant circumstance being a 1953 declaration by the state of Johor whereby it did not claim ownership of Pedra Branca/Pulau Batu Puteh]. However these circumstances clearly do not apply to other maritime features in the vicinity of Pedra Branca/Pulau Batu Puteh, i.e., Middle Rocks and South Ledge. None of the conduct reviewed in the preceding part of the Judgment which has led the Court to the conclusion that sovereignty over Pedra Branca/Pulau Batu Puteh passed to Singapore or its predecessor before 1980 has any application to the cases of Middle Rocks and South Ledge."[734]

8.39 The Spanish maps drawn up in 1900 to reflect the outcome of the Paris Convention attest to the parties' exclusion of the three islands. And when depicting Mbanié, they still did not identify it as Spanish (see map below, p. 150)[735].

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[730] MEG, Vol. I, para. 6.13.

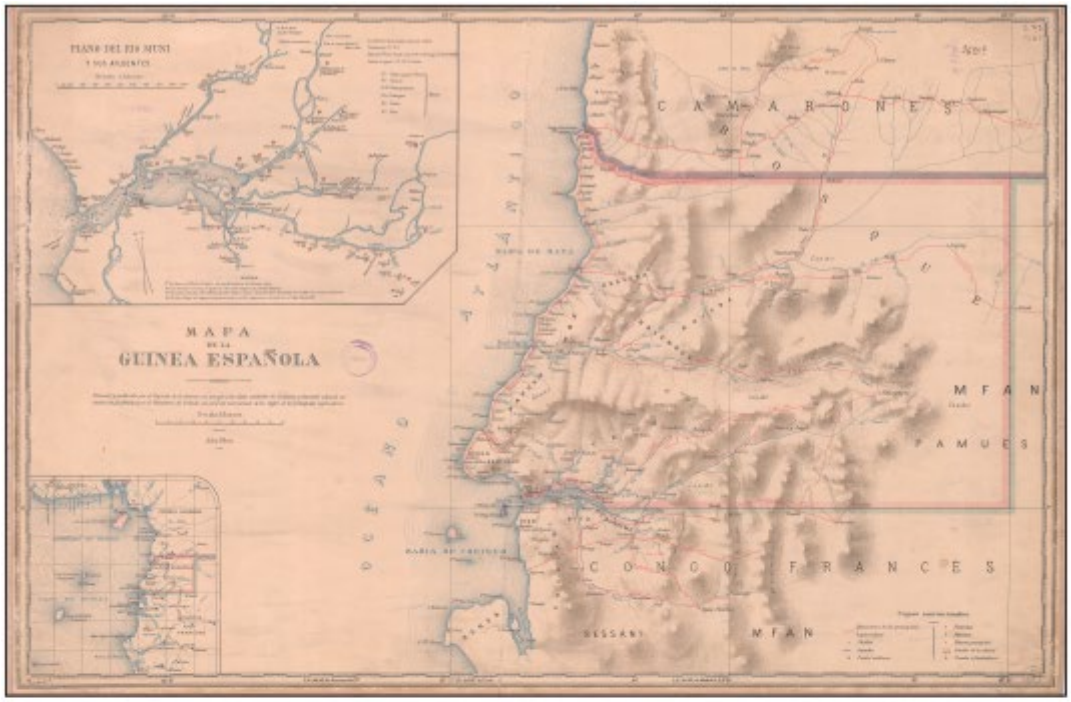
[731] See above, paras. 1.15-1.20.

[732] Geographic Service of the French Army, sheet No. 34 (Libreville) of the map of Africa (Equatorial region), scale 1:2,000,000, prepared and drawn by the Head of the Engineer Corps, Regnauld de Lannoy de Bissy (known as the "Lannoy map"), 1892 (CMG, Vol. II, Ann. C4); A. Largent (Head of the Colony's Customs Service), General map of Gabon, scale 0.004:1,000, sheets 1 and 3, Apr. 1884 (CMG, Vol. II, Ann. C1).

[733] See above, para. 8.7.

[734] *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment, I.C.J. Reports 2008*, p. 99, para. 289.

[735] *Depósito de la Guerra, Mapa de la Guinea Española*, scale 1:500,000, 1900 (CMG, Vol. II, Ann. C8). Two excerpts from this map are reproduced below. See also Annuarios Bailly Baillière y Riera Reunidos, *Mapa del Muni* (CMG, Vol. II, Ann. C21).



Annex C8
***Depósito de la Guerra, Mapa de la Guinea Española*, scale 1:500,000, 1900**

III. A dispute reignited as independence approached

8.40 It is precisely because the Paris Convention failed to settle the question of sovereignty over Mbanié, Conga and Cocotiers that France and Spain continued to hold opposing views about them after 1900. Indeed, France considered the islands its own[736] and engaged in acts *à titre de souverain* on them, including installing a beacon on Cocotiers in 1955, which was met with fierce opposition from Spain[737]. It appears from exchanges between the two States that neither considered at the time that the 1900 Convention had resolved the question of sovereignty over those islands.

8.41 As set out in Chapter II of this Counter-Memorial[738], the French authorities regularly carried out beaconing work in Mondah Bay[739]. Moreover, when Mbanié, Cocotiers and Conga are depicted on maps produced by French officials, there is no mention of them belonging to Spain[740], whereas the island of Corisco and the Elobey Islands are specifically shown as being under Spanish sovereignty.

8.42 When in 1952 France and Spain held specific exchanges on the subject of sovereignty over Mbanié, Cocotiers and Conga, the French Ministry of Foreign Affairs considered that:

> "after examining the files [of the French Ministry of Foreign Affairs], there is nothing that allows the nationality of the Corisco Bay islands to be confirmed, other than for the islands of Elobay, Corisco and Añobon. These islands are formally acknowledged to be owned by Spain, either in the preliminary reports for the June 27, 1900, Convention or in the text of said diplomatic instrument, itself. Baynia (or Bañe) Island, the primary land mass emerging from the bank to which the 'Cocotier' islet belongs, did not, specifically, appear in any text."[741]

8.43 To prevent the incident from escalating, the work was ultimately completed by France with Spain's consent[742], on the understanding that the latter would compensate France for the costs incurred[743], which never happened. Since then, France — and subsequently Gabon — have maintained the installation in question and the other buoys and beacons in the vicinity of Mbanié[744].

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[736] See above, paras. 2.32, 2.34.

[737] See above, para. 2.34.

[738] See above, paras. 2.32, 2.34.

[739] See above, para. 2.32; Letter from the French Minister for the Colonies to the Head of the Navy's Hydrographic Service, 4 July 1931 (CMG, Vol. IV, Ann. 79); Letter No. 349 from the Lieutenant-Governor of Gabon to the French Minister for the Colonies, 29 Sept. 1932 (CMG, Vol. IV, Ann. 82); Letter from the Inspector-General of Public Works for the Colonies to the Head of the Central Lighthouses and Beacons Service, 10 Nov. 1932 (CMG, Vol. IV, Ann. 83); Letter from the Head of the Lighthouses and Beacons Service to the Inspector-General of Public Works for the Colonies, 18 Nov. 1932 (CMG, Vol. IV, Ann. 84). See also the Hydrographic chart of Corisco Bay based on the Spanish and German surveys of 1913-1914, No. 3037, 1932 (CMG, Vol. II, Ann. C14).

[740] Hydrographic chart of Corisco Bay based on the Spanish and German surveys of 1913-1914, No. 3037, 1932 (CMG, Vol. II, Ann. C14); Sketch-map of French Africa, scale 1:1,000,000, Libreville sheet, 1935 (CMG, Vol. II, Ann. C15); Map of French Congo, scale 1:2,000,000, 1950 (CMG, Vol. II, Ann. C17). See also above, para. 2.32.

[741] Letter from the French Minister for Foreign Affairs to the Minister for Overseas France, 6 May 1955 (MEG, Vol. IV, Ann. 94).

[742] Letter No. 247 by the captain of the *Beautemps-Beaupré* and the hydrographic mission on the west coast of Africa to the Governor of Overseas France, 8 Oct. 1955 (CMG, Vol. IV, Ann. 101).

[743] Letter from the Head of the Lighthouses and Beacons Service to the Director-General of Public Works for French Equatorial Africa, 26 Jan. 1956 (CMG, Vol. IV, Ann. 102).

[744] See also Hydrographic Service of the French Navy, *Lights and Fog Signals, C Series, English Channel and Eastern Atlantic Ocean* (MEG, Vol. V, Ann. 132).

The three islands were also not specifically included in any Spanish legislation either before[745] or after[746] the 1955 incident.

8.44 The uncertainties as to who held sovereignty over the islands of Mbanié, Cocotiers and Conga are further reflected in the negotiations on the maritime delimitation between Spain and Gabon. In a confidential report, officials at the Spanish Ministry of Industry thus suggested that the starting-point for the delimitation should be the Corisco baseline, because "if we start from the island Cocotier or Bane [(Mbanié)], we greatly fear that those negotiations will be clouded with difficulties"[747].

8.45 Maritime delimitation talks resumed in 1970, shortly after Equatorial Guinea achieved independence. It is in this context that the question of sovereignty over the islands of Mbanié, Cocotiers and Conga grew in importance[748]. In 1972, following various troubling incidents at sea[749], the Gabonese authorities established a small police station on Mbanié to ensure the safety of its sailors and fishermen[750].

8.46 Among other things, the Commission set up within the framework of the good offices mission of the Conference of Heads of State and Government of Central and East Africa consulted Spain and France on "which Power was responsible for the administration of the islands of Mbana, Cocotier and Conga before the Gabonese Republic and the Republic of Equatorial Guinea gained independence"[751]. Unsurprisingly, the responses received from the colonial Powers reflect their earlier disagreements[752]. In the summer of 1974, Gabon increased its presence on Mbanié, but this time without protest from Equatorial Guinea[753].

8.47 Such was the situation between Gabon and Equatorial Guinea in the period leading up to the signing of the Bata Convention: the two States were competing for sovereignty over Mbanié, Cocotiers and Conga, which were under the control of the Gabonese authorities.

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[745] See above, para. 2.33.

[746] See above, para. 2.35.

[747] Confidential report by the Spanish Ministry of Industry, 12 July 1966 (MEG, Vol. IV, Ann. 103) (Equatorial Guinea's translation of the original Spanish: "si nosotros partimos de la isla Cocotier o la de Bañe, mucho nos tememos que dichas negociaciones van a estar sombradas de difficultades").

[748] See above, paras. 2.49-2.50.

[749] Letter from the Gabonese Minister for Foreign Affairs and Co-operation to the Ambassador of Equatorial Guinea to Gabon, 21 Feb. 1972 (CMG, Vol. V, Ann. 116). See also Report prepared by the Gabon-Equatorial Guinea Joint Commission after the meeting in Libreville from March 25 to 29, 1972, 29 Mar. 1972 (MEG, Vol. VII, Ann. 199); Note Verbale from the Gabonese Ministry of Foreign Affairs and Co-operation, 12 Sept. 1972 (CMG, Vol. V, Ann. 123).

[750] See above, paras. 2.49-2.50.

[751] See Telegram No. 670/672 from the Embassy of France in the Democratic Republic of the Congo to the French Ministry of Foreign Affairs, 19 Sept. 1972 (CMG, Vol. V, Ann. 126).

[752] See above, paras. 2.52-2.53.

[753] Telegram No. 4/5 from the Ambassador of France to Equatorial Guinea to the French Ministry of Foreign Affairs, 8 Jan. 1974 (CMG, Vol. V, Ann. 131) (emphasis added); Dispatch No. 30/DA/DAM from the Ambassador of France to Equatorial Guinea to the French Ministry of Foreign Affairs, 8 Apr. 1974 (CMG, Vol. V, Ann. 132).

IV. The Bata Convention is the title that has the force of law with regard to sovereignty over the islands of Mbanié, Cocotiers and Conga

8.48 The Bata Convention finally resolved the question of sovereignty over the islands of Mbanié, Cocotiers and Conga. Article 3 of that instrument provides:

> "The High Contracting Parties recognize, on the one hand, that Mbane Island forms an integral part of the territory of the Gabonese Republic and, on the other, that the Elobey Islands and Corisco Island form an integral part of the territory of the Republic of Equatorial Guinea."

8.49 The text of Article 3 of the Bata Convention is clear. The two States recognized Gabon's sovereignty over the island of Mbanié on the one hand, and Equatorial Guinea's sovereignty over Corisco and the Elobey Islands on the other. Whatever the legal situation regarding sovereignty over the uninhabited islands may have been before the Bata Convention was signed, and irrespective of that situation, the matter is definitively resolved by Article 3 of the Convention[754].

8.50 This conclusion is confirmed by the contrast between the terms of that provision and those of Article 2 of the same instrument. While Article 2 expressly provides for a reciprocal cession of territories (an "area of the Medouneu District situated in the territory of Equatorial Guinea . . . is *ceded* to the Gabonese Republic", and "the Gabonese Republic *cedes* to the Republic of Equatorial Guinea . . . two land areas, which shall have a total surface area equal to that *ceded* to the Gabonese Republic")[755], Article 3 provides for the *recognition* ("recognize") of Gabon's sovereignty over the island of Mbanié, a term which attests to the fact that the Parties considered in 1974 that Mbanié already belonged to Gabon — just as the island of Corisco and the Elobey Islands are "recognize[d]" in that same provision as forming part of the territory of Equatorial Guinea.

8.51 Consequently, the Bata Convention constitutes the legal title on the basis of which the question of sovereignty over Mbanié is resolved between the two Parties under international law.

8.52 The same applies to the islands of Cocotiers and Conga, mentioned in Article 1, paragraph 1, of the Special Agreement[756], whose fate is settled by the Bata Convention in so far as that instrument concerns Mbanié, with which those two islands form a geographical and geological unit: very close to one another — Conga and Cocotiers appearing as small satellites framing the main island of Mbanié — the three islands are also connected by a submerged sandbank, as shown in the satellite photograph on page 3 above[757].

8.53 Moreover, the island dispute between the colonial Powers, which had been left unresolved by the Paris Convention and which persisted after independence, specifically concerned Mbanié but in fact extended to the group of islands as a whole; this is evidenced by the incident relating to

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[754] See *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, pp. 38-39, paras. 75-76.

[755] Emphasis added.

[756] Special Agreement between the Gabonese Republic and the Republic of Equatorial Guinea, 15 Nov. 2016, Art. 1, para. 1.

[757] See above, para. 6.

France's installation of a navigational beacon on Cocotiers in 1955, which gave rise to protests from Spain[758].

8.54 The fact that the Bata Convention considers "Mbanié" to be a unit comprising Conga and Cocotiers is further demonstrated by the maritime delimitation of the territorial seas between Gabon and Equatorial Guinea, which is set out in Article 4 of that instrument and leaves no doubt as to Gabon's sovereignty over the islands of Mbanié, Cocotiers and Conga, just as it confirms Equatorial Guinea's sovereignty over the island of Corisco and the Elobey Islands.

8.55 The agreed delimitation line along "a straight line parallel to latitude 1° north", starting from the land boundary terminus, lies to the north of all six of the aforementioned islands, which are thus all located in the territorial waters of Gabon. To give effect to Equatorial Guinea's sovereignty over Corisco Island and the two Elobeys, "water areas" around these islands are specifically attributed to Equatorial Guinea. Article 4 does not, however, grant Equatorial Guinea territorial waters around the islands of Cocotiers or Conga. Had Equatorial Guinea truly wished to claim sovereignty over these two islands, it would logically have requested that they be treated in the same way as Corisco and the Elobey Islands. Yet nothing of the sort can be deduced from the text of Article 4 or from any other provision of the Bata Convention. For this additional reason, the islands of Mbanié, Cocotiers and Conga, taken as a whole, necessarily fall under Gabonese sovereignty, in accordance with the provisions of the Bata Convention.

8.56 Furthermore, the authorities of Gabon and Equatorial Guinea have confirmed this interpretation of the Bata Convention. In the days after it was signed, the two countries' respective authorities expressed concordant views on the solution regarding sovereignty over the islands.

8.57 Thus, Equatorial Guinea's Acting Deputy-Minister for Foreign Affairs informed the French Ambassador to Malabo that "[t]he islets of M'Banie, Cocotier and Conga will be legally declared to belong to Gabon, and the territorial waters in dispute in this region will be relinquished to Gabon"[759].

8.58 In addition, the Gabonese Ambassador to Equatorial Guinea explained to his French counterpart that "Gabon ha[d] obtained *de jure* recognition of its sovereignty over M'Banie, Cocotier and Conga"[760]. Equatorial Guinea's President Macías Nguema also reported in an interview with the French Ambassador to Equatorial Guinea that he "had relinquished to Gabon *de jure* sovereignty over M'Banie, Cocotier and Conga"[761].

8.59 During a presentation to diplomatic representatives in Malabo on 13 October 1974, President Macías Nguema again recalled that Equatorial Guinea had

> "completely relinquished its sovereign rights over M'Banie, Cocotier and Conga, although the Commission appointed by the OAU and the document signed by the four

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[758] See above, para. 2.34.

[759] Dispatch No. 39/DA/DAM from the Ambassador of France to Equatorial Guinea to the Directorate of African and Madagascan Affairs of the French Ministry of Foreign Affairs, 23 Sept. 1974 (CMG, Vol. V, Ann. 151), p. 6.

[760] Dispatch No. 40/DA/DAM-2 from the Ambassador of France to Equatorial Guinea to the Directorate of African and Madagascan Affairs of the French Ministry of Foreign Affairs, 2 Oct. 1974 (CMG, Vol. V, Ann. 152), p. 3.

[761] *Ibid.*, p. 7. See also above, para. 3.20.

Heads of State who composed it had formally stipulated in 1972 that these islets would be a neutral zone"[762].

Conclusion

8.60 For all these reasons, the Bata Convention constitutes a legal title with regard to sovereignty over the islands of Mbanié, Cocotiers and Conga. It is, moreover, the only legal title applicable to the question of sovereignty over those three islands, since it resolved the island dispute which had persisted since the nineteenth century and which the colonial Powers, both unable to establish the existence of a title to the islands, had left outside the scope of the Paris Convention.

[762] Dispatch No. 43/DA/DAM-2 from the Ambassador of France to Equatorial Guinea to the Directorate of African and Madagascan Affairs of the French Ministry of Foreign Affairs, 14 Oct. 1974 (CMG, Vol. V, Ann. 153), p. 5. See also above, para. 3.18.

CHAPTER IX
THE LEGAL TITLE RELATING TO THE MARITIME BOUNDARY

9.1 Equatorial Guinea erroneously contends that the following have the force of law between the Parties in so far as they concern their common maritime boundary:

> "1. the 1900 Convention in so far as it established the terminus of the land boundary in Corisco Bay, and recognized Spain's sovereignty over Corisco Island, Elobey Grande and Elobey Chico; and
>
> 2. the United Nations Convention on the Law of the Sea signed on 10 December 1982 at Montego Bay, and
>
> 3. customary international law in so far as it establishes that a State's title and entitlement to maritime areas derives from its title to land territory"[763].

9.2 The legal title having the force of law between the Parties is the Bata Convention **(I)**. It is in fact the only title, since those invoked by Equatorial Guinea are not legal titles for the purposes of the delimitation of the maritime boundary between the Parties (**II**).

I. The Bata Convention has the force of law between the Parties as regards the maritime delimitation

9.3 The Bata Convention is the legal title that determines the maritime boundary between Gabon and Equatorial Guinea off the coast of Río Muni[764]. Article 4 of that instrument provides:

> "The maritime frontier between the Republic of Equatorial Guinea and the Gabonese Republic shall consist of a straight line parallel to latitude 1º north, starting from the point of intersection of the Muni River thalweg with the straight line drawn from the Cocobeach headland to the Diéke headland.
>
> However, the Republic of Equatorial Guinea shall be granted water areas surrounding the Elobey Islands and Corisco Island with the following dimensions:
>
> — For Corisco Island:
>
> — 1.5 miles to the north;
>
> — 6 miles to the west;
>
> — 1.5 miles to the south, that is to say between Corisco and Mbane;
>
> — 1.5 miles to the east.
>
> — For the Elobey Islands:

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[763] MEG, Vol. I, p. 144.

[764] Gabon and Equatorial Guinea have another common maritime boundary further south, between Gabon's Atlantic coast south of Port Gentil, on the one hand, and the eastern coast of the island of Annobón, belonging to Equatorial Guinea, on the other. Gabon accepts that there is no legal title or convention delimiting this maritime boundary between Gabon and Equatorial Guinea.

— 0.06 miles to the north of Elobey Chico;

— 1.5 miles to the west;

— 0.30 miles to the east;

— 0.30 miles to the south of Elobey Grande."

9.4 This provision of the Bata Convention clearly defines the "maritime frontier between the Republic of Equatorial Guinea and the Gabonese Republic". That boundary consists of three distinct segments: it comprises a line running parallel to the 1º north parallel of latitude, starting at the land boundary terminus; Article 4 then also provides for the creation of two enclaves around the islands belonging to Equatorial Guinea — Corisco, on the one hand, and Elobey Grande and Elobey Chico, on the other — which are "on the wrong side of the line". Since those islands lay to the south of the first segment described above and therefore in Gabon's maritime space, Article 4 grants Equatorial Guinea "water areas" around them.

9.5 The course of the boundary line is clear. All the elements needed to identify the first segment of the boundary are provided and require no further clarification: these elements are either identified (the 1º north parallel of latitude) or are identifiable (the point of intersection of the Muni River thalweg with the straight line drawn from the Cocobeach headland to the Dieke headland). As regards the enclaves, the co-ordinates of the lines dividing the waters falling under the respective jurisdictions of Gabon and Equatorial Guinea are not specified, but the extent of the maritime areas granted to each of Equatorial Guinea's islands can easily be determined from the wording of Article 4. Thanks to the details given, the maritime boundaries are sufficiently defined; they can be identified on a map.

9.6 The Bata Convention therefore clearly determines the maritime boundary between the two States and hence the exercise of their respective sovereignties at sea. Article 5 of the Convention further provides that:

> "For access by sea to the Muni River as well as to the Elobey Islands and Corisco Island, ships of Equatorial Guinea shall enjoy, *in Gabonese territorial waters*, the same facilities as are granted to Gabonese ships."[765]

The maritime area situated to the south of the boundary line (with the exception of the enclaves around Corisco and the two Elobeys) falls under the sovereignty of Gabon, and Equatorial Guinea has a right of passage. This provision represents a radical change from the Paris Convention, Article 5 of which granted French vessels a right of passage "[f]or entry by sea into the Muni River, in Spanish territorial waters"[766].

9.7 It is clear that in the minds of the negotiators and signatories of the Bata Convention, the Convention was intended to govern the delimitation of the maritime boundary between Gabon and Equatorial Guinea: in the preamble to the Convention, the two Parties clearly record the objective of "lay[ing] firm foundations for peace between their two countries, notably by *definitively* establishing

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[765] Convention delimiting the land and maritime frontiers of Equatorial Guinea and Gabon, 12 Sept. 1974, enclosed with the letter from the President of Gabon to the Ambassador of France to Gabon, 28 Oct. 1974 (CMG, Vol. V, Ann. 155) (emphasis added).

[766] Convention on the delimitation of French and Spanish possessions in West Africa, on the coasts of the Sahara and the Gulf of Guinea, Paris, 27 June 1900, bilingual version (CMG, Vol. III, Ann. 47), Art. 5.

their common land and maritime frontiers"[767]. The language used in Article 4 is precise and binding ("the maritime frontier . . . shall consist" and "shall be granted"). The fact that the signatories included a *nota bene* does not make this any less true: Article 4 of the Bata Convention determines the maritime boundary between the two States[768]. The Convention has the force of law between the Parties in so far as it concerns the delimitation of their maritime boundary.

II. The Bata Convention is the only legal title having the force of law between the Parties as regards maritime delimitation

9.8 Neither the Paris Convention (**A**), nor the United Nations Convention on the Law of the Sea and international custom (**B**) — all three of which have been invoked by Equatorial Guinea[769] — constitutes a legal title having the force of law between the Parties as regards their common maritime boundary.

A. The Paris Convention does not govern the delimitation of the maritime boundary between Gabon and Equatorial Guinea

9.9 The Paris Convention, which Equatorial Guinea invokes as a legal title having the force of law as regards the delimitation of the maritime boundary[770], is silent regarding the course of the maritime boundary. It refers to only two elements relevant to maritime areas. First, Article 4 fixes the land boundary terminus[771] (and therefore, in principle, the starting-point of the maritime boundary) in almost identical terms to those used in the Bata Convention: it begins "at the point where the thalweg of the Muni River intersects a straight line traced from the Coco Beach point to the Diéké point". Second, Article 5 establishes a right of passage for French and Spanish vessels in the territorial waters of each State[772], although the limits of those territorial waters are not defined in the Paris Convention.

9.10 This Convention does not govern the course of the maritime boundary: it determines neither the course of the boundary nor its direction, and does not rule on the maritime area surrounding Equatorial Guinea's islands of Corisco, Elobey Grande and Elobey Chico. Equatorial Guinea acknowledges this fact, moreover, since its reliance on the 1900 Convention as a legal title for the purpose of delimiting the maritime boundary is confined solely to the fact that the Convention refers to the land boundary terminus and to Equatorial Guinea's sovereignty over Corisco Island, Elobey Grande and Elobey Chico[773].

9.11 At most, the Paris Convention could constitute the basis of the Parties' title (their entitlement): it governs, in part, territorial sovereignty as between the States, from which maritime sovereignty could conceivably be determined by virtue of the principle that the land dominates the

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[767] Convention delimiting the land and maritime frontiers of Equatorial Guinea and Gabon, 12 Sept. 1974, enclosed with the letter from the President of Gabon to the Ambassador of France to Gabon, 28 Oct. 1974 (CMG, Vol. V, Ann. 155), preamble, recital 3 (emphasis added).

[768] See above, paras. 6.49-6.52.

[769] MEG, Vol. I, p. 144.

[770] *Ibid.*

[771] Convention on the delimitation of French and Spanish possessions in West Africa, on the coasts of the Sahara and the Gulf of Guinea, Paris, 27 June 1900, bilingual version (CMG, Vol. III, Ann. 47), Art. 4.

[772] *Ibid*., Art. 5.

[773] MEG, Vol. I, p. 144.

sea, which Equatorial Guinea has invoked, moreover[774]. This would make the Paris Convention one of the bases on which the legal title for the purpose of maritime delimitation is founded (the entitlement), but not the title itself.

B. The United Nations Convention on the Law of the Sea and international custom are not legal titles as regards the maritime delimitation between the Parties

9.12 As Gabon has demonstrated in Chapter V of this Counter-Memorial[775], the Court's task is not to pronounce on certain elements relied on by Equatorial Guinea which do not constitute conventional legal titles — and many of them not even "documentary" titles — having the force of law "in the relations between the Gabonese Republic and the Republic of Equatorial Guinea in so far as they concern the delimitation of their common maritime and land boundaries and sovereignty over the islands of Mbanié/Mbañe, Cocotiers/Cocoteros and Conga".

9.13 Only conventional legal titles may be validly invoked by the Parties and submitted for consideration by the Court, which is called on to determine whether they have the force of law. The "United Nations Convention on the Law of the Sea signed on 10 December 1982 at Montego Bay" and "customary international law in so far as it establishes that a State's title and entitlement to maritime areas derives from its title to land territory" are not legal titles for the purpose of delimitating these maritime areas, and therefore fall outside the Court's mandate in this case[776].

9.14 Moreover, Gabon readily admits that the Montego Bay Convention, supplemented by customary international law and the relevant jurisprudence, governs the principles applicable to maritime delimitation between two States with opposite or adjacent coasts. However, neither the Montego Bay Convention (and more specifically Articles 15, 74 and 83 invoked by Equatorial Guinea[777]) nor the customary law of the sea[778] is in itself a legal title as regards the maritime boundary. Equatorial Guinea is mistakenly seeking to equate the possibility of holding a legal title (entitlement) with the title that may derive from that entitlement[779]. But the Court is not called upon to pronounce on the possibility of the Parties holding a legal title (their entitlement), nor, *a fortiori*, on the maritime delimitation itself, but on the existence and possession of that legal title. Besides, Equatorial Guinea accepts that custom constitutes no more than an "entitlement": "customary international law in so far as it establishes that a State's title and entitlement to maritime areas derives from its title to land territory"[780]. Custom and the general provisions of UNCLOS do not constitute a title; they create the possibility of a title and the means by which States may establish it.

9.15 Lastly, as has been shown above[781], the maritime delimitation methods provided for by the Montego Bay Convention, international jurisprudence and custom apply only in the absence of a conventional title. Indeed, the cardinal principle of maritime delimitation is that of delimitation by

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[774] *Ibid*., paras. 6.41 and 6.47 and p. 144.

[775] See above, paras. 5.78 *et seq*.

[776] MEG, Vol. I, p. 144.

[777] *Ibid*., para. 6.54.

[778] *Ibid*., p. 144.

[779] See above, para. 5.81.

[780] MEG, Vol. I, p. 144 (emphasis added).

[781] See above, paras. 5.81-5.83.

agreement between the States whose claims overlap. This principle is expressly enshrined in the Convention:

> "Where there is an agreement in force between the States concerned, questions relating to the delimitation of the exclusive economic zone [and of the continental shelf] shall be determined in accordance with the provisions of that agreement."[782]

The same holds true for the delimitation of the territorial sea[783]. In other words, where there is an agreement, that agreement constitutes the legal title for the maritime delimitation, and it is only in the absence of an agreement — and therefore of a legal title — that the principles and methods governing maritime delimitation provided for by the Montego Bay Convention and custom serve as a basis for establishing a legal title by agreement or, failing that, by judicial or arbitral means.

9.16 Equatorial Guinea appears to recognize this principle. In the conclusion to Chapter 6 of its Memorial, relating to the legal titles with the force of law as regards the maritime delimitation, it asserts that

> "[t]o the extent that the Parties' maritime claims overlap, in the absence of an agreement, the delimitation of their respective areas is to be carried out in accordance with the principles set forth in UNCLOS Articles 15, 74 and 83, and the body of maritime delimitation jurisprudence of the Court in interpreting and applying those principles."[784]

But such an agreement does exist: the 1974 Bata Convention, negotiated and signed by both States, is an agreement delimiting the maritime boundary between Gabon and Equatorial Guinea.

9.17 The "United Nations Convention on the Law of the Sea signed on 10 December 1982 at Montego Bay" and "customary international law in so far as it establishes that a State's title and entitlement to maritime areas derives from its title to land territory" are therefore not legal titles as regards the maritime boundary between Gabon and Equatorial Guinea.

Conclusion

9.18 It is clear from the foregoing that:

(a) the Bata Convention constitutes the legal title in respect of the maritime boundary between Gabon and Equatorial Guinea: it was negotiated and signed by the highest authorities of both countries and settles the question of the delimitation of the maritime boundary;

(b) neither the Paris Convention nor UNCLOS and international custom constitutes a legal title that has the force of law between the Parties as regards their maritime boundary.

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[782] United Nations Convention on the Law of the Sea, Montego Bay, 10 Dec. 1982, *UNTS*, Vol. 1833, No. 31363, Arts. 74 (4) and 83 (4).

[783] *Ibid*., Art. 15.

[784] MEG. Vol. I, para. 6.54.

SUBMISSIONS

In view of the arguments presented in this Counter-Memorial and of any others produced, inferred or substituted, including if necessary *proprio motu*, the Gabonese Republic respectfully requests the Court:

(a) To declare that

(i) the Convention delimiting the land and maritime frontiers of Equatorial Guinea and Gabon of 12 September 1974 (Bata) and the Special Convention on the delimitation of French and Spanish possessions in West Africa, on the coasts of the Sahara and the Gulf of Guinea of 27 June 1900 (Paris) are the legal titles having the force of law in the relations between the Gabonese Republic and the Republic of Equatorial Guinea in so far as they concern the delimitation of their common land boundary;

(ii) the Convention delimiting the land and maritime frontiers of Equatorial Guinea and Gabon of 12 September 1974 (Bata) is the legal title having the force of law in the relations between the Gabonese Republic and the Republic of Equatorial Guinea in so far as it concerns the delimitation of their common maritime boundary and sovereignty over the islands of Mbanié, Cocotiers and Conga.

(b) To reject all claims of the Republic of Equatorial Guinea to the contrary.

Gabon reserves the right to modify or amend these submissions, as appropriate, in accordance with the provisions of the Statute and the Rules of Court.

The Hague, 5 May 2022.

(Signed) Ms Marie-Madeleine MBORANTSUO,
Agent of the Gabonese Republic.

ATTESTATION

I hereby certify that the documents reproduced as annexes are true copies of the originals and that translations into either of the Court's official languages are accurate.

The Hague, 5 May 2022.

(Signed) Ms Marie-Madeleine MBORANTSUO,
Agent of the Gabonese Republic.

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LIST OF ANNEXES
(VOLUMES II TO V)

VOLUME II

Sketch-maps

(The sketch-maps have been produced for illustrative purposes only.)

Maps

Photographs

Videos

VOLUME III

VOLUME IV

VOLUME V

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